APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.06.2012

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

Special Appeal No. - 63 of 2012

C/M Jan Samaj Ucchchatar Madhyamik Viddyapeeth Thru Manager ...Petitioner
Versus
Suresh Kumar and others (Revpd 247/2011) S/S ...Respondent

Counsel for the Petitioner:
Sri Chandra Bhushan Pandey
Sri Jai Narain Pandey

Counsel for the Respondents:
C S C
Sri Manish Kumar

U.P. Intermediate Education Act, 1921- Chapter III Regulation 31 to 45-framed under Section 16-G-termination of class 4th employee-without following procedure contained in statutory provision-without following principle of Natural Justice-termination order rightly quashed by Learned Single Judge-appeal dismissed.

Held: Para 17

We are of the considered view that the impugned dismissal order from service has been passed without affording reasonable opportunity of hearing and without following the procedure and against the relevant regulations 31 to 45 of Chapter III framed under Scheme 16-G of the U.P. Intermediate Education Act, 1921, and thus in violation of statutory provisions as well as in gross violation of Principle of natural justice. In this regard, the view expressed by learned Single Judge does not call for any interference.

Case law discussed:
2010 (1) ALJ 630

(Delivered by Hon'ble V.K. Dixit, J.)

1. This Special Appeal is arising out of the Judgement & Order dated 11.01.2012 passed by learned Single Judge by which the Review Application (Defective) No.247 of 2011 (Committee of Management, Jan Sansthan Uchchatar Madhyamic Vidyapeeth Inter College, through its Manager and another Vs. Survesh Kumar & Others) has been dismissed and Judgment & order dated 04.07.2011 passed by learned Single Judge whereby the Writ Petition No.649 (S/S) of 2009 *(Suresh Kumar Vs. State of U.P. & others)* has been allowed and the impugned order dated 09.07.2008 dismissing the petitioner from service passed by Principal, Sansthan Uchchatar Madhyamic Vidyapeeth Inter College, Digambar pur, Mubarakganj, Faizabad (Appellant No.2) and order of District Inspector of Schools, Faizabad dated 05.12.2008, granting the subsequent approval to the impugned order dated 09.07.2008 under the provisions of Regulation 31, Chapter-III of the U.P. Intermediate Education Act, 1921 have been quashed.

2. Heard Sri Chandra Bhusahn Pandey, learned Counsel for appellants, learned Chief Standing Counsel and Sri Manish Kumar for contesting respondent no.1 and perused the impugned judgment and orders dated 04.07.2011 and 11.01.2012 passed by the learned single Judge giving rise to the present appeal, the grounds taken in the memo of appeal and the documents filed along with it.

3. Submission of the learned counsel for the appellants is that the learned Single Judge allowed the writ petition and rejected the review application without

considering the facts and law in its entirety and thus the order of learned Single Judge is not sustainable in the eyes of law. It is further submitted that under the U.P. Intermediate Education Act, there is absolutely no requirement for conducting full-fledged departmental inquiry in a case where the delinquent employee has absconded and is not participating in the enquiry deliberately despite reasonable and genuine efforts on part of the employer to make him participate. Further on account of non-cooperation on the part of the private respondent, there was no occasion for the appellants to have conducted a full-fledged inquiry in the matter. That the entire scheme of the regulations, in so far as it relates to Class-IV employees makes it abundantly clear that prior approval is not mandatory before terminating the service where subsequently, the competent authority has accorded approval to the dismissal order. In support of such contention, he has relied upon a Full Bench Judgment of this Court passed in the case of ***Rishikesh Lal Srivastava Versus State of U.P. & Others*** reported in 2010 (1) ALJ 630.

4. On the other hand, learned counsel for contesting respondent, refuting the submission of learned counsel for the appellants, contended that the judgment and order dated 04.07.2011 under challenge passed by learned Single Judge has not been passed merely on the point that there was no prior approval from the District Inspector of Schools (D.I.O.S.) but also on the ground that the impugned dismissal order dated 09.07.2008 has been passed without holding any enquiry and without serving any charge-sheet in utter violation of Principles of natural justice is wholly arbitrary and illegal and also against the provisions of Sections 31, 35, 36 and 37 of Chapter III and Section 16 (G) of the U.P. Intermediate Education Act, 1921.

5. We have considered the arguments aforesaid and we find that in order to appreciate the rival contentions we have to consider only the following two points:

(i) whether for awarding a punishment in respect of a Class IV employee prior approval of D.I.O.S. is essential?

(ii) Whether the impugned order dated 09.07.2008 for dismissal has been passed without providing reasonable opportunity of hearing and thus in violation of the principles of natural justice?

6. Learned Single Judge while dealing both the issues has made the following observation:

"on due consideration of facts and circumstances of the present case and the legal position, this Court comes to the conclusion that the impugned order has been passed in violation of principles of natural justice as well as against the provisions of Regulation of 31, 35, 36 and 37."

7. So far the first point is concerned, in the present case undisputedly the impugned order of the District Inspector of School, Faizabad, dated 05.12.2008 granting the subsequent approval to the impugned order dated 09.07.2008 passed by the Principal of the institution dismissing the petitioner/contesting respondent from the service. Learned

Single Judge quashed the impugned order of District Inspector of School, Faizabad dated 05.12.2008 granting the subsequent approval to the impugned order of dismissal.

8. The disciplinary proceedings against a Class IV employee of the institution is in the nature of domestic enquiry. In paras 50, 58 and 65 of the Full Bench judgment of this Court passed in the case of ***Rishikesh Lal Srivastava (supra)***, the observations made in paras 50, 58 and 64 of the judgment, which on reproduction would read as:-

"**50**-*In our opinion, the aforesaid principle squarely applies in the present context and for the reasons given hereinabove and hereinafter, we would interpret Regulation 31 read with Regulation 100 to mean that the sanction of prior approval in respect of the termination of a Class-IV employee would stand excluded.*

58-*There is yet another principle, which deserves to be taken notice of. If the sanction is required prior to giving effect to a punishment in respect of a Class-IV employee, then the District Inspector of Schools would hear an appeal against his own approval. This, to our mind, would bring about an anomaly, which may extend to an absurdity. The same authority cannot be presumed to have been conferred with a power to hear an appeal against its own approval. This would be 44 rendering nugatory the hierarchy provided for in Regulation 31 itself, where an appeal is provided to the Committee of Management against the order of disciplinary authority and a further appeal to the Inspector of Schools. The purpose, therefore, is clear enough and it does not suffer from any ambiguity which may require us to render an interpretation, which otherwise would bring about an incongruous result. As observed above, the Rules of Interpretation as enunciated by the Apex Court do not permit us to give an interpretation, which would obviously result in a clear anomaly as pointed out hereinabove. This we adopt, as the law permits us to apply 'the intention seeking' Rule of Interpretation to illustrate the anomaly that may result in the event we accept the proposition that a prior sanction is required.*

64-*Having laid threadbare the first principles on which we have interpreted the provisions, we have no hesitation in coming to the conclusion that there is no requirement under the Regulations for a prior sanction or approval of the Inspector of Schools in respect of order of termination of Class-IV employees."*

9. In the aforesaid full Bench judgment of this Court in the case of ***Rishikesh Lal Srivastava (supra)*** it has been held that for awarding a punishment as elaborated under Regulation 31 Chapter III of the U.P. Intermediate Education Act, 1921 to a Class IV employee of the institution recognized under the aforesaid Act, no prior approval or sanction from the Inspector of School is required.

10. The decision in the case of ***Rishikesh Lal Srivastava (supra)*** can also be usefully followed and applied to the case in hand.

11. In view of the above, we are respectfully unable to agree with the view of learned Single Judge that prior

approval of D.I.O.S. was necessary before passing the impugned dismissal order dated 09.07.2008 we are of the considered view that the scheme of the Regulations 31 to 45 of Chapter III of the U.P. Intermediate Education Act, 1921 does not provide that prior approval or sanction of D.I.O.S. is essentially required for awarding punishment of removal or terminating of a Class IV employee of the institution recognized under the aforesaid Act.

12. We shall now deal with the question as to whether the impugned order dated 09.07.2008 for dismissal has been passed without providing reasonable opportunity of hearing and thus in violation of the principles of natural justice?

13. Learned counsel for appellants has submitted that on account of deliberate non-cooperation on the part of the Respondent No.1, there was no occasion for the appellants to have conducted a full fledged enquiry in the matter. In fact, he was an absconder and under Regulation 36 (2) of the Act, there was absolutely no requirement of affording any opportunity of hearing to such an employee before passing the impugned dismissal order dated 09.08.2008. It has further been pleaded that under the U.P. Intermediate Education Act, 1921, there is absolutely no requirement for conducting full fledged departmental enquiry in a case where the delinquent employee has absconded and is not participating in the enquiry deliberately despite reasonable & genuine attempts on part of the employer to make him participate.

14. On the other hand, learned counsel for the contesting Respondent No.1 submitted that prior to dismissal, the Respondent No.1 had neither been suspended nor any charge-sheet was served and also no information about departmental enquiry was ever given to him and also the impugned dismissal order has been passed without giving him any opportunity to be heard in violation of principle of natural justice.

15. We have given our thoughtful consideration to the arguments advanced by the learned counsel appearing on either side with reference to the pleadings, records, annexures and the case laws.

16. Undisputedly the contesting Respondent No.1 has not participated in the departmental enquiry proceedings. In view of the facts and circumstances of the case and rival contention of learned counsel for the parties, we do not find any substance in the arguments of the learned counsel for appellants that the contesting Respondent No.1 has absconded and on account of his deliberate co-operation full fledged enquiry in the matter was not required.

17. We are of the considered view that the impugned dismissal order from service has been passed without affording reasonable opportunity of hearing and without following the procedure and against the relevant regulations 31 to 45 of Chapter III framed under Scheme 16-G of the U.P. Intermediate Education Act, 1921, and thus in violation of statutory provisions as well as in gross violation of Principle of natural justice. In this regard, the view expressed by learned Single Judge does not call for any interference.

18. In the result, we do not find any illegality or infirmity in the order. The appeal being devoid of merit, is, therefore, dismissed.

19. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Service Bench No. - 450 of 2012

Utsav Chaturvedi ...Petitioner
Versus
The State of U.P Thru Principal Secy Ministry of Law and others ...Respondents

Counsel for the Petitioner:
Dr. L.P Misra
Sri Deepanshu Dass

Counsel for the Respondent:
C.S.C
Sri Manish Kumar

U.P. Higher Judicial Services Rules1975, readwith Constitution of India, Article 226, 233, 233 (2)-Petitioner seeking direction to declare the provision of Rule 13(2) , 17 (2) ultra-vires-as the petitioner possess more than 7 years practice prior to appointment of P.C.S. (J) M.P.-word used 'already' under Section 233 (2) denotes person must be a practicing Advocate-after joining Judicial Service-petitioner ceased to be a Advocate-even otherwise in view of Section 40 of Advocates Act-petitioner ceased to be an Advocate-held-Rules are not ultra-vires.

Held: Para 20 and 21

The case of Shankar K. Mandal (supra) does not relate to situation envisage under Article 233 of the Constitution of India and considered by the Hon'ble Supreme Court(supra). Recruitment process with regard to ordinary Government service and with regard to judicial services may be different. So far as Higher Judicial Services are concerned, it is governed by the condition contained in Article 233 of the Constitution of India. Article 233 has been interpreted by the Hon'ble Supreme Court in catena of judgments, out of which aforesaid two judgments referred herein above would reveal that on the cut of date or at the time of recruitment, the candidate must be the member of Bar or a practicing advocate. In case he has requisite experience, but he is not the member of Bar or practicing advocate then keeping letter and spirit of Article 233 of the Constitution of India, he shall not be entitled to appear in the Higher Judicial Services.

So far as the validity of impugned Rules are concerned, they do not seem to be ultra-vires to the Constitution. In case, the Rules in question are considered in the light of aforesaid judgment of the Hon'ble Supreme Court, it appears to be intra-vires regulating the condition of recruitment.

Case law discussed:
(1991) 1 Supreme Court Cases 330; AIR 1985 SC 308; (2003) 9 SCC 519

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

1. Heard Sri Sandeep Dixit, learned counsel appearing for the petitioner as well as learned Chief Standing Counsel.

Petitioner, who is a member of provincial Judicial Services of State of Madhya Pradesh had applied for U.P. Higher Judicial Services Exam, 2012 in pursuance to the impugned advertisement as contained in Annexure No. 1. The instant writ petition has been preferred challenging Rule 13(2) and 17(2) of the U.P. Higher

Judicial Service Rules, 1975 (in short, "the Rules") to declare it illegal, arbitrary and ultra-vires to the Constitution of India being hit by Articles 14, 16 and 233(2) of the Constitution of India.

Further, the petitioner has prayed for a writ in the nature of certiorari to quash the impugned advertisement by which the judicial officers have been deprived to appear in the examination of U.P. Higher Judicial Services. An alternative prayer has also been made not to proceed with the impugned advertisement.

2. Rules 13(2) and 17(2) of the U.P. Higher Judicial Services Rules, 1975 are reproduced as under:-

Rule 13(2)-*The candidates for direct recruitment must produce a certificate of good character from the District Judge of the district in which they have been practicing, and in the case of candidates normally practicing in the High Court, from the Registrar of the High Court and also from two responsible persons of status (not related to candidates) who are well acquainted with them in private life and are unconnected with their University, College or School.*

Rule 17(2)-*The application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practicing, and in the case of members of the Bar normally practicing in the High Court, through the Registrar of the High Court. The application shall be accompanied by certificate of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be required to be furnished.*

3. A plain reading of the aforesaid Rules reveals that, with regard to direct recruitment, it shall be incumbent upon the applicant to produce a certificate of good character from the District Judge of the district in which they have been practicing, and in the case of candidates normally practicing in the High Court, the certificate is to be obtained from the Registrar of the High Court. Such application shall be submitted through the District Judge within whose jurisdiction the candidate has been practicing, and in the case of members of the Bar normally practicing in the High Court, such application shall be submitted through the Registrar of the High Court along with the testimonials.

4. While assailing the impugned Rules, it has been stated by the learned counsel for the petitioner that the Rules framed by the respondents are violative of Article 233 of the Constitution of India. Article 233 of the Constitution of India is reproduced as under:-

Article 233(1)-Appointment of district judges.-*(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.*

Article 233(2)-*A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.*

The sum and substance of arguments advanced by the learned counsel for the petitioner is that under Clause (2) of Article

233, a person shall be entitled to appear in the examination in question, in case he rendered seven years or more practice at Bar earlier to joining of Judicial Services.

5. Submission of the learned counsel for the petitioner is that the petitioner is Civil Judge (Class-II) and he was selected in the P.C.S. (J) examination of Madhya Pradesh and in consequence thereof, he resumed duties on 27.08.2008 and thereafter he is serving in the Madhya Pradesh Judicial Services. Since he has practiced more than seven years before joining the judicial services of Madhya Pradesh, he claims to be entitled to appear in the U.P. Higher Judicial Services Examination.

6. While interpreting Clause (2) of Article 233 of the Constitution of India, it has been stated by the learned counsel for the petitioner that it is not necessary that the applicant must be a practicing advocate at the time of advertisement. Any person rendered seven years of practice at Bar, till the last date of eligibility and had joined the judicial services like the petitioner shall be entitled to appear in the examination with consequential benefits.

7. Clause (2) of Article 233 starts with the word "already" which means the candidate should not be in service of union or state. In Law Lexicon by P. Ramanatha Aiyar, 2009 Edition the word "already" has been defined as under:-

"Already. Does not mean at some time previously, but, means at the time stated and immediately preceding thereto."

Keeping in view the aforesaid definition, in case the word "already" is considered, then it means "immediately preceding" on the date of advertisement, the person should not be employee of state or union service.

8. The next condition emerging from Article 233 is that the person has been for not less than seven years an advocate or a pleader. Constitutional framers has used the word "has been".

9. Shri Sandeep Dixit, learned counsel for the petitioner may not be in correct while making submission that the word "has been" may include past incidents. However Hon'ble Supreme Court in the case reported in AIR 1989 SC 509 Secretary R.T.A. Bangalore Vs. D.P. Sharma, held that the expression "has been" denotes transaction prior to the enactment of the statute in question or a transaction after coming into force of the statute, has to be gathered from the provision, in which the expression "has been" occurs or from the other provision of the statute.

Accordingly the expression "has been" contained in Article 233 is to be looked into keeping in view the overall reading of Article 233 including the word "already". Under clause (2) of Article 233 the expression has been used in continuous tense which denotes that the person must have been a practicing advocate.

10. Learned counsel for the respondents has relied upon the case reported in ***(1991) 1 Supreme Court Cases 330 - Sushma Suri vs. Government of National Capital Territory of Delhi and another.*** In the case of Sushma Suri (supra), under the Delhi Higher Judicial Services Rules, a question was raised that a person holding office of Law Officers shall be entitled to appear in the examination of Higher Judicial Services.

11. After considering the rival submission, the Hon'ble Supreme Court ruled that if a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. Their Lordships further held that whenever a person is appointed as Pleader or Government Advocate and appears in Court without surrendering the certificate of registration to Bar Council he shall be deemed to be an advocate and be entitled to appear in the examination.

Relevant portions of the aforesaid judgment of the Hon'ble Supreme Court are produced as under:

6. If a person on being enrolled as an advocate ceases to practice law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any Corporate body or person practices before Court as an advocate for and on behalf of such Government, Corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case.

10. ... What is of essence is as to what such Law Officer engaged by the Government does - whether he acts or pleads in Court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the Body Corporate. Therefore, Bar Council of India has understood the expression 'advocate' as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

11. ... We think it is in this manner that the expression used in Article 233(2) of the Constitution has to be understood and the rules framed by the Delhi Administration in this regard have to be read in the light of the constitutional provisions. The expression used 'from the Bar' would only mean from the class or group of advocates practising in Courts of law. It does not have any other attribute.

12. The letter and spirit of Sushma Suri's case (supra) is that immediately after joining the employment a person shall surrender the certificate to the Bar Council concerned, hence shall ceases to be an advocate. Thus, while interpretating Article 233(2) of the Constitution of India in Sushma Suri's case (supra), it has been held by the Hon'ble Supreme Court that a person who has surrendered certificate of registration to the Bar Council and ceases to practice in the Court shall not be entitled to appear in the Higher Judicial examination. The effect of Clause (2) of Article 233 is that a candidate must be a practicing advocate, whose certificate should not have been surrendered to the Bar Council. Meaning thereby if a person is appointed in the judicial services and surrender the certificate of registration ti State Bar Council then whatever experience he has got as a member of Bar its benefits cannot be made available to such person under the garb of Clause (2) of Article 233 of the Constitution of India to enable him to appear in U.P. H.J.S. Exam.

The aforesaid proposition of law finds force from another judgment of Hon'ble Supreme Court in the case reported in earlier case ***AIR 1985 SC 308, Satya Narain Singh vs. High Court of Judicature at Allahabad*** followed by later judgment.

13. In the case of Satya Narain Singh (supra), their lordships of Hon'ble Supreme Court interpreted the word "service" as contained in Article 233 of the Constitution of India. Service means the "judicial service" in terms of Article 233(2) of the Constitution of India. The relevant portions of the aforesaid judgment of Satya Narain Singh's case is reproduced as under:-

4. In Chandra Mohan v. State of Uttar Pradesh (supra) Subba Rao, C.J. after referring to Articles 233,234, 235, 236 and 237 stated,-

"The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and pro motion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations."

Subba Rao, CJ. then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service. After pointing out that Art. 233(1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state,

"But the sources of recruitment are indicated in cl. (2) thereof. Under cl. (2 of Are. 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader."

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Art. 233(2) could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary Contrary to Art. 14 and Art. 16 of the Constitution.

14. Admittedly, the petitioner is a judicial officer. He shall be deemed to be in judicial service and there appears to be no reason to doubt that because of joining in the judicial service he ceases to be an advocate. Nothing has been brought on record that the petitioner is entitled to retain the certificate of registration granted by the Bar Council or entitled to practice law.

15. Section 23 of the Advocates Act, 1961 provides that only the advocate alone will be entitled to practice law. Section 45 of the Advocates Act further provides that any person who practices in any court or before any authority or person not entitled to practice under the provision of Advocates Act may be punished with the imprisonment which may extend to six months.

16. It shall always be obligatory for the person to surrender the certificate to the State Bar Council after joining the services. Otherwise also a person got an employment shall not be entitled to practice at Bar. Accordingly, keeping in view the letter and spirit of Article 233 (2) of the Constitution person who is not an advocate or possess right to practice under the Advocate Act shall not be entitled to appear in the examination of Higher Judicial Services. Needless to say that persons appointed under Article 233 are different class in itself chosen from bar within their respective quota. Substantial major portion of cadre is filled up by promotees from subordinate judicial services PCS (J).

17. Learned counsel for the petitioner vehemently relied upon the case reported in ***(2003) 9 SCC 519 - Shankar K. Mandal and others vs. State of Bihar and others.***

18. The case of Shankar K. Mandal (supra) relates to the recruitment process of Government employee. The relevant paragraph 5 & 6 of the aforesaid judgment of the Hon'ble Supreme Court are reproduced as under:-

5. Pursuant to the directions contained in the earlier judgment of the High Court as affirmed by this Court, a fresh exercise was undertaken. Since the present appellants were not selected, writ petitions were filed before the High Court. In the writ petition which was filed by 55 persons and disposed of by the Division Bench the conclusions were essentially as follows:(1) Some of the writ petitioners (Writ petitioners Nos. 5, 18, 23, 28, 41 and 53) were over age at the time of their initial appointment and their cases were, therefore, wholly covered by the directions given by the High Court, and they were not entitled to relaxation of age;(2) So far as writ petitioners Nos. 6, 26, 30 and 55 are concerned, the stand was that they had not crossed the age limit at the time of making the applications for appointment and, therefore, were within the age limit at the time of initial appointment and were, therefore, entitled to relaxation of age in terms of the judgment passed by the High Court earlier and affirmed by this Court. This plea was turned down on the ground that what was relevant for consideration related to the age at the time of initial appointment and not making of the application;(3) As regards writ petitioner No.24, he was under age at the time of appointment. He was permitted to file a representation before the Director of Primary Education and the High Court ordered that his case would be considered afresh;(4)In respect of writ petitioners Nos. 9 and 17, it was noted that they were refused absorption on the ground that they had not made any application in response to advertisement issued pursuant to the order passed by this Court. Since no material was placed to substantiate this stand and no reasons had been communicated for non-absorption, direction was given to consider representations if made by them within

one month from the date of judgment. The said judgment is under challenge in C.A. No.916/1999. Appellants have taken the stand that in terms of this Court's judgment, a person who was not over age on the date of initial appointment was to be considered. Though it was conceded before the High Court that they were over age at the time of initial appointment, much would turn as to what is the date of initial appointment. The High Court had not considered as to what was the applicable rule so far as the eligibility regarding age is concerned. Learned counsel appearing for the respondent-State however submitted that having made a concession before the High Court that they were over age on the date of appointment, it is not open to the appellants to take a different stand. The crucial question is whether appellants were over age on the date of their initial appointment. It is true that there was concession before the High Court that they were over age on the date of initial appointment. But there was no concession that they were over age at the time of making the application. There was no definite material before the High Court as to what was the eligibility criteria so far as age is concerned. No definite material was placed before the High Court and also before this Court to give a definite finding on that aspect. What happens when a cut off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any non-prescription has been considered by this Court in several cases. The principles culled out from the decisions of this Court (See Ashok Kumar Sharma and Ors.v. Chander Shekhar and Anr. (1997 (4) SCC 18, Bhupinderpal Singh v. State of Punjab (2000 (5) SCC 262 and Jasbir Rani and ors. v. State of Punjab and Anr. (2002 (1) SCC 124) are as follows:

(1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules;

(2) If there is no cut off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications; and

(3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

6. It has, therefore, to be decided by the authorities as to which of the three conditions indicated above were applicable to the facts of the case. In the absence of definite material, we think it appropriate to direct the authorities to take a decision within a period of four months from today, as to whether the appellants or one of them was eligible by applying the tests indicated above. These directions shall apply to the writ petitioners who are appellants in the present appeal and to nobody else. The other directions given by the High Court so far as the writ petitioners Nos. 9, 17 and 24 are concerned do not warrant any interference as there has been no challenge by the State Government.

19. It has been submitted by the learned counsel for the petitioner that since the petitioner fulfilled the requisit condition of seven years at Bar before the cut off date before joining of Judicial

Services he shall be entitled for selection and appointment in U.P. Higher Judicial Service. The argument advanced by learned counsel for the petitioner seems to be misconceived.

20. The case of Shankar K. Mandal (supra) does not relate to situation envisage under Article 233 of the Constitution of India and considered by the Hon'ble Supreme Court(supra). Recruitment process with regard to ordinary Government service and with regard to judicial services may be different. So far as Higher Judicial Services are concerned, it is governed by the condition contained in Article 233 of the Constitution of India. Article 233 has been interpreted by the Hon'ble Supreme Court in catena of judgments, out of which aforesaid two judgments referred herein above would reveal that on the cut of date or at the time of recruitment, the candidate must be the member of Bar or a practicing advocate. In case he has requisite experience, but he is not the member of Bar or practicing advocate then keeping letter and spirit of Article 233 of the Constitution of India, he shall not be entitled to appear in the Higher Judicial Services.

21. So far as the validity of impugned Rules are concerned, they do not seem to be ultra-vires to the Constitution. In case, the Rules in question are considered in the light of aforesaid judgment of the Hon'ble Supreme Court, it appears to be intra-vires regulating the condition of recruitment.

22. In view of above, the writ petition is devoid of merit and the same is hereby dismissed in limine.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.05.2012

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA, J.

U/S 482/378/407 No. - 670 of 2010

Smt. Shiv Kumari ...Petitioner
Versus
State of U.P., & another ...Respondents

Counsel for the Petitioner:
Sri Amarjeet Singh Rakhra

Counsel for the Respondents:
G.A.
Sri Indrajeet Shukla

Code of Criminal Procedure-Section 239, 240-discharge application-on ground-F.I.R. Lodged after 15 years suit for cancellation of sale deed already pending since 1991-inspite of direction Magistrate without application of mind-without going through material placed by Police-without considering the scope of Section 239-about discharge before commencement of Trail-outrightly rejection on ground of at this stage-held-order suffers from non application of mind-rejection order quashed with direction of fresh consideration.

Held: Para 6

From the above, it appears that learned Magistrate proceeded on the assumption that he has no power to evaluate the materials forwarded by police under Section 173 Cr.P.C. and at that stage, prayer for discharge cannot be entertained. This is in violation of clear mandate of Sections 239 & 240 Cr.P.C. which require a finding by the Magistrate with regard to the charge against the accused being groundless or that there is ground for presuming that the accused has committed offence. This finding was to be recorded upon considering the police report, the documents sent

therewith and after hearing both the parties, Magistrate has not considered any document or material forwarded by the police nor has even referred to the contentions raised by the applicant. Magistrate has not applied his mind to the contentions raised by the applicant and provisions of section, thus the order cannot be upheld. Section 239 Cr.P.C. contemplates discharge even before the commencement of the trial which factor has been overlooked by the Magistrate. Thus, order suffers from vice of non-application of mind.

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

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

2. From the record, it transpires that chargesheet was submitted against applicant under Sections 419, 420, 467, 468, 471 IPC. Petitioner had filed Criminal Misc. Case No. 2742 of 2007 (u/s 482 Cr.P.C) which was disposed of finally on 23.04.2009 by Hon'ble Mr. Justice D.V. Sharma (Retd.) directing the petitioner to move application under Section 239 Cr.P.C. which was to be disposed of within 30 days. Another petition was filed by the petitioner being Criminal Misc. Case No. 3294 of 2009 (u/s 482 Cr.P.C.) which too was disposed of on 11.09.2009 with the direction to consider the bail application, if possible on the same day.

3. In pursuance of this judgment, petitioner concerned had got himself bailed out on 23.09.2009, thereafter, she moved application to discharge under Section 239 Cr.P.C. before the Chief Judicial Magistrate, Gonda, raising that defendants of suit are wrongly claiming the ownership of the property on the basis of sale deed. Civil Suit no 49 of 1991 was pending for cancellation of the sale deed. FIR has been lodged after 15 years. Suit having been dismissed, has been restored on 16.07.2005 and nothing incriminating has been collected or found by the Investigating Officer against the applicant. This application has been rejected by Judicial Magistrate-II, Gonda, which order has been impugned in the instant petition.

4. With the consent of parties, I propose to decide this case finally. Section 239 Cr.P.C. is being reproduced below:

"If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing. "

5. From the above section, it is manifest that Magistrate has to consider the police report and documents sent therewith under Section 173 Cr.P.C., examine the accused and give opportunity of hearing to both the parties. He can discharge the accused if he finds that charge against the accused groundless and he will have to record reasoning therefor. On the other hand, if he finds the grounds for presuming that the accused has committed an offence then charge will be framed under Section 240 Cr.P.C. Application moved under Section 239 Cr.P.C., raises many grounds, however, learned Magistrate has not considered any

ground and has rejected the application by one sentence :

श जहॉ तक अभियुक्ता शिव कुमारी के विरूद्ध अपराध के बनने का प्रष्न है यह साक्ष्य का विषयहै। पत्रावली अभी हाजिरी अभियुक्तगण में नियत है। इस प्रकम पर अभियुक्ता श्रीमती शिवकुमारी को उन्मोचित किये जाने का कोई आधार नहीं है। अभियुक्ता श्रीमती शिवकुमारी को साक्ष्य के स्तर पर वादी व उसके साक्षीगण से जिरह का पूर्ण अवसर प्राप्त होगा। अतः अभियुक्ता का प्रार्थनापत्र स्वीकार किये जाने योग्य नहीं है।"

6. From the above, it appears that learned Magistrate proceeded on the assumption that he has no power to evaluate the materials forwarded by police under Section 173 Cr.P.C. and at that stage, prayer for discharge cannot be entertained. This is in violation of clear mandate of Sections 239 & 240 Cr.P.C. which require a finding by the Magistrate with regard to the charge against the accused being groundless or that there is ground for presuming that the accused has committed offence. This finding was to be recorded upon considering the police report, the documents sent therewith and after hearing both the parties, Magistrate has not considered any document or material forwarded by the police nor has even referred to the contentions raised by the applicant. Magistrate has not applied his mind to the contentions raised by the applicant and provisions of section, thus the order cannot be upheld. Section 239 Cr.P.C. contemplates discharge even before the commencement of the trial which factor has been overlooked by the Magistrate. Thus, order suffers from vice of non-application of mind.

7. Accordingly, the petition is allowed. Order dated 08.01.2010 passed by Judicial Magistrate-II, Gonda, in Case No. 3550 of 2007 is quashed.

8. Magistrate is directed to decide the application in accordance with law within a period of six weeks from the date a certified copy of this order is produced before him.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

SECOND APPEAL No. - 1190 of 1976

Ved Prakash ...Petitioner
Versus
Phool Chand and others ...Respondents

Counsel for the Petitioner:
Sri N.C.Rajvanshi
Sri M.K. Rajvanshi
Sri P.K.Tyagi
Sri P.N. Tyagi
Sri Ravi Kant
Sri Sankatha Rai
Smt.Archana Tyagi
Sri Ved Prakash
Sri Ashok Srivastava

Counsel for the Respondents:
Sri Dhan Prakash
Sri M.C.Joshi
Sri Rajiv Joshi
Sri Sudhir Prakash
Sri V.K.S.Chaudhary

Code of Civil Procedure-Section 100-cancellation of sale deed by minor on behalf of his maternal uncle-sale deed executed by natural father of minor-basis of suit that the father of miner had executed gift deed when minor was 2 years old-which was never acted upon and the name of donor continued over revenue record-after 2 1/2 years father executed sale deed-no where pleaded that the natural guardian had no relation with minor-suit by maternal uncle as

guardian-nothing but a fraud-sale deed executed by father is protected.

Held: Para 10

In fact the entire transition and the suit was nothing but a fraud. The maternal uncle of the minor plaintiff who filed the suit as guardian of the minor no where stated that the minor was not residing along with his parents or that his parents were not taking care of the minor or that there was any dispute between the minor plaintiff (who was 13 years of age at that time) and her parents. All these things clearly go to show that the gift was not intended to be acted upon and it was never accepted by the father owner on behalf of his infant son donee. Mutation of minor in revenue record through his father and guardian would have been the best evidence of acceptance of the gift by the father donor as guardian.

Case law discussed:
A.I.R. 2004 S.C. 1257

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

1. Heard learned counsel for the parties.

2. This Second Appeal was allowed on 20.2.2006. Against the said judgment and decree Special Leave Petition was filed before the Supreme Court which was converted into Civil Appeal No.5197 of 2007. The Supreme Court allowed the appeal on 14.11.2007 on the ground that questions of law had not been framed and remanded the matter to the High Court for a fresh hearing. Thereafter amendment application was filed on 15.12.2008 containing five substantial questions of law. The application was allowed on 30.1.2009. On 13.12.2011 following order was passed on the order sheet:-

"Amendment application filed on 15.12.2008 has formally been allowed on 30.1.2009. It is further clarified that this Second Appeal will be heard on the substantial questions of law A,B,C,D and E given in the said amendment application.

List in the next cause list."

3. The questions of law mentioned in the Amendment Application filed on 15.12.2008 are quoted below:

A. Whether the Lower Appellate Court was correct in taking the view that inspite of the fact that the plaintiff was minor (2 years old) at the time of Execution of the Gift Deed in his favour by his natural father, express acceptance of the Gift was necessary in order to make it a valid Gift?

B. Whether in the facts and circumstances of the present case, the Lower Appellate Court ought to have treated the Gift as deemed accepted and acted upon since Ram Singh, the father of the plaintiff, himself was the guardian and had himself executed the Gift Deed in favour of his minor son (Plaintiff)?

C. Whether the Lower Appellate Court was justified in dismissing the Suit in spite of arriving at a conclusion that the Suit so far as the relief of cancellation of the impugned Sale Deed is concerned is not hit by the bar imposed by Section 49 of the Consolidation of Holdings Act?

D. Whether the conclusion drawn by the Lower Appellate Court that the suit is barred under Section 49 of the U.P. Consolidation of Holdings Act since it involved the question of title to the disputed agriculture land, is correct in view

of the fact that plaintiff was minor during consolidation operations and his guardian, his real father, was in collusion with Phool Chand, Vendee of his father?

E. Whether the Lower Appellate Court was justified in allowing the Appeal treating the Gift Deed as invalid and Suit barred under Section 49 of the U.P. Consolidation of Holdings Act without discussing, dealing and discarding the Evidence relief upon by the Trial Court for arriving at a contrary conclusion?

4. This Second Appeal arises out of Original Suit No.358 of 1973 instituted by Ved Prakash minor son of Ram Singh through his guardian Shri Naresh Chand, maternal uncle. In the suit father and mother of the plaintiff minor i.e. Ram Singh and Smt. Prakasho were impleaded as defendant nos. 2 and 3. The defendant no.1 was Phool Chand. It was stated in the plaint that Ram Singh father of plaintiff Ved Prakash had executed registered gift deed of the agricultural land in dispute in his favour on 28.2.1962 when Ved Prakash plaintiff was only two years old. Ram Singh after about two and half years of the Gift Deed i.e. on 3.8.1964 executed a registered sale deed of the agricultural land in dispute in favour of Phool Chand, defendant-respondent no.1. Through the suit cancellation of the said sale deed had been sought. Suit was decreed on 2.6.1975 by City Munsif, Saharanpur and sale deed dated 3.8.1964 was cancelled. Against the said decision defendant-respondent no.1 Phool Chand filed Civil Appeal No.226 of 1975 which was allowed by Vth Additional District & Sessions Judge, Saharanpur on 19.2.1976 through which judgment and decree passed by the trial court was set aside and suit for cancellation of the sale deed was dismissed hence this Second Appeal. The Lower Appellate Court held that:-

"It could not be established that the alleged Gift Deed was accepted on behalf of donee, no valid Gift Deed was granted in his favour under the Deed (Exhibit-2) it must also be held that the Gift Deed was not acted upon and given effect to by the donar who on 3.8.1964 executed the impugned Sale Deed in respect of land in suit in favour of the defendant-appellant. Not only that in the mutation proceedings taken out by the defendant-appellant on the basis of the impugned sale deed executed in his favour defendant Ram Singh stated before the A.C.O., Saharanpur that in his place the name of his vendee namely Phool Chand may be mutated over plots in question of which he had been delivered possession."

5. Lower appellate court further held that the suit was filed after nine years of execution of the sale deed even though maternal uncle (mama) of the plaintiff was aware of the same since its execution and all these facts further re-enforced the argument that the Gift Deed was in fact a sham transaction and that it was never acted upon.

6. Learned counsel for the appellant has placed strong reliance upon the authority of the Supreme Court reported in **K. Balakrishnan v. K. Kamalam and Ors. A.I.R. 2004 S.C. 1257** (as was done at the earlier stage when this appeal was allowed.)

7. It is correct that gift in of minor by his guardian can very well be accepted by the guardian himself. However the facts in the above authority of he Supreme Court were somewhat different. In that case

mother had gifted the property to her son who was 16 years of age at that time but through the gift possession and right of enjoyment was retained by donor mother. In that scenario it was held that no overt act was required either by the donor or by the donee to show acceptance of the gift and that in normal course acceptance is to be presumed as, unless the gift is onerous, it is for the benefit of the donee.

8. However, in the instant case it can not be said that gift made by the father was accepted by him on behalf of his son who was two years of his age. Main part of the Section 122 Transfer of property Act is quoted below:

"Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donor, and accepted by or on behalf of the donee."

9. After execution of the gift father did not get the name of the donee infant son and two years of age, mutated in the revenue records. After two years of the gift he sold the property and until sale name of the father was continued to be recorded in revenue records. Even though revenue entries do not conclusively prove title, however, they have got lot a value and are a very strong evidence of possession.

10. In fact the entire transition and the suit was nothing but a fraud. The maternal uncle of the minor plaintiff who filed the suit as guardian of the minor no where stated that the minor was not residing along with his parents or that his parents were not taking care of the minor or that there was any dispute between the minor plaintiff (who was 13 years of age at that time) and her parents. All these things clearly go to show that the gift was not intended to be acted upon and it was never accepted by the father owner on behalf of his infant son donee. Mutation of minor in revenue record through his father and guardian would have been the best evidence of acceptance of the gift by the father donor as guardian.

11. Accordingly, question of law no. A and B are decided in favour of the plaintiff-respondent and against the appellant. I do not propose to decide substantial question of law no. C, D and E as the decision on question no. A and B is sufficient for decision on the appeal.

12. There is one more substantial question of law involved in this appeal which is to the following effect"

F. Whether sale deed is protected on the basis of doctrine of ostensible owner as provided under Section 41 of Transfer of Property Act?

13. Father was guardian of the minor. He did not make any effort to get the name of his infant son donee recorded as Bhomidhar of the land in dispute in the revenue records. Accordingly, father as guardian of the minor allowed himself to remain the ostensible owner of the property in dispute hence sale deed is fully protected and valid on the basis of Section 41 of Transfer of property Act. This question is also decided in favour of the plaintiff-respondent.

14. Accordingly, on the basis of decision on substantial question of law no. A and B and additionally on the basis of decision on substantial question of law no. F this Second Appeal is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE HET SINGH YADAV, J

First Appeal From Order No. - 1921 Of 2012

The New India Assurance Co. Ltd ...Petitioner
Versus
Smt. Rani Devi and others ...Respondents

Counsel for the Petitioner:
Sri Saral Srivastava

Counsel for the Respondents:
.....

Motor Vehicle Act, 1988-Section-163-A-(2)-deceased TRAVELLING IN Tractor Trolley-accident took place due to negligence to Bus Driver-running Bus from wrong side-Tribunal awarded much excess than the amount claimed-held-no requirement of prove of negligence under Section 163-A (2)-no interference called for-Appeal dismissed.

Held: Para 6

We are of the view that even if the claimant claimed less amount but in a case of death or permanent disability, under the Statute, it is required that the compensation is to be calculated in accordance to the Schedule II of the Act. Therefore, the compensation should be calculated in accordance to Schedule II. In the present case, the Tribunal has rightly done so.

Case law discussed:
2009 (2) TAC 677

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

1. Heard learned counsel for the appellant.

2. This is an appeal by the insurance company. The appellant is the insurer of bus bearing registration no.UP-93C-2348. The accident took place on 27.04.2009. The case of the claimant was that few persons, namely, Laxmi Narain and Jai Ram Sahu and others were travelling in tractor trolley going from Jhansi to their village. The tractor was going on its own side while the bus came from right side and hit the tractor trolley, as a result of accident, the tractor trolley turtled causing grievous injuries to the persons sitting in the tractor trolley. Jai Ram Sahu and Nand Kishore died and other persons suffered injuries. The first information report was lodged and site plan was prepared. Laxmi Narain, who was eye witness stated that the driver of the bus was driving the bus negligently and came to the wrong side and hit the tractor trolley. The site plan filed by learned counsel for the appellant is at page no.54 of the memorandum of appeal, also reveals that the bus came from wrong side and hit the tractor trolley. The accident was caused on account of the negligence of the driver of the bus. Tribunal on the basis of the principle laid down by the Apex Court in the case of ***Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 (2) TAC, 677*** has assessed the compensation.

3. Learned counsel for the appellant submitted that the claim was made under Section 163-A of the Motor Vehicles Act at Rs.2,81,500 while the Tribunal has awarded the compensation to the extent of Rs.3,93,500/= in excess to the amount claimed by the claimant which is not justified.

4. We do not find any substance in the argument of learned counsel for the appellant.

Sections 163-A and 166 of the Motor Vehicles Act are being reproduced below:

"163-A. Special provisions as to payment of compensation on structured formula basis.- (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.- For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

166. Application for compensation.- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made.-

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

3[*****]

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

5. Section 163-A starts with non-abstante clause "Notwithstanding any thing contained", therefore, it has an over-riding effect on other sections of the Act.

6. The application for the compensation is required to be moved under Section 166 of the Act. Section 163-A provides that the compensation is payable by the owner or the insurer in the case of the death or permanent disability. Section 163-A (2) provides that it is not required to prove wrongful act, negligence or default on the part of the driver of the vehicle. Whether the application has been moved under Section 166 or 163-A of the Act, in both the cases, compensation has to be calculated under Schedule II, provided under the Act in case of death or permanent disability. In the present case, the compensation has been calculated under Schedule II of the Act. The claimant claimed that the income of the deceased was Rs.3300/= per month, but in the absence of any evidence, notional income of the deceased has been taken at Rs.3,000/= per month, in view of the principles laid down by the Apex Court in the case of **Sarla Verma vs. Delhi Transport Corporation (supra).** It appears that the claimant might have not applied the proper multiplier as per the Schedule and has not claimed the other admissible compensation, which is normally awarded. It is not the case where the Tribunal has estimated higher income of the deceased than the income claimed by the claimant. We are of the view that even if the claimant claimed less amount but in a case of death or permanent disability, under the Statute, it is required that the compensation is to be calculated in accordance to the Schedule II of the Act. Therefore, the compensation should be calculated in accordance to Schedule II. In the present case, the Tribunal has rightly done so.

7. In the facts and circumstances of the case, we do not find any error in calculation of the amount of compensation by the Tribunal, which is in accordance to the principles laid down by the Apex Court in the case of **Sarla Verma vs. Delhi Transport Corporation (supra).** In the result, the appeal fails and is dismissed. However, dismissal of the present appeal will not affect rights of other parties.

8. The office is directed to remit back the statutory amount to the concerned Tribunal within four weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 2515 of 1992

U.P.State Road Transport Corporation ...Petitioner
Versus
State of U.P. and other ...Respondents

Counsel for the Petitioner:
Sri Shri Kant Sharma
Sri Samir Sharma

Counsel for the Respondents:
S.C.
Sri Pankaj Mittal

U.P. Industrial Dispute Act 1947-Section-6-(1)-Labor Commissioner issued recovery certificate for much and more amount than claimed-where undisputed amount

presupposes due can proceed but where employer disputed liability-can not be allowed to travel beyond jurisdiction-R.C. Quashed-matter remitted back for fresh consideration.

Held: Para 4

It is true that Section 6-H(1) of Act 1947 is in the nature of execution but it presupposes an amount due. Whenever there is dispute as to whether an amount is due or not or about the quantum of such amount, the authority concerned cannot treat the claim of workman to be sacrosanct for issuing recovery certificate but has to apply its mind and record a finding that the amount is due after considering the case set up by the employer in this regard and it is under an obligation in such a circumstance to pass a speaking order determining as to what is an amount due for which recovery certificate has to be issued. It a mechanical manner it cannot issue a recovery certificate for an amount claimed by the workman particularly when correctness of quantum and the claim set up by the workman is disputed by the employer otherwise it would amount to issuing a recovery certificate ex parte without considering the claim of the other side on merits. A statutory authority cannot be permitted to proceed in such a matter as that would amount to misuse of power and would result in travesty of justice.

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

1. Writ petition is directed against the recovery certificate dated 21.10.1991 issued by Deputy Labour Commissioner, U.P. Meerut Region, Meerut on an application filed by respondent workman under Section 6-H(1) of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "Act 1947") wherein he had claimed only Rs.1,00,313/- the amount payable to him from 1986 to 1990. The Deputy Labour Commissioner, however, has issued recovery certificate, impugned in this writ petition, for Rs.1,93,515/-.

2. Sri Samir Sharma, learned counsel for the petitioner submitted that whatever amount due to the workman concerned under the award dated 09.3.1990 in Adjudication Case No.148 of 1988 was already paid to the workman concerned and this was detailed in the reply submitted by the petitioner-employer but without looking into the reply given by the employer, Deputy Labour Commissioner in a mechanical manner has issued recovery certificate and that too for a sum more than the amount actually claimed by the workman. It is true that Section 6-H(1) of Act 1947 is in the nature of execution but it presupposes an amount due. Whenever there is dispute as to whether an amount is due or not or about the quantum of such amount, the authority concerned cannot treat the claim of workman to be sacrosanct for issuing recovery certificate but has to apply its mind and record a finding that the amount is due after considering the case set up by the employer in this regard and it is under an obligation in such a circumstance to pass a speaking order determining as to what is an amount due for which recovery certificate has to be issued. It a mechanical manner it cannot issue a recovery certificate for an amount claimed by the workman particularly when correctness of quantum and the claim set up by the workman is disputed by the employer otherwise it would amount to issuing a recovery certificate ex parte without considering the claim of the other side on merits. A statutory authority cannot be permitted to proceed in such a matter as that would amount to misuse of power and would result in travesty of justice.

3. A perusal of workman's application dated 20th February, 1991, a copy whereof has been filed as Annexure 2 to the writ petition, it is evident that the workman claimed that a sum of Rs.1,70,500/- became due to him from 1986 to 1990 against which he had received Rs.70,187/- and therefore remaining unpaid amount of Rs.1,00,313/-, which he claimed, is due to him. The petitioner-employer in their reply, copy whereof is Annexure 3 to the writ petition, has clearly shown that whatever amount due to the workman was already paid and the amount he has claimed, no basis thereof has been given and the said amount was not payable to him. Without looking into the dispute about actual claim set up by the workman, in a mechanical manner and without application of mind the Deputy Labour Commissioner has issued recovery certificate which is more than the amount actually claimed by the workman and recovery certificate of such an amount could not have been issued. The said recovery certificate is ex facie illegal and cannot sustain.

4. It is true that Section 6-H(1) of Act 1947 is in the nature of execution but it presupposes an amount due. Whenever there is dispute as to whether an amount is due or not or about the quantum of such amount, the authority concerned cannot treat the claim of workman to be sacrosanct for issuing recovery certificate but has to apply its mind and record a finding that the amount is due after considering the case set up by the employer in this regard and it is under an obligation in such a circumstance to pass a speaking order determining as to what is an amount due for which recovery certificate has to be issued. It a mechanical manner it cannot issue a recovery certificate for an amount claimed by the workman particularly when correctness of quantum and the claim set up by the workman is disputed by the employer otherwise it would amount to issuing a recovery certificate ex parte without considering the claim of the other side on merits. A statutory authority cannot be permitted to proceed in such a matter as that would amount to misuse of power and would result in travesty of justice.

5. The writ petition is allowed. The recovery certificate dated 21.10.1991 (Annexure No.5 to the writ petition) issued by Deputy Labour Commissioner, U.P. Meerut Region, Meerut is hereby quashed. The matter is remanded to the Deputy Labour Commissioner, Meerut Region, Meerut to reconsider the matter and first of all he will decide the question whether any amount is due and payable to the workman concerned and only thereafter after passing the speaking order on this aspect, shall issue recovery certificate, if any required.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.06.2012

BEFORE
THE HON'BLE S.S. CHAUHAN, J.

Writ Petition No.2903 (MS) of 2012

Sardar Patel Institute of Technology ...Petitioner

Versus

State of U.P. and others ...Opp. Parties

Constitution of India, Article 226-writ of mandamus-direction to allow the student to appear in B.Ed course-examination 2012-admittedly the institution was granted affiliation for 200 students-temporarily approval granted by unauthorized person-canceled-institution admitted 44 excess students without any authority-held-in view of direction of Laxmi Sharma Case-in

absence of affiliation-institution acted illegally admitting 48 students-petition dismissed.

Held: Para 15

In the said case the students were allowed to appear in the examination as they were admitted. Since in the present case, the students were not validly admitted after affiliation, therefore, they cannot be allowed to appear in the examination. The petitioner, therefore, has failed to make out a case for interference. There has been no affiliation from the examining body. In absence of affiliation, the petitioner was not entitled to admit the students and anyhow if any mistake was committed by the Agra University, that will not entitle the petitioner to claim any parity or any illegal parity is supposed to grant indulgence in favour of the petitioner. It appears that by mistake 48 students were admitted illegally by the petitioner, whereas recognition was only in respect of 200 seats. Therefore, I find no illegality in the order passed by the opposite party no.3.

Case law discussed:

(2006) 9 SCC 1; (2012) 2 SCC 425; (2011) 4 SCC 527; (2000) 5 SCC 231; (1995) 4 SCC 104; (2011) 4 SCC 527; (2012) 1 UPLBEC 312; AIR 2001 Delhi 154; (2004) 4 SCC 513; (2003) 9 SCC 564

(Delivered by Hon'ble S.S. Chauhan, J.)

1. This petition has been filed with the prayer for quashing the order dated 9.5.2012 passed by the opposite party no.3 and further with the prayer of mandamus commanding the State Government to direct the opposite party no.2 to allow 48 students admitted by the petitioner-institution on vacant seats in B.Ed. session 2008-09 to appear in the University examination, which is going to be held in the month of June, 2012 in terms of the Government Order dated 30.9.2011.

2. The facts in short are that the petitioner- Sardar Patel Institute of Technology (for short 'the petitioner-institution') is a self financed unaided private educational institution established by a registered charitable trust. The National Council for Teacher Education (for short 'the Council') a statutory body of the Government of India granted affiliation to the petitioner- institution under Section 14(3) (a) of the National Council for Teacher Education Act (for short 'the Act') for conducting B.Ed. course of one year duration for 100 seats from academic session 2002-03. In pursuance to the aforesaid permission granted by the Council, the Chaudhary Charan Singh University, Meerut (for short 'the Meerut University') granted affiliation to the petitioner-institution to run B.Ed. course with annual intake of 100 seats from academic session 2002-03. The petitioner-institution thereafter applied for 100 more seats and the Council vide letter dated 13.8.2007 granted recognition for 100 additional seats to the petitioner-institution under Section 15(3) (a) of the Act and the Meerut University in pursuance thereof by means of letter dated 18.3.2008 granted permanent affiliation in respect of the additional 100 seats. The petitioner-institution thereafter applied for enhancement of 100 more seats on 29.2.2008, on which the Meerut University constituted an inspection committee for the purpose of conducting inspection for grant of affiliation for 100 additional seats though recommendation was made by the Council for grant of recognition for 100 additional seats (300 seats) w.e.f. 1.7.2006 vide letter dated 19.3.2008. After inspection of the petitioner-institution on 12.3.2008, the Meerut University vide letter dated 19.3.2008 recommended the case of the petitioner-institution for grant

of affiliation for 100 additional seats w.e.f. 1.7.2006. The recommendation was forwarded by the Meerut University on Proforma 'A' to the State Government. The Assistant Registrar of the University, who was given the charge of the Registrar for one day, proceeded to grant provisional affiliation to the petitioner- institution on 14.7.2009 along with three others in respect of 100 additional seats. It is stated that the Assistant Registrar has been proceeded departmentally and action has been taken against him and the affiliation granted by him in respect of four institutions has been cancelled as it was obtained in collusion with the said officer, who was having no authority under law to grant affiliation and the competent authority to grant affiliation is the Vice-Chancellor, which is evident from Annexure No.1 dated 9.5.2012, which is under challenge. For the academic session 2008-09 counseling for B.Ed. course was conducted by the Dr. Bhim Rao Ambedkar University, Agra (for short 'the Agra University') and the petitioner-institution was allowed to participate in the counselling with the sanctioned strength of 300 (200+100) seats. Agra University held three rounds of counselling for the session 2008-09 to fill the seats in all B.Ed. Colleges in the State of U.P. and the petitioner-institution was allotted only 170 students in first and second rounds of counselling and 74 students in the third round of counselling thereby allotting total 244 students. When the Agra University did not allot the students as per the total sanctioned strength, petitioner- institution wrote letters to the opposite parties on 27.1.2010, 17.2.2010 and then admitted 48 more students on the basis of merit, who have qualified in the entrance examination of B.Ed. 2008-09 and secured 50% marks in Graduation and these students were admitted in pursuance to the advertisement published in the newspapers inviting applications from eligible students, who had qualified the entrance examinations of B.Ed. 2008-09. The petitioner-institution sent information to the Meerut University vide letters dated 12.3.2010 and 27.5.2010 about admission of 48 students in the B.Ed. Course and under assumption that approval has been accorded, it allowed the students to complete their studies and they had also attended the requisite number of classes as per the requirement. The State Government vide order dated 30.9.2011 took a decision that the examination of those students be held, who were given admission by the private institutions on their own as per the procedure prescribed in the Government Order dated 12.8.2008. When the Meerut University did not permit the students admitted by the petitioner institution, they filed Writ Petition bearing No.7349 (MS) of 2011 before this Court, in which it was directed that in case the students admitted by the petitioner-institution are covered under the Government Orders dated 12.8.2008 and 30.9.2011, the opposite parties shall permit them to appear in the University examination for B.Ed. Course 2008-09 as and when the same is going to be held. The Meerut University conducted the examination for B.Ed. Course 2008-09 from 6.1.2012 and did not allow 48 students admitted by the petitioner-institution on its own after not adopting the procedure prescribed in the aforesaid Government Orders. The petitioner-institution again applied for permanent affiliation from session 2010-11 for 300 seats and when the State Government did not take any decision in the matter, the petitioner-institution filed Writ Petition No.6057 (MS) of 2008, which was finally disposed of by this Court vide order darted

6.8.2010 with a direction to the State Government to consider the matter for grant of permanent affiliation within two weeks. In pursuance to the order of this Court dated 6.8.2010, the State Government vide order dated 29.11.2010 rejected the matter of the petitioner for grant of permanent affiliation for 300 seats from academic session 2010-11. In pursuance to the aforesaid order, the Vice-Chancellor of the Meerut University proceeded to pass the consequential order refusing to grant affiliation to the petitioner- institution vide order 9.5.2012. Hence this petition.

3. Submission of learned counsel for the petitioner is that in view of the promulgation of the Act, which is a Central Act, the requirement of affiliation is not contemplated under law and if any such condition has been laid down by the State Government, then the same is ultra-vires and does not have any recognition and cannot prevail over the Central Act. He further submits that while granting recognition, all the requirements were complied with and so the State Government cannot impose any additional requirements for grant of affiliation. The rejection of the affiliation is wholly illegal and cannot be held to be a valid action under law on account of the fact that the recognition granted by the Council is final. It is also submitted that the affiliation was granted by the Assistant Registrar vide order dated 14.7.2009 and, therefore, the petitioner cannot be made to suffer as they acted bona fidely on the basis of the said affiliation, which was granted provisionally and the students admitted by the petitioner, have been admitted on the basis of the Government Orders dated 12.8.2008 and 30.9.2011 on the basis of advertisement made in the newspapers as the Agra University failed to provide students to the petitioner-institution, which was the University conducting the counselling. It is further submitted that on the basis of the order of this Court at Allahabad in Writ Petition No.59661 of 2008, wherein an order was passed to the effect that in case the students are available in the select list prepared by the Kanpur University, Kanpur itself, the counselling may be held so that the institutions, which are eligible either under the orders of this Court or otherwise may be given opportunity of counselling and students as per the sanctioned strength of the institution by the NCTE be allotted, to such institution, the students were to be allotted, but it is stated that no such students were allotted. The said writ petition was got dismissed as having become infructuous on 9.12.2011. Submission, therefore, is that 48 students, who have been admitted by the petitioner-institution are entitled to appear in the University examinations, which are going to be held in the month of June, 2012. In support of his contention, he has placed reliance upon the following decisions:-

"(1) State of Maharashtra vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others, ***(2006) 9 SCC 1;***

Adarsh Shiksha Mahavidyalaya and others, vs. Subhash Rahangdale and others, (2012) 2 SCC 425;

Chairman, Bhartia Education Society and another vs. State of Himachal Pradesh and others, (2011) 4 SCC 527 ;

Jaya Gokul Educational Trust vs. The Commissioner & Secretary to Government Higher Education Department, Thiruvananthapuram, Kerala State and another (2000) 5 SCC 231;

State of Tamil Nadu and another vs. Adhiyaman Educational and Research Institute and others, ***(1995) 4 SCC 104;***

4. Counsel for the opposite parties, on the other hand, has submitted that the petitioner has not approached this Court with clean hands and they have concealed certain material facts, which are necessary to be brought on record. He has further submitted that the Assistant Registrar was given the charge of Registrar for one day and he granted provisional recognition in respect of four institutions. He has been proceeded departmentally and action has been taken against him and the four provisional affiliations, which were granted by him, were held to be invalid and were cancelled and they were not given effect under law. The inspection was made by the inspection team and various short comings were found, on account of which the inspection team recommended to the State Government and the State Government found that the petitioner-institution does not conform to the requirements as contemplated for affiliation and so it proceeded to reject the affiliation to the petitioner-institution vide order dated 29.11.2010. The Vice-Chancellor in consequence thereof passed the impugned order on 9.5.2012 refusing to grant affiliation under Section 37(2) of the U.P. State Universities Act. The petitioner was never granted affiliation for additional 100 seats and the recommendation made by the inspection team did not conform to the requirements, which were required under law. The position of appointment of teachers in respect of additional 100 seats was not clear and the inspection team also made a request that the inspection be made by the District Magistrate, Bulandshahr so as to assess the correct position of the infrastructure and other requirements. The students were never admitted on the basis of the merit as contemplated under the Government Orders dated 12.8.2008 and 30.9.2011 and an advertisement was made in the newspapers and on that basis the students were admitted. It is, therefore, submitted that since there was no recognition, the institution was not authorized under law to admit the students. When the petitioners failed in their attempt, then 38 students of the petitioner-institution approached this Court at Allahabad by filing Writ Petition No.39931 of 2011, Khushboo Rai and others vs. State of U.P. and others, in which the parties were asked file counter affidavit and no interim order was granted. In the said case on 17.10.2011 further order was passed and the Court also wanted to know as to whether the institution in question was granted affiliation or not by the State Government under Section 37(2) of the U.P. State Universities Act. Thereafter, another Writ Petition No.2660 (MS) of 2011 was filed by the 45 students of the petitioner-institution before this Court at Lucknow and this Court vide order dated 10.5.2011 rejected the application for interim relief by a detailed order. The said writ petition was thereafter got dismissed as having become infructuous on 2.1.2012. The submission is that after having failed in all tactics, the petitioner has approached this Court as a last resort concealing material facts and made a prayer to allow its students to appear in the examination. Therefore, the said relief cannot be granted by this Court. In support of his contention, he has placed reliance upon the following decisions:-

"Chairman, Bhartiya Education Society and another vs. State of Himachal Pradesh and others, ***(2011) 4 SCC 527;***

Shri Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College vs. National Council for Teachers' Education and others ***(2012) 1 UPLBEC 312;***

Rahul Dhaka Vikas Society and another vs. Guru Gobind Singh Indraprastha University and others, ***AIR 2001 Delhi 154;***

State of Tamil Nadu and another vs. S.V. Bratheep (Minor) and others ***(2004) 4 SCC 513;***

State of Andhra Pradesh vs. K. Purushotham Reddy and others, ***(2003) 9 SCC 564."***

5. I have heard learned counsel for the parties and perused the record.

6. The petitioner initially applied for grant of recognition of 100 seats to the Council and the recognition was granted in respect of 100 seats by the Council on 5.12.2002 and the affiliation was granted to the petitioner on 27.3.2003. The petitioner thereafter applied for additional 100 seats and vide letter dated 13.8.2007 recognition was granted to the petitioner-institution for additional 100 seats by the Council and affiliation was granted by the Meerut University vide letter dated 18.3.2008. The petitioner thereafter applied for 100 additional seats after 200, on which the Meerut University vide letter dated 10.3.2008 constituted an inspection committee for conducting inspection for affiliation of 100 additional seats (200+100) and in pursuance thereof the inspection team conducted the inspection on 12.3.2008. The Meerut University also forwarded the recommendation on Form 'A' on 26.4.2008. The main thrust of the argument of counsel for the petitioner is that the petitioner was granted provisional recognition vide order dated 14.7.2009 and, therefore, it was entitled to take admission for the 100 additional seats and these admissions were taken only when the Agra University failed to allocate the students to the petitioner-institution after 244 students in the first, second and third rounds of counselling. The petitioner thereafter wrote letters to the Agra University for allocation of more students vide letters dated 27.1.2010 and 17.2.2010 and when the Agra University failed to allocate the students, then the petitioner made an advertisement in two newspapers and admitted 48 students on the basis of the Government Orders dated 12.8.2008 and 30.9.2011. It has to be seen as to whether the aforesaid admissions were made on the basis of merit or not. There is no pleading in the writ petition that admissions were made out of the select list prepared by the Agra University conducting the counselling. The students were admitted, who responded to the advertisement and the question of merit as contemplated under the Government Order dated 12.8.2008 was given go bye. Apart from it, the right to admission of students was vested with the petitioner-institution only after there was affiliation by the University. However, there was no affiliation by the University and only a provisional affiliation was obtained by the petitioner fraudulently from the Assistant Registrar, who was given the charge of the Registrar for one day and he granted provisional recognition in respect of four institutions. He was proceeded with departmentally and action has been taken against him and the recognition granted by him has been cancelled. The petitioner thereafter preferred Writ Petition No.59661 of 2008 at Allahabad in which the petitioner did not implead the Meerut University from where the question of affiliation could have been verified and got

an interim order in its favour on 19.12.2008, wherein it was provided that in case the students are available in the select list prepared by the Kanpur University, Kanpur itself, the counselling may be held so that the institutions, which are eligible either under the orders of this Court or otherwise may be given opportunity of counselling, but it has to be seen that the petitioner was not qualified under law to admit the students and, therefore, the said order was not applicable in case of the petitioner and neither the petitioner has come forward to say that the admissions were made by the petitioner on the basis of the said order. The said writ petition was got dismissed having become infructuous on 9.12.2011. The petitioner thereafter obtained another device by filing Writ Petition No.39931 of 2011 through its students to get an interim order seeking prayer to appear in the examination. In the said writ petition, counter affidavit was called for and thereafter on 17.10.2011 an order was passed by this Court at Allahabad wherein the Court emphasized as to whether the institution was affiliated under Section 37(2) of the U.P. State Universities Act or not. The petitioner thereafter adopted another device and filed Writ Petition No.2660 (MS) of 2011 on behalf of the 45 students and this Court vide order dated 10.5.2011 rejected the interim relief application. The said writ petition was got dismissed having become infructuous on 2.1.2012. Having failed in all its tactics either on behalf of the students or itself, the petitioner has approached this Court again by means of the present writ petition claiming therein that affiliation is not required under law. The inspection committee pointed out certain short comings on account of which the State Government took a decision on 10.2.2012 declining permission in respect of 100 seats. The inspection committee reported that the District Magistrate was asked to give information, who reported that infrastructure for appointment of teachers in respect of the additional 100 seats after 200 seats was not clear and so it was decided not to grant affiliation vide order dated 29.11.2010. The Vice-Chancellor, Meerut University passed an order dated 9.5.2012 refusing to grant affiliation to the petitioner in pursuance to the order of this Court dated 5.12.2011 passed in Writ petition No.7349 of 2011 as the students were not admitted on the basis of the merit of the select list prepared by the Agra University.

7. The argument advanced by the counsel for the petitioner in respect of question of non-requirement of affiliation cannot be accepted in view of the law laid down by the apex Court in the case of ***Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya*** (supra).

8. The apex court in a recent judgment in the case of ***Chairman, Bhartiya Education Society*** (supra), drew the difference between recognition and affiliation and came to the conclusion that examining body can impose its own requirement in regard to eligibility of students for admission to a course in addition to those prescribed by the NCTE. The recognition order was also relied upon and interpreted by the apex court. In Paras-22 and 24 of the said judgment, the apex court observed as under:

"22. *Sub-section (6) of Section 14 no doubt mandates every examining body to grant affiliation to the institution on receipt of the order of NCTE granting recognition to such institution. This only means that recognition is a condition precedent for*

affiliation and that the examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by NCTE while granting recognition. For example, NCTE is required to satisfy itself about the adequate financial resources, accommodation, library, qualified staff, and laboratory required for proper functioning of an institution for a course or training in teacher education. Therefore, when recognition is granted by NCTE, it is implied that NCTE has satisfied itself on those aspects. Consequently, the examining body may not refuse affiliation on the ground that the institution does not have adequate financial resources, accommodation, library, qualified staff, or laboratory required for proper functioning of the institution. But this does not mean that the examining body cannot require compliance with its own requirements in regard to eligibility of candidates for admissions to courses or manner of admission of students or other areas falling within the sphere of the State Government and/or the examining body. Even the order of recognition dated 17-7-2000 issued by NCTE specifically contemplates the need for the institution to comply with and fulfil the requirement of the affiliating body and the State Government, in addition to the conditions of NCTE.

***24.** The examining body can therefore impose its own requirements in regard to eligibility of students for admission to a course in addition to those prescribed by NCTE. The State Government and the examining body may also regulate the manner of admissions. As a consequence, if there is any irregularity in admissions or violation of the eligibility criteria prescribed by the examining body or any irregularity with reference to any of the matters regulated and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution continues to enjoy the recognition of NCTE. Sub-section (6) of Section 14 cannot be interpreted in a manner so as to make the process of affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the institution deserves affiliation or not, independent of the recognition. An institution requires the recognition of NCTE as well as affiliation with the examining body, before it can offer a course or training in teacher education or admit students to such course or training. Be that as it may."*

9. Emphasis laid upon an interim order of this Court passed in *Writ Petition No. 2286 (MB) of 2009,* laying down the preposition of law that affiliation was not required stands diluted in view of the judgment rendered by the apex court in the case of ***Chairman, Bhartiya Education Society (***supra). Therefore, reliance placed upon the aforesaid interim order is of no consequence.

10. The matter again came up for consideration before the apex court in regard to withdrawal of recognition, wherein several deficiencies were pointed out and the institution was found to be not equipped with the infrastructure as required under the Act and also not in a position to impart quality education.

11. The apex court in the case of ***Shri Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College*** (supra), deprecated the practice of granting approval in respect of institutions which

are ill-equipped and noticed the mushroom growth of ill-equipped, under-staffed and unrecognized educational institutions. In the said case, certain shortcomings were found and withdrawal of recognition to B.Ed. College was under challenge. The apex court found that the deficiencies were in the nature of inadequacy of built-up area available to the institution, the land underlying the structure was not in the name of the appellant-Trust and the college was being run in a building that was used by two other institutions. The apex court took a serious view and proceeded to consider the case laws propounded by the apex court in this respect time and again. In paras- 8, 10 and 17 of the aforesaid judgment, the apex court held as under:

"8. The High Court upon a consideration of the relevant records including the inspection report placed before it, dismissed the writ petition relying upon the decisions of this Court in Chairman, Bhartia Education Society and Anr. v. State of Himachal Pradesh and Ors. (2011) 4 SCC 527, N.M. Nageshwaramma v. State of Andhra Pradesh and Anr. (1986) Supp. SCC 166, Students of Dattatraya Adhyapak Vidyalya v. State of Maharashtra and Ors. SLP (C) No.2067 of 1991, decided on 19.2.1991, Andhra Kesari Educational Society v. Director of School Education (1989) 1 SCC 392 and a few others. The High Court held that the appellant was not entitled to any relief in the writ proceedings filed on its behalf and accordingly dismissed the writ petition. Hence the present appeals, assail the said judgment and order.

10. Mushroom growth of ill-equipped, under-staffed and un-recognised educational institutions was noticed by this Court in State of Maharashtra v. Vikas Sahebrao Roundale and Ors. (1992) 4 SCC 435. This Court observed that the field of education had become a fertile, perennial and profitable business with the least capital outlay in some States and that societies and individuals were establishing such institutions without complying with the statutory requirements. The unfortunate part is that despite repeated pronouncements of this Court over the past two decades deprecating the setting up of such institutions. The mushrooming of the colleges continues all over the country at times in complicity with the statutory authorities, who fail to check this process by effectively enforcing the provisions of the NCTE Act and the Regulations framed thereunder.

17. There is no distinguishing feature between the cases mentioned above and the case at hand for us to strike a discordant note. The institution established by the appellant is not equipped with the infrastructure required under the NCTE Act and the Regulations. It is not in a position to impart quality education, no matter admissions for the session 2011-2012 were made pursuant to the interim directions issued by the High Court. We have, therefore, no hesitation in rejecting the prayer for permitting the students to continue in the unrecognised institution of the appellant or directing that they may be permitted to appear in the examination. We, however, make it clear that this order will not prevent the respondent-University from examining the feasibility of reallocating the students who were admitted through the University process of selection and counselling to other recognised colleges to prevent any prejudice to such students. Such re-allocation for the next session may not remedy the situation fully qua the students

who may have to start the course afresh but it would ensure that if such admissions/reallocation is indeed feasible, the students may complete their studies in a recognised college instead of wasting their time in a college which does not enjoy recognition by the NCTE. We, however, leave this aspect entirely for the consideration of the University at the appropriate level, having regard to its Rules and Regulations and subject to availability of seats for such adjustment to be made as also the terms and conditions on which the same could be made. This order shall also not prevent the affected students from seeking such reliefs against the appellant college as may be legally permissible including relief by way of refund of the fee recovered from them."

12. So far as the laying down of additional qualification by the State Government is concerned, the apex court in the case of Laxmi Sharma (supra), found that the college was granted only temporary affiliation and permanent affiliation was refused by the University. Though the students were admitted and permitted by the Court to appear in the examination, but the results were not declared. In those very special situation, direction was given to admit the students, but so far as affiliation was concerned, the affiliating body was directed for giving opportunity to the college and it was very clearly laid down that the Courts cannot direct the concerned authorities to grant affiliation, as it would amount to trespass on the jurisdiction of the University. The apex court in Para-20 of the said judgment held as under:

"20. As far as the appeals preferred by the college against the common judgment and the order passed on the review application are concerned, we agree with the view expressed by the High Court that it is not for the Court to direct the concerned authorities to grant affiliation as that would amount to trespassing on the jurisdiction of the university. We can only request the university to consider the grant of such affiliation in view of the several inspection reports and the recommendations made by the inspection teams for grant of such recognition. The appeals preferred by the college are, therefore, disposed of with a direction upon the university to consider the grant of permanent affiliation to the college after giving the college authorities a reasonable opportunity of being heard."

13. Even in the case of Adarsh Shiksha Mahavidyalaya (supra) in clause (xv) of para 87 it has been provided that the students admitted by unrecognized institutions and institutions, which are not affiliated to any examining body are not entitled to appear in the examination conducted by the examining body or any other authorised agency. In clause (xviii) of the said para it has also been held that in future, the high Courts shall not entertain prayer for interim relief by unrecognized institutions and the institutions which have not been granted affiliation by the examining body and/or the students admitted by such institutions for permission to appear in the examination or for declaration of the result of examination. This would also apply to the recognised institutions if they admit students otherwise than in accordance with the procedure contained in Appendix 1 of the Regulations.

14. In para 79 of the said judgment, it has been held as under:-

" 79. What needs to be emphasised is hat no recognition/permission can be granted to any institution desirous of conducting teacher training course unless the mandatory conditions enshrined in Sections 14(3) or 15(3) read with the relevant clauses of Regulations 7 and 8 are fulfilled and that in view of the negative mandate contained in Section 17-A read with Regulation 8(10), no institution can admit any student unless it has obtained unconditional recognition from the regional committee and affiliation from the examining body."

15. In the said case the students were allowed to appear in the examination as they were admitted. Since in the present case, the students were not validly admitted after affiliation, therefore, they cannot be allowed to appear in the examination. The petitioner, therefore, has failed to make out a case for interference. There has been no affiliation from the examining body. In absence of affiliation, the petitioner was not entitled to admit the students and anyhow if any mistake was committed by the Agra University, that will not entitle the petitioner to claim any parity or any illegal parity is supposed to grant indulgence in favour of the petitioner. It appears that by mistake 48 students were admitted illegally by the petitioner, whereas recognition was only in respect of 200 seats. Therefore, I find no illegality in the order passed by the opposite party no.3.

16. Writ petition is devoid of merit. It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.05.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. 3053 of 2008

Dharmendra Kumar Singh ...Petitioner
Versus
State of U.P. Thru Secy. Sec. Education & 4 others ...Respondents

Counsel for the Petitioner:
H.G.S. Parihar

Counsel for the Respondents:
C.S.C.

U.P. Secondary Services Selection Board 1982-Section 16 (c)-payment of salary-claimed by those L.T. grade teachers and lecturers-appointed against substantive vacancy on short term basis-held-management has no power to appoint short term basis against substantive vacancies-salary can not be paid from sate fund.

Held: Para 108 and 110

For the foregoing reasons, it can be safely held that in view of the provisions as provided under Section 16(1) of U.P. Secondary Services Selection Board Act, 1982, the Committee of Management has got no power whatsoever to make selections on the post of Assistant Teacher/Lecturer in L.T. Grade against a substantive vacancy or a vacancy which has converted into substantive one and the power to make selection against the said vacancy is vested only with the Selected Board duly constituted for the said purpose.

In the result, I do not find any infirmity or illegality in the action on the part of the State authorities/District Inspector of Schools either not to pay the salary or to

stop the payment of salary to the Assistant Teachers/Lecturers who are appointed against substantive vacancy or short term vacancy which subsequently converted into substantive vacancy on ad hoc basis by the Committee of Management as the said authority has got no power under law to appoint them, accordingly, all the writ petitions lack merit and are dismissed.

Case law discussed:

(1998) 4 SCC 231; (1992) 1 SCC 335; 2004 (22) LCD 1604; 1996 (10) SCC 71; Writ Petition No. 20843 of 2002; 2010 (28) LCD 1375; 2011 (7) SCC 639; 2007 (6) SCC 586; 2006 (3) UPLBEC 2159; 1991 (2) SCC 599; 1992 (2) SCC 66; 1993 (1) SCC 645; (1991) 3 SCC 67; (1989) 1 SCC 104; (1991) 4 SCC 312; (2011) 1 SCC 354; (2011) 9 SCC 707; 2004 vol. 3 UPLBEC page 2671; 1986 UPLBEC 477; 1996 (3) UPLBEC 1959; 1955 Suppl. (27 SCC 73); 1973 (2) SCC 72; AIR 1976 SC 1031; 1989(1) SCC 272; (2009) 15 SCC 458; 2011 (4) SCC 602; (1989) 1 SCC 272; (2009) 15 SCC 458; 2011 (4) SCC 602; (2003) 7 SCC 197; 1994 (2) E.S.C. 1284 (Alld); 2004 (22) LCD 1604; Civil Misc. Writ Petition No. 20813 of 2002 (Daya Shanker Mishra Vs. State of U.P. And others); 2001 (1) UPLBEC 741; 2010 (4) ADJ 143; 2010 (6) ADJ 299 (DB); 2010 (7) ADJ 392 (DB); 2011 (11) LBESR 505 (All); (2012) 1 UPLBEC 260; 2007 (6) SCC 236; 1996 (3) SCC 709; 2008 (2) SCC 254; AIR 1964 SC 1135; AIR 1968 SC 1; (1978) 2 SCC 1; SEB (1988) 3 SCC 382; 2002 (2) SCC 318; (2000) 8 SCC 633; AIR 1966 SC 942; (2002) 5 SCC 111; AIR 1996 SC 1864; Commissioner of agricultural Income Tax Vs. Keshav Chand, AIR 1950; AIR 1955 SC 661; AIR 1983 SC 420; AIR 1963 SC 1128; (1998) 3 SCC 218; AIR 1996 SC 1963; AIR 1996 SC 1153; AIR 1997 SC 2847; AIR 2003 SC 1115; (2004) 5 SCC 155; (2010) 7 SCC 643; U.P. Secondary Education Service Selection Board (Amendment) Act, 2011 (U.P. Act 5 of 1982); A.I.R. 1976 page 137; 1956 (1) All England Reports page 859; AIR 1977 Supreme Court 265; 62 (1986) STC 1121; (1987) 1 SCC 424: (AIR 1987 SC 1023); 1956 SCR 603; (1990) 4 SCC 406; JT 2008 (9) SC 227; AIR SC 96; (2004) 5 SCC 518; (2003) 5 SCC 590; AIR 2003 SC 511; (2003) 5 SCC 134; AIR 1964 Supreme Court page 358; AIR 1936 Privy council page 253; (2004) 3 UPLBEC 2671; 1989 (1) SCC 252; 2009 (15) SCC 458; 2011 (4) SCC 602; 2003 (7) SCC 197; 2010 (1) ADJ 357; 2010 (6) ADJ 299 (DB); 2010 (10) ADJ, 849 (DB); 2009 (9) ADJ 650; 2010 (7) ADJ 392 (DB); 2011 (29) LCD 826; 2012 (1) UPLBEC 260; 2012 (1) SCC 122

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

1. Heard Sri H.G.S. Parihar, Sri M.B. Singh, Pt. S. Chandra, Sri M.S. Rathour, Sri Ramesh Pandey, Sri Sanjay Mishra, Sri S.P. Singh, Sri G.C. Verma, Sri D.P.S. Chauhan, Sri R.P. Singh, Sri Ajay Kumar Singh Sri Sharad Pathak, learned counsel for petitioners and Sri V.S. Tripathi, learned Additional Chief Standing Counsel on behalf of respondents.

2. The role of teachers in society is both significant and of widespread value. They had influenced the society they lived in and no other personalities had a greater influence than the teachers. Students are strongly influenced by teacher's love, compassion, character, competence, and moral commitment. A popular teacher is one who becomes a role model for his students. Often the students try to follow their teachers in their behavior, dress, etiquette, conversational style, and way of living. He's their ideal.

3. The importance of teachers as architects of our future generations demands that only the best, most intelligent and competent members of our intellectuals are allowed to qualify for this noble profession. But, it is unfortunate to find that in general the worst and most incapable people find their way into this profession. Anyone who fails to find an open road in life, gets into this profession and starts recklessly playing with the fate of nation.

4. In the instant matters, the controversy involved is in respect to the petitioners who are Assistant Teachers or

Lecturers selected in Intermediate colleges situated in different cities of the State of U.P. as ad hoc teacher on substantive vacancy or short term vacancy which were subsequently converted into substantive vacancy by the Committee of Management. However, approval of their appointments has been refused by District Inspector of Schools concerned either expressly or impliedly, thus they were not paid the salary as matter regarding payment of salary has been rejected by the D.I.O.S. and for the said grievances they approached this Court under article 226 of the Constitution of India for redressal of their grievances i.e. for payment of salary.

5. So far as the educational qualification and other eligibility criteria of the petitioners in respect of holding the post of Assistant Teacher/Lecturer is concerned, it is not an issue in the present case, but the only question involved in the present matter is whether the committee of Management of the various institutions situated throughout the State of U.P. have got power to make ad hoc selection against substantive vacancy or not.

6. Before dealing with the issue in question, it would be appropriate to quote the relevant provisions of U.P. Intermediate Education Act, 1921, Payment of Salaries Act, 1971 and U.P. Secondary Education Services Selection Board Act, 1982 and Regulations and Rules framed under these Acts. Relevant portion of the same are reporduced as under:-

"1. The Uttar Pradesh Intermediate Education Act, 1921

16-E. Procedure for selection of teachers and head of institutions. - *(1) Subject to the provisions of this Act, the Head of Institution and teachers of an institution shall be appointed by the Committee of Management in the manner hereinafter provided.*

(2) Every post of Head of Institution or teacher of an institution shall except to the extent prescribed for being filled by promotion, be filled by direct requirement after intimation of the vacancy to the Inspector and advertisement of the vacancy containing such particulars as may be prescribed, in at least two newspapers having adequate circulation in the State.

(3) No person shall be appointed as Head of Institution or teacher in an institution unless he possess the minimum qualifications prescribed by the Regulations:

Provided that a person who does not possess such qualification may also be appointed if he has been granted exemption by the Board having regard to his education, experience and other attainments.

(4) Every application for appointment as Head of Institution or teacher of an institution in pursuance of an advertisement published under sub-section (2) shall be made to the Inspector and shall be accompanied by such fee which shall be paid in such manner as may be prescribed,

(5) (i) After the receipt of applications under sub-section (4), the Inspector shall cause to be awarded, in respect of each such applications, quality-

point marks in accordance with the procedure and principles prescribed, and shall thereafter, forw2ard the applications to the Committee of Management.

(ii) The applications shall be dealt with, the candidates shall be called for interview, and the meeting of the Selection Committee shall be held, in accordance with the Regulations.

(6) The Selection Committee shall prepare a list containing in order of preference the names as far as practicable of three candidates for each post found by it to be suitable for appointment and shall communicate its recommendations together with such list to the Committee of Management.

(7) Subject to the provisions of sub-section (8) the Committee of Management shall, on receipt of the recommendations of the Selection Committee under sub-section (6), first offer appointment to the candidate given the first preference by the Selection Committee, and on his failure to join the post, the candidate next to him in the list prepared by the Selection Committee under this section, and on the failure of such candidate also, to the last candidate specified in such list.

(8) The Committee of Management shall, where it does not agree with the recommendations of the Selection Committee, refer the matter together with the reasons of such disagreement to the Regional Deputy Director of Education in the case of appointment to the post of Head of Institution and to the Inspector in the case of appointment to the post of teacher of an institution, and his decision shall be final.

(9) Where no candidate approved by the Selection Committee for appointment is available, a fresh selection shall be held in the manner laid down in the section.

(10) Where the State Government, in cases of the appointment of Head of Institution, and the Director in the case of appointment of teacher of an institution, is satisfied that any person has been appointed as Head of Institution or teacher, as the case may be, in contravention of the provisions of this Act, the State Government or, as the case may be, the Director may, after affording an opportunity of being heard to such person, cancel such appointment and pass such consequential order as may be necessary.

(11) Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or [by death, termination or otherwise] of an incumbent occurring during an educational sessions, may be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed;

Provided that no appointment made under this sub-section shall, in any case, continue beyond the end of the educational session during which such appointment was made."

"2. **Regulations framed under The Uttar Pradesh Intermediate Education Act 1921.**

Chapter-II

APPOINTMENT OF HEADS OF INSTITUTIONS AND TEACHERS

(Sections 16-E, 16-F and 16-FF)

1. The minimum qualifications for appointment as Head of the Institution and Teachers in any recognised Institution whether by direct recruitment or otherwise, shall be as given in Appendix A.

.....

9. *(1) Where a vacancy in the post of teacher is caused by grant of leave to him for a period exceeding six months or where a teacher is placed under suspension which has been approved in writing by the Inspector under sub-section (7) of Section 16-G and the period of such suspension is likely to exceed six months from the date of such approval the vacancy may subject to the provisions of these Regulations be filled temporarily by direct recruitment or promotion as the case may be.*

(2) Where any vacancy is of the nature referred to in Clause (1) or is caused as a result of promotion under Regulation 2 and the period of such vacancy exceeds thirty days but does not exceed six months, it may be filled by the Committee of Management by promotion of a duly qualified permanent teacher of the institution in the next lower grade on the basis of seniority.

(3) If any vacancy under Clause (2) cannot be filled due to the non availability of any teacher of the institution in the next lower grade, possessing the prescribed minimum qualifications for the post, it may be filled on ad hoc basis by the Committee of Management by the direct appointment for a period of not exceeding six months in aggregate.

(4) All vacancies filled under Clause (2) or Clause (3) shall be reported to the Inspector in the proforma prescribed in Appendix 'B' within a week of being filled up.

9-A. A teacher appointed to a post to fill a vacancy caused by the promotion of a permanent teacher from a lower grade to higher grade shall be deemed to have been appointed in substantive capacity on the post from the date of confirmation of such permanent teacher in the higher grade.

10. The procedure for filling up the vacancy of the head of institution and teachers by direct recruitment in any recognised institution shall be as follows:-

(क) प्रबन्ध समिति द्वारा सीधी भर्ती से भरी जाने वाली रक्तियों को संख्या अवधारित कर लिये जाने के पश्चात् संस्था के प्रबन्धक द्वारा कम से कम दो ऐसे समाचार पत्रों में जिनमें एक व्यापक प्रचलन का स्थानीय अथवा संस्था के निकटम स्थान से प्रकाशित होने वाला कोई समाचार पत्र हो और दूसरा राज्य में व्यापक परिचालन वाला समाचार पत्र हो पद विज्ञापित किये जायेंगे, प्रतिबन्ध यह है कि समाचार पत्रों की सूची जिसे विद्यालय निरीक्षक अपने सम्भाग के सम्भागीय उप शिक्षा निदेशक की स्वीकृति के उपरान्त निर्धारित करेंगे और उनसे से ही दो समाचार पत्रों में जनपद के समस्त प्रबन्ध समितियों द्वारा विज्ञापन देना अनिवार्य होगा विज्ञापन में रिक्तियों के प्रकार (अर्थात स्थायी हैं या अस्थायी) तथा रिक्तियों की संख्या, पद का विवरण (अर्थात प्रिंसिपल या प्रधानाध्यापक, प्रवक्ता या एल0टी0, सी0टी0 या जे0टी0सी0, बी0टी0सी0 श्रेणी के अध्यापक तथा ऐसा या ऐसे विषय जिसमें या जिनमें प्रवक्ता या अध्यापक की आवश्यकता हो), वर्तमान और अन्य भत्ते, अपेक्षित अनुभव, पद के लिए विहित न्यून्तम अर्हता और न्यून्तम आय यदि कोई हो, के सम्बन्ध में विवरण दिये गए हों और अन्तिम दिनांक (जो साधारणतया विज्ञापन के दिनांक से दो सप्ताह से कम न हो होना चाहिये) विहित किया जायेगा जिस तक अभ्यर्थियों द्वारा विहित प्रपत्र में सम्यक् रूप से पूर्णतया भरे गये आवेदन–पत्र निम्नलिखित के कार्या में प्राप्त किये जायेंगे।

(i) the District Inspector of Schools, or

(ii) the Regional Inspectors of Girls' Schools, in case of institutions for girls.

The advertisement shall also state that the prescribed application forms can be had from the office of any Inspector on payment of Rs.9 per form by a crossed postal order or bank draft or through Treasury challan by depositing the amount in the State Bank of India under the head indicated by the Inspector. In no case the payment shall be accepted in cash in the Office of the Inspector. A copy of each advertisement shall be simultaneously sent by the Manager to the District Inspector of Schools or the Regional Inspectress of Girls' Schools concerned and in case the post of the head of institution is advertised a copy of the Advertisement shall also be sent to the Regional Deputy Director of Education.

3. Whether recognised/and on the grant -in-aid list ..... 4.Purpose for which grant is required .... (With details of expenditure)

....

5.Particulars of grants (recurring and non-recurring), if any received during the year of application and the year preceding it .....

3. The Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982

10. Procedure of selection of teachers specified in the Schedule.

(1) For the purposes of making appointment of a teacher specified in the Schedule, the management shall notify the vacancy to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the posts of such teachers shall be such as may be prescribed:

Provided that the Commissioner shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).

11. ***Panel of candidates selected by Commissioner.***

(1) The Commission shall, as soon as possible, after the notification of vacancy under Section 10, hold interviews (with or without examination) of the candidates and prepare a panel of those found most suitable for appointment.

(2) The panel referred to in sub-section (1) shall be forwarded by the Commission to the officer or authority referred to in sub-section of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under sub-section (2), the officer or authority concerned shall intimate the management of an institution in respect of which the vacancy was notified under sub-section (1) of Section 10, the names of candidates selected for appointment as teachers, and for this purpose, the officer or authority

shall follow such procedure as may be prescribed.

(4) The management shall within a period of one month from the date of receipt of such intimation, issue appointment letter to the candidate whose name has been intimated under sub-section (3).

(5) Where the candidate referred to in sub-section (3) fails to join the post of a teacher in such institution within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such candidate is otherwise not available for appointment as such teacher, the officer or authority concerned may, on the request of the management, intimate fresh name or names from the panel forwarded by the Commission under sub-section (2) in the manner prescribed.

The procedure laid down in Sections 10 and 11 qualifies the power of the Commission mentioned in Section 16 to make recommendations for appointment. The procedure as laid down in Sections 10 and 11 is obviously inapplicable to a case of transfer. It cannot thus be said that the Commission is to be consulted or that the Commission has to make recommendations with regard to transfer. The Commission can make recommendations only on the basis of regular selection as mentioned in Sections 10 and 11. These provisions do not fit in with the concept of a transfer of the nature contemplated in regulations Nos.55 to 60.

Every transfer, though it does involve an appointment in the sense indicated above, is not a fresh appointment or a recruitment for a fresh appointment. It is only fresh appointments, and recruitments therefore which are sought to be regulated by the new Act.

16. ***Appointments to be made only on recommendations of the Commission or the Board. –***

(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder but subject to the provisions of Sections 18 and 33 -

(a) every appointment of a teacher specified in the Schedule shall, on or after July 10, 1981; be made by the management only on the recommendation of the Commission.

(b) every appointment of a teacher (other than a teacher specified in the Schedule) shall, on or after July 10, 1981, be made by the management only on the recommendation of the Board;

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall apply with the modification that in sub-section (2) of the aforesaid section, for the words 'six months' the words 'two months' shall be deemed to have been substituted.

(2) Every appointment of a teacher, in contravention of the provisions of sub-section (1), shall be void.

18. ***Ad hoc Teachers (as originally enacted).-***

(1) Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and - (a) the Commission has failed to

recommend the name of any suitable candidate for being appointed as a teacher specified in the Schedule within one year from the date of such notification ; or

(b) the post of such teacher has actually remained vacant for more than, two months, then, the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder.

(2) The provisions of sub-section (1) shall also apply to the appointment of a teacher (other than a teacher specified in the Schedule) on ad hoc basis with the substitution of the expression 'Board for the expression "Commission".

(3) Every appointment of an ad hoc teacher under sub-section (1) or sub-section (2) shall cease to have effect from the earliest of the following dates namely

(a) when the candidate recommended by the Commission or the Board, as the case may be, joins the post ;

(b) when the period of one month referred to in sub-section (4) of Section 11 expires ;

(c) thirtieth day of June following the date of such ad hoc appointment.

The word "appointment" appearing in Section 16 has to be construed in harmony with the provisions of the two Acts, particularly Sections 10 and 11 of the new Act and Section 16-G of the Intermediate Education Act,. Words take their colour from the context in which they appear. The expression "appointment" in its widest sense would, no doubt, include a transfer also but considering the context and the object of the new Act the word "appointment" as it appears in Section 16 cannot comprise an appointment through transfer or an appointment of say, a Government Official on deputation to a recognised institution.

Section 16 does not depend for its operation on fulfilment of any condition precedent or making of a provision, the language of sub-section (2) of Section 1 is clear and leaves no room for doubt that the appointment to be made against the provisions of the Ordinance would be void.

The expression 'void' used in sub-section (2) of Section 16 is very material. In the strict sense the word 'void' means nullity.

18. ***Ad hoc Principals or Headmasters (as it stands after amendment in 2001).-***

(1) Where the Management has notified a vacancy to the Board in accordance with sub-section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the Management shall fill such vacancy on purely ad hoc basis by promoting the senior-most teacher,

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal;

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the senior-most teacher under sub-section (1) the Inspector shall himself issue the order of promotion of such teacher and

the teacher concerned shall be entitled to get his salary as the principal or the Headmaster, as the case may be, from the date he joins such post in pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of the Principal or the Headmaster, as the case may be, due to any act or omission on the part of the Management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an ad hoc Principal or Headmaster under sub-section (1) or sub-section (2) shall cease to have effect from the date when the candidate recommended by the Board joins the post.

32. ***Applicability of U.P. Act II of 1921.*** *- The provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act or the rules or regulations made thereunder shall continue to be in force for the purpose of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher.*

33-***E Rescission of orders.-*** *The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties((Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982, are hereby rescinded.*

4. ***The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998***

Rule 2(e). *-"Vacancy" means a vacancy arising out as a result of death, retirement, resignation, termination, dismissal or removal of a teacher or creation of new post or appointment or promotion of the incumbent to any higher post in a substantive capacity.*

5. ***The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981.***

1. ***Short title and commencement. –***

(1) This Order may be called the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981.

(2) It shall come into force at once.

2. ***Vacancies in which ad hoc appointment can be made.*** *- The management of an institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in accordance with the provisions of this Order in the following cases, namely:*

(a) in the case of a substantive vacancy existing on the date of commencement of this Order caused by death, retirement, resignation or otherwise;

(b) in the case of a leave vacancy, where the whole or unexpired portion of the

leave is for a period exceeding two months on the date of such commencement;

(c) where a vacancy of the nature specified in clause (a) or clause (b) comes into existence within a period of two months subsequent to the date of such commencement.

3. ***Duration of ad hoc appointment.*** *- Every appointment of an ad hoc teacher under paragraph 2 shall cease to have effect from the earliest of the following dates, namely:*

(a) when the candidate recommended by the Commission or the Boards joins the post; or

(b) when the period of six months from the date of such ad hoc appointment expires.

4. ***Ad hoc appointment by promotion. –***

(1) Every vacancy in the post of an Head of an institution may be filled by promotion:

(a) in the case of an Intermediate College, by the senior most teacher of the institution in the lecturer's grade;

(b) in the case of a High School raised to the level of an Intermediate College, by the Headmaster of such High School;

(c) in the case of a Junior High School raised to the level of a High School, by the Headmaster of such Junior High School.

(2) Every vacancy in the post of a teacher in Lecturer's grade may be filled by promotion by the senior most teacher of the institution in the trained-gradate (L.T.) grade.

(3) Every vacancy in the post of a teacher in the trained graduate (L.T.) grade shall be filled by promotion by the senior most teacher of the institution in the trained undergraduate (C.T.) grade.

(4) Every vacancy in the post of a teacher in the trained undergraduate (C.T.) grade shall be filled by promotion by the senior most teacher of the institution in the J.T.C. Grade or B.T.C. Grade.

Explanation. - For the purposes of clauses (1) to (4) of this paragraph, the expression "senior most teacher" means the teacher having longest continuous service in the institution in the Lecturer's grade or the trained graduate (L.T.) grade, or trained undergraduate 9C.T.) grade or J.T.C. Or B.T.C. Grade, as the case may be.

5. ***Ad hoc appointment by direct recruitment. –***

(1) Where any vacancy can not be filled by promotion under paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

(2) The management shall as soon as may be, informed the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the local Employment Exchange and also through public advertisement in at least two news papers having adequate circulation in Uttar Pradesh.

(3) Every application referred to in clause (2) shall, be addressed to the District Inspector of School and shall be accompanied:

(a) by a crossed postal order worth ten rupees payable to such Inspector;

(b) by a self-addressed envelop bearing postal stamp for purposes of registration.

(4) The District Inspector of Schools shall cause the best candidates selection on the basis of quality points specified in Appendix. The compilation of quality points may be done on remunerative basis by the retired Gazetted Government servants under the personal supervision of such Inspector.

(5) If more than one teacher of the same subject or category is to be recruited for more than one institution, the names of the selected teacher and the names of the institutions shall be arranged in Hindi alphabetical order. The candidate whose name appears on the top of the list shall be allotted to the institution the name whereof appears on the top of the list of the institutions. This processes shall be repeated till both the lists are exhausted.

Explanation . - In relation to an institution imparting instruction to women the expression "District Inspector of Schools" shall mean the "Regional Inspectress of Girls Schools".

6. ***Eligibility for appointment.*** *- Every appointment of a teacher under paragraph 4 to 5 shall be subject to the following conditions, namely:*

(a) The candidate sough to be appointed by promotion or by direct recruitment must fulfil the essential qualifications laid down in Appendix A referred to in the Regulation (1) of Chapter II of the Regulations made under the Intermediate Education Act, 1921.

(b) The candidate sough to be appointed by direct recruitment under paragraph 5 shall not be related to any member of the Committee of Management in the manner indicated in Schedule II to the Intermediate Education Act, 1921.

(c) The candidate sought to be appointed by promotion under paragraph 4 must have been serving the institution in substantive capacity from before the date of commencement of this Order.

7. ***Disputes to be referred to Director.*** **–**

(1) Every dispute connected with the promotion or direct recruitment under this Order shall be referred to the Director and his decision thereon shall be final.

(2) Without prejudice to the generality of clause (1), the Director shall have the power to look into the complaint, if any, regarding the award of the quality points mentioned in Appendix or the validity or any promotion or direct recruitment in accordance with this order and to cancel any promotion, recruitment or appointment made in continuation of such order.

6. ***The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981***

1. ***Short title and commencement.*** **–**

(1) This Order may be called the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981.

(2) It shall come into force at once.

2. ***Procedure for filling up short-term vacancies. –***

(1) If short term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled by the Management of the institution, by promotion of the permanent senior most teacher of the institution, in the next lower grade. The management shall immediately inform the District Inspector of Schools of such promotion along with the particulars of the teacher so promoted.

(2) Where any vacancy ,referred to in clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possession the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).

(3) (i) The Management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the institution along with the particulars given in Appendix 'B' to this order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, issued with notification no.Ma-1993/SV-7-1(79)-1981, dated July 31., 1981, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of institution.

(ii) The names and particulars of the candidate selected and also other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure to communicate his decision within seven days of the receipt of papers by him from the Manager, the Management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation. - For the purpose of this paragraph –

(i) the expression 'senior-most teacher' means the teacher having longest continuous service in the institution in the Lecturer's grade or the trained graduate (L.T.) grade, or trained under-graduate (C.T.) grade or J.T.C. Or B.T.C. Grade, as the case may be ;

(ii) in relation to institution imparting instructions to women, the expression 'District Inspector of Schools' shall mean the 'Regional Inspectress of Girls Schools';

(iii) 'short term vacancy' otherwise ceases to exist.

4. Every appointment of a teacher under paragraph 2 shall mutatis mutandis be subject to the conditions laid down in para 6 of the First Removal of Difficulties Order, 1981.

5. ***Substitution of paragraphs 2 of the First Removal of Difficulties Order 1981.*** *- In the First Removal of Difficulties Order, 1981, for paragraph 2, the following paragraph shall be substituted, namely : -*

"2. The management of an institution may appoint by promotion or by direct recruitment, a teacher on purely ad hoc basis in accordance with the provisions of this Order in the case of a substantive vacancy caused by death, retirement, resignation, or otherwise."

6. ***Amendment of the Appendix appended to the First Removal of Difficulties Order, 1981.-*** *In the Appendix to the First Removal of Difficulties Order, 1981, for the entry against item 5 in each of the two tables pertaining to trained under-graduates grade and trained graduates grade, the following entry shall be substituted, namely*

Examination	*First Division*	*Second Division*	*Third Division*
5. (a) Training	*12*	*6*	*3*
(b) Practical	*12*	*6*	*3*

APPENDIX

(i)Name:
(ii)Date of birth
(iii)Qualifications - Examinations with date of passing them subject(s) and Divisions;
(iv)Whether trained ? If so division in theory and practice.

SUBMISSIONS MADE ON BEHALF OF PARTIES

7. First argument which has been advanced on behalf of petitioners in the present case is to the effect that Section 33 E of U.P. Act No. 5 of 1982 is ultra vires to the provisions of Article 14 of the Constitution of India as well as Section 16 E (11) of the U.P. Intermediate Education Act, 1921, as after insertion of the said section in the statute, there is no provision which enables the Committee of Management to make ad hoc selection/appointment on the post of Assistant Teacher against substantive vacancy. Thus, the selection/appointment on the post of Assistant Teacher/Lecturer by the Committee of Management as per the Provisions of Section 16 E(11) of Chapter II and Regulation 9 of the Regulation framed under U.P. Intermediate Education Act, 1921, by the Committee of Management competent to make their selection/appointment in no manner be curtailed of the provision as provided under Section 33 E of the U.P. Act No. 5 of 1982.

8. Further in view of Section 32 of the U.P. Secondary Education Service Selection Board, 1982 which provides that the provisions contained under the U.P. Intermediate Education Act, 1921 and the Regulation framed thereunder which are not in consistent with the provisions of U.P. Act No. 5 of 1982 shall continue to applicable in respect to the appointment and selection of the teachers and since Regulation 9 is not in consistent with any provisions of Act No. 5 of 1982, so the selections/appointments are perfectly valid. Further, the provisions as provided under U.P. Secondary Education

(Removal of Difficulties) (Second) Order 1981 affirmed the power to make ah hoc appointment but the said order has been rescind on 25.01.1999 and thereafter the appointment, can be made under existing Regulation 9 of Chapter II of U.P. Intermediate Education Act, 1921 and as the same are not in consonance with provision of U. P. Act No. 5 of 1982, so even after the commencement of U.P. Secondary Education Service Selection Commission the said provision of Intermediate Act will remain operative in view of the provisions under Section 32 of U.P. Act No. 5 of 1982 which provides that the provisions contained under U.P. Intermediate Act and Regulation framed thereunder shall remain operative, moreover, U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 were issued under Section 3 of U.P. Intermediate Education Act overcome the defects arising out due to non-availability of teachers duly selected by the Educational Authorities.

9. The U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 were issued authorising the appointing authority i.e. Committee of Management to make appointment on ad hoc basis so that the interest of students may not suffer, thus, the rescinding of the section without making any alternative arrangement for immediate filling of vacancy by U.P. Act 5 of 1982 is wholly illegal and arbitrary and contrary to the very purpose and object of the principles of Act (U.P. Intermediate Education Act, 1921) and against the mandate of Article 14 of the Constitution of India, hence Section 33(E) of U.P. Act 5 of 1982 inserted vide U.P. Act, 12 of 1999 i.e. Uttar Pradesh Secondary Education Service Selection Board, (Amendment Act) 1999 and Uttar Pradesh Secondary Education Selection Board (Amendment Act), 2005. so far it amends Section 18 of Uttar Pradesh Secondary Education Service Selection Board, 1982 is unconstitutional and ultra vires.

10. Next argument which has been advanced on behalf of the petitioners is to the effect that Section 16 of the U.P. Act No. 5 of 1982 provides that notwithstanding anything contrary to the U.P. Intermediate Education Act, 1921 or Regulations framed thereunder (but subject to the provisions of Section 12, 18, 21-B, 21-C, 21-D, 21-F, 22, 33-A, 33-B, 33-C, 33-D and 33-F) every appointment of teachers shall on or after the date of commencement of the U.P. Secondary Education Service Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board. However, Section 16-EE of the U.P. Intermediate Education Act regarding the absorption of retrenched employees, the provision regarding transfer of the teachers from one institution to another institution under Regulations made under Section 16-E of the U.P. Intermediate Education Act and the compassionate appointment of dependent of the teachers have been saved and thus, from perusal of Section 16(1) of U.P. Act No. 5 of 1982, it is evident that regular appointment either after recommendation of the U.P. Secondary Education Service Selection Board or the regular appointment either by absorption of retrenched employees by transfer or and thus, entire scheme under Section 16 relating the appointment deals with regular appointment by different modes and only Section 18 relates to ad hoc appointment of Principals/head Masters.

11. Thus, so far as Section 16 of U.P. Act No. 5 of 1982 is concerned, it does not create a blanket bar on temporary/ad hoc

appointments in accordance with provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act and Regulation 9 Chapter -II of the Regulations framed thereunder.

12. The Word "Notwithstanding" (non-obstante clause) contained in Section 16 (1) of U.P. Act NO. 5 of 1982 will apply only to regular selection/appointment and not for ad hoc/ temporary Selections/appointments and it does not render the provisions of U.P. Intermediate Education Act and the Regulations framed thereunder as redundant. Section 16 E(11) of U.P. Intermediate Education Act is also special legislation and the words "death, termination or otherwise" has been substituted by Section 18 of U.P. Act No. 12 of 1978 w.e.f. 21.1.78 and in absence of any provision contained under U.P. Act No. 5 of 1982, the provisions relating to ad hoc/temporary appointment will continue to operate in view of Section 32 of U.P. Act No. 5 of 1982. The word "notwithstanding" has been interpreted in the Book **"Principles of Statutory Interpretation"** by Justice G.P.Singh 7th Addition, the Extract of Chapter **"Non Obstante Clause"** (Page 271) and it has been interpreted that even though the notwithstanding clause is very widely worded, its scope may be restricted by construction having regard to the intention of the Legislature gathered from the enacting clause. This may particularly be so when the non-obstante clause "does not refer to any particular provision which it intends to override but refers to the provisions of the statute generally". In support of said argument, reliance has been placed on the following judgments:-

(1)(1998) 4 SCC 231, A.G. Varadarajulu and another Vs. State of T.N. & others.

(2)(1992) 1 SCC 335, R.S. Raghunath Vs. State of Karnataka and another.

13. It is further submitted that from perusal of earlier provisions contained under Section 18 of U.P. Act No. 5 of 1982 and Removal of Difficulties Orders issued from time to time, it is evident that the State Government had taken care of the fact that even in case there is vacancy of teachers for a few months, even then, the institution will not be left without teachers and in the interest of students the management was permitted to make ad hoc selection/appointment even against the shot term vacancies which occurred for only 2 or 3 months.

14. Before commencement of U.P. Act No. 5 of 1982 the temporary / ad hoc appointments were to be made by the management in accordance with the provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act and it provided that notwithstanding anything contained under Sub-Section 1 to 10 of the Section 16-E of U.P. Intermediate Education Act, appointment in the case of a temporary vacancy caused by grant of leave to an incumbent for a period not exceeding six months (or by death, termination or otherwise) of an incumbent occurred during an educational session, may be made by direct recruitment or by promotion without reference to the selection Committee in such a manner or subject to such condition, as may be prescribed.

15. Under Section 16 E (11) of the U.P. Intermediate Education Act a proviso

was inserted on 22.4.1978 providing that the appointment made under Sub-Section (11) in any case continued beyond the educational session for which such appointment was made since prior to commencement of U.P. Act No. 5 of 1982 for regular appointments the selections were to be made at the District Level by the Selection Committee comprising of District Inspector of Schools or its nominee and the Manager of the Committee of Management, as such it was expected that by the end of session, the selection committee will hold selection for regular appointment and the vacancy occurring at the end of session also due to retirement could have been filled up without any delay by the management by regular selection.

16. After commencement of U.P. Act No. 5 of 1982, judicial notice has been taken of the fact that the Commission is not making prompt selection and selections are being made after undue delay and even in the present matter, the requisition has been sent to the District Inspector of Schools then to the Board, but till date has not made any regular selection.

17. Further, the matter come up for consideration before this Court in the case of **Rakesh Chandra Mishra Vs. State of U.P. and others reported in 2004 (22) LCD 1604** as to whether the management has right to make ad hoc Selection against the substantive vacancies as well as short term vacancies in accordance with Section 16E(11) of the U.P. Intermediate Education Act and Regulation 9 of Chapter II of the Regulations framed thereunder after the removal of Difficulties Orders being rescinded on 25.1.1999 and even after Section 18 regarding ad hoc appointment of the teachers being repealed w.e.f. 30.12.2000. This Court held that so far as the ad hoc appointments against short term vacancies as mentioned under Regulation 9 of Chapter II of the Regulations framed under U.P. Intermediate Education Act are concerned, the same can be made by the management even after the Removal of Difficulties Orders being rescinded and said provision was protected by Section 32 of the U.P. Act No. 5 of 1982 being not inconsistent with any provision of the U.P. Act No. 5 of 1982 and Rules and Regulations farmed thereunder.

18. Regarding the ad hoc appointments against the substantive vacancies, this Court held that so far as ad hoc selections against substantive vacancies as mentioned under Section 16 E(11) of the U.P. Intermediate Education Act are concerned, the same can be made by the management even after Section 18 being repealed with effect from 30.12.2000 by exercising powers conferred under Section 16 E(11) and thus, the selection against short term vacancy as well as against substantive temporary vacancies which had occurred due to death, termination or otherwise (resignation, retirement etc.) could be made and such appointments would continue till regular section was made by the Board.

19. In the case of **Rakesh Chandra Mishra's (Supra)** during the course of hearing, the Secretary, Secondary Education Department, Govt. of U.P. was called by the Court to explain as to what steps are being taken to meet out the shortage of teachers for the period till regular selection is made and the Secretary, Secondary Education Department informed the Court, that even if the ad hoc teachers who have been illegally appointed by the management be permitted to continue till end of session, (so considering the statement of Secretary,

Secondary Education the Court was of the view that before the end of session some mechanism would be evolved for filling up the gap during the period for which no regular selection is held but nothing has been done till date.

20. Further, it has been argued that the word "otherwise" which has been used under Section 16 E(11) of the U.P. Intermediate Education Act will cover all the eventualities whether the vacancy had occurred due to death, resignation, promotion, dismissal, removal, reversion or retirement and also due to delay on the part of the Board in making selection for regular appointment of the teachers. As the Ho'ble Supreme Court in case of **J.A. S. Inter College, Khurja Vs. State of U.P. & others; 1996 (10) SCC 71** has held that even in case the ad hoc appointments are not made in accordance with rules, such appointments can be allowed to continue till regular selection is held as well as in the case of **Rakesh Chandra Mishra (Supra)** this Court observed that the existing gap, if not immediately filled in, it will cause grave depredation to the society. ***"An unseemingly unforeseen, piquant situation has been created by doing away with all the process of making ad hoc appointment of teachers, leaving the genuinely admitted students, in particular subjects to lurch and at the same time compelling the Management to make arrangement by adopting unauthorized measures."***

21. Thus, the management cannot afford, losing its prestige and goodwill by not being able to provide teachers to the students, in the subject allotted to them and therefore, they sometimes under compelling circumstances and at time of bestowing favours on their nears and dear one, appoint teachers on ad hoc basis, despite there being no authority with them for making such appointment, more so when the Selection Board in large number of cases has not been able to provide duly selected candidates, even against regular substantive vacancies and the vacancy caused for any reason whatsoever may be, on account of death, dismissal, termination,, removal or retirement or otherwise of a teacher need not be allowed to remain unfilled for indefinite period and in case the appointment by regular selection through the Selection Board is likely to consume time, a provision may be made for making appointment for interregnum period i.e. till regularly selected candidate is available namely; the ad hoc appointment, for such period with a specific provision that on the availability of selected candidates such appointments shall stand automatically ceased irrespective of the fact as to whether the Committee of Management allows joining of such candidate who has been selected by the Board or not.

22. In the case of ***Rakesh Chandra Mishra (Supra)*** the Court has advised the State Government to make necessary provisions either by amending the Act namely, U.P. Act No. 5 of 1982 or if necessary by issuing necessary Removal of Difficulties Order, or otherwise for filling up vacancies by appointing ad hoc teachers till a regular selected teacher is made available by the Board, it is expected that the State Government shall take an early decision in the matter and expressed its hope and trust that the State Government would not be apathetic or reticent but shall take immediate action in issuing necessary direction as required, without any further delay. The case of Sri Rakesh Chandra Misrha was referred to a larger Bench by Hon'ble Single Judge in the case of **Daya Shanker Misrha Vs. District Inspector of**

Schools, Allahabad and others, (Writ Petition No. 20843 of 2002), the point of reference are as under:-

(i)Whether after rescission of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 with effect from 25.1.1999 the Committee of Management can make temporary/ad hoc appointment on short term vacancies resorting to its power given under Chapter II, Regulation 9 and Section 16 E(11) of the U.P. Intermediate Education Act, 1921 despite the provisions of Section 16(1) of the U.P. Secondary Education Services Selection Board Act, 1982?

(ii)Whether the judgment of learned Single Judge in **Rakesh Chandra Mishra Vs. State of U.P. & others, (2204) 3 UPLBEC 2671**, lays down correct law?

23. While answering the reference, the Division Bench expressed its concern that in case large number of vacancies are not filled up for years together and if an institution requires a teacher in some subjects then in that circumstances any other teacher who is qualified to teach such subjects, should be made available at the first instance. If a student at Intermediate level is not taught such subjects by a qualified teacher and the entire academic year passes, less said the better with regard to the learning of such student of such subjects. The entire batch in that institution, without any teacher of subjects such as mathematics and science would effectively be wasting its time and the only outcome would be failure and the large Bench held that the Management of an institution is vested with the power to fill up short term vacancy/temporary vacancy.

24. Moreover, Division Bench of this Court in the case of **Daya Shankar(Supra)** approved and reiterated the observations made in the case of **Rakesh Chandra Mishra (Supra)** by the learned Single Judge while making the reference order and thus both the learned Single Judges have felt that there should be some provision for filling up the substantive vacancies by making ad hoc appointments. The larger Bench further held that we are also of the considered view that vacancies whether substantive or short term, should be filled up at the earliest to maintain our Constitutional goal of imparting quality secondary education . However, till date, the request made by the Hon'ble Single Judge in **Rakesh Chandra Mishra's** case to the State Government to make some provisions for appointment of teachers and even the same view being taken by the Division Bench of this Hon'ble Court in **Daya Shanker Misrha's case,** that ***"since last about a decade no effective provision has been made by the State Government for appointment of teachers during the period no regular selection is held by the Board." (See;- Daya Shanker Misrha Vs. District Inspector of Schools & others, 2010 (28) LCD 1375).***

25. Accordingly, an argument has been raised on behalf of petitioners that from the perusal of the reference as made by learned Single Judge in the Daya Shankar Misrah case (supra) to a Division Bench/Larger Bench the question to the effect that whether the Committee of Management has got power to make ad hoc selection against the substantive vacancy was not referred. As such the finding given by the Division Bench on reference in Daya Shankar Mishra's case that *"however as long as a statute create a bar, the Management cannot confer with any power*

to make ad hoc appointment against substantive vacancy" cannot in any way be a legal impediment in the wayof the Committee of Management to make ad hoc selection/ appointment against substantive vacancy by invoking provisions as provided under Section 16 E(11) of U.P. Intermediate Education Act, 1921 as the finding given by the Division Bench/Large Bench in the case of **Daya Shankar Mishra (Supra)** is without any contest and no reference in this regard made to the Larger Bench, so the same is not binding even though the said findings have been given by the Division Bench, in support of the said argument, reliance has been placed on the following cases:-

1.State of Madhya Pradesh Vs. Narmad bachao Andolan and another, 2011(7) SCC 639

2.State of U.P. and others Vs. Jeet S. Bisht and another, 2007 (6) SCC 586

3.Ajit Singh @ Muraha Vs. State of U.P. and others, 2006 (3) UPLBEC 2159.

26. Another argument has been advanced on behalf of petitioners that in view of the provisions of Section 16 E(11) of U.P. Intermediate Education Act, 1921, where there is a non obstantive clause and if the same is read with Section 16 (1) of U.P. Act No. 5 of 1982, wherein it has been mentioned that "notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder." which is also a non obstante clause, and as it is well known that a non-obstante clause is a legislative device which is usually employed to give over-riding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Hence, the non-obstante clause in Section 16 of U.P. Act No. 5 of 1982, namely, notwithstanding anything in the contrary contained in the Intermediate Education Act 1921 must mean not withstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. So there is no legal bar or impediment for selection/appointment of the Assistant Teacher/Lecturer by the Committee of Management invoking the provision of Section 6(E) 11 read with Regulation 9 of Chapter II of U.P. Intermediate Education Act, 1921 in spite of the existence of non-obstante clause in Section 16 of U.P. Act No. 5 of 1902

27. As Author Sri Bindra in his book interpretation of Statutes 7th Edition (1984) page 1093 has interpreted the word "notwithstanding anything" as under:-

"The very purpose of non-obstante clause is that provision shall prevail over any other provision and that other provision shall not be of any consequence in case there is any inconsistency or departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause would prevail over other clauses. Even by dictionary sense the expression "notwithstanding" implies that other provisions shall not prevail over the main provision."

28. Justice G. P. Singh in his commentary on the treatise **"Principles of Statutory interpretation 5th Edition (1992)** observed as under:-

"A clause beginning with "notwithstanding anything contained in this Act or in some particular Act or in any law for the time being in force. In some times appended to a section in the beginning with a view to give effect. The indicating part of the section in case of conflict and over-riding effect over the provisions or Act mentioned in the non-obstante clause has an over-riding effect and it has to be given its due effect."

29. Thus, in spite of the existence of the provisions as provided under Section 16(1) of U.P. Act 5 of 1982, the Committee of Management has got authority and power to select/appoint Teacher as Assistant Teacher on ad hoc basis against substantive vacancy and the said right cannot be taken away from the Committee of Management till the regular selection of candidates have been done against the post. In support of his argument, reliance has been placed on the judgment of the Apex court in the case of **Rabi Naray Mohapatra Vs. State of Orissa and others, 1991 (2) SCC 599.**

30. Further, in order to support the action of the Committee of Management, selection/appointment on ad hoc basis against a substantive vacancy in the institution, it has been argued on behalf of petitioner by the learned counsel that initially Section 18 of U.P. Act 5 of 1982 provides/empowers the Committee of Management to make ad hoc appointment of Assistant Teachers/Lecturers against substantive vacancy. Subsequently, even after taking away the said power by the U.P. Act No. 5 of 1982, there is no legal impediment or bar to make ad hoc appointment against substantive vacancy because the said power exists with the Committee of Management in view of the provisions as provided under Section 32 of U.P. Act 5 of 1982 read with Section 16 E(11) of U.P. Intermediate Education Act, 1921 which empowers the Committee for selection of the teachers on ad hoc basis against substantive vacancy.

31. Even otherwise, the said power cannot be taken away from the Committee because the legislature has actually empowered the Selection Board to select the candidate for appointment against substantive vacancy, which is occurred in the institution govern by the U.P. Intermediate Education Act, 1921 and other enactments which governed the field and power to give appointment to a selected candidate/teacher is vested to the Committee of Management. Hence, there is no justification or reason on the part of respondents not to pay the salary to the petitioners who are appointed on ad hoc basis against the substantive vacancy when they are selected/appointed by the Committee of Management of the Institution, who has power to appoint them, so the action on the part of the official respondent/D.I.O.S. Not to pay salary to them or to pass an order thereby refusing to give salary is an action which is wholly illegal and arbitrary, violative of Article 14 of the Constitution of India as well as principles of natural justice and cannot be sustained under law. As Education is a Fundamental Right Guaranteed Under Article 21 of the Constitution of India, as such the teachers who were selected/appointed on ad hoc basis against the short term vacancy by the Committee of Management by exercising power as provided under Section 16 E(11) of U.P. Intermediate Education Act has been rightly appointed taking into consideration teaching which is to be provided to the students. In support of argument, reliance has been

placed on the judgment rendered by Hon'ble the Apex Court in the following cases:-

1.1992 (2) SCC 66 - Mohini Jain (Miss) Vs. State of Karnataka and others

2.1993 (1) SCC 645 - Unni Krishnan J.P. Vs. State of Andhra and others.

3.(1991) 3 SCC 67 - Rattan Chand Hira Chand Vs. Askar Nawaz Jung & others.

32. It has been argued that the Committee of Management has right to make selection/appointment of teachers in pursuance to the provisions of Section 16 - E(11) of the U.P. Intermediate Education Act, 1921 which makes provision for scheme of administration and it provides that there shall be a scheme of administration for the institution and the said scheme of administration shall amongst the other matters provides for constitution of Committee of Management and the Management vested with authority to manage and conduct the affairs of the Institution as per the provisions of U.P. Intermediate Education Act. The said action on the part of Committee of Management is in accordance to the law laid down by Hon'ble the Apex Court in the case of **Brahmo Samaj Education Society and others Vs. State of West Bengal & Others,** wherein it has been held that the Management has right to administer the institution and control of the State Government cannot extend day to day administration of the institution. Independence for the selection of teachers among qualified candidates is fundamental to maintenance of academic and administrative autonomy of an aided institution as well right to administer also includes the right to appoint teachers of their choice among the qualified candidates. (Reliance placed on- (1) **(1989) 1 SCC 104, Municipal Corporation of Delhi Vs. Gurnam Kaur,** (2) (**1991) 4 SCC 312, Thota Sesharathyamma Vs. Thota Manikyamma** (3) **(2011) 7 SCC 639, State of Madhya Pradesh Vs. Narmada Bachao Andolan and another** (4) **(2011) 1 SCC 354, Delhi Airtech Services Private Limited & another Vs. State of Uttar Pradesh & another).**

33. Lastly, it has been argued that the intention of Section 32 of U.P. Act No. 5 of 1982 by which the provisions of U.P. Intermediate Education Act and Regulations framed thereunder which are not inconsistent with any provision of U.P. Act No. 5 of 1982 and Rules framed thereunder will remain operative, to protect all the provisions of U.P. Intermediate Education Act and Regulations framed thereunder, so that if there is any difficulty arose due to non-fulfillment of object of the Act No. 5 of 1982 i.e. regular selection, the gap could have been filled up by making ad hoc / temporary selection/appointment by utilizing the provisions contained under U.P. Intermediate Education Act and the Legislature's intention was to make arrangement of teachers till regular selection is made and thus, as per the provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act, the management has right to make ad hoc / temporary selection/appointment for a period till regularly selected candidate is made available. In support of said argument, reliance placed on the judgment of the Apex Court in the case of **Venkatachalam Vs. Ajitkumar C. Shah & others (2011) 9 SCC 707,** accordingly it has been summed up that till date, the direction given by this Hon'ble Court in **Rakesh Chandra Mishra's** case in

September, 2004 to the State Government to make necessary provision for appointment of regular teachers by way of regular selection has not been complied with, thus, the official respondents has not adhered to the direction/suggestion issued by Hon'ble the Single Judge in **Rakesh Chandra Mishra's** case being approved by the Division Bench of this Hon'ble Court in **Daya Shanker Mishra's** case and no appropriate steps have been taken by the State Government, as such, the ad hoc/temporary appointments of the teachers made by the Committee of Management of the various institutions as per the provisions of Section 16 E(11) of the U.P. Intermediate Act, 1921 to meet out the exigencies is a valid exercise and they may be paid salary till regularly selected candidates are not appointed by the Commission by the respective D.I.O.S. and the present writ petitions be allowed.

34. Sri V.S. Tripathi, learned State counsel submits that in the institution in questions selections/appointments have been made by the Committee of Management in the various districts of the State of U.P., are recognized and Government Aided Intermediate College. Accordingly, U.P. Intermediate Education Act, 1921, U.P. Secondary Education Services Selection Board Act 1982, Rules framed under Act of 1982 and U.P. High School and Intermediate Colleges (Payment of salaries to the Teachers and other employees) Act 1971 are applcable on the aforesaid College.

35. Section 16 of the U.P. Secondary Education Services Selection Board Act 1982 (hereinafter referred to as the Act of 1982) in very categorical terms provides that every appointment on the post of Teacher in a recognized and Government Aided Intermediate College will be made only in pursuance of recommendations of the Board.

36. On the short term vacancies of the posts of Teacher in recognized and Government Aided Intermediate Colleges appointments were being made under U.P. Secondary Education Service Commission (Removal of Difficulties (Second) Order 1981 but on 25.01.1999 Section 33 -E was inserted in the U.P. Secondary Education Services Selection Board Act 1982 and thereby the aforesaid Removal of Difficulties Second Order of 1981 has been rescinded, therefore now the power of Committee of Management of the College to make appointment against the short terms vacancy does not exit.

37. The earlier under Section 18 of the U.P. Secondary Education Service Selection Board Act 1982 ad-hoc appointments on the posts of Teacher in recognized and Government aided Intermediate Colleges could have been made but in the year 2000 the aforesaid Section 18 was amended and now as per amended section 18 ad-hoc appointment can only be made on the post of Principal and on the post of Teacher ad-hoc appointments can not be made.

38. Further, section 16(1) of U.P. Secondary Education Service Selection Board Act 1982 in very categorical terms provides that every appointment on the post of Teacher will be made on the recommendations of the Board therefore now the Committee of Management of a recognized and Government Aided Intermediate College does not have any authority to make any kind of appointment on the post of Teacher and if any appointment is made by the Committee of Management without recommendation of

Board same will be hit by Section 16(1) of the Act of 1982 and therefore will be absolutely illegal.

39. Section 16 (1) in very categorical terms also provides that any provision existing in U.P. Intermediate Education Act 1921 and in Regulations framed under the Act of 1921, which are contrary to section 16(1) will be redundant and will not be applicable. It is further submitted that the languagge of Section 16(1) of the Act of 1982 is very clear and unambiguous as in the said section it has been provided that every appointment of a Teacher will be made on recommendation of Board and every appointment include all types of appointments i.e. regular appointments, appointments against short term vacancies and appointments on ad-hoc basis, therefore it is patently manifest that no appointment on the post of Teacher can be made by the Committee of management except in accordance with Section 16(1) of the Act of 1982.

40. This Court in the case of **Rakesh Chandra Mishra Vs. State of U.P. and others reported in 2004 vol. 3 UPLBEC page 2671** provided that the Committee of Management has power to make appointment on short terms vacancies under Section 16-E(11), of the U.P. Intermediate Education Act, 1921 and under Regulation 9 of Chapter II of the Regulations framed under the Act of 1921 but the aforesaid case law was again considered by another Ho'nble Single Judge of this Court at Allahabad in **Civil Misc. Writ Petition NO. 20843 of 2002 Sri Daya Shanker Misrha Vs. D.I.O.S. Allahabad and another** Ho'ble Single Judge in his order recorded categorical finding that aforesaid Section 16- E (110 of the Act of 1921 and Regulation 9 of Chapter II of the Regulations framed under Act of 1921 are contrary to the Section 16(1) of the Act of 1982 and therefore are redundant and will not be applicable.

41. Accordingly, Sri V.S. Tripathi, learned Additional Chief Standing Counsel submits that it is a matter of common knowledge that the Management of the private institution are not always fair in the matter of appointment of teachers on merit of the candidates.

42. In view of the abovesaid facts, the legislature had stepped in and has taken away the power of ad hoc appointment from the Management of the aided institution in which the substantive vacancy created and the provisions as provided under Section 33 E in U.P. Act No. 5 of 1982 has been inserted which is in accordance with aims and object of U.P. No. 5 of 1982 by which [Section 16(1)], the power of selection of an assistant teacher against the substantive vacancy has been vested with the Selection Board, as such the said action is neither in contravention to Article 14 or Article 19(4) of the Constitution of India or any other provision as provided under U.P. Intermediate Act, 1921 and in support of his submission, Sri V.S. Tripathi, learned Additional Chief Standing Counsel had placed reliance on the judgment of this Court in the case of **Shiksha Prasar Samiti Babhanan Vs. State of U.P. and others, 1986 UPLBEC 477,** in the case of **Prabhat Kumar Sharma and others Vs. State of U.P. and others, 1996 (3) UPLBEC 1959** and in the case of **State of H.P. And others Vs. Mahendra Pal and others, 1955 Suppl. (27 SCC 73).**

43. Sri V.S. Tripathi, learned Additional Chief Standing Counsel also submits that in Section 16(1) of Act NO. 5

of 1982 there is a non-obstante clause (notwithstanding anything), the same has an overriding Act over the notwithstanding clause as contained in Section 16(1) of the U.P. Intermediate Act, 1921 because the Act No. 5 of 1982 is a special Act and the same will prevail over the provisions as provided under U.P. Intermediate Education Act because the word notwithstanding as define in **Chamber's 21st Century Dictionary** as under:-

"prep in spite of, adverb in spite of that; however if although."

In legal **Glossory (Government of India Publication)** at page 224 defined as under:-

"a clause to prevail over other clause"

44. In support of the said argument, Sri V.S. Tripathi, learned Additional Chief Standing Counsel has placed reliance on the judgment of the Apex Court in the case of **Union of India Vs. Maj. I.C. Lala etc. etc. 1973 (2) SCC 72** and in the case of **KSE Board Vs. Indian Aluminium Co., AIR 1976 SC 1031.**

45. Sri V.S. Tripathy, learned Additional Chief Standing Counsel further submits that after the reference made in Daya Shanker Mishra's case by the learned Single Judge, the matter went up for consideration before a Division Bench of this Court and while answering the reference in Daya Shanker Mishra's case, the Division Bench/Larger Bench has held that there is no provision under U.P. Act No. 5of 1982 for making selection/appointment under the short term vacancy. So, in view of the said categorical finding given by the Court, the argument as advanced from the side of the petitioners that the matter in respect to the selection against the substantive vacancy was not under consideration before the Division Bench/Larger Bench in the reference matter, as such the said finding given in respect to the appointment on substantive vacancy has no binding effect on the matter in issue has got not force and liable to be rejected in view of the judgment as rendered by the Apex Court in the case of **Smt. Saiyada Mossarrat Vs. Hindustan Steel Ltd., 1989 (1) SCC 272**, in the case of **Subhash Chandra Vs. Delhi Sub. Service Selection Board (2009) 15 SCC 458** and in the case of **Gangadhara Palo Vs. Div. Officer & another, 2011 (4) SCC 602,** because the said finding given by the Division Bench though the matter in respect to substantive appointment not referred, even then will be obiter dicta as per the law of the Supreme Court as cited above (See **Smt. Saiyada Mossarat Vs. Hindustan Steel Ltd. (1989) 1 SCC 272, Subhash Chandra Vs. Delhi Sub. Service Selection Board (2009) 15 SCC 458, Gangadhara Palo Vs. Div. Officer & another, 2011 (4) SCC 602 and Divisional Controller KSRTC Vs. Mahadeva Shetty & another, (2003) 7 SCC 197).**

46. Sri V.S. Tripathi, learned Additional Chief Standing Counsel also submits that an Assistant Teacher who is either appointed on a short term vacancy subsequently converted into substantive one or against the substantive vacancy by the Committee of Management has got no right to continue on the post in question in view of the law as laid down by a Division Bench in Daya Shanker Mishra's case and in support of his argument, he has placed reliance on the following judgments:-

(a) Smt. Pramila Mishra Vs. Dy. Director of Education Jhansi and others (F.B.), 1994 (2) E.S.C. 1284 (Alld)

(b) Rakesh Chandra Mishra Vs. State of U.P. and others, 2004 (22) LCD 1604

(c) Civil Misc. Writ Petition No. 20813 of 2002 (Daya Shanker Mishra Vs. State of U.P. and others)

(d) Daya Shanker Mishra Vs. State of U.P. and others, 2001 (1) UPLBEC 741

(e) Arun Kumar Mishra Vs. State of U.P. and others 2010 (4) ADJ 143

(f) Arjun Prasad @ Arjun Prasad Pandey Vs. State of U.P. and others, 2010 (6) ADJ 299 (DB)

(g) Ram Niwas Sharma Vs. State of U.P. and others 2010 (6) ADJ 299 (DB)

(h) Shashi Pal Rao Vs. C.O.M. Manas Inter College & others, 2010 (7) ADJ 392 (DB)

(i) Ghanshyam Vs. State of U.P. and others, 2011 (1) LBESR 505 (All).

(j) Haripal Singh Vs. State of U.P. and others (2012) 1 UPLBEC 260.

47. Sri V.S. Tripathi, learned Additional Chief Standing Counsel further submits that the argument as advanced on behalf of petitioners that no steps were taken by the State in order to fill up the vacancies in question in spite of the direction given by this Court in the case of Rakesh Chandra Mishra is also incorrect and wrong rather in this regard effective step has been taken and in order to support the said argument he has placed reliance on an affidavit filed by Sri Jitendra Kumar, Secretary Secondary Education, Govt. of U.P., Lucknow in Special Appeal No. 351 of 2009 (Hari Bansh Bahadur Singh Vs. Jitendra Kumar and others), relevant paragraphs of the said affidavit are quoted hereinbelow:-

"Para No. 10 - That in compliance of the Hon'ble Court's Order a massive survey of the Institutions receiving grant-in-aid from the State Government, was conducted which yields that out of 69602 posts of Assistant Teachers in L.T. Grade 4966 are vacant against which only 4176 posts have been requisitioned to the selection Board. Likewise, in case in Lecturer's grade, out of 24306 sanctioned posts, 1523 posts are still vacant against which only 1076 posts have been requisitioned to the Secondary Education Services Selection Board by the respective Committee of Management. A photostat copy of the Survey Report dated 15.01.2010 is being annexed herewith and marked as Annexure No. 1 to this Court affidavit.

Para No. 11 - that it is relevant to submit here that vide Advertisement No. 1/2008. 2/2008. 530 and 554 posts of Institutional Heads have been advertised by the Selection Board and selection process has been completed by the Selection Board. Likewise, the head of the Institutions, vide advertisement no. 1/2009 and 1/2009 a number of 964 posts of Lecturers and 5990 posts of L.T. Grade Teachers have been advertised against which the selection process have been completed.

Para No. 12 - That it is further relevant to submit here that vide advertisement No. 1/2010, 4038 posts of L.T. Grade teachers were advertised and vide Advertisement No. 2/2010 a number of 892 posts of Lecturers were advertised

and the written examination of which are due in the month of January, 2011.

Para No. 13 - That it is also noteworthy to state here that in Advertisement No. 1/2010 and 2/2010 the anticipated vacancy which are likely to form upto 30 June, 2011 in the respective institutions, have been included. A copy of the letter dated 24.11.2010 sent by the Secretary Secondary Education Services Selection Board, Allahabd to the Secretary, U.P. Government, Secondary Education Department, Civil Secretariat, Lucknow is being annexed herewith as **ANNEXURE NO. CA-2** to this Counter affidavit.

Para No. 14 - That under the aforesaid facts and circumstances, particularly when the Service Selection Board is rapidly and continuously making appointments against the vacant post of Principals, Lecturers and L.T. Grade Teachers by direct recruitment therefore it cannot be said that the answering Respondents are not cautious in regard to filling up the existing vacancies, rather every effective measures are being taken by the answering respondents to fill up the respective vacancies in the non-governmental aided institutions."

48. Thus, in view of the aforesaid legal position the Committee of Management does not have any authority to make appointments on the posts of Teachers without recommendation of the Board and if any appointment is made by the committee of Management in defiance of Section 16(1) of the Act of 1982 same is absolutely illegal and there is no liability on the State Government to make payment of salary to such appointee from the State Exchequer. Hence, the writ petitioners are liable to be dismissed.

FINDINGS AND CONCLUSIONS

A teacher or school teacher is a person who provides education for pupils (children) and students. The role of teacher is often formal and ongoing, carried out at a school or other place of formal education. In many countries, a person who wishes to become a teacher must first obtain specified professional qualifications or credentials from a university or college. These professional qualifications may include the study of peagogy, the science of teaching. Teachers, like other professionals, may have to continue their education after they qualify, a process known as continuing professional development. Teachers may use a lesson plan to facilitate student learning providing a course of study which is called the curriculum.

49. There are many similarities and differences among teachers around the world. In almost all countries teachers are educated in a university or college. Governments may require certification by a recognized body before they can teach in a school. In many countries, elementary school education certificate is earned after completion of high school.

"CANADA"

Teaching in Canada requires a post-secondary degree Bachelor's Degree. In most provinces a second Bachelor's Degree such as a Bachelor of Education is required to become a qualified teacher.

"ENGLAND"

Teachers must have at least a bachelor's degree, complete an approved teacher education program, and be licensed.

"FRANCE"

In France, teachers, or professors, are mainly civil servants, recruited by competitive examination.

"SCOTLAND"

In Scotland, anyone wishing to teach must be registered with the General Teaching Council for Scotland (GTCS). Teaching in Scotland is an all graduate profession and the normal route for graduates wishing to teach is to complete a programme of initial Teacher Education (ITE) at one of the seven Scottish Universities who offer these courses. Once successfully completed, "Provisional Registration" is given by the GTCS which is raised to "Full Registration" status after a year if there is sufficient evidence to show that the "Standard for Full Registration" has been met.

"UNITED STATES"

In the United States, each state determines the requirements for getting a license to teach in public schools. Teaching certification generally lasts three years, but teachers can receive certificates that last as long as ten years. Public school teachers are required to have a bachelor's degree and the majority must be certified by the state in which they teach. Many charter schools do not require that their teachers be certified, provided they meet the standards to be highly qualified as set by No Child Left Behind.

"India"

In Hindusm the spiritual teacher is known as a guru. In the latter Day Saint movement the teacher is an office in the Aaronic priesthood, while in Tibetan Buddhism the teachers of Dharma in Tibet are most commonly called a Lama. A Lama who has through phowa and sidhi consciously determined to be reborn, often many times, in order to continue their Bodhisattva vow is called a Tulku.

There are many concepts of teachers in Islam, ranging from mullahs (the teachers at madrassas) to ulemas.

50. Since ancient time, the position of teacher/guru throughout the world is above God and they are respected by every citizens in every walk of life.

51. A teacher does not only teach the students who came up for the said purpose but also shows spiritual path in life to its pupils. Sant kabir Das has said :-

"गुरु गोविन्द दोनों खड़ेए काके लागून पाए

बलिहारी गुरु आपकी जिन गोविन्द दियो बताये"

52. So far as the first argument advanced on behalf of the petitioners that Section 33(E) of U.P. Act 5 of 1982 is ultra vires to Article 14 of the Constitution of India and Section 16 E (11) of the U.P. Intermediate Education Act, 1921 as is discriminatory, arbitrary in nature because it take away the power of the Committee of Management to select a teacher for ad hoc appointment against the substantive vacancy.

53. There is always a presumption in favour of the constitutionality of an enactment and that the burden is upon the person who attacks it, is a fairly well-settled proposition that the classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Law made by Parliament or by the legislature can be struck down by the Courts on two grounds alone, namely:-

"(a) lack of legislative competency, and

(b) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision."

54. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some constitutional infirmity has to be found before invalidating an Act . An enactment can not be struck down on the ground that the Court thinks it unjustified. Parliament and legislatures, composed as they are representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them.

55. The Court can not sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz.,

(a) unreasonableness, which can more appropriate be called irrationality,

(b) illegality, and

(c) procedural impropriety.

56. The Hon'ble Supreme Court in the judgment reported in **2007 (6) SCC 236 Greater Bombay Coop. Bank Ltd. Vs. United Yarn Tex (P) Ltd. and others** following the ratio as laid down in the case of **State of A.P. And others McDowell & Co. and other, 1996 (3) SCC 709** held that it is the duty of the constitutional Courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislature had assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.

57. Accordingly, for the purpose of sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less in exactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment.

58. After all, an Act made by the legislature represents the will of the people and that can not be lightly interfered with. As held by the Apex Court in **2008 (2) SCC 254 Karnataka Bank Ltd. Vs. State of Andhra Pradesh and others** that there is

always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt.

59. Where validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and validity of law upheld. In pronouncing on the constitutional validity of a statute, the Court is not concerned with the wisdom or unwisdom, justice or injustice of the law. If that which is passed into law is within the scope of power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a Court may think of it.

60. In **State of U.P. Vs. Kartar Singh, AIR 1964 SC 1135** the Constitution Bench of the Apex Court has held that where a party seeks to impeach the validity of a rule on the ground that such rule is offending of Article 14, the burden is on him to plead and prove infirmity is under:-

"the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Article 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations."

61. In **Sub-Divisional Magistrate, Delhi V. Ram Kali, AIR 1968 SC 1,** the Hon'ble Supreme Court again reiterated the said legal position as:-

"The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

62. In **Pathumma V. State of Kerala (1978) 2 SCC 1** a seven-Judge Bench of the Apex Court highlighted that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution :-

"It is obvious that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognized that there is always a presumption in favour of the Constitutionality of a statue and the onus to prove its invalidity lies on the party which assails the same".

63. The Apex Court in **Fertilizers and Chemicals Travancore Ltd Vs. Kerala SEB (1988) 3 SCC 382** emphasized that the allegations of discrimination must be specific and that the action of the governmental authorities must be presumed to be reasonable and in public interest . It is for the person assailing it to plead and prove to the contrary (See also

2002 (2) SCC 318, State of Maharashtra Vs. Marwanjee F. Desai and others).

64. In **Praveen Singh Vs. State of Punjab & ors., (2000) 8 SCC 633,** the Apex Court held that in the matter of employment, i.e., selection and appointment , the authority concerned has unfettered power in procedural aspect. The Courts should not interfere unless the appointments so made are found to have been made "at the cost of fair play, good conscience and equity." The eligibility criteria should not be arbitrary or unreasonable and if is found so, it becomes liable to be quashed as it falls within the mischief of Article 14 of the Constitution of India which provides for equality before law and equal protection of law. (see also **Bombay Labour Union & anr. Vs. M/s. International Franchises (P) Ltd. & anr., AIR 1966 SC 942 and in Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology, (2002) 5 SCC111).**

65. Articles 14 and 16 of the Constitution secure equal protection and the doctrine of equality before law is a necessary corollary to the concept of rule of law adopted in the Constitution. However, there is always a presumption in favour of the constitutionality of the enactment and the person who challenges it has to show that there has been a clear transgression of the constitutional principles. Such a presumption stands from the wide power of classification which the legislature must have possessed in making laws operating differently as regards different groups of persons in order to give effect to policies.

66. Legislature is supposed to understand better the needs of the society and its laws are directed to problems made manifest by experience. In **Madhu Kishwar & ors. Vs. State of Bihar & ors., AIR 1996 SC 1864,** the Hon'ble Supreme Court held that every discrimination does not necessarily fall within the ambit of Article 14 of the Constitution of India and becomes liable to struck off as every case has to be examined in peculiar facts and circumstances involved therein, otherwise it would create a chaotic situation.

67. It is well settled law that hardship or inconvenience of a group of persons cannot be the ground of deciding the law as bad. (Vide **Commissioner of Agricultural Income Tax Vs. Keshav Chand, AIR 1950; Bengal Immunity Company Vs. State of Bihar, AIR 1955 SC 661; and D.D. Joshi Vs. Union of India, AIR 1983 SC 420).**

68. As is said, "*dura lex sed lex'* which means "the law is hard but it is the law." Even if the statutory provision causes hardship to some people, Court has to implement the same and ("inconvenience is not" a decisive factor in such matters) as held by Hon'ble Supreme Court in the case of **Mysore State Electricity Board Vs. Banglore Woolen, Cotton & Silk Mills Ltd. & ors, AIR 1963 SC 1128 .**

69. Therefore, it is evident that hardship to an individual/group of persons cannot be ground of not giving the effective to the statutory provisions. More so, it is settled principle of law that the Court would lean in favour of upholding constitutionality of a Statute unless it is manifestly discriminatory as held by the Apex Court in the case of **K. Anjaiah & ors. Vs. K. Chandraiah & anr., (1998) 3 SCC 218,** that it is the cardinal principle of construction that the statute and the rules or the regulations must be held to be constitutionally valid unless and until it is

established that they violate any specific provision of the Constitution and the Court is under solemn duty to scrutinies the provisions of the Act. Rules or the Regulations within the set parameters if the validity of the statutory provisions is challenged {see also **Smt Parayankandiyal Eravath Kanepravan Kalliani Amma & ors. Vs. K. Devi, AIR 1996 SC 1963; Dr. K.R. Lakshmanan Vs. State of Tamil Nadu & anr., AIR 1996 SC 1153; New Delhi Municipal Committee Vs. State of Punjab etc. etc., AIR 1997 SC 2847; Public Services Tribunal Bar Association Vs. State of U.P. & ors., AIR 2003 SC 1115; and State of Gujrat Vs. Akhil Gujrat Pravasi Vs. Mahamandal, (2004) 5 SCC 155)}.**

70. Similarly, in **Easland Combines, Coimbatore Vs. Collector of Central Excise, Coimbatore, (2003) 3 SCC 410,** while reiterating the similar view, the Apex Court has held as under:-

"It is well settled law that merely because of law causes hardship, it cannot be interpreted in a manner so as to defeat its object.....It is the duty imposed on the Courts in interpreting a particular provision of law to ascertain the meaning of intendant of the Legislature and in doing so, they should presume that the provision was designed to effectuate a particular object or to meet a particular requirement." (See. **Nagaland Senior Government Employees Welfare Association and others Vs. State of Nagaland and others (2010) 7 SCC 643.)**

71. Needless to mention therein that the **vires of U.P. Secondary Education Service Selection Board (Amendment) Act, 2001 (U.P. Act 5 of 1982)** although at the relevant point of time, the Section 16 (1) of the Act has not been inserted, come up for consideration before a Division Bench of this Court in the case of **Shikhsha Prasar Samiti, Babhanan, District Gonda Vs. State of U.P. and others, 1986 UPLBEC 477,** in para Nos. 5, 6 and 7, held as under:-

"Para No. 5 - How the Act is discriminatory or arbitrary in its application to various institutions has not been spelt out with any precise clarity. The averments are vague and general in character and it is not possible to hold on the basis of the pleading contained in the writ petition that whole of the Act or any part thereof is ultra vires the Constitution.

Para - 6. Article 19(1)(a) lays down that all citizens shall have a right to form association or unions. Article 19(4) provides that nothing in Sub-clause (c) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interesst of public order or morality, reasonable restrictions on the exercise of the right conferred by the said Sub-clause.

Para No. - 7. Clause (1)(c) of ArticlE 19 guarantees the right to form associations or unions. This clause has to be read with Clause (4) which permits the imposition of legal restrictions in the interest of public order or morality. The restriction imposed should not only be in the interest of public order or morality but must also be reasonable. U.P. Act No. V of 1982 does not restrict the right of the citizens to form associations or unions. The members who constitute Petitioner society are free to form as many associations or unions as they likes The right to form association is different from making appointment of teachers in an institution. The Supreme Court in D.A.V.

College Jullundur v. The State of Punjab : AIR 1971 SC 1737 has held that compulsory affiliation of an institution run by a society docs not affect the right to form association guaranteed under Articl2 19. In any case, the activities of the members of the association can be reasonably regulated in the interest of public order or morality. The U.P. Act V of 1982 is, therefore, neither discriminatory nor violative of any right under Article 19 of the Constitution."

72. Thus, keeping in view the aims and objects of both the Acts i.e. U.P. Intermediate Education Act, 1921 and U.P. Act 5 of 1982 by the legislature thereby inserting the provisions as provided under Section 33 (E) in U.P. Act 5 of 1982 by any means neither infringed nor violate the rights as guaranteed under Article 14 of the Constitution of India or any other provisions as provided under U.P. Intermediate Education Act, 1921 hence the argument as advanced in this regard on behalf of petitioners has got no force and rejected.

73. So far as the next argument advanced on behalf of the petitioners whether in spite of the provisions as provided under Section 16(1) of the U.P. Act 5 of 1982, the Committee of Management of an institution has got power to select teacher for appointment on ad hoc basis on the post of Assistant Teacher/Lecturer invoking the provision as provided under Section 16 E (11) of the U.P. Intermediate Education Act, 1921.

74. Author **Sri Bindra in his book interpretation of Statutes 7th Editioned (1984) page 1093** interpreted the word "notwithstanding anything" as under:-

"The very purpose of non-obstante clause is that that provision shall prevail over any other provision and that other provision shall not be of any consequence. In case there is any inconsistency or a departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause which would prevail over.

The very purpose of non-obstante clause is that that provision shall prevail over any other provision and that other provision shall not be of any consequence in case there is any inconsistency or departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause would prevail over other clauses. Even by dictionary sense the expression "notwithstanding" implies that other provisions shall not prevail over the main provision."

75. Justice G. P. Singh in his commentary on the treatise **"Principles of Statutory interpretation 5th Edition (1992)** observed as under:-

"A clause beginning with "notwithstanding anything contained in this Act or in some particular Act or in any law for the time being in force. In some times appended to a section in the beginning with a view to give effect. The indicating part of the section in case of conflict and over-riding effect over the provisions or Act mentioned in the non-obstante clause has an over-riding effect and it has to be given its due effect."

76. Patna High Court in the case of **Laluprasad and Anr. vs. Sate of Bihar reported in A.I.R. 1976 page 137** in para 4 observed as under:-

"It is not a sound principle of construction to brush aside words in a statute as being inapposite or surplusage if they can have an appropriate application. The very purpose of non-obstante clause is that provision shall prevail over any other provision and that other provision shall not be of any consequence. In case there is any inconsistency or a departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause that would prevail over the other clause. Even by dictionary sense, the expression "nothwithstanding" implies that other provisions shall not prevail over the main provision."

77. Word "Notwithstanding anything contained" has been defined in **Words and Phrases page 287** as under:-

"The word "notwithstanding" is one in opposition to and not one of compatibility with another statute and actually means in spite of."

78. **Lord Viscound Simond in Smith v. East Elore Rural and District council and Ors. Reported in 1956 (1) All England Reports page 859** observed as under:-

"My Lord I do not refer in detail to these authorities only because it appears to me that they do not over-ride the first of all principles of construction that plain words must be given their plain meaning."

79. Hon'ble the Apex Court in the case of **Sarwan Singh and another vs. Kasturi Lal AIR 1977 Supreme Court 265 in paragraph 20** whereof it has been held as under:-

"Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. When two or more laws operate in the same filed and each contains a non obstante clause stating that its provisions will over-ride those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration."

80. Hon'ble the Apex Court in the case of ***Chunni Lal Parasadilal v. Commissioner of Sales Tax U.P. Lucknow reported in 62 (1986) STC 1121*** observed that an interpretation which will make the provisions of the Act effective and implement the purpose of the Act should be preferred when possible, without doing violence to the language.

81. Thus, the trust of the entire decision is that non-obstante clause will prevail other clauses. It simply cannot be brushed aside and it cannot be treated as a surplusage.

82. It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation. In **RBI v. Peerless General Finance and Investment Company Ltd. (1987) 1 SCC 424 : (AIR 1987 SC 1023)**, Chinnappa Reddy, J. highlighted the

importance of the rule of contextual interpretation in the following words:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

83. Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.

84. In **Shri Ram Narain v. Simla Banking and Industrial Company Ltd. 1956 SCR 603,** Hon'ble the Apex Court held that the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both the enactments contained provisions giving overriding effect to the provisions of the enactment over any other law. After noticing the relevant provisions, Hon'ble the Supreme Court observed:

"Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case.

It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

85. In **Kumaon Motor Owners' Union Ltd. v. State of Uttar Pradesh ,** there was conflict between the provisions contained in Rule 131(2) (g) and (i) of the Defence of India Rules, 1962 and Chapter IV-A of the Motor Vehicles Act, 1939. Section 68-B gave overriding effect to the provisions of Chapter IV-A of the Motor Vehicles Act whereas Section 43 of the Defence of India Act, 1962, gave overriding effect to the provisions contained in the Defence of India Rules. The Hon'ble Apex Court after looking into object behind the two statutes, namely, Defence of India Act and Motor Vehicles Act and on that basis also it was held that the provisions contained in the Defence of India Rules would have an overriding effect over the provisions of the Motor Vehicles Act.

86. In **Ashok Marketing Limited v. Punjab National Bank (1990) 4 SCC 406**, the Constitution Bench considered some of

the precedents on the interpretation of statutes and observed:

"The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."

87. In view of the abovesaid facts, although the Section 16-E(11) of the U.P. Intermediate Education Act, 1921 has a non-obstante clause but that would prevail over the various sub sections of Section 16-E of Act 1921 and not to the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the "1982 Act"). On the contrary, 1982 Act has overriding effect over any provision of 1921 Act and regulations framed thereunder to the extent they are contrary to Act No.5 of 1982.

88. The Full Bench of this Court in **Radha Raizada Vs. Committee of Management Vidyawati Darbari Girls Inter College (F.B.) 1994 Alld.L.J. 1077** has also found that 1982 Act has overriding effect over 1921 Act to the extent it contains inconsistent provisions. The Full Bench in Radha Raizada (Supra) after going through the provisions of 1982 Act and the Removal of Difficulties Orders issued thereunder came to the conclusion that a vacancy whether short term or regular has to be advertised in two daily newspapers and, therefore, the aforesaid view would not stand otherwise affected in any manner by Section 16-E(11) of 1921 Act since the later Act would override the earlier one.

89. Even otherwise U.P. Act 5 of 1982 is a special Act. The Apex Court in the case of **Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and another, JT 2008(9) SC 227** held that the provisions of a special Act will override the provisions of a general Act.

90. Further, if the non-obstante clause of Section 16 of U.P. Act No. 5 of 1982 i.e. "notwithstanding anything contrary contained in the Intermediate Education Act, 1921", was not there, even keeping in view the intention of legislature in framing U. P. Secondary Service Commission Selection Board, 1982 and its aims and objects to make selection of suitable teachers in order to teach the students of Intermediate College in order to uplift and maintain high standards of education, there should be free and fair selection of the teachers (Assistant Teachers/Lecturers) to be appointed in the institution which are imparting education in various subjects in Intermediate Classes. The provisions as provided in U. P. Act No. 5 of 1982 in respect to selection of teachers/Assistant Teachers by the selection Board must prevail over any provisions contrary to that provided in any Act or the Intermediate Education Act 1921, is the only interpretation which can be given to the provisions as provided under Section 16 of U.P. Act No. 5 of 1982 so as to advance the object of the Act (U.P. Act No. 5 of 1982) rather than retard it. Because the Courts decide what the law is and not what it should be. The Courts of course adopt a construction which will carry out the obvious intention of the legislature but cannot legislate. But to invoke judicial activism to set at naught legislative judgment is sub serve of the constitutional harmony and comity of instrumentalities. The above said view is reiterated by the

Hon'ble Spreme Court in the following cases:-

(I)Union of India and another v. Deoki Nandan Agarwal, AIR SC 96

(II)All India Radio v. Santosh Kumar and another (1998) 3 SCC 237

(III)Sakshi v. Union of India and others, (2004) 5 SCC 518

(IV)Pandian Chemicals Ltd. V. CIT (2003) 5 SCC 590

(V)Bhavnagar University vs. palitana Sugar Mills (P) and others, AIR 2003 SC 511

(VI)J. P. Bansai v. State of Rajasthan, (2003) 5 SCC 134

91. In ***Nasiruddin v. Sita Ram Agarwal (2003) 4 SCC 753,*** the Supreme Court has held that the Court can iron cut of the creases but cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain, unambiguous. It cannot add or subtract words to statute or read something into in which is not there. It cannot rewrite or recast the legislation.

92. It is well settled principle of law as laid down by Supreme Court in various decisions for example ***State of U.P. V. Singhepa Singh, reported in AIR 1964 Supreme Court page 358,*** keeping in view the consideration as laid down by Privy Council in the case of ***Nazir Ahmad v. King Emperor, reported in AIR 1936 Privy council page 253*** that when the law prescribes a certain mode or specific mode of or for doing a thing or certain mode of exercising certain power of authority or right or for performing certain act then that act or thing has got to be done in that manner alone & not otherwise. Other modes in respect thereof are necessarily and by necessary implication taken to have been forbidden & closed.

93. In view of the abovesaid facts, argument as advanced by learned counsel for the petitioners that in spite of the provisions as provided under Section 16 of the U.P. Secondary Education Service Commission and Selection Board Act 1982 the selection on the post of Assistant Teacher/Lecturer in institution to teach Intermediate classes can be made by the Committee of Management by invoking the provision as provided under Section 16 E (11) has got no force rather the same is in contravention to law as laid down by Full Bench of this Court in the case of **Radha Raizada (Supra)** and the same is binding on this Court, hence rejected.

94. In the light of the abovesaid facts, when a vacancy is to be filled up by direct recruitment and salary has to be paid by State Exchequer the compliance of Articles 14 and 16 of the Constitution of India has to be observed otherwise direct recruitment by private arrangement or without making vacancy available to public at large would be violative of Articles 14 and 16 of the Constitution of India.

95. Another argument advanced on behalf of petitioners that the power to make ad hoc selection/appointment on the post of Assistant Teacher/Lecturer against substantive vacancy has been referred to the Division Bench/Larger Bench by the learned Single Judge in the **Daya Shankar Mishra's case (Supra)**, as such any finding given in this regard by the Division

Bench/Larger Bench has got no binding effect.

96. From the perusal of the judgment passed by learned Single Judge, matter in respect of the appointment of Assistant Teacher/Lecturer on ad hoc basis in the institutions which are governed by the above said provisions has come up for consideration before the learned Single Judge of this Court in the case of ***Rakesh Chandra Misra vs. State of U.P. and others; (2004) 3 UPLBEC 2671*** wherein it has been held that during the period when removal of difficulties order were in force or when the provisions of Section 18 of 1982 Act were in force, the appointment against short term vacancies and the ad hoc appointments could have been made only in the manner prescribed for making ad hoc/short term appointments and the provisions of Regulation 9 of such appointment during the aforesaid period. However, the inconsistent provision in 1982 Act after 25.1.1999 to one contained in Chaper-II, Regulation 9 and Section 16-E (11), the provisions of Chapter-II, Regulation 9 and Section 16-E (11) shall continue to hold the filed by virtue of Section 32 of 1982 Act. Paragraphs 71, 72, 75 and 79 of the said judgment are extracted below:-

"71. An understanding of the provisions of (Removal of Difficulties) Orders, U.P. Act No.5 of 1982 as amended from time to time and the Regulation 9 of Chapter II of the Act 1921 makes it clear that during the period when other the (Removal of Difficulties) orders issued under the provisions of Selection Board Act, were in force or when the provisions of Section 18 of the said Act were in force, the appointment against short-term vacancies and the ad hoc appointments could have been made only in the manner prescribed for making ad hoc/short-term appointments. The provisions of Regulation 9 of Chapter II of the Act, 1921 could not have been used for making such appointment during the aforesaid period but during all such period when there existed no such provision either under the (Removal of Difficulties) Orders aforesaid or Selection Board Act No.5 of 1982 as amended from time to time, the Committee of Management could have made the appointments or could make the appointments strictly in accordance with the provisions of Regulation 9 (1) and (2).

72. Likewise at all times when there existed no such power to make appointment on temporary vacancy caused because of death, termination or otherwise during mid of the academic sessions the recourse could be taken to the provisions of Section 16-E (11) of U.P. Intermediate Education Act, 1921 for making such appointment which could lost till the end of such academic session in which such appointment was made, but this provision can be given a purposeful meaning by keeping the appointment intact till a regularly selected candidate is made available.

75. After the Amendment Act, 2001 the power to make ad hoc appointment has been completely taken away, even from the hands of the Committee of Management to make appointment was already taken away by virtue of U.P. Act No.24 of 1992 by conferring the power upon the Selection Committee constituted under the provisions of amended Section 13. This power has also been taken away by the aforesaid Amendment of the year 2001. Thus after the Amending Act, 2001 came into force with effect from 30th December, 2000 there remains no power either with the Committee of Management or with

Educational Authorities or the Selection Committee constituted under the Act for making such appointment under the provisions of the Selection Board Act, 1982. The power to make ad hoc appointment under various (Removal of Difficulties) Orders has already ceased by insertion of Section 33-E of the Act by means of Amending Act of 1999 which came into force on 25.1.1999.

79. While concluding I hold that in the circumstances detailed in the judgment all the appointments made by the Committee of Management, on the vacancy, if the vacancy is/was in the nature of vacancy as specified in Regulations 9(1) and 9(2) of the U.P. Act of 1921 has been filled during the period when either U.P. Act of 1921 was in force or when neither the (Removal of Difficulties) Orders issued under U.P. Act No.5 of 1992 were available nor there was a provision under the Selection Board Act or the Rules framed there under to make such appointment the Committee of Management would have the power to make such appointment of short-term vacancy in accordance with the Regulation 9, which appointment would be in the nature of ad hoc appointments as given under the said provisions."

97. Thereafter, the case of **Rakesh Chandra Misra (supra)** came up for consideration before the learned Single Judge of this Court at Allahabad in **Writ Petition No. 20843 of 2002 "Daya Shanker Mishra vs. District Inspector of Schools and Ors."** and learned Single Judge did not agree with the case of **Rakesh Chandra Misra (supra),** has referred the matter to the Larger Bench, the relevant portion of the judgment passed by learned Single Judge in the case of **Daya Shanker Mishra (supra)** is being reproduced hereinbelow:-

"It is well settled law that when the statutes are clear, the court by putting interpretation cannot add or subtract any words or alter the scheme of the Act. It is for the Legislature and the State Government to come forward and take appropriate steps for redeeming the situation. The attention of the learned Single Judge was not drawn towards the embargo contained in Section 16(1) of 1982 Act, i.e. the words "every appointment of a teacher", which as observed above, can include both substantive and short term appointment. I am of the opinion that following questions raised in this writ petition require to be referred to a Larger Bench for authoritative pronouncement:-

(I)Whether after resession of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 with effect from 25.1.1999, the Committee of Management, can make temporary/ad hoc appointment on short term vacancies resorting to its power given under Chapter-II, Regulation 9 and Section 16-E(11) of the U.P. Intermediate Education Act, 1921 despite the provisions of Section 16(1) of the U.P. Secondary Education (Service Selection Boards) Act, 1982?

(II)Whether the judgment of learned Single Judge in Rakesh Chandra Misra vs. State of U.P. and others; (2004) 3 UPLBEC 2671, lays down correct law.

98. Thereafter, the matter in question came up for consideration before the Division Bench and it has held as under:-

"The 1982 Act puts a complete embargo on any appointments being made unless selected by the Board. According to Section 16(2) of the 1982 Act, any appointment of the teacher made in contravention of the provisions of Sub-section (1) would be void. Further Section 18 of the 1982 Act provides for making ad hoc appointments, according to which where a vacancy has been notified under Section 10 (1) of the 1982 Act by the management to the Commission and the Commission has failed to recommend the name of any suitable candidate within the specified time, then the management may appoint a teacher or principal or headmaster by direct recruitment or promotion on purely ad hoc basis subject to other terms and conditions as provided in Sub-section (3) thereof. This was the position when the 1982 Act was promulgated. Subsequently by amendment, Section 18 has been confined to ad hoc appointments of headmasters and principals only on the basis of promotion. In any case for dealing with the issue in hand, Section 18 as it originally stood, referred to vacancy being notified by the institution. Thus when the 1982 Act came into force, it gave the power to the management to make ad hoc appointments against notified vacancies i.e. substantive vacancies on ad hoc basis, upon failure of the Board to make the recommendations, within the stipulated time. Subsequently after amendment in Section 18 of the 1982 Act in the year 2001 the only power left with the management to make ad hoc appointment against substantive vacancy of Principal and Headmaster Now the question is what exactly is meant by the word vacancy as used in the Act. The word vacancy has not been defined in the 1982 Act. It has, however, been defined in Rule 2(e) of the 1998 Rules. It is very clear that the word vacancy has been defined to mean a substantive vacancy only arising out of death, retirement, resignation, termination, dismissal or removal or creation of a new post or appointment or promotion of an incumbent to any higher post in a substantive capacity. Further Sections 10 and 11 of the 1982 Act and the rules 10 to 12 of the 1998 Rules dealing with the procedure for recruitment, clearly provide the manner in which the vacancies are to be calculated and are to be notified. Such determination of vacancies is only referable to substantive vacancies.

In the light of the aforementioned statutory provisions, we have to examine as to whether the words "every appointment of a teacher" used in Section 16 of the 1982 Act would include within its ambit appointments made against short terms vacancies also or only the substantive vacancies. The language used in Sections 10, 11 and 18 of the 1982 Act,the definition of the vacancy as given in rule 2(e) of the 1998 Rules as also the rules 10 to 12 of the 1998 Rules lead to an inevitable conclusion that the vacancy means only the substantive vacancies, which are to be notified by the management and it is against such vacancies only that the Board shall have the power to make the selections.

The word appointment has to be correlated with the vacancy. Appointment is to be made against a vacancy. The question is of the nature of vacancy. The embargo created by section 16 of the 1982 Act has to be read and interpreted in reference to vacancy. In the present case as discussed above the vacancy refers only to substantive vacancy. Thus the power of the Board to make appointment is only

against the substantive vacancy. The learned Single Judge while recording his disagreement with the ratio of law laid down in the case of Rakesh Chandra Misra (supra) has not taken into consideration this aspect of the matter. Although the learned Single Judge deciding the case of Rakesh Chandra Misra (supra) also did not deal with this aspect of the matter.

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.

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.

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.

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.

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.

The learned Single Judge in the case of Rakesh Chandra Misra (supra) while concluding had also dealt with the issue that the State Government must take urgent steps for meeting the exigencies of filling up all the vacancies which are unforeseen and also for the vacancies which are likely to occur in near future including regular substantive vacancies by providing a mechanism for making ad hoc appointments against such vacancies either by direct recruitment or by promotion till the duly selected candidate is made available by the Board. The learned Single Judge was referring to substantive vacancies lying vacant for long durations and the management having been denuded of its powers for making the ad hoc appointments on substantive vacancies after the amendment of Section 18 of the 1982 Act, practical difficulties were arising in carrying out the primary goal of imparting quality education. These observations of the learned Single Judge in the case of Rakesh Chandra Misra (supra) were approved and reiterated by the learned Single Judge while making the reference order. Thus both the learned Single Judges have felt that there should be some provision for filling up the substantive vacancies by making ad hoc appointments. We are also of the considered view that vacancies whether substantive or short term, should be filled up at the earliest to maintain our Constitutional goal of imparting quality secondary education. However, as long as the statutes create a bar, the management cannot be conferred with any power to make ad hoc appointment against substantive vacancy.

We have although taken the same view as in the case of Rakesh Chandra Misra (supra) but for different reasons.

Therefore, the judgment in the case of Rakesh Chandra Misra (supra) cannot be said to have laid down any incorrect law.

In view of the discussions made above, in our considered opinion the management has the power to make ad hoc appointments on short term vacancies under the provisions of 1921 Act and the Regulations framed thereunder and the judgment in the case of Rakesh Chandra Misra (supra) lays down the correct law.

99. In the judgment given by Division Bench/Larger Bench in the case of **Daya Shankar Mishra (Supra),** it has been in clear terms held as under:-

"However as long as the statute create a bar, the management cannot confer with any power to make ad hoc appointment against substantive vacancy".

100. In view of the said categorical finding given by the Division Bench/Larger Bench in the case of **Daya Shankar Mishra,** even if the matter in respect to power of selecting teacher for appointment on the post of Assistant Teacher/Lecturer by the Committee of Management on ad hoc basis against the substantive vacancy has not been referred to Division Bench/Larger Bench, the same has got a binding effect in view of Section 16(1) of U.P. Act 5 of 1982 which will prevail over all the other provisions as provided in respect to selection of Assistant Teacher/lecturer against the substantive vacancy in U.P. Intermediate Education Act, 1921.

101. Even otherwise the said finding given by a Division Bench in respect to the power of the Committee of Management for making ad hoc selection/appointment against substantive vacancy is binding on a learned Single Judge (as per the law as laid down by the **Apex Court in the cases of (a) 1989 (1) SCC 252, Smt. Saiyada Mossarrrat Vs. Hindustan Steel Ltd. (b) 2009 (15) SCC 458, Subhash Chandra Vs. Delhi Sub. Services Selection Board (c) 2011(4) SCC 602, Gangadhara Palo Vs. Revenue Div. Officer & Another (d) 2003 (7) SCC 197, Divisional Controller KSRTC Vs. mahadeva Shetty & another).** As such the argument advanced on behalf of the petitioners in this regard, has no force, hence rejected.

102. One of the the argument advanced that initially in view of the provisions as exists in Section 18 of the U.P. Act 1982 in respect to the power of ad hoc appointment of Assistant Teacher/Lecturer in LT Grade when the same has not been taken away read with the provision as provided under Section 16 E(11) of U.P. Intermediate Education Act, 1921 keeping in view Section 32 of U.P. Act 18 of 1982 and the provisions as provided under Section 16 of U.P. Act 5 of 1982 that power to select is still vested in the Committee of Management has got no force, and is liable to be rejected, as in the case of **Hakim Chandra and others Vs. District Inspector of Schools, Jaunpur, 2010 (1) ADJ 357** and in the case of **Ram Niwas Sharma Vs. State of U.P. and others, 2010 (6) ADJ 299 (DB),** it has been held that after the enforcement of U.P. Secondary Services Selection Board, 1982, the Committee of Management has got no power to make selection of teachers on ad hoc basis against a substantive post and the same can be done only upon recommendation made by the Government authorities.

103. In the case of **Ghanshyam Vs. State of U.P. and others, 2010 (10) ADJ, 849 (DB),** a Division Bench of this Court after taking into consideration the Full Bench

judgment of this Court in the case of **Promila Mishra Vs. District Inspectors of Schools and others** and the judgment reported in **2009 (9) ADJ 650** held that once a vacancy is converted into substantive vacancy, a teacher who is appointed by the Committee of Management on ad hoc basis has no right to continue on the post in question.

104. The said view was further reiterated by another Division Bench Judgment, reported in **2010 (7) ADJ, 392 (DB), Shashi Pal Rao Vs. Committee of Management, Manas Inter College, Fateshpur, Deoria and others.**

105. In the case of **Abha Rani Vs. Regional Inspectress of Girls School, Meerut and others, 2011 (29) LCD 826,** it has been held as under:-

"This Court may record that U.P. Secondary Education Services Commission and Selection Boards Ordinance, 1981 (Ordinance No. 8 of 1981) was enforced on 10th July, 1981. Under the ordinances, the power to make substantive appointment was withdrawn from the Committee of Management.

If the case of the petitioner is that she had been appointed in accordance with the U.P. Intermediate Education Act, U.P. Intermediate Education Act, 1921 and then this Court may only record that the procedure prescribed under the U.P. Intermediate Education Act has not been followed in the matter of appointment. Neither any selection committee under Section 16-F was constituted nor selection has been held in accordance with the procedure prescribed thereunder.

This Court has no hesitation to record that the entire claim set up by the petitioner is farce. Because of such illegal appointment claimed by the petitioner based on half facts without disclosing any statutory rules, wherein such appointment could be justified at the hands of the Committee of Management, petitioner obtained an interim order from this Court staying the operation of the order of Regional Inspectress of Girls School dated 4th February, 1981, which order was not even challenged in the present writ petition. The result of the interim stay order has been that the petitioner has drawn salary from the State exchequer since 1981.

The petitioner is completely ineligible to draw the salary from the State exchequer. On a pointed query made by this Court to the learned counsel for the petitioner, he stated that the appointment has been made under the provisions of U.P. Intermediate Education Act. However, he could not substantiate the contention so raised by referring to any averment in the writ petition, wherein the requirement of the constitution of the selection committee under Section 16E read with Section 16F and the procedure prescribed for selection could be said to have been followed.

In view of the aforesaid, this Court feels that the persons like the petitioner, who with the help of the Management succeed, is drawing the salary from the State exchequer without being appointed after following the statutory procedure prescribed must be put to terms. Therefore, not only the entire salary which the petitioner has drawn is to be recovered, exceptional cost is also to be imposed. "

106. In the case of **Haripal Singh Vs. State of U.P. and others, 2012 (1) UPLBEC 260.,** after going through the

various provisions as provided in respect to ad hoc appointment of a teacher on a substantive vacancy as per U.P. Intermediate Education Act, 1921 and U.P. Secondary Services Selection Board, 1982, held that a Committee of Management has got no power to appoint a teacher on a substantive vacancy on ad hoc basis.

107. In the case of **Vishwamohini Vs. District Inspectors of Schools and others 2012 (1) SCC 122,** Hon'ble the Apex Court held as under:-

"3. The appellant thereafter filed a writ petition before the High Court of Judicature at Allahabad which was dismissed by the High Court. The learned Single Judge of High Court found that the appellant was appointed for a short term by the management and since Smt. Manju Lata Bajpai, Assistant Teacher, who was on long leave had retired, substantive vacancy occurred and against the substantive vacancy the management had no right to make short term appointment.

4. The appellant preferred an appeal against the dismissal of the writ petition before the Division Bench of the High Court. The Division Bench upheld the order of the learned Single Judge and dismissed the appeal.

5. We have heard the learned counsel for the appellant as also the learned counsel for the respondents.

6. In the peculiar facts and circumstances of this case, we are of the considered view that interest of justice would meet if the appellant is paid for the period she worked with the concerned school. Accordingly, we direct respondent Nos.1 to 4 to pay the salary of the appellant for the period she worked, within eight weeks from today. However, the District Inspector of Schools and the State of U.P. would be at liberty to recover that amount from the management of the school or from any other individual.

108. For the foregoing reasons, it can be safely held that in view of the provisions as provided under Section 16(1) of U.P. Secondary Services Selection Board Act, 1982, the Committee of Management has got no power whatsoever to make selections on the post of Assistant Teacher/Lecturer in L.T. Grade against a substantive vacancy or a vacancy which has converted into substantive one and the power to make selection against the said vacancy is vested only with the Selected Board duly constituted for the said purpose.

109. Last argument as advanced on behalf of petitioner that the official respondent has not taken any step to fill up the vacancy in question in spite of the direction given by this court in the case of **Rakesh Chandra Mishra (Supra).** In this regard Sri V.S. Tripathi, learned Additional Chief Standing Counsel on the basis of the affidavit filed by Sri Jitendra Kumar, Secretary Secondary Education, Govt. of U.P., Lucknow in Special Appeal No. 351 of 2009 (Hari Bansh Bahadur Singh Vs. Jitendra Kumar and others) has categorically submitted that necessary steps has been taken in order to fill up the vacancy in question, an advertisement has been issued, so it is hope and trust that the State/official respondent shall take effective steps in this direction in order to fill up the vacancies in question in order to carry out the direction/mandate as given by this Court in Rakesh Kumar Mishra's case (Supra) expeditiously keeping in view that the career of the students who are studying in the institution in question will

not suffer during the present era of competition.

110. In the result, I do not find any infirmity or illegality in the action on the part of the State authorities/District Inspector of Schools either not to pay the salary or to stop the payment of salary to the Assistant Teachers/Lecturers who are appointed against substantive vacancy or short term vacancy which subsequently converted into substantive vacancy on ad hoc basis by the Committee of Management as the said authority has got no power under law to appoint them, accordingly, all the writ petitions lack merit and are dismissed.

111. The interim orders granted in favour of petitioners in some of the writ petitions are vacated.

112. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.05.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. - 4076 of 2011

Iliyas Ali ...Petitioner
Versus
State of U.P. Thorugh The Principal Secy. Secondary Dept.Lko ...Respondents

Counsel for the Petitioner:
Dr.L.P.Misra
Sri Abhishek Misra

Counsel for t he Respondents:
C.S.C.
Sri D.P.Singh

Constitution of India, Article 226- Disciplinary Proceeding-continuation-against Principal of Inter College-after retirement withholding gratuity pension consequent thereof-held-in absence of specific provision in Intermediate Education Act-continuation of disciplinary proceeding and withholding retirement benefits-arbitrary in view of Rajesh Kumar Saxena case.

Held: Para 21

For the foregoing reasons, once there is no specific provisions in the in the U.P. Intermediate Education Act, 1921 or Regulation framed thereunder for initiation of a disciplinary proceeding or continuing the disciplinary proceeding against petitioner who placed under suspension after his retirement then the action on the part of official respondents to withhold his post retiral dues is an action which is arbitrary in nature, thus, violative of Article 14 of the Constitution of India as well as principles of natural justice (See. Rajesh Kumar Saxena Vs. Bharat Sanchar Nigam Ltd. and others, [2007 1 ESC 648 (All) (DB)].

Case law discussed:
(1999) 3 SCC 666; [2007 1 ESC 648 (All) (DB)]; (1999) 4 SCC 759

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

1. Matter is taken in the revised cause list.

2. None present on behalf of O.P. No. 5.

3. Heard Dr. L.P. Mishra, learned counsel for petitioner, learned State counsel for official respondents and perused the record.

4. In the City of Unnao, there is an institution known as Jawahar Lal Nehru Inter College, Fatehpur Chaurasi, Unnao (hereinafter referred to as the institution) recognized by U.P. Secondary Education Board, Allahabad as provisions provided

under U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder as well as U.P. High Schools and Intermediate Colleges (Payment of Salaries to the Teachers and Other Employees) Act, 1971.

5. On 27.07.1974, the petitioner was appointed on the post of Lecturer in Geography in the institution. In July, 2010 as he was the senior-most Lecturer in the institution, so appointed as Principal in July, 2010. While working an discharging the duties on the said post, by an order dated 10.06.2011 placed under suspension thereafter retired on 30.06.2011 after attaining the age of superannuation during suspension period.

6. In view of the abovesaid factual background, the present writ petition has been filed by the petitioner with the following main prayer:-

"(a) To issue a writ, order or direction in the nature of Mandamus commanding the Opp. parties 1 to 4 pay to the petitioner his post-retirement benefits including the monthly pension by treating the petitioner having retired from the post of Principal of Jawahar Lal Nehru Inter College, Fatehpur Chaurasi, Unnao, the suspension order date 10.05.2011 notwithstanding."

7. Dr. L.P. Mishra, learned counsel for petitioner while pressing the relief as claimed by petitioner submits that he was appointed on the post of Principal in the institution being the senior most Lecturer is to retire on after attaining the age of superannuation i.e. 62 years as his date of birth recorded in High School Certificate/Service Book as 14.03.1949. Hoever, he was allowed to continue till 30th June, 2011 under the provisions that the age of superannuation of a teacher including the Principal of an Intermediate College is 62 years but in the event of date of birth being Second July, or onwards, the person shall continue till the end of Academic Session, i.e. June, 30 of the said year. But 20 days prior to his retirement placed under suspension by order dated 10.06.2011 by leveling false and frivolous allegation.

8. He further submits that after retirement from services there is no provisions, provided under U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder for conducting disciplinary proceedings or the continuance of any disciplinary proceedings against a Teacher or a Principal of an Intermediate College. Hence, in the present case after retirement on 30.06.2011 neither the suspension nor any disciplinary proceeding can either be initiated or conducted against the petitioner, so withholding of the post retiral dues of the petitioner by the respondents is not permissible under law and they shall be directed to pay the same to him.

9. In support of his argument, he placed reliance on the judgment given by Apex Court in the case of **Bhagirathi Jena Vs. Board of Directors, O.S.F.C. And Others (1999) 3 SCC 666** and in the case of **Rajesh Kumar Saxena Vs. Bharat Sanchar Nigam Ltd. and others, [2007 1 ESC 648 (All) (DB)].**

10. **Further,** in the instant matter, on behalf of the opposite party Nos. 1 to 4 i.e. State authorities, no counter affidavit has been filed in spite of time granted to them. However, learned State Counsel on the basis of the document on record, a letter dated 13.10.2011 written by District Inspector of Schools to Manager of the

institution submits that as the suspension order dated 10.06.2011 by which the petitioner has been placed under suspension by the Committee of Management has not been approved by the said authority, so the same has automatically ineffective after his retirement. In this regard, he placed reliance on the following averments made in the letter dated 13.10.2011, the District Inspector of Schools, relevant portion quoted below:-

"प्रबंध समिति के प्रस्ताव दिनांक 10.06.2011 के द्वारा श्री इलियास अली कार्यवाहक प्रधानाचार्य का प्रबंध समिति द्वारा किये गए निलंबन का स्नुमोदन न होने के कारण श्री इलियास अली के सम्बन्ध में प्रबंध समिति द्वारा की गे कार्यवाही स्वतः निष्प्रभावी सो गयी है | श्री इलियास अली सेवानिवृत कार्यवाहक प्रधानाचार्य के द्वारा मा० न्यायलय में रिट याचिका नोटिस संख्या .. 4813/2011 योजित की गयी है | उक्त आदेश मा० न्यायलय द्वारा पारित होने वाले आदेश से प्रतिबंधित होगा /

अतः श्री इलियास अली तत्कालीन कार्यवाहक प्रधानाचार्य का दिनांक 10.06.2011 *से* 30.06.2011 *तक का वेतन एवं पेंशन प्रकरण तीन दिन के अन्दर इस कार्यालय को उपलब्ध डरना सुनिश्चित करेंए ताकि प्रकरण पर अग्रेतर कार्यवाही की जा सके /*"

11. As stated above, none has appeared on behalf of O.P. Nos. 5 and 6 i.e. Committee of management and the Manger of the institution, however, on the basis of the counter affidavit filed on their behalf, the stand taken by the said authorities is that the petitioner has has placed under suspension on 10.06.2011.

12. However, in respect to the pleading as raised by the petitioner in para Nos. 18 and 19 of the writ petition that after his retirement no disciplinary proceedings can either be initiated or conducted, the reply as given in para No. 18 of the counter affidavit by the said opposite parties are to the effect that *"the contents of paras 18 and 19 of the writ petition are not correct."*

13. In view of the abovesaid facts, after hearing learned counsel for parties who are present today and going through the material on record, sole question to be decided in the present case is whether after the retirement of the petitioner disciplinary proceeding can continue against him when there is no specific provision for initiation and continuation of any disciplinary proceeding after retirement of a teacher or Principal of Intermediate College in the U.P. Intermediate Education Act, 1921 and the Regulation framed thereunder.

14. In order to decide the same it is relevant to go through the provisions provided in the Intermediate Education Act, 1921 for conducting disciplinary proceeding.

15. Regulation 31 to 45 under Chapter III framed in U.P. Intermediate Education Act, 1921 provide condition of service of teachers and employees of the institution upto Intermediate classes.

"Regulation 35 of Chapter III of the Act provides that if a complaint or an adverse report is received by the Committee of Management of the institution, against a teacher or a principal of the institution, the Manager, in the case of a teacher and in the case of the principal of the institution, a sub-committee will be constituted to enquire into the charges and submit the report.

Regulation 36 of the Regulations provides:- *that the grounds which it is proposed to take action shall be reduced int eh form of a definite charge or charges which shall be communicated to the employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him.*

.....The Inquiring authority conducting the enquiry may also, separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee."

The language of Regulation 35 read with Regulation 36 makes it clear that it is obligatory in the case of the allegations against a principal, that a Sub-Committee should be constituted to enquire into the charge. The said Sub-Committee is required to reduce in the form of a definite charge or charges the grounds on which it proposes to hold enquiry."

16. Further, Regulation 39 Chapter-III of the U.P. Intermediate Act, 1921 provides the formalities are to be done by the Committee of Management after submitting of the inquiry report by the Inquiry Officer the said Regulation is quoted as under:-

" Regulation 39 Chapter-III framed under U.P. Intermediate Act, 1921 reads as under:-

"39(1). The report regarding the suspension of the head of institution or of the teacher to be submitted to the Inspector under sub-section 16-G shall contain the following particulars and be accompanied by the following document-

(a) the name of the persons suspended along with, particular of the (posts inculding grades) held by him since the date of his original appointment till the time of suspension including particulars as to the nature of tenure held at the time of suspension, e.g., temporary permanent or officiating;

(b) a certified copy of the report on the basis of which such person was last confirmed or allowed to cross efficiency barf, whichever later;

(c) details of all the charges on the basis of which such person was suspended;

(d) certifed copies of the complaints, reports and enquiry report, if any, of the enquiry officer on the basis of which such person was suspended;

(e) certified copy of the resolution of the Committee of Management suspending such person;

(f) certified copy of the order of suspension issued to such person;

(g) in case such person was suspended previously also, details of the charges, on which and the period for which he was suspended on previous occasions accompanied by certified copies of the orders on the basis of which he was re-instated.

(2) An employee other than a head of institution or a teacher may be suspended by the appointing authority on any of the grounds specified in Clauses (a) to (c) of sub-section 5 of Section 16-G.

(3) उप नियम (92) के अंतर्गत निलंबन का कोई आदेश प्रभाव में नहीं रहेगा, जब तक की ऐसे आदेश के दिनांक से साठ दिन के भीतर निरीक्षक द्वारा इसका लिखित रूप में अनुमोदन न कर दिया जय ।

17. Needless to mention that there is no provision under in the U.P. Intermediate Education Act, 1921 or the Regulation framed thereunder which deals with issue that if the person is placed under suspension and during the period of suspension retired from service then a disciplinary proceeding can either be instituted or conducted after retirement.

18. Hon'ble the Apex Court in the case of **Bhagirath Jena Vs. Board of Directors, O.S.F.S. And others (1999) 3 SCC 666** in para Nos. 6 and 7 held as under:-

"Para No. 6. *It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation.*

Para No. 7. *In view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95, there was no authority vested in the Corporation or continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."*

19. The abovesaid view was further reiterated by Hon'ble the Supreme Court in the case of **State Bank of India and others Vs. J.J. Paul, (1999) 4 SCC 759.**

20. Accordingly, in absence any provision in the Act, 1921 Rule or Regulation framed there in which governs the field for initiating or conducting the disciplinary proceedings after retirement of Teacher/Principal of the Intermediate Institution the competent/concerned authority after the retirement of a Teacher/principal cannot proceed to initiate or conduct the disciplinary proceedings after his retirement and the entire disciplinary proceedings if initiated would laps with the retirement.

21. For the foregoing reasons, once there is no specific provisions in the in the U.P. Intermediate Education Act, 1921 or Regulation framed thereunder for initiation of a disciplinary proceeding or continuing the disciplinary proceeding against petitioner who placed under suspension after his retirement then the action on the part of official respondents to withhold his post retiral dues is an action which is arbitrary in nature, thus, violative of Article 14 of the Constitution of India as well as principles of natural justice (See. **Rajesh Kumar Saxena Vs. Bharat Sanchar Nigam Ltd. and others, [2007 1 ESC 648 (All) (DB)].**

22. In the result, the writ petition is allowed with a direction to respondents to pay the petitioner his post retiral dues treating him to retire from the post of Principal, Jawahar Lal Nehru Inter College, Fatehpur Chaurasi, Unnao w.e.f. 30.06.2011 in accordance with law expeditiously preferably within a period of four weeks from the date of receiving certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2012

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

Civil Misc. Writ Petition no. 5998 of 1998

Smt. Geeta Srivastava ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri S.K. Kesarwani
Sri S.K. Kulshreshtha

Counsel for the Respondents:
Sri R.K. Tripathi,
S.C.

Constitution of India-Article 226-cancellation of compassionate appointment-denied on ground daughter-in-law is not within the definition of family-held-in view of amendment in Rule enforceable w.e.f 22.12.2011-daughter-in-law included all in family member-cancellation of appointment-illegal-direction to reinstate and pay arrear of salary within two month-issued.

Held: Para 8

In view of the above legal proposition as well as the amendment in the Dying in Harness Rules, 1974 to include the widowed daughter-in-law in the definition of the term 'family', this writ petition is allowed and the impugned order dated 15.1.1998 passed by the Basic Shiksha Adhikari, Fatehpur is quashed. The petitioner shall be treated to be in service with all consequential benefits. The petitioner will also be entitled to the arrears of salary which shall be paid to her within two months from the date a certified copy of this order is received by the respondent no. 4-Basic Shiksha Adhikari, Fatehpur.

Case law discussed:
2010 (2) AWC 1606; 2011 (1) UPLBEC 290

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

1. In this writ petition the petitioner is seeking quashing of the order dated 15.1.1998 passed by District Basic Shiksha Adhikari, Fatehpur rejecting the claim of the petitioner for appointment on compassionate grounds on the ground that the benefit of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 does not extend to widowed daughter-in-law and for a further direction to the respondents not to interfere in the functioning of the petitioner as an Assistant Teacher and to pay the petitioner her regular monthly salary of the said post.

2. The facts, in brief, are that the petitioner -Smt. Geeta Srivastava was married to one Anuj Kumar Srivastava son of Late Raj Narain Srivastava. The said Raj Narain Srivastava was employed as an Assistant Teacher in a Junior Basic School run by the Board of Basic Education, U.P. Shri Raj Narain expired while in service. In the meantime Anuj Kumar Srivastava, husband of the petitioner has also expired leaving behind his widow, the present petitioner. The

petitioner, therefore, submitted an application for grant of compassionate appointment as a widowed daughter-in-law of the deceased employee. Her application was considered and she was given compassionate appointment as an untrained assistant teacher on a consolidated salary of Rs.850/- per month and she joined in Prathamik Pathshala, Sarai Sayeed Khan, Development Block, Teliyani, Fatehpur. However, when the salary was not being paid to her she filed a writ petition no. 881 of 1998 seeking a direction to the respondents to pay her salary. The said writ petition was disposed of with a direction to the respondents to pay regular salary to the petitioner from month to month. She was also recommended for under going training at the District Institute of Education and Training, Fatehpur. Her case is that in-spite of the order of this Court she has not been paid her salary. By the impugned order dated 15.1.1998 her appointment has been cancelled on the ground that the benefit of compassionate appointment is not available to a widowed daughter-in-law.

3. I have heard Shri Adarsh Bhushan, learned counsel appearing for the petitioner and the learned standing counsel appearing for the respondents.

4. The facts arising in this case are not disputed between the parties. The only question now remains is as to whether the appointment of the petitioner could have been cancelled by the impugned order on the ground that the benefit of compassionate appointment would not be available to a widowed daughter-in-law under the Dying in Harness Rules, 1974?

5. This controversy had earlier come up for consideration before a learned Singh Judge of this Court and the learned Single Judge interpreting the term 'family' in the case reported in ***2010 (2) AWC 1606 Smt. Amrita Mishra Vs.State of U.P. and others*** relying upon a Division Bench decision in the case of Zila Panchayat Kaushambi and others V. Lalti Devi and another reported in 2008 (2) ADJ 428 has held as under:

"6. Having considered the Rule in question and having perused the Division Bench judgment of this Court in the case of Zila Panchayat, Kaushambi and others V. Lalti Devi and another, 2008 (2) aDJ 428: 2008(1)AWC 1035 (DB), it is not necessary call for any counter-affidavit on behalf of the State as the said decision squarely covers the case of the petitioner. It has been held by this Court that the word "family" includes the relations as defined therein. According to the Division Bench judgment the said definition is inclusive and to the extent of daughter-in-law is not exhaustive. It has been held that a daughter-in-law who is a widow, is also entitled for compassionate appointment.

7. Learned counsel for the petitioner further relied on the judgment of this Court in the case of Smt. Sanyogita Rai Vs. state of U.P. and others, 2006 (5) ADJ 501. The said decision has also been noticed in the judgment of Division Bench referred to hereinabove.

8. Accordingly, the impugned order for the reasons aforesaid is unsustainable. The order dated 5.9.2009, insofar as it relates to the petitioner, is hereby quashed and the matter is remitted back to the District Basic Education Officer to

reconsider the claim of the petitioner in the light of the observations made herein above and pass an appropriate order within a period of six weeks from the date of presentation of a certified copy of this order before him.

The writ petition is allowed. No costs."

6. Subsequently, this controversy has also been settled by a Full Bench decision of this Court in the case reported in ***2011 (1) UPLBEC 290 (U.P. Power Corporation Allahabad Vs. Smt. Urmila Devi*** wherein the Full Bench interpreting the term 'family' occurring in the U.P. Electricity Board Appointment of Dependants of Employees of Board (Dying in Harness) Rules, 1975 has held as under:

"8. We must, however, note one feature of the definition of the word "family" as generally contained in most Rules. The definition of "family" includes wife or husband; sons; unmarried and widowed daughters; and if the deceased was an unmarried Government servant, the brother, unmarried sister and widowed mother dependant on the deceased Government servant. It is, therefore, clear that a widowed daughter in the house of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not included in the definition of "family". It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her fahter-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law on the death of her husband does not cease to be a part of the family. The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, in our opinion, arbitrariness, as presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, prima facie, would be irrational and arbitrary. The State, therefore, to consider this aspect and take appropriate steps so that a widowed daughter-in-law like a widowed daughter, is also entitled for consideration by way of compassionate appointment, if other criteria is satisfied.

7. The State Government has also now amended the U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 and has included a widowed daughter-in-law in the category of 'family'. The said amendment has also been published in the official gazette dated 22.12.2011. The term 'family' has been defined to include the following members:

"(C) "Family" shall include the following relations of the deceased Government servant:-

(i) wife or husband;

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughter-in-law;

(iv) unmarried brothers, unmarried, sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court;

provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the world "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

8. In view of the above legal proposition as well as the amendment in the Dying in Harness Rules, 1974 to include the widowed daughter-in-law in the definition of the term 'family', this writ petition is allowed and the impugned order dated 15.1.1998 passed by the Basic Shiksha Adhikari, Fatehpur is quashed. The petitioner shall be treated to be in service with all consequential benefits. The petitioner will also be entitled to the arrears of salary which shall be paid to her within two months from the date a certified copy of this order is received by the respondent no. 4-Basic Shiksha Adhikari, Fatehpur.

9. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.

Civil Misc. Writ Petition No. 6825 of 2004

Ashok Kumar ...Petitioner
Versus
Union of India Thru. Secy. Min. of Defence & Others ...Respondents

Counsel for the Petitioner:
Sri C.P.Srivastava
Sri Anubhav Chandra

Counsel for the Respondents:
S.S.C.
Sri Rakesh Sinha
Sri B.K. Singh Raghuvanshi
Sri K.C. Sinha

Constitution of India, Article 226-Appointment/Regularization-petitioner worked on post of oil engine driver-for 264 days-also appeared in Trade Test-claim of regularization based on circular dated 27.11.1992-providing regularization of those casual worker who were engaged prior to 07.06.1988 and are in services on dated 07.04.1991-admittedly disengaged from 16.11.1984-not coming within preview of one time regularization scheme-not entitled for any relief.

Held: Para 21 and 23

It is apparent from the above OM that consideration of casual workers for regularization was only as a one time measure, in consultation with the Director General Employment and Training, Ministry of Labour. Since the petitioner was not in service on 8th April, 1991, when this letter was issued he had no right of regularization.

As in the instant case, the petitioner has not been able to show that he has any legal right to be permanently absorbed and he was not eligible on the date one time concession was granted to such employee who were working as such the petition deserves to be dismissed.

Case law discussed:

JT 2006 (4) SC 420; Civil Misc. Writ Petition No. 40713 of 2002 Union of India through Secretary, Ministry of Defence, Government of India, New Delhi and others vs. Jagat Narain Mishra and another decided on 18.01.2008 ; Writ-A No. 12912 of 2006 Union of India through Secretary, Ministry of Defence, New Delhi and others vs. Shamshad Husain and another decided on 13.05.2010

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

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

2. This Civil Misc. Writ Petition has been filed by Ashok Kumar S/o Chottey Lal, R/o 101, R.A. Bazar, Post Office-GPO, Allahabad, for quashing the order dated 19th December 2002 (Annexure 1 to the writ petition), by which the representation of the petitioner for appointment on the post of Oil Engine Driver, was rejected. It was moved vide order of Central Administrative Tribunal, Allahabad dated 20th September, 2002, in O.A. No. 792 of 1996 filed by the petitioners Ashok Kumar and others vs. Union of India and others.

3. Brief facts of the case are that the petitioner had worked for a period of 264 days under the respondent No. 3, Commander Works Engineer, Military Engineering Services, Allahabad as Oil Engine Driver on casual basis. He received letter dated 21st November, 1987 to appear in trade test for appointment on the post of Oil Engine Driver, pursuant to which he appeared in the trade test and was selected, but his appointment was postponed for want of age relaxation on the ground that he was slightly over aged at the time of trade test and selection.

4. After some time of the declaration of the result, a ban was imposed by the Government on recruitment which was lifted in the year 1994 when the respondents decided that such casual workers as the petitioner who was initially sponsored through Employment Exchange and recruited having completed more than 240 days should be offered appointment against existing vacancies. After lifting of the ban on recruitment, petitioner again approached the office of the respondent No.3 for his appointment and submitted a representation dated 24th April, 1995.

5. The office of the respondent No. 3 appears to have informed the petitioner that his name has been sent to the higher authorities for relaxation of age and he will be appointed as soon as the relaxation is granted the Central Government, through Secretary, of Defence, Raksha Bhawan, New Delhi and the Engineer in Chief Military Engineering Services, Allahabad.

6. The case of the petitioner was wrongly forwarded to respondent No. 1 and 2 for age relaxation because the crucial date for determining the age limit should be the closing date for receipt of application from from candidates. The petitioner then preferred Original Application no. 792 of 1996, Ashok Kumar and others vs. Union of India and others, before the Central Administrative Tribunal, Additional Branch, Allahabad (hereinafter referred to as 'CAT') on 19th July, 1996.

7. The aforesaid Original Application was contested by the respondents and the CAT, after considering the pleading of parties, the documentary evidences available on record and the arguments advanced on behalf of the parties, directed the respondent to consider the case of the applicant and to pass a reasoned and speaking order within three months from the date of receipt of a copy of the aforesaid judgement dated 20th September, 2002 keeping in view the earlier judgement passed by it in O.A. No. 892 OF 1991 and O.A. No. 893 of 1991.

8. In view of the aforesaid, respondent no. 3 is allegedly to have passed an arbitrary order rejecting the claim of the petitioner vide judgment dated 20th September, 2002. Respondent No. 3 has rejected the claim of the petitioner who was not at parity to the cases of ***Awadh Kishore vs. Union of India and others and Jeet Narain and others vs. Union of India and others*** decided by the Central Administrative Tribunal in O.A. No. 892 of 1991 and O.A. No. 893 of 1991.The claim of the petitioner was also rejected on the ground that he has filed original application in the year 1996, which was barred by limitation.

9. Respondents have filed a counter affidavit alleging that the above civil misc. writ petition relates to regularization of casual services rendered by the petitioner during the year 1983-84 in the capacity of Oil Engine Driver under Garison Engineer (Air Force) Bamrauli and Garison Engineer (East) Allahabad. Respondents No.3 who looks after the supply of water/electricity construction and maintenance of buildings roads, and of furniture for the troops located in the area; that due to shortage of regular staff, certain Oil Engine Drivers were employed for specific work for limited period on need basis not exceeding 89 days in one spell to meet the emergent requirement of such works for troops and on completion of the specified period of work, the such casual employment/ engagement automatically comes to an end. Employees so engaged do not have any lien or right for further employment.

10. It is averred that the workers Union had represented to Army Head-quarter with regard to providing regular appointment to such casual workers. Pursuant thereof the Engineer-in-Chief of the Branch directed vide his letter dated 27 November, 1992 to lower formations for examining the cases of all casual workers fulfilling the following criteria and for submission of proposals for consideration of their cases for regular appointment by the Ministry of defence;

1. "Casual workers who had been initially inducted through employment exchange.

2. Casual workers who had worked for more than 240 days in two consecutive calender year and 180 days in one year."

11. Counsel for the petitioner on the basis of the above directions submits that the name of the petitioner along with all the eligible casual employees were forwarded to higher authorities for consideration. Subsequently the Chief Engineer Central Command, Lucknow, vide letter no. 901407/1/1518/EIC (2) dated 30.05.1994, intimated that cases for regularization of casual personnel had been referred to the Ministry of Defence, which had rejected the proposal on the ground that policy/instructions do not permit regularization of services of casual workers, who had been discharged earlier prior to

issue of DOPT office memorandumNo. 49019/2/86-Estt (C) dated 07.06.1988.

12. In the instant case, the petitioner was disengaged from services with effect from 16th November, 1984. As the case of the petitioner did not fall within the ambit of policy decision of Government of India, Department of Personnel Public Grievances and pension and department of personnel and training as well as O.Ms. dated 07.06.88 and 08.04.91 the writ deserves dismissal. The office memorandum dated 08.04.91 provides that casual workers recruited before 07.06.88 and who were in service on the date of issue of the instructions i.e. 08.04.1911 may be considered for regular appointment.

13. Reliance has been placed by him on paragraph 43 of the judgment rendered in ***Secretary, State of Karnataka and others vs. Umadevi and others JT 2006 (4) SC 420*** wherein the Apex Court held that a temporary employee cannot seek a writ of mandamus to compel the authorities to absorb or regularize them in service unless it is shown by them that legal duty is imposed by some statute in this regard or they have a legal right in this regard under any rule framed under such statute.

" 43. Normally, what is sought for by such temporary employees when they approach the Court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in ***Dr. Rai Shivendra Bahadur vs. The Governing Body of the Nalanda College.*** *That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved arty had a legal right under the statute or rule to enforce it. This classical position continues and* ***a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."***

14. We find that the petitioner was recruited in the year 1984 and he was not in service on the date of issue of the order i.e. 08.04.91. Admittedly the petitioner along with other candidates was trade tested by Board of officers for the purpose of ascertaining his suitability for appointment. No assurance was given to him with regard to appointment as ban on recruitment had been imposed by the Government w.e.f. 03.06.84. The proceedings of the Board of Officers in this regard therefore could not progress. Consequently, a doubt had arisen on the eligibility of some of the candidates who were trade tested and who were over aged at that time, hence in the circumstances, the matter was forwarded to the higher authorities vide letter dated 30.03.92 for obtaining Government sanction with regard to relaxation of age in such matter. However, the matter was remitted back under covering letter dated 23.05.92 clarifying that only those personnel who meet the criteria stated above i.e. they are otherwise eligible for regular appointment (a) only such casual workers who were recruited before 07.06.88 and who are in service on 08.04.91. (b) who had worked

for more than 240 days including broken period would be eligible for regularization (even if they were recruited otherwise through employment exchange and had crossed the upper age limit).Since the petitioner was disengaged from service with effect from 16.11.84 he could not be considered in these facts and circumstances.

15. A rejoinder affidavit was filed denying the contention of counter affidavit and reiterating the contents of the writ petition.

16. We have heard the petitioners counsel Sri Anubhav Chandra and learned Standing Counsel for the respondents.

17. It has been argued on behalf of petitioner on the basis of two decisions of this Court passed in ***Civil Misc. Writ Petition No. 40713 of 2002 Union of India through Secretary, Ministry of Defence, Government of India, New Delhi and others vs. Jagat Narain Mishra and another*** decided on 18.01.2008 and also the judgment rendered in ***Writ-A No. 12912 of 2006 Union of India through Secretary, Ministry of Defence, New Delhi and others vs. Shamshad Husain and another*** decided on 13.05.2010 that appointments had been made by the respondents by providing age relaxation to the candidates in these cases hence, the petitioner is also entitled for age relaxation on the basis of parity.

18. Counsel for the respondents argued that since the petitioner did not possess the eligibility criteria aforesaid, hence he was rightly not offered appointment and the representation made by him pursuant to the judgement rendered by the Central Administrative Tribunal, Allahabad. The order passed on the representation dated 19.12.2002 of the petitioner shows that it was rejected on that ground that:-

"Though he was in casual service before 7th June 1988, he was not in service on 8th April 1991."

19. Moreover, the petitioner has himself annexed certificate of experience as Annexure 2 to the writ petition which shows that he had worked for the following periods in the establishment:-

"1. 08.11.83 to 07.12.83
2. 22.12.83 to 18.02.84.
3. 16.04.84 to 13.07.84
4. 17.08.84 to 10.10.84 and
5. 07.12.84 to 05.01.85"

20. It is established from the own document of working period shown by the petitioner that he was not in service on 8th April 1991. Further paragraph 2 of Annexure No. 9 appended with the writ petition which is copy of O.M. No. 49014/4/98-Estt. (C) Ministry of Personnel, Public Grievances and Pension (Deptt of Personnel and Trg) dated 08th April 1991 mentions that:-

" Requests have now been received from various Ministries Department for allowing relaxation in the conditions of upper age limit and sponsorship through employment exchange for regularization of such casual employees against Group 'D' posts, who were recruited prior to 7.6.88 i.e. date of issue of guidelines. The matter has been considered and keeping in view the fact that the casual employees belong to the economically weaker section of the society and termination of their services will cause undue hardship to the, it has been decided as a one time measure in consultation with the Director General

Employment and Training, Ministry of Labour that casual workers recruited before 07.06.88 and who are in service on the date of issue of these instructions, may be considered for regular appointment to Group 'D' posts, in terms of the general instruction, even if they were recruited otherwise than through employment exchange and had crossed the upper age limit prescribed for the posts provided they are otherwise eligible for regular appointment in all other respects."

21. It is apparent from the above OM that consideration of casual workers for regularization was only as a one time measure, in consultation with the Director General Employment and Training, Ministry of Labour. Since the petitioner was not in service on 8th April, 1991, when this letter was issued he had no right of regularization.

22. The decisions referred to by the counsel for the petitioner are not applicable in this case as the petitioner in those cases were not in service on 8th April, 1991 the date on which the policy decision was enforced by the government. These decisions only refer to the relaxation of age, whereas it is clearly revealed in the impugned order that the application for regular appointment of the petitioner had not been rejected only on the grounds of his being over age at the time of trade test.

23. As in the instant case, the petitioner has not been able to show that he has any legal right to be permanently absorbed and he was not eligible on the date one time concession was granted to such employee who were working as such the petition deserves to be dismissed.

24. For all the reasons stated above, the writ petition is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.06.2012

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No. 7268 of 2010

Smt. Rama Kushwaha and others
...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Raghubir Singh

Counsel for the Respondents:
Govt. Advocate
Sri Dashrath Lal

Code of Criminal Procedure-Section 482-quashinfg of summoning order-offence under Section 498-A with 3/4 D.P. Act-Magistrate passed order on basis of material-recorded under Section 200 and 202 Cr.P.C.-does not form any illegality-mediation failed between the parties-application-dismissed-interim order vacated.

Held: Para 6 and 7

I have perused the summoning order dated 5.11.2009 which has been passed on the basis of the statement recorded under Sections 200 Cr.P.C. and 202 Cr.P.C. respectively. On the basis of the material available on record, the learned Magistrate found a prima facie case made out against the applicants has summoned them to face the trial in the aforesaid offences.

In my opinion, the summoning order dated 5.11.2009 does not suffer from any illegality nor it can be said to be

abuse of the process of the Court, hence no interference is called for by this Court in exercise of its inherent power under Section 482 Cr.P.C. The application lacks merit and is, accordingly, dismissed.

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

1. List is revised. None responds on behalf of the applicant as well as opp. party No.2.

2. Heard learned AGA for the State and perused the record.

3. The present matter has come up before this Court today on an application given by opp. party No.2 on 19.5.2012 addressed to Hon'ble the Chief Justice of this Court for vacating the interim order passed by this Court as she is being denied for early justice from this Court or she will be compelled to commit suicide failing to seek justice. The said application was referred by the Registrar General on 6.6.2012 to the In-charge of Mediation Centre. It further transpires that the said application was placed before the Hon'ble Chairman of Supervisory Committee AHCMCC, who vide order dated 20.6.2012 directed the Registrar (Listing) to get the case listed in the next cause list before the appropriate Court and also to apprise the Hon'ble Court hearing the matter with the contents of the contents of the application. Hence the present application under Section 482 Cr.P.C. has come up today before this Court for disposal, as already stated above that the mediation between the parties have failed before the Mediation Centre.

4. From the record, it transpires that the opp. party No.2, Smt. Seema, is the wife of applicant No.4. The matter being matrimonial dispute, was referred to the Mediation and Conciliation Centre by this Court vide order dated 10.3.2010. As per the report of the Mediation Centre dated 21.12.2010, which is on record of this case, the Mediation process between the husband and wife has been stated to be unsuccessful.

5. By means of this application, the applicant has challenged the summoning order dated 5.11.2009 passed by the C.J.M., Lalitpur in complaint case No.3404 of 2009 (Smt. Seema Devi Vs. Gajendra Singh and others), under Sections 498-A I.P.C. and D.P. Act, Police Station-Kotwali, District-Lalitpur.

6. I have perused the summoning order dated 5.11.2009 which has been passed on the basis of the statement recorded under Sections 200 Cr.P.C. and 202 Cr.P.C. respectively. On the basis of the material available on record, the learned Magistrate found a prima facie case made out against the applicants has summoned them to face the trial in the aforesaid offences.

7. In my opinion, the summoning order dated 5.11.2009 does not suffer from any illegality nor it can be said to be abuse of the process of the Court, hence no interference is called for by this Court in exercise of its inherent power under Section 482 Cr.P.C. The application lacks merit and is, accordingly, dismissed.

8. Interim order passed by this Court on 10.3.2010 is hereby vacated.

9. Office is directed to communicate the certified copy of this order to the trial Court as well as opp. party No.2 for follow up action immediately by Fax and other means.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2012

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE RAMESH SINHA, J.

Habeas Corpus Writ Petition No. - 11122 of 2010

Abrar Ahmad & Others ...Petitioner
Versus
Adheekshak Kendriya Karagar and others ...Respondents

Counsel for the Petitioner:
Sri Chandrakesh Mishra
Sri Daya Shankar Mishra

Counsel for the Respondents:
Govt. Advocate
Sri Amit Sthalekar
Sri Sanjay Kumar Singh
Sri Sudhir Mehrotra

Constitution of India, Article 226-Habeas Corpus Petition-seeking direction for formation of Special Bench dealing with criminal appeal, revisions-pending before High Court-and to declare the detention like petitioner contrary to constitution-petitioners having alternative remedy to apply for bail-apart from unless confinement-held-illegal-petition not maintainable-if such direction on such frivolous petitions issued-very chaotic situations be created and the unique position of chief Justice would be jeopardy-for last 3 years no body turnup to press this petition-inspite of repented call-itself example that petitioner more interested in hogging the lime light than agitating for right cause-petition dismissed.

Held: Para 6

We cannot direct the Court, under the circumstance we have just noted. It would not only be perilous to do but shall also be a dangerous and hazardous thing to happen to judicial system. The Chief Justice of any court is supposed to be sensitive enough to the pendency and it is further supposed that His Lordship is making all efforts to expedite the hearing alongwith his brother judges. Any one from the public might be public-spirited in highlighting the pendency but here in the present case we are of the opinion that the petitioners appears more interested in hogging the lime-light than raising and agitating a right cause. As regards the relief of issuing direction in the nature of mandamus, etc. to the court for its expeditious disposal of the cases, we do not find any reason existing for our indulgence.

Case law discussed:
Habeas Corpus petition no.30373 of 2009 Ram Lochan Yadav vs. State of U. P. and others

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. This petition is of the year 2010 and in spite of the same being listed is not being prosecuted by the petitioners, as none appears on their behalf on each day, the same is being called out, as such, we are forced to hear Sri Sudhir Saxena, who has been assisting the Court as the counsel of the High Court of Judicature at Allahabad.

2. The prayers which have been made in the present petition are as under :-

1.That this Court should issue writ in the nature of habeas corpus, order or direction so as to deciding or hearing the criminal revision petitions, criminal appeals of different nature and other such proceedings in which cases the persons are interested which are pending before this Court;

2.That the court should issue writ of habeas corpus and should declare the detention of the accused like the present

petitioners who have been convicted and should declare their further detention as against the Constitution and law and should direct their release.

3.This court should issue the writ of habeas corpus or of mandamus to itself and should direct the hearing of appeals pending against the judgments of conviction passed in the cases of Narcotic Drugs and Psychotropic Substance Act and further direct that appropriate Benches be constituted for granting reliefs as prayed for, in different proceedings.

4.Any other relief this Court deems fit to be granted, besides the last 4th relief, costs of the present proceedings.

3. The High Court of Judicature at Allahabad has filed replies to the petition and has submitted, as may appear from paragraph 4 onwards that statutory rights of appeal or of revision, being exercised by different convicted persons including the present petitioners appeal/ revision were duly filed before the appropriate benches and due process of law was observed. When the prayer for bail of the petitioners was taken up for hearing an appropriate orders either in the nature of rejection or allowing prayer have been passed. It was contended that as remedy was available under law, then the petition itself was not maintainable as the petitioners have already availed alternative, efficacious statutory remedy available to them. So far as the other prayers are concerned it was contended that the Rules of the Court specially Chapter XXI were clear as to how the Habeas Corpus petitions have to be filed and that clearly points out that unless the confinement was illegal, no such petition could be maintainable. It was further brought to our notice that similar prayer has been decided by the court in Habeas Corpus petition no.30373 of 2009 **Ram Lochan Yadav vs. State of U. P. and others** and it was held that a convict could not claim himself to be illegally detained as such no remedy could be availed by him under article 226 and 227 of the Constitution of India.

4. We might be sitting on the judicial side of the court but the administrative side of the court is also the judicial acts of the judges towards administration of justice. If each one of us start issuing direction on such frivolous petitions then not only a chaotic situation shall be created, but the very position of Hon'ble the Chief Justice which is unique in constitution of the High Court would also be put to jeopardy.

5. It is true that the petitioners have shown their concern about pendency of different petitions or matters yearwise before this Court but the petitioners lack of courage to point out that the sanctioned strength of this Court being of 160 judges, just one month prior from today, our number was only 75 which has now been increased to 86. This Court is still functioning almost under half of its strength and the pendency which has been pointed out by the petitioners simply appear a particular task as regards the number of Judges which this Court is having today on its bench. Pendency is not the creation of the Judges. This petition should itself be an example as to how the pendency is increased because after having filed the petition in 2010, the petitioners have not been at pains to ensure that the petition is properly prosecuted and the court is allowed to pass a proper order. This petition remained pending for two years, might be for some reasons, but since last week or so we had been grappling with the situation of

not having before with us the learned counsel for the petitioners so as to hearing the petition and disposing it of and could, legitimately, point out that this petition at least remained pending before us since the day it was listed before us. Only because the learned counsel was not appearing, the absence of the counsel has forced us to hear the matter finally and decide it.

6. We cannot direct the Court, under the circumstance we have just noted. It would not only be perilous to do but shall also be a dangerous and hazardous thing to happen to judicial system. The Chief Justice of any court is supposed to be sensitive enough to the pendency and it is further supposed that His Lordship is making all efforts to expedite the hearing alongwith his brother judges. Any one from the public might be public-spirited in highlighting the pendency but here in the present case we are of the opinion that the petitioners appears more interested in hogging the lime-light than raising and agitating a right cause. As regards the relief of issuing direction in the nature of mandamus, etc. to the court for its expeditious disposal of the cases, we do not find any reason existing for our indulgence.

7. We have reasons to believe that Hon'ble Judges of the Court are conscientious and they are making valiant efforts in their own way to dispose of as many number of cases, as could be allowed to be disposed of, by the parties.

8. While we were perusing the petition and hearing Sri Mehrotra, we had an impression coming out of the record and that the main attempt of the petitioners was to short circuit the legal procedure and to get a relief which could not be granted to them in the garb of this petition which has been filed under the heading of 'Habeas Corpus Petition'.

9. This petition, in our considered view, is out and out unnecessary and appears frivolous and the same is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 11725 of 1998

Yatender Kumar Singh ...Petitioner
Versus
The Commissioner Moradabad Division, Moradabad and others ...Respondents

Counsel for the Petitioner:
R.K.Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Article-226- correction Deed-deficiency of Rs. 1778.50/-with penalty-challenged on ground-stamp duty already paid at the time of Registration-consequent to partition-present deed merely correction-hence additional stamp duty can not be imposed-held-misconceived-consequent to partition certain portion came in share of petitioner-requires registration -demand of additional stamp-proper.

Held: Para 6

In the opinion of the Court, the subsequent transaction was a fresh transaction, inasmuch as, it was a transfer of a specific property. In the circumstances, this second documentation cannot be said to be a mere correction and was a complete transaction conferring distinct right, title

and interest to the petitioner over the same which has a different identity.

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

1. Heard learned counsel for the petitioner.

2. The contention raised is that the show cause notice issued to the petitioner was for a deficiency of Rs. 1778.50 paise only including penalty whereas while passing the order the Stamp Collector has enhanced the said amount to the tune of Rs. 23740/-

3. A revision was filed against the same which has been dismissed.

4. Learned counsel submits that the document in question was only a correction deed, and therefore, no further Stamp duty was leviable as concluded by the Stamp Collector. It was not a new document of transaction and as such any imposition of deficiency of Stamp and penalty is without authority in law. The revision has also been dismissed on the same erroneous grounds hence the impugned orders deserve to be set aside.

5. Having perused the facts on record what appears is that the petitioner had initially purchased the share of the vendor which became subject matter of a partition suit and after the property was partitioned a particular plot came to the share of the petitioner. The vendor accordingly executed a fresh deed which according to the petitioner was only a correction deed.

6. In the opinion of the Court, the subsequent transaction was a fresh transaction, inasmuch as, it was a transfer of a specific property. In the circumstances, this second documentation cannot be said to be a mere correction and was a complete transaction conferring distinct right, title and interest to the petitioner over the same which has a different identity.

7. In the circumstances, the Collector was justified in imposing the deficiency of Stamp Duty as well as the penalty.

8. The second issue relating to enhancement of the amount as against the show cause notice does require a reconsideration, inasmuch as, the petitioner had raised his objections and had also taken grounds in his grounds of revision. In the circumstances, the revisional order dated 10.12.1997 is set aside and the matter is remitted back to the revising authority to adjudicate this issue relating to the enhanced amount of deficiency as is alleged to have been imposed on the petitioner at the time of passing of the final order. The revising authority shall consider the same and pass orders as expeditiously as possible preferably within a period of three months. The amount already deposited by the petitioner shall be subject to the final outcome of the revision.

9. The writ petition is partly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 11842 of 1982

Vijai Vir Singh & Ors. ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Girdhar Nath
Sri K.R. Singh
Sri RPS Chauhan
Sri V.D. Chauhan
Sri Krishna Raj Singh
Sri Avadhesh Kumar

Counsel for the Respondents:
S.C.
Sri K.C. Dwivedi

Imposition of Ceiling on land Holding Act, 1960-Section 10 (2)-Exemption from surplus land-claimed on basis of gift deed-executed on 19.01.70-categorical finding of fact regarding continuation of possession of donor-both sons as minor-gift deed found to be sham transaction-ignoring such gift deed-held justified.

Held: Para 13

In the present case the Appellate Authority has discussed this aspect and has recorded a finding that cultivation and possession of land continued with the tenure holder and the gift deed was never acted upon. There is nothing on record in the present writ petition as also the pleadings to show that the aforesaid findings are perverse or contrary to record.

Case law discussed:
1994 Supp (3) SCC 702; 1979 AWC 187

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

1. Heard Sri Ravi Kant, Sr. Advocate assisted by Sri Vikram D.Chauhan for the petitioners and learned Standing Counsel for the respondents.

2. The writ petition is directed against the order dated 03.8.1982 passed by IV Addl. District Judge, Moradabad deciding Civil Appeals No.351 of 1976 and 350 of 1976 by a common judgment pursuant to the direction of this Court vide judgment dated 23.4.1980 in Writ Petitions No.4901 of 1978 and 4902 of 1978.

3. The ceiling proceedings were initiated under Section 10(2) of Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "Act 1960") against Sri Man Vir Singh, father of the petitioners. Besides Sri Man Vir Singh, petitioner's father, objections were also filed by petitioners stating that there are five children therefore every member is entitled for exemption of two hectares of land and that for certain land sale deeds were executed prior to 24.1.1971 hence that could not have been included with the holding of noticee so as to determine surplus land and that there is a valid gift of certain land before 24.1.1971 hence it is also liable to be excluded.

4. Prescribed Authority passed final order on 28.7.1976 determining 10.71 acres of irrigated land as surplus rejecting all their objections.

5. Two appeals were preferred by the petitioners and petitioner's father which were decided by Appellate Authority vide judgment dated 31.3.1978 and both the appeals were dismissed. The

petitioners brought the case to this Court in Writ Petition No.4901 of 1978 (Manvir Singh Vs. State of U.P. & Ors.) and 4102 of 1978 (Vijayveer Singh & Ors. Vs. State of U.P. & Ors.). Both the writ petitions were decided vide judgment dated 23.4.1980 and on two aspect the matter was remanded to Appellate Authority. The Court said as under:

"The learned counsel for parties next contended that the appellate court was wrong in thinking that Explanation II to Section 5(1) was applicable to the gift deed dated 19th January, 1970. The learned counsel has drawn my attention to the mutation order dated 18.5.1970, a true copy whereof is Annexure 3 to the Rejoinder Affidavit in Civil Misc. Writ Petition No.4901 of 1978 and the said order clearly shows that the mutation was done prior to 24th January 1971; therefore, it is obvious that Explanation II could not apply to the said document the appellate court was wrong in thinking that the said Explanation was attracted to the said document.

However, so far as the sale deed is concerned, the appellate court was right in holding that Explanation II of Section 5(1) was attracted to the facts of the case. In such findings, no interference can be made in this petition. The learned counsel next contended that so far as the sale deed dated 2nd July 1969 was concerned whereby some land was purchased by Vijayvir Singh. The adult son of the tenure-holder from one Shiv Ram, no discussion was made in the lower appellate court's judgment. This document was executed prior to 24th Jan. 1971 and even mutation is stated to have taken place before the said date.

Accordingly, I allow both the petitioners and quash the judgment of the appellate court dated 31.3.1978. So far as the aforesaid two deeds are concerned, namely the sale deed dated 2nd July, 1969 whereby Vijay Bir Singh purchased some land from Sri Ram and the gift deed dated 19th January, 1970 whereby the Tenure-holder gifted some land in favour of his three sons, the appellate court shall reconsider the controversy about the lands covered by the said two deeds in the light of the law laid down by the Division Bench in Yadunath Singh's case (1979 A.W.C.187 Yadunath Singh Vs. State of U.P. others) and thereafter it shall be decided whether the lands covered by the said two deeds should or should not be included in the holding of Manvir Singh, the tenure-holder. The ceiling area and surplus lands shall be determined thereafter. It is made clear that no other controversy shall be allowed to be raised before the appellate court hereafter. In the circumstances, there will be no order as to costs."

6. On remand, Appellate Authority passed the impugned order dated 3.8.1982 again dismissing appeals. Both the issues on which the matter was remanded have been decided against petitioners.

7. The first issue relates to the effect of sale deed dated 2.7.1969 whereby petitioner No.1 Vijay Singh purchased some land from Sri Ram and the second issue relates to the effect of gift deed dated 19.1.1970 whereby tenure holder Manvir Singh said to have gifted one-third share of 66 acres of land to his three sons i.e. the petitioners in the present writ petition including Sri Vijay Vir Singh, the eldest son claimed to be major at that time.

8. Sri Ravi Kant, learned Senior Advocate appearing for petitioners contended that once it is admitted that sale deed was executed before 24.1.1971, question whether sale deed was executed for valid consideration and bona fide, cannot be looked into by the ceiling authorities. They are bound to exclude the land transferred by such a sale deed executed before 24.1.1971. He drew support placing reliance on Apex Court's decision in **Ramadhar Singh Vs. Prescribed Authority & Ors., 1994 Supp (3) SCC 702.**

9. So far as exposition of law with reference to effect of Section 5(6) of Act 1960 is concerned, I do not admit any doubt on the proposition aforesaid, advanced by the learned Senior counsel. The law laid down by Apex Court in Ramadhar (supra) is also very clear. Once it is not in dispute that a sale deed was executed before 24.1.1971, i.e. prior to the appointed day, enquiry regarding genuity, bona fide consideration etc. in execution of sale deed, under sub section (6) of Section 5 is impermissible. The Apex Court said :

"The existence of the sale deed being not disputed and it having taken place, as said before, on February 24, 1969, prior to the appointed day that is January 24, 1971, the inquiry regarding the validity of the sale deed under sub section (6) of Section 5 was totally misplaced. Thereunder, as it appears to us, the appropriate authority had no jurisdiction to be put the validity of the sale deed to test since his jurisdiction arose only when the deed of transfer had been effected on or after the appointed day."

10. However, this is not the real issue in the case in hand for the reason that the tenure holder of the entire land admittedly was Sri Manvir Singh. His tenure holding was not found ancestral so as to result in share of his sons since their birth. It was the absolute tenure holding of Sri Manvir Singh. It is in this context while determining surplus land, Prescribed Authority could have given the maximum benefit of Section 5(3)(b) to tenure holder having family of more than five members by permitting each of the members exceeding five and for each of his adult sons who are not themselves tenure-holders or who hold less than two hectares of irrigated land, by giving two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two hectares, subject to a maximum of six hectares of such additional land. The Prescribed Authority since treated Sri Vijay Vir Singh, the petitioner no.1, a landless adult son and therefore allotted two hectares of additional land under Section 5 (3)(b) of the Act 1960. But if the land acquired by Sri Vijay Vir Singh vide sale deed dated 02.07.1969 is to be given due credit whereby he got, 1.38 acres of land that would mean that instead of 2 hectares of additional land, he could have been allowed only 0.68 acres of land more so as not to permit more than 2 hec. of surplus land for him as per the ceiling prescribed in Section 5(3)(b) of the Act 1960. This aspect has been considered by learned Appellate Authority in para 3 of the judgment, impugned in this writ petition. Sri Ravi Kant, learned counsel for the petitioner could not show any patent illegality therein warranting interference. In fact Section 5(6) of Act, 1960 has no application in the case in hand but here even if the land transferred

to Sri Vijay Vir Singh vide sale deed dated 2.7.1969 is taken care of, actual determination of land in any manner would make no difference.

11. Now coming to the second aspect about gift deed said to have been executed on 19.1.1970, this Court finds that Appellate Authority has also considered this issue very rightly and aptly. It has found that on the date of execution of said gift deed, two sons were minor being six and two years of age. Regarding one son claim to be major, the Court found that no evidence whatsoever was adduced to support it. This finding has not been challenged and even before this Court no material has been placed to show any infirmity therein. The Court below has found that throughout, the land said to have been gifted, remained in possession of Sri Man Vir Singh, who himself was cultivating the field since his children were either minor or otherwise not performing any cultivation. The gift deed was nothing but has been found to be a sham transaction.

12. This Court in **Yadunath Vs. State, 1979 AWC 187** has held, if Prescribed Authority finds that gift in question is really a sham transaction, and, that, actual title in the gift property did not pass to the donee i.e. the tenure-holder continued to remained in physical possession of the gifted property, it would be justified in ignoring such a gift deed but not otherwise.

13. In the present case the Appellate Authority has discussed this aspect and has recorded a finding that cultivation and possession of land continued with the tenure holder and the gift deed was never acted upon. There is nothing on record in the present writ petition as also the pleadings to show that the aforesaid findings are perverse or contrary to record.

14. In the circumstances, I do not find any error apparent on the fact of record in the impugned orders warranting interference.

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

16. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 16843 of 2011

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

Counsel for the Petitioner:
Sri S.K. Chaturvedi

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-charge of Additional Stamp duty and fines of equal amount with 12-1/2 % interest-on ground during course of inspection-ADM found ground floor used by Doctor as clinic-if the son of erstwhile landlord running clinic-can not effect the user of building-moreover part of building used by lawyer, Doctor and C.A. Is a vocation or occupation requiring special advance of education knowledge and skill predominately of an intellectual rather physical or manual-J.D.A. declares that area as residential-considering law of

Apex Court building remain residential in nature-demand of additional stamp treating commercial-held-illegal-demand notice-quashed.

Held: Para 22

In view of the aforesaid facts and circumstances, I hold that the authorities below have erred in treating the ground floor portion of the building in question to be commercial in nature for the reason that at one point of time a doctor's clinic or a pathology lab was being run from there. It is a part of a residential building.

Case law discussed:
(2000) 2 SCC 494

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

1. Petitioners are purchasers of two storied building vide registered sale deed dated 16.2.2009 for a sale consideration of Rs. 40 lacs, but for the purposes of payment of stamp duty petitioners disclosed its market value as Rs. 75lacs and paid stamp duty accordingly.

2. The authorities under the Indian Stamp Act, 1899 (hereinafter referred to as an 'Act'), on the report of the Sub-Registrar dated 19.2.2009 drew proceedings under Section 47-A of the Act for determination of deficiency in stamp duty, if any.

3. The Additional District Magistrate (for short ADM) inspected the property on 25.8.2009. On the basis of the above inspection and the report of the Sub-Registrar the authorities held that the property is partly in commercial use and partly is of residential nature. Accordingly, the market value of the ground floor portion of the building was assessed by treating it to be commercial for the reason it happened to be a clinic of a doctor and that of the first floor to be residential in nature. Thus, deficiency in stamp duty was determined and an equal amount of penalty was imposed. Both the amounts were directed to be recovered with interest @ 12.5% per mensum.

4. It is against the aforesaid two orders determining the deficiency in stamp duty and imposing penalty that the petitioners have invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India.

5. I have heard Sri S.K. Chaturvedi, learned counsel for the petitioners and Sri Nimai Das, learned Standing counsel for the respondents and with their consent proceeds to decide the petition finally on the basis of the pleadings exchanged.

6. There is no dispute that the property was inspected by the ADM himself on 25.8.2009 in the presence of petitioner no. 1 and the Lekhpal of the area. A sketch map of the location of the property was prepared and placed on record showing shops in vicinity to the ground floor of the building in question. The said inspection was made at the insistence of the petitioners and in their presence. Therefore, the map prepared on the inspection can not be discarded simply for the reason that it is not accompanied by any narrative or a report when the inspection was made by the authorized officer himself in accordance with Rule 7 of the Uttar Pradesh (Stamp Valuation of Property) Rules, 1997. However, the said inspection map is not conclusive of the fact that the ground floor portion happened to be a commercial establishment or that it existed in a commercial area.

7. It has been stated in the writ petition that under the master plan of the Jhansi Development Authority the area where the building is located has been notified as residential area and therefore no part of the building can be treated as commercial. The averments to this effect made in the writ petition have not been denied by the respondent in the counter affidavit. Therefore, the Court is left with no option but to treat the area as residential in nature.

8. In the above facts and circumstances the solitary question which arises for consideration is whether the ground floor portion of the building situated in a residential locality and which at one time was being used as a clinic or a pathology laboratory by the Doctor son of the erstwhile owner would be assessable to market value as a commercial property for the purposes of realizing stamp duty on the aforesaid sale deed.

9. Commercial property has not been defined under the Act but the Rules in Section 2 (d) explains "commercial building" as a commercial establishment or a shop as defined under Section 2 (4) and (16) respectively of the U.P. Dukan and Vanijya Adhisthan Adhiniyam, 1962 (hereinafter for short 'Adhiniyam').

10. In view of the above definition of the commercial building, property which is covered by the definition of commercial establishment or shop as contained in Section 2(4) and (16) respectively of the Adhiniyam alone shall be assessable to market value as commercial building. Section 2 (4) of the Adhiniyam defines commercial establishment to mean any premises, not being the premises of a factory, or a shop, wherein any trade, business, manufacture, or any work in connection with, or incidental or ancillary thereto, is carried on for profit and includes a premises wherein journalistic or printing work, or business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, or which is used as theater, cinema, or for any other public amusement or entertainment or where the clerical and other establishment of a factory, to whom the provisions of the Factories Act, 1948, do not apply.

11. The above definition of the 'commercial establishment' can be put in a simplified manner to mean:-

i) Any premises or a shop wherein any trade, business, manufacture is carried on or any work in connection with, or incidental or ancillary thereto is carried on for profit;

ii) Such premises includes a premises wherein journalistic or printing work, or business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on;

iii) Premises which is used as theater, cinema or for any other public amusement or entertainment.

iv) Any premises where clerical or other establishment of a factory to whom the provisions of Factories Act, 1948 do not apply. It excludes premises of a factory.

12. The ground floor portion of the building in question is certainly not covered by clause (ii) (iii) and (iv) above of the definition of the commercial establishment as referred to above.

13. Section 2(16) of the Adhiniyam defines 'shop' to mean any premises where any wholesale or retail trade or any business is carried on, or where services are rendered to customers and includes all offices, godowns or warehouse, which are used in connection with such trade or business.

14. The ground floor portion of the building is not a godown or a warehouse and to that extent would not be covered by the definition of the shop.

15. Now the issue is whether the ground floor portion of a building in a residential locality which at one time was used as a clinic/dispensary/pathology laboratory by a doctor would be a premises, shop or office where any trade either retail or wholesale or business is said to be carried or services are being rendered to customers.

16. The work of a Doctor, Chartered Accountant or a Lawyer or as a matter of fact any consultant is a profession which is distinct from any trade or business. Generally, profession is an activity which is carried by an individual by his personal skill, intelligence depending upon his character. It is not in the nature of any trade or business. It is a vocation or occupation requiring special, advance education, knowledge and skill predominantly of an intellectual nature rather than physical or manual.

17. The Supreme Court had an occasion to consider the nature of the activity of a private dispensary run by a a doctor vis-a-vis the definition of 'commercial establishment' contained in Section 2 (4) of the Bombay Shops and Establishment Act, 1948 which is para-materia to the definition of commercial establishment contained in Section 2 (4) of the Adhiniyam. Their Lordship's of the Supreme Court after in depth consideration of the matter held that the activity of a doctor is a profession and is not a commercial activity and therefore a private dispensary of a doctor is not a 'commercial establishment'.

18. A similar controversy arose before the Supreme Court in connection with lawyers office. The Supreme Court in considering the definition of commercial establishment as appearing in Section 2(4) of the Kerela Shops and Establishments Act went on to hold that office of lawyers or a firm of lawyers is not a commercial establishment within the meaning of the Act, as lawyers do not carry a trade or business nor do they render services to the customers.

19. In another case before the Supreme Court, the M.P. Electricity Board charged the Advocate with electricity tariff applicable to non domestic users by treating his office as a commercial activity. The Madhya Pradesh High Court held that the legal profession does not involve any commercial activity and therefore the rate applicable to commercial consumers can not be applied to a lawyer's office. The matter was taken up before the Supreme Court and the Supreme Court disagreeing with certain observations made in an earlier decision in the case of ***New Delhi Municipal Counsel Vs. Sohan Lal Sachdeva dead (2000) 2 SCC 494*** referred the matter to a larger Bench.

20. The larger Bench of the Supreme Court vide judgment and order dated 27.10.2005 held that advocate running his

office from his residence can not be charged additional tariff on commercial basis. However, in case office is run by him from an independent and commercial place, then he can not be exempted from the commercial tariff. Thus, a distinction was made between the office of a lawyer situate in a residential area or in a residence and the office situate in a commercial place.

21. The profession of lawyer and that of a doctor stand on equal footing as both are professionals and so is the lawyer's office and that of doctor's clinic/dispensary or even a pathology lab. The building in question is recognized by the respondents themselves partial as residential in nature, therefore the portion of the doctor's clinic/dispensary or lab situate therein would be a part of the residential premises. The area has also been notified by the Jhansi Development Authority as residential in nature. In short, the clinic/dispensary or laboratory is being run from a residential area and the portion would not be covered by commercial establishment or shop within the meaning of Sub-section (4) and 16 of Section 2 of the Adhiniyam and its market value is not determinable as a commercial building as provided under Rule 2 (d) of the Rules.

22. In view of the aforesaid facts and circumstances, I hold that the authorities below have erred in treating the ground floor portion of the building in question to be commercial in nature for the reason that at one point of time a doctor's clinic or a pathology lab was being run from there. It is a part of a residential building.

23. Accordingly, a writ of certiorari is issued quashing the impugned orders dated 10.3.2011 and 29.5.2010 passed by the Commissioner, Jhansi Division, Jhansi and Additional Collector respectively.

24. The writ petition is allowed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2012

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE RAMESH SINHA, J.

Habeas Corpus Writ Petition No. - 19037 of 2011

Smt. Saroj ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
A.G.A.
Sri B. Narain Singh
Sri N.D. Rai
Sri Sudhir Mehrotra

Constitution of India, Article 226-Habeas Corpus Petition-petitioner being 17-18 years old girl-as per statement made under Section 164 before Magistrate as well as per ossification test-more than 18 years-on her ownfree will living as husband and wife with her lover Manish-can not be act of "taking away" on "enticing away" but a case of elopement-can not be termed as an accused-direction of Magistrate sending Nari Niketan amounts to attack upon her freedom-held-order passed by Magistrate-as well as revisional court-

not sustainable-petition allowed with exumptory cost of Rs. 50,000/-towards wrongful confinement.

Held: Para 9

The learned Chief Judicial Magistrate was simply ignorant of the constitutional provisions on the procedure being reasonable and liberty being the most valuable fundamental right of a person. There is no age bar when it comes to valuing the liberty of a person be she a woman or be he a gent. Even a child has a right to avail of his or her liberties, of course within the caring custody of parents. No law could be upheld even in a case of a child if he is deprived of the right to life and valued the right to liberty. Might be, that the liberty of a child may be confined to the laps of his parents, but that lap is more wider than the whole world and the horizon of universe. No judicial authority on planet earth has such much of jurisdiction and power if so as to committing any encroachment upon the liberties of a person, if no law permits or the curtailment of his or her liberty.

Case law discussed:

AIR 1982 SC 1297

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. Even on repeated calls during revision of the list, none appears on behalf of the petitioner.

2. We have heard the learned AGA Sri Sudhir Mehrotra and Sri B. Narain Singh learned counsel appearing on behalf of respondent no. 5.

3. The case relates to confinement of petitioner Smt. Saroj, who was confined in Nari Niketan, Gorakhpur at the orders of the Chief Judicial Magistrate, Maharajganj passed in criminal case no. 1018 of 2010 which is dated 7th February, 2011, which order was upheld by the learned Session Judge by order dated 21st February, 2011 passed in Criminal Revision petition no. 24 of 2011 Manish Kumar vs. State of U.P. And others.

4. The background facts of the case was that the abovenoted case crime no. 1018 of 2010 under section 363 and 366 I.P.C. was registered on the basis of the written report of Ram Charan son of Jagroop, respondent no. 5, who happened to be the father of the above named lady petitioner, Smt. Saroj. The allegation was that when the petitioner went out of her house for attending to the classes, she did not come back and it appeared that the accused Manish son of Ram Bachan had probably taken on enticed her away.

5. It appears that the lady was recovered by the police and she was sent for medical examination as appears from Annexure 3 submitted by the Emergency Medical Officer, District Hospital, Maharajganj which report appears at pages 22 and 23 of the present petition. After carrying out the ossification test, it was found that the lady was aged about 18 years. The lady further appears produced before a Judicial Magistrate for recording her statement under section 164 Cr.P.C. and a copy of the same has been enclosed as Annexure 4 which appears at page 24 of the present petition. The lady stated that she had met accused Manish some 2 - 4 months ago and fell in love with that boy and further, that date of birth which was stated in her matriculation certificate was not correct and she was aged in between 17-18 years. The lady stated that her father was residing in Mumbai in connection with earning livelihood and her mother and she herself were residing at their native place. She stated that the

case which was lodged by her father was not correct and further that she herself gave a ring to the accused Manish Kumar, called him and came out of her school and thereafter took an auto rickshaw to go to Farendra and from there to different place. She stated that during her sojourn out of her parent's house and the village she and Manish resided as legally wedded couple and during that course she had sexual entercourse with the boy also. She stated that it might be that accused Manish was guilty of the offence, but still she wanted to remain as his wife and further that if he was in custody then she also should be at that particular palace and further that she would not like to go to Nari Niketan.

6. Thus, what appears from the statement of Smt. Saroj was that it could not be said that it was an act of '*taking away'* or *'enticing away'*, rather it could be a case of '*elopement*' as was indicated by the Supreme Court in **S. Varadarajan vs State of Madras AIR 1965 SC 942.** Their Lordship had distinguished the case of taking or enticing away from the mere act of elopement and in that connection had pointed out that even if a lady, who had not attained majority, i.e., age of 18 years herself goes out with a man of her own volition then it could not be said to be a case of either *'taking way'* or *'enticing away'* a minor woman out of the keeping of her lawful guardianship. Their Lordships further went on to hold that in such factual situation, no offence either under section 363, 366-A or 366 I.P.C. could be said to be made out. This is one aspect of the matter.

7. The lady had stated that the age indicated in her matriculation certificate was incorrect and that her age was in between 17-18 years. That statement appears getting support from the medical report which appears at pages 22 and 23 of the present petition. The medical report indicated as if the lady was aged about 18 years. We have regularly been pointing out that in the light of **Jaya Mala v. Home Secretary, Government of Jammu and Kashmir AIR 1982 SC 1297** an addition of three years is to be made to medically assessed age and thus, we could not have any hesitation in recording that the lady could be above 18 years of age.

8. The learned Chief Judicial Magistrate appears not considering these aspects of the matter. He further appears overlooking the ordinarily law which appears from common procedural aspects of criminal trial or prosecution that a victim of offence under section 363, 366-A, 366 or 376 I.P.C. could not be falling in the category of an accused and as such no court could be authorised under any provisions of law to authorise the detention of such a lady even into protective custody if the lady objects to such detention. Besides, a victim of such offences are often found treated as if she was a juvenile in conflict with law and till the enquiry on her juvanility is conducted she could not enjoy her freedom. The Bar also appears living with this wrong motion.

9. The learned Chief Judicial Magistrate was simply ignorant of the constitutional provisions on the procedure being reasonable and liberty being the most valuable fundamental right of a person. There is no age bar when it comes to valuing the liberty of a person be she a woman or be he a gent. Even a child has a right to avail of his or her liberties, of

course within the caring custody of parents. No law could be upheld even in a case of a child if he is deprived of the right to life and valued the right to liberty. Might be, that the liberty of a child may be confined to the laps of his parents, but that lap is more wider than the whole world and the horizon of universe. No judicial authority on planet earth has such much of jurisdiction and power if so as to committing any encroachment upon the liberties of a person, if no law permits or the curtailment of his or her liberty.

10. We regret that we should not point out these aspects of such matters as indicated to judicial officers of any rank, because we were living and continue to live under a very sanctified impression that judges of all ranks are supposed to be respectful to personal liberties of a person and in no case they should utilise their jurisdiction or wrongly apply the same to put in peril the liberties and freedom of a person.

11. We are sad to note that this gem of the principle on fundamental rights was simply missed out by the highest court of the district when the session court was also upholding the completely erroneous order passed by the Chief Judicial Magistrate.

12. At the bar today, we were informed by learned AGA, Sri Mehrotra, that the trial had ended and that the accused has been acquitted and he now is enjoying freedom of all sorts which could be enjoyed under the Constitution of India.

13. This is the saddest aspect of the trial of the case that the victim who was alleged to be kidnapped, is still confined within the precincts of a place which could never be proper place for the custody of a young lady. It is not unknown to us that Nari Niketans are as unsafe as any other places and definitely unsafe than the house of parents or a husband. We are pained to note that the trial judge while acquitting the accused also was aware of this fact and did not care for the poor girl who was illegally authorised to be detained in Nari Niketan, Gorakhpur.

14. We direct that she should be immediately released today itself by the end of the next hour so that she avail of her liberties.

15. The learned AGA is directed to communicate this order of ours verbally to the Superintendent, Nari Niketan, aforesaid that confinement of the lady is not only illegal but wrongful confinement and that should accrue criminal liability to any person.

16. We allow this petition and quash the order dated 7-2-2011 passed by the Chief Judicial Magistrate, Maharajganj and order dated 21-2-2011 passed by the Sessions Judge, Maharajganj.

17. The facts which were presented before us legitimately require that some compensation should be allowed to the lady for being wrongfully confined and we direct the State of U.P. to pay a compensation of Rs.50,000/- to Smt. Saroj wife of Manish Kumar after due identification of hers, within two months of the present order.

18. Let a copy of this order be handed over to the learned AGA for

communication to the authorities and for implementation of the present order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE HET SINGH YADAV, J.

Civil Misc. Writ Petition No. 24625 of 2009

Raj Kumar ...Petitioner
Versus
The Central Administration Tribunal & Others ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar Singh

Counsel for the Respondents:
Sri Govind Saran
Sr Sushil Kumar Srivastava

Constitution of India, Article 226-Right to appointment-petitioner being selected as Pro ASM-given four opportunities to clear Practical Training-but remained failed-original application rejected on ground of un-explained delay of 8 years-Post of Pro-ASM is a post of responsibility-petitioner being wholly incompetent can not be allowed further opportunity-where the recruitment process came to an end in the year 1999.

Held: Para 11 and 12

In our considered opinion no further opportunity is required to be given to the petitioner for clearing the training of the post of Pro ASM now after lapse of almost fourteen years of his passing of the written examination and interview particularly when no rule provides for repeated opportunities. The Original Application was moved by the petitioner after about eight years for which there is no reasonable explanation in law . He even did not move any application alongwith the O.A. for condonation of delay showing sufficient cause for delay.

For all these reasons stated above, there is no illegality or infirmity in the impugned order dated 27.3.2009 passed by the Central Administrative Tribunal rejecting to him and to appoint him as Pro ASM. We, therefore, uphold the impugned orders dated 27.3.2009 of the Tribunal as well as the order dated 17.8.2007 passed by the authority.

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

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

2. The petitioner challenges the impugned order dated 17.8.2007 passed by the Divisional Railway Manager, Jhansi and order dated 27.3.2009 passed by Central Administrative Tribunal, Allahabad in O.A. No. 314 (D) of 2009, Raj Kumar Vs. UIO and others. He also prayed for mandamus commanding the respondents to permit him to work as Assistant Station Master (hereinafter referred as Pro ASM) and pay him his salary of the post regularly.

3. The brief facts of the case are that notification no. RRB/BPL/5/96 was published in Newspaper by the Railway Recruitment Board, Bhopal inviting applications for appointments on various posts in the Railway. The petitioner submitted his application for consideration of his candidature on the post of Pro ASM. After clearing written examination and interview he was selected for the post of Pro Asm on 3.12.1997 at Faridabad and was required to undergo practical training at Bhusawal before appointment. A Perusal of the communication dated 17.8.2005 (Annexure No. 5 to the writ petition)

shows that representation of the petitioner to the Minister of Railways was not considered favourably as inspite of four opportunities provided to him to clear the training he could not do so. Hence he was not appointed appointment on the said post. Letter dated 17.8.2005 reads thus:

''माननीय रेल मंत्री, भारत सरकार, नई दिल्ली को उपरोक्त विषय में आपके द्वारा भेजा गया प्रतिवेदन दिनॉक निल इस कार्यालय को प्राप्त हुआ है।

इस सम्बन्ध में आपको सूचित किया जाता है कि प्रो0 एएसएम के आरम्भिक प्रशिक्षण में आपको चार बार भुसावल भेजा गया था एवं उक्त प्रशिक्षण में प्रत्येक बार अनुत्तीर्ण घोषित होने के कारण आपको सहायक स्टेशन मास्टर के पद पर पद स्थापित नहीं किया गया था।''

4. It appears that the petitioner then moved representations dated 5.3.2008 to the General Manager, North Central Rly, Allahabad as well as to the Senior Divisional Personnel Officer North Central Rly. Jhansi for granting him one more opportunity to clear the training for the post of Pro ASM but no heed is alleged to have been paid to his representations. Therefore he moved the Central Administrative Tribunal, Allahabad by means of O.A. No. 314 (D) of 2009, Raj Kumar Vs. Union of India and others which was dismissed by the Tribunal vide its judgement dated 27.3.2009 in the following terms:

"Registry to place Sl. No. of inward Register (Register NO.1 as the number of O.A. Qualified capital letter "D" and after year capital letter 'N.R' within brackets.

2.Accordingly to scrutiny report and Note of Registry dated 26.3.2009, O.A. Is time barred about 08 years and no application for condonation of delay, as required under law, has been filed.

3.It is clear from the facts stated in the O.A. That the applicant has been representing before the respondents from 26.6.2003 and thereafter on 05.03.2008 and 20.11.2008. He again waited without 'good reason' from 20.11.2008 i.e. for about 07 months. According to the applicant, in response to representation dated 26.6.2003, he received certain information from the respondents vide letter dated 17.8.2007, this does not furnish adequate explanation to show that the applicant has acted diligently and bonafide. His conduct in this respect, is casual, negligence and full of apathy.

4.Cause of action, if any, arose in the year 1997, thereafter in 2003 and then in 2007. since the period of limitation prescribed under section 21 of Administrative Tribunal Act 1985, is only one year from the date of initial causes of action arose', the O.A. (un-numbered) is highly time barred and it is accordingly dismissed.

5.There will be no order as to costs."

5. Learned counsel for the petitioner submits that if the petitioner is provided with one more opportunity to appear in the training he would clear it and that his third opportunity got wasted as he could not appear in that training due to reason that he was suffering from Typhoid at that time therefore he should be given another opportunity to appear in the training in lieu thereof.

6. Learned counsel for the respondents submits that the petitioner had already been granted four opportunities to clear the training but he could not do so and that a person can not be granted infinite opportunities till he

clears the training particularly when other subsequent batches were coming for training hence it is not be possible to give training to one person time and again merely because he was not able to clear it.

7. We have considered the submissions advanced by the parties .

8. On perusal of the judgement passed by the Central Administrative Tribunal, firstly which has recorded a finding unexplained delay of eight years in moving the Tribunal. It is settled that repeated representations do not relax the limitation under the statutory provisions under section 21 of Central Administrative Tribunal. The limitation to move the Central Administrative Tribunal is one year from the date of cause of action arises.

9. Moreover, in the facts and circumstances of the case, we are of the considered view that the petitioner though was able to clear the written examination and interview for post of Pro ASM but failed to clear the training even though opportunities were granted to him by the Railways at least four times. Thus he having failed in the training examination for which the recruitment process is already over in 1999, the respondents can not be directed to appoint the petitioner now on the post of Pro ASM by giving him another opportunity the fifth time to clear the training. As regards his contention that during the period third opportunity was granted to him he suffered from Typhoid and as such could not appear in the examination to clear it, hence was entitled to another opportunity, we can only say that railway had been liberal enough to give him another opportunity the fourth time to clear the training examination in which he again failed.

10. To our mind the petitioner is a through incompetent person as far as passing of practical training is concerned. The post of Pro ASM is a post of responsibility involving rail traffic. Lives of passengers and accident free running of trains requires a competent person. They cannot be put in the hands of such persons who are not able to clear even basic training for the post even in four attempt.

11. In our considered opinion no further opportunity is required to be given to the petitioner for clearing the training of the post of Pro ASM now after lapse of almost fourteen years of his passing of the written examination and interview particularly when no rule provides for repeated opportunities. The Original Application was moved by the petitioner after about eight years for which there is no reasonable explanation in law . He even did not move any application alongwith the O.A. for condonation of delay showing sufficient cause for delay.

12. For all these reasons stated above, there is no illegality or infirmity in the impugned order dated 27.3.2009 passed by the Central Administrative Tribunal rejecting to him and to appoint him as Pro ASM. We, therefore, uphold the impugned orders dated 27.3.2009 of the Tribunal as well as the order dated 17.8.2007 passed by the authority.

13. The writ petition accordingly dismissed.

14. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Civil Misc. Writ Petition No. 25711 of 2010

Surendra Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Siddharth Singh

Counsel for the Respondents:
C.S.C.

U.P. Pension Cases (Submission, Disposal and avoidance of delay) Rule 1995-Rule-7-readwith Civil Services Regulations-Regulation-357-A-Disciplinary proceeding-charge sheet submitted on 13.06.07-reply submitted on 27.06.07-inquiry report submitted on 19.12.07-show cause notice given 22.01.08 replied on 14.02.09-after 6 month of retirement-addition chargesheet given on 08.10.09-Governor granted sanction on 18.12.09-after two month of additional chargesheet-allegation related to 2002-03 (more than 4 years)-Departmental inquiry not concluded within 6 month of retirement-additional chargesheet quashed-earlier proceeding not concluded within 6 month-stood dropped-entitled for entire retirement benefit with 10 % interest.

Held: Para 15 and 16

Further the U.P. Pension Cases (Submission, disposal and Avoidance of Delay)Rules, 1995 provides for the time schedule in which the inquiry is to be completed. As per Rule 17, the pending departmental proceeding as against the retired employee must be completed within six months after his retirement. As such, the disciplinary proceedings or enquiry, if any, on the basis of the charge sheet dated 13.6.2007 should have been concluded up to six months after the retirement of the petitioner, which would be up to 30th September, 2009. Further the sanction was granted by the Governor after the said date on 18.12.2009, which was in contravention of the aforesaid rules.

In view of what has been stated in the foregoing paragraphs, the issuance of the additional charge sheet dated 8.10.2009 is liable to be quashed, being violative of Rule 351-A of the Civil Service Regulation. Further the order dated 18.12.2009 is also liable to be quashed being in contravention of Rule 17 of U.P. Pension Cases (Submission, Disposal and Avoidance of Delay) Rules, 1995.

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

1. The petitioner was appointed as Assistant Sales Tax Officer on 15.10.1976. He was served with a charge sheet on 13.6.2007, to which the petitioner submitted his reply on 27.9.2007. Thereafter the Enquiry Officer submitted his report dated 19.12.2007 exonerating the petitioner in 5 out of 6 charges and one charge No. 2 was partially proved against the petitioner. A show cause notice was issued to the petitioner on 22.1.2008, to which the petitioner submitted his detailed reply on 14.2.2008

2. However, no order of punishment was passed against the petitioner by the Disciplinary Authority and in the meantime on 31.3.2009 the petitioner has retired from the post of Deputy Commissioner Trade Tax. However, after six months of the retirement, an additional charge sheet dated 8.10.2009 was issued to the

petitioner. After two months on 18.12.2009, the petitioner was served with a letter indicating that the Governor has been pleased to direct that the disciplinary proceedings against the petitioner dated 13.6.2007 will continue even after his retirement.

3. By means of this writ petition the petitioner has prayed for quashing of the Additional Charge sheet dated 18.10.2009 as well as the communication of the order dated 18.12.2009 mentioning that the disciplinary proceedings will continue.

4. It has further been prayed that the directions be issued to the respondents to conclude the disciplinary proceedings instituted on 13.6.2007 in terms of the enquiry report dated 19.12.2007 and to pay to the petitioner his pension and other retiral dues.

5. It is specifically stated that when the writ petition was filed in May, 2010, an interim order was passed on 7.5.2010 directing the respondents to pay the petitioner his provisional pension regularly and that the entire amount of the provident fund and the remaining amount of gratuity, leave encashment and other dues shall be subject to the decision of the writ petition or the departmental enquiry.

6. It is submitted by the learned counsel for the petitioner that it is stated in the counter affidavit that in compliance of the said interim order dated 7.5.2010, the provisional pension for six months was paid to the petitioner besides the payment of 90% of the GPF amount. After the initial payment of provisional pension for six months, no further payment has been made by the respondents and two years have passed since the passing of the interim order.

7. We heard Shri Siddharth Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents and perused the record.

8. The first question to be decided in the petition is as to whether the fresh charge sheet can be issued against the petitioner regarding same instance, which took place more than four years prior to the retirement of the petitioner. Admittedly, the petitioner retired on 31.3.2009.

9. The other question to be decided is as to whether the as per the U.P. Pension Cases (Submission, Disposal and Avoidance of Delay) Rules, 1995, the pending departmental proceeding as against the retired employee must be competed within six months after retirement.

10. The admitted position is that the petitioner retired from service on 31.3.2009. Prior to that the petitioner had been exonerated in 5 out of 6 charges vide the enquiry report dated 19.12.2007. In respect of one charge, it was said to be partly proved against the petitioner, to which the petitioner submitted his reply on 14.2.2008 and no order has been passed by the Disciplinary Authority. The additional charge sheet dated 8.10.2009 was not with regard to same instances on which the initial charge sheet dated 13.6.2007 had been issued.

11. As such the contention of the learned counsel for the petitioner that the same amounts to initiation of fresh

departmental proceedings against the petitione, has force. Rule 351-A of the Civil Service Regulations provides that no departmental proceedings can be instituted against the officer after his retirement without the sanction of the Governor.

12. It further provides that no such departmental proceedings can be instituted in respect of an event which took place not more than four years before the institution of such proceedings.

13. In the present case the additional charge sheet was issued to the petitioner after his retirement on 8.10.2009 whereas the sanction of the Governor for continuance of the disciplinary proceedings dated 13.3.2007 was obtained on 18.12.2009, which was more than two months after the issuance of the charge sheet.

14. A perusal of the additional charge sheet dated 8.10.2009 goes to show that all the charges against the petitioner related to the year 2002-2003, which were of more than four years prior to retirement of the petitioner or the issuance of the additional charge sheet dated 8.10.2009.

15. Further the U.P. Pension Cases (Submission, disposal and Avoidance of Delay)Rules, 1995 provides for the time schedule in which the inquiry is to be completed. As per Rule 17, the pending departmental proceeding as against the retired employee must be completed within six months after his retirement. As such, the disciplinary proceedings or enquiry, if any, on the basis of the charge sheet dated 13.6.2007 should have been concluded up to six months after the retirement of the petitioner, which would be up to 30th September, 2009. Further the sanction was granted by the Governor after the said date on 18.12.2009, which was in contravention of the aforesaid rules.

16. In view of what has been stated in the foregoing paragraphs, the issuance of the additional charge sheet dated 8.10.2009 is liable to be quashed, being violative of Rule 351-A of the Civil Service Regulation. Further the order dated 18.12.2009 is also liable to be quashed being in contravention of Rule 17 of U.P. Pension Cases (Submission, Disposal and Avoidance of Delay) Rules, 1995.

17. Accordingly the writ petition is allowed. The additional charge sheet dated 8.10.2009 and the order dated 18.12.2009 are hereby quashed.

18. In view of the fact that the proceedings in pursuance of the charge sheet dated 13.6.2007 have not been concluded even after six months from the date of retirement of the petitioner, the same shall stand dropped. The respondents are directed to pay the entire retiral dues to the petitioner within three months from the date of filing of a certified copy of this order before them. The respondents are also liable to pay interest to the petitioner at the rate of 10% on the amount when it actually falls due till the actual payment is made. Respondents are also directed to pay pension to the petitioner regularly, month by month.

ORIGINAL JURISDICTION
CIVIL. SIDE
DATED: ALLAHABAD 25.05.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 26189 of 2012

Km. Sandhya Singh and others
...Petitioners
Versus
State of U.P.Thru. Secy. and others
...Respondents

Counsel for the Petitioner:
Sri Babu Nandan Singh

Counsel for the Respondents:
C.S.C.

Constituting of India-Article, 226-Right to appointment-petitioner being selected on post of Shiksha Mitra in 2009-not send on training due to ban dated 02.06.2010-considering two conflicting views of Division Bench-holding ban not applicable retrospectively another even being selected due to ban have no right-question referred to Larger Bench.

Held: Para 6

There is a conflict in the law laid down by the two Division Benches, as noticed above, it has become necessary for this Court to refer the following questions for being referred to a Larger Bench:

(a) Whether mere selection on a date prior to 02.06.2010 will confer a right upon the incumbent to claim appointment and for being sent for training as Shiksha Mitra even after the State Government has imposed a ban on such appointment on 02.06.2010 and the scheme of Shiksha Mitra itself has been dropped by the State Government.

(b) Whether the law laid down by the Division Bench in the case of Sonika Verma vs. State of U.P. and others (supra) or the law laid down by the Division Benches in the case of Km. Rekha Singh vs. State of U.P. and others (supra) and in the case of Pankaj Kumar vs. State of U.P. and others (supra) is the correct law.

Case law discussed:
2011 (1) ESC 681; 1998 (1) ESC, 74 (SC); Km. Rekha Singh vs. State of U.P. and others (Special Appeal Defective No. 276 of 2011)

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

1. Petitioners, who are five in number, claim to have been selected for the post of Shiksha Mitra in the year 2009. However, they were neither appointed as Shiksha Mitra nor were sent for training despite the said selection. In the meantime the State Government imposed a ban on appointment of Shiksha Mitra because of the change in the policy vide Government Order dated 02.06.2010. The scheme in respect of Shiksha Mitra itself has been done away with and by means of the subsequent government order it has been provided that no further training to Shiksha Mitras shall be provided.

2. According to the petitioners one Sheela Yadav who was also selected similarly like the petitioner filed Civil Misc. Writ Petition No. 15796 of 2011 before the High Court. The writ petition was dismissed on 29.03.2011 because of the ban imposed by the State Government vide Government Order dated 02.06.2010.

3. Sheela Yadav, not being satisfied, filed Special Appeal No. 765 of 2011. The appeal has been allowed by the Division Bench of the High Court and it has been held that since selections had taken place earlier in point of time to the

imposition of the ban, the same shall not apply as it was prospective in nature. The selected Shiksha Mitra was directed to be sent for training.

4. According to the petitioner against the order of the Division Bench, Special Leave to Appeal was filed before the Apex Court which has been dismissed on 09.01.2012. Petitioners have, therefore, come up before this Court for similar orders being issued.

5. On behalf of the respondents it is stated that although the Division Bench in the case of **Sonika Verms vs. State of U.P. and others reported in 2011 (1) ESC, 681** has held that the Government Order dated 02.06.2010 is prospective in nature, therefore, will not prohibit the appointment and training of Shiksha Mitra who had been selected earlier to the imposition of ban. Yet two other Division Benches of the Lucknow Bench of this Court in the case of **Km. Rekha Singh vs. State of U.P. and others (Special Appeal Defective No. 276 of 2011)** and in the case of **Pankaj Kumar vs. State of U.P. and others (Special Appeal Defective No. 373 of 2011 dated 13.05.2011)** have explained that mere selection does not confer any rights as laid down by the Apex Court in the case of **Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneshwar vs. Harprasad and others** reported in **1998 (1) ESC, 74 (SC).** The Division Benches have gone on to hold that with the imposition of the ban on 02.06.2010, there can be no further direction for appointment or training being imparted to the Shiksha Mitra who were selected earlier. The relevant portion of the judgments of the said Division Benches of this Court are as follows:

"**Special Appeal Defective No. 276 of 2011 :**

In the instant case, even before the petitioner-appellant could be appointed and sent for training, on account of intervening circumstance, the State took a stand that they are no longer making appointment to the post of Shiksha Mitra in view of the promulgation of the Right to Education Act, 2009.

The selection only gives a right to the selected candidate to be considered. It is always open to the respondents to give satisfactory reasons for not making appointment. In the instant case, the respondents have given sufficient reason as to why the appointment could not be made. That reason cannot be faulted, namely that after promulgation of the Right to Education Act, 2009, they are no longer making any appointment to the post of Shiksha Mitra"

"Special Appeal Defective No. 373 of 2011 :

Learned counsel for appellant also referred to a judgment rendered by the Division Bench headed by Hon'ble Chief Justice in his favour. However, in the said judgment, the appellant had been denied appointment on the ground that other similarly situated 22 candidates who have been selected with him, had been given appointment. In this case also, the Division Bench has held that Govt. Order 2..6.2010 was to apply prospectively.

Learned counsel for Basic Shiksha Adhikari, Sri Jyotinjay Verma referred to

another Division Bench judgment of Allahabad Bench wherein it was held that fresh engagement requires a prior training, therefore, when no engagement as such has been made, the case of the appellant will be hit by Govt. Order dated 2nd June, 2010. Sri Verma also submitted that though process of file started between 2008 and 2011 but the appellant did not raise any issue till 2011 or in any case before issuance of Circular of 2010. Learned Counsel also submitted that State Govt. has issued further two Circulars dated 22.2.2011 and 1.3.2011 but reiterates the first Circular dated 2.6.2010. Thus, intention of the Govt. Order has been made amply clear that there was a ban on engagement after first Circular dated 2.6.2010. Similarly, learned State Counsel also referred to two judgments of the Supreme Court. In the judgment reported in AIR 1963 Supreme Court, page 395, Bachhittar Singh v. State of Punjab and another, a Constitution Bench laid down the basic law that even in a case where policy decision was taken as a part of cabinet noting in favour of a candidate yet if the same was not communicated to the person, it did not create any enforceable right. Learned State Counsel further referred to a judgment in Tagin Litin v. State of Arunachal Pradesh, 1996(5) SCC 83 wherein it was laid down that till appointment letter was issued or it was in transit, no enforceable right could be created.

In the instant case, though the learned counsel for appellant has annexed the recommendation of Village Level Committee but there is nothing to show that recommendation went up further or District Level Committee caused delay by sitting over the file. Moreover, the appellant had all the opportunity to agitate the issue before the date of issuance of Circular on 2.6.2010 but instead the writ petition was filed in 2011. Besides, there is nothing from the record to show that a decision was taken in favour of the petitioner or there was nothing like appointment letter for attending training under the Right to Education Act. Moreover, another Division Bench of Allahabad Bench in Tarun Prakash Pandey (supra), has categorically held that till the training was completed, there was no question of engagement as Shiksha Mitra and since there was ban on engagement even such candidates who had completed training after appointment, had no right to be communicated"

6. There is a conflict in the law laid down by the two Division Benches, as noticed above, it has become necessary for this Court to refer the following questions for being referred to a Larger Bench :

(a) Whether mere selection on a date prior to 02.06.2010 will confer a right upon the incumbent to claim appointment and for being sent for training as Shiksha Mitra even after the State Government has imposed a ban on such appointment on 02.06.2010 and the scheme of Shiksha Mitra itself has been dropped by the State Government.

(b) Whether the law laid down by the Division Bench in the case of Sonika Verma vs. State of U.P. and others (supra) or the law laid down by the Division Benches in the case of Km. Rekha Singh vs. State of U.P. and others (supra) and in the case of Pankaj Kumar vs. State of U.P. and others (supra) is the correct law.

7. Since similar matters are coming up before this Court repeatedly, it would be appropriate that the said question may be answered by the Larger Bench, at the earliest possible. Let the papers be laid immediately before the Hon'ble The Chief Justice for constituting the Larger Bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 32242 of 1997
And
Civil Misc Writ Petition No. 974 of 1998

M/S. Upper Doab Sugar Mills Muzaffarnagar ...Petitioner
Versus
Prescribed Authority and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh
Sri S.D.Singh

Counsel for the Respondents:
S.C.
Sri Deepak Verma
Sri S.K. Srivastava

Payment of Wages Act, 1936-Section-15 (2) and (3)-Power of Prescribes Authority-where the relationship of employer and employee seriously disputed-the claimant being worker of contractor/Transporter have no concern with petition-such question is not incidental but a substantive jurisdictional issue-order passed by Prescribed Authority-beyond jurisdiction.

Held: Para 16

To my mind, this issue is not incidental to the question of deduction or delayed payment but a condition precedent to attract the very provisions of Act 1936. Therefore, in a case where the very relationship is under a serious cloud, and needs a detailed but exclusive discussion, it is beyond the jurisdiction of Prescribed Authority under Section 15(1) and (2) of the Act 1936 and has to be adjudicated in appropriate regular proceedings by raising an industrial dispute. It could not have been decided by an authority under Section 15(1) while entering a claim under Section 15(2) and assuming jurisdiction upon itself to decide the said issue. It is infact not an incidental but a substantial jurisdictional issue relating to very applicability of Act 1936. Hence this could not have been decided by Prescribed Authority under Section 15 of Act 1936. The impugned orders passed in both the writ petitions are thus wholly without jurisdiction.

Case law discussed:
1980 (40) FLR 362

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

1. Heard Sri S.D.Singh, learned counsel for the petitioner. Names of Sri Deepak Verma and Sri S.K.Srivastava are shown in the cause list for the respondents but none has appeared though the case has been called in revised except learned Standing Counsel for the respondents.

2. The common question that arises in both the matters relates to the very jurisdiction of the Prescribed Authority under Payment of Wages Act, 1936 (hereinafter referred to as "Act 1936") to decide the issue relating to relationship of employer and employee and therefore, are being heard and decided by this common judgment.

3. The writ petition is directed against order dated 7.7.1997 (Annexure 7 to the writ petition No.32242 of 1997), and

18.8.1997 (Annexure 1 to the writ petition No.974 of 1998) passed by Prescribed Authority under the Act 1936 allowing the claim of workmen regarding alleged non payment/deduction/delayed payment of their wages along with compensation.

4. Sri S.D.Singh, learned counsel for the petitioner contended that claim under Section 15 of Act 1936 can be registered by an 'employee' against 'employer' complaining about delayed or non payment of wages or wrongful deduction but when there is a serious dispute about very existence of relationship of 'employer' and 'employee' between the claimant and alleged employer, such an issue cannot be decided in a summary proceeding under Section 15 of Act 1936 Act but for the said purpose claimant has to invoke jurisdiction of regular adjudication of dispute before Labour Disputes Adjudicatory Forum by raising an Industrial Dispute. In such matters, Prescribed Authority ought not to proceed to decide seriously disputed question of employer and employee relationship. Such a audacity on the part of Prescribed Authority is wholly unwaranted and render his order without jurisdiction. The impugned order therefore cannot sustain. He placed reliance on a Division Bench decision of this Court in **M/s E.Hill & Company (P) Ltd., Mirzapur Vs. City Magistrate Mirzapur & Anr., 1980(40) FLR 362.**

5. Learned Standing Counsel defended the impugned order relying on the findings recorded therein and said that no interference is called for in this matter.

6. The term "employee" has not been defined as such under the Act 1936 but Section 2 contains the definition of "employed person" and "employer" as under:

"(i) "employed person" includes the legal representative of a deceased employed person;

(i-a) "employer" includes the legal representative of a deceased employer;"

7. Both the definitions are inclusive but do not throw any light on the meaning of these terms as such.

8. Similarly the term "wages" is defined in Section 2(vi) reads as under:

"wages means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes-

(a) any remuneration payment under any award or settlement between the parties or other of a Court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for

the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,
but does not include-

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;

(2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government;

(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(4) any travelling allowance or the value of any travelling concession;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

9. This definition of 'wages' is pari materia with the similar definition of "wages" in 2(h) of the Contract Labour (Regulation and Abolition) Act, 1970. Section 3 of Act 1936 provides that, every employer is under an obligation for payment of all wages to persons employed by him. Section 15(2) of Act 1936 entitles a person employed but not paid his wages or when there is any unauthorized deduction or delay in payment, to make an application before the Prescribed Authority i.e. authority notified under sub section (1) of Section 15 for claiming such wages. A reading of sub-section (2) and (3) of Section 15 makes it clear that the application can be moved not only against the employer but if there is any other person responsible for payment of wages of such employed person, application can be filed under Section 15(2) against such person also. To attract Section 15(2) of Act 1936, two things therefore must exist namely a person 'employee' and another person who had employed such person, namely the "employer" or other person responsible for payment of wages under Section 3 i.e. to whom the employer has authorized.

10. The limited scope of adjudication under Section 15 is regarding the claim arising out of deduction or delayed payment and not any other issue namely, the very existence of relationship of employer and employee or the question whether the claimant was a person employed or not or that the person against whom such a claim is raised whether he is an employer or the person authorized for payment or not. If in a given case an issue other than that of alleged deduction or delay in payment arises and the competent authority finds that such an issue has been raised only to defeat an otherwise bona fide claim and in its view the incidental issue raised is bogus, fictitious, superfluous or fanciful, it can continue to proceed to decide the matter but where a serious, bona fide, genuine dispute

of relationship arises, this Court is also of the view that such an issue cannot be adjudicated by the authorities under Section 15(1) and (2) of the Act, 1936, lacking inherent jurisdiction to entertain such a dispute.

11. In **Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Anr.,** the Apex Court observed that a jurisdiction conferred upon the authority under Section 15 is limited and exclusive, therefore, if any incidental issue is taken for adjudication, it must take care that under the guise of deciding incidental issue, limited jurisdiction is not unreasonably or unduly extended.

12. I find that to the same effect is the view taken by the Division Bench in **M/s E. Hill & Company (P) Ltd. (supra)** wherein this Court considered the words "all matters incidental to such claims" and quoted from **Shri Ambika Mills Co. Ltd. (supra)** as under:

"if a claim is made by an employee on the ground of alleged illegal deduction or alleged delay in payment of wages several relevant facts would fall to be considered. Is the applicant an employee of the opponent ?; and that refers to the subsistence of the relation between the employer and the employee. If the said fact is admitted, then the next question would be what are the terms of employment ? Is there any contract of employment in writing or is the contract oral ? If that is not a point of dispute between the parties then it would be necessary to enquire what are the terms of the admitted contract. In some cases a question may arise whether the contract which was subsisting at one time had ceased to subsist and the relationship of employer and employee had come to an end at the relevant period. In regard to an illegal deduction a question may arise whether the lock-out declared by the employer is legal or illegal. In regard to contracts of service some times parties may be at variance and may set up rival contracts, and in such a case it may be necessary to enquire which contract was in existence at the relevant time."

13. After referring to various authorities of Apex Court and various other Courts, the Division Bench in **M/s E.Hill & Co. (P) Ltd. (supra)** said:

"A mere denial of existence of the relationship of employer and employee may not oust the jurisdiction of the Authority under the Payment of Wages Act but where a serious controversy is raised about the existence, continuance or emergence of a fresh contract of employment, the Authority would have no jurisdiction to entertain and try the claim as the dispute may involve decisions of complicated questions of law and fact. In the present case the employee admittedly tendered his resignation, whatever be circumstances under which this step was taken. The resignation was admittedly accepted but the parties are at variance whether the employee was reinstated. According to the petitioner the letter of reinstatement was a forgery. It is not a case of mere denial of the contract of service. The very foundation for the claim of wages is in dispute. Such a question cannot possibly be characterised as incidental to the claim for wages. The Authority illegally assumed jurisdiction to entertain and try the claim of respondent No. 2 under Section 15 of the Act."

14. In the present case it was clearly pleaded by petitioners in the written statement filed before Prescribed authority that petitioners had engaged a Transporter

for carrying out their goods. The concerned claimants were employees of Transporter who was under contract with the petitioner for transportation purpose only. There was no relationship of employer and employee with the claimants vis a vis the petitioner.

15. The petitioner, in both the writ petitions, is a sugar industry engaged in the manufacturing of sugar for which it purchased sugarcane from sugarcane grower and is engaged in all incidental activities for manufacturing of sugar. From the impugned order it is evident that the question of very existence of relationship of employer and employee was seriously pressed before Prescribed Authority. In its entire order it has discussed the issue of relationship, with reference to various other statutes and authorities. It has also referred to some evidences on this aspect. Apparently the Prescribed Authority, in the case in hand, has decided a seriously disputed question regarding the very existence of relationship of employer and employee between the petitioner and the claimants.

16. To my mind, this issue is not incidental to the question of deduction or delayed payment but a condition precedent to attract the very provisions of Act 1936. Therefore, in a case where the very relationship is under a serious cloud, and needs a detailed but exclusive discussion, it is beyond the jurisdiction of Prescribed Authority under Section 15(1) and (2) of the Act 1936 and has to be adjudicated in appropriate regular proceedings by raising an industrial dispute. It could not have been decided by an authority under Section 15(1) while entering a claim under Section 15(2) and assuming jurisdiction upon itself to decide the said issue. It is infact not an incidental but a substantial jurisdictional issue relating to very applicability of Act 1936. Hence this could not have been decided by Prescribed Authority under Section 15 of Act 1936. The impugned orders passed in both the writ petitions are thus wholly without jurisdiction.

17. The writ petitions, in the facts and circumstances of the case, as discussed above, are allowed. The impugned orders dated 7.7.1997 (Annexure 7 to the writ petition No.32242 of 1997), and 18.8.1997 (Annexure 1 to the writ petition No.974 of 1998) passed by Prescribed Authority are hereby quashed.

18. However, this order shall not preclude the concerned respondents workman to take recourse to such proceedings as permissible in law for enforcing their claim, if any.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 40478 of 1997

Vinod Prakash Chaturvedi ...Petitioner
Versus
Presiding Officer. Labour Court & others ...Respondents

Counsel or the Petitioner:
Sri S.N. Dubey

Counsel for the Respondents:
C.S.C.
Sri Ranjit Saxena

U.P. Industrial Tribunal Act, 1947 Section 33-C(2)-claim of extra wages on discharge of extra duties-Labour Court refused on ground issue requires adjudication-scope of 33 confined with

"pre-existing benefits or right"-employer never admitted claim of workman-labour court rightly declined to interfere.

Held: Para 10

In view of above exposition of law and considering the fact that claim raised by the petitioner i.e. the workman was never admitted by the employer, I do not find that the Tribunal has committed any mistake, legal or otherwise, in rejecting the application of petitioner under Section 33-C (2) of Central Act, 1947 warranting interference in exercise of power under Article 226. The order impugned in this writ petition deserves to be sustained.

Case law discussed:

AIR 2006 SC 1784; AIR 2008 SC 968; 2008 (7) SCC 22; 2005 (8) SCC 58; Writ Petition No. 11653 of 2004 (State of U.P. through Superintending Engineer Vs. Ram Sahai and another)

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

1. Heard Sri S.N. Dubey, learned counsel for petitioner and perused the record.

2. Writ petition is directed against the order dated 17.7.1997 passed by Labour Court rejecting petitioner's application moved under Section 33-C (2) of Industrial Disputes Act, 1947 (hereinafter referred to as "Central Act, 1947") claiming extra wages on the ground that he has discharged extra duties. The Labour Court has observed that matter includes certain issues which require investigation into disputed questions of fact and that adjudication is not permissible on an application under Section 33-C (2) of Central Act, 1947 but it should be adjudicated in a regular manner by raising industrial dispute under Section 4-K of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "U.P. Act, 1947") or Section 10 (1) (c) of Central Act, 1947.

3. It is not the case of petitioner that the various factual issues were already admitted by the employer or adjudicated by competent authority/Court. He, therefore, could not show any existing right to claim extra wages and the claim which he raised included certain issues required to be adjudicated which could have been done only on a reference made under Section Section 4-K of U.P. Act, 1947 or Section 10 (1) (c) of Central Act, 1947.

4. The scope of Section 33-C has come up for consideration time and again before the Courts and some of principles enunciated therein may be reminded hereat for analysing whether the order impugned in the writ petition is valid or not.

5. Section 33 commences with the words "whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money". Thus, the first condition which has to be shown to exist in order to attract Section 33-C(2) is the entitlement of workman to receive any money or benefit capable of computation in terms of money. The factum of its entitlement has to be an admitted fact but where the very entitlement is in dispute, Section 33-C (2), in my view, would not be attracted for the reason that further question that workman was entitled to receive the said amount but was denied would not arise.

6. In **Union of India Vs. Kankuben AIR 2006 SC 1784** the Apex Court referring to earlier decisions observed that the benefit sought to be enforced under Section 33-C(2) is necessarily "a pre-existing benefit or one flowing from a pre

existing-right". The difference between a pre-existing right and benefit on the one hand and right and benefit which is considered just and fair on the other hand is vital. The former comes within the ambit of Section 33-C(2) while latter does not.

7. Considering pari materia provision in Section 6-H of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "U.P. Act, 1947") in **Hamdard Laboratories Vs. Deputy Labour Commissioner AIR 2008 SC 968**, the Court said that Section 6-H (1) of the U.P. Act, 1947 is in the nature of an execution proceedings. It can be invoked inter alia in the event any money is due to workman under an award but cannot be invoked in a case where ordinarily an industrial dispute can be raised and can be referred to any adjudication by the appropriate Government to an industrial Court. The authorities under Section 6-H cannot determine any complicated question of law and also cannot determine in regard to existence of legal right. The Court went to observe that it cannot usurp the jurisdiction of the State Government under Section 11-B of the U.P. Act, 1947. The Court said in paras 38 and 39 that the jurisdiction of Labour Court under Section 33-C(2) is limited and if existence of right itself is disputed the provisions may not be held to have any application.

8. In another decision in **D. Krishnan and another Vs. Special Officer, Vellore Coop. S.M. and another, 2008(7) SCC 22** with reference to Section 33-C (2) the Court said that the proceedings therein are in the nature of execution and pre-supposses some adjudication leading to determination of a right which has to be enforced. By simply referring to certain documents a disputed claim cannot be allowed to be executed without any adjudication thereof. The Court referred to its earlier decision in **State of U.P. and another Vs. Brijpal Singh, 2005(8) SCC 58** wherein it had held as under:

"It is well settled that the workman can proceed under Section 33-C(2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages (P) Ltd. vs. Suresh Chand held that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer."

9. Following the above authorities, this Court already taking the same view in **Writ Petition No. 11653 of 2004 (State of U.P. through Superintending Engineer Vs. Ram Sahai and another)** decided on 25.5.2011 allowed the writ petition and quashed the order of Tribunal entertaining and allowing a disputed claim of workman by means of application under Section 33-C (2) of Central Act, 1947.

10. In view of above exposition of law and considering the fact that claim raised by

the petitioner i.e. the workman was never admitted by the employer, I do not find that the Tribunal has committed any mistake, legal or otherwise, in rejecting the application of petitioner under Section 33-C (2) of Central Act, 1947 warranting interference in exercise of power under Article 226. The order impugned in this writ petition deserves to be sustained.

11. Writ petition is dismissed.

12. However, it is made clear this order shall not preclude the petitioner from taking such recourse as available to him in law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.05.2012

BEFORE
THE HON'BLE SURENDRA KUMAR, J.

Criminal Misc. Application No. - 41851 of 2011

Virendra Jaiswal ...Petitioner
Versus
The State of U.P. ...Respondents

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

Counsel for the Respondents:
Govt.Advocate

Code of Criminal Procedure Section-451-release of Revolver-applicant being accused under section 307-enlarged on bail-application-on ground it was never used in incident-refused merely on pendnecy of criminal case-ignoring direction of Apex Court in S.A. Desai Case-without disclosing any reason for refusal-held-not sustainable-quashed-direction to release the same within 3 weak given.

Held: Para 8

Taking into consideration the entire facts and circumstances, I come to the conclusion that the orders of the courts below can not be left to stand. No good reason has been assigned for refusing the prayer for release of the said revolver. Accordingly, the order dated 14.7.2011 passed by the learned Judicial Magistrate Ist, Court No. 24, Gorakhpur and the order dated 15.11.2011 passed by the learned Sessions Judge, Gorakhpur are quashed.

Case law discussed:
2003 (46) A.C.C. 223: AIR 2003 SC 638; 2003 (47) A.C.C. 1086

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

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

2. The applicant Virendra Jaiswal has filed this application under Section 482 Cr.P.C. challenging the order dated 14.7.2011 passed by the learned Judicial Magistrate Ist, Court No. 24, Gorakhpur in Crime No. 140 of 2011-State Vs. Ravi Jaiswal, under Section 307 I.P.C., Police Station Khajani, District Gorakhpur and the order dated 15.11.2011 passed by the learned Sessions Judge, Gorakhpur in Criminal Revision No. 272 of 2011-Virendra Jaiswal Vs. State of U.P., whereby release of the revolver of the applicant has been refused.

3. It appears that the said revolver is involved in Case Crime No. 140 of 2011-State Vs. Ravi Jaiswal, under Section 307 I.P.C., Police Station Khajani, District Gorakhpur. The allegation is that the instant revolver was used in the aforesaid offence and, therefore, it was refused to be released.

4. Learned counsel for the applicant has submitted that the applicant is owner of 32 bore Revolver No. 21569 F.G. being Licence No. 5487 and the said revolver was never used in any criminal activities and no complaint was ever made against him. The applicant was involved in the said case and he was granted bail by the court below in Case Crime No. 140 of 2011-State Vs. Ravi Jaiswal, under Section 307 I.P.C., Police Station Khajani, District Gorakhpur but the said revolver has been refused to be released.

5. The next submission of the learned counsel for the applicant is that the applicant had produced the relevant documents before the learned Sessions Judge to substantiate his ownership. There is no dispute regarding ownership but on account of pendency of criminal case, he has been refused release.

6. I have gone through the record as well as the impugned orders. The Hon'ble Apex Court, in the case of ***Sunderbhai Ambalal Desai Vs. State of Gujrat, 2003 (46) A.C.C. 223: AIR 2003 SC 638*** has clearly held that the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes:- (i) Owner of the article would not suffer because of its remaining unused,(ii) Court or the police would not be required to keep the article in safe custody, (iii) If the proper panchnama before handing over article is prepared, that can be used in evidence instead of its production before the court during the trial, if necessary, (iv) This jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles. The Apex Court has clearly held that appropriate orders should be passed immediately because keeping it at police station for a long period would only result in decay of the article. The court should ensure that the article will be produced if and when required by taking bond, guarantee or security.

In the aforesaid judgment it has also been held that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month.

7. Similar view has been followed in a number of decisions of this Court as well. ***Mohd. Shamim Khan Vs. State of U.P., 2004, A.C.C. (48), 605. In the case of Tulsi Rajak Vs. State of Jharkhand, 2004, Criminal Law Journal, 2450,*** it was held that truck lying in the police station for more than one year resulted in heavy loss of the petitioner and in the circumstances, the High Court permitted to release the vehicle. In ***Gurnam Singh and another Vs. State of Uttaranchal, 2003 (47) A.C.C., 1086,*** it was held that what so ever the situation be, there is no use to keep the seized vehicle at the police station or court campus for a long period, the Magistrate should pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle, if required at any point of time.

8. Taking into consideration the entire facts and circumstances, I come to the conclusion that the orders of the courts below can not be left to stand. No good reason has been assigned for refusing the prayer for release of the said

revolver. Accordingly, the order dated 14.7.2011 passed by the learned Judicial Magistrate Ist, Court No. 24, Gorakhpur and the order dated 15.11.2011 passed by the learned Sessions Judge, Gorakhpur are quashed. The learned Magistrate concerned is directed to release the said revolver in favour of the applicant within a period of three weeks from the date, a certified copy of this order is produced before him after taking adequate guarantee/ security of the said revolver from the applicant and also an undertaking that the revolver will not be disposed of during pendency of the criminal proceedings.

9. With the aforesaid observations, this application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petitions No. 42938 of 1997

Kharanan ...Petitioner
Versus
Presiding Officer, Labour Court, Varanasi and others ...Respondents

Counsel for the Petitioner
Sri Shesh Kumar

Counsel for the Respondents
C.S.C.
Sri Neeraj Tripathi
Sri Samir Sharma

Constitution of India, Article 226-writ against order of Labor Court-deciding reference against work man-who was engaged as casual worker on post of fitter but discharged duty of Stenographer-entitled for nomenclature and pay as of stenographer-as a matter of fact workman claiming promotion-employer had already given all benefit of the post on which was engaged-Labour Court rightly decided reference against workman-petition dismissed.

Held:Para 8

In the case in hand, Labour Court has clearly observed that since at no point of time, petitioner was appointed as Stenographer by the competent authority following procedure prescribed in law, he was not entitled for post, pay scale and other benefits on the post of Stenographer. It is not the case of petitioner that he was appointed by competent authority in accordance with law on the post of Stenographer at any point of time. He was substantively appointed as Fitter and was given dues payable on the said post. In the circumstances, I do not find any error apparent on the face of record in the impugned award warranting interference.

Case law discussed:
1985 UPLBEC 539; 2009 LabIC 905=2008 JT (10) 578; 1966 (2) SCR 465; Civil Misc. Writ Petition No. Case 17313 of 1997 (U.P.S.R.T.C. & Another Vs, Brij Nandan Lal & Others) decided on 2.5.2012; 2007 (4) ESC 2261 (Alld) (DB); 2007 (2) ESC 987; AIR 1993 SC 2273; 1991 Supple (2) SCC 733

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

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

2. Writ petition is directed against the award dated 28.11.1996 in adjudication case no. 51 of 1994 answering the reference against the workman. It appears that workman claimed designation, pay scale and other benefits on the post of Stenographer though he was substantively appointed as Fitter. It is contended that for

sufficiently long time respondent-Corporation has taken work from petitioner as Stenographer therefore he was entitled for appointment on the post of Stenographer i.e. designation, pay scale etc. Reliance is placed on a decision of this Court in **Lallan Prasad Patel Vs. District Inspector of Schools, Deoria and others 1985 UPLBEC 539.**

3. However, in my view in fact workman has claimed promotion since admittedly he was never appointed on the post of Stenographer by the competent authority following the procedure prescribed in Statute.

4. The dispute in the present case, in my view, is akin and covered by the law laid down by Apex Court in **U.P. State Sugar & Cane Vs. Chini Mill Mazdoor Sangh 2009 LabIC 905=2008 JT (10) 578** wherein the workmen were employed as seasonal workman but they claimed to have worked throughout the year like permanent workmen and hence claimed benefit of a permanent workmen. The reference was made "whether the workman can be declared permanent". The Labour Court answered the reference in favour of the workmen. The Apex Court referring its earlier Constitution Bench judgment in **Management of Brook Bond India (P) Limited Vs. Workmen, 1966 (2) SCR 465**; and **Workmen Employed by Hindustan Lever Ltd. (supra),** held in paras 21, 22, 23 and 24 as under:

"21. That there are different categories of workers employed in the sugar industries, and, in particular, during the crushing season, is not disputed by any of the parties. It is not denied that apart from the permanent workmen, the other categories of workmen are employed during the crushing season which begins in the month of October in a given year and continues till the month of April of the following year. It is the period during which the sugarcane crop is harvested, and, thereafter, transported to different mills where they are crushed for production of sugar. Admittedly, as will appear from Standing Order No. 2, a muster- roll of all employees, who are not permanent, is maintained by the different sugar mills and at the beginning of the crushing season the seasonal labour who had worked during the previous crushing season are asked to join their duties for the crushing season in their old jobs. It is also not denied that the pay scales of the different categories of workmen are different.

22. It has been submitted on behalf of the appellant that even when the seasonal workmen are employed during the off season they are paid the same wages as are paid to them during the crushing season, which is one of the basic distinctions between them and permanent workmen who are on the rolls of the sugar mills. It is also an admitted position that, in terms of the policy followed by the sugar mills, promotions are given from one category to the next higher category depending on the number of vacancies as are available at a given point of time. Even in the instant case, of the 39 workmen referred to in the terms of reference, 13 had been made permanent by the appellant which supports the case of the appellant that promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour Court.

23. We are in agreement with the views expressed by the Constitution Bench

of this Court in the Brooke Bond case (supra) as also those of the three-Judge Bench in the Hindustan Lever case (supra). In our view, this is not a case of fitment depending on the nature of the work performed, but a case of promotion as and when vacancies are available. Both the Labour Court as well as the High Court do not appear to have considered this aspect of the matter with the attention it deserved and proceeded on the basis that this was a case where the respondent Nos. 2-15 had been denied their right to be categorised as permanent workmen on account of the nature of the work performed by them throughout the year. The High Court has, in fact, merely relied on the findings of the Labour Court without independently applying its mind to the said aspect of the matter.

24. We, therefore, accept the submissions advanced by Mr. Upadhyay and allow the appeal. The Award of the Labour Court and the Judgment of the High Court impugned in this appeal, are set aside."

5. Following the above authorities, this Court in **Civil Misc. Writ Petition No. Case 17313 of 1997 (U.P.S.R.T.C. & Another Vs, Brij Nandan Lal & Others)** decided on 2.5.2012 set aside the award of Labour Court observing as under:

"The mere fact that a person is discharging duties of a particular nature would not entitle him to claim a right to the post or else other benefits of that post unless he is appointed on the post in accordance with the procedure prescribed in law."

6. The reliance placed by learned counsel for petitioner on **Lallan Prasad Patel (supra)** is misplaced since the facts of that case show that the same has no application to the case in hand. There the incumbent was actually appointed, though on ad hoc basis as officiating Principal in the upgraded Junior High School. The factum of appointment having not been disputed, the Court held that a person officiating on the post of Principal is entitled to receive salary of Principal. However, when a person is not appointed but simply permitted to discharge duties on a higher post, salary is not payable.

7. In Somewhat similar circumstances, a Division Bench of this Court (in which I was also a Member) in **Daljeet Singh Vs. State of U.P. & others 2007 (4) ESC 2261 (Alld) (DB),** following the various authorities of Apex Court on the subject as well as a Division Bench judgment of this Court (in which I was also a Member) in **Smt. Vijay Rani Vs. Regional Inspectress of Girls School 2007 (2) ESC 987** observed as under:

"There is another aspect of the matter, We do not find from the record that the management passed any order at any point of time appointing petitioner as officiating or ad hoc principal of the College. The petitioner has placed on record only a document showing that he took over charge of the office of Principal on 20.11.2002 and the letter dated 2.12.2002 issued by the University approving his working as Principal of the College. Therefore, at the best, the petitioner was allowed to discharge duties on the post of Principal whereafter he took over charge on 20.11.2002. Appointment to a post on ad-hoc or officiating basis is different than mere discharge of duties of a higher post. In other words, the petitioner was only given current duty charge in addition to the substantive post he held. In our view, this

arrangement did not result in promotion to the post of which the current duty charge was handed over to the petitioner unless an order of promotion is issued by the management in favour of the petitioner.

*In **State of Haryana Vs. S.M. Sharma AIR 1993 SC 2273**, the Chief Administrator of the Board entrusted Sri S.M. Sharma, with the current duty charge of the post of Executive Engineer, which was subsequently withdrawn as a result of his transfer to other post. He challenged the said order stating that it amounts to reversion. The Apex Court held that Sri Sharma was only having current duty charge of the post of Executive Engineer and was never promoted or appointed to the aforesaid post. Therefore, on transfer to some other post, it did not result in reversion from the post of Executive Engineer.*

*A somewhat similar situation occurred in **Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, 1991 Supple (2) SCC 733** and the Apex Court observed as under:-*

"The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion."

It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it sometimes. However the person continues to hold substantive lower post and only discharges duties of the higher post essentially as a stop-gap arrangement. A further contention was raised that such an arrangement if continued for a very long period it would give some kind of right to continue on the post but negativing such contention, it was held that an in-charge arrangement is neither recognition nor is necessarily based on seniority and therefore, no rights, equities and expectations can be built upon it.

*A similar issue was considered by a Division Bench of this court also in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools Region-I, Meerut and others, 2007 (2) ESC 987** and this Court held as under:-*

"In this view of the matter, the Petitioner-Appellant has miserably failed to show that the management ever appointed her as officiating Principal of the College and, therefore, we hold that she was only allowed to discharge duties of the office of officiating Principal, but was never appointed/promoted by the management as officiating Principal of the College. The question no. 1 is answered and decided accordingly."

8. In the case in hand, Labour Court has clearly observed that since at no point of time, petitioner was appointed as Stenographer by the competent authority following procedure prescribed in law, he was not entitled for post, pay scale and other benefits on the post of Stenographer. It is not the case of petitioner that he was appointed by competent authority in accordance with law on the post of Stenographer at any point of time. He was substantively appointed as Fitter and was given dues payable on the said post. In the

circumstances, I do not find any error apparent on the face of record in the impugned award warranting interference.

9. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2012

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

Civil Misc. Writ Petition No. 48448 of 2008

Narendra Kumar Singh ...Petitioner
Versus
D.I.O.S., Allahabad & others ...Respondents

Counsel for the Petitioner:
Sri Praful Bahadur
Sri Rakesh Bahadur

Counsel for the Respondents:
C.S.C
Sri Waqar Haider Zaidi
Sri Anoop Mishra
Sri Salil Srivastava

Constitution of India, Article 226- payment of salary-petitioner when engaged as Assistant Teacher (Sanskrit)- was merely Intermediate-the institution junior high school-upgraded in 1978- brought under payment of salary on ground not possessing minimum qualification-defence of G.O. dated 10.03.1997 as appointment made prior 1978 not required training-admittedly petitioner now possessing degree of M.A. With B.Ed.-after deceleration of dying cadre of C.T. Grade-became L.T. Grade teacher-entitled for salary.

Held: Para 13

Thus in view of the settled legal position that where such appointments between 1971 to 1978 could not be said to be erroneous only because the only qualification possessed by the Assistant Teacher was Intermediate and approval had not been obtained from the District Basic Education Officer.

Case law discussed:
1999 (3) UPLBEC 2379

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

1. By means of this writ petition the petitioner is challenging the order dated 12.6.2008 by which matter relating to the appointment of the petitioner as Assistant Teacher (Sanskrit) in the institution, namely, Adarsh Uchhatar Madhyamik Vidyalaya, Malihan, Phoolpur, Allahabad and the approval granted to his appointment has been rejected by the Director Education(Secondary) U.P..

2. The case of the petitioner is that he was appointed in the C.T.grade for teaching Junior High School classes in the Adarsh Uchhatar Madhyamik Vidyalaya, Malihan, Phoolpur, Allahabad on 1.7.1976. The petitioner was an Intermediate pass on the date of appointment. The institution was granted permanent recognition as Junior High School with effect from 1.7.1978 vide letter dated 11.8.1978 of the Deputy Director of Education, Region-IV, Allahabad. Thereafter, it was upgraded to High School level in terms of Section 7A of the U.P. Intermediate Education Act, 1921 and granted permanent recognition by Additional Secretary, Secondary Education Board by his letter dated 24.12.1980. The petitioner has also passed M.A. B.Ed and claims to be entitled to the L.T.grade in terms of the G.O. dated 3.9.1986 upon the declaration of the C.T. Grade to be dying cadre.

3. When he was not paid salary, the petitioner along with two others filed

Civil Misc.Writ Petition No.27713 of 1993. This writ petition was disposed of by this Court by order dated 29.6.1993 with a direction to the District Inspector of Schools to decide the representation of the petitioners including the present petitioner after giving him and the Committee of Management an opportunity of being heard. In compliance of the said order of this Court, the District Inspector of Schools, Allahabad reconsidered the matter and passed fresh order dated 3.8.1993, which is filed as Annexure-7 to the writ petition. The finding recorded by the District Inspector of Schools, Allahabad in respect of the petitioner, which is at page 53 of the writ petition clearly shows that the petitioner was appointed as Assistant Teacher (Sanskrit) by the Committee of Management on 1.7.1976 and that he did his M.A.(Sanskrit) in the year 1982 and passed the B.Ed. examination in 1985.

4. On 11.11.1980, the Principal/Manager sent a letter to the Basic Education Officer, Allahabad giving the list of teachers already working in the school. In this list the name of the petitioner also finds mention at Serial no.14 (Annexure-9 to the writ petition). However, by his order dated 3.8.1993 the District Inspector of Schools has rejected the claim of the petitioner for payment of salary on the ground that in the approval stated to have been granted by Basic Education Officer by his letter dated 19.12.1980 the name of the petitioner did not find mention.

5. Aggrieved by the said order the petitioner filed Writ Petition no.894 of 1995. The Court after considering the entire facts on record as well as original records, which were produced in the Court, held as follows:-

'The impugned order records that only those teachers were paid salary under the payment of Salary Act, 1971 whose name was in approved list sent by the Basic Shiksha Adhikari on 19.12.1980 and the reason given for rejecting the petitioner's claim is that his name was not there in the so called letter dated 19.12.1980. The record of the case was summoned and examined. the letter dated 19.12.1980 is nowhere on the record at all.....

In view of the fact that a factual controversy has developed during the hearing of this case and for the first time the respondents have come out with a new story that the letter dated 19.12.1980 is a forged letter. If, that is so, all those teachers approved by way of the letter dated 19.12.1980 were perhaps not approved at all, their approval also becomes doubtful. The matter, therefore, requires careful reconsideration. The matter is, therefore, remanded to the Director of Education, U.P. to look and enquire into the matter with regard to the claims of the petitioner for grant of salary with effect from 1.4.1991. he may look into the matter and pass orders in accordance with law within a period of three months from the date of production of a certified copy of this order and all others concerned may also be given an opportunity of hearing before the respondent no.2 passes orders. The impugned order dated 3.8.1993 is, therefore, set aside.'

6. Thus this Court has recorded a clear cut finding that the so called letter dated 19.12.1980 stated to have been

issued by the Basic Education Officer not being on record is a forged document. On the contrary, the letter dated 11.11.1980 by which approval was granted to the appointment of the petitioner is on record. It is in view of this, clear cut finding that this matter was remitted back with a direction to the Director of Education, U.P. to enquire into the matter with regard to the claim of the petitioner for grant of salary with effect from 1.4.1991.

7. In pursuance of the direction of this Court dated 8.4.2008 that the the impugned order dated 12.6.2008 has been passed by the Director of Education (Madhyamik), U.P., Allahabad.

8. I have heard Sri Rakesh Bahadur,Sri Anoop Misra, learned counsel appearing for respondent no.3 and learned standing appearing for respondent nos.1,2 and 4.

9. The facts regarding the appointment of the petitioner in the year 1976 and the approval granted on 11.11.1980 and filing of the writ petitions in between and the orders passed by the Deputy Director of Education,U.P. as well as the District Inspector of Schools are not disputed between the parties.

10. In para 6 of the counter affidavit, it has been stated by learned standing counsel that at the time of his appointment on 1.7.1976 the petitioner was only intermediate pass but on the upgradation of the Junior High School he was also required to possess the requisite qualifications for the same. In para-6 of the counter affidavit, it has been stated that at the time of his appointment the petitioner did not possess the requisite qualification and that there was no approval granted by the Basic Education Officer. However, it is stated that at the time of his appointment the petitioner was untrained teacher and at the time when the institution was upgraded to High School in 1980 he was an untrained teacher and his appointment had not been approved by the District Basic Education Officer, Allahabad.

11. From a perusal of the impugned order as well as averments made in paras-6 and 17 of the counter affidavit, it is not in dispute that the petitioner was an Intermediate pass at the time of his initial appointment in the year 1976. The institution was upgraded as Junior High School in 1978 and thereafter, the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1978 became applicable. The institution was upgraded as a High School in 1980 by order dated 24.12.1980. This Court in its order dated 8.4.2008 after calling for the original record and perusing the same has recorded a clear cut finding that in the list which was forwarded by the Committee of Management for approval on 11.11.1980 the name of the petitioner finds place at serial no.14. Document filed as Annexure-9 to the writ petition at page 62 of the writ petition is the list dated 11.11.1980 which clearly shows the name of the petitioner at serial no.14.

12. Learned counsel for the petitioner has placed reliance upon a decision of a learned Single Judge reported in ***1999 (3) UPLBEC 2379, Pati Ram Yadav vs. State of U.P. and others*** wherein this Court relying upon the provisions of G.O. dated 10.3.1971 has

held that appointments prior 1978 did not require training as training was not an essential qualification and that an untrained teacher could be appointed between 1971-78. This Court also placed reliance upon a decision of this Court in ***1990 UPLBEC 351, Rikh Pal Singh vs. District Basic Education Board, Allahabad*** and held that 1978 Rules were not retrospective, and therefore, appointment of an untrained teacher prior to these Rules could not be held to be bad in law and that an untrained teacher could be appointed permanently between 1971 and 1978. This Court has held as follows:-

"6. I would take up the case of Pati Ram Yadav as he was intermediate only on the date of his appointment and if he is found entitled for absorption and payment of salary then there would not be any difficulty for petitioners in Writ No.8166 of 1994 as on the date of their appointment they were either graduate or post-graduate. Pati Ram during service with the permission of the authorities obtained degree of M.A.(History), M.A. (Sociology) and training certificate from the Government Basic Training College, Lucknow on 16.7.1979. But the question is whether the ADE was justified in recording the finding that Pati Ram was neither eligible nor qualified to be appointed as assistant teacher in 1972. He has given three reasons in support of his finding one that the petitioner was not educationally qualified, second he was untrained and the third that his appointment was not approved by the basic education officer. Each reason given by him is either contrary to the provisions which were applicable to junior high schools at the time of petitioner's appointment or it is against facts. The ADE has not referred to any provision in the regulation or schedule appended to it, which may indicate that the minimum qualification for an assistant teacher in junior high school was more than intermediate. Even when U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules were enacted in 1978 (in brief Rules, 1978) the minimum educational qualification prescribed for appointment as assistant teacher was intermediate only. The petitioner, Pati Ram, was thus educationally qualified to be appointed as assistant teacher in Junior High School. It may now be examined whether an untrained teacher could be appointed permanently and whether such appointment was illegal. Before 10.3.1971 the services of assistant teachers in junior high schools were governed by provisions in the Education Code. Chapter V dealt with recognised junior and senior basic schools. It had two Sections A and B. The former dealt with school for boys and latter for girls. No qualification was prescribed for an assistant teacher in boys' schools. But paragraph 196 in B section provided that no untrained teacher shall be appointed permanently in a recognized school. This did not apply to boy's school. There was thus no bar on permanent appointment for an untrained teacher in boys schools. Even if it is assumed that the Regulation 196 applied to boys schools the doubt if any stood removed when the State Government issued the order in 1971. The order purported to revise the salary of assistant teachers in junior high schools but it made obligatory for any untrained teacher appointed after the notification was issued to acquire

training certificate within five years of his appointment otherwise he would be paid the initial salary only. There was thus no restriction on the management of a Junior School in appointing an untrained teacher permanently. Pati Ram having been appointed permanently, as is clear from his appointment order, after the Government Order of 10.3.1971 had been issued his appointment was in accordance with law it was neither irregular nor illegal. Training became essential qualification under Rules, 1978. The appointment of petitioner, however, being prior to it and in accordance with law in force on the date of his appointment it did not suffer from any defect. In Rikhi Pal Singh vs. District Basic Education Board, Allahabad, 1990 UPLBEC 351, it has been held by this Court that the provisions in 1978 Rules were not retrospective therefore appointment of an untrained teacher prior to these rules could not be terminated. These rules did not in any manner effect the appointments made after Government Order of 1971. An untrained teacher, therefore, could be appointed permanently between 1971 and 1978. The appointment letters of all the petitioners clearly show that their appointment was permanent."

13. Thus in view of the settled legal position that where such appointments between 1971 to 1978 could not be said to be erroneous only because the only qualification possessed by the Assistant Teacher was Intermediate and approval had not been obtained from the District Basic Education Officer.

14. In my opinion, the impugned order dated 12.6.2008 is absolutely illegal and erroneous and cannot survive. The writ petition is allowed and the impugned order dated 12.6.2008 is, therefore, quashed. Respondents no.1 and 2 will take take steps for payment of salary to the petitioner within a period of three months from the date a certified copy of this order is received by them.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2012

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 51944 of 2006

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

Counsel for the Petitioner:
Sri Jagdish Pathak
Sri Sanjay K. Sharma

Counsel for the Respondents:
C.S.C.,
Sri ripendra Mishra

Constitution of India, Article 226- compassionate appointment-earlier petitioner given consent to appoint his son-subsequently considering his bad habits not loyal to family-she claimed appointment for herself-remain pending for more than 3 years-suddenly rejection on ground of delay-not proper.

Held: Para 14

The Authority concerned is directed to consider the case of petitioner on merit and while considering so the competent authority shall examine as to whether the family of deceased employee continues to be under financial distress and hardship and the family of deceased employee cannot be relieved from such financial hardship and distress unless the compassionate appointment is offered to

the petitioner. It is needless to say that while taking such decision the competent authority shall pass reasoned and speaking order. Such exercise shall be completed within a period of two months from the date of production of certified copy of the order passed by this court before competent authority.

Case law discussed:

2009 (2) LBESR 482 (Alld); 1998 (5) SCC 192=AIR 1998 SC 2230; 2010 (7) ADJ Page 1

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

1. Heard learned counsel for the parties.

2. By this petition, the petitioner has sought initially a writ of mandamus commanding the respondents to give her compassionate appointment in place of her husband Shyam Veer Singh under Dying-in-harness Rules. But subsequently a writ of certiorari for quashing the order dated 27.6.2006 passed by Assistant General Manager of Corporation contained in Annexure-CA-2 of the counter affidavit and Annexure-1 of the supplementary affidavit filed in support of amendment application, whereby the petitioner's claim for compassionate appointment has been rejected, is also sought for.

3. The relief sought in the writ petition rests on facts that the husband of petitioner Late Shyam Veer Singh while working as Messenger/Sandesh Wahak in the District Office of Food Corporation of India, Moradabad has died on 11.10.2002 while in service. He left behind him the petitioner as widow and his three daughters and two sons i.e. Sri Anil Kumar Singh and Sri Amit Kumar Singh as his heirs and also his old and sick mother. It is stated that both two sons of petitioner are still unemployed and the family of the petitioner is totally on the verge of starvation as no body in the family is earning hand and there is no money for the treatment of the old mother of her late husband. After the death of Shyam Veer Singh the petitioner gave her consent for compassionate appointment of her son Amit Kumar Singh under Dying-in-harness Rules and as such an application was made for such appointment on behalf of her aforesaid son on 26.12.2002 as class IV employee in the department. Later on under frustration, the conduct of Amit Kumar Singh towards the family and the petitioner became very bad and he indulged in bad activities as he was not appointed under dying in harness rules by the respondent. At this point of time the petitioner realized that even if the son of the petitioner gets compassionate appointment in place of her husband, the sole purpose of providing such appointment will not be fulfilled as her son was no more loyal to the family as well as to the petitioner and as such the family of the deceased will not be benefited on such appointment. Then the petitioner gave application dated 23.8.2004 for her own appointment to the respondent no.2 in place of her late husband. A photostat copy of such application dated 23.8.2004 is on record as Annexure-1 to the writ petition.

4. It is further stated that the forms and application of the petitioner was forwarded to the respondent no.1 by the Assistant Manager (Pension) Food Corporation of India, Moradabad. Thereafter the petitioner gave several reminders regarding her pity condition to the respondents but nothing was done and ultimately vide letter dated

22.2.2005 of respondent the petitioner was told that since no vacancy is available at that time so her case can not be considered at present but as and when the vacancy will arise she will be considered for such appointment. The aforesaid letter of respondent dated 22.2.2005 is on record as Annexure-5 to the writ petition. It is further stated that when nothing was done in the matter the petitioner has again sent reminder/representations dated 8.4.2005, 17.1.2006, 8.4.2006 and 22.7.2006 collectively contained in Annexure- 7 to the writ petition. As nothing has been done by the respondent, she moved this petition before this court seeking aforesaid relief.

5. A counter affidavit has been filed on behalf of respondents stating that under relevant scheme applicable to the employees of the Corporation only 5% of the vacancies meant for direct recruitment could be available for compassionate appointment. In the year 2000-2001 no compassionate appointment was made for want of vacancy. In the counter affidavit the scheme of compassionate appointment of Government of India contained in office memo dated 5.5.2003 has been filed as Annexure-CA-1, which provides that no request for compassionate appointment can be considered if it has not already acted upon within three years. Since the vacancy for compassionate appointment did not occur for three years, therefore, claim of petitioner was not considered. The petitioner was informed by letter dated 27th June, 2006 that she fulfilled qualification and eligibility for Class IV post but due to non availability of vacancy her case could not be considered for compassionate appointment. The aforesaid letter dated 27.6.2006 has been filed as Annexure-CA-2 to the aforesaid counter affidavit.

6. After going through the aforesaid version of the parties Hon'ble Mr. Justice Sudhir Agarwal has been pleased to dismiss the writ petition on 23.11.2010 with the following observations:-

" 5. It is well settled that compassionate appointment can be allowed strictly under the scheme applicable to the Corporation. It is not the case of the petitioner in the rejoinder affidavit or otherwise that the scheme, said to be applicable to the respondents-Corporation, is not in the manner, as stated by the respondents, but otherwise.

6. Since the appointment of the petitioner could not be made within the prescribed period of three years for want of vacancy, and further that the scheme provided that no such request can be considered, I do not find that the act of the respondents in any manner is contrary to the scheme for compassionate appointment.

7. I, therefore, find no error apparent on the face of the record or in the act of the respondents warranting any interference.

8. Dismissed.

9. Interim order, if any, stands vacated."

7. Feeling aggrieved against the aforesaid order dated 23.11.2010 the petitioner preferred special appeal before this Court which was numbered as Special Appeal No.13 of 2011 Smt. Asha Rani Vs. State of U.P. and others. A Division Bench of this Court has been pleased to set aside the judgment of Hon'ble Single Judge and remitted the matter back to the learned Single Judge with direction to consider the scope and ambit of elaborate judgement in the matter of ***Hari Ram Vs. Food Corporation of India and others reported in 2009 (2) LBESR 482 (Alld).*** It would be useful to quote the relevant observations made by division Bench of this Court as under:-

"We have gone through an elaborate judgment dated 08.04.09, Hari Ram Vs. Food Corporation of India & others passed in Civil Misc. Writ Petition No.2412 of 2008 from which it appears that the learned single Judge considered the scheme as harsh in nature and ultimately quashed the instructions contained in the Office Memorandum dated 5th May, 2003 of the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India fixing time limit of three years for offering compassionate appointment declaring it to be irrational, arbitrary, unreasonable and violative of Art. 14 and 16 of the Constitution of India.

We have been told that no appeal has been preferred against such order atleast not to the knowledge of the learned counsel appearing for the appellant. If it is so, it would be proper for the learned single Judge to consider this aspect upon being called. Since the consideration of such part was not available before the learned single Judge, we are of the view that the order impugned should be set aside, and is accordingly set aside, remitting the matter back to the learned single Judge to consider scope and ambit of the elaborate judgment in the matter of Hari Ram (supra).

Accordingly the appeal is disposed of at the stage of admission, however, without imposing any cost."

8. Thereafter the matter came to be listed before this Court on 20.4.2012. Since counter and rejoinder affidavits have been exchanged between the parties and the case was ripe for final disposal, therefore, learned counsel appearing for the parties agreed for final disposal of the case and advanced their arguments for final disposal of the case.

9. I have considered the submissions of learned counsel for the parties, perused the record and have gone through the decision rendered by Division Bench of this Court in special appeal filed by the petitioner and reported decision rendered by Hon'ble Single Judge in Hari Ram's case (supra).

10. In **Hari Ram Vs. Food Corporation of India through its Executive Director, Noida & others, 2009(2) LBESR 482 (All)**, Hon'ble Single Judge of this court while considering the rationality of instructions contained in Office Memo dated 5.5.2003 of Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India fixing time limit of three years for offering

compassionate appointment has held that fixing time limit for three years for offering such compassionate appointment is irrational, arbitrary, unreasonable and violative of Articles 14 and 16 of the Constitution of India. The pertinent observations made by this court in aforesaid decision contained in para 13,14,15,16,18 and 19 are extracted as under:-

"13. The prescription of 5% quota of the direct recruitment for compassionate appointment falls within the domain of the policy adopted by the Government of India. The court will not ordinarily interfere with such policy unless it is wholly arbitrary and unreasonable. The policy is reasonable and adopted to balance with the rights of unemployed men and women and is thus not violative of Articles 14 and 16 of the Constitution of India.

14. The maximum limit of three years, however, does not appear to be reasonable to the object of providing the compassionate appointment. The Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India by its Office Memo randum dated 5th May, 2003, decided that with one year limit prescribed for grant of compassionate appointment often results in depriving genuine cases seeking compassionate appointment, on account of regular vacancies not being available within the prescribed period of one year and within the prescribed limit of ceiling of 5% DR quota, and it was, therefore, decided that if compassionate appointment to genuine and deserving case as per guidelines contained in the Officer Memorandum dated December 3rd, 1999 is not possible in the first year, due to non-availability of regular vacancy, the Prescribed Committee may review such case, to evaluate the financial condition of the family to arrive at a decision as to whether a particular case warrants extension of one more year for consideration for compassionate appointment by the committee, subject to availability of clear vacancy within the prescribed 5% quota. The Office Memorandum provides that if on scrutiny by the Committee a case is considered to be deserving, the name of such a person can be continued for consideration for one more year and that maximum time in para 3, for persons' name can be kept under consideration for offering compassionate appointment will be three years, subject to the condition that Prescribed Committee has reviewed and certified the penurious condition of the applicant at the end of the first and second year. After three years, if compassionate appointment is not possible to be offered to the applicant, his case will be finally closed and will not be considered again.

15. It does not appear to be reasonable that if a case of a person is certified by the Prescribed Committee, after a review, in which the Committee finds that the condition of the applicant's family continues to be penurious, the case should be closed on the expiry of three years. It may not only be arbitrary but will also cause injustice to the person, who has been certified to deserve compassionate appointment.

16. It is always possible as in the present case that the family of the

dependent is found to be living in a financial distress and that family needs compassionate appointment, the person may not fall within 5% DR quota for three continuous years. It will be extremely unjust and harsh to deny compassionate appointment in such case. The restriction of number of vacancies to be made available in 5% DR and then confining it to three years, makes the entire exercise of offering compassionate appointment, a matter of chance and thereby in ignorance of the object for which such appointment is offered and makes the whole policy irrational.

18. In this case the placement in the waiting list for 5% DR quota has not been shown to be based on the penurious condition of the family of the deceased employee. His first and second review by the Prescribed Committee confirms that the application still needs and falls within the category of the family, which are in financial distress. Inspite of such verification, the prescription of maximum period of three years for compassionate appointment may result into grant of appointment after long delay, but has no object to be achieved except by permitting the family to continue to live under poverty, whereas new cases may be considered on their own merits in the first, second and third years.

19. In my opinion the prescription of maximum period of three years after verification by the Prescribed Committee of the penurious condition of the dependents of the deceased is highly irrational and unreasonable. The compassionate appointment should not be kept in the realm of a chance and to become a gaming exercise subject to the availability of vacancies and the maximum number of years it should be based on human and sympathetic consideration to the family of the deceased employee. Each case should be reviewed on its own merit and consideration should not be allowed to any number of years. If the family continues to be under financial distress, there should be no limit of maximum number of years for which an application may be considered."

11. At this juncture it is to be noted that in **Director of Education (Secondary) Vs. Pushpendra Kumar, 1998 (5) SCC 192 = AIR 1998 SC 2230,** once the Apex Court has held that the compassionate appointment should be offered only against the vacancies of Class III and Class IV posts liable to be filled up through direct recruitment then it should not have been confined again within the ceiling limit of 5% of such vacancies for the reason that allocation of merely 5% vacancies of direct recruitment quota for compassionate appointment does not provide sufficient opportunity to the dependent of deceased government servant, instead thereof it provides a mere chance of employment. Therefore, such policy fixing 5% vacancies of direct recruitment for the purpose of compassionate appointment can also be held to be arbitrary, irrational, unreasonable and contrary to the main object of compassionate appointment under Dying-in-Harness Rules but since Hon'ble Single Judge of this Court has declared the aforesaid aspect of Office Memo dated 5.5.2003 as reasonable in Hari Ram's case (supra), therefore, I am not inclined to refer the issue for

consideration to the larger Bench and I would like to accept the verdict of this Court in **Hari Ram's** case as referring the matter to the larger Bench in instant case would further prolong the litigation and since the death of government servant has taken place in the year 2002 and a period of about more than nine years have passed, therefore, any further delay in the matter would cause prejudice to the case of petitioner.

12. In this connection, it would be useful to refer a Division Bench decision of this Court rendered in **Vivek Yadav Vs. State of U.P. and others, 2010 (7) ADJ Page 1** wherein while considering the content and import of proviso to Rule-5(1) of U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974 in respect of extension of time for making application for compassionate appointment beyond the period of 5 years fixed for making such application after the death of Government servant in para 7 and 8 of the decision it has been held that power to relax itself contemplates that in a particular case, the matter has to be dealt with in a just and equitable manner. In other words, the test to be applied is does the family of the deceased continue to suffer financial distress and hardship occasioned by death of breadwinner so as to relax the period within which the application could be made. For ready reference the pertinent observations made by this Court in aforesaid para are quoted as under:-

"7. ..... The proviso, in our opinion, which confers power to relax the delay in making an application within five years, also must be read to include consideration of an application even after expiry of 5 years if the applicant was a minor at the time of death of the deceased employee and makes an application within reasonable time of attaining majority.

8. The power to relax itself contemplates that in a particular case, the matter has to be dealt with in a just and equitable manner. In other words, the test to be applied is does the family of the deceased continue to suffer financial distress and hardship occasioned by the death of the breadwinner so as to relax the period within which the application could be made. These are matters of fact, which the competent authority would have to consider. In the instant case, what we find is that the application was rejected merely because it was beyond the time prescribed."

13. In view of law laid down by this court in **Hari Ram's case** and **Vivek Yadav's cases** the concerned authorities are required to consider each case on its merit and consideration should not be allowed to any number of years. If the family of the deceased employee continues to be under financial distress and hardship, there should be no limit of maximum number of years under which an application may be considered. In instant case, since the authority concerned has rejected the application of petitioner for compassionate appointment on account of lapse of a period of more than three years from the date of death of Shyam Veer Singh without further considering the case of applicant on merit as to whether the family of deceased

employee is continuously facing financial distress and hardship occasioned by death of deceased employee of corporation and whether the family can not be relieved from such financial distress and hardship without offering compassionate appointment to the applicant, therefore, the impugned order dated 27th January 2006 passed by Assistant General Manager, contained in Annexure S.A.-1 of Amendment Application and also as Annexure C.A.-2 to the counter affidavit cannot be sustained. Accordingly the same is hereby quashed.

14. The Authority concerned is directed to consider the case of petitioner on merit and while considering so the competent authority shall examine as to whether the family of deceased employee continues to be under financial distress and hardship and the family of deceased employee cannot be relieved from such financial hardship and distress unless the compassionate appointment is offered to the petitioner. It is needless to say that while taking such decision the competent authority shall pass reasoned and speaking order. Such exercise shall be completed within a period of two months from the date of production of certified copy of the order passed by this court before competent authority.

15. With the aforesaid observations and directions, writ petition succeeds and is allowed to the extent indicated herein before.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2012

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

Civil Misc. Writ Petition no. 57380 of 2009

Radhey Shyam Maurya ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri R.S. Ram
Sri M.P. Yadav
Sri Harendra Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- cancellation of Fire Arm license-on ground pendency of certain criminal cases against petitioner-no material produced to establish misuse of Fire Arm-mere pendency of criminal case can not be ground for revocation of license.

Held: Para 18

It is well settled that mere fact that some reports had been lodged against the petitioner would not establish the "necessary connection with security of the public peace or public safety". Therefore, in view of the settled law unless there is some other report or material, only initiation of the criminal cases against the petitioner cannot be a ground to sustain the order of revocation of arms licence.

Case law discussed:
2011 (74) ACC140; 1978 AWC 122; 2011 (74) ACC 304; 2010 (3) JIC 630; 2004 (2) JIC 239 (All); 2002 (1) JIC 501 (All); 2011 (1) JIC 417 (All); 2011 (73) ACC 846; 2005 (3) 774 (All)

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

1. Heard Shri M.P. Yadav, learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

2. The present writ petition has been filed challenging the order dated 6.2.2009 passed by the District Magistrate Mau, whereby firearm licence of the petitioner has been cancelled.

3. Petitioner preferred an appeal against the order of the District Magistrate, which was also rejected by the order dated 3.9.2009.

4. Petitioner is licencee of 315 Bore rifle bearing number 06280 and 32 Bore revolver. The show cause notice dated 8.5.2008 has been served upon the petitioner and the petitioner submitted his explanation denying all the allegations made therein.

5. The case of the petitioner is that he is contractor of Central Storage Corporation and also a member of Kshettra Panchayat. During contract-ship some antisocial elements have opened fire upon him on 9.5.1993. As a result of which he lodged First Information Report under section 307 I.P.C. and after trial accused were convicted for five years rigorous imprisonment with fine. Because of enmity against the petitioner in the locality, licence for rifle and revolver is necessary for safety and security of his life and property.

6. Counsel for the petitioner further submits that in the case crime no. 55 of 2008 under sections 188 I.P.C and case crime no. 56 of 2008 under sections 147, 148, 149, 353, 332, 504 and 506 I.P.C. and 7 of Criminal Law Amendment Act, apart from the petitioner, seven other persons were also named and show cause notices have been issued against them on 15.3.2008.

7. The cases of these seven persons whose names have been mentioned in paragraph-16 of the petition, notices dated 15.3.2008 has been cancelled and their arms licence have been restored vide separate orders dated 25.2.2009 passed by the District Magistrate. The copies of the orders in cases of seven persons namely Kasif son of Imtiyaj Ali, Tauqir Ahmad s/o Maqbool Ahmad, Ansar Ahmad s/o Ashfaq Ahmad, Arvind Singh s/o Mahendra Nath Singh, Shakeel Haider s/o late Hasan Haider, Zakir Husain s/o Safat Husain, Kamata Ram s/o Kuber Ram have been annexed as annexures- 9 to 15 to the writ petition. In all these matters finding has been recorded by the District Magistrate that there is nothing on record to show that they or any other person has misused their licensed firearms. In the cases of these persons District Magistrate in its order dated 22.5.2009 has recorded the finding that the criminal case registered against them is pending before the competent court. He further concluded that as per law laid down by this court, pendency of a criminal case can not be a ground for cancelling the firearm licence. It has also been recorded that no other criminal case has been registered against these persons and as such there is no justification for cancelling the firearm licence of the seven persons whose names have been mentioned in the case.

8. Counsel for the petitioner submits that copy of the orders dated

22.5.2009 passed by the District Magistrate, Ghazipur restoring the arms licence of other persons who were co-accused in case crime no. 56/2008, and 55/2008 were placed before the Commissioner, Azamgarh Division, Azamgarh but the Commissioner had dismissed the appeal without taking into consideration the said order passed in favour of other co-accused. On the other hand, the Commissioner simply affirmed the order of the District Magistrate dated 6.2.2009 and concluded that as the criminal cases have been registered against the petitioner, he cannot be allowed to retain the firearms as it would be against public interest.

9. Counsel for the petitioner further submits that there is no finding of the District Magistrate that petitioner has misused the licenced firearm and there is no allegation of criminal history against the petitioner except the three cases in which he was falsely implicated by the Police of Police Station Cantt. District Lucknow. Petitioner was arrested and has been released on bail. The allegation levelled against the petitioner are politically motivated and Administrative Authorities with ulterior motive under the pressure of local political leader had cancelled the firearms licence of the petitioner without any lawful cause. The Commissioner, Azamgarh, Division Azamgarh, committed illegality and acted arbitrarily in overlooking the orders passed by the District Magistrate, Ghaziabad, whereby he has restored arms licence of other accused persons, who were prosecuted along with petitioner. The dismissal of the appeal of the petitioner is totally unjustified and the orders passed by the authorities cannot be sustained.

10. Learned counsel for the petitioner relied upon the judgements of this court in **2011 (74) ACC 140(Ashish Tripathi Vs. State of U.P.), 1978 AWC 122(Sheo Prasad Misra Vs. District Magistrate, Basti) (D.B.); 2011 (74) ACC 304(HiraMani Singh Vs. State of U.P. and another); 2010 (3) JIC 630 (All) (L.B) (Satish Singh Vs. District Magistrate, Sultanpur and others); 2004 (2) JIC 239 (All) (Ishwar @ Bhuri Vs. State of U.P. & Others) ; and 2002 (1) JIC 501(All) (Iftikhar Khan Vs. State of U.P. & others)** and submitted that the mere involvement of licensee in criminal case cannot be made the basis for coming to the conclusion that continuance of his licence would affect public peace and security.

11. Repelling the submissions of the learned counsel for the petitioner, learned standing counsel vehemently argued that the petitioner is a man having criminal history and is a member of Mafia gang. On 24.2.2008 at about 19.45 hours, petitioner was caught at Mohanlal Ganj crossing near Lucknow along with twenty members of the gang. Criminal cases no. 55/08, 56/08 and 75/08 were registered against the petitioner on 24.2.2008 at police station Cantt., Lucknow. The Senior Superintendent of Police, Lucknow has sent his report dated 13.3.2009 to the District Magistrate, Mau, along with report of Incharge Police station Cantt., Lucknow on 5.3.2009. The said reports have been annexed along with counter affidavit.

12. Learned Standing Counsel submits that petitioner is a hardcore criminal and there is every apprehension of breach of public peace and such person cannot be allowed to retain the

firearms. Mere release of the petitioner on bail does not mean that petitioner has been absolved from the charges levelled against him. Learned Standing Counsel drawn attention of the court to paragraph-5 of the counter affidavit, where it has been stated that licensed arms of the petitioner was misused by him and other members of the gang which is apparent from the reports dated 13.3.2008 and 5.3.2008 of the Senior Superintendent of Police and Incharge police station Cantt. Lucknow, respectively.

13. Learned Standing Counsel placed reliance upon the judgement, **2011 (1) JIC 417, (All) Rajeswar Singh Yadav Vs. State of U.P. and others) and 2011(73) ACC 846(Ram Sanehi Vs. Commissioner Lucknow, Division, Lucknow and others).**Learned standing counsel also placed reliance on the Full Bench judgement of this court in **Chhanga Prasad Sahu Vs. State of U.P. and others) and Gaya Din Vs. State of U.P. and others reported in 2005(3) JIC 774 (All).**

14. Placing reliance upon these judgements, learned standing counsel submits that the assessment of the administrative authorities with regard to grant of licence, or cancellation of licence already granted should not be interfered ordinarily by this Court in exercise of its extra ordinary jurisdiction unless same is so illegal or arbitrary so as to prick the conscious of the court.

15. In the present case, considering the conduct of the petitioner and his association with antisocial elements, the decision taken by the District Magistrate and the appellate authority should be given its proper weightage and no interference be made.

16. Learned counsel for the petitioner drawn the attention of the court to the reply given by the petitioner to paragraph -5 of the counter affidavit, in paragraph 5 of the rejoinder affidavit, wherein it has been categorically stated that there is no mention of any other incident in the reports dated 13.3.2009 and 5.3.2009 annexed with counter affidavit, in which petitioner has misused the firearms. The said reports only speak of three cases having been registered on the same day over the alleged one incident. Hence the averments of paragraph-5 of the counter affidavit are totally false and incorrect in which it has been stated that licensed firearm of the petitioner was being misused by him and other members of the criminal gang.

17. Having considered the submission of the learned counsel for the petitioner and perusal of records, it is clear that licence of the petitioner has been cancelled by the District Magistrate , Mau by order dated 6.2.2009 on the ground of arrest of the petitioner made on 22.2.2008 and three cases as mentioned above had been registered against him. It is clear from the order of the District Magistrate and the reports of the S.S.P. and Incharge Police Station Cantt. Lucknow dated 13.3.2008 and 5.3.2008 that apart from three cases there is no reference of any other criminal case registered against him. There is no material on record to indicate that petitioner has been involved in any other criminal case or licensed firearms of the petitioner has been misused by him or any other person. The finding recorded by the District Magistrate that the

petitioner is man of criminal mentality is based on no material on record.

18. It is well settled that mere fact that some reports had been lodged against the petitioner would not establish the "necessary connection with security of the public peace or public safety". Therefore, in view of the settled law unless there is some other report or material, only initiation of the criminal cases against the petitioner cannot be a ground to sustain the order of revocation of arms licence.

19. Petitioner has made out a case for setting aside the order of cancelling his firearm licence as well as order of appellate authority. The order dated 6.2.2009 passed by the District Magistrate, Mau and order of the Commissioner, Azamgarh Division, Azamgarh dated 3.9.2008 are hereby quashed .

20. The writ petition is allowed.

21. However, the Court is not aware of the fact whether the petitioner has been involved thereafter in any other criminal activities or that he is desirable or a fit person to be allowed to possess the firearms.

22. For the aforesaid reason , the District Magistrate, Mau will consider the matter afresh in the light of Section 14 of the Arms Act 1959 and consider the conduct of the petitioner subsequent to the year 2009 and pass a fresh order as regards to the firearm licence to be held by the petitioner within three months from the date a certified copy of this order is produced before him.

23. The release of the firearms of the petitioner shall depend upon the fresh order to be passed by the District Magistrate /Licencing Authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2012

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

Civil Misc. Writ Petition No. 59814 of 2008

C/M, N.A.S. Inter College Meerut & another ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Nitin Sharma

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

Constitution of India, Article 226-selection of Principal-Inter college aided institution-vacancy of principal notified 1995-penal of selected candidate prepared on 15.04.1997-by G.O. 17.04.1997 implementation of select list stayed considering pending SLP before Supreme Court-ultimately validity of provision of Section 9, 10, 11of Commission Act 1984 upheld-senior most selected candidate refused to join-DIOS posted R-4 being place at serial no. 2-challenge made on ground life of select list exhausted after one year on refusal of topmost in merit list-held-after joining on resignation or death such plea available but where topmost in merit not joined-list still holds good-petition dismissed.

Held: Para 15

In my opinion, since the select list of 1997 still holds good on the non-joining of candidate at serial No. 1 of the said

select list, as held by the Division Bench of this Court in the case of Chandresh Nath Singh Baghel (supra) the right of the respondent No. 4 to seek his appointment on the post of Principal in the N.A.S. Inter College cannot be defeated, solely on the ground that he had in the mean time join the Nehru Smarak Inter College, Kurali, Meerut.

Case law discussed:

2008 (1) ESC 428 (All) (DB)

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

1. This writ petition has been filed by the petitioner challenging the orders dated 8.09.2008, 3.10.2008 and 23.10.2008 and seeking a further direction commanding the respondents not to appoint the respondent No. 4 as Principal of the petitioner-Institution.

2. The facts of the case in brief are that there is an Institution known as Nanak Chand Anglo Sanskrit Inter College, Meerut (the Institution). The said Institution is recognized and is also receiving grant-in-aid. It is governed by the provisions of U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder as also the U.P. Secondary Education Services Selection Board Act, 1982. A post of Principal fell vacant in 1995 and a requisition for selection to the said post was forwarded by the Committee of Management to the Selection Board under the Act, 1982. Pending selection a senior most Lecturer was appointed as officiating Principal till the candidate selected by the Selection Board would join. After the interview, a panel of selected candidates was prepared on 15.04.1997. In the meantime the constitutional validity of Sections 9,10 and 11 of the U.P. Secondary Education Commission Act, 1982 was challenged and therefore, the State Government issued a notification on 17.04.1997 staying the implementation of the select list. Ultimately, the vires of the Act 1982 were upheld by the Supreme Court.

3. The contention of the petitioner, Committee of Management is that the candidate at serial No. 1 of the select list, one Sri Syed Hussain Asgar Kazmi was directed to report to the institution and submitted his joining but Sri Kazmi did not join the institution. Accordingly, the respondent No. 4 who was the second candidate in the select list was directed to submit his joining in the institution. The contention of the petitioner is two-fold, one that once the candidate at serial No. 1 of the select list had declined to join the institution, the select list came to an end and thereafter, there was no further scope for directing the candidate at serial No. 2 namely, the respondent No. 4 to join the institution. The second contention of the petitioner is that as per the proviso to sub rule 5(a) of Rule 12 of the U.P. Secondary Education Services Commission Rules, 1995, no candidates shall be allocated the institution of his home district.

4. I have heard Sri Nitin Sharma, learned counsel appearing for the petitioner, Sri Vinod Kumar Singh, learned counsel appearing for respondent No. 4 and the learned standing counsel appearing for respondent Nos. 1,2 and 3. The order is being dictated in open Court.

5. The submission of the learned counsel for the petitioner is that once a

candidate at serial No. 1 of the select list had declined to join the institution in question, the select list would cease to operate and therefore, no direction could have been given by the DIOS, Meerut to the respondent No. 4 to submit his joining in the said institution. Rebutting the submission of the learned counsel for the petitioner. Sri Vinod Kumar Singh appearing for respondent No. 4 has relied upon the decision of a Division Bench of this Court reported in ***2008(1)ESC 428 (All) (DB), Chandresh Nath Singh Baghel Vs. Bhagwan Singh Sisodia and others.*** He has in particular drawn the attention of the Court to Para 7 of the said judgment wherein the issues for consideration of the Court have been outlined. Para 7 reads as follows:

"The issues for consideration before this Court in the present Special Appeal are allowed as follows:

"(a) Whether the select panel notified under the provisions of the Act exhausts itself with the appointment of the candidate empanelled at serial No. 1.

(b) Whether the candidate empanelled at serial No. 2 of the said panel can be offered appointment in case the person at serial No. 1 after joining, retires, resigns or expires within the valid period of the select panel, which under the Rules is one year.

(c) Whether select panel in respect of an earlier vacancy can be used for filling up of the subsequent vacancy because of death, resignation or retirement of the earlier incumbent or such vacancy is required to be advertised afresh so as to make the process of selection in conformity with Articles 14 and 16 of the Constitution of India."

In Para 21 of the said judgment, the Division Bench has further held as follows:

"So far as the life of select panel is concerned as provided for, under the U.P. Commission Rules, suffice it to point out that the said valid select list is only for the purpose of offering appointment to the candidates in order of merit only if the person higher in merit does not join the post and once the empanelled candidate joins in accordance with his merit, the remaining select panel would exhausts itself automatically and the remaining panel could cannot be said to have a life beyond the purpose for which it was prepared, therefore, no shelter can be taken by a person in the select list/waiting list behind the provision which prescribes the life of the select panel as one year."

6. Thus what has been held by the Division Bench is that the life of a select list comes to an end when a candidate at serial No. 1 joins and after joining retires/resigns or expires within a valid period of the select panel which under the rules is one year. However in Para 21, the Court has held that the valid select list under the U.P. Commission Rules is only for purpose of offering appointments to the candidates in order of merit, only if, the person higher in merit does not join the post and once the empanelled candidate joins the post in accordance with his

merit, the remaining select panel would exhaust itself automatically and the remaining panel cannot be said to have a life beyond the purpose for which it was prepared.
0.00"

7. In the present case, the admitted facts are that the candidate at serial No. 1 of the select list, namely, Sri Syed Hussain Asgar Kazmi did not join on the post of Principal in the institution in question. Therefore, the submission of the learned counsel for the petitioner that the life of the select list would come to an end and the select list would exhaust itself, does not hold water.

8. Sri Nitin Sharma further submitted that after the select panel of the year 1997, two more select panels have been declared by the U.P. Secondary Education Services Commission and, therefore, it cannot be said that the panel of 1997 will alive. This submission of the learned counsel also does not hold water in view of the law laid down in the case of Chandresh Nath Singh Baghel (supra) when applied to the facts of the present case. Since the candidate at serial No. 1 had not joined, it could not be said that the select list has exhausted itself and that no directions could be given to the respondent No. 4 to join the institution.

9. The second leg of the submission of Sri Nitin Sharma is that the respondent No. 4 belonged to the home district of Meerut in which N.A.S. Inter College is situated and therefore, in terms of the proviso to sub rule 5(a) of Rule 12 of the U.P. Secondary Education Services Commission Rules, 1995, he was not eligible to be appointed as Principal in the N.A.S. Inter College, Meerut. In support of his submission Sri Sharma has placed reliance upon the documents filed as Annexure III to the writ petition wherein at page 21 of the writ petition at serial No. 3 after the name of respondent No. 4 it is mentioned as "Prantiya Upadhyaksha", Uttar Pradesh Madhyamik Sikshak Sangh, Meerut. He has also drawn attention of the Court to the document filed as Annexure VI at page 30 of the writ petition where the address of the respondent No. 4 has been shown as " dwara Sri Bhagwan Sharma, 158 Kailashpuri, Meerut".

10. Rebutting the second submission Sri Vinod Kumar Singh, learned counsel for respondent No. 4 has drawn attention of the Court to the document filed as Annexure V (CA-5), service book of respondent No. 4. This is the photocopy of the first page of the service book of the petitioner wherein the address of the respondent No. 4 has been shown as "Village-Achchhaija Post Hapur District Ghaziabad". He also relied upon a subsequent document which is at page 30 of the counter affidavit which is a certificate issued by SDM, Hapur District Ghaziabad, which also verifies that the respondent No. 4 is ordinarily a resident of Village-Achchhaija Post Hapur District Ghaziabad.

11. From a perusal of the documents which have been filed by the petitioner as well as by the respondent No. 4 to show the residence of respondent No. 4, from the documents at page 29 and page 30 of the counter affidavit, there is absolutely no doubt that the home district of respondent No. 4 is district Ghaziabad (now district

Hapur) Village-Achchhaija. In fact document on page 29 of the counter affidavit is a photocopy of the page of the service book of the petitioner which also mentions the home district of respondent No. 4 to be Village-Achchhaija, Tehsil Hapur (now district Hapur) District Ghaziabad. The document filed at page 21 of the writ petition does not mention the address of the respondent No. 4. It only states that the respondent No. 4 is the "Prantiya Upadhyaksha" of the Uttar Pradesh Madhyamik Shikshak Sangh, Meerut. The document at page 30 also after the name of respondent No. 4 mentions his address as " dwara Sri Bhagwan Sharma, 158 Kailashpuri, Meerut" which translates as C/o Sri Bhagwan Sharma, 158, Kailashpuri, Meerut. It is not disputed between the parties that prior to his selection for the post of Principal, the respondent No. 4 was working as Assistant Teacher in the institution at Meerut and therefore, it is obvious that he would have some residential address in Meerut but that would not itself would lead to any inference that Meerut is the home district of the respondent No. 4.

12. The term "home district" has not been defined any where, either in the U.P. Intermediate Education Act, 1921 or the Regulations framed thereunder or under the U.P. Secondary Education Services Selection Board Act, 1982 or the Rules 1995 but in common parlance "home district" would mean the place of permanent resident of the individual irrespective of where he may be settled for the purposes of his job or other vocation.

13. In view of the foregoing discussions, I find no merit in the writ petition.

14. It is further contended by Sri Nitin Sharma that during the period when the matter was pending before the Court, the respondent No. 4 had joined another institution namely, Nehru Smarak Inter College, Kurali, Meerut in the year 2009 as a permanent Principal selected through the Commission. Sri Vinod Kumar Singh, however, seriously disputed this fact and he submits that though the respondent No. 4 joined the Nehru Smarak Inter College, Kurali, Meerut in the year 2009, he has been placed under probation and even after the expiry of two years his probation has been extended further on the ground that the matter regarding his posting in the N.A.S. Inter College is still *sub judice* before the Court. He therefore, submits that his right to seek appointment on the post of Principal in the N.A.S. Inter College, Meerut flows from the validity of the life of select list of 1997 and that right cannot be obliterated by his subsequent joining in the Nehru Smarak Inter College, Kurali, Meerut which he joined only for purposes of his livelihood.

15. In my opinion, since the select list of 1997 still holds good on the non-joining of candidate at serial No. 1 of the said select list, as held by the Division Bench of this Court in the case of Chandresh Nath Singh Baghel (supra) the right of the respondent No. 4 to seek his appointment on the post of Principal in the N.A.S. Inter College cannot be defeated, solely on the ground that he had in the mean time join the Nehru Smarak Inter College, Kurali, Meerut.

16. In view of the foregoing discussions and the law laid down by Division Bench of this Court, in my opinion, the present writ petition is devoid of merit and deserves to be dismissed. It is, accordingly, dismissed.
