ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.07.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
HON'BLE ASHOK PAL SINGH, J.

Misc. Bench No.6047 of 2009

National Federation of the Blind Petitioner
Versus
State of U.P. Respondent

Counsel for the Petitioner:
Sri Sudhir Kumar Misra
Sri Arun Kumar Mishra

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

Persons with Disabilities(Equal Opportunities,protection of Rights & Full Participation) Act 1995-Section 32, 33- Petitioner blind person-seeking direction to identify and to ensure their appointment over all vacancies of class I, II, III and 4th w.e.f. 07.02.1996-chief secretary directed to constitute committee headed by officer rank of secretary and principal secretary-fill up all backlog vacancies within period of 6 month-after giving personal hearing to the petitioner-petition allowed.

Held: Para-26
Keeping in view unjustifiable approach of the State Government and lack of effective implementation of the Act, it shall be appropriate that the Chief Secretary of the State may constitute a committee headed by an officer of the rank of Secretary or Principal Secretary to monitor the vacancies falling within the quota of blind as well as physically handicapped persons. All backlog vacancies should be filled up within a period of six months in accordance with rules. The petitioners and their representative are permitted to represent their cause before the Chief Secretary of the State of U.P and who shall also provide personal hearing before the constitution of Monitoring Committee for the purpose.

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

1. Heard Mr. S.K. Rungta, learned counsel appearing for the petitioners assisted by Mr. Sudhir Kumar Mishra and Smt. Sangeeta Chandra, learned Addl. Chief Standing Counsel for the State as well as Mr. Rajneesh Kumar, learned counsel appearing on behalf of U.P. Public Service Commission.

2. Learned counsel for the petitioners is a blind person pursuing the present controversy for his colleagues who have not been given appointment by the State Government in pursuance to statutory mandate provided by the "Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" (in short, 1995 Act). The 1995 Act came into force on 7.2.1996. According to the petitioners' counsel, in spite of repeated orders passed by this Court, the Government has been failed to comply with statutory mandate to identify and fill up 1% vacancies by blind persons. He further submits that admittedly, the State Government has not filled up the vacancies ignoring the statutory mandate and the judgment of Hon'ble supreme court decided on 7.7.2010 in **Special Leave Petition (C) No.14889 of 2009 Government of India versus Ravi Prakash Gupta and another.**

3. While assailing the conduct of the State Government, it is vehemently argued by the petitioners' counsel that the State of U.P has adopted dilatory tactics by not complying with statutory mandate provided under 1995 Act.

4. On the other hand, Smt. Sangeeta Chandra, learned Addl. Chief Standing Counsel submits that it is not adversarial of litigation and the government is very well trying to identify and fill up the quota of blind persons. At no stage, the government is trying to curtail the rights of blind persons.

5. The petitioners' counsel has submitted a written argument also. The factual controversy depicted therein has not been disputed by other side. From the argument advanced by the parties' counsel and the pleading on record, the factual position is discussed hereinafter.

6. The foundation of the present writ petition dates back to the office memorandum dated 9.6.2009 whereby the State of U.P has proceeded with special drive for recruitment of candidates to clear the backlog vacancies. While proceeding to fill up the backlog vacancies through special recruitment drive, no effective steps were taken to fill up the quota of blind persons. Hence, the petitioners approached this Court.

7. It was as far back as in the year 1972, the Government of U.P issued an order providing 2% reservation for all categories of persons with disabilities including blind, hearing impaired and locomotor disabled. On 8.6.1982, the government took a decision to fill up the vacancies of blind persons through special recruitment drive since they were not considered for appointment in pursuance to the aforesaid Government Order. In consequence thereof, 213 blind candidates were appointed by the State Government to fill up the backlog vacancies between 1972-82. It was in the year 1995, the Parliament enacted 1995 Act(supra). Apart from other things, the 1995 Act provides for 3% reservation to the persons with disabilities in all establishments of appropriate Government to be equally distributed to the extent of 1% each among them and utilisation of vacancies in identified posts for appointment against 1% reservation for each of three categories of persons with disabilities, viz. Blind and low vision, hearing impaired and locomotor disabled and cerebral palsy respectively.

8. The State Government in pursuance to the statutory mandate issued an order dated 20.9.1997 to implement the Scheme of reservation for physically impaired persons. It appears that from time to time recruitments were done but the statutory mandate was not complied with in its letter and spirit.

9. Between 1999 to 31.3.2010, 1,57,510 vacancies were advertised for Group C post. 79826 vacancies were filled up. It has been stated that out of 79826, 2445 were disabled but the number of blind was only 49. In case the quota of blind persons are calculated at the rate of 1%, then it will come to 798. The respondents have not provided detail with regard to factual position of subsequent period.

10. 3955 Group D vacancies were advertised during the aforesaid period, out of which 3733 were appointed which includes 92 physically disabled persons but only 11 were blind persons although the quota of blind comes to 37. It has been brought on record that from 1.2.2007 to November, 2010, U.P. Secondary Board made appointments against 2763 vacancies out of which 79 were disabled but quota for the blind was not made available though in

terms of 1% reservation, 27 blind persons ought to have been appointed.

11. 7968 persons were appointed as Assistant Teacher out of which, 238 were disabled. Submission is that though 79 blind persons ought to have been appointed but no one succeeded to seek appointment under the quota. It has been brought on record that in 2008, 88,385 persons were appointed out of which 1932 were disabled and 399 persons were blind. Against the vacancies of 88,385, total 884 blind persons should have been appointed but it was not done.

12. From the factual matrix on record discussed hereinabove, there appears to be no room of doubt that the State has not taken the case of blind persons seriously. It has been stated that the rights of physically disabled persons including the blinds cannot be curtailed by the State from being selected and appointed in terms of the statutory mandate. It is further stated that in accordance with the Government Order dated 3.2.2008, all vacancies under Group C and Group D posts both identified and unidentified should have been taken into account but it appears that the State Government acted in violation of its own office memorandum dated 3.2.2008 while computing the quota of blind persons and proceeding with appointment and selection.

13. Sections 32 and 33 of the 1995 Act are relevant for disposal of present controversy. For convenience, they are reproduced as under :

"**Section 32.** Identification of posts which can be reserved for persons with disabilities.-

Appropriate Governments shall -

(a) Identify posts, in the establishments, which can be reserved for the persons with disability;

(b) At periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

Section 33 Reservation of posts.- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i)blindness or low vision;

(ii)hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided, that the appropriate Government may, having regard to the type of work carried on in any department or establishment by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

14. A plain reading of the aforesaid provisions reveals that it shall be obligatory on the part of the State to identify the posts in the establishments which can be reserved for the persons with disability. The Parliament to its wisdom used the word, "establishments" which means the different posts across the table which shall include all the categories of posts in the government. In case there are some posts in Class-II or Class-I cadre which can be very well occupied by blind

persons or physically impaired or disabled persons, then it is not permissible for the State not to identify the posts. Neither Section 32 nor Section 33 of 1995 Act makes any distinction with regard to Class A, B, C and D posts. Of course, option is open for the Government to identify the posts.

15. In the present case, it appears that the government assumed that identification is to be done only of Class III and Class-IV posts and not the posts falling within the higher category of government department. While identifying the posts, it is necessary for the government to look into the nature of job of different categories including Class-I, Class-II, Class-III and Class-IV and find out whether the blinds may be accommodated and discharge duty. Under Section 33, reservation has been made from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy.

16. Mr. Rungta while assailing the conduct of the State invited attention to some of the advertisements which reveals that while advertising the vacancies, conditions have been imposed that the low vision or the blind persons should be a person who can drive a cycle. We feel that such condition imposed by the appointing authority seems to be against the spirit of Clause (1) of Section 33. By imposing condition that a candidate should possess efficiency to ride a cycle virtually amounts to curtail the statutory rights available to the blind persons under Clause (1) of Section 33. No such condition should have been imposed by the government while advertising the vacancies for any of the posts within its jurisdiction to select and recruit the blind persons. The medical certificate furnished by the blind persons that he or she is blind or physically impaired will suffice to claim appointment under the provisions of 1995 Act and any such condition imposed by the government while advertising the vacancies shall be against the letter and spirit of Section 33 of the 1995 Act.

17. Our attention has been invited to the judgment of Hon'ble Supreme Court in the case of Ravi Prakash Gupta (supra). Their Lordships while reaffirming the judgment of Delhi High Court has held as under :

"17. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise

and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

18. The various decisions cited by A. Sumathi, learned Advocate for the first intervenor, Shri A.V. Prema Nath, are not of assistance in the facts of this case, which depends on its own facts and interpretation of Sections 32 and 33 of the Disabilities Act, 1995.

19. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the Special Leave Petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court."

18. Hon'ble Supreme Court has upheld the judgment of Delhi High Court long back as on 7.7.2010. Even after lapse of 2 ½ years, neither the statutory mandate nor the judgment of Hon'ble supreme Court has been complied with by the State Government of U.P in its totality.

19. Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel submits that the government has identified the posts and issued the Government Order dated 13.1.2011 under Section 32 of 1995 Act even for Group A and Group B posts. Mere identification on the part of the government without complying with the provisions of Section 33 is not sufficient. The identification is of 13.1.2011 but the fact remains that the quota of blind persons necessary to be filled up have not yet been exhausted by the State by identifying the posts of Groups A, B, C and D category. The government seems to have not discharged its statutory liability.

20. The factual position discussed herein above with regard to backlog has not been disputed by the respondents while filing affidavit. Once there is backlog under the blind quota and while making selection from time to time, the whole of the quota has not been filled up and still the blinds are running from pillar to post and roaming round the State Government of U.P. for their cause and justice, it does not show that the State has acted in true spirit of law while discharging its constitutional and statutory obligation. Since the controversy relates to different departments, it is not possible for this Court to monitor the conduct of every department. It shall be appropriate that the Chief Secretary of the State be directed to meet out the requirement of law to fill up the backlog vacancies with regard to blind persons and monitor the same.

21. It has been stated by learned Addl. Chief Standing Counsel that that in some of the departments, quota has been filled up but the fact remains that the backlog pointed out by the petitioners and the existing anomalies while filling up the vacancies referred to above have not been disputed.

22. Justice is a social virtue and it may be granted only by well organised social order. With regard to concept of justice, Hans Kelsen observed :-

"No other question has been discussed so passionately, no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of

so much intensive thinking by the most illustrious thinkers from plato to Kant, and yet this question is today as unanswered as it ever was. It seems that it is one of those questions to which the resigned wisdom applies that man can not find a definite answer, but can only improve the question. The longing for justice is man's eternal longing for happiness. It is happiness that man can not find alone, as an isolated individual and seeks in society. Justice is social virtue and it can be guaranteed by a social order." (Kelsen Hans, What is Justice ? At 1-2 (1957)

23. With the changing phase of society, the old notion of justice has undergone sea change. The orthodox approach of justice has now supplemented by modern concept of social justice to wipe the tear of lowest strata of society. The modern approach is to look at the notion of justice from the point of view of citizen to whom just treatment was due.

24. Pt. Jawahar Lal Nehru while defending Directive Principles of State Policy (Part IV of Constitution) in the Constituent Assembly debate stressed that, to quote :

"the first task of this Assembly is to free India through a new Constitution, to free the starving people, and to cloth nacked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and sufferings, so long our work will not be over. With the independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end itself, only, means to an end,... that end being the raising of the people.. to higher levels and hence the general advancement of humanity."

25.Knowledge is not vested only in the able persons. There has been great thinker, philosopher, Poets and Scientists who were physically disabled and blind but the services rendered by them made ever-lasting imprint on the sand of human history. Some of them are Tilly Aston, Louis Braille, Francis Joseph Campbell, Kenneth Jernigan, Helen Keller, Juan Carlos Gonzalez Leiva, Erik Weihenmayer, David Alexander Paterson, Surdas, John Milton.

25. Apart from above, one of the most famous and surviving legend Scientist 'Stephen Hawking' is a physically crippled person but a leading personality of Theoretical Physics.

26. Keeping in view unjustifiable approach of the State Government and lack of effective implementation of the Act, it shall be appropriate that the Chief Secretary of the State may constitute a committee headed by an officer of the rank of Secretary or Principal Secretary to monitor the vacancies falling within the quota of blind as well as physically handicapped persons. All backlog vacancies should be filled up within a period of six months in accordance with rules. The petitioners and their representative are permitted to represent their cause before the Chief Secretary of the State of U.P and who shall also provide personal hearing before the constitution of Monitoring Committee for the purpose.

27. In view of above, the writ petition is allowed. A writ in the nature of mandamus is issued directing the State Government to fill up all the backlog vacancies of blind persons to the extent of 1% in every department in case already not filled up, expeditiously, say within a period of six months. Henceforth no advertisement shall be made and vacancies shall be filled up while proceeding with recruitment in government departments, corporation and local bodies without making a provision with regard to vacancies of physically handicapped persons including blind persons.

The Chief Secretary of the Government of U.P shall constitute a Committee to monitor and ensure compliance of the judgment. All vacancies including backlog quota shall be filled up with regard to blind persons within the aforesaid period of six months. The Chief Secretary of State of U.P shall file a personal affidavit in this Court indicating under what manner the backlog quota of blind persons has been filled up. He shall also grant time to the representative of blind persons including Mr. S.K. Rungta who is present in this Court to invite his attention to different backlog quota as well as irregularity committed by different departments in filling the vacancies meant for blind persons and pursue their cause.

Registry to take follow up action. The affidavit filed by the Chief Secretary shall be placed before the Bench immediately after six months.

The writ petition is allowed accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2013

BEFORE
THE HON'BLE SHABUHUL HASNAIN, J.

Service Single 6769 of 2007

Vishal Kumar Srivastava ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
R. Vijay Singh

Counsel for the Respondents:
C.S.C.

U.P. Koshagar Lipikiya Sewa Niyamawali 1978-Rule16- Criteria for promotion-junior clerk to senior Assistant-petitioner alongwith two others were considered for promotion-D.P.C. found eligible-considering criteria for promotion-seniority cum suitability-rejection of unfit-other two promoted-by impugned order only reason disclosed-non completion of 7 years as per -G.O.-subsequently clarified to be applicable in particular individual case-more over G.O. can not override statutory provision-held-petitioner entitled for promotion in pursuance of recommendation of DPC-without entitlement of salary on promotional post e.g. notional promotion-but this period shall be taken in account while considering next promotion, and other benefits.

Held: Para-6
Accordingly, the order dated 10.8.2007 rejecting the case of the petitioner for promotion is set aside. The case of the petitioner should be considered for giving him promotion from the date when his name was considered and was illegally rejected. His seniority should reckon from the date aforesaid three persons were given promotion. Since he has not worked on promoted post hence it will be treated to be

a notional promotion and higher salary of the post of Assistant Accountant shall not be payable to him for that period. However, seniority will be counted for all other purposes from the date when his colleagues were given promotion and he was left out arbitrarily.

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

1. Heard Sri Ran Vijay Singh, learned ocunsel for the petitioner and learned Standing counsel.

2. Petitioner has prayed for quashing of the impugned government order dated 20.4.2007 contained in annexure No.1 as well as the decision of the departmental promotion committee dated 10.8.2007, as contained in annexure No.2 to the writ petition. The petitioner was appointed on the post of Junior Clerk under Dying in Harness Rules on 7.11.2003. The petitioner has annexed the 1978 rules known as as Uttar Pradesh Koshagar Lipik Vargiya Sewa Niyamawali, 1978. Attention of this Court has been drawn towards rule No.16 (1) which says that promotion to the next higher post will be made on the principle of seniority subject to rejection of unfit. Petitioner has made categorical statement that the said rules have not been modified or changed till date. He says that he has all the qualifications mentioned in the rules and, as such, he ought to have been promoted along with Ajay Kumar Tripathi, Smt. Rekha Gaud and Sri Shailendra Srivastava, who were promoted on 10.8.2007. The departmental promotion committee found the petitioner suitable in all respects except for the fact that he had not completed seven years on 10.8.2007 i.e. the date of promotion of aforesaid three persons.

3. Counter affidavit has been filed. Learned Standing counsel has pointed out that there was government order No.5-3-writ-136/10-2007, dated 20th April, 2007 which had prescribed that the minimum length of service for promotion from the post of Junior Clerk to the post of Assistant Accountant will be seven years.

4. Petitioner has filed supplementary affidavit on 11.7.20012 vide annexure No.SA-1. A letter has been issued by the Anu Sachiv, dated 3.2.2009 clarifying that the said order dated 20.4.2007 was not a government order in true and strict sense. It was issued in a particular case and it can not be used as an example for others. The said order also clarifies that 1978 rules are still in existence. Petitioner counsel has forcefully argued that in view of letter dated 3.2.2009, the alleged order dated 20.4.2007 looses its authority and significance meaning thereby that the case of the petitioner should not have been rejected on 10.8.2007 when he was declared suitable for promotion but was denied on the ground of length of service being less than seven years. It has been clearly mentioned that the said order dated 20.4.2007 was issued in a particular case and it does not have the authority and connotations of a government order. The said order was neither binding on the petitioner nor his case was covered by the alleged government order.

5. Learned counsel for the petitioner has raised another legal argument that even if the letter dated 20.4.2007 is taken to be a government order, it could not have modified the provisions of 1978 rules. A government order can not override the statutory provisions, as such, the rejection of the petitioner was absolutely arbitrary and misconceived. This being the position, the Court is of clear view that the petitioner has been discriminated due to misunderstanding of the opposite parties. His case was considered along with Ajay Kumar Tripahti,

Smt. Rekha Gaud and Shaildendra Srivastava on 10.8.2007. Result of this consideration has been annexed. At the end of this report of the departmental promotion committee it is mentioned says that he was found suitable for promotion.

6. Accordingly, the order dated 10.8.2007 rejecting the case of the petitioner for promotion is set aside. The case of the petitioner should be considered for giving him promotion from the date when his name was considered and was illegally rejected. His seniority should reckon from the date aforesaid three persons were given promotion. Since he has not worked on promoted post hence it will be treated to be a notional promotion and higher salary of the post of Assistant Accountant shall not be payable to him for that period. However, seniority will be counted for all other purposes from the date when his colleagues were given promotion and he was left out arbitrarily.

7. Since the validity of the order dated 20.4.2007 has itself been denied by an order of the government dated 3.2.2009, there is no purpose of quashing the said government order. However, it is made clear that it will not be read adversely in the case of the petitioner and it will not adversely affect the promotion of the petitioner w.e.f. 10.8.2007.

8. The petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2013

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Service Single No. 7002 of 2009

Smt. Rajeshwari Devi ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Nitin Kumar Mishra, Sri N.N. Jaiswal Sri Prashant Jaiswal, Sri Siddharth Shekhar Singh

Counsel for the Respondent:
C.S.C.

Constitution of India Art. 23- Petitioner working as 'Dai for last 10 years-getting Rs. 50/- subsequently enhanced to Rs. 200/-11post of Dai still vacant-amount to Begar as per Art. 23 of Constitution-petitioner being Backward category-entitled for age relaxation-authorities to consider selection of petitioner without being prejudice with crass of upper age limit-considering long period of working as she became overage-direction issued accordingly.

Held: Para-5
Petitioner has now worked for almost ten years with the opposite parties. She must definitely have become overage by now. The petition is disposed of with a direction to the opposite partis that in case the said 11 posts are to be filled up, the petitioner will also be allowed to participate in the selection in view of the law laid down in the case of Yamuna Shanker Sharma Vs. State of Rajasthan and others, (2007) 2 Supreme Court Cases 611 as also in the case of Mukesh Chandra Vs. State of U.P. and others, 2000 (1) A.W.C. 221.

Case Law discussed:
(2007) 2 SCC 611; 2000 (1) A.W.C. 221

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

1. Heard Sri N. N. Jaiswal, learned counsel for the petitioner and learned Standing counsel.

2. It is the case of the petitioner that she was appointed as part time 'Dai' on

30.4.2003 and she joined her duties at Sub-Centre, Akbara Primary Health Centre, Pura Bazar, District - Faizabad. She was paid honorarium of Rs.50/- only which was converted to Rs.200/- per month. Petitioner has passed Class VIII-Madhyama which is equivalent to Class X and she also undergone some training in the department. Petitioner has been working since then yet she is not even being paid daily wages what to say of regularization.

3. Sri Jaiswal has informed that there are 11 posts of regular 'Dai' available with the opposite parties and the services of the petitioner can be regularized on one of these posts.

4. Learned Standing counsel has submitted that there is no post of 'Dai' with the department yet he admits that the petitioner was appointed on part-time 'Dai'. There is a contradiction in the counter affidavit and the arguments of the State. Paying Rs.200/- per month can only be explained as 'Begar' which has been prohibited under Article 23 of the Constitution of India, which is quoted as under:-

"23. Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

5. Petitioner has now worked for almost ten years with the opposite parties. She must definitely have become overage by now. The petition is disposed of with a direction to the opposite partis that in case the said 11 posts are to be filled up, the petitioner will also be allowed to participate in the selection in view of the law laid down in the case of Yamuna Shanker Sharma Vs. State of Rajasthan and others, (2007) 2 Supreme Court Cases 611 as also in the case of Mukesh Chandra Vs. State of U.P. and others, 2000 (1) A.W.C. 221.

6. Since the petitioner belongs to backward caste, the relaxation of age will be available to her in that category also. In any view of the matter, she will not be debarred on the basis of age in participating in the selection.

7. The petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.
HON'BLE Dr. SATISH CHANDRA, J.

Misc. Bench No.7558 of 2011

Nawab Haider ...Petitioner
Versus
Urban Cooperative Bank Ltd. & Ors. Respondents

Counsel for the Petitioner:
Sri Vivek Srivastava, Sri Manoj Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Deepak Srivastava

Sri Kishore Kumar Singh, Sri Nirmal Kumar Yadav

Constitution of India, Art. 226-Recovery against guarantor- loan advanced for purchase of Car-petitioner stood guarantor-argument that firstly it should be recovered from principal borrowers assets or the property pledged by borrower-held in view of law laid down by Apex Court-amount can be recovered from the guarantor-petitioner being member of cooperative society in terms of section 40 equally liable to pay-petition dismissed.

Held: Para-8

The Supreme Court in the authority reported in Bank of Bihar vs. Dr. Damodar Prasad AIR 1969 Supreme Court 297, (three judges) categorically held that liability of surety cannot be deferred until remedies against principal debtor are exhausted. Subsequently also in the following authorities placing reliance upon Section 128 of Contract Act, it has been held by the Supreme Court that even without proceeding against principal debtor the proceedings for recovery can be taken against guarantor/surety.

Case Law discussed:

2004(3) UPLBEC 2366; 2009(9) SCC 478; 2012(11) SCC 511.

(Delivered by Hon'ble S.U.Khan, J.)

1. Heard Sri Vivek Srivastava, learned counsel for the petitioner, Sri Deepak Srivastava, learned counsel for opposite party no.1 and learned Additional Chief Standing Counsel for other opposite parties.

2. The petitioner's son Zeeshan Haidar respondent no.3 took some loan from respondent no.1. Petitioner was guarantor of the loan in terms of Section 40 of U.P. Co-operative Societies Act, 1965. Section 40 is quoted below:-

"***40. Deduction from salary to meet society's claim in certain cases.***

(1)Notwithstanding anything contained in any law for the time being in force, a member of a co-operative society may execute an agreement in favour of the co-operative society providing that his employer shall be competent to deduct from the salary or wages payable to him by the employer, such amount as may be specified in the agreement and to pay the amount so deducted to the co-operative society in satisfaction of any debt or other demand owing by the member of the society.

(2)Notwithstanding anything in any law for the time being in force, the employer shall, if so required by the co-operative society by requisition in writing and so long as such debt or demand or any part of it remains unpaid, make the deduction in accordance with the agreement executed under sub-section (1) any pay the amounts so deducted to the society within fourteen days from the date of the deduction.

(3)An employer who without sufficient cause fails to make the deduction in terms of sub-section(2), or having made, any such deduction fails to pay the amount so deducted to the society within fourteen days from the date of deduction, shall be liable to the society to the extent of the amount which the employer has failed to deduct or to pay, as the case may be."

3. Petitioner is an employee of U.P. State Government working under respondent no.2 Executive Engineer Yantrik Khand Lok Nirman Vibhag, Lucknow. Respondent no.3 petitioner's

son and petitioner both were members of Co-operative Society respondent no.1. Respondent no.3 took loan of Rs.234118/- from the society in 2002 for purchasing a car. In term of Section 40 of the Act, petitioner stood surety for the loan of his son respondent no.3. Petitioner's son defaulted in payment. Hence by virtue of the agreement executed by the petitioner in favour of respondent no.1 and in terms of Section 40 (1) of the Act, communication was sent by respondent no.1 to respondent no.2 dated 23.6.2011 and thereafter the loan was started to be deducted from the salary of the petitioner. The said office order dated 23.6.2011 has been challenged through this writ petition.

4. It has been stated that up till 2007 installments were paid but thereafter respondent no.3 stopped payment. Thereafter it is stated in para 5 of the writ petition that respondent no.3 son of the petitioner started behaving cruelly with the petitioner and thereupon petitioner disowned his son through advertisement in newspaper.

5. In this writ petition, interim order was passed on 12.9.2011 directing that recovery shall not be made from the petitioner, however, it could be made by selling the car as well as immovable property owned by respondent no.3.

6. Respondent no.1 has filed supplementary affidavit stating therein that its employee contacted the opposite party no.3 but he misbehaved with him and refused to give information regarding the house and the car, hence car has not been recovered.

7. The anchor-sheet of the argument of learned counsel for petitioner is that in view of Supreme Court authority reported in Pawan Kumar Jain vs. The P.I.I. Corporation of U.P. 2004 (3) UPLPEC 2366, the recovery should have first been made from the principal borrower i.e. respondent no.3. Firstly, documents have not been filed to show that petitioner was simply a guarantor. Secondly, by virtue of Section 40 of U.P. Co-operative Societies Act, petitioner is squarely liable. Thirdly, the Supreme Court Authority reported in Pawan Kumar Jain deals only with recoveries under U.P. Public Money (Recovery of Dues) Act, 1972 Section 4 (2)(a) which requires that first recovery shall be made by selling pledged goods. If the instant case the pledged car is not traceable.

8. The Supreme Court in the authority reported in Bank of Bihar vs. Dr. Damodar Prasad AIR 1969 Supreme Court 297, (three judges) categorically held that liability of surety cannot be deferred until remedies against principal debtor are exhausted. Subsequently also in the following authorities placing reliance upon Section 128 of Contract Act, it has been held by the Supreme Court that even without proceeding against principal debtor the proceedings for recovery can be taken against guarantor/surety.

(I)Industrial Investment Bank of India Ltd. vs. Biswanath Jhunjhunwala 2009 (9) SCC 478.

(II)Ram Kishun and others vs State of U.P. and others 2012 (11) SCC 511.

9. Accordingly we do not find anything wrong in the action of respondent no.1 seeking to recover the amount of loan advanced to respondent no.3 from the salary of the petitioner.

10. Writ petition is, therefore, dismissed.

11. Stay order stands automatically discharged.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 30.07.2013

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

Civil Misc. Writ Petition No.8876 of 2013

Prem Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

Constitution of India-Art. 226- Ad-hoc appointment-on post of L.T. grade teacher-made under provision of Removal of difficulties order 1981-approved by DIOS continued upto 17 years-after retirement-claimed post retirel benefits-denied-on ground -appointment being ad-hoc basis-not a regular one-held-appointment on ad hoc basis following procedure for appointment-is substantive appointment-made under difficulties removal order 1981-held-entitled for pensionary benefit-petition allowed.

Held: Para-30 & 31
30. The principle which can be discerned from the above mentioned judgment is that if adhoc/stopgap/temporary employee having essential qualification and is appointed in terms of the statutory Rules and he continues for a long time and fulfills the qualifying service is entitled for pension and other retiral benefits.

31. Having regard to the facts and circumstances of the case I am of the view that petitioner is entitled for the post retiral benefits as his appointment was made in terms of the statutory Rules viz. Removal of Difficulties Order, 1981, against a short term vacancy with the approval of the appropriate authority/District Inspector of Schools and he worked uninterruptedly for 17 long years.

Case Law discussed:
2007 (3) UPLBEC 2073; 2006 (3) AWC 2909; (2000) 8 SCC 25; (2001) 1 SCC 637; (1989) UPLBEC 501; 2006(1) ALR 839; (2002) 4 LLN 566; 2007(3) UPLBEC 2073; 2012(2) ALJ 132

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. By way of this writ petition the petitioner who was appointed as Assistant Teacher has challenged the order passed by the Joint Director dated 3.11.2012 whereby petitioner's representation for payment of post-retiral benefit has been rejected on the ground that petitioner was not a permanent teacher.

2. Foundational facts in brief are that Karma Kshettra Inter College, Etawah is a recognized institution, wherein education is imparted upto the level of Intermediate. It receives aid out of State Fund. The provisions of the U.P. Intermediate Education Act, 1921 , the Regulations framed thereunder, the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (U.P. Act No. 5 of 1982) and the U.P. High Schools and Intermediate College (Payment of Salaries to Teachers and other Employees) Act, 1971 are applicable to the institution. The institution is administered by the respondent no.6, the Committee of Management.

3. It is averred by the petitioner that a regular/permanent Assistant Teacher namely Gyan Shanker Verma was promoted on the post of Lecturer causing a short term vacancy The petitioner was appointed against the said vacancy as ad hoc Assistant Teacher in L.T. Grade after following the procedure prescribed under the law. After the appointment, the management sent the papers to the office of District Inspector of the Education for his approval.

4. The District Inspector of School having satisfied, accorded his approval, vide order dated 1.2.1995. The Copy of the said order is brought on the record as Annexure-1 to the writ petition. The petitioner joined his duties on the same day. He continuously worked in the Institution and drew his salary from the Salary Payment Account of the state. The Secondary Education Services Selection Board, for the some reasons, could not make selection against the post; therefore, he continued uninterruptedly. The petitioner reached his age of superannuation on 30.6.2012. He completed his 17 years 2 month service in the same status, i.e., on ad hoc basis. After his retirement the petitioner made a representation for his post retrial benefits including the pension. His repeated representation did not find favour from the authority concerned.

5. Petitioner in his evening of life, having lost all the hope, preferred a writ petition No. 41841 of 2012 (Prem Singh Verma v. State of U.P. and others) before this Court for direction upon the respondents to consider his cause, which was disposed of on 24.8.2012 with a direction upon the competent authority to consider the grievance of the petitioner. A copy of the said order has been brought on record as Annexure-3 to the writ petition.

6. Pursuant thereto, the Joint Director of Education has passed the impugned order on 3.11.2012 whereby Petitioner's representation had been rejected primarily on the ground that petitioner was a ad hoc / temporary employee and the pension is admissible only to the regular/permanent teacher.

7. A counter affidavit has been filed on behalf the Sate functionaries. Their stand in the counter affidavit is that the petitioner was admittedly ad-hoc teacher and only a permanent teacher is entitled for the pension, therefore, the ground mentioned in the impugned order are justifiable and no interference is called for under the writ jurisdiction.

8. I have heard Sri Siddarth Khare, learned counsel for the petitioner and Sri A. K. Yadav, learned Standing Counsel .

9. Learned counsel for the petitioner Sri Siddarth Khare submits that the Petitioner has completed more than 17 years of continuous service, therefore, he is entitled for all the benefits which is admissible to a regular teacher. He has drawn the attention of the court to Government order dated 1.07.1989, wherein it is provided that after ten years regular service if an employee reaches his age of superannuation is entitled for pension. He further submits that the said Government Order was filed before Joint Director along with his representation but the Joint Director has failed to advert to the issue. Only a passing reference to the said Government Order has been made by him in the impugned order. He placed

reliance on the judgment of this Court passed in the case of **Hans Raj Pandey v. State of U.P. and others reported in 2007 (3) UPLBEC 2073** and **Ram Pratap Shukla v. State of U.P. and others** reported in **2006 (3) AWC 2909**.

10. Learned Standing Counsel Sri A.K.Yadav, has drawn the attention of the Court to Article 465 A and Article 361 of the Civil Service Regulations wherein conditions have been laid down for qualifying service. He further urged that Article 361 of the Civil Service Regulations requires three conditions a) the service must be under Government, b) the employment must be substantive and permanent and c) the service must be paid by Government. Amplifying his submission he urged that in any event the petitioner does not fulfill the condition no. b) in as much as his appointment is indisputably made on ad hoc basis and it was not a permanent appointment.

11. Lastly Sri Yadav, contended that the ad hoc appointment is a stop gap arrangement and petitioner's appointment was only till the regular selection was made by the U.P. Secondary Education Board , therefore a stop gap appointment cannot be held to be a regular appointment.

12. I have considered the rival submissions of the learned counsel for the respective parties and perused the record.

13. The appointment of the petitioner was made on ad hoc basis. The institution where the petitioner was appointed as ad hoc teacher is govern by the U.P. Intermediate Education Act, 1921 (in short Act,1921) and Act No. 5 of 1982. In the Act, 1921 the word ad hoc or temporary is not defined. Section 16 E deals with the appointment of teachers in Intermediate Colleges; under Section 16 E (11) the temporary appointment were permissible only against a temporary vacancy caused by grant of leave to a incumbent for a period not exceeding six months. Chapter II of the Regulations framed under the Act, 1921 deals with the appointment of Heads of the institution and teachers. Proviso to Regulation 2 sub-clause 1 also permit to make appointment against a temporary vacancy caused by grant of leave for a period not exceeding six months or by death, retirement or by suspension.

14. The State Government amended U.P. Intermediate Education Act, 1921 drastically by U.P. Secondary Education Laws (Amendment) Act, 1975 (U.P.Act No. 26 of 1975). The same difficulties arose due to said amendment and as such the State Government vide Notification dated 18th August, 1975 issued U.P. Secondary Education (Removal of Difficulties) Order, 1975 in respect of substantive or leave vacancy or any vacancy existing or occurring during the academic session of the head of the institution of teachers. For the first time the management was empowered to make ad hoc appointment in the manner provided under the said order. In quick succession the State Government in order to overcome further difficulties which arose, issued Removal of Difficulties Second, Third, Fourth, Fifth, Sixth and Seventh orders between the year 1975 - 1977. There is no need to go into details of those orders as it is not relevant for the issue involved in the present case. Suffice would be to say, that for the first time concept of ad hoc appointment was introduced under the U.P. Intermediate Education Act,1921.

15. In the year 1981 the State Government established the U.P. Secondary Education Service Commission and Selection Board vide Ordinance No. 8 of 1981 which was promulgated on 10th July, 1981. The State Government in exercise of power under section 33 of the said ordinance issued Removal of Difficulties Order, 1981 on 31 July, 1981 which was followed by (Removal of Difficulties) (Second) Order, 1982 on 11th September, 1981. Both these orders were issued laying procedure for appointment on ad hoc basis against the substantive vacancy and short term vacancies.

16. After the enforcement of the U.P. Secondary Education Services Selection Board Act, 1982, the committee of management was empowered to make the ad hoc appointment under section 18 of the Act. The said section was amended by U.P. Act No. 1 of 1993 and U.P. Act No. 5 of 2001.

17. From the aforesaid statutory provisions it is evident that the ad hoc appointments were permissible by following statutory provisions which also requires approval of the District Inspector of Schools. The payment of salary of the ad hoc teachers appointed under the aforementioned statutory provisions are made by the State Fund/Salary Payment Account.

18. Concededly, the petitioner was a ad hoc teacher, his appointment was made against the short term vacancy with the approval of the District Inspector of Schools. He worked for more than 17 years and reached his age of superannuation on 30.6.2012. By the impugned order the petitioner's prayer for pension has been rejected only on the ground that he was not in regular service and the Government Order dated 1st July, 1989 has used the word 'regular service' (Niyamit sewa).

19. The Civil Service Regulation as applicable in Uttar Pradesh are intended to define the prerequisite conditions for grant of pension in the Government Service/Civil Department. The Article 361 of Chapter XVI of the Civil Service Regulations provides conditions of qualifications for pension. Article 361 reads as under :-

"The service of an officer does not qualify for pension unless it conforms to the following three conditions-

a) the service must be under Government,

b) the employment must be substantive and permanent and

c) the service must be paid by Government."

20. Article 424 of Chapter XVIII of the Civil Service Regulations provides the following kinds of pension admissible to a Government servant (a) compensation pension (b) invalid pensions (c) superannuation pensions (d) retiring pensions.

21. The Civil Service Regulation as applicable in Uttar Pradesh is a preconstitutional Rules. The U.P.Fundamental Rules which has been made under section 241 (2) (b) of the Government of India Act, 1935 came into force with effect from 1st April, 1942. Chapter 9 deals with the compulsory retirement. Fundamental Rule 56 (e)

provides for retiring of a Government servant. Clause (e) of Fundamental Rule 56 reads as under:

"(e) A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules to every Government servant who retires or is required or allowed to retire under this rule:

Provided that where a Government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less."

22. The short question which need determination in this case is whether the petitioner who was appointed on adhoc basis and also superannuated in the same capacity without his regularisation can be held to work on a regular basis. The terms under "ad hoc" "stopgap" and "fortuitous" came to be considered by the Supreme Court in the case of **Rudra Kumar Sain v. Union of India, (2000) 8 SCC 25**. The Court found that a person who has a requisite qualification and who is appointed with the approval of the appropriate authority and if he is allowed to continue on the post for a considerable long time then such appointment cannot be held to be stopgap/ fortuitous or purely adhoc appointment. The Supreme court observed as under :-

"In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc".

23. The Supreme Court in the case of **Ramesh K. Sharma v. Rajasthan Civil Services,(2001) 1 SCC 637**, considered the word "substantive basis" following the judgment of Baleshwar Dass v. State of U.P. (AIR 1981 SC 41). The Court held that if an incumbent holds the post for indefinite period then it cannot be said to be adhoc appointment. The Court held as under :-

"If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment, not being either stopgap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stopgap basis then such an appointment cannot be held to be on substantive basis. The expression "substantive basis" is used in the service jurisprudence in contradistinction with ad hoc or purely stopgap or fortuitous."

24. This Court in the case of **Dr. Hari Shanker Asopa v. State of U.P. And another, reported (1989) UPLBEC 501**, considered the Article 361 and Clause (e) of Rule 56 of Fundamental Rules as applied in Uttar Pradesh and the Civil Service Regulations. Dr. Hari Shanker Asopa was appointed on temporary basis on the post of lecturer in

the department of Surgery at S.N.Medical College, Agra on 4th August, 1964. In the year 1969, he was appointed on a substantive post of Reader in Surgery at same College that appointment too was on temporary basis. The term of the appointment was one year or till the candidate selected by the U.P.Public Service Commission was available, whichever was earlier. After three years he was promoted to the post of Professor in Surgery in Jhansi Medical College. The said appointment was also temporary and it was for a period of one year or till the candidate regularly selected by the U.P.Public Service Commission was available or till the services of Dr. Asopa were needed, whichever was earlier. Dr. Asopa uninterruptedly continued for 18 years as a Lecturer, Reader and Professor on temporary basis. His request for voluntary retirement was allowed by the State Government in the year 1983 with a condition that no pension would be paid to him, as he was not permanent on any post of the Government Service. Dr. Asopa feeling aggrieved by the said order dated 21.2.1983 preferred a writ petition before this Court. .

25. This Court interpreted the qualifying service envisaged under Article 465 and 465 A of the U.P.Civil Service Regulations and came to hold that in view of the subsequent amendment in Rule 56 of the U.P.Fundmental Rules (Amendment Act Validation) Act, 1975 (U.P.Act No. 24 of 1975), a temporary government servant is also entitled for the retiring pension notwithstanding the definition of qualifying service under Article 465 and 465 A. Paragraph 19 of the the said judgment reads as under :-

"In the instant case, indisputably Dr. Asopa who allowed to retire under clause (c) of Rule 56 and the first and third conditions envisaged in Article 361 of the Regulations were satisfied. He, therefore, became qualified for a retiring pension notwithstanding the fact that he was not permanent on any of the posts held by him during the tenure of his continuous services of State Medical Colleges of Uttar Pradesh Government. Denial of retiring pension to Dr. Asopa on the ground of his not being permanent on any post of the government service was clearly violative of clause (e) of Rule 56 of the Rules. Condition contained in paragraph 2 of the order, dated 21st February, 1983 (Annexure-10 to the writ petition), depriving Dr. Asopa of retiring pension cannot , therefore, be sustained. The contention of the learned Standing Counsel for the State of Uttar Pradesh that Dr. Asopa was not entitled to any pension lacks merit and has got to rejected."

26. The said judgment of Dr. Asopa was followed by a Division Bench in the case of **Board of Revenue through its Chairman, U.P.Lucknow and others v. Prasidh Narain Upadhyay reported 2006(1) ALR 839** and **Rajendra Singh v. Accountant-General ,(2002) 4 LLN 566**. The Division Bench in this case also considered the Government Order dated 1st July, 1989 wherein the regular service was mentioned as one of the condition for the grant of pension. Relevant paragraphs are extracted hereunder below :-

"From perusal of the G.O., dated 1 July, 1989, Annexure 6 to the writ petition. Government has already taken a policy-decision that Government servant, who has completed 10 years of regular service, on completing the age of superannuation is entitled to get retirement/inability pension in the similar situation and manner like permanent Government employees.

The regular Government servant means, a person working against a post carrying on a pay-scale. If a person is not working against any post or is not getting the pay-scale, he could not be said to be a person appointed and continuing regularly. Only regular employee, whether temporary or permanent, is entitled to get pension.

Regular appointment means the appointment made according to rule and procedure. If against a post, a person was appointed in accordance with rules in the procedure prescribed for Government servant, his appointment is regular appointment."

27. The Government Order dated 1st July, 1989 again came to be considered by this Court in the case of State of U.P. v. Gaya Ram,(2209)75 ALR 77. This Court has interpreted the word regular service and held as under :-

"Learned Standing Counsel Sri Ajay Bhanot has laid much emphasis on the words as used in the Government Order dated 1.7.1989. The submission of the learned Standing Counsel as that the petitioner was only temporary Government Servant hence he cannot be said to have rendered regular ten years service; hence he is not entitled for the benefit of Government Order dated 1.7.1989. The words used in the Government Order dated 1.7.1989, means completion of ten years regular service. Words "regular service' has not been defined in the Government Order. From a reading of the Government Order it is clear that the word "ten years regular service" has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent is automatically entitled for pension. The Government Order dated 1.7.1989 does not contemplate ten years substantive service. The words "regular service" used in the Government Order is not anonymous to substantive service. Admittedly the benefit by Government Order is to be extended to temporary Government Servant. The temporary Government Servant cannot be said to have substantive or regular service. Thus, the words "regular service" used in the Government Order dated 1.7.1989 has not been used as specifying he capacity or status of its holder rather the words "regular service" has been used to denote and specify the nature of service rendered."

28. In the case of **Hans Raj Pandey v. State of U.P. and others, 2007 (3) UPLBEC 2073 (supra)** this Court had occasion to consider the provisions of U.P. State Aided Educational Institution Employees Provident Fund, Insurance and Pension Rules, 1964 also. Rule 43 ,44 and 45 of the said Rule has been considered at length by this Court and also the Regulations 465 and 465 A of the U.P.Civil Service Regulations. The Court held as under :-

"In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B i.e., lack of permanent character of service. However, in out view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P.Act No. 24 of 1975 which allows retirement of a temporary employees also and provides in clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every

Government Servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations, which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Condition -B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is in operative."

29. Sri A.K.Yadav, learned Standing Counsel has relied on the judgment of **Deeparam v. State of U.P. And others 2012 (2) ALJ 132**. In the said case the petitioner was working as Seasonal Peon since the year 1981. His services were regularised on 29.11.1996 and he retired on attaining the age of superannuation on 31.12.2007. The petitioner therein claimed that services rendered by him as Seasonal Collection Peon since 20.11.1981 should be treated as a qualifying service for the purpose of pension and other retiral benefits. The Court refused to accept the said submission on the ground that the services rendered as Seasonal Collection Peon does not qualify for pension as the service is intermittent and cannot be equated with a temporary employee. Thus the said case has a distinguishing features.

30. The principle which can be discerned from the above mentioned judgment is that if adhoc/stopgap/temporary employee having essential qualification and is appointed in terms of the statutory Rules and he continues for a long time and fulfills the qualifying service is entitled for pension and other retiral benefits.

31. Having regard to the facts and circumstances of the case I am of the view that petitioner is entitled for the post retiral benefits as his appointment was made in terms of the statutory Rules viz. Removal of Difficulties Order, 1981, against a short term vacancy with the approval of the appropriate authority/District Inspector of Schools and he worked uninterruptedly for 17 long years.

32. For the aforesaid reasons the impugned order dated 3.11.2012 passed by the Joint Director needs to be set aside. Accordingly, it is set aside.

33. A direction is issued upon the concerned respondents to pay the post retiral benefits to the petitioner in accordance with law as expeditiously as possible preferably within three months from the date of communciation of this order. It is made clear that if the payment is not made to the petitioner within the said period the petitioner shall be entitled for interest at the rate of 9% per annum on the delayed payment.

34. The writ petition is allowed with cost which is quantified Rs.2,000/-.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 23.07.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.12720 of 2010

Vijay Prakash Tiwari ...Petitioner

Versus

State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya, Sri O.P. Tiwari

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Prolong suspension-continued for considerable period of 18 years-held-arbitrary-heavy burden upon public exchequer-quashed with cost of Rs. 25000/-.

Held: Para-6

The above dictum is applicable in the case in hand in entirety. Besides, in the present case, keeping the petitioner under suspension for more than two decade is not only arbitrary and wholly illegal exercise of power, but it shows an criminal intent on the part of respondents in wasting public exchequer by keeping a person under suspension for two decades and more and pay him subsistence allowance and not to take any work for such a long time on the pretext of pendency of an enquiry which has not seen the light of the day for the last more than two decades. Such a prolonged suspension, in my view, speaks volume and it appears that respondents after suspending petitioner forgot it and a Class IV employee in the result has suffered for this entire period. It is in these peculiar facts and circumstances, in my view, not only the order of suspension is unsustainable and petitioner is entitled to relief, but this writ petition deserves to be allowed with exemplary cost against the respondents.

Case Law discussed:
2009(1) AWC 691

(Delivered by Hon'ble Sudhir Agarwal. J)

1. Heard Sri O.P. Tiwari, Advocate, holding brief of Sri Ramesh Upadhyaya, learned counsel for petitioner, learned Standing Counsel for respondents and perused the record.

2. This writ petition shows extraordinary state of affairs on the part of respondents inasmuch a Class IV employee was suspended on 8.5.1992 and this writ petition was filed in 2010 complaining that no enquiry has been completed at all and for the last 18 years petitioner has been kept illegally and unauthorizedly under suspension. This Court on 15.3.2010 granted two weeks' time to learned Standing Counsel to seek instructions in the matter and to find out whether suspension is still continuing or not.

3. Learned Standing Counsel stated that as per the instructions received by him on 27.5.2010, the suspension order is still continuing and enquiry has not been concluded. This is totally arbitrary and illegal exercise of power on the part of respondents.

4. The order of suspension in a pending or contemplated inquiry by itself is not a punishment but in case it is prolonged without initiation or completion of inquiry, it may become punitive with the passage of time. Whether such a prolonged suspension can be held valid and justified and whether the respondents can be allowed to keep an employee under suspension for an indefinite period is the moot question need to be answered in this case. The answer is an emphatic no.

5. This question has already been answered by this Court in **Smt. Anshu Bharti Vs. State of U.P. and others, 2009(1) AWC 691** and in paras 9, 10, 11, 12 and 13 this Court has observed as under:

"9. . . . . The prolonged suspension of the petitioner is clearly unjust and unwarranted. The question deals with the prolonged agony and mental torture of a suspended employee where inquiry either has not commenced or proceed with snail pace. Though suspension in a contemplated or pending inquiry is not a punishment but this is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment if resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not with due diligence and within a reasonable time. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or in a prolonged enquiry is unreasonable. It is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in society. A person under suspension is looked with suspicion in the society by the persons with whom he meets in his normal discharge of function.

10. A Division Bench of this Court in Gajendra Singh Vs. High Court of Judicature at Allahabad 2004 (3) UPLBEC 2934 observed as under :

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

11. Disapproving unreasonable prolonged suspension, the Apex Court in Public Service Tribunal Bar Association Vs. State of U.P. & others 2003 (1) UPLBEC 780 (SC) observed as under :

"If a suspension continues for indefinite period or the order of suspension passed is malafide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution.....(Para 26)

12. The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplated or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided an absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged

unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

13. The view I have taken is supported from another Judgment of this Court in Ayodhya Rai & others Vs. State of U.P. & others 2006 (3) ESC 1755."

6. The above dictum is applicable in the case in hand in entirety. Besides, in the present case, keeping the petitioner under suspension for more than two decade is not only arbitrary and wholly illegal exercise of power, but it shows an criminal intent on the part of respondents in wasting public exchequer by keeping a person under suspension for two decades and more and pay him subsistence allowance and not to take any work for such a long time on the pretext of pendency of an enquiry which has not seen the light of the day for the last more than two decades. Such a prolonged suspension, in my view, speaks volume and it appears that respondents after suspending petitioner forgot it and a Class IV employee in the result has suffered for this entire period. It is in these peculiar facts and circumstances, in my view, not only the order of suspension is unsustainable and petitioner is entitled to relief, but this writ petition deserves to be allowed with exemplary cost against the respondents.

7. In view of above, impugned suspension order cannot sustain.

8. Writ petition is allowed. Impugned order of suspension dated 8.5.1992 (Annexure 1 to writ petition) is hereby quashed.

9. Petitioner shall be entitled to all consequential benefits with cost of Rs. 25,000/- against respondents 2 and 3.

10. At the first instance, the cost shall be paid by respondent no. 1, but it shall be at liberty to recover the same from the concerned officer(s) who is/are found responsible for such extraordinary delay in the enquiry and keeping the petitioner continued under suspension for the last almost two decades.

ORITGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2013

BEFORE
THE HON'BLE MOHD. TAHIR, J.

Criminal Misc. Writ Petition No.17236 of 2010

Shakeel Ahmad and Ors. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioners:
Sri Mohd. Naushad Siddiqui, Sri Amar Nath Tewari
Sri R Nath Tewari

Counsel for the Respondents:
A.G.A., Sri Vinod Kumar

Cr.P.C. Section-133- Petitioner doing business of restoring bones and leather of dead animals-polluting atmosphere of locality-inspite of conditional order passed by Magistrate neither complied direction nor shown cause-even the license not renewed-paying business taxes-with other local taxes-immaterial-Magistrate rightly passed final order-required no interference.

Held: Para-11

According to the the conjoint reading of Sections 135 and 136 Cr.P.C., it is clear that if the person to whom the conditional order is addressed, does not perform the acts within the time as directed by the conditional order or fails to appear and to show cause, the

conditional order is made absolute. In the present case, the petitioners neither performed the act as directed by the conditional order nor showed any cause against the said order in spite of availing sufficient opportunity for the same. So the Magistrate concerned rightly made the conditional order absolute and the revisional court rightly confirmed the same.

Case Law discussed:
1992 (Cr.LJ) 379 (Bom.); 2004 Cr.L.J. 2262; AIR 1939 Patna 183

(Delivered by Hon'ble Mohd. Tahir, J.)

1. By means of this writ petition the petitioners have invoked the extraordinary jurisdiction of this Court with the prayer that the orders dated 30.10.2009 and 15.5.2010 passed by the Sub Divisional Magistrate, Sadar District Chandauli in Criminal Case No.20 of 2009 State vs. Shakeel Ahmad and others under Section 133 Cr.P.C. and the order dated 7.7.2010 passed by the Sessions Judge, Chandauli in Criminal Revision No.65/2010 Shakeel Ahmad and others vs. State of U.P. be quashed and the respondents be restrained from disturbing the peaceful functioning of the godown of the petitioners and from demolishing the same.

2. For the purpose of disposal of this writ petition the relevant and essential facts are as such that one Abdul Rashid had moved an application before the S.H.O., P.S. Mughal Sarai, District Chandauli against the petitioners Shakil Ahmad, Parvez Ahmad and Sirajul Haque to the effect that they are doing the business of flesh, leather and bones of dead animals in Mohalla Kasab Muhal, Mughal Sarai, District Chandauli. Their business are polluting the atmosphere of the locality and it has become very difficult for the persons of that locality to live in that area due to foul smell. On that application, Raju Diwakar Incharge Outpost Kuda Bazar P.S. Mughal Sarai went to the spot and after inspection he submitted his report to the S.D.M. Sadar Chandauli confirming the averments made in the application moved by Abdul Rashid and requested the S.D.M. Sadar to initiate proceedings under Section 133 Cr.P.C. against the petitioners. On receiving that report, the S.D.M. concerned issued notice dated 30.10.2009 to the petitioners under Section 133 Cr.P.C. asking them to remove the aforesaid nuisance or to show cause against the notice on the date fixed. In response to the notice, the petitioners through their counsel sought time for filing the objection and further 5.3.2010, 26.3.2010, 15.4.2010 dates were fixed on the application of the petitioners but no objection against the notice was filed by the petitioners. Further, 3.5.2010 was fixed for hearing but on that date none turned up from the side of the petitioners. So, after giving sufficient opportunity S.D.M. Sadar has passed the impugned order dated 15.5.2010 whereby the conditional order was made absolute. Against that order, the petitioners filed Criminal Revision No.65 of 2010, Shakil Ahmad and others vs. State of U.P. In the court of Sessions Judge, Chandauli. The Sessions Judge, Chandauli after hearing the counsel for both the parties dismissed the revision vide his order dated 7.7.2010 and confirmed the order dated 15.5.2010 passed by the S.D.M. Sadar, District Chandauli. Aggrieved by the said orders, the petitioners have preferred this writ petition before this Court.

3. I have heard learned counsel for the petitioners as well as learned counsel

for the respondents and perused the record.

4. The counsel for the petitioners has submitted that the conditional order of the S.D.M. dated 30.10.2009 under which the notice under Section 133 Cr.P.C. was issued to the petitioners, suffers from illegality as the same was passed without taking evidence. In this regard, the counsel for the petitioners has referred Section 133(1) Cr.P.C. and submitted that according to this Section, a District Magistrate or a Sub Divisional Magistrate empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence, if any, as he thinks fit, may make a conditional order requiring the person concerned to remove obstruction or nuisance or to desist from carrying on objectionable trade or occupation. But, in the present case the conditional order under Section 133(1) Cr.P.C. was passed without taking any evidence, so the whole proceeding initiated under Section 133(1) Cr.P.C. is vitiated.

5. I find no force in the contention of the counsel for the petitioners because for initiation of proceedings under Section 133(1) Cr.P.C. it is the satisfaction of the Magistrate concerned as to whether any public nuisance exists. The relevant portion of Section 133(1) Cr.P.C. reads as hereunder:-

"**133. Conditional order for removal of nuisance**.-(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

(a) *****

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) *****
(d) *****
(e) *****
(d) *****

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order-

(i)to remove such obstruction or nuisance; or

(ii)to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii)*****
(iv)*****
(v)*****
(vi)*****

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him a a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute."

6. The words occurring in Section 133(1) Cr.P.C. "and on taking such evidence (if any) as he thinks fit" indicate that recording or taking of evidence before passing a conditional order under Section 133(1) Cr.P.C. is discretionary and not mandatory. In this regard, my opinion finds support from the view taken by the Bombay High Court in the case of **Tejmal Poonam Chand Burad vs. State of Maharashtra, 1992 (CrLJ) 379 (Bom)**. In that case, the Bombay High Court has held that the Magistrate is not required to record evidence when he passes the conditional order. The trade or business of storing bones and leather of dead animals certainly emits foul smell and injurious to public health and comfort. So in such a case in the interest of public immediate action is necessary and the conditional order for removal of such public nuisance can be passed by the Magistrate without taking or recording evidence. In this regard, my view further finds support from the view taken by the Punjab and Haryana High Court in the case of **Ram Lal vs. State of Punjab, 2004 Cr.L.J.2262**, in which it has been held that illegal Hada Rori operation near National High way emitting foul smell and causing pollution and discomfort to the travellers, is public nuisance and in such a case conditional order can be passed without recording evidence. In the present case, the S.D.M. concerned proceeded under Section 133(1) Cr.P.C. against the petitioners on the basis of the report submitted by the police officer. There is nothing on record to show that the said police officer had some enmity with the petitioners or he in collusion with the opposite party submitted the report against the petitioners. So, in these circumstances, the non-taking or recording of evidence by the Magistrate before passing the conditional order does not, in any manner, adversely affect the proceeding of the present case.

7. The counsel for the petitioners has further submitted that this business of storing bones and leather of dead animals is being carried on by the petitioners on that place for a long time and prior to that their ancestors were doing this business on that place. He has further submitted that the petitioners are paying business tax also to the Municipality and in that regard, the photocopies of tax paying receipts have been filed from their side. So the impugned order of the Magistrate disturbing the business of the petitioners is unjust and improper and accordingly, the revisional court's order confirming the said order of the Magistrate is also unjust and improper. In support of his contention, the counsel for the petitioners has cited the following rulings:

(I)Vasant Manga Nikumba and others vs. Baburao Bhikanna Naidu and another, 1996 SCC (Cri) 27

(II)Makhan Lal and others vs. Buta Singh, 2003 CRI. L. J. 4147

8. I find no force in this contention also because long standing user or business which creates public nuisance and which is injurious to health and physical comfort of the persons of the community and from which there is

strong apprehension of spreading the serious diseases, cannot be legalised on the basis of its long existence. In the present case, there is clear report of the police officer concerned that the petitioners are running the business of storing the bones and leather etc. in their godowns, in the thickly populated locality of Mohalla Kasab Muhal, P.S. Mughal Sarai, District Chandauli, as a result of which foul smell spreads out all around and it has become very difficult for the persons of that locality to live there. This report is of the date of 1.9.2009. Prior to this report, on 19.7.2007 petitioners Shakeel Ahmad, Parvez Ahmad and Sirajul Haque had given written undertaking (Tehrir) to the Additional Superintendent of Police to the effect that they would shift their godowns of bones and leather outside the Abadi by 30.9.2007. This report clearly shows that the petitioners were operating this noxious business inside the Abadi and further it shows that they promised to shift this business outside the Abadi before 2 years of the said police report. The report of the committee, dated 19.5.2010, consisting of S.D.M. Sadar, C.O. Sadar and Chief Veterinary Officer, Additional Chief Medical Officer submitted to the District Magistrate, Chandauli also further fortifies this fact that this business was being carried on inside the Abadi and the said godown of bones etc. was emitting unbearable smell and was creating health hazards to the people of that locality. The photocopies of the aforesaid two papers have been filed along with the counter affidavit filed by the private respondent and these two papers have not been challenged by the petitioners. So, such a business which creates health hazards to the community of the locality and from which there is strong apprehension of spreading serious diseases in the locality, cannot be allowed to continue on the basis of its long existence. Therefore, no length of enjoyment can legalise a public nuisance involving danger to the health of the community. In this regard, my view finds support from the view expressed by the Division Bench of Patna High Court in the case of **Maksood Ali and others vs. President, Union Board, Garhwa, AIR 1939 Patna 183**. In the cases relating to the rulings cited by the counsel for the petitioners the public nuisance was not proved but in the case at hand the public nuisance undisputedly and by its nature is very well proved, so the rulings cited by the counsel for the petitioners are distinguishable on facts and circumstances of the matter, so they are not applicable in the present case.

9. It is also pertinent to mention here that the petitioners in the revision memo filed by them in the revisional court have admitted that they have no licence to run the business in question. So, the business tax payment receipts are of no help to the petitioners. In that view of the matter also, the impugned order of the Magistrate concerned is fully just and proper and the revisional court has rightly dismissed the revision filed against that order.

10. The counsel for the petitioners has further challenged the order dated 15.5.2010 of the Magistrate concerned on this ground also that this order is an ex parte order and on the date, this order was passed, the Advocates of Chandauli court were on strike, so in the absence of the parties or their counsel this order ought not to have been passed by the Magistrate concerned and in this regard, the copy of the Resolution of Bar Association has

been filed by the petitioners. This contention is also bereft of any force because there was no such resolution of Bar Association that the Magistrate or any other officer would not pass any order on that date and moreover, there is no law that the Magistrate or any other officer cannot pass any order on the day of strike of the advocates. The impugned order of the Magistrate concerned indicates that the petitioners were given about 5 dates for filing their objections against the conditional order but no objection was filed by the petitioners against the conditional order and the petitioners even remained regularly absent on two dates from the court. So, sufficient opportunity was given to the petitioners by the Magistrate concerned to file objection against the conditional order but they failed to file the objection against the same, as a consequence thereof the conditional order was made absolute by the Magistrate concerned under the provisions of Section 136 Cr.P.C. In this regard, the reference of Sections 135 and 136 Cr.P.C. appears essential. Sections 135 Cr.P.C. reads as follows:-

"135. Person to whom order is addressed to obey or show cause.-The person against whom such order is made shall-

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same.

Section 136 Cr.P.C. reads as follows:

"136. Consequences of his failing to do so.-If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code (45 of 1860,) and the order shall be made absolute."

11. According to the the conjoint reading of Sections 135 and 136 Cr.P.C., it is clear that if the person to whom the conditional order is addressed, does not perform the acts within the time as directed by the conditional order or fails to appear and to show cause, the conditional order is made absolute. In the present case, the petitioners neither performed the act as directed by the conditional order nor showed any cause against the said order in spite of availing sufficient opportunity for the same. So the Magistrate concerned rightly made the conditional order absolute and the revisional court rightly confirmed the same.

12. In view of the above, I find no illegality or impropriety or jurisdictional or procedural error in the impugned orders of both the courts below and therefore, these orders call for no interference.

13. For the foregoing reasons, the writ petition is dismissed and the impugned orders of both the courts below are confirmed.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 23.05.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 19200 of 2012

Shishupal Parihar ...Petitioner

Versus

State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sumati Rani Gupta

Counsel for the Respondents:
C.S.C., Sri Rajesh Tiwari

U.P. Industrial Piece Timely Payment of wages Act-1978-Section-3 Application for recovery of wages-workman engaged by Engineer for interior designing of Bangla-some daily rated employees engaged held-Bungla not within meaning of Industrial establishment-application not maintainable-order quashed.

Held: Para-8

In the instant case the admitted fact is that the petitioner is the owner of a bungalow and he employed an engineer for the purpose of redesigning and redecorating his house. Daily rated workers were employed as mason, electrician and painters, who worked in the house. The petitioner's bungalow is not an industrial establishment, and the facts, which has been brought on the record clearly indicate that no manufacturing activities of any sort was carried out nor any articles were produced, processed or manufactured, which was put up for sale, use or for transportation. The Court further finds that the petitioner cannot be termed as an occupier. He is the owner of a residential house and is not an occupier as defined under Section 2-C of the Act. The Act is clearly not applicable.

Case Law discussed:
1994 SCC (L&S) 286

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

1. Fourteen workers filed an application under Section 3 of the U.P. Industrial Piece Timely Payment of Wages Act, 1978 alleging that the petitioner has failed to pay wages amounting to Rs.3,86,575/- and therefore, the said amount may be recoverred under the Act. The petitioner appeared and objected to the proceeding contending that, for the purpose of interior designing and painting his bungalow, the petitioner had engaged an engineer Sri J.D.Geharana and under his supervision some masons, painters and electricians were engaged on daily rated basis for which they were paid their wages. It was contended that whatever wages were payable was paid to the Engineer, who in turn had made the payment to the workers and that nothing was due and payable. Further, the petitioner is not an occupier nor the bungalow where the interior works were carried out, is an industrial establishment. The petitioner, consequently, contended that no proceedings under the Act 1978 could be initiated.

2. Inspite of this specific objection being raised, the Deputy Labour Commissioner has passed an order under Section 3 of the Act for recovery of the wages, on the ground, that no proof of payment was filed by the petitioner or by his Engineer, Sri Gehrana. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. In order to appreciate the rival submissions of the parties the Court finds that the statements of Objects and Reasons given under the Act of 1978 indicates that the provisions of the Payment of Wages Act was found to be inadequate to ensure timely payment of wages and that the incidence of disturbance of industrial peace was greater in establishment and, therefore, it was considered necessary to provide that if the wage bill in default exceeded Rs.50,000/-, the amount would be recoverable as arrears of land revenue. This became essential because it was found that there was a

tendency of the employers to keep large amount of wages in arrears.

4. The Supreme Court analysed the provisions of the Act of 1978 in **Modi Industries Ltd. Vs. State of U.P. and others, 1994 SCC (L & S) 286** in which the Supreme Court held:

"8. The inquiry under Section 3 being thus limited in its scope, the Labour Commissioner's powers extend only to finding out whether the workmen who have put in the work were paid their wages as per the terms of their employment and within the time stipulated by such terms. If the Labour Commissioner is satisfied that the workmen, though they have worked and are, therefore, entitled to their wages, are not paid the same within time, he has further to satisfy himself that the arrears of wages so due exceed Rs.50,000/-. It is only if he is satisfied on both counts that he can issue the certificate in question. Under the Act, the Labour Commissioner acts to assist the workmen to recover their wages which are admittedly due to them but are withheld for no fault on their behalf. He does not act as an adjudicator if the entitlement of the workmen to the wages is disputed otherwise than on frivolous or prima facie untenable grounds. When the liability to pay the wages, as in the present case, is under dispute which involves investigation of the questions of fact and/or law, it is not the function of the Labour Commissioner to adjudicate the same. In such cases, he has to refer the parties to the appropriate forum."

5. The Supreme Court found that the inquiry under the Act was limited only to find out whether the workman had earned their wages as per the terms of their employment or not and if the authority was satisfied that the workers had worked and was entitled to their wages and if the authority further found that the arrears of wages exceeded Rs.50,000/-, in that case he was obligated to issue a recovery certificate. The Supreme Court held that the authority was required to act as the facilitator and not as an adjudicator, namely, that if the claim of the workers was disputed, the authority could not adjudicate upon the dispute unless frivolous or prima facie untenable grounds were taken by the employers. The Supreme Court further observed that where the dispute involved investigation of questions of fact and of law, it was not the function of the authority to adjudicate the same and, in such matters, the parties were required to approach the appropriate forum.

6. The Act is applicable to an industrial establishment. "Industrial establishment" has been defined under Section 2(a) of The Uttar Pradesh Industrial Peace (Timely Payment of Wages) Act, 1978. For facility, the said provision is extracted hereunder:

"(a) "industrial establishment" means any factory, workshop or other establishment in which articles are produced, processed, adopted or manufactured with a view to their use, transport or sale;"

7. From the aforesaid, it is clear that an industrial establishment is a factory or a workshop or an establishment where articles are produced, processed, adopted or manufactured for the purpose of use, transport or sale. Section 2-C of the Act defines "occupier" as under:

"(c) "occupier" in relation to an industrial establishment, means the employer of workmen employed in such establishment and includes in the case where the employer is a company the Managing Director and where it is a firm the partner designated in that behalf by the firm and in case of any other employer an officer designated in that behalf by the employer with his consent and whose name is intimated by the employer to the Labour Commissioner in the prescribed form by the prescribed date;"

8. In the instant case the admitted fact is that the petitioner is the owner of a bungalow and he employed an engineer for the purpose of redesigning and redecorating his house. Daily rated workers were employed as mason, electrician and painters, who worked in the house. The petitioner's bungalow is not an industrial establishment, and the facts, which has been brought on the record clearly indicate that no manufacturing activities of any sort was carried out nor any articles were produced, processed or manufactured, which was put up for sale, use or for transportation. The Court further finds that the petitioner cannot be termed as an occupier. He is the owner of a residential house and is not an occupier as defined under Section 2-C of the Act. The Act is clearly not applicable.

9. In the light of the aforesaid, the impugned order cannot be sustained and is quashed.

10. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No.19355 OF 2013

Aftab Ahmad ...Petitioner
Versus
UPPCL and Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Srivastava

Counsel for the Respondents:
C.S.C., Sri Mahboob Ahmad

Constitution of India, Art. 226- Power connection-7.50 H.P. +120 wats to run pump-set-on private bore well-as per circular dt. 31.08.2010-petitioner deposited Rs. 14,175(11,175/cost of line+2250 toward cost of 15 meter line) on 21.02.2011 but no connection given-corporation taking plea entire erection of line expense should bear by the consumer itself-held-illegal-direction issued to construct entire line within 3 month-order impugned quashed.

Held: Para-11
Since as per circular of the respondent-corporation dated 31.8.2010, nothing is to be charged from the tube-well consumer for laying the electric line up to 300 meters and also since for rest of 15 meters, the respondent-corporation has charged a sum of Rs. 2,250/- towards cost of line as evident from line chart and the report and they have also made provision of carriage and erection of 315 meters line as per estimates of transmission and transformation which has been made chargeable to the corporation as per approved report dated 31.1.2011 and as such the stand of the respondents that the petitioner should construct the whole electric line of 315 meters from the materials provided by the corporation, does not appears to be correct and justified. The maximum which the respondents could

have required the petitioner to pay could be that the petitioner should bear the cost of construction of line beyond 300 meters. However, in this regard, we find that as per line chart and approved report containing sanction of the estimate, a sum of Rs.11,775/- has been made chargeable to the consumer (petitioner) which includes Rs.2,250/- towards cost of 15 meters line @ 150 per meter which is mentioned as cost of line in the order 19.2.2011. A sum of Rs. 11,775/- alongwith security of Rs.2,400/- total Rs.14,175/- has been deposited by the petitioner on 21.2.2011 which is undisputed. Under the circumstances it appears to be not justifiable for the respondent-corporation to require the petitioner to construct the line from the materials provided by the corporation.

(Delivered by Hon'ble Surya Prakash Kesarwani, J)

1. By means of this writ petition the petitioner has prayed for following reliefs :

"a. issue a writ order or direction in the nature of certiorari quashing the impugned order dated 18.10.2012 passed by the respondent no. 2 (Annexure No.9) to the writ petition.

b. issue a writ order or direction in the nature of mandamus directing the respondent Corporation to provide the electricity connection to the petitioner to run the private Pump set of 7.5 H.P. + 120 Wat within a specific period, so that justice may be done.

c. issue any suitable order or direction which this Hon'ble court may deem fit and proper under the facts and circumstances of the case, so that justice may be done.

d. award the cost of the writ petition."

Facts of the Case

2. Briefly stated the facts giving rise to the present petition are that the petitioner is an agriculturist having 8 Bigha agricultural land in the village Jafarpur Malawan, Pargana Karkari, Tehsil Manjhanpur, district Kaushambi. With a view to improve his agricultural land, the petitioner got constructed a bore well and to install a private pumping set of 7.5 H.P. he applied to Purvanchal Vidyut Vitran Nigam Ltd., Kaushambi for electricity connection under General / Normal Scheme annexing therewith a boring certificate issued by Assistant Engineer (Minor Irrigation), Kaushambi dated 25.5.2010 (Annexure No.2). It appears that pursuant to the application of the petitioner for electric connection, a report dated 31.1.2011 was submitted by the respondent authorities alongwith a line chart (Annexure No. SCA-1) and estimate of cost of 11 KV line in two parts, namely, transmission and transformation (Annexure No. SCA-2). Thereafter the Executive Engineer granted the approval and issued an order dated 19.2.2011 (Annexure No. SCA-3) for electric connection which was followed by the Line Order/ Work Order dated 20.6.2011 (Annexure No. SCA-4).

3. Despite deposit of a sum of Rs.14,175/- by the petitioner on 21.2.2011 pursuant to the order of the respondent no. 2 dated 19.2.2011 and issuance of Line Order/ Work Order dated 20.6.2011 (Annexure No. SCA-4), the electric connection was not given to the petitioner and as such the petitioner filed a Writ Petition No. 9993 of 2012 which was disposed of vide order dated 24.2.2012 (Annexure No. 6) observing that representation of the petitioner be decided

within six weeks from the date a certified copy of the order is produced before the respondent no. 2. It appears that the petitioner has filed a certified copy of the aforesaid order of this court dated 24.2.2012 vide letter dated 2.3.2012 (Annexure No.7) before the respondent no.2. The petitioner also moved a Contempt Application (Civil) No.1860 of 2012 which was rejected by this Court on 27.2.2013 by the following order : -

"This contempt petition has been filed with the allegation that despite an order dated 24.2.2012 passed in Writ Petition No. 9993 of 2012, the opposite parties have not taken a decision.

The issue between the parties was with regard to grant of electricity connection and the writ Court directed the opposite parties to consider his representation. In pursuance thereof, the order has been passed on 18.10.2012 stating that the applicant has not performed his part of the obligation under the scheme and, therefore, the line cannot be energized and accordingly his representation has been decided.

Learned counsel for the applicant contends that erection of the transmission line is obligation of the opposite party but this fact is contested on the ground that under the scheme in which the applicant has applied the liability is of the consumer. This is a question of fact which needs adjudication and this exercise cannot be undertaken in contempt jurisdiction and the applicant can approach before appropriate forum.

However, since there is substantial compliance of the writ order, notices are discharged. Contempt petition is rejected and consigned to record. "

4. Now the petitioner has filed the present writ petition challenging the order dated 18.10.2012 (Annexure No.9) which has been passed by the respondent no.2 observing that it was the obligation of the petitioner under the orders dated 19.2.2011 and 20.6.2011 to construct the line from the materials already provided by the respondent to him which has not been done so far and as such the construction of line be completed and be intimated to the S.D.O. (IInd), Manjhanpur so that enerization may be done.

5. We have heard Sri Sanjay Srivastava, learned counsel for the petitioner, Sri Mahboob Ahmad, learned counsel for the respondent nos. 1 & 2 and learned Standing Counsel for the respondent no.3.

Submissions of the petitioner

6. Sri Sanjay Srivastava, learned counsel for the petitioner submits that in the report prepared by the concerned authorities and approved by the Executive Engineer alongwith the line chart, the total length of line is 315 meters and estimate for laying the line has been sanctioned for Rs.1,44,377/- under the Normal Scheme. Out of this amount Rs.1,32,602/- is chargeable to the respondent-corporation and Rs.11,775/- is chargeable to the petitioner. As per line chart, a sum of Rs.11,775/- consists the cost of line of 15 meters at Rs.2,250/-, fixed charges Rs.2,000/-, system loading charges Rs.1,800/-, Electric meter Rs.5,725/-. He further submits that the breakup of charges to corporation of Rs. 1,32,602/- is given in the line chart as cost of 11 KV line in two heads, namely, transmission Rs.56,863/- and

transformation of Rs.75,739/-. The attention of the Court was drawn to the details of items under the heads of transmission and transformation as given in Annexure No. SCA-2 which consist of the cost of various items, concreting of pole, carriage and erection charges etc. He submits that as per circular of the corporation dated 31.8.2010 (Annexure No. SCA-1A), no line charges can be charged from the consumer for line up to 300 meters from HT/LT main. He further submits that as per report dated 31.1.2011, line chart and the details of transmission and transformation cost estimate, the provision for concreting of pole etc. and carriage, erection / over head charges have already been made in the estimate and thereafter the charges to the consumer has been determined at Rs.11,775/- and the petitioner has deposited a sum of Rs.14,175/- (charge to consumer Rs.11,775/- + Rs. 2,400/- security charge). He further submits that the construction of line can be done only by the respondent - corporation and as such they are bound to construct the line and to give connection to the petitioner to run his private tube well.

Submissions on behalf of Respondents

7. Sri Mahboob Ahmad, learned counsel for the respondent nos. 1 and 2 submits that as per order dated 19.2.2011 followed by the Line Order/ Work Order dated 20.6.2011, it is the obligation of the petitioner (consumer) to construct the line from the materials provided by the corporation. He draws the attention of the Court to the averments made in paragraph nos. 6, 7, 8, 9 and 11 of the counter affidavit to contend that a sum of Rs. 14,175/- deposited by the petitioner does not include expenses on carriage of material from store and erection of line and over head charges, however it includes the cost of line in excess of 300 meters. The paragraph nos. 5, 6, 7, 8, 9 and 11 of the short counter affidavit are reproduced below : -

"5. That the petitioner applied for electricity connection to run the tube-well of 7.5 H.P. His application was processed and report alongwith line chart was prepared by the Junior Engineer showing distance of 315 meters from the premises of the applicant to 11 KV H.T. Line with an estimate of Rs.1,44,377/-. The report of Junior Engineer dated 31.1.2011 is annexed with this affidavit and is marked as Annexure No. SCA-1.

6. That in pursuance to report dated 31.1.2011 the petitioner had to deposit Rs.1,44,377/- for electricity connection and in such an event the entire work had to be carried out by the department. Since the petitioner was not able to take the electricity connection by depositing the estimated cost and he shown his willingness to obtain the benefit of normal scheme under which the petitioner was entitled for heavy subsidies provided by the State Government. According to this scheme all necessary materials including the transformer of 25 KVA, PCC pole with stone pad, etc. are provided to consumers from the department with the condition to construct the electricity line through his own labour as per line chart prepared by the Junior Engineer under the supervision of the departmental staff and finally the consumer will provide a cable to the department and that cable shall be attached from L.T. Side of the transformer to the input supply point of the motor through which the consumer will run

tube-well, the work of energizing the electricity line shall be performed by the departmental staff but earlier to this, the consumer will construct the complete line from the materials provided to him under this scheme under the supervision of departmental staff of the concerning division.

7. That the estimate prepared after the inspection and line chart are in two parts. The first part of the estimate deals with the transmission from 11 KV line and for this purpose all necessary poles and other materials are provided to the consumers free of cost from the subsidy provided by the State Government. The second part of the estimate deals with the transformation, under this estimate the entire materials including 25 KVA transformer with materials are provided to consumer free of cost, as per scheme.

8. That the aforesaid policy is provided to consumers on first come first serve basis hence as per instructions issued by the State Government the materials are provided to consumers on the basis of determination of the seniority fixed, after the consumer deposits the amount mentioned in terms and conditions which includes cost of line in excess of 300 meters, system loading charges, meter charge, security charge and processing fee. Copy of the circulars dated 31.8.2010 and 30.6.2011 are jointly annexed with this affidavit and are marked as Annexure No. SCA-1A.

9. That as per instructions issued by the U.P. Electricity Regulatory Commission under the Cost Data Book for recovery of expenses and other charges from prospective consumers for taking electric supply which is binding upon the licensee is to the effect that in the matters of private tube-well (PTW) the concreting material (brick ballast, sand, cement) and labour shall be provided by the consumer for the PTW (private tube-well) connection. However, actual requirement of material, etc. shall be communicated by the licensee to the consumer while offering terms and conditions for PTW (private tube-well) connection. It further provides that any subsidy for PTW (private tube-well) consumer in respect of new connection shall be deducted from line charge.

11. That the terms and conditions finalized on 19.2.2011 clearly indicates an amount of Rs. 14,175/- to be deposited by the petitioner which does not include any carriage of material from store and erection of line plus over head charges which is shown in both the estimates as Rs.15,121/- and Rs.15,725/- applicable under the complete deposit scheme by the consumers and in present case under which the materials are provided to consumers by the department free of cost. The carriage and erection plus over head charges are mentioned for the purpose of preparation of the estimate, if a consumer obtains a connection under the full deposit scheme and does not take benefit of normal scheme. True copy of the terms and conditions dated 19.2.2011 which indicates an amount of Rs. 14,175/- to be deposited by the petitioner with certain other conditions is annexed with this affidavit and is marked as Annexure No. SCA-3.

Our Findings

8. We have considered the submissions of the learned counsel for the parties and perused the record. The only

dispute involved in this writ petition is as to **whether the petitioner should construct the electric line of 315 meters from the materials provided by the respondent or the respondent corporation itself should construct the line ?**

9. From the perusal of the report dated 31.1.2011, line chart and the estimate of transmission and transformation, it is evident that the total estimate for construction of line was sanctioned for Rs. 1,44,377/- chargeable as under : -

(i)Chargeable to corporation Rs. 1,32,602/-

(ii)Chargeable to consumer Rs. 11,775/-

Total Rs. 1,44,377/-

10. As per circular dated 31.8.2010 (SCA-1A) issued by the Managing Director, Purvanchal Vidyut Vitran Nigam Ltd., no line charges would be realised from the tube-well consumer up to 300 meters distance. In paragraph 8 of the short counter affidavit , the respondents have themselves stated that materials are provided to the consumer after depositing the amount mentioned in terms and conditions which includes cost of line in excess of 300 meters. It undisputed that the petitioner has deposited the required amount pursuant to the order dated 19.2.2011. The circular clearly shows that for laying the line up to 300 meters nothing is chargeable from the petitioner who is seeking electric connection for tube-well. The aforesaid sum of Rs.1,32,602/-, chargeable to the respondent- corporation as per their own line chart and report dated 31.1.2011 bearing sanction order; consist of the transmission cost of Rs. 56,863/- and transformation cost of Rs. 75,739/- (Annexure SCA-2). We find that the transmission charges include cost of various materials and expenses of concreting of pole, concreting of stay, earthing complete and carriage and erection+overhead charges. Likewise transformation charges of Rs.75,739/- include cost of various materials and expenses of concreting of pole, concreting of stay, earthing complete and carriage and erection + overhead charges. Thus, as per own documents filed by the respondent - corporation, it is evident that the sanctioned estimate includes the expenses of construction of line. The entire amount chargeable to the petitioner as per sanction order has been paid by the petitioner. The rest of the amount of the sanctioned estimate is chargeable to the respondent-corporation under the scheme itself.

11. Since as per circular of the respondent-corporation dated 31.8.2010, nothing is to be charged from the tube-well consumer for laying the electric line up to 300 meters and also since for rest of 15 meters, the respondent-corporation has charged a sum of Rs. 2,250/- towards cost of line as evident from line chart and the report and they have also made provision of carriage and erection of 315 meters line as per estimates of transmission and transformation which has been made chargeable to the corporation as per approved report dated 31.1.2011 and as such the stand of the respondents that the petitioner should construct the whole electric line of 315 meters from the materials provided by the corporation, does not appears to be correct and justified. The maximum which the respondents could have required the

petitioner to pay could be that the petitioner should bear the cost of construction of line beyond 300 meters. However, in this regard, we find that as per line chart and approved report containing sanction of the estimate, a sum of Rs.11,775/- has been made chargeable to the consumer (petitioner) which includes Rs.2,250/- towards cost of 15 meters line @ 150 per meter which is mentioned as cost of line in the order 19.2.2011. A sum of Rs. 11,775/- alongwith security of Rs.2,400/- total Rs.14,175/- has been deposited by the petitioner on 21.2.2011 which is undisputed. Under the circumstances it appears to be not justifiable for the respondent-corporation to require the petitioner to construct the line from the materials provided by the corporation.

12. The learned counsel for the respondents has also submitted that as per order dated 19.2.2011 (Annexure No.3) the petitioner was to enter into agreement and thereafter he has to construct the line from the materials provided by the corporation and as per Line Order/ Work Order dated 20.6.2011 also the line is to be constructed by the petitioner. We find that the order dated 19.2.2011 and Line Order/ Work Order dated 20.6.2011 are on printed proforma and as such it has to be read harmoniously with the description/ calculation of charges given therein, the contents of sanctioned estimate under the normal scheme and the circular of the Managing Director dated 31.8.2010 (Annexure No. SCA-1A) which we have already discussed in preceding paragraphs. This circular is wholly undisputed rather it has been referred and relied by the respondents in paragraph 8 of the short counter affidavit contending that consumer is to deposit the amount mentioned in the terms and conditions which includes cost of line in excess of 300 meter, system loading charges, meter charge, security charge and processing fee. It is also evident from the report dated 31.1.2011, line chart and the order dated 19.2.2011 that the petitioner has deposited a sum of Rs.2,250/- towards cost of line of 15 meters i.e. beyond 300 meters. Thus there is no force in the submission of learned counsel for the respondents.

13. In view of the above, we are of the view that the impugned order dated 18.10.2012 (Annexure No. 9) is wholly unjustified and is accordingly set aside. The respondent no. 2 is directed to construct the line expeditiously preferably within a period of three months from the date a certified copy of this order is filed before him by the petitioner.

14. In view of the discussions made above, the writ petition is allowed. However, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 02.05.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 24778 of 2013

Surendra Prasad Rai ...Petitioner
Versus
Addl. Commissioner & Ors...Respondents

Counsel for the Petitioner:
Sri Shamimul Hasnain, Sri Dhirendra Kr. Srivastava

Counsel for the Respondents:
C.S.C., Sri Mahesh Narain Mishra

Sri P.K. Rai.

Code of Civil Procedure-Order XIV Rule 2(2)-all issues including jurisdiction-decided simultaneously-argument about deciding the issues of jurisdiction as preliminary issues-held-in view of amended provision of C.P.C. courts below rightly decided all issues relating to question of law and facts be decided together.

Held: Para-21

The learned counsel for the petitioner, except expressing his anxiety to save the time of the court, has not placed any material before the Court from which it can be inferred that Sub-Rule 2 of Order 14 of the Code of Civil Procedure mandate that the question of jurisdiction is to be decided first even if investigation of fact is required. In this case both the courts below have held that the issue no. 6 be decided along with other issues and the conclusion is based on sound reasoning i.e. to decide the bar of jurisdiction, investigation of fact is required which can only be arrived at after availability of evidence. The view taken by the courts below since are based on sound reasoning, therefore the same cannot be faulted with.

Case Law discussed:

1993 Allahabad civil Journal 216; AIR 1993 Allahabad 2; AIR 1999 Allahabad 304; AIR 1952 SC 181; AIR 1961 SC 751; AIR 1965 SC 895; AIR 1975 SC 2190; AIR 1980 SC 303; (1999) 1 SCC 354; AIR 2002 SC 2031; (2003) 3 SCC 433; AIR 2003 SC 511; AIR 2004 SC 2036

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

1. Heard Sri Shamimul Hasnain, learned counsel for the petitioner, Sri R.N.Singh, learned Senior Counsel assisted by Sri P.K.Rai, learned counsel appearing for the respondent no. 3, learned Standing Counsel and learned counsel for the Gaon Sabha.

2. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 4.4.2012 passed by Sub-Divisional Magistrate Chakia, District Chandauli (the respondent no. 2) and judgment and order dated 30.1.2013 passed by Additional Commissioner (Administration) Varanasi Division Varanasi (the respondent no.1).

3. Vide order dated 4.4.2012, the petitioner's application to decide the Issue Nos. 6 and 7 as a preliminary has been rejected on the ground that under the facts and circumstances of the case it be decided along with remaining issues. Whereas vide order dated 30.1.2013, the petitioner's Revision No. 14 of 2012 filed against the order dated 4.4.2012 has been dismissed. Out of these two issues one issue was relating to the under valuation of the suit and payment insufficient court fee and another was with regard to bar of jurisdiction of civil court under Section 49 of U.P. Consolidation of Holdings Act, 1953.

4. Sri Hasnain has very vehemently contended that when the question of jurisdiction is raised, it should be decided as a preliminary issue for the reason that if it is held that the court has no jurisdiction to proceed with the matter, the proceeding will come to an end and the valuable time of the court as well as litigant will be saved. In support of his submissions, he has placed reliance upon the Division Bench judgment of this Court in **Mrs. Shahnaz Husain Vs. Mohd. Yunus 1993 Allahabad Civil Journal 216.**

5. Refuting the submissions of learned counsel for the petitioner, Sri R.N.Singh,learned counsel appearing for the respondent no. 3 submitted that Order 14 of Code of Civil Procedure has been amended

in the year 1976 and in view of Sub-rule 2 of Order 14, all the issues have to be decided together. He has also contended that there can be no straight jacket formula to decide the question of jurisdiction at the first instance and it always depend upon the discretion of the court either to decide the question of jurisdiction as a preliminary issue or to decide the same along with other issues. In support of his submissions, he has placed reliance upon another Division Bench decision of this Court in **Manager Bettiah Estate Vs. Bhagwati Saran Singh AIR 1993 Allahabad 2.** Particular attention has been drawn towards para 12 of the aforesaid judgment. Reliance has also been placed upon the judgment of this Court in **Mithlesh Kumari and others Vs. Gaon Sabha, Kishanpurand others AIR 1999 Allahabad 304**. Learned Senior Counsel has also submitted that in this phenomenon once the discretion has been exercised by the court, there can be hardly any ground to interfere with the matter under Article 226 of the Constitution of India as the writ petitions are not entertained against an order exercising the discretion this way or that way. For entertaining the writ petition there must be some statutory breach or jurisdictional error and in absence of that no interference should be made with the orders passed by the courts below.

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

From the perusal of the record, it transpires that as many as 13 issues were framed by the court below. The issue nos. 6 and 7 are reproduced hereinunder

6- क्या वाद दफा 49 जो0च0अ0 से बाधित है?

7- क्या वाद का मूल्यांकन कम किया गया है और दिया गया न्यायशुल्क अपर्याप्त है?

7. The petitioner has given an application for deciding the Issue Nos. 6 and 7 together. This application was rejected on 4.4.2012 so far as it relates to Issue No. 6 which relates to the jurisdiction of the Court whereas with respect to Issue No. 7, the valuation of the suit and payment of court fees are concerned, the court below held that sufficient court fees has been paid.

8. The aggrieved petitioner has field revision that too has been dismissed.

9. While assailing these order, Sri Hasnain has placed reliance upon the division bench judgment of this Court in **Mrs. Shahnaz Husain** (supra). Relevant para of the aforesaid judgment is reproduced hereinunder :-

The above rule no doubt empowers a Court to set aside an order for injunction, but only if it comes to the conclusion that the party in whose favour the order of injunction was passed is delaying the proceedings or is otherwise abusing the process of the Court. The learned Civil Judge had allowed both the amendment applications. It cannot be said the amendments sought were frivolous and intended to delay the proceedings. If some preliminary issues were raised, the Court was bounds to decide it at the earliest before it starts hearing the suit. The pleas regarding jurisdiction which cut at the very root of the suit should be decided as preliminary issues. If such issues are left to be decided at the final trial and after evidence the court comes to the conclusion that it had no jurisdiction to try the suit and returns the plaint for presentation before another Court, then the Court's valuable time will obviously be lost. Hence it cannot be said that by

asking the Court to decide some preliminary issues the defendants had intended to delay the suit. We do not agree with learned counsel for the respondents that issues 14 and 18 could have been decided along with the whole suit.

10. In response thereto, the learned Senior Counsel, apart from the decision on which he has placed reliance, has also invited attention of the Court towards the amended provisions of Order 14 which is reproduced hereinunder :-

Sub-Rule 2 of Order 14

Court to pronounce judgment on all issues :- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-Rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

11. Sub-Rule 2 of Order 14 speaks that Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-Rule (2), pronounce judgment on all issues and Sub-Rule 2 (2) of Order 14 speaks that Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court, or a bar to the suit created by any law for the time being in force.

12. The provisions contained in this Sub-rule 2 (2) of Order 14 appears to be directory in nature. From the bare reading of the Rule aforesaid, it transpires that although the statute requires that pure question of law relating to jurisdiction be decided first but where question of law depends upon investigation of fact, the Court may decide the same along with other issues after availability of sufficient material before the Court.

13. Hon'ble Supreme Court in **Dattatraya Moreshwar Vs. The State of Bombay & Ors., AIR 1952 SC 181** has observed that a law which creates public duty is directory but if it confers private rights, it is mandatory. Relevant passage from this judgment is quoted below:-

"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provisionof a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

14. A Constitution Bench of the Hon'ble Supreme Court, in **State of U.P. & Ors., Vs. Babu Ram Upadhya, AIR 1961 SC 751,** while considering the issue as to whether a provision contained in a Statute is mandatory or directory, observed as under:-

"For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

15. In **Raza Buland Sugar Co. Ltd., Rampur Vs. Municipal Board, Rampur, AIR 1965 SC 895; and State of Mysore Vs. V.K. Kangan, AIR 1975 SC 2190**, whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

16. In **Sharif-Ud-Din Vs. Abdul Gani Lone, AIR 1980 SC 303**, the Supreme Court, while considering the provisions of Sub-section (3) of Section 89 of the J&K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory. The Apex Court held as under:-

"In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory.....Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

17. Similar view has been reiterated in **Dinkar Anna Patil & Anr. Vs. State of Maharashtra & Ors., (1999) 1 SCC 354; Shashikant Singh Vs. Tarkeshwar Singh, AIR 2002 SC 2031; Balwant Singh & Ors., Vs. Anand Kumar Sharma & Ors., (2003) 3 SCC 433; Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors., AIR 2003 SC 511; and Chandrika Prasad Yadav Vs. State of Bihar & Ors., AIR 2004 SC 2036).**

18. In view of the various decisions of the apex Court, it is clear that while

holding a particular statute as mandatory or directory, it would be necessary to look into the intention of the Legislature. From a bare reading of the rule it transpires that it is the discretion of the Court either to decide the question of jurisdiction at a first instance or at the time of decision of all other issues. The Divisional Bench of this Court in **Manager Bettiah Estate (supra)**, on which Sri Singh has placed reliance, has observed as under :-

Only an issue of law can be decided as a preliminary only where it is such that its decision does not necessitate investigation into facts and it relates either to the jurisdiction of the Court or to the suit being barred under any prevailing law, and that, in the opinion of the court the decision of the issue will result in the decision of the whole or a part of the suit. The discretion in this regard must always be exercised on the basis of sound judicial principles. It may however be made clear that even if an issue of law can be decided as a preliminary issue as aforesaid the Court is not always bound to decide it as a preliminary issue and can in its discretion, postpone its decision also along with other issues whether of law or fact. The whole purpose behind the amended provision is to restrict piecemeal decision and unnecessary multi-tier appeals at intermediate stages on preliminary issue alone and thus avoid procrastination of litigation. The new provision justly aims at abridging the proceeding in the suit rather than permitting prolongation thereof.

19. This view has been subsequently taken by the learned Single Judge of this Court in **Mithlesh Kumari (supra)**. Here in this case, from the perusal of the judgment it transpires that the petitioner has raised question of jurisdiction taking shelter of Section 49 of the Act but the otherside has made allegation of fraud. The bar of jurisdiction in view of Section 49 of the Act may be the question of pure law but the pure law cannot be applied in air unless the facts are investigated particularly where there are allegations of fraud. Here the revisional court in its judgment has observed in categorical words that since the fraud has been alleged therefore it would be appropriate to decide all the issues together and taking note of that, the revisional court has refused to interfere with the judgment passed by the Sub-Divisional Officer and rejected the petitioner's revision.

20. Otherwise also, it is settled law that if by reading of statute, two views are possible to be taken and one view has been taken by the court, that is not amenable for interference under Article 226 of the Constitution of India unless there is jurisdictional error or conclusion has been drawn in ignoring the statute or misreading/non consideration of the relevant materials available on record.

21. The learned counsel for the petitioner, except expressing his anxiety to save the time of the court, has not placed any material before the Court from which it can be inferred that Sub-Rule 2 of Order 14 of the Code of Civil Procedure mandate that the question of jurisdiction is to be decided first even if investigation of fact is required. In this case both the courts below have held that the issue no. 6 be decided along with other issues and the conclusion is based on sound reasoning i.e. to decide the bar of jurisdiction, investigation of fact is required which can only be arrived at after availability of evidence. The view taken by the courts below since are based on sound reasoning, therefore the same cannot be faulted with.

22. In view of foregoing discussions, I do not find any ground to interfere with the impugned orders. The writ petition fails and it is hereby dismissed.

23. However, keeping in mind the anxiety of counsel for both the parties and pendency of the matter before the Sub-Divisional Officer for quite long time, it is observed that the Sub-Divisional Officer shall make his all endeavour to decide the suit expeditiously, if possible, within a period of one year from the date of production of certified copy of the order of this Court without granting any unnecessary adjournments to the learned counsel for the parties.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 15.05.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc Writ Petition No. 25772 of 2013

Kanta@ Ramakant ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri R.C. Singh, Sri Rituvendra Singh

Counsel for the Respondents:
C.S.C., Sri H.K. Dubey, Sri Mahesh Narain Singh,Sri Vijai Bhan Singh, Sri Hemant Kumar

U.P.Z.A.& L.R. Act, 1950, Section 198(4)- Cancellation of lease-granted for agricultural purpose-but can not be applicable for cancellation of fisheries rights-admittedly the District Magistrate empowered to take such decision- mention of wrong provision or section-shall not effect the order-if well within jurisdiction-against cancellation revision maintainable-can not be interfered under writ jurisdiction status quo as prevailing to day shall be maintained.

Held: Para-7
Here, the issue in question was validity of fishery lease, on which finger was raised that during the settlement of lease, irregularities have been committed. The Collector has exercised its power may be under section 198(4) of the Act, but that will not vitiate the proceeding as the Collector has power to cancel the lease, either it is agricultural lease or fishery lease, but under different provision.

Case Law discussed:
2005 (99) RD 823

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

1. Heard Sri Rituvendra Singh, holding brief of Sri R.C. Singh, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents, Sri Hemant Kumar, appearing for respondent no. 4 and Sri Vijai Bhan Singh, holding brief of Sri M.N. Singh, learned counsel for the Gaon Sabha.

2. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 15.4.2013 passed by the Collector, Kushinagar, by which the petitioner's fishery lease has been cancelled.

3. Sri Singh contends that the order impugned, passed by the Collector, is without jurisdiction as no application could be entertain under sub-section (4) of section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short, 'the Act').

4. On being confronted as to whether the Collector has power to cancel the fishery lease or not, Sri Singh states that the Collector has power to cancel the fishery lease in view of the government

order dated 17.10.1995 but not under the provisions of section 198(4) of the Act.

5. Sri Hemant Kumar has raised objection with regard to maintainability of the writ petition by submitting that the order impugned is revisable and the writ petition should be dismissed on the ground of alternative remedy.

6. I have heard learned counsel for the parties and considered their submissions.

7. So far as the submission of Sri Singh with regard to entertaining of application under section 198(4) of the Act is concerned, he is right to the extent that no application lies for cancellation of fishery lease under the aforesaid section, but it is not in dispute that the Collector has power to cancel the fishery lease under government order dated 17.10.1995. It is settled law that wrong mentioning or non-mentioning of a section could not vitiate the proceeding if the authority/court concerned has power to adjudicate upon the issue in question. Here, the issue in question was validity of fishery lease, on which finger was raised that during the settlement of lease, irregularities have been committed. The Collector has exercised its power may be under section 198(4) of the Act, but that will not vitiate the proceeding as the Collector has power to cancel the lease, either it is agricultural lease or fishery lease, but under different provision.

8. In my considered opinion, on this ground, the order cannot said to be without jurisdiction.

9. So far as the entertaining of the writ petition is concerned, as the order impugned is revisable, in view of the Full Bench decision of this Court in the case of **Ram Kumar and Others Vs. State of U.P. and Others** 2005 (99) RD 823, the petitioner is at liberty to file revision against the order impugned. In case such revision is filed within a period of three weeks from today, the same may be considered and decided without entertaining any objection to the limitation.

10. The petitioner is also at liberty to file an application for interim protection. In case the revision is filed within a period of three weeks from today with application for interim protection along with a certified copy of the order of this Court, the said application be also considered and decided in accordance with law after hearing all concerned.

11. Till the petitioner's application for interim protection is considered, status quo as on date be maintained. However, the Commissioner, thereafter, shall pass an independent order in accordance with law.

12. It may be clarified that I have neither addressed myself on the merit of the order of the Collector nor the merit of the petitioner's application for interim protection and the Commissioner is free to pass an independent order in accordance with law without being influenced by the interim order passed by this Court.

13. With the aforesaid observation / direction, this writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 29000 of 2013

Dr. Madhulika Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Bal Mukund Singh

Counsel for the Respondents:
C.S.C., Sri A.K. Yadav

Constitution of India, Art. 226- Experience of teaching on fixed honorarium-can not be ignored-for counting-teaching experience is material and not the mode of appointment-rejection-not proper-direction for fresh consideration issued.

Held: Para-9
In both cases payment of honoraria cannot be the criteria of rejection of experience. Merely because a teacher has received lower emoluments, though working on an equivalent post, cannot be the ground to reject a candidature. The judgments referred to hereinabove have to be taken into account that relies on the Apex Court decision in the case of Mohd. Altaf and others Vs. U.P. Public Service Commission and another reported in 2008(14) SCC 139; 2008 (14) SCC 144; 2008 (14) SCC 146 and 2002 (93) FLR 1208.

Case Law discussed:
2008(14) SCC 139; 2008(14) SCC 144; 2008(14) SCC 146; 2002(93) FLR 1208

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

1. The impugned order dated 13th March, 2013 has been passed by the respondent Board refusing to accept the experience of the petitioner that she has received in a degree college affiliated to the Purvanchal University as she was employed on a fixed honoraria basis. The impugned order further refused to recognize the experience of the petitioner in a self financed Intermediate college.

2. The issue relating to experience in a self financed Intermediate college has already been resolved by the decision of this court in the case of Dr. Deepak Bhatiya and others Vs. State of U.P. and others, writ petition no. 2842 of 2010, decided on 15.7.2010. A copy of the said judgment is annexure 10 to the writ petition.

3. Apart from this, the ratio of the decision in the case of Dr. Madhulika Singh the petitioner herself in writ petition no. 14582 of 2012 relies on the ratio of a Supreme Court decision in relation to experience.

4. The petitioner's experience certificate of teaching in a Girls Degree College is on record and her appointment order in the degree college dated 23.1.2004 is Annexure 5 to the writ petition.

5. A perusal of the said appointment order indicates that the petitioner was appointed on a fixed honoraria basis after approval of the Vice Chancellor of the University. In such circumstances, the said appointment cannot be said to be an appointment either de-hors the rules or not in accordance with law so as to disentitle the petitioner to get the said period of experience counted for the purpose of selection.

6. The petitioner has described herself as a full time teacher supported by

a certificate from the institution. Payment of a fixed honoraria is not necessarily an indicator of full time or part-time experience. Receipt of emoluments are not a substitute for experience.

7. A teacher getting a fixed salary at times is more devoted towards performance than those who have secured permanent berths. The experience of a teacher in a particular subject can be gauged by performance and the status of involvement in the institution, and not on some subjective assumption. However the genuineness of such experience, like in the present case, would also have to be assessed by the nature of engagement. In the present case the petitioner claims her status of a teacher in a degree college upon approval by the Vice Chancellor of a recognized University.

8. So far as her experience as a teacher in an Intermediate College is concerned, that experience has also to be examined in accordance with the modes of appointment in an unaided Inter College.

9. In both cases payment of honoraria cannot be the criteria of rejection of experience. Merely because a teacher has received lower emoluments, though working on an equivalent post, cannot be the ground to reject a candidature. The judgments referred to hereinabove have to be taken into account that relies on the Apex Court decision in the case of Mohd. Altaf and others Vs. U.P. Public Service Commission and another reported in 2008(14) SCC 139; 2008 (14) SCC 144; 2008 (14) SCC 146 and 2002 (93) FLR 1208.

10. It is expected that the Board shall now consider the matter more objectively.

11. Thus the reasons given in the impugned order dated 13.3.2013 cannot be sustained. The impugned order is quashed.

12. The writ petition is allowed with a direction to the respondent Board to consider the experience of the petitioner in the light of observations made hereinabove and pass an appropriate order within six weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2013

BEFORE
THE HON'BLE SHIVA KIRTI SINGH, CHIEF JUSTICE.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No.29272 of 2011,
W.P. No. 59228 of 2010,
W.P. No. 59229 of 2010 and W.P. No. 28895 of 2003

Arun Kumar Joseph ...Petitioner
Versus
Victor Samuel Mathews and Anr. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Jain, Sri Saurabh Jain

Counsel for the Respondents:
Sri Arun Kumar Singh, Sri Rohit Agarwal
Sri Arvind Srivastava, Sri Manoj Misra

U.P. Urban Building(Regulation of Rent and Letting Act 1972-Section 16(1)(b)- Release Application-by land lord-whether limitation of 12 years can be applicable-held-'no'-right of release application-a creation of statute-can not be taken away by putting embargo of limitation?

Held:Para-21

For all the aforesaid reasons, we have no hesitation in answering the questions under reference in the following terms:-

(i)Answer to Question No.(a):- Release application by landlord cannot be treated to be barred by limitation even if the same is presented after more than 12 years from the date person has entered into an unauthorised occupation of the premises covered by the Act.

(ii)Answer to Question No.(b):- In absence of any limitation being provided under the Act for initiation of release proceedings in respect of deemed vacancy, no period of limitation can be read in the statutory provisions only on the principle that a power vested in an authority must be exercised within a reasonable time.

Case Law discussed:
2009(1)ARC 266; 2009(2) ARC 117; 2008(3) ARC 359; 2007(3) ARC 633; 2006(2) ARC 287; AIR 1983 SC 1239; 2006(1)ARC 377; 1996(2) ARC 474; (2010)3 ADJ 328; 2008(5) ADJ 538(DB); AIR 1974 SC 1924; AIR 1969 SC 1297; Writ-A No. 33751 of 1999

(Delivered by Hon'ble Shiva Kirti Singh, Chief Justice)

Parties have been heard in detail.

2. By a specific order passed on 19.05.2011 in the first case of Arun Kumar Joseph, a learned Single Judge has referred two questions of law for determination by a Larger Bench in the light of apparent conflict between two sets of judgments passed by different Benches of learned Single Judges. The connected matters are to be governed by the answers to the issues under reference. The questions of law referred are as follows:-

"(a). Whether release application by landlord can be said to be barred by limitation if the same is presented after more than 12 years from the date person is said to have entered into an unauthorized occupation of the premises covered by U.P. Act No.13 of 1972;

(b) Whether in absence of any limitation being provided under U.P. Act No.13 of 1972 for initiation of release proceedings, qua deemed vacancy can any period of limitation, be read in the statutory provisions, on the principle that the power/right vested must be exercised within reasonable time."

3. Before scrutinizing the two sets of judgments and other relevant judgments on the aforesaid issues and the relevant provisions of U.P. Act No.13 of 1972, the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'the Act'), the relevant facts of the first matter at hand may be noted in brief. Petitioner-Arun Kumar Joseph is undisputedly in occupation of the premises in question, since 1994. There is no allotment order in his favour and it is also not in dispute that the provisions of the Act are applicable to the premises in question. After purchasing the property from the earlier owner, the respondents filed a release application before the Rent Control and Eviction Officer sometimes in 2007 on the ground that the writ petitioner is an unauthorized occupant because there is no allotment order in his favour and as such there is a deemed vacancy under the Act and hence, the property be released in their favour on account of bona fide personal requirement. The writ petitioner contested the application under Section 16 (1) (b) of the Act and took a specific plea that since possession of the petitioner is for more than 12 years, therefore, he cannot be

evicted nor vacancy can be declared. The Rent Control and Eviction Officer declared vacancy by order dated 28.8.2009 and release was ordered on 18.8.2010. Writ petitioner's revision application before the District Judge was also dismissed by the impugned order dated 26.04.2011.

4. Before the Writ Court, the main contention was that even if a person is in possession of premises covered by the Act without any allotment order in his favour, release application filed after 12 years would be barred by time. Admittedly, the Act does not prescribe any such limitation, but reliance was placed upon three judgments rendered in different matters by the learned Single Judges of this Court. Those judgments are mentioned in the order of reference as 'judgments 1st set'. The judgments are in the case of **(1) Smt. Jamuna Devi Vs. District Judge, Kanpur Nagar & Others, 2009 (1) ARC 266, (2) Hazi Naseem Ahmad Vs. Rent Control and Eviction Officer, 2009 (2) ARC 117 and (3) Rajeev Maurya Vs. Rent Control and Eviction Officer/ADM (City), 2008 (3) ARC 359.**

5. On the other hand, the contrary contention advanced on behalf of the respondents was based upon the contrary views taken by two learned Single Judges in two different cases, **(1) Babloo Vs. Munna Lal Verma & Another, 2007 (3) ARC 633 and (2) Rajendra Singh Vs. The Rent Control and Eviction Officer, 2006 (2) ARC 287.**

6. A perusal of judgments of 1st set discloses that in the earliest of these judgments in the case of Rajeev Maurya (supra) dated July 16, 2008, the learned Single Judge in paragraph 3 placed reliance upon the authority of the Supreme Court reported in **Mansaram Vs. S.P. Pathak, AIR 1983 SC 1239** and his own judgment in the case of **Anil Kumar Dixit Vs. Smt. Maya Tripathi and Another, 2006 (1) ARC 377**, to hold that proceedings for allotment of release on the ground of deemed vacancy may be initiated within 12 years from the date of occurrence of vacancy. Thereafter came the judgment in the case of Smt. Jamuna Devi (supra) dated 19th September, 2008. In that case also, release order was interfered with mainly by placing reliance upon the judgment of the Supreme Court in the case of Mansaram (supra) by highlighting the view that when power is conferred to effectuate any purpose, it has to be exercised in a reasonable manner. Reasonable exercise would also mean exercise within a reasonable time. Learned Single Judge pointed out that this view was followed by this Court in the case of **Brij Bala Jain Vs. Amar Jeet Kaur**, 1996 (2) ARC 474. Judgement in the case of Brij Bala Jain (supra), which appears to be one of the earliest judgments on the issue, is totally based upon the judgment of the Apex Court in the case of Mansaram (supra). The third judgment of 1st set was rendered in the case of **Hazi Naseem Ahmad** on 24th April, 2009. It simply follows the views taken in the other judgments of the 1st set of cases referred therein including the judgment of the Apex Court in the case of **Mansaram** (supra).

7. On the other hand, a perusal of two judgments in 2nd set discloses that in the case of **Babloo** (supra) decided on August 22, 2007, the learned Single Judge affirmed the views of Court below and held that there is no limitation under the

Act which will extinguish the right of landlord to take action on the basis of his need. The learned Single Judge referred to the whole Scheme of the Act to point out that in certain circumstances, the landlord has the right to initiate action for bringing the relationship of tenant and landlord to an end and when the Act does not prescribe any period of limitation, holding otherwise would in such cases, debar the landlord for all times to initiate a proceeding or Suit against the tenant if a period of limitation is read into the Act by judicial pronouncements, even if it is established that need of the landlord is bona fide. The judgment of the Apex Court in the case of Mansaram (supra) was also noticed for pointing out that the Apex Court did not prescribe any period of limitation and, therefore, action can be initiated within a reasonable time. In the case of Rajendra Singh (supra) decided on March 31, 2006, the issue of limitation was neither raised nor decided. However, the relevant facts mentioned in the judgment disclose that although the tenant was in occupation without any allotment order since 1976, the declaration of vacancy on 11.1.1994 and order of allotment dated 20.1.1994 were held to be valid on the ground that the writ petitioner was in occupation of the premises without allotment order after July 1976 and, therefore, he had become an unauthorized occupant.

8. It may be relevant to mention here that the learned Single Judge, who rendered the judgment in the case of Babloo (supra) followed his views in the case of **Chandra Mohan Sama Vs. Banwari Lal Ghai**, (2010) 9 ADJ 303. In this case, after noticing that the Act does not prescribe any period of limitation for the landlord for seeking release of the premises, it was held that reading of period of limitation would amount to permitting illegal occupants to enjoy legal sanction for acts done in violation of the provisions of the Act and occupation of building without allotment would frustrate the regulatory provisions of the Act against the object for which the Act was enacted. An example was cited that due to forcible occupation of a premises by an influential person or Mafia, the landlord may be forced to maintain silence for a long period, but this as per provisions of the Act would not destroy his right to seek vacancy at a later period by pointing out that the occupation was without allotment and he was in bona fide need of the premises. Another learned Single Judge in the case of **Shital Prasad Vs. R.C. and E.O./Additional City Magistrate (First) Kanpur Nagar and Others, (2010) 3 ADJ 328** also held that if a wrong committed by landlord inducing a tenant without allotment order is granted legal sanction on account of passage of reasonable time, it would amount to allowing an illegality to continue indefinitely and that "two wrongs will not make one right".

9. In view of sharp conflict of opinion between two sets of judgments of this Court rendered by different Benches of learned Single Judges, as noticed above, it is imperative to notice, in some detail, the judgment of the Apex Court in the case of Mansaram (supra) and one of the earliest judgments of this Court in the case of Brij Bala Jain (supra), wherein the learned Single Judge chose to rely upon that judgment and held that in any case 12 years period should be taken as reasonable time for initiating a proceeding under the Act from the date cause of action arises for taking action. Only in

exceptional circumstances, a person may claim extension of time beyond 12 years. Thereafter it would be relevant to notice another Division Bench judgment of this Court rendered in the case of **Ajay Pal Singh Vs. District Judge, Meerut & Ors., 2008 (5) ADJ 538 (DB**), answering a reference on three questions relating to same very Section 16 (1) (b) of the Act.

10. Before proceeding to discuss the aforesaid judgments for culling out their ratio and correct proposition of law on the subject, it is necessary to notice some relevant provisions of the Act. The object of the Act is to provide, 'in the interest of the general public, for the regulation of letting and rent of and the eviction of tenants from, certain classes of buildings situated in urban areas and for matters connected therewith.' While the general prevailing view in respect of the Rent Control Act is that they are basically meant for protection of the tenant and if he goes on paying the agreed rent regularly, he cannot be evicted except on the ground of bona fide need of the landlord, the declared purpose of the Act is interest of the general public, which is apparent also from Section 2 of the Act, which exempts several kinds of buildings from operation of the Act. Such exempted buildings include not only the buildings of Government or Local Authority etc., but also buildings of Educational Institutions, Public Charitable or Public Religious Institutions or of Waqf, Factories, buildings for industrial purposes, for public entertainments, buildings built and held by the Registered Societies or Cooperative Societies, Companies or Firms constructed for its own occupation or for its officers or servants or even the buildings whose monthly rent exceeds Rs.2000/-. Newly constructed buildings are also exempted for a period of 40 years. While Chapter II of the Act deals with regulation of rent and prohibits premium or additional payment over and above the rent payable, Chapter III of the Act deals with regulation of letting. Section 11 of the Act contains a prohibition on letting without allotment order issued under Section 16 of the Act. Section 12 of the Act provides for deemed vacancy of building in certain cases. Section 12 (1) of the Act applies both to a landlord as well as a tenant. As a result of this provision, if a landlord or tenant has allowed a building covered by the Act to be occupied by any person, who is not a member of his family or in some other circumstances also, they shall be deemed to have ceased to occupy the building or a part thereof and a deemed vacancy shall arise. Section 13 of the Act puts restrictions on occupation of building without allotment or release. Section 14 of the Act permits regularization of authorised licensee or tenant in certain circumstances, if they were lawfully continuing as such when the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976 came into force. Section 15 of the Act places obligation upon landlord as well as tenant to intimate vacancy to the District Magistrate within a limited period as specified in the Section. Section 16 of the Act contains provisions for allotment and release of vacant building.

11. For the purpose of better appreciation of issues at hand, Sections 11, 12 (1), 13, 14, 15 and 16 (1) & (2) are quoted below:-

"11. Prohibition of letting without allotment order. - Save as hereinafter provided, no person shall let any

buildings except in pursuance of an allotment order issued under Section 16.

12. Deemed vacancy of building in certain cases. - (1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if -

(a) he has substantially removed his effects therefrom; or

(b) he has allowed it to be occupied by any person who is not a member of his family; or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

13. **Restrictions on occupation of building without allotment or release**. - Where a landlord or tenant ceases to occupy a building or part thereof, no person shall occupy it in any capacity on his behalf or otherwise than under an order of allotment or release under Section 16 and if a person so purports to occupy it, he shall, without prejudice to the provisions of Section 31, be deemed to be an unauthorised occupant of such building or part.

14. Regularization or occupation of existing tenants. Notwithstanding anything contained in this Act or any other law for the time being in force, any licensee (within the meaning of Section 2-A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976, not being a person against whom any suit or proceeding for eviction is pending before any Court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building.

15. **Obligation to intimate vacancy to District Magistrate**. - (1) Every landlord, shall on a building falling vacant by his ceasing to occupy it or by the tenant vacating it or by release from requisition or in any other manner whatsoever give notice of the vacancy in writing to the District Magistrate not later than seven days after the occurrence of such vacancy, and such notice may at the option of the landlord be given before the occurrence of the vacancy.

(2) Every tenant so vacating a building shall give notice thereof in writing to the District Magistrate and also to the landlord not less than fifteen days before the vacancy.

(3) The notice under sub-section (1) or sub-section (2) shall contain such particulars as may be prescribed.

(4) The District Magistrate, on being satisfied on an application made to him in that behalf that there was sufficient cause for the landlord or the tenant not to give notice under sub-section (1) or sub-section (2) within time, may condone such delay.

16. **Allotment and release of vacant building.** - (1) Subject to the provisions of the Act, the District Magistrate may by order -

(a) require the landlord to let any building which is or has fallen vacant or is

about to fall vacant or a part of such building but not appurtenant land alone, to any person specified in the order (to be called an allotment order); or

(b) release the whole or any part of such building, or any land appurtenant thereto, in favour of the landlord (to be called a release order):

[Provided that in the case of a vacancy referred to in sub-section (4) of Section 12, the District Magistrate shall give an opportunity to the landlord or the tenant, as the case may be, of showing that the said section is not attracted to his case before making an order under clause (a).]

(2) No release order under clause (b) of sub-section (1) shall be made unless the District Magistrate is satisfied that the building or any part thereof or any land appurtenant thereto is bona fide required, either in its existing form or after demolition and new construction, by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, calling or where the landlord is the trustee of a public charitable trust, for the objects of the trust, or that the building or any part thereof is in a dilapidated condition and is required for purposes of demolition and new construction, or that any land appurtenant to it is required by him for constructing one or more new buildings or for dividing it into several plots with a view to the sale thereof for purposes of construction of new buildings :

Provided that no application under this sub-section shall be entertained for the purposes of a charitable trust the objects of which provide for discrimination in respect of its beneficiaries on the ground of religion, caste or place of birth."

12. As indicated above, answer to the questions under reference depends heavily upon correct appreciation of judgment of the Supreme Court in the case of **Mansaram** (supra). That case involved Central Provinces and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as 'Rent Control Order, 1949'), particularly Clauses 22, 23 and 25. The appellant of that case had obtained lease of the concerned premises while he was in service under the Telephone Department. After retirement in 1967 he continued in possession of the premises. Respondent no.1-Sri S.P. Pathak preferred an application before the House Allotment Officer in 1976-77 against the appellant-Mansaram alleging that appellant's occupation was in contravention of different clauses of the Rent Control Order, 1949 which required that premises occupied by a holder of office of profit under the Union or the State had to vacate the premises on ceasing to hold the office or the post which enabled him to obtain an order of allotment. The Apex Court held that there was no material to show that the appellant had obtained allotment of the premises on the ground of being in service under the Union or the State. The legal provisions in that case cast a duty only upon landlord of giving intimation of vacancy and if no allotment was issued within 15 days of the intimation, the landlord could proceed to let out the premises of any one. The only duty upon the tenant was to seek an assurance from the landlord that the premises were legally

permitted to be occupied. The applicant in that case was not a landlord, but a person desirous of allotment of the premises in his favour. The landlord did not contest the defence of the appellant, who was the tenant. On various counts, in the facts of that case, the Apex Court came to the conclusion that the facts did not support the allegation that the appellant continued to be a tenant of the premises in violation of provisions of the Rent Control Order, 1949.

13. The Apex Court after deciding the case of Mansaram (supra) in his favour on the basis of facts and materials available on record, also noticed that power was conferred on the Collector by Clause 28 to see that the provisions of the Rent Control Order, 1949 are effectively implemented and if he finds on information that there is a contravention, he is clothed with adequate power to set right the contravention by ejecting anyone who occupies the premises in contravention of the provisions. Such suo motu power was not subject to any limitation, but considering the nature of the power, the Apex Court observed that where power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner, which implies its exercise within a reasonable time. In that case, the legality of the appellant's continuance as a tenant was decided after he was in possession for 22 years as a tenant. Even after retirement, the appellant had continued as a tenant till 9 years. The landlord in that case had not sought his eviction under any statutory provision or otherwise. In such facts, the Apex Court held that although no period of limitation was prescribed for exercise of power by the Collector under Clause 28, it was not obligatory for the Collector to pass a peremptory order of eviction rather in such situation, it would be open to him not to evict the appellant.

14. To buttress the proposition that power conferred to effectuate a purpose should be exercised in a reasonable manner and within a reasonable time, the Apex Court noticed a judgment in the case of **Murlidhar Agarwal and Another Vs. State of U.P. & Others**, AIR 1974 SC 1924, which related to the U.P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter referred to as 'the Act, 1947'). In that case, the District Magistrate had power to take action against unauthorised occupation under Section 7-A, but as noticed by the Apex Court itself, there was a proviso to that Section which enabled the District Magistrate not to evict a person found to be in unauthorised occupation, if the District Magistrate was satisfied that there had been undue delay or otherwise it was inexpedient to do so. The other judgment noticed was in the case of **State of Gujarat Vs. Patel Raghav Natha & Others, AIR** 1969 SC 1297. That case involved exercise of suo motu power of revision by the Commissioner under Section 211 of the Bombay Land Revenue Code, which did not prescribe any period of limitation for exercise of revisional powers. The Commissioner exercised such suo motu revisional power after one year from making of order by the Collector. The High Court set aside the order of the Commissioner on the ground that such power must be exercised within a reasonable time and period of one year was held to be too late. The Apex Court also declined to interfere in the matter.

15. The aforesaid discussion clearly reveals that case of Mansaram (supra) was decided mainly on the basis of facts and the

law which was discussed for holding that power available for a purpose should be exercised for that purpose within a reasonable time was not in the context of any proceeding for initiation whereof a right has been vested in a party such as a landlord under Section 16 (1) (b) of the Act. The context was a situation where an authority had been vested with general power of supervision to be exercised at its discretion or suo motu power of revising orders of subordinates. In that context the law is trite that such power must be exercised in a manner and within a time which should satisfy the test of reasonableness. The situation would be entirely different as in the present case if the statutory provisions create a right in one or the other party to move an authority for relief under express provisions of the Statute. In such a situation no limitation can be read so as to prevent the concerned party from obtaining a decision in the lis on merits from the competent authority. In cases where right is vested by the Statute, the right can be circumscribed only by Statute and not by discretion of the authority. Holding otherwise would amount granting supremacy to an Executive or Administrative Officer over the express intention of the Legislature. The judgment of the Apex Court in the case of Mansaram (supra) dealt with entirely different provisions of law and the fact that reliance was placed upon the case of State of Gujarat (supra) makes it abundantly clear that the Court was laying down the law in the context of discretionary, supervisory or suo motu power of revision. The ratio of that judgment cannot be applied to the issues under reference, which have to be answered in the context of provisions of the Act alone.

16. The judgment of the learned Single Judge in the case of **Brij Bala** Jain (supra) to the extent it relied upon the judgment of the Apex Court in the case of Mansaram (supra) for holding that even in absence of any period of limitation only 12 years' time can be granted as a reasonable time for initiating the proceedings under a Statute, in our considered view, does not lay down the law correctly and is based upon incorrect appreciation of law laid down in the case of Mansaram (supra). The other judgments of the 1st set and the judgments following those cases for holding that an application by a landlord under Section 16 (1) (b) of the Act must be rejected if it is filed beyond 12 years from the date of unauthorised occupation of premises by a tenant also did not lay down the correct law. To that extent they stand over ruled. The judgments of the learned Single Judges noticed in the order of reference as 'judgment 2nd set' have rightly answered the questions on the basis of provisions of the Act under which there is no scope to dilute the prohibition in Section 11 that no person shall let any building without allotment order and there shall be deemed vacancy of building as provided by Section 12 of the Act. Occupation without an order of allotment or release under Section 16 of the Act cannot be treated to be lawful because Section 13 of the Act mandates such occupation to be treated as an unauthorised occupation. The obligation to intimate vacancy to the District Magistrate under Section 15 of the Act is upon both, the landlord as well as a tenant vacating the building. The power vested under Section 16 upon the District Magistrate to issue an allotment order in favour of any person and require the landlord to let the vacant building to such person is in larger public interest and to sub-serve the purpose of the Act. The power to release the whole or any part of such building in favour of the landlord upon being satisfied that the building is required by the landlord for

occupation by himself or any member of his family is to protect the bona fide interest of a landlord when the building has fallen vacant or is about to fall vacant in terms of provisions of the Act. Such protection to the landlord in case of bona fide requirement cannot be made dependent upon a particular period of time which expired between the building falling vacant, either actual or deemed and the date of application by the landlord. There may be cases where the landlord may not have bona fide requirement of the building for a decade or more and hence, he cannot seek a release order till he faces bona fide requirement and is in a position to prove the same to the satisfaction of the District Magistrate through an application under Section 16 (1) (b) of the Act. The Legislature has nowhere given any discretion to the District Magistrate to treat unauthorised occupation of a building as authorised occupation on account of lapse of any time period. The Supreme Court in the case of Mansaram (supra) noticed the judgment in the case of Murlidhar Agarwal (supra) and also the provision in Section 7-A of the Act, 1947, which enabled the District Magistrate not to evict a person found to be in unauthorised occupation in case he was satisfied that there was undue delay or otherwise it was inexpedient to do so. There is no such provision in the Act, which has been enacted by the same Legislature at a later stage. This also reflects the intention of the Legislature not to vest any discretion in the District Magistrate in the context of Section 16 (1) (b) of the Act.

17. The view which we have taken above is supported by the views taken by a Division Bench of this Court in the case of **Ajai Pal Singh** (supra). In that case the questions referred to the Division Bench for answers required the Court to decide whether in case a landlord lets a building covered under the Act to a person without allotment order and the building is declared vacant on account of such letting, the landlord is deprived of seeking release of such building under Section 16 (1) (b) of the Act or not. In order to answer the issue raised through three different questions, the Division Bench considered the relevant judgments of this Court as well as the Supreme Court, the provisions in the Act as also the relevant provisions in the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to as 'the Rules'). Rule 13 of the Rules, which relates to the release of premises on an application by the landlord was extracted and after noticing all the materials, the Division Bench has held as follows:-

"This statutory right of the landlord under Section 16 (1) (b) has not been infringed or diluted in any manner because of the vacancy having been deemed because of an unauthorised occupant having been put in possession of the premises by the landlord. The Act confers a right upon the landlord to make an application for release of the building or part thereof or any land appurtenant thereto even in respect of premises which are deemed to be vacant under Section 12 (4). The authority concerned, however, has been conferred a discretion to allow the application only on certain conditions being proved to exist to his satisfaction. If the landlord in a given case fails to satisfy the authority concerned on any of the aspects, which are necessarily to be examined for allowing the application, the authority may reject the application and thereafter consider the allotment applications made by the prospective allottees."

18. It is to be noticed that Section 16 (1) (a) of the Act authorising issuance of an allotment order in favour of a prospective tenant in respect of a vacant building as well as Section 16 (1) (b) of the Act authorising issuance of a release order in favour of the landlord are equally applicable to a building which is deemed to be vacant under Section 12 of the Act. Anybody in occupation of such building without allotment order or release order has to be treated as an unauthorised occupant, who cannot stand in the way of issuance of an allotment order on an application by a prospective tenant or in the way of the landlord seeking a release order. Under Rule 13 of the Rules so long as the application for release is pending, an application for allotment has to be kept pending. There is no good reason why a limitation of 12 years should be read in respect of an application by the landlord for release even if he is able to prove his bona fide requirement when there is no reason or scope to create similar bar of limitation upon a prospective tenant who may apply for an allotment order under Section 16 (1) (a) of the Act any time. The views of the Division Bench on consideration of Rule 10 (5) of the Rules that while restrictions have been placed under the Act and the Rules on the rights of the unauthorised occupants qua allotment of the premises, but no similar restrictions have been placed by the Legislature on the rights of the landlord who has inducted unauthorised tenant, so far as his release application under Section 16 (1) (b) of the Act is concerned, clearly support the view which we have adopted.

19. Before concluding the discussions, we feel duty bound to take note of a recent judgment by a learned Single Judge of this Court in Writ-A No.33751 of 1999 (**Smt. Uma Yadav Vs. A.D.M. (Supply)/R.C.E.O. Vns. & Ors.** rendered on 16.07.2012. Even after noticing that the present reference is pending before a Division Bench of this Court, the learned Single Judge has, in that judgment, ventured to discuss all the relevant aspects for coming to a conclusion that the judgment in the case of Mansaram (supra) did not lay down any period of limitation such as 12 years. It also considered that even if a period of 12 years, as held in some judgments, is presumed to be correct, it would depend upon the facts and circumstances because period of 12 years would necessarily have to be calculated from the time when cause of action would arise. It was pointed out that cause of action can arise on different dates depending upon whether the application has been filed by the landlord whose accommodation is under unauthorised occupation or by an applicant, a prospective allottee, who is in need of accommodation which he finds out to be in unauthorised occupation or for the Rent Control and Eviction Officer/District Magistrate who have to accept the verdict of the Statute and declare vacancy and make allotment when the facts of vacancy or deemed vacancy are brought to their notice. It was also rightly pointed out by the learned Single Judge that a landlord also may come to know about unauthorised occupation at a subsequent date, if he is residing elsewhere and can satisfy the Authority about his ignorance. Clearly 12 years' period cannot apply uniformly in a case of unauthorised occupation. In the present case, the landlord has purchased the premises from the previous landlord and on that count itself, he may claim and prove that he came to know about the

tenant being unauthorised occupation without an allotment order at later stage in 2007-08 and that gave him cause of action for treating the premises to be under deemed vacancy and available for seeking an order of release.

20. The principle in the case of Mansaram (supra) that power vested in an authority must be exercised in a reasonable manner and within a reasonable time flows from Article 14 of the Constitution of India and may apply at best only where the information about the unauthorised occupation was available to the District Magistrate/R.C.E.O., but they failed to exercise their power in a reasonable manner or within a reasonable time. The responsibility or duty of reasonableness cannot be fastened upon private person, a future allottee, i.e. prospective tenant or a landlord seeking release. Their rights flowing from the Statute have to be governed by provisions of the Act itself. As discussed earlier, the right flowing from the Statute cannot be curtailed or abridged by reading power into the authority such as District Magistrate to reject the application for release on the ground of limitation. Being a creature of the Statute, the District Magistrate must act within four corners of the Statute and cannot assume a power not vested in him, such as a power to reject the application for release on the ground of limitation not prescribed by the Statute.

21. For all the aforesaid reasons, we have no hesitation in answering the questions under reference in the following terms:-

(i)Answer to Question No.(a):- Release application by landlord cannot be treated to be barred by limitation even if the same is presented after more than 12 years from the date person has entered into an unauthorised occupation of the premises covered by the Act.

(ii)Answer to Question No.(b):- In absence of any limitation being provided under the Act for initiation of release proceedings in respect of deemed vacancy, no period of limitation can be read in the statutory provisions only on the principle that a power vested in an authority must be exercised within a reasonable time.

22. The reference having been answered, we remit all the matters back to the concerned Bench for disposal of the writ petitions as per law in the light of discussions made in this judgment and the answer to the questions of law referred to us.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 30548 of 2012
with W.P. 31464 of 2012

Jahid Khan and Anr. ...Petitioner
Versus
Suresh Chand Jain & Ors ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Srivastava
Smt. Alka Srivastava

Counsel for the Respondents:
Sri Shashi Nandan, Sri Vikrant Rana

Code of Civil Procedure-Order 21 Rule 97- Objection filed by petitioner-rejected

as the petitioner not disclosed as to how come into possession-appeal under order 21 rule 103 also rejected-in view of law as developed by Apex Court-a person resisting execution of decree claiming possession-before execution of decree-adjudication of objectors claim is must-order quashed-matter remanded back for reconsideration.

Held: Para-14

In view of the above decisions of the Supreme Court the law appears to be settled that once a complaint resisting or obstructing a decree execution of a decree of possession of immovable property is made by a person claiming to be in possession, his rights thereof are liable to be adjudicated first before he is dispossessed and he should not wait for loosing possession to the decree holder and then to make an application under Rule 99 of Order 21 CPC.

Case Law discussed:

AIR 1997 SC 856; AIR 1998 SC 1827; (2000) 10 SCC 405

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

1. Petitioners are resisting the execution of the decree passed in Original Suit No. 221 of 1983 which has become final on the ground that their shops exist on the disputed land and since they were not party to the suit, the said shops can not be demolished and they are not liable for eviction therefrom.

2. The objections of the petitioners to the execution of the decree preferred under Order 21 Rule 98 CPC were rejected as not maintainable and their appeal under Rule 103 of Order 21 CPC has also been dismissed.

3. The above two orders dated 24.5.2012 and 29.5.2012 have been impugned in this writ petition.

4. Sri Santosh Kumar Srivastava, learned counsel for the petitioners and Sri Shashi Nandan, Senior Advocate assisted by Sri Vikrant Rana, learned counsel for respondents no. 1,2 and 3 were heard and they had agreed for final disposal of the writ petition on the basis of the averments made in the writ petition and the counter affidavit on record.

5. The basic submission of the learned counsel for the petitioners is that the courts below are not justified in rejecting the objections of the petitioners as not maintainable. The petitioners can not be evicted from their shops and it can not be demolished pursuant to the decree. The decree is not binding upon them as they are not party to it and are not claiming any rights through the judgment debtors of the said decree.

6. The contention from the other side is that the decree has attained finality and has to be executed in the form it exits. The petitioners have failed to disclose the manner in which they have acquired rights over any part of the suit property. Their remedy, if any, lies in making application under Rule 99 of Order 21 CPC if at all they are dispossessed illegally in the execution proceedings and the objections on their behalf under Rule 97 of Order 21 are not maintainable.

7. In view of the rival submissions of the parties let me first examine as to whether petitioners are entitle to resist the decree by filing objections under Rule 97 of Order 21 CPC.

8. Order 21 Rule 97 CPC has to be read in conjunction with Order 21 Rule 99 CPC. Rule 97 is actually a remedy available to the decree holder to make a

complaint to the executing court, if execution of the decree is resisted or obstructed by any person in possession of the property. At the same time Rule 99 of Order 21 CPC stipulates that where any person other than judgment debtor is dispossessed from the immovable property by the decree holder, he can apply to the court complaining about such dispossession. The executing court in both the cases is under obligation to determine the rights of the parties and the order is appellable as decree under Rule 103 of Order 21 CPC.

9. For the sake of convenience Rule 97 and 99 of order 21 CPC are reproduced herein below:--

97. **Resistance or obstruction to possession of immovable property**-.

"(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to execute upon the application in accordance with the provisions herein contained."

99. **Dispossession by decree-holder or purchaser**-

(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

10. A plain reading of Rule 97 literally provides for a remedy available to the decree holder who is being obstructed in the execution of decree by a third party claiming to be in possession of the property. It is not a remedy available to the person resisting or obstructing the decree. Nonetheless, visualizing the hardship faced by the person in possession, the Supreme Court formed an opinion that it is improper to allow a person in possession to be first dispossessed and then to make a complaint about his dispossession and therefore it is always in the interest of justice that his rights be adjudicated before he is actually dispossessed.

11. Thus in **Brahmadev Chaudhary Vs. Rishikesh Prasad Jaiswal and another AIR 1997 SC 856** after considering the provisions of Rule 97 and 99 of Order 21 CPC it was ruled that where a decree of possession is obstructed by a stranger claiming himself to be in possession, his rights are to be adjudicated before he looses his possession to the decree holder.

The Court observed as under:-

"Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing

Court as well as by the decree holder the remedy available to the decree holder against such an obstruction is only Order XXI, Rule 97 sub-rule (1) and he can not by pass such obstruction and insist on re-issuance of warrant for possession under Order XXI. Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI. Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court is is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99 CPC and pray for restoration of possession."

12. A similar question whether the third party in possession of the property claiming independent right as a tenant and not party to a decree in execution could resist such decree by seeking adjudication of his objections under Order 21 Rule 97 CPC come up for consideration before the Supreme Court in **Shreenath and another Vs. Rajesh and others AIR 1998 SC 1827**. Their Lordships of the Supreme Court held that any person claiming rights of his own in the suit property can resist the execution by filing objections under Order 21 Rule 97 CPC and he need not wait for his dispossession and thereafter file objections/application under Rule 99 of Order 21 CPC. It means that a stranger in possession claiming independent rights in the property can object and get his rights adjudicated prior to his dispossession by the decree holder under Rule 97 of Order 21 CPC.

13. A similar view has also been expressed by the Supreme Court in **Anwarbi Vs. Pramod D.A. Joshi and others (2000) 10 SCC 405**. In the said case while considering the provisions of Order 21 Rule 97 CPC their Lordships held where the execution of a decree is obstructed by a third party, it is the decree holder who has to take appropriate steps under Order 21 Rule 97 CPC for removal of obstructions and to get the rights of the parties adjudicated and that when a person in possession of immovable property obstructs the execution of the decree he may not be dispossessed till his rights are adjudicated in execution proceedings and the decree holder can not take possession unless such proceedings terminated in his favour.

14. In view of the above decisions of the Supreme Court the law appears to be settled that once a complaint resisting or obstructing a decree execution of a decree of possession of immovable property is made by a person claiming to be in possession, his rights thereof are liable to be adjudicated first before he is dispossessed and he should not wait for loosing possession to the decree holder and then to make an application under Rule 99 of Order 21 CPC.

15. In the light of the above legal position, the courts below fell in error in rejecting objections of the petitioners under Rule 97 of Order 21 CPC as not maintainable. The rights of the petitioners have not been adjudicated by any of the courts on merit.

16. The appellate court has only stated that the petitioners in their objections have not clarified the location of their shops and therefore are not entitle to any protection.

17. The decree passed in Original Suit No. 221 of 1983 is in respect of

khasra no. 1203 area 1bigha 3 biswa and khsra no. 1245/A area 1 bigha, situate in quasba Baraut, District Baghpat.

18. The decree is for injunction in respect of land of khasra no. 1245/A and for eviction of the defendants in respect of land of khasra no. 1203. The petitioners in the writ petitions are claiming that their shops having area of 8ft./31 ft. with a sahan 8ft/15 ft. is on part of khasra no. 1203.

19. The contesting respondents are probably not disputing the above contention of the petitioners but in paragraph 10 of the counter affidavit they allege that the petitioners have not stated anything as to how they have acquired rights or possession over the said property and that as per the Amin report dated 5.8.1983 they are not in possession of any part of the said land.

20. In view of the above, it was incumbent upon the courts below in deciding the objections of the petitioners to find out the nature of the rights of the petitioners over the disputed part of the property and as to whether their shops form part of the suit land.

21. The courts below have not dealt with any of the above aspects while rejecting the objections.

22. In view of the aforesaid facts and circumstances, I am of the opinion that the matter requires reconsideration by the executing court on merits of the objections preferred by the petitioners under Order 21 Rule 97 CPC.

23. Accordingly, the impugned orders dated 24.5.2012 and 29.5.2012are quashed and the matter is remanded to the executing court for fresh decision of the objections under Order 21 Rule 97 CPC in accordance with law as expeditiously as possible preferably within a period of six months from the date of production of the certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.33260 of 2012

Jitendra Kumar and Ors. ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri M.M. Sahai, Sri R.Sahai

Counsel for the Respondents:
C.S.C., Sri K.K. Chand

Constitution of India, Art.-226- Appointment of post of U.P. Rojgar Guarantee Yojna-as per notification dt. 23.10.2008-Chapter Viii Para 8.1. minimum qualification is post graduate with computer awareness-must contention that are M.A. under B.C. category be given appointment merely with B. Tech qualification-held-parity can be claimed positive consideration two wrong can not make one right-rightly not considered for appointment-petition dismissed.

Held: Para-7
It is well settled that if a wrong has been committed by the respondents in respect to some other persons, that will not provide a cause of action to claim parity on the ground of equal treatment since the equality in law under Article 14 is applicable for claiming parity in respect to legal and authorized acts. Two wrongs will not make one right.

Case Law discussed:
(2010)1 SCC 422; (2010) 2 SCC 728; AIR 2000 SC 2306; AIR 2003 SC 3893; AIR 2004 SC 2303; AIR 2005 SC 5565; AIR 2006 SC 1142

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

1. Heard Sri M.M.Sahai, learned counsel for the petitioners, learned Standing Counsel and perused the record.

2. Admittedly, petitioners do not possess post graduate qualification as per the scheme of U.P. Gramin Rajgar Guarantee Yojna, amended by notification dated 23rd October, 2008. Under Chapter 8, para 8.1 of aforesaid scheme, minimum educational qualification for appointment is post graduate. Thereafter, since computer awareness have been found to be compulsory, therefore, certain decree have been mentioned so as to be given special preference but minimum educational qualification indisputably is post graduate qualification.

3. In the present case, none of the petitioners possess requisite minimum qualification, therefore, in my view, they have rightly been rejected by means of impugned order .

4. Learned counsel for the petitioner drew my attention to Annexure 14 to the writ petition, which shows that one Rakesh Ranjan, who possess only B.Tech. qualification and belong to OBC category, was appointed as Assistant Programme Officer.

5. Be that as it may, it cannot be doubted that if an illegal appointment has been made by authorities concerned, disobeying the provisions providing necessary minimum qualification, petitioners do not get a right to claim parity with such illegal act of the respondents. In **Union of India & another Vs. Kartick Chandra Mondal & another (2010) 2 SCC 422**, the Court has gone to the extent that even if some other persons similarly placed have been absorbed, that cannot be a basis to grant a relief by the Court which is otherwise contrary to statute. In para 25 of judgment, the Court said:

"Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. However, we intend to refer to a latest decision of this Court on this point in the case of State of Bihar v. Upendra Narayan Singh and Ors. (2009) 5 SCC 65, the relevant portion of which is extracted hereinbelow:

"67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order ..."

6. In **State of Karnataka & others Vs. Gadilingappa & others (2010) 2**

SCC 728, the Court reiterated that it is well settled principal of law that even if a mistake is committed in an earlier case, the same cannot be allowed to be perpetuated.

7. It is well settled that if a wrong has been committed by the respondents in respect to some other persons, that will not provide a cause of action to claim parity on the ground of equal treatment since the equality in law under Article 14 is applicable for claiming parity in respect to legal and authorized acts. Two wrongs will not make one right. The Apex Court in the case of **State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306; Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983; Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303; M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 5565; and Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142** has held that Article 14 has no application in such cases.

8. In view of the aforesaid, I find no merit in the writ petition.

9. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2013

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No.34881 of 2011

Dr. Madan Kumar Bansal ...Petitioner
Versus
Union of India and Ors. ...Respondents

Counsel for the Petitioner:
Sri R.N. Rai, Sri Adarsh Kumar

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri J.P. Singh, Miss Seema Singh

Constitution of India, Art. 30- Minority institution-declaration thereof-commission without considering the fact-whether institution run and managed by minority community-controlled by that particular community-declaration as minority institution-unsustainable-quashed.

Held: Para-21
In light of the said judgement of the Division Bench and in view of Section 12 (2) of Act, 2004 which provides that Commission for the purposes of discharging its functions under this Act, shall have all the powers of a civil court trying a suit. It logically follows that Commission while declaring the status of a institution to be a minority institution shall not only consider the material evidence relevant for the purpose, but shall also pass a reasoned order with reference to the evidence so produced for coming to the conclusions that institution in question had been (a) established by a minority community and (b) had been run and managed by a minority community since its establishment.

Case Law discussed:
AIR 1968 SC 662; (2002) 8 SCC 481; AIR 1992 SC 1630; Special Appeal No. 903 of 2006

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

1. Heard Sri B.N. Rai, learned counsel for the petitioner, Sri J.P. Singh, learned counsel for the contesting respondent no. 6 and learned Standing Counsel for the State-respondents.

2. Petitioner, before this Court, is the life member of the the institution established in the name and style of "Ram

Ratan Intermediate College, Billari, District Moradabad".

3. Petitioner seeks quashing of the notification dated 4th May, 2009 issued by the Secretary, National Commission for Minority Educational Institution, New Delhi as well as the letter dated 5th May, 2009 issued by the same authority and the consequential order dated 16th March, 2011 issued by the District Inspector of Schools, Moradabad. Under the aforesaid documents, the petitioner's institution has been declared to be a minority institution covered by Article 30 of the Constitution of India. The District Inspector of Schools has further directed that since the status certificate has been issued by the National Commission for Minority Educational Institution, which is a statutory body, the same has to be honoured. The institution must therefore, act accordingly.

4. On behalf of the petitioner it is contended that for any institution being treated to be minority institution covered by Article 30 of the Constitution of India, it has to satisfy, (a) that the institution was established by a minority community and (b) said institution is run and managed by the minority community.

5. According to the petitioner, both the conditions must co-exist. Even if one of them is found to be lacking, institution cannot be treated to be a minority institution within the meaning of Article 30 of the Constitution of India.

6. Learned counsel for the petitioner with reference to paragraphs 5 to 11 of the present writ petition submits that the institution in qeustion established by the general public of Billari belonging to various communities and castes. It is further his case that in the memorandum of association of the society, which now manages the institution, there is no mention of any minority institution being established for protecting any of the rights of the minority community, either linguistic or religious. It is further his case that all through upto 1992-1993, the Committee of Management of the institution comprised of persons belonging to the various category and castes. Petitioner, therefore, submits that the institution was neither established by a minority nor was exclusively managed by any such minority community. He then submits that the National Commission for Minority Educational Institutions was constituted under an Act of Parliament being Act No. 2 of 2005. This Act, as as amended by Act No. 18 of 2006, envisages that the minority colleges were to be established with the permission of the Commission and these colleges were to be granted recognition by the Universities as defined under Section 2(f) of University Grants Commission Act, 1956 including the deemed Universities. It is his case that very purpose of Act, 2004 is limited to the establishment of new institution with the permission of the Minority Commission (Reference Section-10 of Act, 2004). The power of the Commission to decide the status of institution and the disputes arising there-from as envisaged by Sections 11 and 12 has to be treated with reference to such colleges. Even otherwise, the certificate, which has been issued by the Commission itself is wholly illegal, inasmuch as the institution in question is not a minority institution. The consequential order issued by the District Inspector of Schools directing the institution in question to be run as a minority institution is also bad. He lastly contends that the minimum

expected from the Commission was to have exercised powers as a Civil Court and to have determined after recording evidence as to whether requirement of Article 30 of the Constitution of India as explained in various judgements of the Apex Court stood satisfied qua the institution being a minority institution or not. A minority status certificate cannot be issued without relevant facts with regard to the establishment of the institution by a minority community and its management by such community having been established. For the purpose, he has referred to Section 11 (f) of Act, 2004 as introduced by amending Act No. 18 of 2006, which provides that the Commission shall have all powers of Civil Court trying a civil suit particularly in respect of matters as elaborated there-under.

7. Sri J.P. Singh, learned counsel for respondent no.6 in compliance to the order of the Court dated 21st February, 2013 has filed an affidavit bringing on record all the relevant documents, which according to him, lead to the conclusion that the institution was established by a minority community and it has all along been run and managed by the same community. It is his case that the institution made an application before the National Commission for being declared a minority institution. On the application, notices were issued and after relevant records were produced by respondent no.5, the National Commission was satisfied that the institution was a minority institution and it has accordingly issued the certificate. He further submits that against the order of the Commission, petitioner has the remedy under Section 12-C of Act, 2004 which confers a power upon the Commission to cancel the minority status conferred on an institution. He also submits that from the documents enclosed at page 17 of the Supplementary Counter Affidavit-1, it is established that the money for establishing the institution was paid by persons belonging to the Jain Community only and thereafter, they were the persons responsible for managing the institution. He therefore, submits that both the conditions, namely, establishment of the institution by Jain community and its management by the members of the same community was a fact comply. He explains that if in between for some small period, members of other communities were included in the management of the institution, it will not mean that the minority status has been lost. He clarifies that in view of Section 11 (f) of Act, 2004, the Commission has the right to declare the status of the educational institution as minority.

8. He lastly submits that in Section 2 (g) of Act, 2004, use of the word "Or" after establishment is purposive. Under the said provision, if the institution has been established or if it is being run by a minority community, it would become entitled to be treated as a minority institution. Both the requirements are not required to be satisfied simultaneously.

9. I have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

10. So far as the law in respect of minority institutions covered by Article 30 of the Constitution of India is concerned, suffice is to refer to the judgement of the Apex Court in the case of Azeez Basha vs. Union of India

reported in AIR 1968 SC 662. The Apex Court has laid down that for an institution to be covered within the meaning of Article 30 of the Constitution of India, it must be proved that (a) institution was brought into existence (established) by a minority community and (b) institution has all along been run and managed by the minority community, which had established the same. Relevant portion of the Judgement reads as follows:

"19. .....The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an education institution provided it has been established by it. ....."

11. The Apex Court has held that both the above conditions must be satisfied simultaneously. If one of the conditions is found to be wanting, then the institution will not be treated to be a minority institution within the meaning of Article 30 of the Constitution of India.

12. This Court may therefore, deal with the last contention raised on behalf of respondent no.6, first namely that the use of word "OR" in Section 2 (g) of Act, 2004 has diluted the law laid down by the Apex Court for the purposes of treating an institution as minority institution within the meaning of Article 30 of the Constitution of India and now satisfaction of only one of the conditions, namely, establishment or management by a minority community would suffice.

13. Contention raised on behalf of the respondent no.6 has only been raised to be rejected. Article 30 is a part of Part-III of the Constitution of India. Scope of Article 30 of the Constitution of India cannot be diluted by any Act of Parliament. Article 30 has been explained in detail by the Apex Court in the case of **T.M.A. Pai Foundation & others vs. State of Karnatka & others**, reported in (2002) 8 SCC 481. The use of word "Or" in Section 2 (g) of Act, 2004 has to be read in consonance with the law laid down by the Apex Court and would, therefore, necessarily mean "AND". The contention raised on behalf of the petitioner has to be rejected as being without any substance.

14. It has been specifically laid down in paragraph-19 by the Apex Court in the case of **Azeez Bhasha** (Supra) that if an institution has not been established by any minority community, then it cannot set up a right under Article 30 of the Constitution of India only because it is started managing the same at some later point of time.

15. From the document enclosed as Annexure-1 to the counter affidavit filed by the respondent-Committee of Management, which is said to be proceedings book (page-17 of the counter affidavit) it is apparently clear that in the said meeting, all the prominent residents of Billari and representatives of all

communities were present. It was unanimously resolved that private school (English) run by the public of Billari be taken over by the association and steps be immediately taken to raise it to the High School standard and get it affiliated and recognised by the U.P. Education Department.

16. It is no doubt true that in the said meeting, contributions were made by the members of Jains family. However, the proceedings are in themselves sufficient to establish that the institution had been established by the public of Billari belonging to the various communities. It is this established institution was sought to be taken over by the association, and a decision was taken to get it recognised by the U.P. Education Board after up-gradation upto High School. From a simple reading of the proceedings so enclosed, it is apparent that there was decision to convert the private school (English) into any minority institution either for the purposes of protecting any minority linguistic rights or religious rights. Even the Managing Committee formed under the said resolution comprised of persons of various communities. From the said document filed by the respondent-Committee of Management itself, at least one thing stands proved beyond doubt that the institution in question was not established by any minority community/Jains. The institution in question was established and was being run and managed by the public of Bilari, members whereof belonging to the various communities upto to date of passing of the resolutions enclosed as Annexure-1 to the counter affidavit.

17. The Apex Court in the case of Azeez Bhasha (Supra) as already noticed above, has specifically laid down that if an institution has not been established by the minority community, then subsequently only on the plea that it has started managing the said institution, it cannot claim a fundamental right guaranteed under Article 30 of the Constitution of India and such institution cannot be treated to be a minority institution.

18. A constitution Bench of the Apex Court in the case of **St. Stephen's College etc. etc. vs. The University of Delhi, etc. etc.**, reported in AIR 1992 SC 1630, has specifically held in paragraph-29 as follows:

"29. ..... It should be borne in mind that the words "establish" and "administer" used in Article 30 (1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution. ....."

19. In view of the aforesaid, the Minority Commission appears to be unjustified in declaring the institution in question as a minority institution. It appears that the law laid down by the Apex Court in the case of **Azeez Bhasha (Supra)** and in the case of **St. Stephen's College (Supra)** has completely been ignored.

20. Another aspect of the matter, which needs mentions is that under Section 11 (f) of the Commission Act, 2004, a power has been conferred upon the Minority Commission to examine the

issue pertaining to the status of an institution as a minority education institution, but it has to be kept in mind that a Division Bench of this Court in **Special Appeal No. 903 of 2006 (Committee of Management Inter College Dharaon, District Chandauli vs. State of U.P. And others) decided on 24th August, 2006,** has held that it is only for a competent Court of law to declare an institution to be minority institution and it is not within the competence of the State Government to issue any such declaration. The relevant portion of the order of the Division Bench reads as follows:

".....It is not for any State Government to grant any minority status to any institution; not even the Parliament or State Legislature can do it. A minority institution has to grow by itself. Only a competent Court of law can declare such status."

21. In light of the said judgement of the Division Bench and in view of Section 12 (2) of Act, 2004 which provides that Commission for the purposes of discharging its functions under this Act, shall have all the powers of a civil court trying a suit. It logically follows that Commission while declaring the status of a institution to be a minority institution shall not only consider the material evidence relevant for the purpose, but shall also pass a reasoned order with reference to the evidence so produced for coming to the conclusions that institution in question had been (a) established by a minority community and (b) had been run and managed by a minority community since its establishment.

22. In absence of reasons having been recorded in the order passed by the Commission declaring minority status with reference to the evidence on record, the declaration issued appears to be unjustified.

23. The notification dated 4th May, 2009 issued by the Secretary, National Commission for Minority Educational Institution, New Delhi as well as the letter dated 5th May, 2009 issued by the same authority and the consequential order dated 16th March, 2011 issued by the District Inspector of Schools, Moradabad cannot be legally sustained and are hereby quashed.

24. The present writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 15.07.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.35695 of 2013

Mahendra Prakash Srivastava..Petitioner
Versus
D.J., Allahabad and Anr. ..Respondents

Counsel for the Petitioner:
Sri Satish Dwivedi

Counsel for the Respondents:
C.S.C., Sri Yashwant Verma

Constitution of India, Art. 226- Gratuity-withheld-on ground of pendency of disciplinary action-against petitioner-much after retirement-disciplinary proceeding initiated without any authority of law-direction issued to release amount of gratuity within one month-interest payable-after one month from actual date of retirement @ 10% per annum.

Held: Para-17

Be that as it may, in any case, 90% of gratuity being provisional payment has to be made even if an enquiry would have been pending at the time of retirement but in the present case even that is not the state of affairs. In these facts and circumstances it is evident that withholding of gratuity for more than two years on the part of the respondents is patently illegal, erroneous, unjust, improper and unwarranted.

Case Law discussed:

1972 AC 1027; 1964 AC 1129; JT 1993 (6) SC 307; JT 2004(5)SC 17; (1996) 6 SCC 530; (1996) 6 SCC 558; AIR 1996 SC 715; W.P. No. 34804 of 2004; 1985(1) SLR-750; (1987) 4 SCC 328; (1994) 6 SCC 589; AIR 1997 SC 27; (1999) 3 SCC 438; (2008) 3 SCC 44; 2011(2) ADJ 608; (2008) 119 FLR 787; AIR 2005 SC 2755.

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

1. After receiving instructions, Sri Yashwant Verma, learned Counsel appearing for respondents fairly stated that at the time of retirement, no departmental enquiry was pending against petitioner. He, however, submitted that in the year 2013, two enquiries have been initiated but could not show any provision under which if any enquiry was not pending against an employee at the time of retirement, still his gratuity would not have been paid or respondents were authorized by some other provision to withhold gratuity of petitioner for such a long time.

2. Withholding of retiral benefits of retired employees for years together is not only illegal and arbitrary but a sin if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillar of our constitution.

3. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees and their legal heirs like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man

who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

4. In our system, the Constitution is supreme, but the real power vest in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

5. Regarding harassment of a common man, referring to observations of **Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and **Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129**, the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

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

7. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

8. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in

himself the power to act in a manner which is arbitrary".

9. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

10. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

11. Now, coming to another aspect of the matter, if retiral benefits are paid with extra ordinary delay, the Court should award suitable interest which is compensatory in nature so as to cause some solace to the harassed employee. No Government official should have the liberty of harassing a hopeless employee or his heirs by withholding his/her lawful dues for a long time and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal, unjust or arbitrary act. Every authority howsoever high must always keep in mind that nobody is above law. The hands of justice are meant not only to catch out such person but it is also the constitutional duty of Court of law to pass suitable orders in such matters so that such illegal acts may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing such unjust act.

12. Interest on delayed payment on retiral dues has been upheld time and against in a catena of decision. This Court in **Shamal Chand Tiwari Vs. State of U.P. & Ors. (Writ Petition No.34804 of 2004)** decided on 6.12.2005 held:

"Now the question comes about entitlement of the petitioner for interest on delayed payment of retiral benefits. Since the date of retirement is known to the respondents well in advance, there is no reason for them not to make arrangement for payment of retiral benefits to the petitioner well in advance so that as soon as the employee retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues. In the case of State of **Kerala and others Vs. M. Padmnanaban Nair, 1985 (1) SLR-750**, the Hon'ble Supreme Court has held as follows:

"Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following

day and pension at the expiry of the following months. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasized and it would not be unreasonable to direct that the liability to pay panel interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement."

In this view of the matter, this Court is of the view that the claim of the petitioner for interest on the delayed payment of retiral benefits has to be sustained."

13. It has been followed and reiterated in **O.P. Gupta Vs. Union of India and others (1987) 4 SCC 328, R. Kapur Vs. Director of Inspection (1994) 6 SCC 589, S.R. Bhanrate Vs. Union of India and others AIR 1997 SC 27, Dr. Uma Agarwal Vs. State of U.P. & another (1999) 3 SCC 438** and **S.K. Dua Vs. State of Haryana and another (2008) 3 SCC 44.**

14. A Division Bench of this Court has also considered the question of award of interest on delayed payment of retiral benefits recently in **Rajeshwar Swarup Gupta Vs. State of U.P. & others 2011 (2) ADJ 608** and, relying on the Apex Court decision in **M. Padmnanaban Nair (supra)** and its several follow up as also an earlier Division Bench judgement of this Court in **Smt. Kavita Kumar Vs. State of U.P. & others (2008) 119 FLR 787**, has awarded 12% interest in the said case.

15. In view of the above, I have no hesitation in holding that non payment of gratuity to petitioner is wholly arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

16. In a case where the person who has invoked extraordinary equitable jurisdiction satisfying the Court that in the hands of authorities of state instrumentality, individual has suffered grievously, the Court, while deciding the matter, can also pass an order of exemplary cost compensatory in nature so that such authorities may not recur the similar negligence in future. In **Gurpal Singh Vs. State of Punjab and another, AIR 2005 SC 2755** it was held that the Court must do justice by promotion of good faith and prevent law from crafty invasion.

17. Be that as it may, in any case, 90% of gratuity being provisional payment has to be made even if an enquiry would have been pending at the time of retirement but in the present case even that is not the state of affairs. In these facts and circumstances it is evident that withholding of gratuity for more than two years on the part of the respondents is patently illegal, erroneous, unjust, improper and unwarranted.

18. The writ petition is accordingly allowed. Respondent no.1 is directed to forthwith release gratuity to the petitioner alongwith interest @ 10% p.a. To be computed after a month from the date of retirement, till the payment is actually made.

19. The petitioner shall also be entitled to cost which is quantified to Rs.5,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2013

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE BHARAT BHUSHAN, J.

Civil Misc. Writ Petition No. 35775 OF 2013

Swaroop Chand Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Saurabh Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-341(1)and (2)- Whether 'Kasera' is sub cast of "Shilpkar"?-question referred to larger Bench.

Held: Para-13
It is pertinent to refer here that the 'Kasera' was included in Schedule-I with reference to Section 2 (b) of U.P. Public Services (Reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 at serial no.54:- "54, Kasera, Thathera, Tamrakar in the list of Other Backward Classes." The UP Act of 1994 did not amend the List of Scheduled Caste inasmuch as the said List can only be amended by the Parliament under Article 341 (2) of the Constitution of India under its statutory powers.

Case Law discussed:
Service Bench No. 2080 of 2011; Civil Appeal No. 5821 of 2012.

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

1. We have heard Shri Saurabh Kumar, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents.

2. By this writ petition the petitioner has prayed for directions to the District Magistrate, Mirzapur to issue a Scheduled Caste certificate in the name of petitioner's son Tarang Singh.

3. The reason, for which Shri Tarang Singh, who is minor, has not been impleaded in the writ petition, has not been stated. The petitioner is given liberty to file an appropriate application impleading Tarang Singh, through his father-the petitioner as petitioner no.2.

4. It is submitted that the District Magistrate has not issued caste certificate, despite repeated applications.

5. The petitioner has relied upon a Division Bench judgment of Lucknow Bench of this Court in **Service Bench No.2080 of 2011 (State of UP vs. Vijay Shankar & another)** decided on 23.12.2011.

6. We have perused the judgment and do not agree with the reasoning, which has far reaching effect on the issuance of caste certificates to the persons belonging to 'Kasera' caste as Scheduled Caste, and will discriminate other notified castes as Scheduled Castes.

7. The facts given in the judgment cited by the petitioner, and annexed as Annexure no.3 to the writ petition that Shri Vijay Shankar-the opposite party was appointed as Assistant Prosecution Officer on the recommendation of the UP Public Service Commission in the reserved category of the Scheduled Caste vide a Certificate issued by the Tehsildar,

Mirzapur dated 2.2.1987 certifying that he belongs to 'Shilpkar' caste. Later, on a complaint made on the ground that he has obtained appointment by submitting a forged Scheduled Caste certificate and that he actually belongs to 'Kasera' caste as verified in his school certificate, he was dismissed from service on 21.5.2007. Aggrieved he filed a claim petition before the U.P. State Public Services Tribunal, which set aside the punishment order with directions to be reinstated with all consequential service benefits.

8. The questions, which arose before the Division Bench, was whether Shri Vijay Shanker was issued the caste certificate by the Tehsildar, Mirzapur on 2.2.1987. It was pleaded on behalf of the District Magistrate, that no such caste certificate was issued between the years 1983-1985 pertaining to the 'Kasera' caste being a Scheduled Caste. On an enquiry made by the District Magistrate it was found that said certificate was not issued.

9. The Division Bench observed that it is not mandatory to make an entry for issuing every certificate and then proceeded to examine the caste certificate of father and mother of Shri Vijay Shanker and found that they were categorised in the National Citizens Register as 'Shilpkar'. It proceeded further to hold that the Tribunal observed that 'Kasera' is a sub-caste of 'Shilpkar' as per Government Order dated 12.12.1950, and in fact there are 26 sub-castes of 'Shilpkar', of which 'Kasera' is one of them. The Court held that thus 'Kasera' as a sub-caste of 'Shilpkar' comes under the category of Scheduled Caste.

10. We do not subscribe to the reasoning given in the judgment on the grounds that it is mandatory for the Tehsildar, who is the competent authority to issue caste certificate to maintain a register and make an entry for issuing certificate with serial number and date and that when the District Magistrate had categorically stated that no such caste certificate was issued, the Court could not have recorded the findings contrary to pleading on the ground that it was not mandatory to make an entry to issue a caste certificate. We, however, find that this is a question of fact, on which the State should have filed a review petition or preferred an appeal to the Supreme Court.

11. The other finding, that 'Kasera' is a sub-caste of 'Shilpkar', is based upon a Government Order dated 12.12.1950. In our opinion, this finding is not based on correct appreciation of facts and law. Since the finding is going to affect a large number of persons belonging to notified Scheduled castes and that the persons, belonging to sub-caste of 'Kasera' may apply and occupy the vacancies reserved for Scheduled Caste, it is necessary to refer the matter to larger bench. The reasons for our disagreement are as follows:-

12. Under Article 341 (1) of the Constitution of India the List of Scheduled Caste with respect to any State can be notified only by a Presidential Order after consultation with the Governor of that State, by public notification. The Presidential Order 1950 was amended by an Amendment Act in 1976 and thereafter in 1991 in which in Part 18 of the Schedule only 66 castes were notified as Scheduled Caste for the State of UP. The Government of U.P. by Government Order dated 10.7.1986 notified the same 66 castes as Scheduled Caste and

which includes 'Shilpkar' at serial no. 65. The Presidential Order or the notification of the State Government does not include any sub-caste for any of the 66 notified Scheduled Caste. The State Government or the High Court does not have a power to expand the notified Scheduled Caste by adding any sub-caste, race, tribe or any group within that caste. The Courts have not been given powers to expand the scope of the caste by adding sub-caste vide **Kavita Solanke vs. State of Maharashtra and others Civil Appeal No.5821 of 2012** decided by Supreme Court of India on 9.8.2012. In this judgment the Supreme Court held that the Courts could not and should not expand their jurisdiction while dealing with the question as to whether a particular caste or sub-caste, tribe or sub-tribe was included in any one of the Entry mentioned in the Presidential Orders issued under Article 341 and 342 of the Constitution. Even the Governor of the State in exercise of his executive powers or State Government cannot add or delete any caste from such notification

We have made the reference of the notifications from Sewa Vidhi by Shri V.K. Singh published by Aliya Law Agency (Pages 136 and 137).

13. It is pertinent to refer here that the 'Kasera' was included in Schedule-I with reference to Section 2 (b) of U.P. Public Services (Reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 at serial no.54:- "54, Kasera, Thathera, Tamrakar in the list of Other Backward Classes." The UP Act of 1994 did not amend the List of Scheduled Caste inasmuch as the said List can only be amended by the Parliament under Article 341 (2) of the Constitution of India under its statutory powers.

14. In case 'Kasera' caste was included as sub-caste of Shilpkar in the Presidential Order or any amendments made by Parliament, there was no need to include 'Kasera' in the List of OBC in Schedule I of the UP Act of 1994.

15. On the aforesaid reasoning, we disagree with the judgment and refer the following questions to be considered by the larger bench:-

"(1) Whether 'Kasera' is a sub-caste of 'Shilpkar' which is notified in the category of Scheduled Caste under Article 341 (1) and (2) of the Constitution of India?

(2)Whether the judgment dated 23.12.2011 in Service Bench No.2080 of 2011 (State of UP and another vs. Vijay Shanker and another) is correct in law?.

16. Let the papers be placed before Hon'ble the Chief Justice for nominating a larger bench to decide the matter.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 16.07.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.36202 of 2013

Subhash Chandra Sharma ...Petitioner
Versus
Naresh Chand Jindal ...Respondents

Counsel for the Petitioner:
Sri M.A. Qadeer, Sri Mohd. Hisham Quadeer
Sri Shamim Ahmad

Counsel for the Respondents:
Sri B.D. Mandhyan, Sri Sanjay Kumar

U.P. Urban Building(Regulation of Letting Rent & Eviction)Act 1972- Section 21(c) a-application by Land Lord-on personal bonafide need tenant objected as having alternate accommodation-Land Lord being heart patient and his wife suffering from 'Arthritis' -held-land lord is best judge-finding regarding bonafide need recorded by both court below-warrant no interfere-petition dismissed.

Held: Para-9

In my view, the bonafide need and comparative hardship are to be examined only with reference to the property in dispute. Whether other portion of the house is vacant or it has been let out, is wholly irrelevant. It is the choice of the landlord to either let it out or to keep the property in his possession. The tenant has no right to dictate his own term. The tenant, as a matter of right, cannot claim that he may be provided alternate accommodation.

Case Law discussed:

(1996) 6 SCC 222; (1981) 3 SCC 36; (1996) 5 SCC 353; AIR 2000 SC 534; 2010(3) ARC 544

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

1. Heard Sri M.A. Qadeer, Senior Advocate, assisted by Sri Shamim Ahmad, learned counsel for the petitioner and Sri B.D. Mandhyan, Senior Advocate, assisted by Sri Sanjay Kumar, learned counsel appearing on behalf of the respondent.

2. This is the petition by the tenant, challenging the order of the Prescribed Authority dated 16.5.2012 and the order of the District Judge, J.P. Nagar (Amroha) dated 1.5.2013.

3. The petitioner is a tenant of ground floor house no. 91, Amroha, owned by the respondent. The respondent-landlord filed a release application under Section 21 (1) (a) of the Act No. 13 of 1972 for the release of the premises in dispute in his favour on the ground that he is an old man, aged about 65 years at that time and he is a heart patient and his wife is also suffering from Arthritis. He had four daughters and one son, all married. The son was residing at Ghaziabad. Both, son and daughter-in-law are doctors. They were earlier residing along with son at Ghaziabad upto 2004 but they have left the house because of non-understanding with the daughter-in-law and started living with his brother at Amroha. The petitioner filed written statement. In Para 24 of the written statement, it is stated that apart from house no. 91, the respondent had one more house no. 93 at Amroha, which was in the name of his father and after the death, the respondent has become owner, hence the respondent has no bonafide need of the premises in dispute. It was stated that during the pendency of the suit in 2010, the first floor has been vacated by Sri Anil Kumar and second floor has also been vacated by Sri Mahesh Bhatnagar and both the floors were available to the respondent which were sufficient for their living.

4. The Prescribed Authority allowed the release application on the ground that the applicant is an old man and is suffering from heart disease and has also been subjected to heart operation and his wife is suffering from Arthritis and both have been advised to live on the ground floor, which was in possession of the petitioner and, therefore, the landlord has established the bonafide need. It is further stated that it is upon the landlord to decide that which floor would be more appropriate for his living and the tenant cannot interfere on his discretion. On a comparative hardship, the Prescribed

Authority has stated that the tenant was a Police personnel and is out of service and he belongs to Bijnor and after the retirement, he can live at Bijnor. It has been further observed that the tenant has neither any business nor he has any agricultural land at Amroha.

5. Being aggrieved by the order of the Prescribed Authority, the petitioner filed an appeal which has been dismissed by the order dated 1.5.2013, which is impugned in the present writ petition.

6. Learned counsel for the petitioner submitted that the Prescribed Authority in its order has stated that the second floor was vacant. The petitioner has offered to vacate the premises in case he may be provided alternate accommodation on the first floor or on the second floor. The said plea has not been accepted by the appellate authority on the ground that such offer has not been made when both the premises fallen vacant in the year 2010. He further submitted that the landlord had another house at Amroha, which claimed to have been sold in the year 2009 during the pendency of the suit and the landlord failed to establish his genuine bonafide need inasmuch as the comparative hardship is in favour of the tenant. The landlord is at present living along with his brother at Amroha comfortably and at present there is no genuine need.

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

8. The bonafide need and the comparative hardship are to be examined with reference to the premises in dispute. I am of the view that on the facts and circumstances, the landlord was able to make out a case of genuine bonafide need of the premises in dispute. The landlord was aged about 65 years when the release application was filed. At present he is more than 70 years old. Various evidences have been filed to demonstrate that he was suffering from heart disease and has also been subjected to heart surgery. The evidences have also been filed to demonstrate that his wife was Arthritis patent and both have been advised to live on the ground floor. This establishes genuine bonafide need of the landlord. So far as the comparative hardship is concerned, it is also in favour of the landlord as observed by both the authorities that the petitioner was a retired Police personnel and is out of service and belongs to Bijnor. Neither he is doing any business nor he has any agricultural land at Amroha and, therefore, he can conveniently go to Bijnor. In any view of the matter, no effort has been made since last several years to search any other accommodation. Both the authorities have recorded the findings that other house no. 93 was in the name of his father, who had executed a will in favour of his grandson and the grandson sold the said house in the year 2009. The said house was neither owned by the landlord nor it was in his possession.

9. In my view, the bonafide need and comparative hardship are to be examined only with reference to the property in dispute. Whether other portion of the house is vacant or it has been let out, is wholly irrelevant. It is the choice of the landlord to either let it out or to keep the property in his possession. The tenant has no right to dictate his own term. The tenant, as a matter of right, cannot claim that he may be provided alternate accommodation.

10. In the case of **Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta, reported in (1996) 6 SCC 222**, while considering the bonafide requirement of the landlord, the Apex Court has held that the alternative accommodation available to the landlord, must be reasonably suitable, obviously in comparison with the suit accommodation wherefrom the landlord is seeking eviction. Convenience and safety of the landlord and his family members would be relevant factors. While considering the totality of the circumstances, the court may keep in view the profession or vocation of the landlord and his family members, their style of living, their habits and the background wherefrom they come.

11. In the case of **M.M. Quasim Vs. Manohar Lal Sharma, reported in (1981) 3 SCC 36,** the Apex Court has held that the landlord does not have an unfettered right to choose the premises but merely showing that the landlord has some other vacant premises in his possession may not be sufficient to negative the landlord's claim if the vacant premises were not suitable for the purpose for which he required the premises. The Court must understand and appreciate the relationship between the legal rules and necessities of life.

12. In the case of **Sarla Ahuja Vs. United India Insurance Co. Ltd. (1996) 5 SCC 353**, the Apex Court has held that the Rent Controller should not proceed on the assumption that the landlord's requirement is not bonafide. When the landlord shows a prima facie case a presumption that the requirement of the landlord is bonafide is available to be drawn. It is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without giving possession of the tenanted premises. While deciding the question of bonafides of the requirement of the landlord, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself.

13. In the case of **Ragavendra Kumar Vs. Firm Prem Machinery and Co., reported in AIR 2000 SC 534**, the Apex Court has held that it is settled position of law that the landlord is best judge of his requirement for residential or business purpose and he has got complete freedom in the matter.

14. In the case of **Ashfaque Brother and others Vs. Additional District Judge, Court No. 10, Kanpur Nagar and others, reported in 2010 (3) ARC 544**, this Court has held that it is the legal right of the landlord to decide which portion or accommodation would suit him/her for utilizing it how and in what manner. This factor of utility is to be satisfied by him to meet his needs is only dependent upon the landlord only and tenant has no say in the matter.

15. In view of the above, the findings recorded by both the authorities that the landlord has a bonafide need and comparative hardship is in favour of the landlord are the findings of fact, based on material on record and needs no interference.

16. Learned counsel for the petitioner submitted that a reasonable time may be allowed to vacate the premises.

17. In the facts and circumstances, it would be appropriate to allow three

months time to the petitioner to vacate the premises, in case if the petitioner gives and undertaking before the court below.

18. In the result, the writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.36314 of 2013

Gopal Ji Gupta ...Petitioner
Versus
Debt Recovery Appellate Tribunal & Ors. ....Respondents

Counsel for the Petitioner:
Sri Deepak K. Jaiswal, Sri Sanjay Kumar Gupta

Counsel for the Respondents:
Sri V.K Srivastava, Sri Yashwant Singh

Securtization and Reconstruction of Financial Assests and Enforcement of Security Interest Act,2002-Section 18-appeal against order debt recovery tribunal-condition of 50 % deposit-as per 2nd proviso-Bank already recovered Rs. 50,11,847/- against demand of Rs. 60,65,380/-further deposited Rs. 2,65000/-before filing appeal-held-once liability not fixed by Tribunal-against demand notice more than 50% already recovered during auction sale-no further amount payable-order passed by Appellate Tribunal set-a-side-with direction to entertain appeal without pre-deposit condition.

Held: Para-12
The Court is of the opinion that there was no requirement for the petitioner to deposit any further amount for entertainment of his appeal under the second proviso to Section 18 of the Act of 2002.

Case Law discussed:
2010(3) Banker's Journal 9

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

1. Heard Sri Deepak Kumar Jaiswal, the learned counsel for the petitioner and Sri V.K. Srivastava, the learned counsel for the respondent-bank.

2. With the consent of the learned counsel for the parties, the writ petition is being decided at the admission stage itself without calling for any counter affidavit, since no factual controversy is involved in the present writ petition.

3. The petitioner is a guarantor to a loan taken by M/s Ganpati Traders, who defaulted in the payment of the loan. Accordingly, the bank issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act of 2002) and thereafter, issued a notice under Section 13(4) of the Act of 2002 for taking possession of the property of the guarantor, pursuant to which possession was taken and the property of the guarantor was put to auction. It has come on record, that pursuant to the auction, a sum of Rs.50,11,847/- has been realized towards the loan amount.

4. The petitioner, being aggrieved by the issuance of the notice bank under Section 13(4) of the Act of 2002, filed an application under Section 17 of the Act of 2002 before the Debts Recovery Tribunal praying that the possession be restored in his favour. This application was rejected by the Tribunal, against which the petitioner preferred an appeal under Section 18 of the Act of 2002.

5. Section 18 of the Act of 2002 requires that any person aggrieved by an order of the Debts Recovery Tribunal could prefer an appeal provided he deposits 50% of the amount of debt due from him as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less. The petitioner by his own calculation filed an application for waiver of the 50% to 25% as per the second proviso of Section 18 of the Act of 2002 along with a bank draft of Rs.2.65 lacs and prayed that suitable orders may be passed for waiving the balance amount and entertaining the appeal. The said application was rejected by the Debts Recovery Appellate Tribunal by the impugned order. The petitioner, being aggrieved by the said order, has filed the present writ petition.

6. The Appellate Tribunal held that 50% of the amount demanded by the bank has to be deposited irrespective of the recovery so made by the bank by way of auction.

7. Having heard the learned counsel for the parties and having perused the impugned order, the Court finds it strange that the bank is demanding Rs.94,08,777/- along with future interest but the possession notice issued under Section 13(4) of the Act of 2002 indicates that the bank had demanded a sum of Rs.60,65,380.90 along with future interest. The Court is of the opinion that the amount indicated in the notice under Section 13(4) of the Act of 2002 can only be made the basis for the purpose of filing the appropriate deposit in an appeal under Section 18 of the Act of 2002, inasmuch as the petitioner had questioned the said notice before the Debts Recovery Tribunal. The contention of the respondent bank's counsel that 50% of Rs.94,08,777/- has to be deposited is erroneous.

8. The second proviso to Section 18 of the Act of 2002 is relevant for the purpose of deciding the appeal. For facility, the said provision is extracted hereunder:

"18. Appeal to Appellate Tribunal.--(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less]

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.]"

9. A perusal of the said provision indicates that 50% of the amount of the debt due from him as claimed by the secured creditors or determined by the Debts Recovery Tribunal has to be deposited by the person who challenges the order of the Debts Recovery Appellate Tribunal.

10. In the instant case, no amount as yet has been determined by the Debts Recovery Tribunal and the petitioner has only questioned the possession notice issued by the bank under Section 13(4) of the Act of 2002, which indicates that an amount of Rs.60,65,380.90 was required to be deposited by the petitioner at the time of filing the appeal.

11. In the instant case, the Court finds that the respondent bank had auctioned the property of the petitioner and has recovered a sum of Rs.50,11,847/-, which is more than the 50% of the total amount sought to be recovered. The proviso to Section 18 of the Act of 2002 restricts the entertainment of the appeal unless the borrower deposits 50% of the amount of debt due from him as claimed by the secured creditors. Since more than Rs.50 lacs has already been realized by the secured creditor, namely, the bank, which is more than 50% of the debt due from the petitioner, the purpose of the proviso stands satisfied.

12. The Court is of the opinion that there was no requirement for the petitioner to deposit any further amount for entertainment of his appeal under the second proviso to Section 18 of the Act of 2002.

13. In the light of the aforesaid, the decision cited by the respondent-bank in the case of **Indian Bank Vs. M/s. BLue Jaggers Estates Ltd. and others, 2010 (3) Bankers' Journal 9** has no application to the present set and circumstances of the case.

14. For the reasons stated aforesaid, the impugned order cannot be sustained and is quashed. The writ petition is allowed. The Debts Recovery Appellate Tribunal is directed to entertain the appeal without any pre-condition of deposit and decide the appeal on merits in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2013

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No.36609 of 2013

Kailash Nath ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri B.P. Singh, Sri Ashok Malviya

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Cancellation of fair price shop licence-petitioner submitted explanation after expiry of period-hence authority refused to consider the same-direction to consider the explanation if it is filed within 3 weeks-take appropriate decision within 6 weeks thereafter-petition disposed of.

Held: Para-
Having regard to the facts and circumstances of the case and having considered the submissions made by the learned counsel for the parties, we are of the view that the interest of justice would be subserved by disposing of the Writ Petition with the following directions

1. Within three weeks from the date of receipt of certified copy of this order, the petitioner will submit his explanation

along with the documents as well as a certified copy of this order before the respondent no.2.

2. The respondent no.2 will proceed to consider the matter regarding the licence of the petitioner in respect of the Fair -Price Shop in question , and decide the same in accordance with law expeditiously, preferably , within a period of six weeks of the receipt of the aforesaid explanation and documents, after giving reasonable opportunity of hearing to all concerned including the petitioner and by passing a speaking order.

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. We have heard Sri Ashok Malaviya, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent nos. 1 and 2.

2. From a perusal of the Writ Petition and Annexures thereto, it appears that the petitioner was having licence in respect of the Fair -Price Shop in question.

3. By the order dated 16.6.2013 passed by the respondent no.2, the licence of the petitioner in respect of the Fair-Price Shop in question was suspended, and the petitioner was required to submit his explanation in regard to the irregularities allegedly committed by the petitioner, within one week of the receipt of the said order dated 16.6.2013.

4. It appears that the petitioner could not submit his explanation within the stipulated time, as mentioned in the said order dated 16.6.2013. In paragraph no. 14 of the Writ Petition, the petitioner has averred that the petitioner submitted his explanation with the documents, but the respondent no.2 declined to accept the same on the ground that the stipulated period of one week, as mentioned in the order dated 16.6.2013, had expired .

5. On 10.7.2013, the learned Standing Counsel appearing for the respondent nos. 1 and 2 was granted time to obtain instructions in the matter, particularly in regard to the averments made in paragraph no.14 of the Writ Petition.

6. Learned Standing Counsel appearing for the respondent nos. 1 and 2, on the basis of instructions received by him, states that the explanation submitted by the petitioner could not be accepted , as stipulated period of one week mentioned in the order dated 16.6.2013, had expired. However, learned Standing Counsel submits that the petitioner may submit his explanation within three weeks, and the respondent no.2 will thereafter, proceed to decide the matter expeditiously.

7. Sri Ashok Malaviya, learned counsel for the petitioner states that the petitioner has already sent his explanation alongwith all the documents by Registered Post A.D. on 18.7.2013.

8. Having regard to the facts and circumstances of the case and having considered the submissions made by the learned counsel for the parties, we are of the view that the interest of justice would be subserved by disposing of the Writ Petition with the following directions:

1. Within three weeks from the date of receipt of certified copy of this order, the petitioner will submit his explanation along with the documents as well as a certified copy of this order before the respondentno.2.

2. The respondent no.2 will proceed to consider the matter regarding the licence of the petitioner in respect of the Fair -Price Shop in question , and decide the same in accordance with law expeditiously, preferably , within a period of six weeks of the receipt of the aforesaid explanation and documents, after giving reasonable opportunity of hearing to all concerned including the petitioner and by passing a speaking order.

9. The Writ Petition is accordingly disposed of with the aforesaid observations.

10. It is made clear that this Court has not adjudicated the claim of the petitioner on merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.36701 of 2013

Smt. farmoodi ...Petitioner
Versus
A.D.J. Muzaffar Nagar & Ors. ..Respondents

Counsel for the Petitioner:
Sri S.D. Ojha

Counsel for the Respondents:
C.S.C.

U.P. Motor Vehicle Rules 1998-Rule 220-B- Release of fixed deposit amount-on ground of daughter marriage-Tribunal rejected application on ground no particular of expenses given-held-very rigid view taken-Tribunal failed to understand the need and urgency-order not sustainable quashed-direction for release of entire amount with interest given.

Held: Para-10

In the instant case, the Court finds that the Tribunal has taken a very rigid stand and has mechanically passed the order without understanding and without appreciating the distinction drawn by the Supreme Court. The guidelines, which have now been incorporated in the Rules was only to safeguard the interest of the claimants particularly the minors and the illiterates. The guidelines were not meant to understood to mean that the Tribunal was supposed to take a rigid stand while considering the application of the petitioner for release of the money.

Case Law discussed:
1994 (1) TAC 323; 2012(1)TAC 740.

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

1. Heard the learned counsel for the petitioner. The writ petition is being decided at the admission stage itself without calling for a counter affidavit.

2. A claim application was filed by the petitioner under the Motor Vehicles Act against the owners of the vehicle and the insurance company for compensation in a case where the son of the petitioner died in a motor accident. The Motor Accident Claims Tribunal gave an award dated 11th September, 2012 awarding a compensation of Rs. 3,28,500/- (Three lacs twenty eight thousand and five hundred) in favour of the petitioner and directed the insurance company to deposit the entire amount along with interest. The Tribunal further directed that 50 per cent of the amount would be paid to the petitioner and the balance 50 per cent would be kept in the nationalized bank for a period of five years.

3. The said award was accepted by the insurance company and the amount

has been deposited before the Tribunal, pursuant to which, 50 per cent of the amount has been withdrawn by the petitioner.

4. The petitioner thereafter moved an application before the Tribunal seeking permission for release of the balance amount in her favour contending that her eldest daughter was going to get married and that the amount was required for the expenses involved in the marriage. The Tribunal, by the impugned order, rejected the application on the ground that the petitioner has not been able to give details of the expenses incurred by her for the amount already released in her favour, and consequently, the balance amount could not be released. The petitioner, being aggrieved, has filed the present writ petition.

5. The purpose of keeping the amount in a fixed deposit is for a specific purpose. The Supreme Court in the case of **General Manager, Kerala State Road Transport Corporation Vs. Sushamma Thomas & Others, 1994 (1) TAC 323** issued certain guidelines to the Claims Tribunal while awarding compensation. The said guidelines are extracted below:

"(i).The claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposited at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however, be allowed to be withdrawn.

(ii). In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as agricultural implements, rickshaw, etc. to earn a living the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money.

(iii). In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expending any existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv). In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above subject to the realization set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order.

(v). In the case of widows the claims Tribunal should invariably follow the procedure set out in (i) above.

(vi). In personal injury cases, if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii). In all cases in which investment in long term fixed deposits is made it should be an condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency if the amount awarded is substantial the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such F.D.R. can be liquidated."

6. These guidelines have now been incorporated by the legislature and Rule 220-B of the U.P. Motor Vehicle Rules, 1998 have been inserted in the Rules.

7. The purpose for keeping the amount in a fixed deposit has been explained by the Supreme Court again in **A.V. Padma and Others Vs. R. Venugopal and Others, 2012 (1) TAC 740**, namely "safeguard the feed from being frittered away by the beneficiaries due to ignorance illiteracy and susceptibility to exploitation."

8. The Supreme Court held :

"4. In the case of Susamma Thomas (supra), this Court issued certain guidelines in order to "safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation". Even as per the guidelines issued by this Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice. "

9. The Supreme Court held that these guidelines were issued to keep the amount in a fixed deposit for a period of time was mandatory only in the case of minors, illiterate claimants and widows.

10. In the instant case, the Court finds that the Tribunal has taken a very rigid stand and has mechanically passed the order without understanding and without appreciating the distinction drawn by the Supreme Court. The guidelines, which have now been incorporated in the Rules was only to safeguard the interest of the claimants particularly the minors and the illiterates. The guidelines were not meant to understood to mean that the Tribunal was supposed to take a rigid stand while considering the application of the petitioner for release of the money.

11. In the instant case, the Court finds that the application was meant for the release of the money so that the

petitioner's daughter could get married. Proof of this fact was also filed, but the Tribunal has failed to understand the need and urgency in the matter and has mechanically passed the order while rejecting the application. There is nothing to show that the petitioner is an illiterate widow. On the other hand, a genuine reason has been given for the release of the balance amount.

12. Consequently, without further adverting on this issue, the Court is of the opinion that the impugned order cannot be sustained and is quashed.

13. The writ petition is allowed.

14. The petitioner is entitled for the release of the amount as prayed by her. The Tribunal is directed to release the amount along with the interest so accrued immediately upon the receipt of the certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2013

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

Civil Misc. Writ Petition No.36766 of 2013

Dharmendra Kumar Saxena ...Petitioner
Versus
State of U.P. and Ors. ... Respondents

Counsel for the Petitioner:
Sri G.P. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226-Service Law- Transfer-against government transfer policy-court should be slow interfere-proper way to make representation before the competent authority-who take appropriate decision-disclosing reasons for breech of transfer policy-petition disposed of.

Held: Para-42
After careful consideration of the law laid down by the Supreme Court, I am of the view that this Court cannot interfere with the transfer matter as the Government servant has no vested right to continue at a place of his choice. The Government can transfer the officer/employee in the administrative exigency and in public interest. However, if a transfer is made against the executive instructions or transfer policy, the competent authority must record brief reason in the file for deviating from the transfer policy or executive instructions and the transfer must be necessary in the public interest or administrative exigency. If an officer/employee, who is aggrieved by his/her transfer, makes a representation to the competent authority, his/her representation must be decided objectively by a reasoned order.

Case Law discussed:
(1981)2 SCC 72; (1986) 4 SCC 131; 1991 Supp (2) SCC 659; (1994) 6 SCC 98; (2004) 11 SCC 402; (2007) 8 SCC 150; (2009) 15 SCC 178; (2010)13 SCC 306; (2003) 11 SCC 740; (1979) 3 SCC 489; (1973) 1 SCC 194; (1975) 3 SCC 503; (1989) 2 SCC 602; (2004) 7 SCC 405; (1994) 1 AC 531; (1973) 2 SCC 836; (1990) 4 SCC 594; AIR 1970 SC 150; (2004) 5 SCC 568; (2004) 5 SCC 573; (2008) 3 SCC 172; (2008) 9 SCC 407; (2008) 11 SCC 205; (2009) 12 SCC 609; (2009) 3 SCC 258; (2009) 4 SCC 422; (2010) 3 SCC 732; (2010) 13 SCC 336.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The writ jurisdiction of this Court under Article 226 of the Constitution of India is invoked by a Government servant against his transfer order dated 10th May, 2013 passed by the respondent no. 2 i.e.

Director, Fisheries, U.P., Lucknow, whereby petitioner has been transferred from the office of Assistant Director, Fisheries, Bareilly to the office of Assistant Director, Fisheries, Maharajganj.

2. Short question, which arises for determination, is that what would be the effect of violation of transfer policy/ executive instruction in the matter of transfer of officers and employees of the State Government. For this purpose, few facts, which would be relevant for considering the issue arises in the present case, may be set out.

3. The petitioner is an Assistant Fisheries Development Officer. In the year 2005 he was transferred to the office of Assistant Director, Fisheries, District J.P. Nagar and after about one year he was transferred to District Moradabad. In the year 2009 he was transferred from District Moradabad to District Pilibhit. After sometime, he was attached to the Assistant Director, Fisheries, District Shahjahanpur, from where he was again transferred to the office of Assistant Director, Fisheries, District Bareilly on 31st July, 2012. By the impugned order, the petitioner has been transferred from the office of Assistant Director, Fisheries, District Bareilly to the office of Assistant Director, Fisheries, District Maharajganj, which is about 600 Kms. away from district Bareilly.

4. Learned Counsel for the petitioner submits that transfer of the petitioner is in violation of the transfer policy of the State Government as the petitioner has been transferred four times within a short span of time and he will reach his age of superannuation on 30th April, 2016. He has made several representations that his wife is seriously ill and she is undergoing treatment at Bareilly. He has filed several medical certificates in support of the said fact.

5. In the transfer policy of the State Government it is provided that officers of Group-A and Group-B, who have completed six years' service in a district, shall be transferred and if they have completed ten years' service in the same Division, then such officer may be transferred out of the Division after completion of 10 years. It is submitted that the petitioner has been transferred four times within a short span of three years and he has not completed 6 years in the district. It is also provided in the transfer policy that if an officer/employee has some personal difficulty like illness, education of children, etc., adjustment can be made. A copy of the transfer policy/executive instructions dated 18th April, 2013 of the State Government has been placed on record.

6. Legal position in the matter of transfer of Government servant is too well settled to require any reiteration.

7. Before adverting to the core question of the case, I find it helpful to refer some decisions of the Supreme Court on this issue. From a perusal of those judgments, the principle, which emerges, is that a Government servant has no vested right to ask to continue at a place of his choice. Transfer is an incident of service. Government is the sole authority to take a decision regarding posting/transfer of an officer/employee in administrative exigency and in public interest. The Court cannot examine whether transfer is in public interest or not because it requires factual adjudication. The Court cannot act as an

appellate authority and substitute its finding for that of the Government. There would be a chaos in the administration if Courts start interfering in the transfer matter in a routine manner.

8. Transfer of an officer/employee is inherent in terms of the appointment and in absence of its provision in the relevant Service Rule, it is implicit as an essential condition of service subject to contrary provision in the rule. Fundamental Rule 15 provides that "the President may transfer a Government servant from one post to another". One common thread running from almost all the cases is that in transfer matters each case should be decided upon the facts and circumstances of the case concerned.

9. In the case of **Shanti Kumari v. Regional Deputy Director, Health Services, Patna Division, Patna and others, reported in (1981) 2 SCC 72**, the petitioner was Auxiliary Nurse Midwife posted at Bowstead Zanana Hospital at Barh. She was transferred to Urban Family Welfare Centre, Danapur. She challenged her transfer in Patna High Court by filing writ petition, which was dismissed in limine. In her special leave petition the Supreme Court declined to interfere with order of High Court but authorities were directed to consider her grievance and until decision was taken, her transfer order was stayed. The Supreme Court ruled as under:

"2. .....Transfer of a Government servant may be due to exigencies of service or due to administrative reasons. The courts cannot interfere in such matters. ...."

10. In **B. Varadha Rao v. State of Karnataka and others**, reported in **(1986) 4 SCC 131**, the Supreme Court had the occasion to consider a short point whether an order of transfer is appealable under Rule 19 of the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, and the Supreme Court held in paragraphs- 4 and 6 as under:

"4. ..... It is well understood that transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of any of the conditions of service to his disadvantage. That a government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post. .."

"6. .....But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of class III and class IV employees stand on a different footing. We trust that the government will keep these considerations in view while making an order of transfer"

11. The Supreme Court in the case of **Shilpi Bose (Mrs) and others v. State**

of Bihar and others, reported in 1991 Supp (2) SCC 659, was dealing with the case of transfer of some lady teachers in Primary Schools in the State of Bihar. They were transferred, on their own request, to places where their husbands were posted. The transfer orders were made by the District Education Establishment Committee. The teachers, who were displaced, challenged the transfer order before the Patna High Court on the ground that District Education Establishment Committee had no jurisdiction. Patna High Court allowed the petition, set aside the transfer order and directed for re-posting of the respondents. Ultimately, the matter was carried to the Supreme Court and the Supreme Court set aside the judgment of the Patna High Court and held as under:

"4. In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders."

12. The law laid down in **Shilpi Bose (supra)** was again reiterated by the Supreme Court in the case of Union of India and others v. S.L. Abbas, reported in **(1993) 4 SCC 357,** and observed as under:

"6. An order of transfer is an incident of Government service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority". Fundamental Rule 15 says that "the President may transfer a Government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. .."

13. In the case of **N.K. Singh v. Union of India and others**, reported in (**1994) 6 SCC 98**, the appellant Sri N.K.Singh was an I.P.S. Officer. He was allocated to State cadre of Orissa. He was I.G., C.I.D. in Orissa. His services were placed on deputation to Ministry of Home Affairs and was posted as Joint Director in Central Bureau of Investigation (C.B.I.). He was In-charge of a Special Investigation Group conducting some sensitive investigation. He was abruptly transferred to Boarder Security Force (B.S.F.) in an equivalent post of I.G.P.. He challenged his transfer order on the ground of malafide against the then Prime Minister Shri Chandrashekhar and the then Union Law Minister Dr. Subramanyam Swami. The grievance of the appellant therein was that he was In-charge of a Special Investigation Group

investigating into St. Kitts affair. Therefore, he was eased out from the C.B.I. to scuttle the fair investigation. Against this background, the Supreme Court ruled as under:

"6. Shri Ram Jethmalani, learned counsel for the appellant did not dispute that the scope of judicial review in matters of transfer of a government servant to an equivalent post without any adverse consequence on the service or career prospects is very limited being confined only to the grounds of mala fides and violation of any specific provision or guideline regulating such transfers amounting to arbitrariness. In reply, the learned Additional Solicitor General and the learned counsel for Respondent 2 did not dispute the above principle, but they urged that no such ground is made out; and there is no foundation to indicate any prejudice to public interest."

"24. ...Challenge in courts of a transfer when the career prospects remain unaffected and there is no detriment to the government servant must be eschewed and interference by courts should be rare, only when a judicially manageable and permissible ground is made out. This litigation was ill-advised."

14. The Supreme Court again dealt with the matter of transfer in the case of **State of U.P. and others v. Gobardhan Lal,** reported in **(2004) 11 SCC 402**. Said case arose out of the judgment of a Division Bench of the Allahabad High Court (2000 All LJ 1466), wherein the High Court had issued some general directions in the matter of transfers. The Government servants were given liberty to file representation against their transfer directly to the Chief Secretary and further direction was issued to the State Government to constitute Civil Service Board for dealing with transfers and postings of Class-I officers. The Supreme Court found that the High Court fell in serious error and such general direction will leave an impression that the Courts are attempting to take over the reign of the executive administration. In paragraph-8 of the judgement, the Supreme Court held as follows:

"8. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

15. In the case of **Mohd. Masood Ahmad v. State of U.P. and others**, reported in **(2007) 8 SCC 150**, the Supreme Court has elaborately considered the well settled principle again and observed as under:

"4. ....Since the petitioner was on a transferable post, in our opinion, the High Court has rightly dismissed the writ petition since transfer is an exigency of

service and is an administrative decision. Interference by the courts with transfer orders should only be in very rare cases. As repeatedly held in several decisions, transfer is an exigency of service .."

16. In the aforesaid case i.e. **Mohd. Masood Ahmad (supra)** the Supreme Court approved the view taken by the Allahabad High Court wherein this Court had refused to interfere in the transfer cases. The Supreme Court observed as under:

"7. .... Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in Vijay Pal Singh v. State of U.P, (1997) 3 ESC 1668, and Onkar Nath Tiwari v. Chief Engineer, Minor Irrigation Deptt., (1997) 3 ESC 1866, has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a court of law in exercise of its discretionary jurisdiction under Article 226 unless the court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

17. Similar view has been reiterated by the Supreme Court in the case of **Rajendra Singh and others v. State of Uttar Pradesh and others**, reported in **(2009) 15 SCC 178**, and held as under:

"8. A government servant has no vested right to remain posted at a place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contrary. No Government can function if the government servant insists that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires [see State of U.P. v. Gobardhan Lal, (2004) 11 SCC 402; SCC p. 406, para 7).

9. The courts are always reluctant in interfering with the transfer of an employee unless such transfer is vitiated by violation of some statutory provisions or suffers from mala fides..."

18. In a recent judgment rendered in the case of **State of Haryana and others v. Kashmir Singh and another**, reported in **(2010) 13 SCC 306**, the Supreme Court has observed that in the matter of transfer of police personnel, the Courts should be very slow to interfere in their transfer as the competent authorities of the State are in the best position to assess the necessities of the administrative requirements of the situation. The Supreme Court held as under:

"12. Transfer ordinarily is an incidence of service, and the courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, we are of the opinion that transfer and postings of policemen must be left in the discretion of the State authorities concerned which are in the best position to assess the necessities of the administrative requirements of the situation. The administrative authorities concerned may be of the opinion that more policemen are required in any particular district and/or another range than in another, depending

upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and it is well settled that courts must not ordinarily interfere in administrative matters and should maintain judicial restraint, vide Tata Cellular v. Union of India [(1994) 6 SCC 651]."

19. However the Supreme Court has carved out few exceptions where Courts can interfere in transfer matters, some of the exceptions are;

(i) If the order is found to be infected by mala fide.

(ii) If there is infraction of any statutory provisions.

(iii) If the power of transfer is abused or transfer is made for some collateral purpose; if it is found that the Government has not used its power bonafidely to meet the exigency of administration or transfer order has been passed by an authority, who had no power.

(iv) The order of transfer cannot prejudicially affect the status of the employee.

20. The aforesaid principle emanates from the judgments of the Supreme Court in the cases of **Shilpi Bose (supra), S.L. Abbas (supra), N.K. Singh (supra**) and **B. Varadha Rao (supra).**

21. Now I turn to the central question of the case, what would be the effect if an order of transfer is made in violation of the policy decision of the State Government.

22. The Supreme Court in the case of **Sarvesh Kumar Awasthi v. U.P. Jal Nigam and others,** reported in (2003) 11 SCC 740, by an interim order dated 04th September, 2001, had issued a direction to the Government of Uttar Pradesh to frame the guidelines for transfer. The direction given by the Supreme Court reads as under:

"3. In our view, transfer of officers is required to be effected on the basis of set norms or guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians whose work is not done by the officer concerned. For better administration the officers concerned must have freedom from fear of being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration.

4. In this set of circumstances, the Chief Secretary, State of U.P. is directed to file necessary affidavit within six weeks from today pointing out rules and regulations for effecting transfers of officers including higher officers such as District Magistrates. A copy of Annexure A-2 (p. 124 of the paper-book) be also sent to the Chief Secretary, State of U.P. along with this order by which the transfers of the officers are effected..."

23. In compliance of the said order, the State of Uttar Pradesh constituted a committee to frame the guidelines in respect of IAS and PCS officers. After several adjournments taken by the parties, learned Solicitor General of India, who appeared on behalf of State of Uttar Pradesh, submitted guidelines before the Supreme Court. On 22nd November,

2002 the Supreme Court passed the following order:

"Mr. K.L. Rawal, learned Solicitor General appearing on behalf of State of U.P. submits that the direction issued on the basis of the affidavit dated 26.8.2002 laying down the transfer policy for I.A.S. and P.C.S. officers would be strictly adhered to. In this view of the matter, this petition would not survive and stands disposed of accordingly. If any other officer is having any grievance, it would be open to him to approach the appropriate forum."

24. On a perusal of the order it is evident that State Government stated before the Court that it will follow its policy strictly.

25. The effect of infraction of policy decision or the executive instructions has been subject matter of several judgments of the Supreme Court. The Supreme Court in the case of **Ramana Dayaram Shetty v. International Airport Authority of India and others**, reported in **(1979) 3 SCC 489**, had the occasion to deal with the executive orders. The Court observed as under:

"10. .....It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in Viteralli v. Saton [359 U.S. 535: Law Ed (Second series) 1012] where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged .... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed .... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

26. Similar view was taken by the Supreme Court in its earlier decision in the case of Union of India v. K.P. Joseph and others, (1973) 1 SCC 194, and held as under:

"9. Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in Sant Ram Sharma v. State of Rajasthan and Another (AIR 1967 SC 1910) that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service."

27. In the case of **Dr. Amarjit Singh Ahluwalia v. The State of Punjab and others**, reported in **(1975) 3 SCC 503**, the Supreme Court was dealing with the executive/ administrative instructions and held as under:

"9. .....Now, it is true that clause (2)(ii) of the memorandum dated October 25, 1965 was in the nature of administrative instruction, not having the force of law, but the State Government could not at its own sweet will depart from it without rational justification and fix an artificial date for commencing the length of continuous service in the case of some individual officers only for the purpose of giving them seniority in contravention of that clause. That would be clearly violative of Articles 14 and 16 of the Constitution. The sweep of Articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the "State". Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under articles 14 and 16. It is interesting to notice that in the United States it is now well-settled that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Vide the Judgment of Mr Justice Frankfurter in Vitaralli v. Seaton."

28. From the aforementioned cases, it is evident that the Government is bound by executive orders/policies. The guidelines are made to follow it and not to breach it without any justifiable reasons. Whenever the Government deviates from its policies/guidelines/ executive instructions, there must be cogent and strong reasons to justify the order; when transfer order is challenged by way of representation, there must be material on record to establish that the decision was in public interest and it does not violate any statutory provision, otherwise the order may be struck down as being arbitrary and violative of Article 14 of the Constitution. The authorities cannot justify their orders that breach of executive orders do not give legally enforceable right to aggrieved person. As observed by Justice Frankfurter "An executive agency must be rigorously held to the standards by which it professes its action to be judged".

29. It is true that the Supreme Court has consistently taken the view that in transfer matters breach of guidelines/policy/ executive orders do not confer upon government servants any legally enforceable right. But on a careful reading of the judgements of the Supreme Court on this issue, it is also evident that in all those cases the Supreme Court has ruled that in case of breach of executive instructions/orders, the Government Servant can make representation to the appropriate authority and if any such representation is made, the appropriate authority must consider it in proper perspective and in accordance with law. In this regard, some of the relevant observations of the Supreme Court are extracted below:

30. In the case of **Gujarat Electricity Board and another v. Atmaram Sungomal Poshani**, reported in **(1989) 2 SCC 602**, the Supreme Court held as under:

"4. .....Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to

make representation to the competent authority for stay, modification or cancellation of the transfer order. ....."

31. The Supreme Court in the case of Shilpi Bose (supra) held as under:

"4. .....Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. ....."

32. In **S.L. Abbas (supra)** the Supreme Court has held that the guideline does not confer upon the Government servants a legally enforceable right. However, it was also observed that while ordering transfer, the authorities must keep in mind the guidelines issued by the Government on the subject. Relevant part of the judgment reads as under:

"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. ...."

(Emphasis supplied by me)

33. The Supreme Court in the case of **State of U.P. and another v. Siya Ram and another, (2004) 7 SCC 405**, observed as under:

"8. Learned counsel for Respondent 1 submitted that the respondent shall file a representation highlighting the various difficulties which may result or have resulted from the transfer and the non-desirability thereof. If such representation is made to the appropriate authorities, it goes without saying that the same shall be considered in its proper perspective and in accordance with law. We do not express any opinion in that regard. The appeal is allowed to the extent indicated with no order as to costs."

34. In **Gobardhan Lal (supra)** the Supreme Court has observed in respect of the representation against the transfer order in the following terms:

"9. .... Even as the position stands, avenues are open for being availed of by anyone aggrieved, with the authorities concerned, the courts and tribunals, as the case may be, to seek relief even in relation to an order of transfer or appointment or promotion or any order passed in disciplinary proceedings on certain well-settled and recognized grounds or reasons, when properly approached and sought to be vindicated in the manner known to and in accordance with law. No such generalised directions as have been given by the High Court could ever be given leaving room for an inevitable impression that the courts are attempting to take over the reigns of executive administration. Attempting to undertake an exercise of the nature could even be assailed as an onslaught and encroachment on the respective fields or areas of jurisdiction earmarked for the various other limbs of the State. Giving room for such an impression should be avoided with utmost care and seriously

and zealously courts endeavour to safeguard the rights of parties."

35. The principle which can be discerned from above mentioned and other various decisions of the Supreme Court is that although the breach of guidelines does not give any legally enforceable right in favour of the employee but at the same time the guidelines/transfer policy/Government orders issued to deal with transfer of officers and employees cannot be ignored altogether by the competent authority. While transferring an officer, the broad guidelines mentioned in the transfer policy, executive orders or guidelines must be kept in the mind.

If in the administrative exigency or in public interest, transfer of an officer/employee is necessary, then the competent authority may record the reasons for departing/deviating from the policy or the guidelines. Recording of such reason in the files would facilitate the superior officers to decide the representation of the officer concerned objectively. It is not necessary that while transferring an officer/ employee, reasons should be communicated to the concerned officer/employee.

36. In England earlier well established law was that in administrative decisions there was no requirement of law to give reasons [**R v. Secretary of State for the Home Department, ex p. V Doody, (1994) 1 AC 531]**. In the said case, Lord Mustill delivered his opinion for the House of Lords and held that "the law does not at present recognise a general duty to give reasons for an administrative decision". But recent trend in England has been noticed by Prof. Smith in his book, known as, "Principles of Judicial Review", (1999 Edition), at page 344, as under:

"The beneficial effects of a duty to give reasons are many. To have to provide an explanation of the basis for their decision is a salutary discipline for those who have to decide anything that adversely affects others. The giving of reasons is widely regarded as one of the principles of good administration in that it encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making. Moreover, if published, reasons can provide guidance to others on the body's likely future decisions, and so deter applications which would be unsuccessful. Further, the giving of reasons may protect the body from unjustified challenges, because those adversely affected are more likely to accept a decision if they know why it has been taken. In addition, basic fairness and respect for the individual often requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit."

37. The Supreme Court expanded the horizon of reason in the case of **Union of India v. Mohan Lal Capoor and others, (1973) 2 SCC 836,** and held that reasons are links between the materials on which certain conclusions are based. They indicate how the mind is applied, whether it is administrative matter or quasi-judicial.

38. Then came a Constitution Bench judgment in **S.N. Mukherjee v. Union of**

India, (1990) 4 SCC 594. The Court observed that it is in the larger public interest that an administrative authority must record the reason for the order passed by him. The Court has quoted the view of Prof. H.W.R. Wade that "natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice". The Court further held that after the decision of **A.K. Kraipak and others v. Union of India and others, AIR 1970 SC 150,** many subsidiary rules came to be added to the rules of natural justice, the reason is also one of them.

39. In recent time, the Supreme Court has further enlarged the scope of the reasons to such an extent that it has termed it heartbeat of every conclusion because it introduces clarity in an order and in its absence the order becomes lifeless. It ensures transparency and fairness in decision-making. It also ensures that aggrieved person must know why his representation/ application has been rejected. The need for recording the reasons is greater in a case where the order is passed at original stage. Reference may be made to the judgments of the Supreme Court wherein aforestated views have been taken, vide, **State of Orissa v. Dhaniram Luhar, (2004) 5 SCC 568; State of Rajasthan v. Sohan Lal and others, (2004) 5 SCC 573; Vishnu Dev Sharma v. State of Uttar Pradesh and others, (2008) 3 SCC 172; Steel Authority of India Limited v. Sales Tax Officer, Rourkela I Circle and others, (2008) 9 SCC 407; State of Uttaranchal and another v. Sunil Kumar Singh Negi, (2008) 11 SCC 205; Uttar Pradesh State Road Transport Corporation v. Jagdish Prasad Gupta, (2009) 12 SCC 609; Ram Phal v. State of Haryana and others, (2009) 3 SCC 258; State of Himachal Pradesh v. Sada Ram and another, (2009) 4 SCC 422; Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and others, (2010) 3 SCC 732; and Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336.**

40. In S.L. Abbas (supra) the Supreme Court has acknowledged the right of the officer/employee to make representation to the superior authority if the transfer order has been passed in violation of policy or government orders. Recording of reason would also be helpful in case of judicial review. Every year large number of writ petitions are filed challenging the transfer orders on the ground of malafide and serious allegations are made that transfer order has been passed for collateral purpose and extraneous reasons. In most of the cases the allegations are that the aggrieved officer has been transferred only to accommodate another officer, who is enjoying political patronage.

41. There is another aspect of the matter. The State Government in compliance of the direction of the Supreme Court in Sarvesh Kumar Awasthi (supra) has framed transfer policy. It has filed an affidavit in the Supreme Court that it would adhere with the guidelines strictly. The statement has also been given by the then learned Solicitor General of India to the said effect. I am not oblivious of the fact that transfer policy/executive instructions are amended periodically. Nonetheless the guidelines are basically same except some insignificant changes. The affidavit and

the statement are not confined to a particular case or the year, therefore, in my opinion, it is binding on the State Government.

42. After careful consideration of the law laid down by the Supreme Court, I am of the view that this Court cannot interfere with the transfer matter as the Government servant has no vested right to continue at a place of his choice. The Government can transfer the officer/employee in the administrative exigency and in public interest. However, if a transfer is made against the executive instructions or transfer policy, the competent authority must record brief reason in the file for deviating from the transfer policy or executive instructions and the transfer must be necessary in the public interest or administrative exigency. If an officer/employee, who is aggrieved by his/her transfer, makes a representation to the competent authority, his/her representation must be decided objectively by a reasoned order.

43. Having regard to the facts and circumstances of the case, in my view, end of justice would be subserved by giving liberty to the petitioner to make a representation to the competent authority within a week from the date of receipt of certified copy of this order. In the event such a representation is made, the competent authority shall decide the same as expeditiously as possible preferably within a period of six weeks from the date of communication of the order.

44. Accordingly, the writ petition is disposed of.

45. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.38524 OF 2012

Phulgen and Ors. ...Petitioners
Versus
Vinay Kumar Tiwari ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Aditya

Counsel for the Respondents:
Sri Ram Niwas Singh, S.C., Sri Vinod Kumar Chandel, Sri Vinay Kr. Singh Chandel

Code of Civil Procedure, Order I Rule 10-
Suit for specific performance-during pendency of suit-plaintiff move application to implead the subsequent purchaser-held-proper Recessional court rightly allowed the application.

Held: Para-50
In view of the aforesaid facts and circumstances in the instant case the subsequent purchasers who are actually transferee pendente-lite are held to be proper party to the suit for specific performance of an agreement to sell and if the revisional court below by the impugned order has permitted their impleadment that too on the application of the plaintiff respondent, no exception to it can be taken in law.

Case Law discussed:
AIR 1963 SC 786; (2001) 8 SCC 133; AIR 1978 Alld. 318; (2007) 8 SCC 506; (1006) 5 SCC 539; (1846) 67 ER 1057; 1954 SC 75; 1970 (3) SCC 140 R.C.; (2005) 6 SCC 733; (1999) 2 SCC 777; 2007(2) AWC 1944 (SC); AIR 2007 SC 1332

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

1. In this writ petition under Article 226 of the Constitution of India, I am to consider the right of the plaintiff/respondent to seek impleadment of subsequent purchasers, to be precise of transferee pendente lite as defendants in a suit for specific performance of an agreement to sell and the consequential amendment thereto in the plaint.

2. The facts of the case in a capsule form are as under:

3. The plaintiff/respondent instituted Original Suit No.466 of 2009 on 28.5.2009 for specific performance of an agreement to sell dated 29.1.1991. The defendant/petitioners in the said suit filed their written statement on 30.8.2010 so as to contest the same and in one of the paragraphs of the written statement they pleaded that the property has been transferred by them on 12.4.2010 and 13.4.2010 by two sale deeds in favour of Smt. Sheela Devi, Anita Gupta, Sangita Gupta, Krishnawati Devi, Anil Kumar and Dinesh Singh.

4. In view of the pleadings in the written statement, plaintiff/respondent moved application for impleadment of the aforesaid subsequent purchasers and for consequential amendment of the plaint seeking declaration of the aforesaid two sale deeds as null and void. The applications were rejected by the court of first instance vide order dated 15.11.2011 whereupon the plaintiff/respondent preferred civil revision No.185 of 2011. The revision has been allowed and the impleadment with consequential amendments has been permitted by the impugned order dated 6.7.2012.

5. The defendants to the suit have invoked the writ jurisdiction of this Court challenging the aforesaid revisional order.

6. Sri Anil Kumar Aditya and Sri R.N. Singh, learned counsel for the parties were heard and they agreed for disposal of the writ petition on the averments in the petition without waiting for any counter affidavit.

7. Sri Anil Kumar Aditya has raised two submissions that in a suit for specific performance subsequent purchasers are not necessary and property party. Secondly, against the rejection of the impleadment application the revision was not maintainable and, therefore, the revisional order is without jurisdiction.

8. Sri R.N.Singh in reply submitted that adding of the subsequent purchasers in the suit cause no prejudice to the defendant/petitioners. The plaintiff/respondent is the master of his suit and is the best person to decide about his adversaries and the defendant/petitioners have no concern with their addition. Therefore, no indulgence should be granted in exercise of writ jurisdiction.

9. In this petition I am concern only with the addition of parties as defendants in the suit for specific performance of an agreement to sell. Therefore, I would be referring to the addition of party in context with a suit for specific performance instead of substitution and deletion of parties in general.

10. A person is a party to a suit if there is cause of action for him or against him. The First Schedule to the Code of civil Procedure in Order I provides for the parties to the suits to mean plaintiffs and defendants.

11. Order 1 Rule 10 CPC enables the Court to add any person as a party at any

stage of the suit if his presence before the Court is necessary, in whose absence effective relief in the suit can not be granted or to effectively and completely adjudicate upon and settle all the issues involved in the suit. Avoidance of multiplicity of proceedings may also be recognised as one of the objects enabling the Court to add any person as a party to a suit.

12. Order I Rule 10 (2) CPC which is relevant for addition or deletion of parties to a suit reads as under:-

"(2) Court may strike out or add parties-.

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

13. Addition of the parties to a suit is dependent upon the fact as to whether the party sought to be added is a necessary or a proper party.

14. The necessary party is one whose presence is essential, against whom relief in the suit is sought and in whose absence no effective order/decree can be passed therein. On the other hand, the proper party is one in whose absence a decree can be passed but whose presence is needed for effective and complete adjudication of the subject matter.

15. In **Udit Narain Singh Malpaharia Vs. Additional Member Board of Revenue, Bihar and another AIR 1963 SC 786** the five Judges Bench of the Supreme Court have observed as under:-

"The law as to to who are necessary or proper parties to a proceeding is well settled. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

16. In view of the above, the court while adding a party as defendant in a suit is only required to see as to whether the said party is a necessary or a proper party.

17. In any suit plaintiff is dominus litis and it is upon him to chose his opponents or the persons from whom he wants to claim the relief. Normally, a court has limited or no role in choosing the adversaries of the plaintiff or the persons from whom the plaintiff should fight. However, if the court is satisfied that a person is a necessary or a proper party to the suit it may exercise its judicial discretion and direct for adding such a party to the suit. The power of the court to add, substitute or strike out parties to a suit is discretionary which has to be exercised on the facts and circumstances of a particular case.

18. As the plaintiff in a suit is dominus litis and has a right to decide about his adversaries, the impleadment of parties on his application stands on a better and higher footing than that on an application, if any, filed by the defendant. A defendant to the suit cannot dictate the plaintiff as to who

should be made a party along with him in the suit. The criteria for considering the impleadment application of a third party is altogether different but of course subject to the cardinal principle of being a necessary or proper party. A liberal approach is generally taken while considering the application moved by the plaintiff to add defendant, whereas it is not so while considering the application of the defendant or of a third party.

19. A subsequent purchaser in context with a suit for specific performance of an agreement to sell may fall in two categories. In the first category is a purchaser who purchases the property from the vendor after the earlier agreement/contract but before the institution of the suit for specific performance of that agreement. The other is where the purchase is made pendente lite.

20. All suits relating to specific performance of contracts including agreement to sell immovable property are governed by Chapter II of Specific Relief Act, 1963 (hereinafter as 'Act' only). A reading of Section 20 and 21 of the Act reveals that the jurisdiction of the court to grant a decree of specific performance of an agreement is discretionary which has to be exercised on sound and reasonable judicial principles and in certain cases the Court instead of a decree of specific performance may award compensation. At the same time Section 19 (b) of the Act stipulates that specific performance of a contract may be enforced against either party thereto or any other person claiming under them by a title arising subsequent to the contract, except a transferee for value who has paid money in good faith and without notice of the original contact.

21. Section 19 (b) of the Act is quoted below:-

19. Relief against parties and persons claiming under them by subsequent title- "Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

"(a) ----------

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without the original contract;"

(c) ----------
----------"

22. In view of Section 19 (b) of the Act an agreement to sell can not be enforced against a transferee who has purchased the property bonafidely in good faith for value from the original owner in ignorance of a contract sought to be specifically performed. Even if it is enforceable, the Court is not bound to pass a decree for specific performance merely because it is lawful to do also. In other words, Court has a discretion to refuse a decree of specific performance or to award compensation.

23. In **(2001) 8 SCC 133 Vasanta Viswanathan and others Vs. V.K. Elayalwar and others** it was observed that under Section 19 (b) of the Act a specific performance of contract can be enforced not only against either party thereto but against any other person claiming under them by a title arising subsequent to the contract, except a transferee for value who had paid the money in good faith and without notice of original contract. It means that though a contract of specific performance can be enforced against a subsequent purchaser but not against a transferee for value who

has paid money in good faith and without knowledge of the prior contract.

24. In what cases the Court in exercise of its judicial discretion refuse to pass a decree of specific performance or to what extent it should grant compensation to the party and whether the subsequent purchaser is a bona fide purchaser having no knowledge of the agreement/contract sought to be enforced or whether he is acting in good faith are all questions that generally crop up in a suit for specific performance where during the subsistence of the agreement but before the institution of the suit there is a transfer in favour of third party. These questions can not be decided in the absence of the subsequent purchaser or without opportunity to him to adduce evidence on the above aspects though he may not be a relevant person for pleading or adducing evidence on the merits of the agreement/contract.

25. The subsequent purchasers falling in this class and not one who purchases after the institution of the suit, if given an opportunity can demonstrate and establish that they had no knowledge of the prior agreement and that they had purchased the property bonafidely in good faith for valuable consideration and as such are not bound by the earlier agreement or that they are entitle to damages and to be restituted the sale consideration paid by them. The subsequent purchasers who purchase property after the initial agreement to sell but before the institution of the suit subject to proving their bona fides, good faith and ignorance of the contract for value are clearly entitle to protection under Section 19 of the Act. They as such are undoubtedly, necessary and proper party to be joined as defendants to the suit for specific performance.

26. At the same time, one can not afford to ignore the doctrine of lis pendens. Section 52 of the Transfer of Property Act, 1882 specifically provides that the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of the other parties thereto except without the authority of the court. In view of the complete embargo upon the parties to the suit to transfer or deal with the property during its pendency, the any sale during the pendency of the suit would clearly be within the teeth of Section 52 of the T.P. Act.

27. The doctrine of lis pendens enshrined under Section 52 of the T.P. Act envisages that a person who purchases property during the pendency of the suit is bound by the decree that may be passed against the person from whom he drives title and the plaintiff is exempt from taking notice of such a subsequent sale or title so acquired by the third party.

28. The provision of Section 19(b) of the Act has no application in respect of cases covered by Section 52 of the Transfer of Property Act. A Full Bench of this Court in **Smt. Ram Peary and others Vs. Gauri and others AIR 1978 Alld.** 318 has clearly ruled that Section 52 of the T.P. Act is not subservient or subject to Section 19 (b) of the Act.

29. In **Sunil Gupta Vs. Kiran Girhotra and others (2007) 8 SCC 506** it has been observed by the Supreme Court that ordinarily a party purchasing property pendente lite without the leave of

the Court can not be impleaded in a suit without the permission of the Court.

30. In **Sarvinder Singh Vs. Dalip Singh (1006) 5 SCC 539** their Lordships of the Supreme Court have observed that alienation of property having been made during pendency of the suit is hit by doctrine of lis pendens and the transferees are neither necessary nor proper party to be brought on record.

31. In view of the aforesaid legal position a transfer made during pendency of the suit without the leave of the Court may not be good and ordinarily such transferees may not be entitle to be impleaded but that has not been held to be an absolute rule. In certain cases, a transferee pendente lite may like to come forward and demonstrate that in reality there is no violation of Section 52 of the Act and that he had purchased the property with the leave of the Court or that the prior agreement which existed had failed for various reasons or has been revoked, cancelled or held to be illegal by the competent authority/court.

32. Section 52 of the T.P. Act puts an embargo upon the transfer of the property during pendency of the suit without taking permission of the Court but it stops short of providing the effect of its violation. A consequence of a transfer which is hit by doctrine of lis pendens is that such a transaction is voidable at the option of the affected party. A person who actually purchases the property during pendency of the suit for specific performance without the leave of the Court does so at its own peril and the sale/transfer made in his favour is always in danger of being declared illegal, null and void by the competent court. He purchases the property with open eyes presumably aware of the pendency of the suit and if not due to concealment on part of the vendor, his cause if any, would be against the vendor for damages and restitution of the sale consideration and not to defend the enforcement of the agreement to sell. Nevertheless, the sale deed executed during pendency of the suit without the leave of the Court can not be declared to be void in a suit for specific performance unless the party in whose favour the sale deed exists is given an opportunity to participate in the same.

33. Apart from the above, in the absence of purchaser pendente lite on record, a decree of specific performance, if any, passed in the suit would not be effective and complete. The reason being that such a decree would provide for execution of sale deed on behalf of the vendor only who ceases to have rights therein by virtue of sale made in favour of the transferee pendente lite. Therefore, to extinguish the rights of the transferee and to restore them in the vendor and then to make him transfer in favour of the plaintiff by means of a sale deed it is imperative to direct the transferee to join the vendor in executing the sale deed while decreeing the suit so that there may not remain any confusion about the title in future. Otherwise, there would be two sale deeds and the person having the first sale deed would always be claiming better and superior rights before all and sundry. Therefore, in suits for specific performance of an agreement to sell when the transfer lis pendens is brought to the notice of the Court the proper and the better course adopted by the courts of law is to direct the subsequent purchaser to join the vendor in executing the sale deed so that rights of the vendor stands duly and validly transferred in favour of the decree holder and at the same time those

created in favour of the subsequent purchaser are extinguished.

34. The above principle had been well recognised by the Court in England more than a century ago. In **Potter Vs. Sanders (1846) 67 ER 1057** it was observed that if a vendor contract with two different persons to sale each of them, the same Estate, the Court will, prima-facie, enforce the contract which was first made; and if party with whom the second contract was made is able to procure a conveyance on the basis of the second contract, the Court will, in a suit for specific performance by the first purchaser against the vendor decree the same to convey the estate to the plaintiff with the direction to the second purchaser to join the conveyance.

35. The practice of Indian courts had not been uniform. According to one practice the proper form of decree was to declare the subsequent sale as void and direct the conveyance of the property by the vendor alone. The second option used to be to direct both the vendor and vendee to join and execute the sale deed.

36. The three Judges Bench of the Supreme Court in **Durga Prasad and another Vs. Deep Chand and others 1954 SC 75** held that the proper from of the decree in a suit for specific performance of the contract is to direct the subsequent transferee to join the vendor in the conveyance so as to pass the title which is vested in him.

37. The above view has been followed by the Supreme Court in **1970 (3) SCC 140 R.C. Chandiok and another Vs. Chunni Lal Sabharwal and others**. I have not been able to lay my hands on any contrary view on the subject.

38. In view of the above, it is settled that in a case of transfer of rights in the property during pendency of the suit for specific performance, at the time of decreeing the suit it is always better to direct the subsequent purchaser to join the vendor in executing the sale deed in favour of the decree holder. This is essential to set at rest all future disputes relating to title of the suit property.

39. The above legal position which has been adopted by the English and the Indian courts, makes it apparent that in a suit for specific performance of an agreement to sell an effective decree directing for execution of a sale in favour of a plaintiff can not be passed until and unless the subsequent purchaser more precisely who has purchased rights during the pendency of the suit, is asked to join in the execution of the sale deed. In this view of the matter, the subsequent purchaser becomes proper party in the absence of whom complete, effective and proper relief can not be granted in the suit.

40. A Bench of three learned Judges of the Supreme Court in **Kasturi Vs. Iyyamperumal and others (2005) 6 SCC 733** in considering a similar controversy in relation to a suit for specific performance of a contract observed that only the parties of the contract or parties claiming under them or a person who had purchased it from the vendor with or without notice of the contract alone are necessary parties and a person who claims independent title and possession adversely to the title of the vendor is not a necessary party.

41. The Court observed as under:-

" A bare reading of Order I Rule 10(2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property form the vendor. In equity as well as in law, the contract constitutes right and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of the vendor is, however, not a necessary party"

42. Another Bench of three Judges of the Apex Court in **(1999) 2 SCC 777 Savitri Devi Vs. District Judge, Gorakhpur and others** considering that in a suit plaintiff is a dominus litis and is not bound to sue every possible adversary observed that the Court may at any stage of the suit in exercise of power under Order I Rule 10 CPC direct for addition of parties which is generally a matter of judicial discretion to be exercised keeping in view the facts and circumstances of the particular case. In the said case transferee pendente lite of interest in immovable property who claimed to be bona fide purchasers for value in good faith was held entitle to be impleaded not only to avoid multiplicity of proceedings but to decide whether the sale made in his favour created any interest in the property.

43. In one other case **Dhanalakshmi and others Vs. P. Mohan and others 2007 (2) AWC 1944 (SC)** the Apex Court in considering the matter of impleadment of a purchaser of the property during pendency of the suit for partition held that a purchaser pendente lite is a necessary and a proper party under Order 1 Rule 10 CPC and is entitle to be impleaded.

44. The impleadment of transferee pendente lite is also dependent upon host of other factors viz., the person who is seeking impleadment and the stage at which it is being sought.

45. An application of the plaintiff, as a general rule ought to be allowed depending upon other attending circumstances. In contrast, the application for the purpose moved by the defendant to the suit or the transferee himself has to be dealt with caution. The Court may consider the intention of the party in moving the application and the ground or purpose of impleadment as it may be with ulterior object to delay the proceedings etc. It may be refused at the sound judicious discretion of the Court.

46. Learned counsel for the petitioner has relied upon **Sanjai Verma Vs. Manik Roy and others AIR 2007 SC 1332** wherein the Court refused to implead transferee pendente-lite in a suit for specific performance in view of Section 52 of the Transfer of Property Act.

47. A careful reading of the above decision reveals that in the said case an application for impleadment was made by the transferees themselves on the ground that there was no body to represent and safeguard their interest. The order allowing the application was set aside and they were held not entitle for impleadment. It was not a case where the application was filed by the plaintiff. The application for impleadment of parties other than the plaintiff stand on a weaker note on a lower pedestal than that of the plaintiff to the suit.

Moreover, it was also not a case where transferees were pleading that the transfer made in their favour was with the leave of the Court or that the agreement which is subject matter of the suit for specific performance has been revoked or cancelled. The ground for seeking impleadment was not tenable. Therefore, the facts of the above case are distinguishable and would not stand in way of the plaintiff respondent herein to get the transferees pendente-lite impleaded in the suit so that an effective executable decree is passed in their favour.

48. The apprehension that permitting impleadment of transfer pendente lite, may become a continuous and endless process as the possibility of further sale during the pendency of the suit can not be ruled out is not well founded. It may not pose any danger as there is no necessity to indulge in the unending process of impleadment of successive transferees. Once the sale made in favour of the first transferee is rendered non est and useless, the subsequent sales would automatically fall and cease to be operative in law leaving no scope to take cognizance of the same.

49. In view of the legal position that has emerged above, depending upon the facts and circumstances of each case, the broad conclusions relating to impleadment/addition of defendants in a suit for specific performance of an agreement to sell can be summed up as under:-

i)a contract of specific performance is enforceable against the parties to the contract including those who are claiming under them;

ii)It is not enforceable against a subsequent transferee for value who has paid money in good faith without notice of the earlier contract as contemplated under Section19 (b) of the Act;

iii) the subsequent transferee covered under Section 19 (b) of the Act is entitle to demonstrate his bona fides, good faith and that he has no knowledge of the earlier contract and for the purpose is a necessary and a proper party to the suit.

iv)transfers pendente lite are hit by Section 52 of the T.P. Act and Section 19 (b) of the Act has no application to such cases;

v) transferee pendente lite can not take shelter of Section 19 (b) of the Act but may be a proper party where he pleads that he has purchased the property with the leave of the Court or that the earlier contract had been rescinded, revoked or cancelled and for passing an effective decree of specific performance;

vi)It is always proper to implead transferee pendente lite on an application of the plaintiff who is dominus litis;

vii)impleadment of transferee pendente lite on the application of the defendant or on his own application has to be examined more carefully and strictly and in case for some reason is turned down even then the Court should ensure to direct him to join the vendor in executing the sale deed in favour of the decree holder while decreeing the suit for specific performance; and

viii) It is not necessary to go on adding all subsequent transferees pendente lite as once the transfer made in favour of the first one fails all consequential transfers would automatically stand invalid.

50. In view of the aforesaid facts and circumstances in the instant case the subsequent purchasers who are actually transferee pendente-lite are held to be proper party to the suit for specific performance of an agreement to sell and if the revisional court below by the impugned order has permitted their impleadment that too on the application of the plaintiff respondent, no exception to it can be taken in law.

51. The order impugned suffers from no illegality or error of law which may require any intervention in this petition.

52. This apart, the petitioners are defendants in the suit. Their rights are not affected by the impleadment of the aforesaid subsequent purchasers. They do not suffer any prejudice or injustice on account of impleadment of the transferee pendente-lite to give them any cause to invoke the extra-ordinary jurisdiction of this court.

53. Accordingly, they are not entitle to any discretionary relief in this petition in exercise of writ jurisdiction.

54. The argument regarding maintainability of the revision is of no purpose. Once this Court has found and held that in the present case the subsequent purchasers are liable to be impleaded as defendants to the suit, the setting aside or quashing of the revisional order on any ground much less on the technical ground of maintainability of the revision or the revisional order being without jurisdiction would amount to reviving of an illegal order passed by the court of first instance rejecting the impleadment application.

55. It has been well settled that in exercise of writ jurisdiction it is not proper to undo an illegal order which may have an effect of reviving of another illegal order.

56. In **Gadde Venketeswara Rao Vs. Government of Andhra Pradesh and others AIR 1966 SC 828** a challenge was made to the Government Order dated 18th April 1963 before the High Court which failed. The Supreme Court observed that if the High Court had quashed the said order, it would have restored an illegal order. Therefore, the High Court had rightly refused to exercise its extra-ordinary power in the circumstances of the case.

57. The above principle is being followed continuously and in **State of Uttaranchal and another Vs. Ajit Singh Bhola and another (2004) 6 SCC 800** the Apex Court again reiterated that the Court will not exercise its discretion to quash an order which appears to be illegal but having effect of reviving another illegal order.

58. In **Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and others (1999) 8 SCC 16** the Supreme Court observed where setting aside of an order on the ground of lack of jurisdiction results in revival of an illegal order, the order which lacks jurisdiction should not be set aside and the Court should refuse to interfere under Article 226 of the Constitution of India.

59. In **Ramesh Heera Chandra Kundan Mal Vs. Municipal Corporation of Greater Bombay (1992) 2 SCC 524** it has been laid down that it is always upon the Court to interfere with an order passed on an application for addition of parties when it is found that the courts below have gone wrong in deciding the said application.

60. In the overall facts and circumstances of the case, without entering into the controversy of the maintainability of the revision before the court below, since I am of the opinion that the plaintiff/respondent are entitle to implead transferee pendente lite in the instant case, I decline to exercise the discretionary jurisdiction in the matter for the above reason alone.

61. In view of the aforesaid facts and circumstances, the writ petition fails and is dismissed with no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 38790 of 2013

Ram Nakshtra Sharma ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Kshetresh Chandra Shukla, Sri Ratan Kumar Singh
Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226-Service Law-Recovery of excess payment-pay scale wrongly fixed Rs. 3200-4900 instead of 3050-4590-contention that petitioner being no instrumental in getting wrong fixation-not entitled to refund-held-misconceived-in view of recent case reported in 2012(3) UPLBEC-2057 in C.P. Uniyal's Case-no such principle of law-where excess payment from public exchequer can not be recovered.

Held: Para-21
Every single penny constituting consolidated fund of India/State comes from hard earned money of tax payers and others. It has to be utilized strictly in the manner in which the competent authority i.e., the legislature has resolved and decided. No amount of public exchequer can be allowed to be squandered as a matter of charity or otherwise to be retained by a Government servant who is not entitled to obtain such money but by another Government Servant has been allowed to withdraw from public exchequer, may be, by his mistake or may be collusive mistake or otherwise.

Case Law discussed:
1979 ALJ 1184; 1994(2) SCC 521; 1995 Suppl.(1) SCC 149; 1997(1) SC 353; 2002(3) SCC 302; 2006(10) SCALE 1999; 2006(1)UPLBEC 399; AIR 1993 SC 1903; AIR 2000 SC 2709; AIR 2000 SC 1557; (2006) 11 SCC 709; 2010(1) SCC 440; 1995 (Supp. (1) SCC 18; 2012 (3) UPLBEC 2057; [(2009) 2 SCC 117]; [(2010) 14 SCC 323]; (2009) 3 SCC 475; Special No. 503 of 2008; 2004(1) ESC (Allahabad) 455; AIR 1978 SC 78.

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

1. The writ petition is directed against the order dated 30.05.2013 passed by Director, Horticulture and Food Processing, U.P., Lucknow pointing out that petitioner's pay w.e.f. 01.01.1996 was wrongly fixed in the same of Rs. 3200-4900 inasmuch as he was earlier in the pay scale of Rs. 950-1500 for which revised pay scale was Rs. 3050-4590, w.e.f. 01.01.1996. The petitioner having been given wrong pay scale and excess salary, the same was liable to be recovered and hence direction has been issued to Deputy Director, Horticulture to recover aforesaid amount.

2. It is contended that excess payment cannot be recovered from petitioner since there is no fraud or misrepresentation on his part. He placed reliance on a Division Bench decision of

this Court in **B.N. Singh Vs. State of U.P. and another 1979 ALJ 1184**. The other decisions are of Apex Court in **Shyam Babu Verma & Anr. Vs. Union of India & Ors. 1994(2) SCC 521, Gabriel Saver Fernandes & Ors. Vs. State of Karnataka & Ors 1995 Suppl.(1) SCC 149, Mahmood Hasan Vs. State of U.P. JT 1997(1) SC 353, State of Karnataka & Anr. Vs. Mangalore University Non-Teaching Employees' Association & Ors. 2002(3) SCC 302, Purushottam Lal Das & Ors. Vs. State of Bihar & Ors. 2006(10)SCALE 1999** and a Full Bench judgment of this Court in **Surya Deo Mishra Vs. State of U.P. 2006(1)UPLBEC 399**, besides some other judgments of this Court largely following above cited decisions. .

3. Some of the authorities cited by learned counsel for the petitioner has been considered by the Apex Court in cases where a different view has been taken. I first propose to refer all these decisions which have come to my notice wherein a view otherwise has been taken and recovery of excess payment from the concerned officials has been upheld since they include a very recent one.

4. The first is **State of Haryana and others Vs. O.P. Shrama and others AIR 1993 SC 1903.** There an ad hoc interim relief was granted in 1972 by the Government on slab basis pending fixation of additional dearness allowance. No formula with reference to cost of living was adopted while granting ad hoc relief. When the formula for grant of additional dearness allowance of the cycle of increase by 8 points in the Consumer Price Index was adopted by the State Government, it realised that the ad-hoc interim relief was in excess by Rs. 9.40 to Rs. 45 per month depending on the pay-slab of a Government servant. It then decided to adjust increase rather than order lump sum recovery of the excess amount, in subsequent emoluments, payable to the employees, instead of recovering entire amount. Such order was passed in March 1974. The Court did not find order bad, illegal, arbitrary, unreasonable or unfair. It held that the Government has rightly chosen to recover excess amount in a phased manner.

5. In **Union of India Vs. Smt. Sujatha Vedachalam and another AIR 2000 SC 2709**, an employee was working as Senior Clerk (Accounts) in the pay scale of Rs.1400-2600. On his personal request, he was transferred from Nagpur to Bangalore. One of the conditions of transfer was that the employee shall technically resign from the post held at Nagpur and join as Direct Recruit on the post of Clerk at Bangalore. At the time of transfer, basic pay drawn by the employee at Nagpur in the cadre of Senior Accountant, was Rs. 1260/-. When the employee joined on the lower post of clerk, by mistake, her salary was fixed at basic pay of Rs.1250/- per month instead of Rs. 1070/-. On detection of mistake, pay was refixed at the stage of Rs. 1070/- by order dated 1.12.1995. The order(s) of recovery and refixation were challenged before Central Administrative Tribunal. Employee's claim was allowed by the Tribunal and Government's Writ Petition was dismissed by High Court. The Apex Court relying on its earlier decision in **Comptroller & Auditor General of India Vs. Farid Sattar, AIR 2000 SC 1557**, set aside both the judgments and upheld G.O. of refixation and recovery, with the only indulgence that excess pay may be recovered in easy instalments. The Court herein upheld recovery and permitted instalments.

6. Next is **Col. (Retd.) B.J. Akkara Vs. Government of India (2006) 11 SCC 709** wherein the law relating to recovery of excess payment from employees was considered. The Court held that cases wherein excess payment has not been allowed to be recovered from employees' are not founded because of any right in the employees but in equity and in exercise of judicial discretion to relieve employees from the hardship that may be caused, if recovery is implemented. Such a discretion is exercised by the Court and one of the reasons therefore, has been, as that the employee was receiving excess payment for a long period and utilising the same, genuinely believing that he is entitled to it, but where the employee had knowledge that the payment so received was in excess of what was due and the error was detected within a short period of wrong payment, Court would not give relief against such recovery. It is said that these matters lie in the realm of judicial discretion of the Court.

7. Then comes **Registrar Cooperative Societies Vs. Israil Khan and others 2010(1) SCC 440** wherein recovery of excess amount paid to employees of cooperative society was challenged relying on Apex Court's decision in **Sahib Ram Vs. State of Haryana 1995 Supp.(1) SCC 18 and Shyam Babu Verma Vs. Union of India (Supra).** A two Judges Bench of Apex Court, consisting of Hon'ble R.V. Raveendran and Hon'ble P. Sathasivam said in para 6 of the judgment that there is no principle that any excess payment to an employee should not be recovered back by the employer. The Court observed that in certain cases merely a judicial discretion has been exercised by Apex Court to refuse recovery of excess wrong payments of emoluments/allowances from employees on the ground of hardship where the following conditions were fulfilled:

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of employee; and

(b) such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

8. Now very recently, the Apex Court in **Chandi Prasad Uniyal and others vs. State of Uttarakhand and others, 2012(3) UPLBEC 2057** has said that there is no such principle of law that wrong payment made to an employee can be recovered only in those cases where he is guilty of fraud and misrepresentation, and not otherwise. The Court has distinguished all its earlier decisions in **Shyam Babu Verma Vs. Union of India (Supra), Sahib Ram v. State of Haryana (Supra), State of Bihar v. Pandey Jagdishwar Prasad [(2009) 2 SCC 117]** and **Yogeshwar Prasad and Ors v. National Institute of Education Planning and Administration and Ors. [(2010) 14 SCC 323].** In paragraphs 9, 15, 16 and 18 of the judgment the Court has said:

"9. We are of the considered view, after going through various judgements cited at the bar,hat this court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular /wrong fixation of pay be recovered."

"15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy."

"16. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situation. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer of the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid /received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

"18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary / pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly instalments starting form October 2012. The appeal stands dismissed with no order as to costs. IA nos. 2 and 3 are disposed of."

9. The Apex Court further held that decision in **Shyam Babu Verma (Supra), Sahib Ram (Supra), Yogeshwar Prasad (Supra)**, etc. are all decided on their own facts and do not lay down any principle of law, restraining recovery of excess payment of salary from the concerned employee. On the contrary, in para 17 of the judgment the Court said that except few instances pointed out in **Syed Abdul Qadir and others vs. State of Bihar and others (2009) 3 SCC 475)** and in **Col. B.J. Akkara (Supra)**, excess payment due to wrong/irregular pay fixation can always be recovered.

10. There is a Division Bench jujdgment of this Court also in **State of U.P. & others Vs. Vindeshwari Prasad Singh (Special Appeal No.503 of 2008)**, decided on 28th July, 2009. The Court formulated two questions, as under:

"(i) Whether any financial benefit given to an employee by mistake without any misrepresentation or fraud on his part can be recovered from him later on after his superannuation from service?

(ii) Whether before directing for recovery of the amount paid in excess, the employee concerned is required to be given notice and opportunity of hearing?"

11. Having said so, the Court said:

"Having given my most anxious consideration, neither on first principle nor precedent, I am prepared to accept the broad submission that excess amount paid to an employee by mistake cannot be recovered after his superannuation only on the ground that while obtaining monetary benefit, it has not made false representation or played fraud."

12. Further, the Court referred to Section 72 of Indian Contract Act and thereafter said:

"From a plain reading of the aforesaid provision it is evident that a person to whom money has been paid by mistake is obliged to return the same. In my opinion an employee not entitled to receive monetary benefit gets it, it becomes a case of unjust enrichment and restitution in case of unjust enrichment is an accepted principle for ensuring justice in appropriate cases. In my opinion in a case of mistake clear, plain and simple, excess amount paid to and employee can be recovered after retirement despite the fact that he had not made any misrepresentation or played fraud. There is no legal impediment in ordering for recovery from a retired employee such monetary benefits, which he had received on account of mistake and not entitled to such benefits. However, I would hasten to add that a mistake, pure and simple though justifies recovery of excess amount paid but in a case in which two interpretations are possible and one was consciously approved and benefit given to an employee by the competent authority but such decision in the ultimate analysis and long process of reasoning, later on is found incorrect, it may be possible to correct the same at a latter stage but the amount already paid in the light of the earlier decision is not fit to be recovered. In other wards, excess payment is made upon reasonably possible view taken by competent authority without fraud or misrepresentation, the excess payment cannot be recovered. Excess payment is possible to be made by the order of the employer. It is also possible by interim or final order of the Court, which ultimately is found to be erroneous. In case of former, a recovery is permissible under the condition enumerated above. However, in latter case, it depends upon the facts and circumstances of each case and it is primarily within the discretion of the Court." (emphasis added)

13. On the second question, however, the Division Bench said that an opportunity before making recovery is must. The Court also relied upon an earlier Division Bench Judgement in **Union of India Vs. Rakesh Chandra Sharma and others 2004 (1) ESC (Allahabad) 455**, observing that there is no law of universal application, restraining the employer from recovering the extra amount paid to an employee beyond entitlement. The Court also observed that rectification of mistake is not only permissible but desirable otherwise system/requirement of auditing of accounts would be rendered nugatory.

14. These authorities clearly show that there is no right of petitioner in law or otherwise that admitted excess

payment wrongly made cannot be recovered. As a matter of right, petitioner cannot contend that though he had been paid certain amount wrongly in excess to what was due to him, yet it cannot be recovered by the administration.

15. In the present case it is not the contention and neither there is any pleading nor actually argued that before passing impugned order no opportunity was afforded to petitioner. There is no challenge to the impugned order on the ground that it is in violation of principle of natural justice. The only argument advanced is that since petitioner himself is not guilty of any fraud or misrepresentation in fixation of his pay in a higher pay scale as a result thereof having been paid extra amount or excess salary over and above to which he was entitled, therefore, the excess amount paid to him cannot be recovered.

16. The above argument also pre-supposes an admission on the part of petitioner that he was not entitled to pay scale of Rs. 3200-4900. It is not the case that petitioner was not aware or would not have been aware as to what would have been the correct pay scale which he would have been entitled to, but he continued to receive salary. If the fixation has been made in a lower pay scale, it has always been seen that employee concerned immediately raises a protest that he is being paid wrong amount or lesser amount but when an employee receive more than the amount to which he was entitled, he does not inform the authorities concerned or bring this fact to their notice. It shows a tacit acquiescence on the part of petitioner in the wrong committed by administration to which he was the beneficiary and became part and parcel to the administration in this regard.

17. There is one more aspect to which this Court would like to consider this matter.

18. The excess money received by petitioner is not anybody's private money but it has come from the coffer of public exchequer. It is a public money contributed by tax payers and hard earned money of public at large. If an excess money is allowed to be retained by a person who is not authorised, that would result in denying user and consumption of that money other than the purpose for which it is meant.

19. Administration, whether in executive or judiciary, holds public funds in trust and with responsibility of spending it strictly in the manner they are required to do so and not to enrich anyone or waste money by its unmindful, unauthorised and illegal acts. If any such thing has happened even if unknowingly and indeliberately, the administration is legally, morally and by any standard of civilised society, is bound to restore back such wasteful expenditure to the public exchequer so that it may thereafter be utilised in the manner and for the purpose, so prescribed. Any attempt on the part of administration to allow an employee to retain certain money, which the Administration has wrongly paid to him, though the employee was not entitled to the same, or, any act on the part of administration, in not realising the said amount from the employee, is liable to be treated as breach of trust. Such decision would amount to not only waste of public money but also an attempt to perpetuate an illegal act. It is not a private property to which one can show any attitude of charity and so called broad heart and magnanimity. This would be against any principle of administrative law. Simultaneously, an employee if retains something which he did

not owe, he being also equally responsible to the public and public fund holding an office of trust, is bound to return/refund it.

20. In **P.K. Chinnaswamy Vs. Government of Tamilnadu and others AIR 1978 SC 78**, the Apex Court said that every public officer is a trustee and in respect of the office he holds and the salary and other benefits which he draws, he is obliged to render appropriate service to the State. Conversely, it would also be true that a Government official would be entitled to payment of only that amount, which he is entitled towards salary etc. under the relevant provisions, applicable to him, in the context of his status, position, rank , etc. If he has received or paid even by mistake, certain amount to which he was not entitled, it would amount to excess drawl of money unauthorisedly from public exchequer to which every Government official is a trustee and, therefore, whether mistaken or otherwise, no one is entitled to retain such unauthorised money belonging to public exchequer but, is under a legal and ethical obligation to return/refund the same, so that, it may be utilized for the purpose, it is made and decided by the competent authorities in budgetary allocation.

21. Every single penny constituting consolidated fund of India/State comes from hard earned money of tax payers and others. It has to be utilized strictly in the manner in which the competent authority i.e., the legislature has resolved and decided. No amount of public exchequer can be allowed to be squandered as a matter of charity or otherwise to be retained by a Government servant who is not entitled to obtain such money but by another Government Servant has been allowed to withdraw from public exchequer, may be, by his mistake or may be collusive mistake or otherwise.

22. This Court also tried to find out as to from which budgetary allocation excess money was paid to the employee and to which it can be adjusted. Since the allocated money is already identified and beyond that nothing could have been paid by anybody, no authority can be allowed to retain any amount which he has received unauthorisedly or on account of mistake of administration. It shall also amount to financial indiscipline and misuse of public fund. In the context of above decisions, we are clearly of the view that various authorities cited by the representationists concerned would not help them to claim that excess amount paid should not be recovered from them.

23. In view of above and the authorities of Apex Court, as discussed above, the judgments cited at the Bar by petitioner in support of his contention, in my view, would not help him and I am bound by the authorities of Apex Court which have come up in the recent past and have considered most of the judgments cited at Bar by petitioner.

24. In view of above, I do not find any reason to interfere. The writ petition lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.40376 of 2013

Shri Jamil Ahmad ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Dwivedi

Counsel for the Respondents:
C.S.C.

U.P. Panchayat Raj Act 1947-Section 95(i)(g)- Removal of village Pradhan-on conviction in criminal case-against show cause notice-plea about pendency of criminal appeal taken-removal order-challenged-held-even on involvement in moral turpitude can be disqualification-petitioner having been convicted-rightly removed.

Held: Para-6
Section 95 (1)(g)(ii) provides that the State Government may remove a Pradhan, if he is accused of or charged for an offence involving moral turpitude. In the instant case, the petitioner has been convicted of an offence involving moral turpitude, and consequently, the District Magistrate was justified in removing the petitioner from the post of Pradhan under the said provision.

Case Law discussed:
2008 AWC(2)1921

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

1. The petitioner was elected as a Pradhan, but subsequently, was convicted of an offence and was sent to jail on account of his conviction. The petitioner was issued a show cause notice as to why he should not be removed from the post of the Pradhan. Upon his reply that he has filed an appeal against his conviction, the District Magistrate passed an order under Section 95 (1) (g) of the U.P. Panchayat Raj, Act, 1947 read with U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 removing him from the post of the Pradhan. The petitioner, being aggrieved by the said order, has filed the present writ petition.

Section 5 (1) (g) provides as under:
"(1) The State Government may-

(g). remove a Pradhan. Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabhandhak Samiti or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he-

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings,

(ii) refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance as such is not desirable in public interest, or

(iii-a) has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of the Scheduled Castes, the Scheduled Tribes or the Backward Classes, as the case may be.

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in clauses (a) to (m) of Section 5-A :

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities, such Pradhan or Up-Pradhan shall cease to exercise and perform

the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.

Provided that-

(i) no action shall be taken under clause (f), clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed."

3. Section 5A (g) provides as under :

"Section 5 A- Disqualification for membership- A person shall be disqualified for being chosen as, and for being, (the Pradhan or) a member of a Gram Panchyat, if he-

(g) has been convicted of an offence involving moral turpitude;"

4. A perusal of the aforesaid, makes it clear that a person shall be disqualified for being chosen and for being the Pradhan, if he has been convicted of an offence involving moral turpitude.

5. In the light of the aforesaid provision, once a person has been convicted, he incurs a disqualification for being chosen or for being the Pradhan and is disqualified from holding an office.

6. Section 95 (1)(g)(ii) provides that the State Government may remove a Pradhan, if he is accused of or charged for an offence involving moral turpitude. In the instant case, the petitioner has been convicted of an offence involving moral turpitude, and consequently, the District Magistrate was justified in removing the petitioner from the post of Pradhan under the said provision.

7. In **Radhey Shyam Vs. State of U.P., 2008 (2) AWC 1921**, a Division Bench of this Court has held that if a person is convicted of an offence involving moral turpitude, he would be removed as the Pradhan under Section 95 (1)(g) of the Act.

8. In the light of the aforesaid, this Court does not find any reason to interfere in the impugned order.

9. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.41394 of 2012

M/s R.P.G. Life Science Ltd. & Ors.
...Petitioners
Versus
Presiding Officer & Ors. ...Respondents

Counsel for the Petitioners:
Sri Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C., Sri B. Pant, Sri J. Nagar
Sri Pratik Nagar

Constitution of India, Art. 226- Petition against Labour Court award-work man working as medical representative transferred from Kanpur to Ballia- instead of joining at transferred place-inspite of traveling allowance- refused to go at transferred place-termination-tribunal set-a-side on ground of violation of principle of natural justice-direction for reinstatement

with full back wages-questioned-so for reinstatement, no doubt based on evidence-require no interference-but considering conduct of workman to disobey transfer order-principle of 'No work no pay' applicable-as such instead of back wages-1 lac compensation shall be proper in end of justice, -accordingly award modified.

Held: Para-16

In the light of the aforesaid, the Court is of the view that on the principle of 'no work no pay', coupled with the fact that a misconduct was committed by the workman, the Court finds that the award of the Tribunal directing payment of full back wages cannot be sustained and, consequently, to that extent, the award is quashed. The writ petition is partly allowed and the Court directs that in the given circumstances the petitioner would pay a composite amount of Rs. One lac towards back wages and cost of the litigation. The said amount shall be paid within six weeks from the date of the production of a certified copy of this order.

Case Law discussed:

1965(3)SCR 583; 1972(1) SCR 755; 1972 (1) LLJ 180; 1973 (1) LLJ 278; 1975 (2) LLJ 379; 1979 SC 1652; AIR 2001 SC 2090; 2005(5) SCC 591; 2009 LIC 415.

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

1. Heard Sri C.B. Gupta, the learned counsel for the petitioner and Sri Pratik Nagar, the learned counsel for the workman-respondent and the learned Standing Counsel.

2. The workman was appointed as a Medical Representative in the petitioner's pharmaceutical company. The first posting of the workman was Jaipur and, subsequently, after a couple of years the workman was transferred to Kanpur. The appointment letter specifically contended that the area of operation of the workman would be the entire dominion of India and that he could be posted in any part of the country. Further, depending upon the exigencies of the business of the Company, the workman could be transferred to any place in India. With these clear stipulation contained in the appointment letter, the workman joined the services.

3. It transpires that some incident took place, in which some Officers got beaten up and the workman was a mute spectator and did nothing in the matter. The management was aggrieved by the conduct of the workman and instead of initiating disciplinary proceedings, considered his long length of service and chose to transfer him from Kanpur to Ballia within the State of Uttar Pradesh. The management accordingly, transferred the workman to Ballia by its order on 8th August, 1999. This order was duly served upon the workman. The workman did not comply with this order and it is alleged that he initiated conciliation proceedings under the U.P. Industrial Disputes Act for conciliation of his dispute. It is alleged by the management that several letters and telegrams were sent including a bank draft of of Rs.3000/- towards travelling expenses and inspite of the receipt of the letters and telegrams, the workman did not join the place of transfer.

4. On the other hand, it was contended by the workman that he had given suitable replies and gave reasons for not joining and further contended that he did not receive the bank draft of Rs.3000/-. Eventually, the management took a decision and, by an order dated 17th November, 1999 terminated the services of the workman on account of not joining the place of transfer. There was no inquiry, no chargesheet and only a simplicitor order of termination was passed on the ground that it appears that the workman was not interested in working with the company.

5. The workman, being aggrieved by the order of termination, raised an industrial dispute and, upon submission of a failure report by the Conciliation Officer, the matter was referred to the State Government and ultimately a dispute was referred to the Industrial Tribunal for adjudication. The terms of the reference order was "Whether the employers were justified in terminating the services of the workman with effect from 17th November, 1999? If not to what relief was the workman entitled to."

6. Before the Tribunal parties filed their pleadings and evidences. The petitioner in particular submitted in its written statement that in the event, the Tribunal comes to the conclusion that the order of termination was in violation of the principles of natural justice then in that event, the employer should be given an opportunity to lead evidence and prove the charge against the workman.

7. The Tribunal, after considering the material evidence on record held that the order of termination was in violation of the principles of natural justice, inasmuch as the employers terminated the services of the workman without giving any notice and without issuing any chargesheet and without holding any domestic inquiry. The Tribunal accordingly, directed reinstatement of the workman with continuity of service and with full back wages.

8. The employers, being aggrieved by the said award, has filed the present writ petition.

9. This Court while entertaining the writ petition passed an interim order directing the petitioner to reinstate the workman pursuant to which the workman has been reinstated in service and is working with the petitioners' company at Kanpur and is being paid his monthly wages. Nothing has come on record to indicate that the workman's performance pursuant to the interim order was unsatisfactory and, consequently, it can be presumed safely that the petitioners' have no quarrel with the performance of the workman.

10. Once a finding has been given by the Tribunal that the order of termination was in violation of the principles of natural justice it became imperative for the Tribunal to give an opportunity to the petitioners' to prove the charge against the workman. This view of the Court is no longer res integra as it has been settled by the Supreme Court in a catena of cases, namely, **Motipur Sugar Factory Pvt. Ltd. Vs. Its Workmen, 1965 (3) SCR 583, Motipur Sugar Factory (P) Ltd. Vs. Its Workmen, 1965 (3) SCR 583, State Bank of India Vs. R.K. Jain and others, 1972 (1) SCR 755, Delhi Cloth & General Mills Co. Vs. Ludh Budh Singh, 1972 (1) LLJ 180, Workmen of Messers Firestone Tyre and Rubber Com. of India (P) Ltd. Vs. Management and others 1973 (1) LLJ 278, Cooper Engineering Ltd. Vs. P.P. Mundhe, 1975 (2) LLJ 379, Shanker Chakraworty Vs. Britannia Biscuit Co., 1979 SC 1652, Karnataka State Road Transport Coporation Vs. Smt. Lakshmidevamma and another, AIR 2001 SC 2090.**

11. In the light of the aforesaid decision, the Court has no hesitation in holding that the award of the Tribunal could not be sustained any further and the Court would be constrained to allow the writ petition and remit the matter to the

Tribunal to decide the matter afresh and give opportunity to the employers to led the evidence and prove the charge against the workman but the Court is of the opinion that by doing so it would not be doing substantial justice. The incident and the termination of the service of the workman is of the year 1999. We are now in the year 2013. Fourteen years have gone by and remitting the matter to the Tribunal would unnecessarily entail further time and energy. The Court has already opined earlier that pursuant to the interim order, the workman has been reinstated and is working to the satisfaction of the employers. In the light of the aforesaid, the Court is of the view that the matter should be finally decided so that the litigation comes to an end once and for all.

12. In the instant case, the order of termination is based on the ground of non-compliance of the transfer order. Admittedly, the workman received the transfer order but did not join the place of transfer for reasons best known to him. The workman did not like the transfer order. To him, it was a punitive order but then he could protest by making a representation or approaching a higher authority but did not do so. It is alleged that he raised a dispute before the Conciliation Officer but nothing is known nor there is any material evidence before the Court to show the fate of this proceeding. The fact remains that till date, the order of transfer has not been questioned in any Court of law or before an appropriate forum. If an order of transfer is not complied, the management was at a liberty to proceed against the workman for the alleged misconduct for not joining. At the same time, by not joining, the workman becomes liable for disciplinary action and entering into unnecessary correspondence, does not behove good conduct on the part of the workman. For this misconduct, the workman has to be punished but the management cannot unilaterally take a decision punishing the workman by terminating his services in contravention to the certified standing orders of the Company and/or the service conditions relating to the Medical Representatives. Admittedly, no inquiry or charge sheet was issued.

13. Consequently, the Court is of the opinion that the order of termination passed by the employer was in violation of the principles of natural justice and that the order of termination cannot be sustained. The Tribunal, in the ultimate analysis, was justified in reinstating the workman. The Court is of the opinion that in the given circumstances and considering the length of service, the order of termination does not commensurate with the misconduct.

14. The Tribunal while reinstating the workman has also granted continuity of service, the Court is of the opinion that the said direction is perfectly justifiable, which requires no interference. The Court, however, finds that the award of the Tribunal directing payment of full back wages is arbitrary. There are a number of factors, which are required to be considered as held by the Supreme Court in the case of **G.M. Haryana Roadways Vs. Rudhan Singh, 2005 (5) SCC 591, Kanpur Electric Supply Comp. Ltd. Vs. Shamim Mirza, 2009 LIC 415** wherein the Supreme Court held that the order of the back wages should not be passed mechanically and other factors, namely, the nature of

appointment, length of service, whether he is in a position to get another employment etc. are some of the factors, which are required to be considered.

15. These factors has not been considered by the Tribunal, the mere fact that the workman contends that he has remained unemployed during the interim period is by itself not sufficient to grant full back wages. The Tribunal has also lost sight of the fact that the workman did commit a misconduct as he did not accept the transfer order and disobeyed the orders of the management. By reinstating the workman and giving him full back wages, the workman would go scott free for the misconduct, which he had committed and this Court cannot allow it to happen.

16. In the light of the aforesaid, the Court is of the view that on the principle of 'no work no pay', coupled with the fact that a misconduct was committed by the workman, the Court finds that the award of the Tribunal directing payment of full back wages cannot be sustained and, consequently, to that extent, the award is quashed. The writ petition is partly allowed and the Court directs that in the given circumstances the petitioner would pay a composite amount of Rs. One lac towards back wages and cost of the litigation. The said amount shall be paid within six weeks from the date of the production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.41477 of 2013

Narendra Kumar ...Petitioner

Versus

State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri A.K. Shukla

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.226- Service Law-Transfer order challenged on malafide ground-non impleadment of authority by name-can not be considered by Court-transfer being exigency of service-can not be interfered by writ court.

Held: Para-3

It is well settled that a person against whom plea of mala fide is taken shall be impleaded eo nomine since plea of mala fide is not available against unnatural person. The Apex Court has gone to the extent that in absence of impleadment of a person eo nomine, against whom plea of mala fide is alleged, Court cannot not even entertain the plea of mala fide

Case Law discussed:
1992 Supp. (1) SCC 222; AIR 1996 SC 326; JT 1996 (8) S.C. 550; AIR 2003 SC 1344; 2008(4) ADJ-36; 2008 (2) ESC 1312; 2008 (3) ADJ 705; AIR 2012 SC 232; 2009(8) SCC 337; JT 2009(2) SC 474.

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

1. It is contended that impugned order of transfer has been passed mala fide and at the instance of District President of Ruling Party and my attention is drawn to letter dated 10.10.2012, Annexure 5-A to the writ petition allegedly written by Pradeep Pandey to the District Magistrate, Shahjahanpur requesting for taking action against petitioner.

2. However, neither any person has been impleaded by name against which mala fide is alleged nor any ground has

been taken in the writ petition. Hence the said plea cannot be entertained at all.

3. It is well settled that a person against whom plea of mala fide is taken shall be impleaded eo nomine since plea of mala fide is not available against unnatural person. The Apex Court has gone to the extent that in absence of impleadment of a person eo nomine, against whom plea of mala fide is alleged, Court cannot not even entertain the plea of mala fide.

4. The Apex Court in **State of Bihar Vs. P.P. Sharma, 1992 Supp (1) SCC 222** in para 55 of the judgment, held: -

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Admittedly, both R.K. Singh and G.N. Sharma were not impleaded. On this ground alone the High Court should have stopped enquiry into the allegation of mala fides or bias alleged against them." (emphasis added)

5. In **AIR 1996 Supreme Court 326, J.N. Banavalikar Vs. Municipal Corporation of Delhi**, in para 21 of the judgment, it has been held:

"Further in the absence of impleadment of the.....the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. malice in fact should not be countenanced by the Court."

6. In **JT 1996 (8) S.C. 550, A.I.S.B. Officers Federation and others Vs. Union of India and others,** in para 23, the Hon'ble Apex Court has said where a person, who has passed the order and against whom the plea of mala fide has been taken has not been impleaded, the petitioner cannot be allowed to raise the allegations of mala fide. The relevant observation of the Apex Court relevant are reproduced as under:

"The person against whom mala fides are alleged must be made a party to the proceeding. Board of Directors of the Bank sought to favour respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fide, which allegations, in fact, are without merit." (emphasis added)

7. In **AIR 2003 Supreme Court 1344, Federation of Railway Officers Association Vs. Union of India** it has been held:

"That allegations regarding mala fides cannot be vaguely made and it must be specified and clear. In this context, the concerned Minister who is stated to be involved in the formation of new Zone at Hazipur is not made a party who can meet the allegations." (emphasis added)

8. The aforesaid view has been followed by various Division Benches of this Court including **Dr. Harikant Mishra Vs. State of U.P. and others**

2008(4) ADJ 36=2008(2) ESC 1312 and Salahuddin Vs. State of U.P. and another 2008(3) ADJ 705.

9. In view of the above, since the person against whom the plea of mala fide has been levelled is not impleaded, I have no hesitation in declining the contention of the petitioner to assail the impugned order on the ground of mala fide.

10. So far as order of transfer is concerned, it is not the case of the petitioner that the impugned order of transfer is against statutory rules or has been passed by an authority not competent to do so or is vitiated on account of mala fide. The service of the petitioner are transferable. The transfer being exigency of service, an employee is liable to be transferred from one place to another and normally no case for interference in Court of law is called for unless the case is within categories, as mentioned above.

11. Recently in **The Registrar General High Court of Judicature at Madras Vs. R. Perachi and Ors., AIR 2012 SC 232**, the Court has observed:

"...transfer is an incident of service, and one cannot make a grievance if a transfer is made on the administrative grounds, and without attaching any stigma....".

12. The Court also referred to its earlier decision in **Airports Authority of India Vs. Rajeev Ratan Pandey, 2009 (8) SCC 337** and said :

"in a matter of transfer of a govt. employee, the scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer."

13. A transfer is made in administrative exigency, if there is a complaint pending and instead of a regular department enquiry, the authority concerned decided to transfer a person concerned. It would then be a transfer purely on administrative ground and not by way of punishment etc. This approach has been approved by Apex Court in **The Registrar General High Court of Judicature at Madras (supra)**, and in para 27 of the judgment the Court observed:

"...the transfer was purely on the administrative ground in view of the pending complaint and departmental enquiry against first Respondent. When a complaint against the integrity of an employee is being investigated, very often he is transferred outside the concerned unit. That is desirable from the point of view of the administration as well as that of the employee.

14. In Tushar D.Bhatt Vs. State of Gujarat & Ors., JT 2009 (2) SC 474, reiterating well established principle in long chain of authority the Court said:

"The legal position has been crystallized in number of judgments that transfer is an incidence of service and transfers are made according to administrative exigencies."

15. In view of the aforesaid, the writ petition lacks merit.

16. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 44781 of 2009
M/s Luxmi Palace(Cinema) ...Petitioner
Versus
Prescribed Authority/Additional Labour Commissione & Anr. ...Respondents

Counsel for the Petitioner:
Sri S.S. Nigam

Counsel for the Respondents:
C.S.C., Sri Ankit Saran

Constitution of India Art. 226-Applicability of minimum wages Act- application by workman-against ex-parte award-writ petition by management-writ court - allowed to work and pay salary by month to month-argument that entitle salary on last pay drawn basis-application for minimum wages not maintainable-held-wages means current wages-application maintainable-in absence of mens-rea-penality can not be imposed-petition partly allowed.

Held: Para-9
The words to "take work" and the words to "pay salary month to month" leads to an irresistible inference, namely, to pay the current salary. It would be too much to expect that the employer will take work and pay last drawn wages. it is not permissible to pay last drawn wages when work is being taken. The workman becomes entitled to be given a fair remuneration and in the opinion of the Court, fair remuneration is nothing else, but current salary since the last drawn wages was being paid, the workman rightly moved an application for payment of minimum wages under the provisions of the Minimum Wages Act. The said application was maintainable and the Prescribed Authority rightly calculated the difference. The Court is of the opinion that the order of the Prescribed Authority was perfectly justified.

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

1. Heard Sri S.S. Nigam, the learned counsel for the petitioner and Sri Ankit Saran, the learned counsel for the respondents.

2. The facts leading to the filing of the writ petition is that an ex parte award dated 3rd July, 1995 was passed by the labour court directing reinstatement with backwages. The petitioner, thereafter, filed a recall application, which was rejected by the labour court by an order dated 06th August, 1997. The petitioner, being aggrieved, filed a writ petition, in which an interim order was passed staying the award subject to deposit of 50 per cent of the amount of the backwages before the Registrar of this Court. Subsequently, by an order dated 25th November, 2003, the interim order was modified. Since this order will have bearing on the ultimate result of this petition, the order dated 25.11. 2003 is extracted here under:

".After hearing the Learned Counsel for the parties and perusal of the record. I consider it appropriate to direct petitioner to allow opposite party No. 4 to join service latest by 15th December, 2003. In case respondent submits joining report to the petitioner, petitioner shall take work from here and pay salary month to month on due date. Put up on 16th December, 2003.

3. Pursuant to this order, the workman was reinstated. The writ petition eventually was decided finally and was allowed by a judgement dated 24th February, 2005 and the award of the labour court was set aside.

4. During the pendency of the writ petition, the workman filed two applications before the Prescribed Authority under the Minimum Wages Act, 1948 for payment of minimum wages for the period 1.11.2004 to 31st January, 2005 and for the period 1.5.2004 to 31st July, 2004. Both the applications were allowed by the Prescribed Authority by two separate orders dated 18th June, 2009 awarding 11,570/- towards balance of the minimum wages plus double the amount i.e. Rs. 23,240/- towards penalty and in the second application awarded Rs. 22,125.50/- towards minimum wages and Rs. 44,251 towards penalty including cost. The petitioner, being aggrieved by the said orders, has filed the present writ petition.

5. Before the Prescribed Authority as well before this Court, the petitioner has contended that the workman was being paid last drawn wages in terms of Section 17-B of the Industrial Disputes Act in pursuance of the interim order passed by this Court, and consequently, the application under the Minimum Wages Act was patently misconceived and could not have been adjudicated. It was contended that in the event, the workman had any grievance, he should have moved an appropriate application before the Writ Court itself for clarification or modification of the interim order.

6. In order to appreciate the submission of the learned counsel for the petitioner, Section 17-B of the Industrial Disputes Act is extracted hereunder:

" **Section 17-B Payment of full wages to workman pending proceedings in higher courts.-** Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be"

7. A perusal of the aforesaid provision indicate that where the Labour Court or Tribunal makes an award directing reinstatement of a workman and the employer prefers a writ petition questioning the validity of the award, in which case, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court, full wages last drawn by him.

8. In the opinion of the Court, this provision automatically comes into play the moment an employer files a writ petition, but this provision get superseded the moment the Writ Court passes an interim order on wages.

9. In the instant case, the Writ Court passed an interim order dated 25th

November, 2003 directed the petitioner to reinstate the workman and further directing the petitioner to take work from the workman and pay salary month to month on the due date. The words to "take work" and the words to "pay salary month to month" leads to an irresistible inference, namely, to pay the current salary. It would be too much to expect that the employer will take work and pay last drawn wages. it is not permissible to pay last drawn wages when work is being taken. The workman becomes entitled to be given a fair remuneration and in the opinion of the Court, fair remuneration is nothing else, but current salary since the last drawn wages was being paid, the workman rightly moved an application for payment of minimum wages under the provisions of the Minimum Wages Act. The said application was maintainable and the Prescribed Authority rightly calculated the difference. The Court is of the opinion that the order of the Prescribed Authority was perfectly justified.

10. However, the Court is of the opinion that awarding penalty was harsh. No mens rea was involved and the petitioner had taken a stand to pay wages as the provision of 17-B of the Industrial Disputes Act . In the absence of mens rea, the Court is of the opinion that the imposition of penalty was not correct. Consequently, the award of the Prescribed Authority awarding penalty can not be sustained and to that extent, the order of the Prescribed Authority is liable to be quashed.

11. In the result, the writ petition is partly allowed. The order of the Prescribed Authority dated 18th June, 2009 is partly quashed to the extent of imposition of the penalty. The amount towards payment of the balance amount of wages is affirmed, which shall be paid to the workman concerned.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED:ALLAHABAD 01.05.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.50962 of 2008

Smt. Vineeta Agarwal ..Petitioner
Versus
Addl. Commissioner & Ors...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Dwivedi

Counsel for the Respondents:
C.S.C., Sri Satish Chaturvedi
Sri Ashwani Mishra, Sri R.K. Pandey.

Indian Stamp Act 1899-schedule I-B-Art. 34- Stamp duty on correction of sale deed-whether payable?-held-'No'-on execution of sale deed-stamp duty already paid-on certain mistake in number of plots-correction deed executed paying stamp duty as Rs. 100/-held-only Rs. 10/-payable-demand of extra duty treating fresh document-illegal.

Held: Para-9
In view of the above, the aforesaid deed dated 7.2.2006 is a deed of correction and since it was necessitated on account of clerical mistake it would be chargeable to stamp duty under Article 34-A of Schedule 1-B of the Indian Stamp Act, 1899 and stamp duty of Rs.10/- alone shall be payable on it. The petitioner has already paid a stamp duty of Rs.100/- on the said deed.

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

1. Heard Sri Ramesh Chandra Dwivedi, learned counsel for the petitioner, learned Standing Counsel for

respondents No.1 to 3 and Sri Rajesh Kumar Pandey, counsel for Allahabad Development Authority, respondent No.4.

2. Petitioner is aggrieved by the order of the Additional Collector (Finance and Revenue), Allahabad dated 15.2.2008 and the appellate order thereto dated 28.7.2008 passed by the Additional Commissioner (Administration), Allahabad Division, Allahabad.

3. Undisputed facts giving rise to this petition are that the Allahabad Development Authority leased out a plot of land in favour of the petitioner in Shantipuram Scheme, Phaphamau, Allahabad and a lease deed in respect of the same was executed on 4.6.2003. However, in the lease deed the plot number was incorrectly mentioned as D-396 in place of D-393. Accordingly, a correction deed was executed and got registered on 7.2.2006. The authorities by the impugned orders have determined deficiency in stamp duty on the aforesaid correction deed by treating it to be a fresh lease deed.

4. The submission of learned counsel for the petitioner is that by the aforesaid deed dated 7.2.2006 only correction in plot number as appearing in the lease deed has been made and it does not confer any new rights upon the petitioner and, therefore, stamp duty afresh is not payable on the same.

5. The deed dated 7.2.2006 is indisputably an instrument, as argued by the learned Standing Counsel, under Section 2(14) of the Indian Stamp Act, 1899 but the question is about the nature of the instrument.

6. Since the aforesaid instrument only proposes to correct the plot number and its description which was already leased out in favour of the petitioner and does not confer any new right upon him, it is simply a deed of correction. This fact has also been accepted by the authorities in the impugned orders but they have declined to treat it to be a correction deed only on the ground that the mistake is not of a clerical nature.

7. The mistake in mentioning the plot number in the lease deed is purely a clerical error which has arisen due to inadvertence of the parties, specially the office of the Allahabad Development Authority. The said correction deed does not create any new rights in favour of the petitioner. The petitioner by the said two documents read together only gets right in plot no.D-393 and, therefore, is liable for payment of stamp duty only once.

8. In Writ Petition No.20061 of 2011 C.L.Memorial Girls Post Graduate College Vs. Deputy Commissioner (Administration) and another dated on 16.5.2012, I have already held that a deed of correction to rectify certain clerical mistake arising in the sale deed already registered would not be liable to payment of stamp duty as a fresh sale deed and would be stamped only as a correction deed.

9. In view of the above, the aforesaid deed dated 7.2.2006 is a deed of correction and since it was necessitated on account of clerical mistake it would be chargeable to stamp duty under Article 34-A of Schedule 1-B of the Indian Stamp Act, 1899 and stamp duty of Rs.10/- alone shall be payable on it. The petitioner has

already paid a stamp duty of Rs.100/- on the said deed.

10. In view of the aforesaid facts and circumstances, the authorities below have grossly erred in treating the above deed to be a fresh lease deed and demanding stamp duty accordingly.

11. The impugned orders dated 15.2.2008 passed by the Additional Collector (Finance and Revenue), Allahabad and dated 28.7.2008 passed by the Additional Commissioner (Administration), Allahabad Division, Allahabad as such are quashed. The writ petition is allowed. Any amount deposited by the petitioner pursuant to the impugned order shall be refunded to the petitioner within a period of one month from the date of presentation of a certified copy of this order. In case of any delay in refund of the amount the petitioner shall be entitle to interest at the rate of 8% per annum for the delay period.
