REVISIONAL JURISDICTION
CRIMINAL- SIDE
DATED: LUCKNOW 05.09.2013

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

Criminal Revision No. 26 of 2002

Ramakant Dubey ...Revisionist
Versus
State of U.P. ...Opp. Party

Counsel for the Revisionist:
Sri Anil Kumar Tripathi, Sri V.P. Pandey

Counsel for the Respondents:
Govt. Advocate, Sri Bireshwar Nath

Criminal Revision- against conviction-offence under section 468, 471, 420 IPC-readwith 511-allegations revisionist based upon forged letter alleged to be issued by P.M.O-tried to get promotion-conviction solely based upon statement under section 313 Cr.P.C.-as well as expert opinion who admitted during cross examination that-he compared admitted hand writing with photo state copy of original letter presuming it to be original-held-both Courts below committed great illegality-in view of Apex Court verdict-statement (u/s 313 Cr.P.C.)can not be utilized as material for conviction similarly-opinion of hand writing expert without original document-no conclusive opinion-finding based upon surmises not sustainable.

Held: Para-24
From the above discussion it is clear that prosecution has failed to prove the original document. The original document was even not produced in the Court. There is no evidence to show that the allegedly that the photo-stat letter sent to the Office of Regional Manager and Divisional Manager, National Insurance Company are true, photo-stat of the original document. The expert PW 5 has given his finding on the basis of photo-stat letter comparing it with the admitted handwriting. He himself has admitted that he has presumed that the photo-stat letter is true photo-stat of the original letter. Thus, there is nothing on record to show that the original letter was in the handwriting of the accused person. In the statement under Section 313 Cr.P.C, the accused has not admitted that he has sent the letter to the Regional Manager and Divisional Office.

Case Law discussed:
1996 Criminal Law Journal 3237; AIR 1977 SC 1091; AIR 2004 SC 3084; AIR 1979 SC 1414; AIR 2002 SC 3582; AIR 1969 Alld. 423; AIR 1978 SC 840; AIR 1978 SC 1091.

(Delivered by Hon'ble Arvind Kumar Tripathi (II), J.)

1. Heard Sri Anil Kumar Tripathi, learned counsel for the revisionist and Sri Bireshwar Nath, learned counsel for respondent.

2. This criminal revision has been filed by RamaKant Dubey, son of Late Sri Ram Adhar Dubey, resident of Village-Dhaskari, P.S. Bhadohi, District Bhadohi (Varanasi) challenging the order dated 15.01.2002 passed by Additional District and Sessions Judge-8th, Lucknow in Criminal Appeal No.01 of 1998 by which the criminal appeal filed against conviction order dated 16.12.1997 passed by Special Judicial Magistrate (CBI) was dismissed.

3. As per prosecution version, a first information report was lodged by Superintendent of Police on 29.1.1986 that accused was working as an agent in National Insurance Company, Bhadohi Branch Office Varanasi. He has moved an application for appointment on the post of Inspector/ Development Officer in the year 1985. But due to certain reasons his

name was not considered. After that a recommendatory letter was received in the Office of Regional Manager National Insurance Company by Sri G.S. Narang the Regional Manager. The letter was allegedly written by Secretary, Sri S. Singh allegedly from Prime Minister's residence which was found forged. On this first information report, a case under Sections 420/511/468/471 IPC was registered. The matter was investigated by CBI, Lucknow and charge-sheet was submitted against the accused. At the time of trial, charge under Sections 420, 468 and 420 read with Section 511 IPC was framed against the accused who pleaded not guilty and claimed to be tried.

4. Prosecution in order to prove its case, examined PW1 M.M.S. Beg, Branch Manager, National Insurance Company, P.W.2 B.R. Khatri retired Senior Divisional Manager National Insurance Company, P.W.3 G.S. Narang, retired Assistant Manager, P.W.4 Ashok Babu, Inspector C.B.I., P.W. 5 Amar Singh, Handwriting Expert and P.W. 6 Om Prakash Mishr, Section Officer (Administration) Prime Minister's Office. Documentary evidence was adduced from the side of prosecution which is the envelope containing that letter exhibit-K-1 to K-16. Learned Court below after going through the evidence and hearing the parties convicted the accused under Sections 468, 471,420 read with Section 511 IPC and convicted him to undergo one year simple imprisonment in each Section and Rs.500/- fine and in default of payment of fine he was directed to undergo one month simple imprisonment.

5. Appeal against that order was preferred being Criminal Appeal No.1/98, which too was dismissed on 15.1.2002. Feeling aggrieved this criminal revision has been filed.

6. It was argued from the side of the revisionist that the letter which is alleged to be forged has not been produced in original. Photostat copy was produced and proved without comparing with the original. It was also submitted that the sample handwriting was compared by the handwriting expert from that of the photostat and the entire judgment is based on conjectures and surmises.

7. It was also submitted that without original being proved no case of forgery is made out. It was also submitted that the expert report is very weak type of evidence and without any corroboration it is dangerous to convict the accused. It was also submitted that statement of the accused under Section 313 Cr.P.C is not evidence and no conviction can be based on the basis of the statement under Section 313 Cr.P.C. It was also submitted that the statement under Section 313 Cr.P.C. should be read as a whole and not as a part. Without considering the statement under Section 313 Cr.P.C. as a whole, the conviction by the trial Court and dismissal of appeal both are erroneous. It was also submitted that both the courts have not considered the evidence in proper perspective and thus the finding is perverse.

8. This revisional court has not been entrusted with the powers of appellate court. As this Court has only to see the irregularity and illegality in the order and for deciding that whether the order is perverse, analysis of the evidence can be done.

9. In the first information report which was lodged on 29.1.86 at about 10

am in Police Station- Bhadohi alleges that Ramakant Dubey attempted to commit the offence of cheating for getting himself appointed at the post of Development Officer/ Inspector of NIC, Bhadohi,Varanasi by adopting fraudulent means inasmuch as he sent/got sent a forged recommendation letter No. Patrank 2/Delhi/34/3 dated 21.1.1985 purported to have been issued by one Sri S. Singh, Secretary to the Prime Minister of India addressed to G. S. Narang, Regional Manager, NIC, Lucknow with copy to Divisional Office, NIC, Varanasi for favour of his appointment at the post of Development Officer/ Inspector at NIC, Bhadohi, Varanasi. List of annexures shows that a photostat letter was sent purportedly issued from Prime Minister's House New Delhi. This clearly goes to show that a photo-stat letter was sent to Sri G.S. Narang, Regional Manager, NIC, Lucknow and another Photo-stat copy was sent to Divisional Office, NIC, Varanasi. This clearly means to say that there was no original, which was produced in the Court and the accused was not confronted with the original copy of that alleged recommendation letter. It also clearly goes to show that the handwriting expert has given his opinion on the basis of examination of writing on photostat letter.

10. After evidence, he has in his statement under Section 313 Cr.P.C. denied that the matter written in Exhibit K-2 Q-5 and Q-6 is written in his own handwriting. He has only admitted that application Exhibit K-2 is under his signature. He has further admitted that during investigation his handwriting sample was taken by the Investigating Officer. He has further stated that previously a criminal case under Sections 43 of 1983 has proceeded against him in which he has been acquitted and the prosecution has filed a criminal appeal which is pending.

11. A perusal of the trial court judgment reveals that the only basis of conviction is expert report of handwriting and certain admissions of revisionist under Section 313 Cr.P.C. There is no corroborative evidence that this letter was sent by the accused.

12. In the case of **S. Gopal Reddy Vs. State of Andhra Pradesh 1996 Criminal Law Journal 3237**, the Apex Court has held as under;

"The evidence of an expert is a rather weak type of evidence and the Courts do not generally consider it as offering 'conclusive' proof and, therefore, safe to rely upon the same without seeking independent and reliable corroboration. In **Magan Bihari Lal Vs. State of Punjab, AIR 1977 SC 1091**, while dealing with evidence of a handwriting expert, this Court opined (at p.1093):

"We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in Ram Chandra V. State of U.P., AIR 1957 SC 381, that it is

unsafe to treat expert handwriting opinion as sufficient basis for conviction, but it may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in Ishwari Prasad V. Md. Isa, AIR 1963 SC 1728, that expert evidence of handwriting can never be conclusive because it is, after all, opinion evidence, and this view was reiterated in Shashi Kumar V. Subodh Kumar, AIR 1964 SC 529, where it was pointed out by this Court that expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert pinion in regard to handwriting in Fakhruddin v. State of M.P. AIR 1967 SC 1326, and it uttered a note of caution pointing out that it would be risky to find a conviction solely on the evidence of a handwriting expert before acting upon such evidence, the Court must always try to see whether it is corroborated by other evidence, direct or circumstantial."

13. In the case of **Magan Bihari Lal Vs. State of Panjab AIR 1977 Supreme Court 1091**, the Apex Court has held in Para 7 as under :

"In the first place, it may be noted that the appellant was at the material time a Guard in the employment of the Railway Administration with his Headquarters at Agra and he had nothing to do with the train by which Wagon No. SEKG .40765 was dispatched from Munda to Bikaner, nor with the train which carried that wagon from Agra to Ludhiana. He was not a Guard on either of these two trains. There was also no evidence to connect the appellant with the theft of the blank Railway Receipt at Banmore Station. It is indeed difficult to see how the appellant, who was a small employee in the Railway Administration, could have possibly come into possession of the blank Railway Receipt from Banmore Station which was not within his jurisdiction at any time. It is true that B. Lal, the handwriting expert, deposed that the handwriting on the forged Railway Receipt Ex. PW 10/A was that of the same person who wrote the specimen handwritings Ex. 27/37 to 27/57, that is the appellant, but we think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a hand- writing expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precendential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in Ram Chandra v. State of U.P. AIR 1957 SC 381 that it is unsafe to treat expert handwriting opinion as sufficient basis for conviction, but it may be relied upon when supported by other items o[internal and external evidence. This Court again pointed out in Ishwari Prasad v. Md. Isa, AIR 1963 SC 1728 that expert evidence of handwriting can never be conclusive because it is, after all, opinion evidence, and this view was reiterated in Shashi Kumar v. Subodh Kumar, AIR 1964 SC 529 where it was pointed out by this Court that expert's evidence as to

handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear_ direct evidence or by Circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in Fakhruddin v. State of M.P. AIR 1967 SC 1326 and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial. It is interesting to note that the same view is also echoed in the judgments of English and American courts. Vide Gurney v. Longlands, (1822) 5 B & Ald 330 and Matter of Alfred Fogter's Will, 34 MIch 21. The Supreme Court of Michigan pointed out in the last mentioned case: "Every one knows how very unsafe it is to rely upon any one's opinion concerning the niceties of penmanship--Opinions are necessarily received, and may be valuable, but at best this kind of evidence is a necessary evil." We need not subscribe to the extreme view expressed by the Supreme Court of Michigan, but there can be no doubt that this type of evidence being opinion evidence, is by its very nature, weak and infirm and cannot of itself form and the basis for a conviction. We must, therefore, try to see whether,in the present case, there is, apart from the evidence of the handwriting expert B. Lal, any other evidence connecting the appellant with the offence."

14. A careful perusal of the above decision of Apex Court it is clear that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This type of evidence being opinion evidence is weak and infirm and cannot of itself form the basis of conviction.

15. There is one more and second aspect in this case, admittedly photo-stat letter was received in the Office of Regional Manager, NIC, Lucknow. Admittedly, the handwriting expert never had occasion to examine the original document, he has examined and compared the sample in handwriting of accused from the photo-stat letter. Naturally, the handwriting expert of indicating in examining the pain pressure and pain pause.

16. A perusal of the record also reveals that the photographs taken by the handwriting expert and its negative are not in the file.

17. A perusal of the statement of PW 5 (Amar Singh) reveals that he has received the documents from the Office of CBI, Lucknow for comparing the sample. The specimen documents are marked 5 to 16 and he compared the specimen handwriting with photo-stat handwriting. He has nowhere stated that he has taken photographs himself and enlarged it. He has also not filed the photographs and negatives of the photo taken of original and specimen handwriting. He has further admitted in cross-examination when original document is not given to him. He presumes that the photostat is correct photo-stat of the original and there is no error in the photo-stat.

18. This statement clearly goes to show that original documents has not

been compared. It is also very clearly that until and unless, the original is proved to be forged. The photostat cannot be said to be a forged document. This creates doubt in the prosecution version.

19. Now coming to the statement under Section 313 Cr.P.C. of which learned trial court has given emphasis on the fact that though, the accused had denied his handwriting on the disputed document but it is proved by the evidence of handwriting expert. The trial court has further given specific finding in his judgment that the forged document has not been proved to be sent in the Divisional Office, but it has been proved that this forged document has been sent to Divisional Manager Lahura Veer, Varanasi in this finding, the trial court is blank head and call to them if the prosecution is not proved that any forged letter was sent in the divisional office then how can be said a forged letter was sent in divisional office. The trial court has further held that prosecution has not proved the seizure memo by which the forged recommendatory letter was seized orders.

20. The statement of that accused under Section 313 Cr.P.C. is concerned, in the Case of **Devendra Kumar Singla Vs. Baldev Kirshan Singla AIR 2004 Supreme Court 3084**, the Apex Court has held that the statement under Section 313 is not evidence. It is only the accused's stand or version by way of explanation, when incriminating materials appearing against him are brought to his notice.

21. In the case of **Banamali Samal Vs. State of Orissa AIR 1979, Supreme Court 1414**, the Apex Court has held that conviction cannot be based on the statement of accused alone.

22. In the case of **Mohan Singh Vs. Prem Singh & Another AIR 2002 Supreme Court 3582**, the Apex Court has held in Para 28 as under :

The statement made in defence by accused under Section 313, Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled the statement under Section 313 Cr.P.C. of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. See Nishi Kant Jha v. State of Bihar, (AIR 1969 SC 422):

"In this case the exculpatory part of the statement in Ex.6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under Section 342 Cr.P.C. to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13th October 1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in the river Patro, the amount of

bleeding and the washing of the blood-strains being so considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Ex.6 the High Court had acted rightly in accepting the inculpatory part and piercing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime."

23. In the case of **Miss Hardevi Malkani Vs. State and another AIR 1969 Allahabad 423**, this Court has held in Para 21 as under:

21. Reliance has been placed on the case of Mohideen Abdul Kadir v. Emperor, (1904) ILR 27 Mad 238. His Lordship the Chief Justice of the Madras High Court relying on an earlier decision in Basant Kumar Ghatak v. Queen Empress, (1903) ILR 26 Cal 49 took the view that a gap in the evidence of the prosecution cannot be filled by any statement made by the accused in his examination under Section 342 of the Code of Criminal Procedure. I am in respectful agreement with the view taken in that case and I am of opinion that even where a matter had been admitted by the accused in his or her statement under Section 342 Cr. P. C., the prosecution had to prove such facts, for want o proof of which, the prosecution must fail. I have, therefore, to examine the evidence on the record in this case in order to find out if Ex. Ka. 2 has been proved according to law or not.

24. From the above discussion it is clear that prosecution has failed to prove the original document. The original document was even not produced in the Court. There is no evidence to show that the allegedly that the photo-stat letter sent to the Office of Regional Manager and Divisional Manager, National Insurance Company are true, photo-stat of the original document. The expert PW 5 has given his finding on the basis of photo-stat letter comparing it with the admitted handwriting. He himself has admitted that he has presumed that the photo-stat letter is true photo-stat of the original letter. Thus, there is nothing on record to show that the original letter was in the handwriting of the accused person. In the statement under Section 313 Cr.P.C, the accused has not admitted that he has sent the letter to the Regional Manager and Divisional Office.

25. The case is totally based on circumstantial evidence and there are big gaps in the chain of events.

26. Doubt would be called reasonable, they are free from zest of abstract speculation. Law cannot afford any favourit other than truth. To constitute reasonable doubt, it must be free from an over emotional response.

27. In the case of **State of U.P. Vs. Ashok Kumar Srivastava AIR 1992 Supreme Court 840** and in the case of

Inder Singh Vs. State of Delhi AIR 1978 Supreme Court, 1091, the Apex Court has held that a reasonable doubt is not a imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence of the case. If a case is proved perfectly, it is argued that it is artificial, if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. Vague hunches cannot take place of judicial evaluation.

28. Judging the instant case from the above parameters it is clear that the prosecution has not been able to prove the case beyond reasonable doubt and both the Courts have erred in convicting the accused on the basis of evidence available on record and the appellate court has also erred in dismissing the appeal.

29. From the above discussion, I am of the view that the findings of both the courts below are perverse and not based on record and liable to be set aside.

30. In the result, the criminal revision is liable to be allowed, and is hereby allowed. The revisionist/accused Ramakant Dubey is acquitted giving benefit of doubt. The accused is on bail and he need not surrender before the trial court.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2013

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Second Appeal Defective No.50 of 2008

Badloo Ram ...Appellant

Versus

Mishree Lal @ Ram Tej & Ors. Respondents

Counsel for the Petitioner:
Sri D.C. Teiari, Pt. D.R. Shukla

Counsel for the Respondents:
Sri Ashish Mishra

C.P.C.-Section 100- Second Appeal-filed 11 years 7 months and 7 days unexplained delay-if delay condoned-amount to misuse of process of law-appeal dismissed on ground of delay itself.

Held: Para-31
In the present case, I do not find any sufficient reason to condone the delay, as such, I am of the view that the judgment cited by the learned counsel for appellant is of no help to him.

Case Law discussed:
(2005) 4 SCC 741; 2009 AIR SCW 1537; AIR 1998 SC 3222; 2006(24) LCD 1239

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

1. Heard Mr. D.R. Shukla, learned counsel for appellant as well as Mr. Ashish Mishra, learned counsel for respondents and perused the record.

2. This second appeal has been filed under Section 100 Code of Civil Procedure (for short 'the Code') against the judgment and order dated 29.2.1996 passed in **Civil Misc. Appeal No. 62 of 1995 (Badloo Ram Vs. Mishree Lal and Others)** arising out of the judgment and decree dated 09.01.1995 passed in **Regular Suit No. 553 of 1991 (Mishree Lal and Others Vs. Badloo Ram)** whereby the suit filed by the respondents-plaintiffs has been decreed in their favour and the first appeal preferred against the said judgment has been dismissed.

3. The appeal has been filed with reported delay of 11 years, 07 months and 07 days as on 08.02.2008.

4. Objection in the form of counter affidavit has been filed to the affidavit filed in support of application for condonation of delay filed under Section 5 of Indian Limitation Act.

5. Mr. D.R. Shukla, learned counsel for appellant submits that the suit for specific performance filed by plaintiffs was decreed vide judgment and decree dated 09.01.1995. The appellant being defendant in the suit, feeling aggrieved, had filed the first appeal (Civil Misc. Appeal No. 62 of 1995). The first appellate Court after hearing the parties had dismissed the appeal and affirmed the judgment of the Trial Court.

6. It is submitted that after the judgment of the appellate Court the appellant had fallen sick as he had suffered attack of paralysis. The appellant was in continuous treatment of Dr. Tribhuwan Pathak who has certified that the appellant was in his treatment during the period 29.2.1996 to 30.6.2006.

7. Submission is that the appellant due to illness could not approach the Court in time to file the instant appeal.

8. It is further submitted that after recovery of health the deponent in the month of June, 2006 had approached the learned Court below to obtain certified copy of the judgment and decree dated 09.01.1995 as well as judgment and order dated 29.2.1996 and thereafter he had again suffered paralysis attack and could not file the appeal. It is also submitted that it was only in the month of January, 2007 that he had got the second appeal prepared by his counsel which was ultimately filed on 08.02.2008.

9. Mr. D.R. Shukla, learned counsel for appellant emphasized that the medical certificate submitted along with affidavit filed in support of application for condonation of delay is a genuine document and in case the other side has any doubt about the authenticity of the same then the Doctor who has issued the said certificate may be summoned to appear before the Court in order to ascertain the authenticity of the said document, in this regard he has also moved an application before this Court.

10. Submission is that the appellant due to his ill health could not approach the Court in time and the delay in filing the appeal is due to bona fide reasons and deserves to be condoned.

11. Mr. D.R. Shukla, learned counsel for appellant also submits that he has filed a better affidavit in order to explain the delay (without any permission from the Court). By way of better affidavit, the appellant wants to explain that he was a victim of fraud played on him by his relatives due to which he was made to believe that proper pairvi in his case is being done during the period of his illness and, therefore, he could not approach the Court under bona fide belief that in case there is any requirement of filing an appeal, he would be duly informed by the person doing pairvi on his behalf.

12. It is submitted that one Mr. Hira Lal (witness to deed) who was hand in glove with the respondents had made the appellant believed that he is watching the

appellant's interest and he need not worry. He had not option but to believe Mr. Hira Lal as he was seriously ill.

13. In support of his submissions, Mr. D.R. Shukla, learned counsel for appellant relies on the following judgments:

(i) **Board of Control for Cricket in India and Another Vs. Netaji Cricket Club and Others; (2005) 4 SCC 741**, particularly paragraphs 89, 90 and 91.

(ii) **State of Jharkhand & Ors. Vs. Ashok Kumar Chokhani & Ors.; 2009 AIR SCW 1537**, particularly paragraph 3.

(ii) **N. Balakrishnan Vs. M. Krishnamurthy; AIR 1998 SC 3222,** particularly paragraph 13.

14. Mr. Ashish Mishra, learned counsel for respondents, on the other hand, submitted that the plea of illness taken by the appellant in the affidavit filed support of his application for condonation of delay is totally false and frivolous as during the period 1996 to 2006 when the appellant claims to be seriously ill due to paralysis attack he was blessed with four children. This fact has not been denied by the appellant, although specifically averred in the counter affidavit of the respondents.

15. It is submitted that the medical certificate annexed with the affidavit filed in support of application for condonation of delay is manufactured and concocted document which does not even bear the designation of the Medical Officer who is alleged to have issued the said certificate.

16. Mr. Ashish Mishra, learned counsel for respondents submitted that the appellant is educated upto class VIII. He understands the legal implications and knows-fully-well the consequences of not approaching the Court in time. It was before the Trial Court as well as before the appellate Court that the appellant had taken the plea of his ignorance and illiteracy and had said that he did not understand the implications of registered agreement to sale. The Trial Court as well as the appellate Court have rejected this plea of the appellant, meaning thereby that the appellant fully understands the implications of not approaching the Court in time and the consequences of inordinate delay in filing the instant appeal.

17. Mr. Ashish Mishra, learned counsel for respondents also submitted that even as per own averment of the appellant as given in the affidavit filed in support of application for condonation of delay, the appellant had approached his counsel for filing of appeal and had got the appeal prepared in the month of January, 2007, however, the said appeal was filed on 08.02.2008 i.e. after more than 13 months. It is submitted that the delay in filing the appeal is to be explained on day to day basis. The appellant has not given any reason for not filing the appeal, although it was prepared in January, 2007.

18. In support of his submissions, Mr. Ashish Mishra, learned counsel for respondents relies on the judgment of this Court in the case of **Sita Ram Vs. Sri Dhar and Others; [2006 (24) LCD 1239].**

19. I have considered the submissions made by the parties' counsel and gone through the records.

20. There is no denying the fact that the appeal has been filed with reported delay of more than 11 years, 07 months and odd as on the date of filing of appeal i.e. 08.02.2008. The second appeal has been filed by the appellant-defendant who has lost in both the Courts below.

21. The suit for specific performance filed by respondents-plaintiffs was decreed vide judgment and decree dated 09.01.1995. The first appeal i.e. Civil Misc. Appeal No. 62 of 1995 preferred by the present appellant was dismissed vide impugned judgment and order dated 29.2.1996.

22. It is to be noted that the plaintiff thereafter had filed execution case on 10.2.1998. The appellant had put in appearance in the said case and contested the said case. The appearance was put by the appellant in the said case in the year 2006.

23. As per the appellant himself he had been continuously under medical treatment during the period 29.2.1996 to 30.6.2006. It appears that after 30.6.2006, the appellant had become fit enough to contest the aforesaid execution case and had put in appearance in the said case to contest the same.

24. Learned counsel for appellant has failed to explain as to why the appellant did not approach this Court for filing the second appeal immediately after June, 2006. It is hard to believe that the appellant on the one hand was fit enough to contest the execution case by putting his appearance there but on the other hand was not fit enough to file the instant appeal in the year 2006.

25. As per own averments of the appellant, as given in paragraphs 6 & 7 to affidavit filed in support of application for condonation of delay, he had contacted his Advocate, namely, Mr. D.C. Tiwari with relevant documents and on his advice had got the second appeal prepared in the last week of January, 2007.

26. It is to be noted that the appeal was ultimately filed on 08.02.2008. There is no explanation as to why the appeal was not filed after it was prepared in January, 2007. The delay in approaching the Court is required to be explained on day to day basis.

27. The Court time and again has held that the Court shall be conscious in condoning the delay, it shall be condoned only when there are sufficient cause or proper reason to condone the delay, it cannot be condoned in a cursory manner.

28. In the case in hand, the appellant has approached the Court after more than 11 years and 07 months.

29. So far as the contention of learned counsel for appellant that the appellant is a victim of fraud played by his relative who had made him believe that he is looking after his interest and doing necessary pairvi in his case is concerned, suffice is to mention that the first appeal filed by the appellant was dismissed on 29.2.1996. The appellant had fallen sick thereafter, however, the appellant had put in appearance in execution case in July, 2006, but he did not approach this Court and file the instant appeal at that time, as such, it is hard to believe that the appellant who is educated upto class VIII was persuaded by anyone not to file the appeal in time.

30. So far as the judgments cited by learned counsel for appellant are

concerned, in the case of **Board of Control for Cricket in India and Another (supra)**, the Apex Court had the occasion to consider the meaning of 'sufficient reason'. It has been held by the Apex Court that 'sufficient reason' would dependent upon the facts and circumstances of the case. The word 'sufficient reason' covers even the misconception of fact or law by the Court or even an Advocate.

31. In the present case, I do not find any sufficient reason to condone the delay, as such, I am of the view that the judgment cited by the learned counsel for appellant is of no help to him.

32. In the case of **State of Jharkhand & Ors. (supra)**, the Apex Court has held that while considering the application for condonation of delay the Court shall not go into the merits of the case.

33. There is no dispute to the said proposition of law.

34. In the case of **N. Balakrishnan (supra),** the Apex Court has observed that the Court should adopt lenient view while considering the condonation of delay. The effort should be to provide an opportunity to the persons concerned to contest the case on merit. It has been observed by the Apex Court that if the explanation does not smack of mala fides or does not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. The observations made in this regard in paragraph 13 on reproduction read as under:

"13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or does not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning the delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss"

35. In the present case, the appeal has been filed beyond the period of 11 years 07 months and 07 days. Learned counsel for appellant has failed to give any sufficient cause to condone the delay.

36. In case the delay is condoned, it will amount to misuse of process of law, as such, I am of the view that it is not a fit case where the delay shall be condoned.

37. Learned counsel for respondents has cited the judgment of this Court in the case of **Sita Ram (supra)** wherein the Court has observed that it is high time that a changed perspective and attitude is adopted particularly when the Courts are already overburdened with the cases and the time of the Court is unnecessary

wasted in dealing with such cases which have been filed with inordinate delay. The relevant paragraph 6 of the judgment on reproduction reads as under:

"6. Previously Courts did show lenience and latitude in dealing with applications for adjournments and condonation of delay. It is high time a changed perspective and attitude is adopted, since the Courts are already overburdened with cases resulting in inordinate delay in disposal of cases. Those days of condonation of dalliance and delay should now be over and in cases where no sufficient and proper reason is assigned for delay, the Court must adopt the stern attitude and refuse relief. That will also help in transmitting a message that the Court will no more be indulgent and parties beware."

38. Considering the entire facts and circumstances, I am of the considered view that it is not a fit case where the delay in filing the appeal is to be condoned.

39. The second appeal as such is dismissed on the ground of inordinate delay.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2013

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Civil Revision No. 111 of 2013

Hari Krishna Ojha ...Revisionist
Versus
Smt. Leelawati and Ors. ...Opp. Party

Counsel for the Petitioner:
Sri Anil Kumar Srivastava

Counsel for the Respondents:
Sri Atul Mishra, Sri Umeshwar Pratap Pandey
Sri Waqar Hashim

C.P.C. Section-115--Civil Revision against rejection of Review Application-as not maintainable-by accident claim Tribunal-provisions of review contained in order 47 rule 5 not applicable-by review the revisionist sought review of award-fixing liability upon the vehicle owner is in correct-as at the time of accident-offending vehicle was insured-which was not available at that time-held-no procedural irregularity-when document not filed inspite of opportunities can not be basis for review-tribunal rightly rejected-revision itself not maintainable.

Held: Para-29
Since I have come to conclusion that the evidence relied by the revisionist while filing the review petition would amount to re-appreciation of evidence which will touch the merit of the judgment and award passed by the Tribunal, as such, I am of the view that the review petition filed by the revisionist was not maintainable. The learned Tribunal has rightly rejected the review petition.

Case Law discussed:
2010 (28) LCD 689; 2010 AICC 465; 2009(27) LCD 476

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

1. Vakalatnama filed today by Mr. Waqar Hashim, Advocate on behalf of respondent no. 8 in Court is taken on record.

2. Heard Mr. Anil Kumar Srivastava, learned counsel for revisionist, Mr. Umeshwar Pratap Pandey, learned counsel for respondent-claimants, Mr. Atul Misra, learned counsel for respondent-Driver as well as Mr. Waqar Hashim, learned counsel for respondent-Insurance Company and perused the records.

3. The instant civil revision under Section 115 Code of Civil Procedure, 1908 (for short the 'Code') has been filed against the judgment and order dated 31.7.2013 passed by the Motor Accident Claims Tribunal/Special Judge, SC/ST Act, Gonda in Review Petition No. 31 of 2008 (Smt. Leelawati and Others Vs. Hari Krishna Ojha) arising out of the Claim Petition No. 109 of 1996 (Smt. Leelawati Vs. Hari Krishan Ojha and Others).

4. Learned counsel for revisionist submits that the learned Tribunal while deciding the claim petition had wrongly come to conclusion that the vehicle involved in the accident i.e. UP 43/5376 was not insured with the respondent-Insurance Company on the date of occurrence of accident i.e. 18.10.1992. The Tribunal has wrongly fastened the liability to pay the compensation on the revisionist being owner of the vehicle.

5. Submission is that the said offending vehicle was duly insured with the respondent-Insurance Company for the period 07.09.1992 to 06.09.1993. The vehicle was transferred in the name of one Mohd. Sageer Ahmad on 28.4.1993, as such, the insurance policy was issued afresh for the remaining period i.e. 29.4.1993 to 06.09.1993.

6. The learned Tribunal did not take care of the aforesaid fact and did not call for the original records from the Insurance Company to verify the aforesaid fact. The revisionist after receiving the relevant documents to show that the said vehicle was duly insured at the time of occurrence of accident had filed the review petition before the learned Tribunal which was registered as Misc. Case No. 26 of 2008. The learned Tribunal by the impugned order has rejected the review petition holding that there is no error apparent on the face of record and the Court cannot appreciate any new evidence in the review.

7. Submission is that it was the specific case of the revisionist before the Tribunal, while contesting the claim petition, that the vehicle was duly insured and the original policy was surrendered to the Insurance Company after the transfer of vehicle in the name of Mohd. Sageer Ahamd. The burden to prove was on the Insurance Company to show that the vehicle was not insured at the time of occurrence of accident. The Insurance Company in spite of direction of the learned Court below to verify the aforesaid fact had failed to show that the vehicle was not insured at the time of occurrence of accident and, as such, adverse inference was required to be drawn against the Insurance Company, however, the learned Tribunal has committed gross illegality in rejecting the review petition on the ground that since no evidence was produced by the claimants or the owner of the vehicle to establish that the vehicle was duly insured at the time of occurrence of accident, as such, there is no error apparent on the face of order of the award.

8. Learned counsel for the revisionist relying on Order XLVII Rule 1 of the Code submitted that it is the inherent power of the Tribunal to make necessary correction in the judgment and award, in case on the basis of discovery of new fact or evidence or matter the Court is of the opinion that an error is apparent on record.

9. The revisionist through the review petition had brought on record the cover

note dated 07.09.1992 issued to the revisionist under Right to Information Act by respondent-Insurance Company which clearly goes to establish that the offending vehicle, at the time of occurrence of accident, was duly insured. The learned Tribunal as such was required to make necessary correction in the judgment and award dated 28.8.2008 by allowing the review petition, however, the learned Tribunal has committed gross illegality in rejecting the review petition.

10. In support of his submissions, learned counsel for revisionist relies on the following judgments:

(i) Sandhya Vaish and another Vs. The New India Insurance Company Ltd. and Others; [2010 (28) LCD 689].

(ii)The Oriental Insurance Company Limited Vs. Tasneem Arzoo and another; [2010 AICC 465].

11. Mr. Waqar Hashim, learned counsel for respondent-Insurance Company, on the other hand, has raised objection regarding maintainability of the revision on the ground that there is no statutory power of review provided under the Motor Vehicles Act. The review petition filed by the revisionist was itself not maintainable and, as such, the revision filed against the said order is also not maintainable and is liable to be rejected.

12. It is submitted that in the claim petition the present revisionist was impleaded as one of the respondents being the owner of vehicle. The burden of proof was on the revisionist to establish before the Tribunal that the vehicle was duly insured at the time of occurrence of accident. There was nothing on record before the Tribunal, while deciding the claim petition, that the vehicle was insured at the time of occurrence of accident.

13. The learned Tribunal while deciding the claim petition had framed certain issues including the issue as to whether the vehicle, at the time of occurrence of accident, was duly insured with the respondent-Insurance Company or not. The learned Tribunal while deciding the said issue had come to conclusion that the cover note no. 792009 indicates that the vehicle was insured for the period 29.4.1993 to 06.09.1993 which was issued in the name of Mohd. Sageer Ahmad, s/o Abudl Salam. The accident had taken place on 18.10.1992, as such, the Tribunal had come to conclusion that at the time of occurrence of accident the vehicle was not duly insured as such had held that the liability to pay compensation is on the revisionist being owner of the vehicle.

14. It is submitted by Mr. Waqar Hashim, learned counsel for respondent-Insurance Company that in absence of any statutory power of review the learned Tribunal was not competent to review the judgment and award dated 28.8.2008 on merit. The evidence produced by the revisionist at the time of filing of the review petition would amount to re-appreciation of evidence which, first of all, is not permissible under the power of review and more-so when there is no such statutory power was conferred on the Tribunal.

15. Learned counsel for respondent-Insurance Company also submitted that the Insurance Company has denied the cover note of the policy dated 07.09.1992 which was annexed with the review petition.

16. In support of his submissions, learned counsel for respondent-Insurance Company relies on the Division Bench judgment of this Court in the case of National Insurance Company Ltd. Vs. Smt. Jairani and Others; [2009 (27) LCD 476].

17. I have considered the submission made by the parties' counsel and perused the records.

18. The learned Tribunal vide judgment and award dated 28.8.2008 had allowed the Claim Petition No. 109 of 1996 whereby an amount of Rs. 2,29,500/- was awarded as compensation to the claimants which was to be paid by the present revisionist. The learned Tribunal had held that the offending vehicle at the time of occurrence of accident was not duly insured with the respondent-Insurance Company and the issue in this regard is decided in favour of respondent-Insurance Company.

19. It is the admitted position between the parties that at the time of deciding the claim petition the cover note dated 07.09.1992 of policy no. 002P00719 was not before the Tribunal. The cover note dated 29.4.1993 relating to said policy was only on record.

20. The review petition was filed by the revisionist claiming that the vehicle was duly insured at the time of occurrence of said accident and in this regard cover note dated 07.09.1992 was brought on record through the review petition. The learned Tribunal while passing the impugned order has held that the judgment cannot be reviewed on merit, only any error apparent on record can be corrected. The evidence relied in the review petition could have been submitted before the Tribunal prior to passing of award dated 28.8.2008, in absence of the same, the award cannot be said to be bad, there is no ground to review the award, the application for review is rejected.

21. Learned counsel for revisionist as well as learned counsel for respondent-Insurance Company have argued at length about the maintainability of review petition in the proceedings under Motor Vehicles Act.

22. The question of maintainability of review has come before the Court on a number of occasions. The Court has been of the consistent view that in case there is any procedural error apparent on the face of record or there is any correction relating to arithmetical calculation, typing error or some small mistake occurred in the order, the competent Court has inherent power to correct the same whether there is any statutory provision of the review or not. However, the Court has also been of the view that in absence of any statutory provision of review, the order cannot be reviewed on merit.

23. In the light of aforesaid legal provision, the judgments cited by the parties' counsel are required to be considered.

24. In the case of Sandhya Vaish and another (supra), this Court vide judgment and order dated 26.2.2010 had allowed the civil revision and order passed rejecting the review petition was set aside. In the said case, the learned Tribunal while deciding the claim petition had awarded interest at the rate of 9%, however, the Tribunal had failed to provide as to from which date the said

interest was to be paid. The review petition filed was rejected on the ground that it is not maintainable. The matter came up before the High Court in revision. The High Court while allowing the revision came to conclusion that it was a procedural mistake in the award in not providing the date from which the awarded interest was to be paid which could have been corrected by the Tribunal itself. The relevant paragraphs of the judgment are reproduced as below:

"Therefore, the finding of the Tribunal that the interest could not have been awarded is devoid of merit and baseless and the Tribunal ought to have corrected the omission on its part in failing to award the interest from the date of filing of the claim petition and the interest should have been awarded from the date of filing of the claim petition.

The question of maintainability of the review application cannot be doubted on account of the fact that the Tribunal was not lacking in its power of reviewing its order which resulting into material injustice to the claimants, who happen to be widows, daughter and sons in these cases. The legislature has not specifically prohibited the Claims Tribunal to follow the general procedure prescribed in the Code and when there is no specific prohibition for following the general procedure in an inquiry under Section 168 of the Act and moreso, when the wide discretion is vested in the Claims Tribunals under sub-section (1) of Section 169 of the Act. Court has no hesitation in holding that the Claims Tribunal failed to exercise the jurisdiction vested in it while rejecting the applications for review filed by the revisionists. The Tribunal ought to have considered the settled law in regard to the award of the interest and further it was not deprived of the power to entertain the review as the legislature has empowered the Claims Tribunal with wide power of discretion to follow such procedure as it thinks fit for holding the enquiry under Section 168 of the Act. The view expressed in Sunita Devi Singhania Hospital Trust (supra) compels this Court to take a view that if any application was moved for rectification of mistake, then the same was within the province of the Tribunal to correct the same in order to discharge the function effectively for the purpose of doing justice between the parties.

The review applications, therefore, were very well maintainable before the Tribunal and the Tribunal failed to exercise the jurisdiction vested in it in accordance with law for correcting the said omission.

The revisions are accordingly allowed. The orders dated 01.03.2008 and 19.04.2008 rejecting the review applications are set aside. The revisionists shall be entitled for the interest at the rate of 9% from the date of filing of the claim petitions excluding the period for which the Tribunal had directed that the revisionists shall not be entitled for the interest."

25. In the case of The Oriental Insurance Company Limited Vs. Tasneem Arzoo and another (supra) the Division Bench has held that the Tribunal has not committed any illegality or jurisdictional error in rectifying the patent error or law committed by it in applying the wrong multiplier upon admitted facts. The Motor Accident Claims Tribunal has all the trappings of a Civil Court and has

inherent powers of review its own orders like a civil Court to correct/rectify patent error of fact or of law committed by itself. The relevant paragraphs 6 & 7 of the judgment on reproduction read as under:

"*6. The submission of the learned Counsel for the appellant that by allowing the claimant's application, the claims tribunal has illegally reviewed its earlier judgment on merits without there being any statutory provision of review under the Motor Vehicles Act has no force and is liable to be summarily rejected. Hence the impugned award is not liable to be interfered with on the aforesaid ground. We are satisfied that the claims tribunal has not committed any illegality or jurisdictional error in rectifying the patent error of law committed by it in applying the wrong multiplier upon admitted facts. It has been held by this Court in 1995 (2) T.A.C. 664, Oriental Insurance Company Ltd. V. Fida Ali and others that a Motor Accident Claims Tribunal has all the trappings of a civil Court and has inherent powers of review its own orders like a civil Court to correct/rectify patent error of fact or of law committed by itself.*

7. In the instant case, we are satisfied that the claims tribunal has not reviewed its earlier judgment on merit but has merely rectified a patent error of law committed by itself by applying the wrong multiplier for determining the compensation upon admitted facts and the claims tribunal in the exercise of its inherent power rightly corrected the multiplier."

In the present case, the review petition was filed annexing the documents on the basis of which it was claimed that the offending vehicle was insured at the time of occurrence of accident and the Tribunal has wrongly fastened the liability to pay compensation on the revisionist-owner of the vehicle. In case the Tribunal had to consider the contention raised by the revisionist, it has to re-appreciate the evidence relied by the revisionist which touches the very merit of the case. As such, I am of the view that the Motor Accident Claims Tribunal in absence of any statutory power of review is not competent to review its judgment on merit.

26. In the case of Sandhya Vaish and another (supra) as well as The Oriental Insurance Company Limited Vs. Tasneem Arzoo (supra), the Court has come to conclusion that there is procedural error committed by the Court and the same can be rectified by the Tribunal in exercise of its inherent power. In fact, in the case of Sandhya Vaish and another (supra), the Tribunal had not provided from which date the interest awarded by it was to be paid whereas in the case of The Oriental Insurance Company Limited Vs. Tasneem Arzoo (surpa), the Tribunal had wrongly applied the multiplier for determining the compensation on admitted facts.

27. The Tribunals in exercise of its inherent power are competent to correct the patent error committed by itself, however, that is not the position in the present case as observed above, as such, I am of the view that the judgments cited by the learned counsel for revisionist are of not much help to him.

28. The Division Bench of this Court in the case of National Insurance Company Ltd. Vs. Smt. Jairani and

Others (supra) has discussed in detail the power of review in the proceedings under Motor Vehicles Act and has held that Section 114 as well as Order XLVII Rule 1 of the Code are not applicable to the proceedings held under Motor Vehicles Act. It has been observed by the Division Bench in the said judgment that The Uttar Pradesh Motor Vehicle Rules, 1998 applies only some of the provisions of the Code to the summary proceedings before the Motor Accident Claims Tribunal which does not include Section 114 or Order XLVII Rule 1 of the Code. The relevant paragraphs 12, 13, 14 on reproduction read as under:

"12. If an award is made without deciding the application under Section 170 of the Act it may be bad for omission to deny the right to contest to the insurer which is a vital right. Section 170 of the Act confers a right on the insurance company to file an application if the conditions mentioned in the section are satisfied. It also casts a duty on the tribunal to decide it in accordance with law. If the tribunal has failed to perform its legal duty, the insurance company cannot be deprived of its right to contest on merits. In law, the insurance company cannot apply for review of the award as under the Act power of review had not been conferred on the tribunal. The Uttar Pradesh Motor Vehicle Rules 1998 (in brief the 'Rules') applies only some of the provisions of the Code of Civil Procedure, 1908 to the summary proceedings before the Motor Accident Claims Tribunal. The provision of Rule 221 of the Rules 1998, is extracted below:

221. Code of Civil Procedure to apply in certain cases- The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX; Rules 3 to 10 of Order XII; Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII.

13. Order XLVII of the Code of Civil Procedure 1908 has not been made applicable to the proceedings before the tribunal. The insurance company is rendered remedy less if the application under Section 170 of the Act is not decided. Since review application is not maintainable no other application with whatsoever nomenclature would be maintainable. By Rule 221 of the Rules only limited provisions of the Code of Civil Procedure, 1908 have been applied to the proceedings before the tribunal. Section 114 or Order 47 of the Code of Civil Procedure had not been made made applicable to the proceedings before the tribunal. It is well settled that the right of appeal, revision or review are the creations of statute and no litigant has got an inherent right to prefer appeal, revision or review except if wrangled through fraud or misrepresentation [See United India Insurance Co. Ltd. v. Rajendra Singh and others; 2000 (2) TAC 613 (SC) and Rajendera Kumar and Others v. Rambhai and Others, 2003 (1) TAC 492 (SC)].

14.Therefore, we are of the considered opinion that Section 170 being mandatory and award made by the tribunal without deciding the application would be a nullity and review application or any other application with whatsoever nomenclature, except for correction of clerical or arithmetical errors, would not be maintainable before the tribunal."

29. Since I have come to conclusion that the evidence relied by the revisionist while filing the review petition would amount to re-appreciation of evidence which will touch the merit of the judgment and award passed by the Tribunal, as such, I am of the view that the review petition filed by the revisionist was not maintainable. The learned Tribunal has rightly rejected the review petition.

30. The instant civil revision as such having no force is dismissed.

31. However, the revisionist shall have the right to challenge the judgment and award dated 28.8.2008 passed in Claim Petition No. 109 of 1996 by filing First Appeal From Order before the High Court.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2013

BEFORE
THE HON'BLE KALIMULLAH KHAN, J.

Criminal Misc. Transfer Application No. 117 of 2013.

Surendra Singh & Ors. Applicants
Versus
State of U.P. & Anr. ...Opp. Parties.

Counsel for the Petitioner:
Sri Ajay Kumar Pandey, Sri Satish Trivedi

Counsel for the Respondents:
A.G.A., Sri K.P.S. Yadav, Sri Rajul Bhargava
Sri Yogesh Srivastava

Cr.P.C.-Section 407- Transfer application by accused applicants-on ground in Distt. Firozabad-no counsel of their choice available-almost 5 time case has been transferred from one court to other-lastly transfer order passed by District Session Judge-on behest of informant-although recorded specific finding all the allegation against presiding judge Court No. 9 are vague-even then transferred the trail of four cases from court no. 9 to court no. 1-undisputed that pursuant to direction High Court-all 23 witness of prosecution as well as defence witness recorded by judge Court No. 9 and the statement under section 313 Cr.P.C. recorded who had privilege to watch the demure of witnesses-considering such facts and circumstances-transfer order quashed-Judge court No.9 shall try and decide the cases within 30 days.

Held: Para-16, 17 & 18

16. To my mind, it would be a mockery to the judicial system that a party is given such a latitude to choose Presiding Officer of his own choice and then allow the trial court to proceed with the case.

17. In the totality of the facts and circumstances of the case, this Court appears to be under obligation, judicial as well as supervisory, to see that the session trials in question be disposed of by the available present Presiding Officer, who had got the opportunity of recording the evidence of prosecution and defence witnesses and to see their demeanour. Once the allegations made by the informant in the transfer application was found false, bearing no substance at all, the learned Sessions Judge was not supposed to allow his transfer application and recall the aforesaid session trials from the court of the learned Additional Sessions Judge, Court No. 9, Firozabad and transfer it to the court of the learned Sessions Judge, Court No. 1, Firozabad, who has neither recorded the evidence of prosecution and defence witnesses nor heard the arguments so far.

18. In the result, the transfer order dated 19.02.2013 passed by the learned

Sessions Judge, Firozabad is, hereby, set aside.

(Delivered by Hon'ble Kalimullah Khan, J.)

1. This transfer application has been filed by 12 accused applicants, under section 407 Cr.P.C. to transfer Session Trial No. 753 of 2008 (State v Ashok Dixit & others) connected with Session Trial Nos. 757 of 2008, 758 of 2008 and 759 of 2008 pending before the court of the learned Additional Sessions Judge, Court No. 1, Firozabad to any other court of competent jurisdiction of any adjoining district.

2. Counter and rejoinder affidavits have been exchanged.

3. The grounds for transfer have been taken in the transfer application itself.

4. According to the applicants they are accused in the aforesaid session trials, which were pending in the court of the learned Additional Sessions Judge, Court No. 9, Firozabad, who after recording the evidence of prosecution and defence witnesses, heard the arguments of prosecution and when the date was fixed for final arguments of the accused, first informant, opposite party no. 2, Om Prakash Yadav, filed transfer application before the court of the learned Sessions Judge, Court No. 1, Firozabad to transfer the main Session Trial No. 753 of 2008 from the court of the aforesaid learned Additional Sessions Judge, Court No. 9, Firozabad to any other court of the competent jurisdiction on the ground that he had no faith in the Presiding Officer of the aforesaid court. Comments were called for from the learned Additional Sessions Judge, Court No. 9, Firozabad by the learned Sessions Judge on which the Presiding Officer concerned submitted his report contending that the allegations made by the first informant are false but since the informant claims to have has lost confidence in him, he himself is not inclined to try the aforesaid sessions trials. Since the High Court has already given directions twice for expeditious disposal of the aforesaid trials, preferably within six months and therefore, he had sit tight over the matter and did not allow frivolous and fictitious attempted adjournments made by the parties.

5. Having heard learned counsel for the parties and going through the records, including the comments of the concerned Presiding Officer, the learned Sessions Judge opined that the grounds of the transfer application bear no substance at all and that deserves to be dismissed but considering the unwillingness of the learned Additional Sessions Judge, Court No. 9, Firozabad, he transferred the aforesaid session trials from the court of the concerned Presiding Officer to the court of the learned Sessions Judge, Court No. 1, Firozabad to proceed with the case in accordance with law.

6. Feeling aggrieved, the instant transfer application has been moved by accused applicants on the ground that some of the accused persons are still in jail for about six years, right since the year 2007 and in one way or the other the strategy of the first informant is that the aforesaid accused should languish in jail for indefinite period as pre-trial convict without getting their trials adjudicated in accordance with law and, therefore, he is accustomed to file number of transfer applications, more precisely, six in numbers, one after the other, as pleaded in para 11 of the transfer application. Learned Sessions Judge while allowing

the transfer application of the first informant, has observed in so many words that the grounds taken by the informant in his transfer application are false and lacks substance still he allowed transfer application, as stated above. Since the informant has no faith in any of the courts in the Firozabad judgeship, therefore, the aforesaid sessions trials should be transferred from Firozabad judgeship to the nearby judgeships in Uttar Pradesh. Due to the pressure tactics adopted by opposite party no. 2 and his supporters from the District Bar Association, Firozabad no advocate of the choice of the applicants want to come to defend them, resultantly, the applicants had to engage the services of advocates from another district Agra to appear and argue their case, although, the said advocate also had to face the ire of opposite party no. 2 and advocates of Firzoabad. The session trials had gone to the files of atleast five Additional Sessions Judges in the judgeship of Firozabad on the transfer application made by opposite party no. 2 but in none of those Presiding Officers he reposed confidence. It is noteworthy that evidence of some of the witnesses only have been recorded by the then learned Additional Sessions Judge, Court No. 5 and the evidence of remaining prosecution witnesses and all the defence witnesses have been recorded by the learned Additional Sessions Judge, Court No. 9. The Presiding Officer of the court of the learned Additional Sessions Judge, Court No. 5 has already been transferred to some other Sessions Division.

7. At present only the learned Additional Sessions Judge, Court No. 9, Firozabad is there in the judgeship of Firozabad and all the other Additional Sessions Judges have been transferred from the said judgeship in regular course, therefore, according to them it is in the fitness of things to transfer all the aforesaid session trials to some other judgeship for trial according to law with strict directions to the Presiding Officer of the transferee court to dispose of the session trials within a stipulated time bound frame.

8. In the counter affidavit filed by opposite party no. 2, first informant, he denied that the aforesaid session trials have been transferred six times earlier, from one court to another. It has further been stated that at an earlier occasion, one of the accused applicant namely; Ashok Dixit, having a criminal history of 69 criminal cases, had made Transfer Application No. 777 of 2008 on the ground that there was danger to his life in Firozabad judgeship. He made prayer in that application to transfer the session trials from Firozabad judgeship to some other district but the said transfer application was dismissed on merits by this Court and the trial court at Firozabad was directed to proceed with the matter on day to day basis and conclude the trial, preferably within a period of six months in the year 2011 but till date the trial could not be concluded.

9. Apart from it, accused applicants had earlier filed petition under section 482 Cr.P.C. before this Court and in pursuance of the order passed therein, the first informant produced all the prosecution witnesses on the date fixed and in-as-much 23 prosecution witnesses have been examined, their statements under section 313 Cr.P.C. have been recorded and number of witnesses have been produced and examined in defence. The adjournment applications, on one

pretext or the other, made by the accused persons were rejected by the trial court. Twenty days time was prayed for by the prosecution for preparation of argument but the same was rejected by the same Presiding Officer and the informant had heard that he could not get justice from the said court, therefore, he made transfer application before the learned Sessions Judge, who allowed his transfer application vide order dated 19.02.2012 and thereafter, this transfer application has been filed in this Court by the accused applicants on fictitious and frivolous grounds.

10. The applicants have filed rejoinder affidavit rebutting the pleadings made by the informant in his counter affidavit that he had not filed six transfer applications, one after the other. The details of the transfer applications, nature of proceedings etc; have been mentioned in paragraph 9 of the rejoinder affidavit dated 2nd August 2013. Supplementary rejoinder affidavit has also been filed agitating the fact that informant had made six Transfer Applications earlier and got the Session Trial transferred from one court to other.

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

12. It is not in dispute between the parties that evidence of prosecution witnesses, 23 in numbers, and defence witnesses have already been recorded. Some of the evidence of the aforesaid witnesses were recorded by the learned Additional Sessions Judge, Court No. 5, Firozabad, who has now been transferred from the judgeship of Firozabad to some other judgeship. Rest of the evidence of the prosecution and defence, major in portion, have been recorded by the learned Additional Sessions Judge, Court No. 9, Firozabad. It is also not in dispute that the Presiding Officer of the aforesaid Court No. 9, Firozabad is still presiding over the same court. It is also not in dispute that some of the accused persons are still in jail since the year 2007. This fact is also not disputed that the prosecution has already completed its argument and now the arguments of the applicants were to be advanced but at this stage, the first informant, opposite party no. 2 had filed transfer application before the learned Sessions Judge concerned. Learned counsel for the parties do admit that the said transfer application of the first informant was not allowed by the learned Sessions Judge on the allegations made by him against the Presiding Officer concerned. Learned counsel for the parties further conceded that when the first informant levelled allegations against the learned Presiding Officer of court No. 9, Firozabad and comments were called for from him by the learned Sessions Judge, he expressed his indifference to decide the aforesaid session trials. On one hand there was pressure in the shape of directions from the High Court, at least twice, to decide the session trials in question within six months and on the other hand parties were not co-operating with the Presiding Officer concerned on one pretext or the other.

13. The matter is highly contested. Parties often adopt lingering tactics on one pretext or the other and in such a scenario of facts, it is the common reaction of the Presiding Officer concerned to get rid of such matters, whenever occasion, if any, arises. When a transfer application is made against any Presiding Officer, normally he denies the

allegation and yet in the concluding portion of his comments/reports, in specific words, he expresses his unwillingness to conduct the trial any further. The present comments/report sent by the Presiding Officer to the learned Sessions Judge on the transfer application made by the first informant, opposite party no. 2, is not an exception of the aforesaid general reaction of the Presiding Officers.

14. The scheme and spirit of the Code of Criminal Procedure, 1974 appears to be that one who has started a sessions trial must decide the same in-as-much as in a criminal trial the impression gathered by Presiding Officer about the demeanour of a witness goes a long way and plays a prominent part in deciding the trial.

15. The instant sessions trials are undisputedly part-heard trials of learned Additional Sessions Judge, Court No. 9, Firozabad, who had recorded the evidence of a number of prosecution witnesses and evidence of all the defence witnesses, examined accused persons under section 313 Cr.P.C. and heard the arguments of prosecution and only the arguments of defence was to be heard by him for pronouncement of judgement, therefore, it is in the fitness of things and also the propriety demands that all the aforesaid four trials must be decided by him. His indifference and reluctance to decide the trials-in-question under the circumstances, noted above must be given gobye to ensure justice according to law.

16. To my mind, it would be a mockery to the judicial system that a party is given such a latitude to choose Presiding Officer of his own choice and then allow the trial court to proceed with the case.

17. In the totality of the facts and circumstances of the case, this Court appears to be under obligation, judicial as well as supervisory, to see that the session trials in question be disposed of by the available present Presiding Officer, who had got the opportunity of recording the evidence of prosecution and defence witnesses and to see their demeanour. Once the allegations made by the informant in the transfer application was found false, bearing no substance at all, the learned Sessions Judge was not supposed to allow his transfer application and recall the aforesaid session trials from the court of the learned Additional Sessions Judge, Court No. 9, Firozabad and transfer it to the court of the learned Sessions Judge, Court No. 1, Firozabad, who has neither recorded the evidence of prosecution and defence witnesses nor heard the arguments so far.

18. In the result, the transfer order dated 19.02.2013 passed by the learned Sessions Judge, Firozabad is, hereby, set aside.

19. Sessions Trial No. 753 of 2008 (State v Ashok Dixit & others) connected with Session Trial Nos. 757 of 2008, 758 of 2008 and 759 of 2008 are recalled from the file of the learned Sessions Judge, Court No. 1, Firozabad and transferred to the court of learned Additional Sessions Judge, Court No. 9, Firozabad, who is directed to proceed with the trials strictly in accordance with the provisions contained under Section 309 Cr.P.C. by proceedings day to day and conclude the trial within a period of thirty days from the date of receipt of copy of this order.

Parties are directed to appear thereon 07.10.2013 before the learned trial court. Registry is directed to communicate copy of this order within three days to the learned Sessions Judge concerned as well as to the concerned trial court for compliance of the order in letter and spirit.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2013

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

Criminal Revision No. 364 of 2006

Babloo ...Revisionist

Versus

State of U.P. ...Opp. Party.

Counsel for the Petitioner:
Sri A.K. Dixit

Counsel for the Respondents:
G.A.

Criminal Revision- Claim of juvenile Justice Act under section 22(5)-based upon date of birth on school leaving certificate-ignored-order not sustainable-quashed-with direction of fresh consideration.

Held: Para-13 & 14

13. In the instant case, court below has not considered this aspect regarding the age mentioned in School Leaving Certificate and its evidentiary value and has not given any finding about the same.

14. In view of above discussion and the reasons mentioned above, this criminal revision is liable to be allowed and is hereby by allowed. Impugned order is quashed. The matter is remanded back to the Court below to decide the matter afresh, after giving opportunity to the revisionist to adduce all such evidence which he wants to adduce, within a period of six months.

Case Law discussed:
2013(1) JIC 192; AIR 1965 SC 282; 2002(2) JIC 984(All.)

(Delivered by Hon'ble Arvind Kumar Tripathi(II), J.)

1. This criminal revision has been filed by Babloo challenging the order dated 31.5.2006 passed by Additional Sessions Judge, Sitapur in Sessions Trial No.361/1997(State Vs. Babloo) under Section 307 IPC, P.S.Maholi, District-Sitapur, by which the application of the revisionist under Section 20/49 of Juvenile Justice (Care and Protection of Children Act, 2000) (hereinafter referred as the Act), was rejected and the revisionist was not declared juvenile on the date of occurrence.

2. Heard learned counsel for the revisionist and learned AGA for the State.

3. It was submitted that learned Court below has erred in not believing the School Leaving Certificate of the revisionist which shows date of birth to be 12.6.1979. It was also submitted that learned trial court has wrongly held that this plea was not taken at the time of appearance in the Court so it cannot be taken at the stage of recording of statement under Section 313 Cr.P.C.

4. In the case of Hari Ram Vs. State of Rajasthan and Another 2010 (68) ACC 367 Apex Court has held that plea of juvenile can be raised before any Court at any stage even after final disposal of a case.

"Section 7-A makes provision for a claim of juvenility to be raised before any

Court at any stage, even after final disposal of a case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. The aforesaid provisions were, however, confined to Courts, and proved inadequate as far as the Boards were concerned. Subsequently, in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which is a comprehensive guide as to how the provisions of the Juvenile Justice Act, 2000, are to be implemented, Rule 12 was introduced providing the procedure to be followed by the Courts, the Boards and the Child Welfare Committees for the purpose of determination of age in every case concerning a child or juvenile or a juvenile in conflict with law."

5. In view of above provision and decision of the Apex Court the plea of juvenility can be taken at any stage.

6. So far as, the procedure regarding determination of age is concerned Rule 22(5) of U.P. Juvenile Justice (Care and Protection of Children Rules 2004) being relevant in this case is being reproduced as follows:-

7. Rule 22(5) of the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004, being relevant in this case is being produced as follows:

"22(5) In every case concerning a juvenile or child, the Board shall either obtain-

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age; and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age."

7. According to this provision the birth certificate given by a Corporation or Municipal Authority or a date of birth certificate from the school first attended is relevant.

8. In the Case of Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal, 2013 (1) JIC 192 Supreme Court, the Apex Court has given certain guidelines regarding which are reproduced as below:

"36. Now, we summarise the position which is as under: (i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court. (ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into

the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility. (iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability. (vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised."

9. In the instant case, the revisionist has relied upon School Leaving Certificate issued by junior high school which shows date of birth to be 12.6.79.

10. In the instant case in order to prove the date of birth Principal of 'Adarsh Janta Madhyamik Vidhyalay, Basara, Sitapur' appeared along with the original register. It is note worthy that this scholar register was not filled by this witness.

11. In the case of Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, AIR 1965 Supreme Court 282 the Apex Court has held that :

"An objection was faintly raised by Mr. Agarwal as regards the admissibility of Ex.2 on the ground that the register is not an official record or a public register. It is unnecessary to consider this question as the fact that such an entry was really made in the admission register showing the appellant's date of birth as October 15,1935 has all along been admitted by him. His case is that this was an incorrect statement made at the request of the person who went to get him admitted to the school. The request was made, it is suggested to make him appear two years younger than he really was so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The appellant's case is that once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub-Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of the opinion that the explanation may very well be true and so it will not be proper for the court to base any conclusion about the appellant's age on the entries in these three documents, viz, Ex.2, Ex.8 and Ex.18."

12. In the case of Dharma Chandra Vs. State of U.P. and Anothers 2002 (2) JIC 984 (AII) this court has held that the age given by the parents of the revisionist in the School Register cannot be held to be reliable because basis of the said entries has not been given.

13. In the instant case, court below has not considered this aspect regarding the age mentioned in School Leaving Certificate and its evidentiary value and has not given any finding about the same.

14. In view of above discussion and the reasons mentioned above, this criminal revision is liable to be allowed and is hereby by allowed. Impugned order is quashed. The matter is remanded back to the Court below to decide the matter afresh, after giving opportunity to the revisionist to adduce all such evidence which he wants to adduce, within a period of six months.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2013

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

Criminal Revision No. 441 of 2010

Pawan Kumar ...Revisionist
Versus
State of U.P. and Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Ajai Krishna

Counsel for the Respondents:
G.A., Sri Shafat Ullah Khan

Cr.P.C.-Section-319- summoning of accused-not named in FIR-during trail on basis of examination of P.W. I-challenged on ground unless cross examined completed-can not be considered for exercising power-held-in view of law developed by Apex Court-Trail Court can not wait for cross examination-even on material disclosed in examination-in-chief-can be summoned-provided with clear cut finding-the un-rebutted testimony are sufficient for conviction-in case in hand no such finding recorded-order vitiated-set-a-side.

Held: Para-12 & 14

12. In the case of Rakesh v. State of Haryana (supra) the Apex Court has ruled that "an application under Section 319 Cr.P.C. is maintainable as even without completion of cross examination of a witness. If the court is satisfied on the basis of cross examination in chief of a witness that a person not shown to be an accused appears to have committed an offence".

14. A perusal of above decisions of the Apex Court clearly reveals that before summoning any person as an accused for facing trial under Section 319 Cr.P.C. there must be a finding of the court that the evidence is such that the accused so summoned is, in all likelihood, would be convicted.

Case Law discussed:

2009(13) SCC 608; (2010) 2 SCC (Crl.) 141; (2001) 6 SCC 248-2001 SCC (Crl.); (2000) 3 SCC 262; (2004) 7 SCC 792; (2007) 14 SCC 544.

(Delivered by Hon'ble Arvind Kumar Tripathi (II), J.)

1. This criminal revision has been filed by Pawan Kumar against the order dated 4.10.2010 passed by the learned Additional Sessions Judge, Unnao by which the application of the prosecution under Section 319 Cr.P.C. was allowed.

2. The facts in nut shell are that FIR was lodged by Smt. Sarvari naming Brijpal, Jagdish, Arvind, Sushil and Pawan. After investigation charge sheet was submitted leaving the name of Pawan. After committal of the case PW-1 was examined, but before her cross examination an application under Section 319 Cr.P.C. was moved, which was allowed by the impugned order. Feeling aggrieved, this criminal revision has been filed.

3. It was submitted from the side of the revisionist that the trial court has, on the basis of uncross examined the testimony of PW-1 summoned the revisionist Pawan Kumar, which is not permitted in view of the decision of the Apex Court in the case of Mohd. Safi v. Mohd. Rafiq, (2007) 14 SCC 544. It was also submitted that the court below has not given any finding that unrebutted testimony of the witness is sufficient for conviction of the revisionist. In view of this the order passed by the is wrong.

4. Learned AGA argued that the trial court has passed the order according to the evidence and now, there is no requirement that the order under Section 319 may be passed only after cross examination.

5. Section 319 of the Code of Criminal Procedure reads as under: -

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court

may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

6. In regard to necessity of cross examination of the prosecution witnesses before invoking section 319 Cr.P.C. the Apex Court observed in Hardeep Singh's case that it is, thus, difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' used in sub-section (1) of section 319 of Cr.P.C. would mean evidence which is tested by cross examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person should or should not be added as accused.

7. In the case of Harbhajan Singh & Another v. State of Punjab & another, 2009 (13) SCC 608, a division bench of the Apex Court has held that only because the correctness of a portion of the judgment in the case of Mohd. Shafi (supra) has been doubted by another bench, the same would not mean that we should wait for the decision of the larger bench, particularly when the same instead of assisting the appellants runs counter to their contention. The Division Bench further held that decision of this Court in the case of Mohd. Shafi (supra), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over. The observation of the Apex Court in this regard is reproduced as follows: -

"We would assume that in all cases the court may not wait till cross-examination is over for the purpose of exercising its jurisdiction. In the aforementioned decision, the learned Judges had referred to a judgment of this Court in the case of Rakesh & Anr. v. State of Haryana (2001) 6 SCC 248 wherein it was held that even without cross-examination on the basis of a prima facie material which would enable the Sessions Court to decide whether the power under Section 319 of the Code should be exercised or not stating that at that stage evidence as used in Section 319 of the Code would not mean evidence which is tested by cross-examination.

..... The decision of this Court in the case of Mohd. Shafi (supra), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over." (para 13)

8. A survey of the aforesaid decisions clearly reveals that the power under section 319 Cr.P.C. is an extra ordinary power, which may be used very sparingly only if compelling or cogent reasons exist against the person sought to be summoned. The term 'evidence' used in section 319 Cr.P.C. does not necessarily mean the evidence which is tested by cross examination. The view expressed in the case of Mohd. Shafi (supra) in this regard, has not been subsequently followed by the Apex Court in the cases of Sarabjeet Singh and another v. State of Punjab and another, (2010) 2 SCC (Crl.) 141. The view expressed in the case of Sarabjeet Singh (supra) has also been expressed in the case of Rakesh v. State of Haryana, (2001) 6 SCC 248 = 2001 SCC (Crl.) 1090, Hardeep Singh (supra) and Harbhajan Singh and another (supra), therefore, a summoning order can not be set aside on the ground that the statements of the witnesses relied on by the court for passing the summoning order, have not been subjected to cross examination. It is true that a Division Bench of the Apex Court in Hardeep Singh's (supra) has referred the questions specified in paragraph 11 of this judgment to a Larger Bench but another Division Bench of the Apex Court in Harbhajan Singh's (supra) has observed that the same would not mean that we should wait the decision of the Larger Bench. The accused sought to be summoned, has no right to be heard on the application under section 319 Cr.P.C., therefore, he has no right to cross-examine the witnesses being examined for the purpose of section 319 Cr.P.C. The accused already facing the trial may or may not like to make cross-examination of the witnesses in regard to the complicity of the person sought to be summoned. Sometimes such accused may act even contrary to the interest of such persons. However, the court may, in its discretion, allow the accused already facing the trial to cross examine the witness or witnesses in relation to the complicity of the person sought to be summoned so as to enable it to render a just and proper order under section 319 Cr.P.C. In this view of the matter, there is no compulsion to get part or full cross-examination of the witnesses done before passing a summoning order under section 319 Cr.P.C. In appropriate cases if the complicity of a person not facing the trial and is not before the court as accused, comes in light in the statement of a witness, it is also open to the court to put relevant questions to the witness to ascertain prima facie correctness of the statement regarding complicity of that person. The Trial Judges and Magistrates have to play pivotal roles in the matter and should not act mere as silent spectators. Therefore, the summoning order under section 319 Cr.P.C. can not be quashed only on the ground that the witnesses have not been cross examined.

9. In para 11 of the case of Michael Machado v. CBI, (2000) 3 SCC 262 considering the basic requirement of Section 319 Cr.P.C. the Apex Court has held that "the basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has

committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects, first is that the other person has committed an offence, second is that for such offence that other person could as well be tried along with the already arraigned accused".

10. Highlighting the underlying object of the provision, the Apex Court proceeded to state in para 12 that "But even then, what is conferred on the court is only a discretion as could be discerned from the words 'the court may proceed against such person'. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons".

11. In the case of Krishnappa v. State of Karnataka, (2004) 7 SCC 792 the Apex Court ruled that power to summon an accused is an extraordinary power conferred upon the court, and it should be used very sparingly, and only if the compelling reasons exist for taking cognizance against the person other than the accused.

12. In the case of Rakesh v. State of Haryana (supra) the Apex Court has ruled that "an application under Section 319 Cr.P.C. is maintainable as even without completion of cross examination of a witness. If the court is satisfied on the basis of cross examination in chief of a witness that a person not shown to be an accused appears to have committed an offence".

13. In the case of Mohd. Safi v. Mohd. Rafiq, (2007) 14 SCC 544 the Apex Court has further held as under: -

"The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. If he though that the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same." (para 12)

14. A perusal of above decisions of the Apex Court clearly reveals that before summoning any person as an accused for facing trial under Section 319 Cr.P.C. there must be a finding of the court that the evidence is such that the accused so summoned is, in all likelihood, would be convicted.

15. From the above discussions, it is clear that in the absence of any clear cut finding of the trial court that the unrebutted testimony of PW-1 is sufficient to convict the revisionist, the order is vitiated.

16. In view of the above, this revision is liable to be allowed, and is hereby allowed. The order dated 4.10.2010 is set aside. The matter is remanded back to the trial court for deciding afresh the application under Section 319 Cr.P.C. in the light of the Apex Court decisions mentioned above.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2013

BEFORE
THE HON'BLE BHARAT BHUSHAN, J.

Criminal Revision No. 446 of 2011

Padam Gupta ...Petitioner
Versus
State of U.P. and Anr. ...Respondents

Counsel for the Petitioner:
Sri J.P. Pandey, Sri Saurabh Pathak

Counsel for the Respondents:
A.G.A., Sri B.M. Singh
Sri M.B. Singh, Sri Sudhanshu Kumar Singh

Criminal Revision-Against summoning order-Magistrate after recording statement under section 200 and 202 passed impugned order-offence u/s 138 of N.I. Act-without ascertaining the correct fact-revisionist neither possess any accommodation nor had occasion to issue cheque-in absence of prospective accused-Magistrate require to ensure precise and fair enquiry-impugned order not reflect participation of revisionist before the Magistrate impugned summoning order quashed.

Held: Para-21
Thus, in view of the aforesaid legal position, it is incumbent upon Magistrates to ensure that the judicial process should not be an instrument of needless harassment. In complaint cases no one is present to watch the interest of prospective accused at initial stage. Therefore, it is duty of the Magistrates to ensure precise and fair enquiry in order to arrive at reasonable conclusion. His energetic participation at initial stage is required in order to obviate or reduce false implications. Impugned order does not reflect required participation by the Magistrate before summoning the revisionist to face the trial for the offence under Section 138 of the N.I. Act.

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

1. This criminal revision is directed against the order dated 26.10.2010 passed by learned Addl. Chief Judicial Magistrate Ist, Firozabad in Criminal Complaint Case No. 4251 of 2010 (Surendra Kumar Jain Vs Padam Gupta) under Section 138 of Negotiable Instruments Act 1881 (in short N.I. Act), P.S. Tundla, District Firozabad.

2. The facts of the case are that opposite party no. 2/complainant lodged a criminal complaint under Section 138 of N. I. Act in the court of learned ACJM Ist, Firozabad alleging therein that he was tenant of a shop in a market situated at Tundla Crossing, belonging to the father of revisionist. It is alleged that some portion of the market was demolished on account of road widening and constructions of four lane road by the National Highway Authority. Revisionist asked the complainant for vacating the said shop, promising to restore back the shop after reconstruction. It is also alleged that the complainant was also paid Rs. 1,50,000/- as compensation for the period of closure of the shop. The revisionist is said to have drawn a cheque under his signature being Cheque No. 622350 dated 20.6.2010 for Rs. 1,50,000/- in favour of the complainant payable at SBI Branch

Tundla, District Firozabad. When the complainant presented the said cheque in his account No. 13652191003175 in Oriental Bank of Commerce Branch at Tundla, the same was returned to the complainant on 21.7.2010 by the said bank with an endorsement of 'insufficient funds'. It is further alleged that the complainant sent a statutory notice through his advocate on 30.7.2010 but the revisionist did not pay Rs. 1,50,000/-.

3. Learned Magistrate after recording the statement of the complainant under Section 200 Cr.P.C. and his witnesses under Section 202 Cr.P.C summoned the revisionist vide order dated 26.10.2010 to face the trial for the offence under Section 138 Negotiable Instruments Act, 1988. It is against this order, present revision has been filed.

4. Learned counsel for the revisionist has challenged the impugned summoning order on the ground that the cheque in question was never issued by the revisionist to the complainant. Revisionist did not have legally enforceable debt or other liability towards complainant/opposite party no. 2 and the present criminal proceeding has been launched with an ulterior motive for wreaking vengeance due to personal grudge.

5. It is further submitted by the learned counsel for the revisionist that the revisionist runs a Saving Bank Account No. 01170005721 in State Bank of India, Agriculture Development Branch, Tundla in District Firozabad and for operating this account the Bank had issued a cheque book bearing serial No. SBI00/329-622341 to 622360 but the said cheque book containing cheques from serial No. 622349 to 622360 was lost on 31.3.2010 while he was going to the Bank from his house and written information in this regard was given at Police Station Tundla, District Firozabad on 31.3.2010 as well as to the Branch manager, SBI (ADB) Branch Tundla on 21.6.2010 with a request not to make any payment in respect of those cheques.

6. It is also submitted by learned counsel for the revisionist that the said lost cheque book was apparently found by the complainant and by misusing the same he presented the disputed cheque on 28.6.2010 in the revisionist's bank. He submits that the revisionist does not own any market complex or the disputed shop. He has submitted that the essential ingredients of section 138 of N.I. Act are lacking and hence the impugned summoning order is liable to be quashed.

7. Refuting the aforesaid submission of learned counsel for the revisionist, it is contended by learned counsel for the complainant that the impugned order is just and proper and there is no illegality, irregularity or perversity in the impugned order. It is further submitted by learned counsel for the opposite party no. 2 that complainant/opposite party no. 2 is the tenant in the market of the revisionist's father namely Sri Bodhanand since 1997 but due to his old age and infirmity the revisionist was acting as care taker and manager of the market. He further submits that some portion of the market was demolished by the National Highways Authority of India for the purposes of widening and constructing the four lane road in the year 2005 and the National Highways Authority has accepted the complainant/opposite party no. 2 as a tenant of a shop in the market

vide its order dated 27.1.2006. It is further submitted by learned counsel for the complainant that the opposite party no. 2/complainant filed an injunction suit against the father of the revisionist in the year 2006 being Original Suit No. 412 of 2006 when the assurance of the father of the revisionist that subsequent to the renovation and repairing of the market, he will be allotted a shop was not fulfilled.

8. Heard Sri Saurabha Pathak, Advocate, holding brief for Sri J.P. Pandey, learned counsel for the revisionist, Sri Sudhanshu Kumar Singh, learned counsel for the opposite party no. 2 and learned AGA for the State and have also perused the material on record.

9. Before coming to the merits of the case, it would be relevant to quote the provision of Section 138 of Negotiable Instruments Act, which deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon, reads as follows: -

"138. Dishonour of cheque for insufficiency, etc, of funds in the account - Where any cheque drawn by a person on account maintained by him with a banker for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an arrangement made with the bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with a fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

10. Perusal of aforesaid legal provision contemplates that section 138 creates an offence for which the mental elements are not necessary. It is enough if a cheque is drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for discharge in whole or in part, of any debt or other liability due.

11. From reading of the aforesaid, the main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of

money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

12. The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, the Court is not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability.

13. Coming back to the facts of the present criminal revision, it is not in dispute that the building was constructed at Tundla Chauraha by the father of the revisionist in which the opposite party no. 2 was admitted as tenant. Tenancy of the shop in the market by the complainant/opposite party no. 2 was also accepted by the National Highways Authority. Said building was demolished by the National Highway Authority of India for widening of the road and after demolition of the said market the Highway Authority under the rehabilitation Scheme had offered compensation to the owner of the market which was accepted by the father of the revisionist and the Highway Authorities had also sanctioned rent allowances to the tenants of the market including the complainant/opposite party no. 2 as is evident from annexure no. 2 to the counter affidavit.

14. Complaint discloses that the cheque was issued by the revisionist as compensation for the loss sustained by the complainant on account of destruction of the the rented shop by the National Highway Authority whereas the revisionist claims that the cheque book in question was misplaced on 31.03.2010 while he was going to the Bank from his house and the same has been misused by the complainant. Revisionist has submitted that he informed the police about the loss on 31.3.2010 itself almost eighty days prior to the date of issuance of the cheque. Information was also sent to the concerned bank on 21.6.2010. However, the complainant by misusing the cheque in question dated 20.6.2010 presented the same in the Bank but the same was not honoured and returned with an endorsement of 'insufficient funds' on 21.7.2010.

15. In the rejoinder affidavit, it is stated that the revisionist had no concern with the disputed shop. Said building was constructed by the father of the revisionist. Complainant/opposite party no. 2 was admitted as tenant by the father of the revisionist. This building was completely demolished by the National Highway Authority for widening of National Highway on 4.10.2007. Since then the disputed shop is not in existence

therefore the complainant/opposite party no. 2 is no longer tenant of his father since 4.10.2007.

16. It is admitted position that if the disputed transaction is ignored then revisionist does not owe any money or has any liability towards the complainant/opposite party no. 2. If disputed transaction is taken into account even then it is apparent that the complainant/opposite party no. 2 was not tenant of revisionist. There was no occasion for him to personally issue the said cheque to the complainant/opposite party no. 2. He did not have any commercial relationship with the complainant/opposite party no. 2. Opposite party no. 2 was the tenant of father of the revisionist. Revisionist had no personal liability towards the tenant. Contents of Original Suit No. 912 of 2006, filed by the tenant/complainant-opposite party no. 2 also makes it clear.

17. Ingredients of Section 138 of N.I. Act presupposes the existence of legally enforceable debt or liability. Unless cheque is issued in discharge of such debt or liability, no offence is made out even if the cheque is returned due to insufficiency of funds.

18. In the facts of the present case, it is apparent that revisionist personally did not have legally enforceable debt or liability towards the complainant/opposite party no. 2. He did not own the disputed shop. Facts of the complaint (Annexure No. 8) do not disclose ingredients of offence under Section138 of N.I. Act against the revisionist.

19. Learned Magistrate should have inquired from the complaint and the evidence both oral and documentary in support thereof and should have come to the conclusion as to whether prima facie case is made out to bring home the accused for the offence as alleged during the course of inquiry as mandated by Apex Court in Pepsi Foods Vs Special Judicial Magistrate, (1997) 8 JT (SC) 705, wherein the Apex Court has held as under:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. "

20. Similarly, in M. N. Ojha Vs Alok Kumar Srivastava, AIR 2010 SC 201, Apex Court held as under:-

"The case on hand is a classic illustration of non application of mind by the learned Magistrate. The learned Magistrate

did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants."

21. Thus, in view of the aforesaid legal position, it is incumbent upon Magistrates to ensure that the judicial process should not be an instrument of needless harassment. In complaint cases no one is present to watch the interest of prospective accused at initial stage. Therefore, it is duty of the Magistrates to ensure precise and fair enquiry in order to arrive at reasonable conclusion. His energetic participation at initial stage is required in order to obviate or reduce false implications. Impugned order does not reflect required participation by the Magistrate before summoning the revisionist to face the trial for the offence under Section 138 of the N.I. Act.

22. In view of above, the criminal revision is allowed. The impugned order dated 26.10.2010 passed by learned Addl. Chief Judicial Magistrate Ist, Firozabad in Criminal Complaint Case No. 4251 of 2010 (Surendra Kumar Jain Vs Padam Gupta) under Section 138 of Negotiable Instruments Act 1881, P.S. Tundla, District Firozabad is hereby quashed.

23. Office is directed to send the copy of the order to learned court below within a fortnight.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2013

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE MAHENDRA DAYAL, J.

Special Appeal (D) No.780 of 2012

State of U.P. ...Appellant
Versus
Sanjeev Kumar Bajpai ...Respondent

Counsel for the Appellant:
C.S.C.

Counsel for the Respondent:
Sri Satya Narain Shukla

High Court Rules-Chapter VIII Rule-5-Special Appeal-84 days delay-without proper explanation-except discussions-from one table to another-held-court should not condone the delay on personal preception and prediction-appeal dismissed on ground of delay itself.

Held: Para-7
On due consideration of rival submissions, we do not find satisfactory explanation to condone the delay. The time taken in the circulation of file from table to table of the officials involved in the process, thus cannot be condoned. It appears that there has been no sincere effort to challenge the order of the learned Single Judge. Moreover, Hon'ble the Apex Court in the case of Lanka Venkateswarlu's case (supra) has held that the courts do not enjoy unlimited and unbridled discretionary powers to condone the delay. The orders of the High Court should not be based on personal perceptions and predilection.

Case Law discussed:
(2011) 4 SCC 363

(Delivered by Hon'ble Uma Nath Singh, J.)

1. We have heard learned counsel for parties and perused the pleadings of special appeal.

2. The appeal arises out of the judgment dated 10.07.2012 passed by

learned Single Judge in Writ Petition No.643 (SS) of 2008, whereby the writ petition was disposed of with certain directions. It appears from the office report that filing of special appeal is barred by 84 days delay. The explanation given for delay as set out in the application is as under:-

"That challenging the judgment and order dated 10.07.2012 the special appeal is being preferred. However, there is some delay in filing the special appeal which is not deliberate and is bonafide and therefore the same is liable to be condoned.

That the copy of the judgment and order dated 10.07.2012 was received in the office of the appellants on 16.07.2012 through a letter of counsel for the petitioner/resondent.

That after receiving the copy of the judgment and order under appeal the same was placed for discussion and on 28.08.2012 the matter was referred to the Law Department.

That on 28.08.2012 the file was returned by the Law Department with a direction that an officer well versed with the matter be deputed to discuss the issue with it.

That on 11.09.2012 discussion was held with the Special Secretary, Department of Law and Additional Legal Remembrancer. After discussion the file was returned with certain queries.

That on 11.09.2012 itself the queries were replied.

That on 21.09.2012 the permission was granted by the Law Department to file the special appeal.

That thereafter it has taken some time in processing the file and arranging the relevant material and on 04.10.2012 the office of the learned Chief Standing was requested to prepare and prefer the special appeal."

3. In reply thereto, in the objection, the respondent has stated as under:-

"That with regard to para 2 of the affidavit it is stated that the special appeal has been filed with a delay of 2.5 months while assuring the deponent all the while that necessary order for compliance of the judgment and order of the Hon'ble Writ Court will be issued shortly.

That the averment that the delay in filing the special appeal is not deliberate and is bona fide is prima facie untenable from the averments in the affidavit itself as is evident from the following-

(1) After receipt on 16.07.2012 of certified copy of the impugned judgment the same was placed for discussion on 28.08.2012 more than a month after its receipt.

(2) After discussion on 28.08.2012, the second discussion with the special Secretary Law took place after 2 weeks on 11.09.2012.

(3) After grant of permission by the Law Department on 21.09.2012 it took 2 weeks to request the Chief Standing Counsel on 04.10.2012 to prefer the special appeal.

(4) Thereafter it took more than 3 weeks to file the instant special appeal.

(5) The affidavit does not give any, leave alone a valid, reason for the inordinate delays at (1) to (4) above. Evidently, there is no explanation for the delay at various stages.

That in the absence of any, leave alone satisfactory, justification for the repeated delays at various stages the prayer for condonation of delay in filing

the special appeal is liable to be rejected in terms of the law laid down on the subjection by the Apex Court to the effect that each days delay has to be explained, as held in the following cases-

(i) AIR 1962 SC 361 (para 12)
(ii) AIR 1998 SC 2276
(iii) AIR 2011 SC 1199

That even otherwise, the application for condonation of delay is liable to be rejected as the appellant has no case on merits also and the special appeal appears to have been filed only to evade compliance of the judgment of the Hon'ble Writ Court for the second time.

That in this connection it is also relevant that once the proceedings for contempt of non-compliance the order of this Hon'ble Court were deffered till the disposal of the special appeal no.146 of 2005 against the judgment in the deponent's earlier W.P. No.1920 (SS) of 2001, the appellants herein never bothered to take any step for the disposal of the said special appeal. Entertaining this belated special appeal is likely to deprive the deponent fruits of the 11 years old litigation. The application for condonation of unwarranted delay in filing the instant special appeal is liable to be rejected for this reason also."

4. In rejoinder thereto, the appellant-State has made the following averments which reads as :-

"That in reply to the averments made in paragraph 3 of the counter affidavit it is stated that the respondent is trying to delay the disposal of the instant appeal as when the matter was taken up 12.03.2013, the counsel for the respondent did not appear at the time to hearing and this Hon'ble Court after hearing the counsel for the appellants was pleased to issue notice to the respondent.

That the contents of paragraphs 4 to 7 of the counter affidavit as stated are denied and in reply thereto it is stated that the delay in filing the appeal cannot in the manner be said to be unexplained. In this regard it is further stated here that the explanation has been given in the affidavit filed in support of the application for condonation of delay. The hyper technical objections being raised by the respondent are not acceptable.

That the contents of paragraphs 8 to 16 of the counter affidavit are denied being misconceived and misleading. In reply thereto it is stated that Khaliullah Khan was appointed vide Office Memorandum dated 01.06.1988 against a temporary post in pay scale of Rs.330-495 whereas the respondent was engaged in the year 1999 on contract basis on a consolidated salary for the purpose of driving a new vehicle purchased Uttaranchal Development Department. Thus there cannot be any similarity between the nature of engagement of 2 persons, one who was appointed on a post in a pay scale and other appointed on contract basis and not against any post but to drive a vehicle purchased for Uttaranchal Development Department. Khali-Ullah Khan was appointed in the year 1988 whereas the respondent was appointed after 11 years of engagement of Khali Ullah Khan in the year 1999 that too on contract basis."

5. Learned counsel for State submitted that the case of Shri Khali-Ullah Khan is totally different from that of the respondent. Learned counsel submitted that Shri Khali-Ullah Khan was appointed against a post of driver on temporary basis in the pay scale

admissible to the Staff Car driver where as the respondent was appointed on contractual basis. Services of Shri Khali-Ullah Khan were transferred along with the post to State Estate Department pursuant to a decision dated 20.01.2001 when he had been absorbed and confirmed. Moreover, his appointment was against a regular salary head.

6. On the other hand, learned counsel for private respondent, Shri S. N. Shukla contends that this is a second round of litigation against the respondent a class-IV employee and working as a driver. The explanation given for condonation of 84 days' delay is contrary to the ratio of judgment of Hon'ble the Apex Court in the case of Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Ors. (2011) 4 SCC 363. It is also a submission of learned counsel for respondent that filing of appeal, and that too, in second round of litigation by the State against a Class-IV employee who is yet to find a regular source of his daily bread and butter is also contrary to the national litigation policy available on the website of Ministry of Law, Government of India.

7. On due consideration of rival submissions, we do not find satisfactory explanation to condone the delay. The time taken in the circulation of file from table to table of the officials involved in the process, thus cannot be condoned. It appears that there has been no sincere effort to challenge the order of the learned Single Judge. Moreover, Hon'ble the Apex Court in the case of Lanka Venkateswarlu's case (supra) has held that the courts do not enjoy unlimited and unbridled discretionary powers to condone the delay. The orders of the High Court should not be based on personal perceptions and predilection. The National Litigation Policy of Government of India said to be available on the website of Ministry of Law also does not support the filing of appeals in service matters where the case pertains to an individual grievance without any major financial consequences. The policy statement, as referred to herein above, is also re-produced:-

"The following are the excerpts the National Litigation Policy available on the website of Ministry of Law:

Given that Tribunalisation is meant to remove the loads from Courts, challenge to orders of Tribunals should be exception and not a matter of routine.

In Service Matters, no appeal will be filed in cases where

(a) the matter pertains to an individual grievance without any major repercussion

(b) the matter pertains to a case of pension or retirement benefits without involving any principle and without setting any precedent or financial implications.

Further proceedings will not be filed in service matters because the order of the Administrative Tribunal affects a number of employees. Appeals will not be filed to espouse the cause of one section of employees against another.

Proceedings will be filed challenging orders of Administrative Tribunals only if

(a) There is a clear error of record and the finding has been entered against the Government

(b) The judgment of the Tribunal is contrary to a service rule or is

interpretation by a High Court or the Supreme Court

(c) The judgment would impact the working of the administration in terms of morale of the service. The Government is committed to file a petition or

(d) If the judgment will have remaining implications upon order caries or if the judgment involves huge financial claims being made."

8. Thus, in view of all the aforesaid discussions, we are not able to persuade ourselves to accept the explanation for delay in filing the appeal particularly in the teeth of opposition on behalf of the respondent who is said to be on road and has not found any favourable response, despite two rounds of litigation, said to have ended in his favour.

9. The special appeal is thus dismissed on the ground of delay.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.09.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE Dr. SATISH CHANDRA, J.

Writ Petition No.1237 (SB) of 2005

Zila Panchayat Abhiyantran Sangh and Anr. . .Petitioners
Versus
The State of U.P. & Ors. ... Opp. Parties

Counsel for the Petitioner:
Sri U.K. Srivastava , Dr. L.P. Mishra
Sri N.A. Siddiqui

Counsel for the Respondents:
C.S.C , Sri Aarohi Bhalla , Sri Abhishek YadavSri Akhilesh Kalra, Sri G K Singh
Sri Gopal Kumar Srivastava, Sri M.A. Siddiqui,Sri Prashant Chandra, Sri R.C. Pandey, Sri Ramesh Chandra Pandey, Sri Ramesh Pandey

Constitution of India, Art. 226-Writ petition-public interest litigation-in service matter P.I.L. not maintainable-writ petition even by Registered or unregistered Association-without resolution of members-can not be filed-so in case of dismissal of petition could have binding effect upon those members-nor the members unable to approach Individually by reason of poverty, disability on economically, disadvantageous position-nor a case where fundamental right of members of association effected-held-petition not maintainable.

Held: Para-22
In view of the aforesaid facts and the proposition of law laid down in Umesh Chandra Vinod Kumar's case [supra] it can safely be held that the writ petition at the instance of an association is not maintianable where the association itself is not affected by any order. In other words, the members of such association may be affected by an order and may have common grievance, but for the purpose of enforcing the rights of the members, writ petition at the instance of such association is not maintainable. Therefore, the petitioner-Association has no locus standi to file this writ petition.

Case Law discussed:
Umesh Chand Vinod Kumar Vs. Krishi Utpadan Mandi Samiti and Ors.; (2011)5 SCC 464; 1968 AWR 844; (2007)5 SCC 580; (2006) 10 SCC 214.

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

1. Heard Mr.Umesh Kumar Srivastava, learned Counsel for the Zila Panchayat Abhiyantran Sangh, Mr.N.A. Siddiqui, learned Counsel for Zila Panchayat and Mr.Aarohi Bhalla, learned

Counsel for private respondent in writ petition no. 1237(SB) of 2005 and petitioner in the second writ petition.

2. The Zila Panchayat Abhiyantran Sangh [in short referred to as 'Association'] and a private individual has filed a writ petition No.1237 (SB) of 2005 challenging the merger order dated 28.4.2005 passed by the State Government, whereby services of opposite party No.4/Pradeep Kumar, a Junior Engineer of Rural Engineering Services, were merged on the post of Abhiyanta in Zila Panchayat Services, whereas Pradeep Kumar has filed a writ petition No.115 (SB) of 2008 aggrieved by the order of repatriation dated 16.1.2008 to his parent department on the ground that his lien in the parent department has already come to an end, vide order dated 30.6.2005, contained in Annexure No.5 to the writ petition and it will amount to ouster from service.

3. It has been submitted by the Counsel for the petitioners appearing in writ petition no. 1237 of 2005 (SB) that the Association comprises of Junior Engineers and Engineers working in various Zila Panchayats of the State of U.P. alongwith one Ameer Chand Dubey, the petitioner no.2, who is a senior-most Junior Engineer aspiring for promotion on the post of Engineer in Zila Panchayat. The Association is a recognized Association and it is claimed that the association has statutory status to espouse the cause of its members, who are Junior Engineers and Engineers working in the Zila Panchayat of the State.

4. The main thrust of the learned Counsel for the petitioner is that Pradeep Kumar, who was working on the post of Junior Engineer (Non-Gazetted) in Rural Engineering Services, U.P., was initially brought on deputation in Zila Panchayat, Gautam Budh Nagar, vide Government Order dated 2.1.2002 for a period of two years, which was to expire on 2.1.2004 but just after one year on 7.2.2003, the private respondent moved an application for merger of his services in Zila Panchayat, on which the impugned order has been passed. The impugned order is purported to have been passed under Section 43(4)(b) of the Act, which has no application to the facts of the present case. According to petitioners, there is no provision in the Statutory Service Rules or in the Act for appointment of a Government Servant on any post of Centralized Cadre in the Zila Panchayat on deputation beyond a period of five years as well as for absorption of such Government Servant on such post.

5. Elaborating the arguments, it has been submitted that the service conditions of Engineer in Zila Panchayat are governed by the provisions of U.P. Zila Panchayat (Central Transferable Cadre) Rules, 1966 [for short it has been referred to as Rules]. Various posts covered by the aforesaid Rules have been included in the Centralized Cadre of which the Appointing Authority is the State Government. Recruitment to the post of Engineer in a Zila Panchayat is made from (i) 50% by means of direct recruitment and (ii) 50% by means of promotion from lower cadre of Junior Engineers. Rule 14 of the Rules provides about the procedure for direct recruitment on the post of Engineer through Public Service Commission, while Rule 27 of the Rules provides about the procedure for making promotion.

6. The State Government in exercise of the powers conferred upon him under

Sections 40, 44 and 46 (2) read with Section 237 of the Act framed U.P. Zila Panchayat (Central Transferable Cadre) (Seventh Amendment) Rules, 2001 [hereinafter referred to as '2001 Rules'], which were enforced through notification of the State Government dated 15.9.2001, whereby Rule 14-A was added. According to petitioners, perusal of the Rules, makes it abundantly clear that till the amendment of Rules, there was no provision either in the Act or in the Rules for appointment of a Government Servant in the Zila Panchayat on deputation and therefore, Rule 14-A was added in the Rules to enable the State Government to exercise the aforesaid power for the first time. The impugned order is not tenable for the reason that the Government Orders cannot supersede the provisions of statutory Rules.

7. Lastly, it has been submitted that merger of private respondent has marred the promotion of petitioner no.2, who is a senior most Junior Engineer in the department. Thus, the action of the official respondents is not only arbitrary and unjust by is violative of Article 14 of the Constitution.

8. On behalf of Zila Panchayat, it has been submitted that in the year 1999, the Chairman of Zila Panchayat required an Engineer to execute the projects which were given by the District Rural Development Agency to Zila Panchayat, Gautambudh Nagar, which were earlier being carried out by Rural Engineering Services Department and in this regard the Chief Development Officer, Gautambudh Nagar was requested in view of the provisions of Section 41(1)(b) of the Act. The Chief Development Officer, Gautambudh Nagar recommended the name of Pradeep Kumar [opposite party no.4], who was a degree holder attached as Engineer in Zila Panchayat from 1999 under the provisions of the Act with the project, which was previously being carried out by the Rural Engineering Services Department. The private respondent was sent on deputation as an Engineer to Zila Panchayat Department to carry out the project, which were entrusted with the Zila Panchayat under the same provisions of the Act under which the private respondent was attached in the year 1999. At the time of deputation, the private respondent was Junior Engineer(Gazetted) in the pay scale of Rs. 8000-13500, which was equal to the pay scale of Engineer working in Zila Panchayat Department. In these circumstances, the private respondent was allowed to work on deputation as an Engineer to the Zila Panchayat taking into consideration the equivalence of eligibility.

9. Learned Counsel for the Zila Panchayat next submitted that vide letter dated 4.9.2004 addressed to the State Government, the Chief Development Officer recommended the merger of opposite party no.4 and the State Government vide order dated 28.4.2005, merged the services of private respondent in the department of Zila Panchayat. The said merger of private respondent was under clause 4(b) of Section 43 of U.P.Kshertra Panchayat and Zila Panchayat Adhiniyam. It has also been pointed out that after the merger, the parent department has terminated his lien w.e.f. 28.4.2005 and will be deemed superannuated in his parent department.

10. It has vehemently been contended that while filing the writ

petition, the petitioners have deliberately suppressed the aforesaid material fact of termination of lien which resulted in passing of the interim order dated 21.7.2005 and now, if the order of merger is quashed, it would amount ousting of Pradeep Kumar [opposite party no.4] from services as his lien in the parent department had already come to an end.

11. In the last, it has been submitted by the learned Counsel that the order dated 16.1.2008 passed by the State Government has been assailed in Writ Petition No. 115(SB) of 2008 filed by the private respondent in which an ad interim order dated 25.1.2008 was passed and in compliance thereof, the private respondent is continuing in service in the Panchayat Department and is being paid regular salary and other benefits as admissible to the employees of Panchayat Department.

12. Mr.Aarohi Bhalla, learned Counsel for Pradeep Kumar has raised a preliminary objection that the writ petition is not maintainable on behalf of the Association in view of the law laid down by the Apex Court as well as Full Bench of this Court. The Full Bench of this Court in Civil Misc. Writ Petition No.13367 of 1981, Umesh Chand Vinod Kumar versus Krishi Utpadan Mandi Samiti and others has clearly held that the writ petition filed by an Association of persons registered or unregistered will be maintainable only if (i) its members are individually unable to approach Court by reason of paucity or disability, etc. (ii) the writ petition involves question of public injury leading to Public Interest Litigation and the Association has a special interest in the subject matter. (iii) where the Rules or Regulations of the Association especially authorize it to take legal proceedings on behalf of its Members; so that any order passed by the Court in such proceedings will be binding on the members. It has been further observed that a registered or unregistered Association cannot maintain a writ petition under Article 226 of the Constitution of India for the enforcement or protection of the rights of its members, as distinguished from the enforcement of its own rights.

13. Of late, the Apex Court, in the case of Bhola Nath Mukherjee and others versus R. K. Mission Centenary College and others [(2011) 5 SCC 464], held that when a particular person is the object and target of the petition styled as Public Interest Litigation, the Court has to be careful to see whether the attack in guise of public interest is really intended to achieve a private vendetta, personal grouse or some other mala fide object since in service matters, the Public Interest Litigations cannot be filed.

14. It has been further observed that the Hon'ble Supreme Court has repeatedly disapproved the tendency of disgruntled employees disguising pure and simple service dispute as Public Interest Litigation. Here, in the present case also, Pradeep Kumar has been targeted on account of malice of opposite party No.2, who was Secretary of the Association at the time of filing of the petition. Apart from this, from the perusal of the writ petition, it will be clear that the grievance of the petitioners in that writ petition, as mentioned in paras 19 and 25, the same is only for promotion of the Junior Engineers on the post of Engineers under 50% quota and it will be found that throughout the grievance has been non-

promotion of Junior Engineers to the post of Engineers under 50% quota, whereas the post on which the private respondent has been absorbed is under 'direct quota' against which the petitioners cannot be considered for promotion and therefore, the writ petition is not maintainable and the petitioners cannot be said to be aggrieved persons as has been held by the Apex Court in Ram Singh versus Director of Consolidation [1968 AWR 844] and, therefore, the petitioners have no locus to prefer the writ petition.

15. Since a preliminary objection has been raised that the writ petition filed by the Association is not tenable at law, because the Association has no locus standi and no fundamental right or any other right of the petitioner-Association is violated by the respondents, we have to deal this question first.

16. Having heard learned counsel for both the sides on this preliminary issue and looking to the facts and circumstances of the case and also looking to the main relief, made in writ petition no. 1237(SB) of 2005, it appear that the petitioner-Union is seeking repatriation of private respondent.

17. It appears that the petitioner-Union, who has filed the instant writ petition, has not annexed any resolution of its Members to file the instant writ petition and in absence of such authority, this type of writ petition cannot be preferred by the petitioner-Union, irrespective of the fact, whether it is registered or not, because if the authority is given to the petitioner-Association by its Members, then it will create estoppel on their part to file another writ petition for the very same relief, if this writ petition, preferred by the present petitioner-Association, is dismissed. No such authority has been given by the members of the Association and there is no document to this effect having been annexed alongwith memo of the writ petition.

18. Likewise, learned Counsel for the petitioners is unable to point out before this court that there are Rules or regulations of the Association/Union specifically authorizing it to initiate the legal proceedings on behalf of its Members, so that any order passed by the Court in such proceedings, will be binding on its Members, and therefore, also the petitioner-Association has no locus standi to file this writ petition.

19. Placing reliance on Bhola Nath Mukherjee's case [supra], Counsel for the private respondent has contended that in service matters PIL is not maintainable and the court should be cautious where a particular person is the object and traget of the petition styled as PIL. Looking to the nature of the writ petition, it appears that no Public Interest Litigation at large is involved in this writ petition. The petition is confined for the Members of the petitioner-Association only and that too, for only ousting the private respondent. Thus, the public at large is not interested in the outcome of this writ petition. On the contrary, it is a private interest litigation for some of the members of the petitioner-Association.

20. It further apepars that the Members of the petitioner-Association are working as Junior Engineers or Engineers working in various Zila Panchayats of the State of U.P. and it is not a case of the petitioner-Association that its members

are unable to approach the Court by reason of (a) poverty; (b) Disability; and (c) Socially or Economically disadvantaged position.

21. On the contrary, looking to the facts of the present case, it appears that the Members of the petitioner-Association, who are employees of Zila Panchayats are fully capable to approach the Court to ventilate their grievances.

22. In view of the aforesaid facts and the proposition of law laid down in Umesh Chandra Vinod Kumar's case [supra] it can safely be held that the writ petition at the instance of an association is not maintianable where the association itself is not affected by any order. In other words, the members of such association may be affected by an order and may have common grievance, but for the purpose of enforcing the rights of the members, writ petition at the instance of such association is not maintainable. Therefore, the petitioner-Association has no locus standi to file this writ petition.

23. Even otherwise, we have examined the record minutely and it comes out that the Project of the District Rural Development Agency was being carried out by the Rural Engineering Services Department, was handed over to the Zila Panchayat, Gautam Budh Nagar, in the year 1999 and the private respondent, who was performing the same, was attached as Engineer in the Zila Panchayat Department to perform the duties in the year 1999. As per provisions of Section 41(1)(b) of the U.P.Kshetra Panchayat & Zila Panchayat Adhiniyam, 1961, whenever the work of any Government Office is transferred to a Zila Panchayat by order in writing, require the Zila Panchayat to employ on such posts and on such terms as may be specified in the order either the entire staff of the office of Government connected with that work or such of the servants in that office as may be designated or nominated by the State Government and the services of such staff or servants shall thereupon be deemed to have been placed at the disposal of the Zila Panchayat for the time being.

24. In the backdrop of the aforesaid facts, the private respondent, who fulfills all the conditions and fully eligible as provided in the U.P. Kshetra Panchayat & Zila Panchayat Adhiniyam, 1961 was sent to Zila Panchayat Department, to perform the duties. It may be noted that private respondent was having Bachelor of Engineering Degree (Civil) and was holding the post of Junior Engineer (Gazetted) carrying the pay-scale of Rs. 8000-13500, which is the pay-scale of Engineer in Zila Panchayat Department. Moreover, the pay scale of Rs. 8000-13500 was not available on the post of Junior Engineer at the relevant time. Since the private respondent was sent under the provisions of Section 41(1)(b) of the U.P. Kshetra Panchayat & Zila Panchayat Adhiniyam, 1961 he was absorbed under the provisions of Section 43(4)(b) of the U.P.Kshetra Panchayat & Zila Panchayat Adhiniyam, 1961, which is also the stand of official respondents. It may be noted that Section 43(4)(b) provides that the State Government at any time require a Zila Panchayat to take its own service any such government servant, whose services have been placed at the disposal of the Zila Panchayat under clause(b) of sub-section(1) of Section 41 and who has given his consent in that behalf and upon being so taken in the

services of the Zila Panchayat, such servant shall cease to be government servant and shall become a servant of the Zila Panchayat. It is also to be noted that the deputation order in favour of private respondent was issued on 2.1.2003 but no one raised any voice but only when the order of absorption in Zila Panchayat was issued, the Association has come forward questioning the validity of the same.

25. It is significant to point out that after absorption, the parent department of the private respondent i.e. Rural Engineering Services terminated his lien vide order dated 30.6.2005. In the writ petition filed by the Association, later on, it was not disclosed, which resulted in passing of an ad-interim order in favour of the petitioners and in compliance thereof the State Government passed the order dated 16th January, 2008, which is impugned in writ petition no. 115(SB) of 2008. Counsel for Zila Panchayat has informed us that consequent to the interim order dated 25.1.2008 passed in the writ petition filed by the private respondent, he is continuing in service in the Panchayat Department and is being paid regular salary. Since the appointment and absorption of private respondent in the Zila Panchayat Department is an exceptional appointment in the exceptional circumstances as provided in the Act and as such the same is protected. Our view is strengthened by a decision of the Apex Court rendered in Arun Kumar and others vs. Union of India and others; (2007)5 SCC 580.

26. Even assuming that the assertion of the petitioners has little force and we proceed to quash the order of repatriation, then it will have an effect of ousting the private respondent from service as neither he will be the employee of the Zila Panchayat Department nor he would be accepted by his parent department in view of termination of his lien. Thus equity is in favour of private respondent. We also find force in the submission of Counsel appearing for private respondent that the decision rendered in Gajendra Pal Singh is not applicable in the instant case as in that case the employee was being repatriated to his parent department, against which he filed a writ petition and the writ petition was dismissed holding that he had no case, but in the present case, the 'absorption order' has been passed and his lien in parent department also stood terminated. In these circumstances the ratio of the case is not applicable. It may be noted in the case of Surendra Singh Gaur Verus State of Madhya Pradesh and others; (2006) 10 SCC 214, on which reliance has been placed by the Counsel for the private respondent, the Apex Court has held that once a person has been absorbed in another department and he has lost his 'lien' in the parent department, the parent department cannot be given a direction to take back the employee, whose 'lien' has been terminated.

27. We would also like to observe that in the writ petition, the petitioners have taken a ground that the post of Abhiyanta, is a promotional post for the Junior Engineers working in Zila Panchayat and merger of private respondent on the post of Engineer amounts to defeating the claim of the petitioner no.2 and other Junior Engineers, who are eligible and entitled for promotion on the basis of seniority-cum-merit. There is no dispute to the fact that the post of Engineer in Zila Panchayat is filled in by direct recruitment and through promotion in the ratio of 50:50. The Zila Panchayat in its

counter affidavit has stated in paragraph 5 that the deputation/merger of the private respondent has been made under the quota of direct recruitment for which 50% of the total seats have been reserved and the remaining 50% are to be filled in by way of promotion from amongst the existing employees of Zila Panchayat. Therefore, it is absolutely incorrect to say that merger of private respondent has defeated the claim of petitioner no.2 and other Junior Engineers. Non-considering the claim of petitioner no.2 of similarly situated other Junior Engineers for promotion in their quota by the department is altogether a different cause of action, which is not the subject matter of dispute in the instant writ petition. However, we would like to add that for filing up the vacant post of 'Engineers' in Zila Panchayat, Junior Engineers as well as petitioner no.2 of writ petition no. 1237(SB) of 2005 initiated legal proceedings and matter went upto Hon'ble Supreme Court. Special Leave Petition (Civil) No. 24206 of 2003 filed by Amir Chandra Dubey (petitioner no.2) was disposed of as having become infructuous vide order dated 2.3.2009 as he was given appointment as Officiating Incharge Engineer.

28. For the reasons aforesaid, writ petition no. 1237 (SB) of 2005 is dismissed and writ petition no. 115(SB) of 2008 is allowed. The order dated 16.8.2005 passed by the State Government is hereby quashed and private respondent/petitioner shall be entitled for all consequential benefits attached to the post in question.

29. Parties shall bear their own costs.

APPELLATEJURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2013

BEFORE
THE HON'BLE LAXMI KANT MOHAPATRA, A.C.J.
THE HON'BLE B. AMIT STHALEKAR, J.

Special Appeal No.1270 of 2013

Satya Deo Shakya ...Appellant
Versus
Ajay Kumar Gupta & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.D. Kautilya

Counsel for the Respondents:
C.S.C., Sri Nand Kishore
Sri H.R. Mishra, Sri B.R. J. Pandey

High Court Rules Chapter 8 Rule 5- Section95(1)(g)(III-A)- Removal of village pradan-on allegation of false cost certificate-by exercising quasi judicial power by Distt. Magistrate-interference by Single Judge-whether special Appeal Maintainable? held-'Yes'.

Held: Para-27
Since we are of the view that judgment in Hoti Lal (supra) lays down the correct law and that sub clause (iii-a) of Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 is ultra vires Article 243-O (b) of the Constitution of India, therefore, in our view the order dated 27.8.2011 of the District Magistrate Bijnor impugned in the writ petition no. 56084 of 2011 was wholly without jurisdiction and is a non-est order and, therefore, such an order cannot be said to be a quasi judicial order as the very foundation for exercise of such power by the District Magistrate stood struck down in the judgment of Hoti Lal (supra) which we also approve. Therefore, in our view this special appeal would be maintainable.

U.P. Panchayat Raj Act 1947-Section 95(1)(g)(III-a)Power exercised by Distt. Magistrate-without jurisdiction-provisions of Section 95(1)(g)(iii-a)in contravention of Art. 243-d of constitution-already held ultra virus in

Hoti Lal Case-question referred before larger Bench.

Held Para-24

However, there is an added twist to the case before us. The judgment of Hoti Lal (supra) where the learned single Judge has held sub clause (iiii-a) of Section 95(1)(g) of the Act, 1947 to be ultra vires Article 243-O(b) of the Constitution of India and struck down sub clause (iii-a) as ultra vires Article 243-O(b) of the Constitution of India has not been referred to at all by the Full Bench in the case of Vivekanand (supra) where this Court held that a Pradhan may be removed under section 95(1)(g) of the Act, 1947 even if cessation of financial and administrative powers are not contemplated. Thus the view we have taken upholding the judgment of Hoti Lal (supra) relying upon the provisions of Article 243-O(b) and 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 stands in direct conflict with the decision of the Full Bench in the case of Vivekanand (supra).

Case Law discussed:

2002(3)AWC 1761; 2005(23) LCD 377; (2003) 1 UPLBEC 496; 1985 UPLBEC 484; 2008(4) AWC 3749; 2010(1)ADJ 1.

(Delivered by Hon'ble Laxmi Kant Mohapatra, A.C.J.)

1. This special appeal has been filed by the appellant challenging the order of the learned single Judge dated 7.8.2013 whereby the writ petition no. 56084 of 2011 filed by Ajay Kumar Gupta was allowed and the order passed by the District Magistrate setting aside the election of Ajay Kumar Gupta was set aside and a direction was given that the petitioner would be reinstated as Pradhan for the remainder of his term.

2. Ajay Kumar Gupta respondent no. 1 in the present special appeal was elected as Gram Pradhan of village Hathin, Block Chhibaramau, District Kannauj. He had contested the election as an OBC candidate claiming that he belongs to the Halwai caste. The appellant alongwith some other persons made a complaint to the District Magistrate, Kannauj alleging that Ajay Kumar Gupta was a general candidate and he had contested the election on a forged caste certificate showing himself as belonging to OBC caste. The District Magistrate issued notice on 25.7.2011 to Ajay Kumar Gupta, in response to which Ajay Kumar Gupta submitted his reply and after considering the reply the District Magistrate by his order dated 27.8.2011 passed an order removing Ajay Kumar Gupta from the post of Gram Pradhan of the Gram Panchayat in question. This order was passed by the District Magistrate, Kannauj in exercise of powers under section 95(1)(g) (iii-a) read with section 11-A(2) and section 12(5) of the U.P. Panchayat Raj Act, 1947. Aggrieved by the said order Ajay Kumar Gupta filed writ petition no. 56084 of 2011. The matter was considered by the learned Single Judge and the order dated 27.8.2011 passed by the District Magistrate was set aside on the ground that the District Magistrate had no power under section 95(1)(g) (iii-a) of the U.P. Panchayat Raj Act, 1947 as he has contested the election on a forged caste certificate and his election, therefore, could only be set aside through an election petition. The learned Single Judge relied upon a Single Judge decision of this Court reported in 2002 (3) AWC 1761, Hoti Lal Vs. State of U.P. and another. A further direction was given in the writ petition that the petitioner would be reinstated as Pradhan for the remainder of his term.

3. We have heard Shri S.D. Kautilya, learned counsel appearing for the appellant, who had been impleaded as respondent no. 5 in the writ petition and Shri H.R. Mishra, learned senior counsel assisted by Shri B.R.J. Pandey, learned counsel appearing for the respondent no. 1.

4. It has been submitted by Shri S.D. Kautilya, learned counsel for the appellant that the impugned order passed by the District Magistrate on 27.8.2011 was absolutely correct and did not call for any interference by the writ court since the respondent no. 1 had contested the election of gram Pradhan on a forged certificate showing himself to be belonging to OBC category of Halwai and the order of the District Magistrate was passed under section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 was absolutely correct. Shri S.D. Kautilya has referred to the provisions of section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 and also relied upon a decision of this Court in the case of Radhey Shyam Sharma Vs. State of U.P. and others reported in 2005(23) LCD 377 wherein this Court while considering the order passed by the District Magistrate under section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 has held that the petitioner in that writ petition had contested the election on a false caste certificate of OBC and later it was found that he did not belong to the backward class category and since the appointment had been obtained by fraud and fraud vitiates every action, therefore the order of the District Magistrate did not call for any interference. The said writ petition was dismissed by the learned single Judge.

5. Shri H.R. Mishra, learned senior counsel appearing for the respondent no. 1 in the present appeal controverting the submission of Shri Kautilya, on the other hand, relied upon a decision of a learned single Judge of this Court reported in Hoti Lal (Supra) wherein the learned single Judge has held section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 to be ultra vires Article 243-O of the Constitution of India. The submission is that section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 having been held to be ultra vires Article 243-O of the Constitution of India, the District Magistrate could not have passed the order dated 27.8.2011 removing the respondent no. 1 (petitioner of the writ petition) and the respondent no. 1 could only have been removed through an election petition. Shri H.R. Mishra also raised a preliminary objection that the special appeal is not maintainable inasmuch as the writ petition was filed against the order of the District Magistrate and irrespective of the fact that the order was valid or not, it was nevertheless a quasi judicial power exercised by the District Magistrate and, therefore, the special appeal was not maintainable. Reliance in this regard has been placed upon the following decisions of the Division Bench of this Court in the case of:

Shyam Behari Vs. State of U.P. and others reported in 2005(3) AWC 2189; and

Vajara Yojna Seed Farm, Kalyanpur (M/s) and others Vs. Presiding Officer, Labour Court U.P. Kanpur and another reported in (2003) 1 UPLBEC 496.

6. Having heard the learned counsel for the parties we are of the view that the preliminary objection will be dependent upon the question as to whether the

District Magistrate was competent to pass the order removing the Pradhan in exercise of powers under section 95(1)(g)(iii-a) of the Act, 1947.

7. Section 95 (1)(g) of the U.P. Panchayat Raj Act, 1947 provides for removal of the Pradhan or member of Gram Panchayat or the Joint Committee or Bhumi Prabandhak Samiti or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat. This power under section 95(1) (g) of the U.P. Panchayat Raj Act, 1947 has been conferred upon the State Government in terms of Section 95(1) of the U.P. Panchayat Raj Act, 1947. The power under section 95(1) (g) of the U.P. Panchayat Raj Act, 1947 has been delegated by the State Government to the District Magistrate by Notification No. 1648/31-1-1979-123/97 Lucknow dated 30.4.1997. The ground on which a Pradhan may be removed have been delineated in section 95(1)(g) (i) to (v).

8. For purposes of the present case the other grounds are not relevant except ground no. (iii-a) of the Act, 1947. The section 95(1)(g) empowers the District Magistrate to remove a Pradhan under sub clause (iii-a), which reads as under:

(iii-a) if he "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."

9. In the present case it is not in dispute between the parties that the order removing the respondent no. 1 dated 27.8.2011 was passed by the District Magistrate Kannauj and, therefore, the said power shall be deemed to have been exercised by the competent authority on behalf of the State Government under section 95(1) (g) of the U.P. Panchayat Raj Act, 1947. The question whether such a power is a quasi judicial power has been considered by this Court in two cases reported in 1985 UPLBEC 484 Layak Ram Vs. District Magistrate, Bijnor wherein this Court has held that the power exercised by the District Magistrate is a quasi judicial power. Paragraph 11 and 12 of the said judgment read as under:

"11. proviso (I) to Section 95 (1) of the Act lays down that-

"no action shall be taken under clause (f), clause (g) or clause (h) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action propose.

12. This is in conformity with the principles of natural justice. In Ved Singh Pradhan's case (AIR 1965 Allahabad 370) which arose from an order of removal of Pradhan under Section (6(1) (g) (iii), a Division Bench ruled tht " the principle of natural justice imposed only this obligation upon him (Assistant Sub-Divisional Officer) that he had to give the appellant an opportunity to explain the charge". The principle has undeniably attained new dimensions with the advent of the decisions in Meneka Gandhi (1978 (1) SCC 248) and M.S. Gil (1978 (1) SCC 405. The proceeding that leads to the removal of the Pradhan from office is clearly quasi judicial. The order affects adversely civil rights of the claimant. The authority has to reach his satisfaction on objective consideration of relevant

grounds. There is statutory duty to afford reasonable opportunity of showing cause implying thereby the necessity to record reasons and moreso because an appeal lies to the District Magistrate. But even if the enquiry be classed as administrative in character, the observance of the basis norms of natural justice is Inescapable. A.K. Kraipak v. Union of India, (1969 (2) SCC 262)."

10. In 2008 (4) AWC 3749 Smt. Kamli Devi Vs. State of U.P. and others again this Court has held the power exercised by the District Magistrate under section 95(1) (g) of the U.P. Panchayat Raj Act, 1947 to be a quasi judicial power. Paragraph 8 of the said judgment reads as under:

"8. In the present case, the Court finds that no show cause notice or opportunity of hearing was given to the petitioner by the authority before ceasing the financial and administrative powers. The Pradhan derives his power and status under the Constitution pursuant to the Constitution (73rd Amendment) Act, 1992. The purpose of this enactment was to provide complete autonomy without interference from the State Authorities. The Court further finds that power exercise by the authority under the proviso to Section 95 (1) (g) of the Act is a quasi-judical power, which entails civil consequences and therefore, it becomes all the more necessary that the principles enshrined under Article 14 of the Constitution is given effect to. Consequently, this Court is of the opinion that, a show cause notice and an opportunity of hearing is the minimum requirement to be given to the Pradhan, by the authority, before passing an order ceasing the financial and administrative powers under the proviso to Section 95(1) (g) of the Act. Since that has not been done in the present case, consequently, I direct that till the disposal of the writ petition qua the decision of the larger Bench, the impugned order ceasing the financial and administrative powers of the petitioner, shall remain stayed. It shall, however be open to the authorities to proceed and complete the formal enquiry contemplated under Section 95(1) (g) of the Act read with the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997."

11. However, the learned Single Judge deciding the case of Smt. Kamli Devi (supra) referred the matter to a larger Bench for consideration as to whether prior to passing an order of cessation of financial and administrative powers of a Pradhan opportunity of hearing is necessary or not. The matter was considered by the Full Bench of this Court in the case of Vivekanand Yadav vs. State of U.P. and another reported in 2010 (1) ADJ 1. For purposes of the present case we are not concerned with cessation of financial and administrative powers as contemplated in the proviso to Section 95 (1) of the U.P. Panchayat Raj Act, 1947 but so far as section 95 (1)(g) of the said Act is concerned the Full Bench has held that there can be a proceeding for removal of a Pradhan without ceasing his financial and administrative powers and has further held that though Section 95(1)(g) or its proviso do not contemplate a formal enquiry for removal but in Rule 6 of the U.P. Panchayat Raj (Removal of Pradhan and UP-Pradhan and Members) Enquiries Rules, 1997 a detailed procedure for final enquiry has been framed and, therefore, if these Rules are applicable in cases of

cessation of financial and administrative powers it would also be applicable in a proceedings for removal of a Pradhan where cessation of financial and administrative powers of the Pradhan is not contemplated. Paragraphs 74, 75, 76, 77 and 78 of the said judgment read as under:

"74. In our opinion there can be a proceeding for removal of a pradhan without ceasing his financial and administrative powers.

75. Section 95(1) (g)- or proviso to Section 95(1) empowering removal of a pradhan do not contemplate any preliminary or formal enquiry before removing a pradhan. They only envisage reasonable opportunity to be given before removal. The preliminary enquiry is mandated by the proviso to Section 95(1) ((g) that stipulates cessation of financial and administrative powers during pendency of the removal proceeding. The Enquiry Rules have been framed in pursuance of the same.

76. Section 65(1) (g) or any of the provisos do not contemplate formal final enquiry for removal but in the Enquiry Rules, a detailed procedure (rule 6) for the final enquiry has been framed. To us, it appears that these Rules were meant to apply in those cases where it was considered expedient to cease the financial and administrative power. However, as there can be proceeding for removal of a pradhan without ceasing his power, does it mean that procedure of Rules 6 does not apply to a removal proceeding if it is undertaken without ceasing power?

77. In our opinion, this cannot be done, as this will amount to discrimination.

78. The proceeding for removal has to be conducted in accordance with Rules 6 onwards of the Enquiry Rules, irrespective of the fact whether right to exercise financial and administrative power was ceased or not. However, where right to exercise financial and administrative power is also to be cease then procedure in Rule 3 and 5 ha to be followed otherwise there is no necessity to follow them."

12. Thus on a conspectus of the several judicial pronouncements and the judgement of the Full Bench referred to above, we are of the view that the power exercised by the District Magistrate under section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 is a quasi judicial power.

13. There still remains the other aspect of the matter as to whether the District Magistrate could have exercised powers under section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 particularly in view of the decision of this Court in the case of Hoti Lal (supra) wherein clause (iii-a) of Section 95 (1)(g) has been held to be ultra vires Article 243-O of the Constitution of India.

14. We cannot ignore considering this question inasmuch as the learned single Judge in the order impugned before us as placed reliance upon the judgment of Hoti Lal (supra) and held that a Pradhan who has contested the election on a forged caste certificate cannot be removed under section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 and his removal can be questioned only through an election petition and on this question the writ petition has been allowed and the respondent no. 1 has directed to be reinstated as Pradhan and

allowed to continue till the end of his remainder term.

15. Shri S.D. Kautilya, as already mentioned above, has placed reliance on a decision of a learned single Judge of this Court in the case of Radhey Shyam Sharma (supra) wherein the High Court while considering the provisions of section 95(1) (g) (iii-a) of the U.P. Panchayat Raj Act, 1947 has held that where election has been contested on a forged caste certificate, the Pradhan can be removed as fraud vitiates every act and that writ petition was therefore dismissed.

16. On reading of the judgment of Radhey Shyam Sharma (supra) we find that there is no reference to the decision of the earlier single Judge decision of this Court in the case of Hoti Lal (supra) wherein the learned single Judge had held the provisions of sub clause (iii-a) of Section 95 (1)(g) of the U.P. Panchayat Raj Act to be ultra vires Article 243-O (b) of the Constitution of India.

17. The Full Bench of this Court in the case of Vivekanand (supra) has held that a Pradhan can be removed under section 95 (1)(g) of the U.P. Panchayat Raj Act even where cessation of financial and administrative power is not contemplated but such removal can only be ordered after holding an enquiry as contemplated in Rule 6 of the U.P. Panchayat Raj (Removal of Pradhan and UP-Pradhan and Members) Enquiries Rules, 1997. The judgment of Hoti Lal (supra) has not been considered by the Full Bench and it appears that the constitutional validity of sub clause (iii-a) of the Act, 1947 was also not raised before the Full Bench. Thus there is an unsettled conflict between the various judgments of this Court as to whether a Pradhan can be removed from his office in exercise of power under U.P. Panchayat Raj (Removal of Pradhan and UP-Pradhan and Members) Enquiries Rules, 1997 by the State Government or whether he can be removed only through an election petition.

18. Before considering the judgment of Hoti Lal (supra) it will be relevant to reproduce the provisions of Article 243-O (b) of the Constitution of India:

"243-O. Bar to interference by courts in electoral matters. - Notwithstanding anything in this Constitution -

(a) .....

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State."

19. Clause (b) of Article 243-O provides that no election of Zila Panchayat shall be called in question except by an election petition. Section 11-A of U.P. Panchayat Raj Act, 1947 provides for reservation in the post of Pradhan for S.C., S.T. and backward classes. In so far as Scheduled caste and Scheduled Tribes are concerned such reservation in terms of the proviso to Section 11-A (2) shall be as far as possible in proportion to the total number of offices of the Pradhan as the population of scheduled caste in the State or Scheduled Tribes in the State and it further provides that reservation for the backward classes shall not exceed 27% of the total number of offices of Pradhan.

20. Section 12(5) of the Act, 1947 also provides that in every Gram Panchayat the seats shall be reserved to

the extent of the proportion of the Scheduled caste and Scheduled Tribes to the population of S.C. and S.T. in the Panchayat area and the proviso thereto further provides that reservation for backward classes shall not exceed 27% of the total number of seats in the Gram Panchayat.

21. Section 12-C(1) of the Act, 1947 provides that election of a person as Pradhan or as member of a Gram Panchayat including election of a person appointed as Panch of a Nyaya Panchayat under section 43 shall not be called in question except by an application presented to such authority within such time and such manner as may be prescribed. The grounds on which such application may be moved have been stated in section 12-C(1), which reads as under:

"12-C. Application for questioning the elections.- (1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of a Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that-

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been ,materially affected-

(i) by the improper acceptance or rejection of any nomination; or

(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder."

22. A conjoint reading of the provisions of Article 243-O (b) of the Constitution of India and 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 would imply that the election of a Pradhan can only be challenged through an election petition on the grounds mentioned in section 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947. The learned single Judge while deciding Hoti Lal (supra) has examined the above provisions of Article 243-O (b) of the Constitution of India and section 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 of the Act, 1947 and held that the election of a Pradhan can only be set aside through an election petition where such a Pradhan has been elected on any of the grounds provided in Section 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 and has further held that the State Government cannot remove a Pradhan on the ground that he has taken the benefit of reservation under sub section (2) of Section 11-A or sub section 5 of Section 12 of the Act, 1947 as the case may, on the basis of a false declaration subscribed by him stating that he is a member of S.C., S.T. or backward class as the case may, as contemplated in sub clause (iii-a) of Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947.

23. Having examined the provisions of Article 243-O(b) of the Constitution of India, section 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 of the U.P. Panchayat Raj Act, 1947 we are also of the view that the State Government cannot remove an elected Pradhan who has been elected on the basis of a false declaration of belonging to a reserved category otherwise than through an election petition and,

therefore, we are of the opinion that the view taken by the learned single Judge in the case of Hoti Lal (supra) lays down the correct law. The judgment in Hoti Lal (supra) has, however, not been referred to in the case of Radhey Shyam Sharma (supra). May the judgment of Hoti Lal was not cited before the learned single Judge deciding the case of Radhey Shyam Sharma. Be that as it may, for the reasons states above, we hold that the judgment in Radhey Shyam Sharma (supra) does not lay down the correct law.

24. However, there is an added twist to the case before us. The judgment of Hoti Lal (supra) where the learned single Judge has held sub clause (iiii-a) of Section 95(1)(g) of the Act, 1947 to be ultra vires Article 243-O(b) of the Constitution of India and struck down sub clause (iii-a) as ultra vires Article 243-O(b) of the Constitution of India has not been referred to at all by the Full Bench in the case of Vivekanand (supra) where this Court held that a Pradhan may be removed under section 95(1)(g) of the Act, 1947 even if cessation of financial and administrative powers are not contemplated. Thus the view we have taken upholding the judgment of Hoti Lal (supra) relying upon the provisions of Article 243-O(b) and 12-C(1) (a) and 12-C(1)(b) of the U.P. Panchayat Raj Act, 1947 stands in direct conflict with the decision of the Full Bench in the case of Vivekanand (supra).

25. In view of the above conflicting position of law we are, therefore, of the view that the matter should be referred to a larger Bench for settling this controversy and clearing the ambiguity in law with regard to removal of a Pradhan. We therefore, direct that the records of this case be placed before the Hon'ble Acting Chief Justice for constituting a larger Bench to resolve the above controversy.

26. So far as the present special appeal is concerned we are not inclined to grant any interim order inasmuch as in paragraph 13 of the writ petition itself it has been disclosed by the respondent no. 1 that the appellant has already filed an election petition no. 3 of 2010 (Satyadeo Vs. Ajay Kumar Gupta and others) which has been registered on 29.11.2010.

27. Since we are of the view that judgment in Hoti Lal (supra) lays down the correct law and that sub clause (iii-a) of Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 is ultra vires Article 243-O (b) of the Constitution of India, therefore, in our view the order dated 27.8.2011 of the District Magistrate Bijnor impugned in the writ petition no. 56084 of 2011 was wholly without jurisdiction and is a non-est order and, therefore, such an order cannot be said to be a quasi judicial order as the very foundation for exercise of such power by the District Magistrate stood struck down in the judgment of Hoti Lal (supra) which we also approve. Therefore, in our view this special appeal would be maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE Dr. SATISH CHANDRA, J.

Writ Petition No.1647 (SB) of 2010

Vinod Kumar ...Petitioner
Versus
Bank of India and Others. ...Opp. Parties

Counsel for the Petitioner:
Sri Ashwani Kumar

Counsel for the Respondents:
Sri Lalit Shukla

Bank of India officers employees(Dispute & Appeal) Regulations 1976-Reg. 6(17)- Dismissal from service-without following procedure provided under Regulation 6(17)-without giving opportunity of cross examination, without giving copy of enquiry report-without show cause notice after conclusion of enquiry-before inflicting major punishment-held-amount to denial of reasonable opportunity-appellate authority also ignored this aspect-order quashed.

Held: Para-27 & 31

27. We are of the considered opinion that the observations in the cases, referred to above, are fully applicable in the facts and circumstances of this case. Non-supply of documents demanded by the petitioner which were actually utilized against him have a potential to cause prejudice to an employee in the enquiry proceedings which would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being inquired into against the employee/officer.

31. It is settled principle that if any material is sought to be used in an enquiry, the copies of material must be supplied to the party against whom such an enquiry is held. The Disciplinary Authority as well as Appellate Authority did not consider this aspect of the matter and expressed their concurrence to the finding of the Inquiry Officer, without applying their independent and free mind. The assertion of the Bank that there is no violation of any statutory provision or principles of natural justice while conducting the disciplinary proceeding is wholly misconceived and is rejected. The Appellate Authority while considering the appeal of the petitioner failed to appreciate the fact that the Enquiry Officer at the back of the petitioner had proved charges without affording reasonable opportunity to controvert the same. Therefore, the order of Appellate Authority is bad in law and cannot be sustained.

Case Law discussed:

(2006) 3 SCC 150; (2006) 5 SCC 673; (2006) 7 SCC 212; State 7 SCC 236; (2007) 7 SCC 236; (2013) 2 SCC 740; 1995(6) SCC 749; AIR 1967 SC 1265; AIR 1970 SC 150; AIR 1961 SC 1623; (1998) 6 SCC 651; (2008) 8 SCC 236; AIR 1963 SC 1719; AIR 1968 SC 158; (1986)3 SCC 229; 1995(Supp)(3)SCC 212; 2003(21) LCD 610; (2009) 2 SCC 570.

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

1. Heard Mr.Kapil Deo, Senior Advocate duly assisted by Mr.Ashwani Kumar, learned Counsel for the petitioner and Mr.Lalit Shukla, Advocate appearing for the respondent-Bank.

2. Petitioner, who was working as Staff Officer MM-III in the Bank of India, was dismissed from the service, has filed the instant writ petition questioning the validity and correctness of the dismissal order dated 25.6.2010, appellate order dated 16.9.2010, forfeiture and recovery order dated 6.8.2010 including the order dated 22.9.2010 passed on the application, contained in Annexure Nos.1, 2, 3 and 4 to the writ petition.

3. Bereft of unnecessary details, in short, facts of the case are that during the period 24.5.2005 to 23.5.2007, when the petitioner was posted as Chief Manager, Bank of India, Rudauli Branch, the Branch received a loan application from one Rajesh Singh for setting up a rice mill in the name of M/s Singh Rice Mill in the month of December, 2005. The loan was proposed to be secured by mortgage of land of Khasra nos.2600 and 2656, which was in the name of the proposed Guarantor Shri Tej Bhan Singh whereas the rice mill was proposed to be set up on a separate land, namely, khasra No.2933. After receipt of application for grant of loan, the petitioner carried out the pre-sanction inspection and submitted its report on 24.1.2006 indicating therein that two properties were inspected, viz., the

properties which were proposed for mortgage and the property on which the mill was situated. Thereafter, the papers were given to Shri G. N. Khare, an Advocate on the Bank's Panel for the last 25 years, who, in turn, submitted its report dated 22.12.2005 certifying that the land of Khasra Nos.2600 and 2656 could be mortgaged in favour of the bank. The proposal was sanctioned by the Bank and the land Khara Nos.2600 and 2656 was mortgaged in favour of the Bank.

4. As proprietor of M/s Singh Rice Mill committed default in re-payment of loan, the Branch initiated recovery proceedings against it by filing recovery certificate with the revenue authorities. In this connection, the Rudauli Branch informed the revenue authorities that the rice mill was located on the property which had been mortgaged in favour of the Bank. According to the petitioner, this information furnished by the petitioner's successor was factually incorrect as in the records of the bank, the rice mill was established on different property and not on the mortgaged property, i.e. Khasra Nos.2600 and 2656.

5. It is in this background that the Additional District Magistrate, Faizabad got the matter investigated by the Naib-Tahsildar, Milkipur and thereafter informed the Bank that no rice mill is existing on the mortgaged property, i.e. Khasra Nos.2600 and 2656 and its owner Shri Tej Bhan Singh had sold his property in 1996. However, on 20.3.2010, the Bank initiated disciplinary proceedings against the petitioner for committing gross dereliction of duties and in gross violation of Bank's procedure while sanctioning cash-credit limit and term loan to M/s Singh Rice Mills, a proprietorship concern of one Rajesh Singh.

6. After conclusion of enquiry, on 1.6.2010, the Inquiry Officer gave a finding of PROVED. However, the loss was quantified by him likely around Rs.25.68 lacs. Thereafter, on 25.6.2010, the Disciplinary Authority imposed the punishment of 'Dismissal' upon the petitioner. Aggrieved by the aforesaid punishment order, the petitioner preferred an appeal under sub-regulation 17 of the Bank Regulation to the Zonal Manager/Appellate Authority, who rejected the same vide order dated 16.9.2010.

7. On 25.6.2010, a show-cause notice was also issued to the petitioner requiring him to show cause as to why recovery/ forfeiture of Rs.25.68 lacs be not made from the Provident Fund (Bank's Contribution) and Gratuity of the petitioner. Though the petitioner replied to the show cause notice on 14.7.2010, yet it was rejected by the Deputy Zonal Manager, Bank of India, Lucknow Zone on 6.8.2010 and recovery of Rs.25.68 was ordered to be made from the petitioner. Thereafter, the petitioner submitted a representation to the Zonal Manager, Bank of India, Lucknow, who too rejected it vide order dated 22.9.2010. This order has also been assailed in the instant writ petition.

8. Learned Counsel for the petitioner has submitted that the disciplinary proceedings are governed by the procedure laid down in the Bank of India Officer Employees' (Discipline and Appeal) Regulations, 1976 [in short referred to as the 'Regulations']. Regulation-6 provides procedure for imposing major penalties and enjoins that no major penalty can be awarded except after an enquiry in accordance with the Regulations. Regulation 6 (17) casts a duty upon the Inquiring Authority to give an opportunity to the delinquent employee

enabling him to explain any circumstances appearing in the evidence against him. This duty is to be performed after the evidence is closed. It has been vehemently argued that the Inquiring Authority in spite of oral request of the petitioner did not allow the aforesaid statutory opportunity, which vitiates the entire disciplinary proceedings including the order of dismissal.

9. Elaborating his submissions, learned Counsel for the petitioner submitted that there are serious defects in the disciplinary proceedings as principles of natural justice have been violated with impunity. According to him, the investigation report submitted by the management witnesses as also the report submitted by the Naib-Tahsildar, which were utilized against the petitioner were never supplied to him. Furthermore, during the course of inquiry, the petitioner requested for the joint inspection of record of the office of Sub-Registrar to ascertain the correct fact but the same was also not done. Even the Naib-Tahsildar, whose investigation report was heavily relied upon by the Inquiry Officer, was not called by the Inquiry Officer to prove the document or to give an opportunity to the petitioner for cross-examination. Thus, serious prejudice has been caused to the petitioner and he has been deprived of his vital right to put his effective version in order to defend himself.

10. Learned Counsel for the petitioner next contended that the Inquiry Officer in its report has concluded that on account of negligence of the petitioner, there is likelihood that the bank will suffer financial loss to the tune of Rs.25.68 lacs. The disciplinary authority passed the order for recovery of Rs.25.68 lacs against the petitioner. The appellate authority also rejected the appeal without dealing with the pleas raised by the petitioner. Both the authorities overlooked the specific pleas of the petitioner regarding non-supply of relevant documents and the fact that borrower had not only deposited Rs.4 lacs towards the loan on 3.8.2010 and a compromise had also been arrived at between the bank and the borrower. Therefore, inflicting the ultimate punishment of dismissal is not commensurate with the guilt of the petitioner as neither there is any charge of embezzlement or misappropriation nor causing deliberate financial loss to the bank.

11. Per contra, Mr. Lalit Shukla, learned Counsel for the Bank submits that the petitioner was given the copies of documents relied upon by the authorities. He was given ample opportunity to defend his case, witnesses were examined and thereafter, final orders were passed by the competent authority in accordance with law and after following the principles of natural justice. During the course of inquiry, neither the petitioner requested for any document after giving the relevancy of those documents in the inquiry proceedings nor the request of the petitioner was rejected for examining any witnesses during the course of inquiry. The petitioner has no right to question the findings recorded by the departmental authorities under Article 226 of the Constitution of India.

12. Counsel for the Bank contended that it is incorrect to say that sub-Regulation 17 of Regulation-6 is applicable upon the petitioner. The aforesaid Regulation comes into picture when Inquiring Authority would have been the disciplinary authority. In the

instant case, the departmental inquiry was conducted by the inquiring authority and not by the disciplinary authority itself. The investigating report was not supplied to the petitioner, as the Presenting Officer of the Bank claimed its privilege. It is true that the report of the Tahsildar was considered by the authority but the petitioner was dismissed from service not only on the basis of the report of the Tahsildar, but there were other materials available on record.

13. On the strength of the decisions rendered in **Syndicate Bank vs Venkatesh Gururao Kulatai** [(2006) 3 SCC 150], **Staet of U.P. vs Raj Kishore Yadav** [(2006) 5 SCC 673], **State Bank of India vs Ramesh Dinker Punde** [(2006) 7 SCC 212], State 7 SCC 236] **and Bank of India vs Ram Lal Bhaskar** [(2011) **Bank of India vs T. Jogram** [(2007) 7 SCC 236] and **State of India vs Narendra Kumar Pandey** [(2013) 2 SCC 740], Counsel for the Bank submitted that non-supply of the document which is neither forming part of the charge sheet relied upon by the prosecution nor relied upon by the authorities will not violate the principles of natural justice. Therefore, the assertion of the petitioner that the authorities have violated the principles of natural justice is wholly incorrect and misconceived. Lastly, it has been contended that the petitioner has no right to question the findings recorded by the departmental authorities under Article 226 of the Constitution and jurisdiction of this Court under Article 226 of the Constitution cannot be converted as a Court of Appeal.

14. It is no doubt true that in cases arising out of disciplinary proceedings culminating in punishment of an employee, scope of judicial review is somewhat restricted in the sense that it is a decision making process, which is open for judicial review and not the decision itself. The Court does not sit in appeal. If the procedure prescribed is followed strictly in accordance with rules and the delinquent employee has been given adequate opportunity of defence, the disciplinary authority by assessing record has reached to a conclusion which a person of ordinary prudence in a given set of circumstances may arrive, this Court shall not interfere with the order of punishment, if any, unless it is shown that the same is without jurisdiction or is otherwise bad on account of mala fide etc.

15. At the same time, a person cannot be denied his right to earn livelihood enshrined under Article 226 of the Constitution of India unless he has been given adequate opportunity of hearing and the conclusion drawn by authorities is one which is probable and permissible from bare perusal of documents and not otherwise. The authorities exercising quasi judicial functions are not courts. They are not bound by principles of evidence yet certain basic principles will have to be observed which may dispel a complaint against fairness, impartiality and pre determination of mind on the part of the employer.

16. In **B.C. Chaturvedi Vs. Union of India** reported in 1995 (6) SCC 749, reiterating the principles of judicial review in disciplinary proceedings, the Apex Court held in para 12 as under:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made.

Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."(para 12)

17. In years by gone the initial exercise of the Courts was first to find out the nature of the order, whether it is an administrative or quasi-judicial order and then to proceed to apply the principles of natural justice. The Apex Court for the first time in the case of **State of Orissa Vs. Dr. (Ms.) Bina Pani Dei** [AIR 1967 SC 1265] broke free from the necessity to examine nature of the order. It held that even an administrative order or decision involving civil consequences, has to abide by the rules of natural justice. The Constitution Bench in the famous case of **A.K. Kraipak V. Union of India** [AIR 1970 SC 150] blunted it further to near extinction. It found that "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past, it was thought that it included just two rules, namely (I) no one shall be a judge in his own cause (Nemo debet esse judex proprise causa), and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon, a third rule was envisaged and that is the quasi-judicial inquiries must be held in good faith without bias and not arbitrarily or unreasonably and it went on to hold;

"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative inquiries from quasi-

judicial inquiries. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial inquiries as well as administrative inquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry."

18. When a departmental enquiry is conducted against the employee, it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased,impartial and fair. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that an employee is treated fairly in proceedings, which may culminate in imposition of punishment including dismissal/removal from service.

19. In **State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan;** AIR 1961 SC 1623; **State of U.P. vs. Shatrughan Lal and another;** (1998) 6 SCC 651 and **State of uttaranchal and others vs. V. Kharak Singh** (2008) 8 SCC 236, the Apex Court has emphasized that a proper opportunity must be afforded to a government servant at the stage of the enquiry, after the charge sheet is supplied to the delinquent as well as at the second stage when punishment is about to be imposed on him. In **State of Uttaranchal & ors. V. Kharak Singh (supra)** the Apex Court has enumerated some of the basic principles regarding conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

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

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

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

20. On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

21. In **Meenglas Tea Estate v. Its Workmen** AIR 1963 SC 1719 the Supreme Court observed that "it is an elementary principle that a person who is required to answer the charge must know not only the

accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled if the result of the enquiry can be accepted.

22. In **State of U.P. v. C.S. Sharma**, AIR 1968 SC 158 the Supreme Court held that omission to give opportunity to an employee to produce his witnesses and lead evidence in his defence vitiates the proceedings. It was further held that a dismissal order has serious consequence and should be passed only after complying with the rules of natural justice.

23. Considering the importance of access to documents in statements of witnesses to meet the charges in an effective manner the Apex Court in **Kashinath Dikshita versus Union of India and others**; (1986)3 SCC 229 held in clear words that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity has been held to be an essential ingredient in disciplinary proceedings.

24. In **S.C.Givotra v. United Commercial Bank** 1995 (Supp) (3) SCC 212, the Supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross-examination.

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

26. In **Roop Singh Negi vs. Punjab National Bank & others:(2009) 2 SCC 570**, the Apex Court held that in the departmental enquiry, mere production of documents is not enough. The contents of documentary evidence has to be proved by examining witnesses. The relevant paras-14, 15 and 23 read as under:-

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled

against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the enquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.

23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

27. We are of the considered opinion that the observations in the cases, referred to above, are fully applicable in the facts and circumstances of this case. Non-supply of documents demanded by the petitioner which were actually utilized against him have a potential to cause prejudice to an employee in the enquiry proceedings which would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being inquired into against the employee/officer.

28. As much emphasis has been laid on Regulation 6 (17) by both the parties, we deem it appropriate to reproduce the same:-

"The Inquiring Authority may, after the officer employee closes his evidence and shall, if the officer employee has not

got himself examined, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the officer employee to explain any circumstances appearing in the evidence against him.

29. A perusal of the aforesaid Regulations would show that it contains the word "Inquiring Authority" only and there is no reference to "Disciplinary Authority" in this regulation. Therefore, the assertion of the Bank that aforesaid Regulation comes into picture when Inquiring Authority would have been the disciplinary authority himself, is not acceptable.

30. Non-supply of the Investigation Report on the ground of privilege claimed by the Presenting Officer is against the provisions of the Regulations. We find force in the assertion of the petitioner that according to Regulation 6 (12), only the authority having custody or possession of the document can claim privilege. Thus, the Presenting Officer had no authority to claim privilege. It is immaterial whether the Bank has relied exclusively or not, on the investigating report whilst framing the charges. Once the Investigating Officer was produced as management witness, the petitioner had the right to cross-examine him on the contents of his investigation report. According to sub-regulation 5 (iv) of Regulation 6 of the Regulations, the Inquiring Authority supplied a copy of the statement of witnesses. This implies that the Disciplinary Authority had supplied the copy of the Investigating Officer's report to the Inquiring Authority. Failure to provide this report to the petitioner has, therefore, resulted in the Inquiring Authority, giving his finding based on material obtained behind the back of the petitioner. It may be noted that a perusal of record shows that Deputy Collector, Milkipur, District Faizabad wrote a letter dated 10.4.2009 to the Bank, which was produced by the Presenting Officer. According to the petitioner, this letter contains three Annexures, out of which Annexure 2 is the Investigating Report of Naib-Tahsildar. It is hard to believe that when other two Annexures enclosed with the letter are available with the Bank, how can the third Annexure can be said to be not available on the record of the Bank. It creates serious doubt in our minds regarding innocence of the Bank.

31. It is settled principle that if any material is sought to be used in an enquiry, the copies of material must be supplied to the party against whom such an enquiry is held. The Disciplinary Authority as well as Appellate Authority did not consider this aspect of the matter and expressed their concurrence to the finding of the Inquiry Officer, without applying their independent and free mind. The assertion of the Bank that there is no violation of any statutory provision or principles of natural justice while conducting the disciplinary proceeding is wholly misconceived and is rejected. The Appellate Authority while considering the appeal of the petitioner failed to appreciate the fact that the Enquiry Officer at the back of the petitioner had proved charges without affording reasonable opportunity to controvert the same. Therefore, the order of Appellate Authority is bad in law and cannot be sustained.

32. So far as order of recovery is concerned, it is the specific stand of the petitioner that the borrower had already deposited a sum of Rs.4 lacs towards the

loan on 3.8.2010 and a compromise has also been arrived at in between the borrower and the bank for depositing the remaining amount with the bank. The bank in its counter-affidavit candidly admitted that the offer submitted by the borrower is under consideration and the compromise is yet to be materialized. However, they did not deny the fact that Rs.4 lacs were deposited by the borrower towards the loan. The petitioner in his rejoinder-affidavit has stated in paragraph 28 that borrower of the loan has entered into a compromise with the bank and in consequence whereof, some amount was deposited by the borrower. He also pointed out that the compromise was approved by the General Manager on 17.8.2010 and the Zonal Office of the Bank informed the same to Rudauli Branch on 29.11.2010. This fact is substantiated by the letter dated 29.11.2010 written by the Chief Manager of the Bank to the proprietor of M/s Singh Rice Mill, which is on record. When the borrower had deposited the amount towards the settlement of loan, no financial loss has accrued to the Bank there was no justification to recover the same amount from the petitioner's gratuity and provident fund. The Bank ought to have modified the order of recovery or recalled it but the same was not done.

33. The long and short of the discussion and taking the holistic view of the matter, the writ petition deserves to be allowed, which is hereby allowed and the impugned orders dated 25.6.2010 passed by the Disciplinary Authority, 16.9.2010 passed by the Appellate Authority, the order dated 6.8.2010 forfeiting and recovery passed against the petitioner as also the order passed on the application of the petitioner dated 22.9.2010 are hereby quashed. As the petitioner has already attained the age of superannuation much earlier, no useful purpose would be served for ordering fresh enquiry in the matter. Since the petitioner has attained the age of retirement, the intervening period between the date of dismissal and date of retirement shall be treated as period rendered in service for the purposes of payment of terminal benefits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.8303 of 2013

Smt. Munesh Devi ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhuvnesh Kr. Singh, Sri Amit Srivastava, Sri Amit Saxena, Sri Mohd. Akram, Sri Ramesh Kumar Shukla, Sri Shamim Ahmed

Counsel for the Respondents:
C.S.C., Sri Abhishek Tiwari, Sri D.K. Singh Sri G.K. Singh, Sri V.K. Singh

Constitution of India, Art. 226-Order re-counting of votes-in Gaon sabha election-on application defeated candidate-only supported by number of affidavit reiterating version of application-can not be basis for recounting unless clinching evidence are there-held secrecy of ballot is sacrosanct-similarly statutory provision can not be broken-unless prima faci case made out-even recounting done-held-immaterial-election tribunal committed manifest error by passing order of recounting-can not sustained-quashed.

Held: Para-17

In the instant case, the Court finds that there was no clinching evidence to show any irregularity or illegality in the counting of the votes or in the reception of the votes. The only allegation was that certain votes of dead persons were cast and certain outsiders have cast the votes. These are bald allegations which are required to be proved by documentary and oral evidence, which stage has not arrived as yet.

Case Law discussed:
AIR 1975 SC 2117; 1986(2) RD 151(FB); (2003) 5 SCC 650; 2004(4) AWC 3667; AIR 1989 SC 640; AIR 1993 SC 367.

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

1. The petitioner is the elected Pradhan having won by 21 votes. The petitioner received 410 votes whereas the contesting respondent received 389 votes. The defeated candidate, being aggrieved by the result of the election, filed an election petition alleging that 13 votes were cast by those persons who were actually dead and that 36 votes were cast by such persons who were not the resident of the village in question. On this premise, the defeated candidate contended that if these votes are excluded, the result would be that he would get elected instead of the petitioner.

2. The allegations made in para 7 of the election petition were not supported or accompanied by any documentary proof. Consequently, these allegations were required to be proved by way of oral and/ or documentary evidence. Prior to the evidence being led, the defeated candidate's application for inspection of the ballot papers was allowed by an order dated 7.2.2013. The order of inspection was passed on the basis of certain affidavits filed by certain persons reiterating the contention raised by the defeated candidate in his election petition and, on that basis, the Tribunal held that a prima facie case was made out for the inspection of the ballot papers.

3. The elected candidate, being aggrieved by this order, filed the present writ petition questioning the veracity of the order in seeking inspection of the ballot papers and in disturbing the secrecy and purity of the election. This Court, while entertaining the writ petition, passed an interim order dated 14.2.2013 directing the Election Tribunal to continue with the proceedings but restrained the Tribunal from passing any final orders. It transpires that the Tribunal proceeded to inspect the ballot papers and finding no major irregularity, passed an order for recounting of the ballot papers. This order was passed on an application moved by the defeated candidate on the same date. It transpires that the recounting was done on 16.2.2013 in which it was depicted that the defeated candidate secured more votes than the petitioner. The order of 16.02.13 has also been questioned by the petitioner in this writ petition by moving an amendment application which has already been allowed.

4. Heard Sri M.A. Qadeer, the learned Senior Advocate assisted by Sri Mohd. Akram, the learned counsels for the petitioner and Sri D.K. Singh, learned counsel for the respondents and learned standing counsel for the State.

5. On the question of recounting of votes the position of law has been crystalized in a catena of cases by the Supreme Court starting from **Bhabi Vs. Sheo Govind and others AIR 1975 SC 2117** in which, the Supreme Court held:

"(1)That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2)That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be Supported by adequate statements of material facts;

(3)The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount ;

(4) That the Court must come to the conclusion that in order grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5)That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6)That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

6. A Full Bench of this Court in Ram Adhar Singh v. District Judge, Ghazipur and others, 1986 (2) RD 151 (FB) held that the authorities while hearing the election petition under the provision of U.P. Panchayat Raj Act can be permitted to look into or can direct the inspection of the ballot papers only upon the existence of two conditions, namely;

" 1. that the petition for setting aside an election contains the grounds on which the election of the respondent is being questioned as also the summary of the circumstances alleged to justify the election being questioned on such ground; and

2. the authority is, prima facie, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties."

7. The right of a defeated candidate to assail the validity of an election result and seek recounting of the votes is subject to the basic principle that the secrecy of the ballot is sacrosanct unless the defeated candidate alleges and is able to substantiate by means of evidence that a prima facie case of a high degree exists for the recounting of the votes. The salutary rule is, that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be broken unless there is a prima facie case and that a genuine case is made out. The justification for an order or re-examination of ballot papers and recounting of the votes is not to be arrived at from hindsight or by the result of the recount of the votes. The justification for recounting of the votes must be made out from the material available on the record.

8. In the light of the aforesaid principles of law, the Court finds that in the instant case an assertion of fact has been made in paragraph 7 of the election petition with regard to the alleged irregularities. Certain affidavits have also been filed but these affidavits are not proof of the alleged irregularities and is only an aid to support such allegations. Issues have been framed and documentary

and oral evidence is required to be given in order to prove the allegations made in the election petition.

9. The Court is of the opinion that the Tribunal was not justified in ordering inspection of the ballot papers and thereafter recounting the votes. In the absence of any clinching evidence, there was no prima facie satisfaction of the Tribunal to come to the conclusion that a case was made out for inspection and for recounting of the votes. The secrecy of the ballot was sacrosanct and purity of the elections was required to be maintained strictly. The secrecy of the ballot could not be violated on the mere ipsi dixie of the Tribunal in the absence of a prima facie case of a compulsive nature being made out by the defeated candidate.

10. The learned counsel for the respondents contended that even though the order of inspection and recounting may contain certain defects but once recounting has been done pursuant to the said order and the recounting declares a different result, the will of the people is known to everyone, and consequently, it is a "fait accompli" and that the clock cannot be turned back even if the secrecy of the ballot had been violated. The learned counsel contended that at the end of the day, the person who has got the maximum votes should be declared elected and once this exercise has been done, the will of the people must be honoured and respected. The learned counsel submitted that on a recount, the elected candidate has secured more votes than the petitioner and therefore the elected candidate should now be declared elected and that the writ petition should be dismissed. In support of his submission, the learned counsel has placed reliance upon a decision of the Supreme Court in T.A. Ahammed Kabeer Vs. A.A. Azeez (2003) 5 SCC 650, wherein the Supreme Court, in paragraph 28, held-

"28. It is true that a re-count is not to be ordered merely for the asking or merely because the court is inclined to hold a re-count. In order to protect the secrecy of ballots the court would permit a re-count only upon a clear case in that regard having been made out. To permit a re-count only upon a clear case in that regard having been made out. To permit or not to permit a re-count is a question involving jurisdiction of the court. Once a re-count has been allowed the court cannot shut its eyes on the result of re-count on the ground that the result of re-count as found is at variance with the pleadings. Once the court has permitted re-count within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the re-count which has to be given effect to."

11. The Supreme Court held that once the recount has been allowed, the Court cannot shut its eyes on the ground that the result of the recount was found at variance with the pleadings. The Supreme Court held that once the Court had permitted a recount within the well settled parameters of exercising jurisdiction in this regard, it was the result of the recount which had to be given effect to. The same principle was followed by this Court in **Arshadi Vs. Prescribed Authority/ Sub Divisional Magistrate, Jakhania, Ghazipur and others 2004(4) AWC 3667.**

12. Having perused the said judgements, the Court finds that the said

decisions are not helpful to the defeated candidate, for the reasons stated herein.

13. In the Full Bench decision of this Court in **Ram Adhar Singh Vs. District Judge, Ghazipur and Others (s**upra), the facts were that the defeated candidate filed an election petition and obtained an order for recounting of the votes. Recounting was done and the defeated candidate was declared elected. The full Bench of this Court considered the matter and held that since the very basis for recounting of the votes was illegal and contrary to the accepted position of law, all subsequent orders, including the order of recounting of the votes, was illegal and had to be set aside.

14. In **P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen & Ors. AIR 1989 SC 640**, the Tribunal allowed the petition and declared the defeated candidate as having been duly elected as he had secured more votes on a recount. The High Court allowed the petition holding that the Tribunal had erred in directing recounting of the votes and that the petitioner had not made out a prima facie case for an order of recount. In Special Leave Petition, the Supreme Court held that an order of recount of votes must stand or fall on the nature of averments made and the evidence adduced before the order of recounting was made and not from the results emanating from the recounting of the votes.

15. In **Satyanarain Dudhani Vs. Uday Kumar Singh & Ors. AIR 1993 SC 367**, the facts in this case were that the elected candidate won by a narrow margin of 24 votes. The defeated candidate challenged the election by way of an election petition. The Election Tribunal rejected the contention of the defeated candidate for the recounting of the votes. The High Court ordered a recount and allowed inspection of the ballot papers. As a result of recounting, the defeated candidate was found to have polled more votes and as such was declared elected. The High Court accordingly allowed the election petition and declared the defeated candidate to be duly elected. The matter went to the Supreme Court and the Supreme Court held that the High Court was not justified in ordering recount and allowing inspection of the ballot papers. The Supreme Court, accordingly, set aside the order of the High Court as well as the declaration of the result of the election of the defeated candidate as a result of recounting.

16. In the light of the aforesaid decisions, the Court finds that the Supreme Court in the case of T.A. Ahammed Kabeer (supra) as stated in paragraph 28 that once the Court has permitted recount within the well settled parameters of exercising jurisdiction of recounting it is only then that the result of recount has to be given effect to. It necessarily means that if the Court finds that the order of recount was correct and valid then the result of the recount has to be given effect to, but if the order of recount was illegal and against the settled principles of law then the result of the recount pursuant to such illegal order could not be sustained and had to be set aside.

17. In the instant case, the Court finds that there was no clinching evidence to show any irregularity or illegality in the counting of the votes or in the reception of the votes. The only allegation was that certain votes of

dead persons were cast and certain outsiders have cast the votes. These are bald allegations which are required to be proved by documentary and oral evidence, which stage has not arrived as yet.

18. This Court is of the opinion that it was not a proper exercise to order recount on the basis of bare allegations in the election petition. The Court has gone through the pleadings in the election petition and is satisfied that the grounds given in the election petition does not justify recounting of the votes or allowing inspection of the ballot papers at this stage. The Election Tribunal committed a manifest error in violating the secrecy of the ballot papers and tinkering with it.

19. In the light of the aforesaid, the impugned orders dated 7.2.2013 and order dated 16.2.2013 cannot be sustained and are quashed. The writ petition is allowed.

20. The Trial Court is directed to decide the matter within six months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2013

BEFORE
THE HON'BLE SHIVA KIRTI SINGH, C.J.
THE HON'BLE VIKRAM NATH, J.

Criminal Misc. Writ (P.I.L) Petition No.9187 of 2013

In action of Police in lodging firs in offences against Women ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
By the Court Suo Moto
Counsel for the Respondents:
A.G.A.

Constitution of India, Art.-226- PIL-seeking direction local police to lodge FIR-on statement of victim recorded by Magistrate-within 24 hours-considering circular issued by DGP-Police avoiding to lodge FIR-direction issued accordingly-to lodge FIR promptly not belated than 24 hours from recording statement by Magistrate-keeping it open to send to concern police station for investigation having territorial jurisdiction-in case of default concern police officer shall be responsible for contempt-petition disposed of.

Held: Para-5
In our considered view it is imperative that in all the serious cases where the victim is injured and his / her statement has been recorded by a Magistrate / Doctor then such statement or further statement of that injured should be recorded as FIR without any delay, in any case within 24 hours of recording of the statement. This alone shall ensure that undue delay is not causing in investigation and shall also subserve the interest of justice.

(Delivered by Hon'ble Shiva Kirti Singh, C.J.)

1. Heard learned Government Advocate, who has assisted the Court in hearing of this matter, which has been taken-up by the Court suo moto as Public Interest Litigation vide order passed on 10th May, 2013.

2. On the last date learned Advocate General assisted this Court in the matter and placed before us an affidavit disclosing that a DGP circular dated 22.05.2013 has already been issued to take care of some of the issues causing delay in lodging of FIR in serious cases of burn etc. committed against women. However the DGP circular does not contain any direction to the police officials of the nearest police station to record an FIR within a reasonable time such as 24 hours time from recording of the statement of the victim of a

serious crime having sustained serious injuries. Such statement, in case victim subsequently dies is treated as dying declaration and in case a victim recovers then it can only be treated as FIR if the police has taken timely steps to record it as such.

3. As it would appear from the facts noticed by this Court in the order dated 10.05.2013, two female victims who were seriously injured and were under going treatment for their injuries in the hospital gave their statements to the Magistrate who was deputed by Chief Judicial Magistrate to record such statement on the prayer made by the police but yet the police authorities did not take any steps to record the FIR on the basis of the statement of the victim. The delay of several days results in looking for another source or witness for the purpose of lodging FIR. In our considered view it amounts to unreasonable inaction on the part of the concerned police official who had knowledge about the injured victim being admitted in the hospital for treatment but yet chose to ignore to record statement of the victim or to lodge FIR on the basis of statement recorded by the Magistrate as is done for purpose of recording dying declaration. The importance of early recording of an FIR has been highlighted by Apex Court in the case of **Apren Joseph alias Current Kunjukunju and others Vs. The State of Kerala reported in AIR 1973(1) SC 1** in the following words:-

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr.P.C. As observed by the Privy Council in Emperor V. Khwaja, ILR 1945 Lah 1 = (AIR 1945 PC 18) the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under S.154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue or unreasonable delay in lodging the F.I.R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

4. Learned Government Advocate has submitted before us that there is no legal impediment in the way of police of the nearest police station in visiting the injured victim and recording the statement which may be treated as FIR under Section 154 of the Code of Criminal Procedure. It is also the duty of the police to know of the statement specially when it is given by the victim in an injured condition and to act on that basis if cognizable offence is disclosed. For meeting such legal obligation, the police officials of

the nearest police station must, as part of their duty to investigate a crime, find out the contents of the statement recorded by the Magistrate/ Doctor and if the victim becomes unable to give further statement or dies then such statement should be the basis for drawing FIR without any undue delay.

5. In our considered view it is imperative that in all the serious cases where the victim is injured and his / her statement has been recorded by a Magistrate / Doctor then such statement or further statement of that injured should be recorded as FIR without any delay, in any case within 24 hours of recording of the statement. This alone shall ensure that undue delay is not causing in investigation and shall also subserve the interest of justice.

6. It is not necessary to reiterate the contents of earlier orders passed on 10th May, 2013 and 7.8.2013. Those orders shall be treated as part of this order.

7. This writ petition (PIL) is disposed of with the direction to all concerned to follow the DGP Circular dated 22.05.2013 which contains valuable directions to ensure that investigation is carried out properly by recording the statement of Doctor and Magistrate who are present at the time of recording of the statement of the victim. The concerned officials shall also follow the directions of this Court given above and in compliance of this direction the Director General of Police, U.P. shall issue a circular in addition to the earlier circular forthwith and in any case within a week. The officials of the nearest police station shall not cause any delay in lodging of the FIR and on that basis they shall inform the police officials of the concerned police station where the crime took place, after recording the FIR in the manner indicated above within 24 hours time limit. The FIR may be sent thereafter to the police station having jurisdiction of the crime. The circular of the Director General of Police must contain stipulation of disciplinary action. Further if such directions are violated by any particular delinquent police official then such an action will amount to contempt of this Court.

8. Writ Petition is disposed of accordingly.

9. Let a copy of this order be furnished to the learned Government Advocate for communication and compliance to all concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.27960 of 2010

Brijesh Chandra and Ors. ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Recovery of excess amount-incentive allowance-G.O. dated 28.11.2007 provides 25% of basic pay with maximum financial limit of Rs. 2500, 2000 and 1000 to S.P. , S.I., Constable and Head Constables-working in intelligence department-admittedly before passing impugned order no opportunity of hearing given-nor petitioner are guilty of fraud or misrepresentation or instrumental in getting excess-amount-held-can not be recovered-recovery quashed with direction to pass order considering their status of promotional

pay etc-after giving opportunity of hearing-subject to working in intelligence or during existence of G.O. dated 28.11.2007.

Held: Para-36

In the result, the writ petition is allowed. The impugned recovery is hereby quashed. It is made clear that so long as the G.O. dated 28.11.2007, prescribing "Incentive Allowance" to police officers of subordinate ranks working in Intelligence is not modified, recalled or revoked, or the petitioners are not transferred from Intelligence to other wing, they shall be entitled for the benefit under aforesaid G.O. It is also provided that if the aforesaid benefit is withdrawn or modified, the subsequent entitlement of petitioners shall be governed accordingly.

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

1. Since pleadings are complete, as requested by learned counsel for the parties, I proceed to hear and decide this matter finally at this stage under the Rules of this Court.

2. Heard Sri Vijay Gautam, learned counsel for the petitioners and learned Standing Counsel for the respondents.

3. The petitioners are enrolled in Police Force of State of Uttar Pradesh having been recruited as Constable in Civil Police and then have been posted in the Local Intelligence Unit of Civil Police. They are the police officers of subordinate rank and governed by various provisions of Police Act, 1861 (hereinafter referred to as the "Act, 1861") read with statutory orders issued under Section 2 thereof and Rules framed under Section 2, read with Section 46 of Act, 1861.

4. The State Government issued a Government Order (hereinafter referred to as the "G.O.") dated 28.11.2007 providing that police officers working in Intelligence Department, up to the pay scale at the level of Deputy Superintendent of Police shall be provided incentive allowance. This incentive allowance is at the rate of 25% of basic pay and dearness allowance, subject to maximum of Rs. 2500/- to those working in the pay scale at the level of Deputy Superintendent of Police; Rs. 2000/- working in pay scale at the level of Inspector and Sub-Inspector; and, Rs. 1000/- to those working in pay scale at the level of Head Constable, Constable and Constable Driver. It is further said that incentive allowance shall be payable only for the period the concerned official remain posted in Intelligence Wing. On his transfer to any other branch the incentive allowance shall stand ceased. Further, if a police official remain posted in Intelligence Department for a period of 10 days or less in a month, he shall be paid incentive allowance proportionately.

5. It is said that the aforesaid G.O. has not been revoked, cancelled or modified till date so as to disallow payment of incentive allowance (Protsahan Bhatta) as per aforesaid G.O. dated 28.11.2007.

6. The petitioners have further said that at the time of issuance of aforesaid G.O., they having already been given benefit of time bound promotional scale, receiving basic pay equivalent to pay scale of Sub-Inspector, i.e., Rs. 5500-9000/- and, therefore, were paid incentive allowance at the rate of Rs. 2000/- per month in terms of the aforesaid G.O.

7. Subsequently, it appears that, an audit objection was raised that incentive allowance admissible to petitioners working as Constable was minimum to Rs. 1000/- per month and they were

wrongly paid incentive allowance at the rate of Rs. 2000/- per month, hence excess amount of Rs. 1000/- per month should be recovered from them. It is pursuant thereto, the impugned order has been passed which is in respect of petitioners and similarly placed other officials who are/were working in Intelligence Wing/Branch and paid incentive allowance at the rate of Rs. 2000/- per month based on the level of pay scale in which they are/were working.

8. It is contended that aforesaid recovery is totally illegal and erroneous. In the alternative, it is said that amount of incentive allowance paid in excess to petitioners is not on account of any fraud or misrepresentation on their part, therefore, ought not to have been recovered and to fortify this submission reliance is placed on S**yed Abdul Qadir and others vs. State of Bihar and others, 2009(3) SCC 475** and a Division Bench decision of this Court in **Ram Murti Singh Vs. State of U.P. and others, 2006(3) UPLBEC 2415.** Lastly, it is contended that in any case the impugned order of recovery having been issued without affording any opportunity to petitioners, therefore, it is in violation of principle of natural justice and liable to be set aside for aforesaid reason.

9. The respondents have contested this matter by filing a counter affidavit and the central theme of defence therein is that petitioners are all "Constables" in Intelligence Branch, therefore, entitled for incentive allowance at the maximum of Rs. 1000/- per month but the have been paid the same at the rate of Rs. 2000/- per month, hence excess amount of Rs. 1000/- per month has been paid to them, which is liable to be recovered.

10. The defence shows that the respondents have read the G.O. dated 28.11.2007 as if it provides incentive allowance at the rate of 25% of basic pay and dearness allowance with reference to rank/position, i.e., subject to maximum of Rs. 2500/- to Deputy Superintendent of Police; Rs. 2000/- to Inspector and Sub-Inspector; and, Rs. 1000/- to Head Constable, Constable and Constable Driver.

11. Learned Standing Counsel contended that on account of specialized kind of duties exercised by police officers posted in Intelligence Branch, the Government decided to provide a special allowance, called as "Incentive Allowance", so that more efficient and competent officials from Civil Police be attracted to have their posting in the Intelligence. The amount of "Incentive Allowance" having been determined by G.O. Dated 28.11.2007, anything beyond that was wholly unauthorised and illegal and, therefore, the same is liable to be recovered. He submitted that if an amount has wrongly been paid in excess to an employee, it is liable to be recovered and in this regard he placed reliance on a decision of this Court in **Writ Petition No. 38790 of 2013, Ram Nakshtra Sharma Vs. State of U.P. and others,** decided on 19.07.2013.

12. I have learned counsel for the parties and perused the record.

13. The rival submissions, giving rise, in my view, to the following questions:

(i) Whether the amount of incentive allowance is payable with reference to the post/position/rank held by a police officer

in Intelligence or with reference to the pay scale applicable to the rank/status/position;

(ii) Whether the recovery in question is bad on account of violation of principle of natural justice; and,

(iii) Whether an amount paid in excess to an employee cannot be recovered if there is no element of fraud of misrepresentation on his part.

14. I proceed to consider the aforesaid issues by discussing in the manner the same have been framed, above.

15. The question No. 1 involves interpretation of G.O. dated 28.11.2007. The phrase which is relevant to determine maximum amount of "Incentive Allowance", reads as under:

''अभिसूचना विभाग में कार्यरत उपाधीक्षक स्तर तक के वेतनमान में कार्यरत अधिकारियों व कर्मचारियों को उनके मूल वेतन व मंहगाई वेतन की 25 प्रतिशत धनराशि (अधिकतम धनराशि की दर पुलिस उपाधीक्षक के वेतनमान तक रूपया 2,500/–, निरीक्षक / उपनिरी0 के वेतनमान तक रूपया 2,000/– तथा मुख्य आरक्षी / आरक्षी / आरक्षी ड्राईवर के वेतनमान तक रूपया 1,000/–) प्रोत्साहन भत्ता के रूप में प्रतिमाह निम्नलिखित शर्तों के अधीन अनुमन्य किये जाने की श्री राज्यपाल सहर्ष स्वीकृत प्रदान करते हैं।''

"His excellency the Governor is pleased to give assent to the sanction of incentive @ 25% of the basic pay and dearness allowance (subject to maximum of Rs. 2500/- upto the pay scale of Deputy Superintendent of Police, Rs. 2000/- upto the pay scale of Inspector/Sub-Inspector and Rs. 1000/- upto the pay scale of Head-Constable/Constable/ Constable Driver) to officers and officials working in the pay scale upto Deputy Superintendent of Police in the Intelligence Department, however, subject to following condition." (English translation by the Court) (emphasis added)

16. A bare reading of aforesaid makes it very clear that it is with reference to pay scale applicable to an officer at a particular level. The very initial clause which provides the rate of incentive allowance says that the officers and employees working in Intelligence in the pay scale up to the level of Deputy Superintendent of Police shall be paid 25% of their basic pay and dearness allowance as incentive allowance. The next clause restrict the maximum amount payable and says that aforesaid amount shall be subject to the maximum of Rs. 2500/- to those who are in the pay scale of Deputy Superintendent of Police; Rs. 2000/- to whose who are in the pay scale of Inspector/ Sub-Inspector; and, Rs. 1000/- to those who are in the pay scale of Head Constable, Constable and Constable Driver. Had the intention of Government been to provide "Incentive Allowance" to the officers of a particular rank, there was no occasion to mention that those who are working in the scale of particular rank shall be paid such allowance. The reason behind is self explanatory. Judicial notice may be taken to the fact that Government employees including those of Police Department, have been provided benefit of time bound higher pay scale with reference to and in promotional scales, called as First Promotional Scale, Second Promotional Scale and Third Promotional Scale, as the case may be. Before introduction of Advance Carrier Promotion Scheme (hereinafter referred to as the "ACP Scheme") vide G.O. dated 04.05.2010, the aforesaid promotional scales were applicable and actually given to eligible persons, as and when fell due, after finding them suitable and entitled for the

same. It is in this view of the matter, those who were getting salary in promotional scale, have been given higher maxima of "Incentive Allowance" vide G.O. dated 28.11.2007. For example, if a Constable has been given promotional pay scale, which is equal to the pay scale prescribed for an officer in the rank of sub-Inspector or Inspector, he would be entitled for Incentive Allowance at the rate of 25% of basic pay and dearness allowance subject to maximum of Rs. 2000/-. It is for this reason the language of G.O. makes the admissibility with reference to pay scale of a particular level and not use level/rank/position. Here reference to pay scale is not equivalent to the status of officer concerned that he must be working in that rank with all attending position of status, rank etc.

17. The respondents, in my view, have clearly misconstrued the aforesaid G.O. by reading it as if the "Incentive Allowance" is with reference to individual rank of an officer. Reading in such a manner the respondents have omitted the words, ''स्तर तक के वेतनमान'' and ''वेतनमान'' used at difference places in the G.O. in question. The use of the words "scale" and "level of scale" is to put stress on the fact that what is relevant is the level of pay scale in which the particular incumbent is getting salary and not his actual rank and status. Judicial cognizance can also be taken of the fact that police officials of lower cadre having been granted the benefit of first, second and third promotional pay scale are getting salary in pay scale applicable to much higher rank of officials but they continue to enjoy actual status of their substantive post. Grant of promotional pay scale does not result in upgrading of their position, rank and status but only financial benefits become available. In the present case, unless the respondents find that the petitioners were actually working in the pay scale equivalent to the scale of Head Constable and Constable and not that of Inspector or Sub-inspector, they could not have said that any excess/extra payment has been made. It could not have been said that they (petitioners) have been paid excess amount of incentive allowance unless a finding is recorded that they are not in the pay scale equivalent to that of a Sub-Inspector/Inspector. In other words without deciding the question, whether petitioners were getting salary in the pay scale equivalent to that of Sub-Inspector or not, it could not have been said that they were not entitled for incentive allowance subject to maximum of Rs. 2000/-. It appears that respondents have proceeded in a mechanical way to determine maximum amount of "Incentive Allowance" with reference to the rank and position, which is not the correct approach on their part. The question No. 1, therefore, is answered accordingly.

18. Now coming to the second question, i.e., opportunity. A specific averment has been made in para 26 of the writ petition that no opportunity of hearing was afforded to petitioners and no show cause notice was issued, therefore, the impugned recovery is in violation of principle of natural justice.

19. The reply is contained in para 7 of the counter affidavit and there is not even a whisper to suggest that any show cause notice was issued to petitioners or they were given any opportunity of hearing before issuing direction for recovery of alleged excess amount of "Incentive Allowance".

20. Regarding application of principles of natural justice, it cannot be doubted that whenever an employer takes a view, or from the record, finds, that

certain amount has been paid to an employee, in excess to what he was entitled, before issuing an order of recovery of the same, he must have given an opportunity to the employee concerned to show cause, whether such amount should/can be recovered from him or not. If this opportunity is given to an employee, he can always show that what was paid to him, he was entitled therefor, and, there is neither any excess payment, nor any payment for which he was not entitled. An order passed directly without giving any show cause notice or opportunity to the employee, in my view, would suffer the vice of non observance of principles of natural justice. In a case where there is a dispute as to whether the employee has been paid an amount rightly or not, before passing any order, having civil consequences, the employer must afford an opportunity to the employee, else, such an order would be in violation of principles of natural justice. The Apex Court in Bhagwan Shukla Vs. Union of India & others 1994 (6) SCC 154, is similar circumstances, has held that an order passed in violation of principles of natural justice cannot be sustained. In para 3 of the judgment, the Apex Court observed as under:

"The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause ...Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him hearing in the matter."

21. The second question, as a proposition of law, therefore, is answered in favour of petitioners.

22. Then comes the third question, i.e., whether an amount if admittedly paid in excess, i.e., more than what the incumbent is entitled, still it cannot be recovered unless the employer finds a case of fraud or misrepresentation on the part of employee. On this aspect, I am inclined to answer the question no. 3 in favour of respondents and my reasons are as under.

23. I propose to refer the decisions of Apex Court which have taken a view holding that an amount, if has been wrongly paid to an employee and he is not entitled for the same, recovery of such amount cannot be said to be bad except of certain very limited exceptions which have also been described therein.

24. 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 excess amount paid in subsequent emoluments in instalments, rather than lump sum recovery of entire excess 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.

25. 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.

26. 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, 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.

27. 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.

28. 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."

29. The Apex Court further held that decision in S**hyam 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.

30. There is a Division Bench judgement 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?"

31. 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."

32. 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)

33. 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.

34. These authorities clearly show that there is no right of petitioners in law or otherwise that admitted excess payment wrongly made cannot be recovered. As a matter of right, petitioners cannot contend that though they had been paid certain amount wrongly in excess to what was due to them, yet it cannot be recovered by the administration.

35. In view of above and looking to the findings in respect to questions no. 1 and 2, this Court has no doubt that this writ petition deserved to be allowed.

36. In the result, the writ petition is allowed. The impugned recovery is hereby quashed. It is made clear that so long as the G.O. dated 28.11.2007, prescribing "Incentive Allowance" to police officers of subordinate ranks working in Intelligence is not modified, recalled or revoked, or the petitioners are not transferred from Intelligence to other wing, they shall be entitled for the benefit under aforesaid G.O. It is also provided that if the aforesaid benefit is withdrawn or modified, the subsequent entitlement of petitioners shall be governed accordingly.

37. It is, however, made clear that looking to the findings recorded by this Court with respect to question no. 1, it shall be open to respondent-competent authority to examine every individual case in the light of the discussion made above, and if it is found that any person has been paid "Incentive Allowance", over and above what was prescribed in aforesaid G.O., it shall be open to respondents to initiate appropriate proceedings for recovery of that much amount but after giving due opportunity of hearing to concerned persons.

38. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 40868 of 1996

Yogesh Kumar Gupta ...Petitioner
Versus
Bharat Heavy Electronics Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.M. Asthana, Sri Indra Mani Tripathi

Counsel for the Respondents:
S.C., Sri K.N. Mishra, Sri Sandeep Saxena

Constitution of India, Art. 226-Right to appointment-petitioner completing

apprenticeship-claim for regular appointment on basis of parity-held- no right for regular appointment,except to participate in selection process-illegality committed for other persons-same mistake can not be protected by court-two wrong can not make one right.

Held: Para-3 & 8

3. The submission is thoroughly misconceived. I find that it is based on directions issued by Apex Court in UPSRTC Employees Federation vs. UPSRTC reported in JT 1995 (2) SC 26 wherein the Court laid down four conditions which have to be observed by an employer in respect to apprentices who had undergone apprenticeship training.

8. In his own words, even if some appointments have been made in flagrant violation of Article 16(1) of the Constitution, in absence of challenge to those appointments, obviously this Court cannot quash the same but illegality committed in some other matter cannot give any benefit to petitioner on the ground of parity. Two wrongs will never make one right.

Case Law discussed:

JT 1995 (2) SC 26; AIR 1987 SC 227; 1998(2) ESC 1394; 2000(5) SCC 438; 2006(1) UPLBEC 950; JT 2009(14) SC 233; W.P. No. 33827 of 2011; W.P. No. 2255(MS)of 1998; AIR 2003 SC 3983; AIR 2004 SC 2303; AIR 2005 SC 565; AIR 2006 SC 1142; Special Appeal No. 375 of 2005; 2007(5) SCC 317; AIR 2008 SC 3182; 2008(7) SCC 245; 2009(1) SCC 565; 2009(2) SCC 589; 2009(5) SCC 65; JT 2009(6) 463; 2009(11) SCALE 149; 2009(11) SCALE 619; 2009(11) SCALE 731; JT 2009(13)SC 422.

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

1. Heard Sri I.M. Tripathi, learned counsel for the petitioner and perused the record.

2. Learned counsel for the petitioner contended that petitioner has completed Apprenticeship training. For regular appointment the respondent-Bharat Heavy Electricals Limited (hereinafter referred to as the "BHEL"), a Government of India undertaking, though proceeded to appoint apprentices, junior to petitioner, but petitioner was not called for interview and has not been appointed. It is contended that petitioner has a right in equity and otherwise and, therefore, non-appointment of petitioner is wholly illegal. It is further submitted that in equity or under the Rules, either way, petitioner, has a matter of right, was/is entitled to be appointed on a regular technical post in Electronic Trade having completed apprenticeship training.

3. The submission is thoroughly misconceived. I find that it is based on directions issued by Apex Court in UPSRTC Employees Federation vs. UPSRTC reported in JT 1995 (2) SC 26 wherein the Court laid down four conditions which have to be observed by an employer in respect to apprentices who had undergone apprenticeship training:

(i) Other things being equal, a trained apprentice should be given preference over direct recruits.

(ii) For this, a trainee would be required to get his name sponsored by any employment exchange. The decision of this Court in Union of India vs. Hargopal, AIR 1987 SC 227, would permit this.

(iii) If age bar would come in the way of the trainee, the same would be relaxed in accordance with what is stated in this regard, if any, in the concerned service rule, if the service rule be silent on this aspect, relaxation to the extent of the period for which the apprentice has undergone training would be given.

(iv) The concerned training institute would maintain a list of the persons trained year wise. The persons trained earlier would be treated senior to the persons trained later. In between the trained apprentice, preference shall be given to those who are senior.

4. Based on the above directions certain apprentices challenged a process of direct recruitment by an establishment on the ground that without absorption of trained apprentices the direct recruitment from open market cannot proceed. A Full Bench of this Court looked into this aspect in Arvind Gautam vs. State of U.P. and Others, 1998 (2) ESC 1394 and held that apprentices are to go through the recruitment provided in the statute and there is no automatic absorption in the vacancy which are to be filled by the direct recruitment under statute. The matter was taken in appeal and the Full Bench's decision was affirmed in U.P. Rajay Vidyut Parishad Apprenticeship Welfare Association and another Vs. State of U.P. and others, 2000(5) SCC 438. The Apex Court held that an apprentice has to undergo the procedure of examination/interview. He has to compete with open market candidates in a selection which is to be held in accordance with statute/rules. The Court, however, observed that while appearing in aforesaid selection the trained apprentices who have completed apprenticeship training may be given benefit laid down in condition No. (i) and (iv) in the judgment in UPSRTC Employees Federation (supra).

5. The issue was again considered by a Division Bench in Bhoodev Singh and others Vs. Chairman, U.P. S.E.B. and others 2006(1) UPLBEC 950 and the question formulated by Court was, "whether petitioners, who were claiming appointments, were required to participate in written examination for appointment or not". The Court held that a candidate cannot claim exemption from the written test if it is required for others under relevant rules. The right of apprentice trainees is limited only to the preference, other beings being equal. They cannot claim any other right, or claim different treatment from other non-apprentice candidates.

6. The above decision has been affirmed in appeal in Santosh Kumar Tripathi and others Vs. U.P. Power Corporation and others, JT 2009(14) SC 233. Similar view has been taken by this Court in many other cases like, Civil Misc. Writ Petition No. 6841 of 1998 (Ramesh Dhar Dwivedi Vs. State of U.P. and Others) decided on 28.2.2006; Civil Misc. Writ Petition No. 33827 of 2011, Dharampal Sharma and others Vs. State of U.P. And others, decided on 16.08.2011; and, Writ Petition No. 2255 (MS) of 1998, Apprentice Training Youth Welfare Association Vs. U.P. S.R.T.C. and others, decided on 31.08.2012.

7. Though admittedly selection has not been challenged in the petition but Sri Tripathi, learned counsel for the petitioner contended that others have been appointed without any advertisement but the same treatment has not been given to petitioner.

8. In his own words, even if some appointments have been made in flagrant violation of Article 16(1) of the Constitution, in absence of challenge to those appointments, obviously this Court cannot quash the same but illegality committed in some other matter cannot give any benefit to petitioner on the ground of parity. Two wrongs will never make one right.

9. It is well settled that two wrongs will not make one right. (See 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 565; and Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142).

10. Recently a Division Bench of this Court (of which I was also a member) in Special Appeal No.375 of 2005 Shiv Raj Singh Yadav Vs. State Of U.P. And Others, decided on 27.05.2011, has considered this aspect in detail and in paragraph no.22 it held as under:

"22. Once it is established that the petitioner had no legal right of regularisation, merely because some irregularities and illegalities have been observed by the respondents in some other cases with respect to regularisation, that would not confer any right upon the petitioner to claim parity. The right of equality under Article 14 and 16 of the Constitution is a positive concept and not a negative one. (See Post Master General, Kolkata and others Vs. Tutu Das, 2007(5) SCC 317; Punjab National Bank by Chairman and Anr. Vs. Astamija Dash, AIR 2008 SC 3182; Punjab State Electricity Board and others Vs. Gurmail Singh, 2008(7) SCC 245; M/s. Laxmi Rattan Cotton Mills Ltd. Vs. State of U.P. and others, 2009(1) SCC 565; Panchi Devi Vs. State of Rajasthan and others, 2009(2) SCC 589; State of Bihar Vs. Upendra Narayan Singh, 2009(5) SCC 65; State of Uttaranchal Vs. Alok Sharma and others, JT 2009(6) SC 463; State of Punjab and another Vs. Surjit Singh and others, 2009(11) SCALE 149; State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009(11) SCALE 619; Shanti Sports Club and another Vs. Union of India and others, 2009(11) SCALE 731; Ghulam Rasool Lone Vs. State of J & K and others, JT 2009(13) SC 422."

11. In view of above discussion, the writ petition lacks merit. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.45858 of 2013

Abhay Kumar Mishra ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Surendra Pratap Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226 petitioner seeking direction to decide representation-counsel fail to reply the provision-which provides representation-nor disclosed as to how his rights affected-held-no legal right to enforce-petition-misconceived-dismissed.

Held: Para-4
Since no legal right has been shown to exist for enforcement whereof the petitioner has come to this Court, the relief sought cannot be granted.

Case Law discussed:
(2008) 2 SCC 280; (1977) 4 SCC 145; AIR 1966 SC 334; 1993(1) SCC 485; 1991(3) SCC 47; 2007(5) ADJ 280(DB); 2001(1) ESC 317; (1997) 8 SCC 488.

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

1. The only relief sought in the writ petition is that the petitioner's representations dated 12.7.2004, 31.8.2009 and 22.1.2013 be directed to be decided.

2. Despite repeated query, learned counsel for the petitioner could not at all show as to under which provision such representation is entertainable so as to cast an obligation upon the respondent no.1 to decide the same failing which the petitioner who is entitled for issuance of writ of mandamus. It is well settled that a writ of mandamus would lie only if the petitioner is enforcing a legal right and the respondents are under a statutory obligation to do or not to do something but have failed to do so.

3. In **Oriental Bank of Commerce Vs. Sunder Lal Jain and another,(2008)2 SCC 280** Apex Court after referring to its earlier judgments in **Bihar Eastern Gangetic Fisherman Cooperative Society Ltd. Vs. Sipahi Singh (1977) 4 SCC 145**; **Lekhraj Sathramdas Lalvani Vs. N.M. Shah, AIR 1966 SC 334, Dr. Uma Kant Saran Vs. State of Bihar 1993(1) SCC 485** and observed as under:

"There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation."

4. Since no legal right has been shown to exist for enforcement whereof the petitioner has come to this Court, the relief sought cannot be granted.

5. Even otherwise, no person has any right to seek a mandamus for getting appointment on a particular post. In the case of **Shankarsan Dash Vs. Union of India, 1991(3) SCC 47** the Hon'ble Apex Court said:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

6. In the case of **U.P. Public Service Commission, Allahabad and Anr. Vs. State of U.P. and Anr., 2007(5) ADJ 280 (DB)** in which rights of wait list candidate was considered by this Court, in para-15 of the judgment held:-

"A wait list candidate does not have any indefeasible right to get appointment

merely for the reason that his name finds place in the wait list."

7. This Court in taking the aforesaid view relied upon the decision in **Ved Prakash Tripathi Vs. State of U.P., 2001(1) ESC 317** and **Surinder Singh and others Vs. State of Punjab & Anr., (1997) 8 SCC 488** and held that even a select list candidate has no indefeasible right to claim appointment. In para 31 of the judgment in U.P. Public Service Commission, Allahabad and Anr. (supra) this Court has further held as under:

"Moreover, even in the case of a select list candidate, the law is well settled that such a candidate has no indefeasible right to claim appointment merely for the reason that his name is included in the select list as the State is under no legal duty to fill up all or any of the vacancy and it can always be left vacant or unfilled for a valid reason."

8. In view of the aforesaid law laid down in **Shankarsan Dash (supra) and U.P. Public Service Commission Allahabad & Anr. (supra),** I am of the opinion that petitioner has no legal or statutory right to enforce.

9. The writ petition lacks merit and it is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.48536 of 2013 and W.P. 47944 of 2013

Ashok Verma & Anr. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Sri Irshad Husain
Sri Sanjeev Singh

Societies Registration Act 1960-Section 24(5) and 25 (2)-power of Registrar-during investigation-it found that for last 5 years no election took place-not the accounts were properly checked-by impugned order appointment of Ad-hoc committee to took the day by day affairs till formation of new committee-ousted member by general body meeting spell out those members of Ad-hoc committee-held-word "any officer authorized by him"-includes appointment of Ad-hoc committee in such circumstances-requires no interference by writ court-resolution of management-without jurisdiction-quashed.

Held: Para-18 & 19

18. Consequently, the Court is of the opinion that the formation of the adhoc committee by an order of the Registrar dated 1st August, 2013 was justified in the given circumstances, which requires no interference.

19. The adhoc committee was required to manage the affairs of the Society on a day to day basis under the supervision of the Registrar. The adhoc committee was not required to take any major decisions like expulsion of any permanent members of the Society. Such resolution passed by the Committee of Management was ex-facie illegal and the Registrar's action in the given circumstances was justified in staying the said resolution by an order of 20th August, 2013. The Court finds that the adhoc committee exercising its power in expelling its members was wholly illegal and that the Registrar was competent to put the clock back and restore the membership of the expelled members.

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

1. Prabhu Narain Union Club, Varanasi is a society registered under the Societies Registration Act, 1960, which was created with the object of providing suitable means of social recreation and feeling of unity, cordiality and sociality amongst respectable persons of all caste and creeds. Under the memorandum of the Association, the term of Committee of Management is one year.

2. On the basis of a complaint, the Assistant Registrar, Firms Societies & Chits, Varanasi issued a letter dated 17th July, 2013 initiating investigation into the affairs of the Society under Section 24 of the Societies Registration Act. Upon investigation, the Assistant Registrar passed an order dated 1st August, 2013 holding that no election of the Society was held for the past 5 years, and that the accounts were not being properly maintained and that the affairs of the Society were not being carried out in accordance with the objects of the Society. The authority, accordingly, directed that the election of the Society would be held under its supervision pending finalization of the members list and till such time the election was not held, the Assistant Registrar directed formation of an adhoc committee to manage the affairs of the Society on a day to day basis.

3. Based on the said direction, the adhoc committee took charge and, by an order dated 14th August, 2013 expelled certain members from the Society. These expelled members being aggrieved by the action of the adhoc committee made a representation before the Registrar, who by an order dated 20th August, 2013 stayed the resolution of the adhoc committee. The adhoc committee, being aggrieved by the order of the Assistant Registrar dated 20th August, 2013 filed Writ Petition No. 47944 of 2013, which was entertained and an interim order was passed staying the effect of the order of the Assistant Registrar. As a result of the interim order, the expelled members filed Writ Petition No. 48536 of 2013 questioning the order of the Assistant Registrar dated 1st August, 2013 and the resolution of the committee of management date14th August, 2013.

4. Since both the writ petitions are interconnected and is one of urgency since in the meanwhile the Assistant Registrar has fixed 29th September, 2013 for holding the election, the matter is being decided at the admission stage itself without calling for a counter affidavit with the consent of the parties.

5. Heard Sri Ashok Khare, learned Senior Counsel and Sri Manish Singh on behalf of the expelled members in Writ Petition No. 48536 of 2013 and Sri Sanjeev Singh, the learned counsel for the adhoc committee, who has filed Writ Petition No. 47944 of 2013 and is representing the Club in the writ petition filed by the expelled members.

6. The learned Senior Counsel contended that the Assistant Registrar while investigating the affairs of the Society under Section 24 of the Act had no power to issue any order for formation of an adhoc committee. The committee so formed was wholly illegal and was liable to be set aside. The learned counsel submitted that the powers of the Registrar under Section 24(5) was only to give such direction upon conclusion of the investigation to remove any defects or irregularities found in such investigation or may proceed to take action under Section 12D or under Section 13B of the Act, as the case may be, but had no power

to appoint an adhoc committee. The learned senior counsel further contended that the adhoc committee was only appointed to look after the day to day affairs and was not entitled to make major decisions such as expelling members of the Society. The learned counsel submitted that the action of the adhoc committee in passing such a resolution was wholly illegal and unwarranted.

7. On the other hand, the learned counsel for the adhoc committee supported the order of the Registrar passed under Section 24(5) of the Act, contending that it had all the powers to form an adhoc committee for the purpose of good governance and that the words "as he may think fit" was wide enough to include the power to appoint an adhoc committee. The learned counsel further submitted that since the members was not adhering to the notices sent by the adhoc committee and were interfering with the affairs of the Society, it became imperative for the adhoc committee to issue the expulsion order in accordance with the bye-laws.

8. Having heard the learned counsel for the parties, the Court finds that in order to settle the issue, it would be appropriate to have a look at certain provisions of the Act, namely, Section 24 and Section 25(2) of the Societies Registration Act as applicable in the State of Uttar Pradesh. For ready reference, Section 24 and 25(2) of the Act are extracted hereunder:

24. Investigation of affairs of a society. - (1) Where on information received under section 22 or otherwise, or in circumstances referred to in sub-section (3) of section 23, the Registrar is of opinion that there is apprehension that the affairs of a society registered under this Act are being so conducted as to defeat the objects of the society or that the society or its governing body, by whatever name called, or any officer thereof in actual effective control of the society is guilty of mismanaging its affairs or of any breach of fiduciary or other like obligations, the Registrar may, either himself or by any person appointed by him in that behalf, inspect or investigate into the affairs of the society or inspect any institution managed by the society.

(2) It shall be the duty of every officer of the society when so required by the Registrar or other person appointed under sub section (1) to produce any books of account and other records of or relating to the society which are in his custody and to give him all assistance in connection with such inspection or investigation.

(3) The Registrar or other person appointed under sub-section (1) may call upon and examine on oath any officer, member or employee of the society in relation to the affairs of the society and it shall be the duty of every officer, member or employees, when called upon, to appear before him for such examination.

[(3A) The Registrar or other person appointed under sub-section (1), may, if in this opinion it is necessary for the purpose of inspection or investigation, seize any or all the records including account books of the society:

Provided that any person from whose custody such records are seized shall be entitled to make copies thereof in the presence of the person having the custody of such records.]

(4) On the conclusion of the inspection or investigation, as the case may be, the person if any appointed by

the Registrar to inspect or investigate shall make a report to the Registrar on the result of his inspection or investigation.

(5) The Registrar may, after such inspection or investigation, give such directions to the society or to its governing body or any officer thereof, as he may think fit, for the removal of any defects or irregularities, within which as may be specified and in the event of default in taking action according to such directions, the Registrar may proceed to take action under section 12D or section 13B, as the case may be.

25. Dispute regarding election of office-bearers.-

(1) .....

(2) Where by an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a society has not been held wihtin the time specified in the rules of that society, he may call a meeting of the general body of such society for electing such office-bearer of office-bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf, and the provisions in the rules of the society relating to meeting and elections shall apply to such meeting and election with necessary modifications.

9. A perusal of Section 24 indicates that the Registrar or any person appointed by him can suo motu or on a complaint, investigate into the affairs of the Society or inspect any institution managed by the Society. On the conclusion of the inspection or investigation, the Registrar upon perusal of such report would give such direction to the Society or to its governing body or any officer as he may think fit for the removal of any defects or irregularities and, in the event of default in compliance of the directions given by the Registrar, the Registrar may proceed to take action under Section 12D or Section 13B of the Act.

10. Section 12D gives power to the Registrar to cancel the registration of the Society in certain circumstances and 13B gives power for dissolution of the Society by a Court.

11. Section 25(2) provides that where the Registrar is satisfied that any election of the office bearers of the Society has not been held within the time specified in the rules of that Society, the Registrar may call a meeting of the general body of the Society for electing such officers or office bearers and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf. Here the words "or by any officer authorized by him in this behalf" is of importance which will be considered hereinafter.

12. From a perusal of the impugned order dated 1st August, 2013, the Court finds that it is a composite order of the Registrar passed under Section 24(5) read with Section 25(2), namely, that the affairs of the Society was not being managed in accordance with the bye-laws of the Society and that the election had not been held for a long time.

13. The Registrar, accordingly, directed appointment of an adhoc committee to manage the affairs of the Society on a day to day basis rather than allowing the old committee to continue and further took upon itself the task of holding the election.

14. During the course of arguments, the learned counsel for the adhoc committee submitted that the list of members has been finalized by the Registrar and 28th September, 2013 has been fixed for holding the election.

15. From a perusal of the order of 1st August, 2013, the Registrar had clearly indicated in the said order for appointment of an adhoc committee to manage the day to day affairs till such time such election of the office bearers of the Society are not held.

16. In the light of the aforesaid provisions, and the order of the Registrar dated 1st August, 2013, the Court finds that the order of the Registrar dated 1st August, 2013 does not suffer from any manifest error of law. The Registrar after investigation found that the affairs of the Society was not being managed in accordance with the bye-laws of the Society and was therefore justified in appointing an adhoc committee and in holding an election. The order for appointing an adhoc committee is not an order under Section 24(5) of the Act but is an order under Section 25(2) of the Act. The Registrar has taken a decision to hold an election, and till such time such election was not held, the Registrar was competent to conduct the affairs of the society himself or by any officer authorized by him in this behalf. The words "any officer authorized by him" in the given circumstances would include an ad hoc committee.

17. The purpose of appointing the ad hoc committee was to remove the outgoing members of the committee of management as they were holding the post for several years and were not conducting the election in accordance with the bye-laws of the society. The action taken by the Registrar was thus justified, in the given circumstances. It would have been a different matter if the adhoc committee was allowed to continue and manage the affairs of the Society, without calling for an election, but in the instant case, the Court has been informed that the election would be held on 28th September, 2013.

18. Consequently, the Court is of the opinion that the formation of the adhoc committee by an order of the Registrar dated 1st August, 2013 was justified in the given circumstances, which requires no interference.

19. The adhoc committee was required to manage the affairs of the Society on a day to day basis under the supervision of the Registrar. The adhoc committee was not required to take any major decisions like expulsion of any permanent members of the Society. Such resolution passed by the Committee of Management was ex-facie illegal and the Registrar's action in the given circumstances was justified in staying the said resolution by an order of 20th August, 2013. The Court finds that the adhoc committee exercising its power in expelling its members was wholly illegal and that the Registrar was competent to put the clock back and restore the membership of the expelled members.

20. In the light of the aforesaid, the order of the Registrar dated 1st August, 2013 appointing an adhoc committee and directing holding of the election does not suffer from any error of law. The resolution of the adhoc committee dated 14th August, 2013 expelling its members is patently without jurisdiction and cannot be sustained and is quashed. The order of the Assistant Registrar dated 20th August, 2013 staying the effect of the resolution dated 14th August, 2013 was perfectly justified in the given circumstances.

21. In the result, the Writ Petition No. 48536 of 2013 is partly allowed. The order dated 1st August, 2013 is affirmed and the resolution dated 14th August, 2013 passed by the adhoc committee of management is quashed.

22. The Writ Petition No. 47944 of 2013 is dismissed. Interim order, if any, is vacated. In the circumstances of the case parties shall bear their own cost. Let a certified copy of the order be issued to the learned counsel for the parties within a week on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.49386 of 2013

Smt. Rani Dixit and Anr. ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Dubey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Petitioners alleging themselves as husband and wife-seeking protection being major-enterned into contract of marriage-no where pleaded regarding performance of marriage according to Hindu rits or marriage registered under special marriage Act-can not be given recognition by writ court as husband and wife-petition dismissed.

Held: Para-12
It has not been pleaded to have been performed according to any other law in force governing the marriages between the Hindus namely Arya Samaj Marriage Validation Act etc. No law recognizes marriage of Hindus through any agreement or a contract, as marriage amongst the Hindus is not a contract but a sacrament.

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

1. Heard leaned counsel for the petitioners.

2. Petitioners who have jointly filed this writ petition supported by the affidavit of petitioner no. 2 have claimed the following reliefs:-

I. Issue a writ, order or direction in the nature of mandamus commanding the respondents not to take any coercive action against the petitioners in the peaceful matrimonial life of the petitioners.

II. Issue a writ, order or direction in the nature of Mandamus commanding the respondent's no. 2 and 3 to provide the security to peacefully matrimonial life of the petitioners.

III. Issue any suitable order or direction as this Hon'ble Court may deem fit and proper under the circumstances of the case.

IV. Award cost of the petition in favour of the petitioner."

3. The petitioners in the writ petition allege that both of them are major and have entered into a marriage contract on 15.6.2012 before the Notary Commissioner at Civil Court, Hathras. They are living as husband and wife but as the parents of petitioner no. 1 have not liked their decision of marriage, they with the help of police are interfering in their married life.

4. In the writ petition there are no pleadings to show the manner in which the marriage of the petitioners was performed except that they have entered into a contract of marriage before the Notary Commissioner.

5. The petitioners are both Hindu by religion. The marriage between two Hindus is governed by the provisions of Hindu Marriage Act, 1955.

6. Section 7 of the Act provides that Hindu marriage may be solemnized in accordance with the customary rights and ceremonies and where such rights and ceremonies include Satpadi the marriage becomes complete and binding when the seven steps have been taken.

7. In view of the above, a marriage between two Hindus is to be solemnized according to customary rights and ceremonies which ordinarily in Northern India especially includes invocation of sacred fire, satpadi before it coupled with Kanyadan.

8. Petitioners have not pleaded any different customary rights and ceremonies and have also no where stated that they have performed the marriage according to any customary rights and ceremonies which are prevalent amongst the Hindus.

9. In the absence of such pleadings the marriage of the petitioners can not be recognized under the aforesaid Act.

10. It is not the case of the petitioners that they have entered into civil marriage and have got it registered under the U.P. Registration of Marriage Act, 1973.

11. The marriage of the petitioners is also not registered under the Special Marriage Act.

12. It has not been pleaded to have been performed according to any other law in force governing the marriages between the Hindus namely Arya Samaj Marriage Validation Act etc. No law recognizes marriage of Hindus through any agreement or a contract, as marriage amongst the Hindus is not a contract but a sacrament.

13. In view of the above, the Court refuses to recognize the marriage of the petitioners, if any. The petitioners are therefore not entitle to any relief from this Court in exercise of discretionary jurisdiction on the basis of the marriage pleaded by them.

14. Accordingly, petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.51506 of 2013

Mahesh Kumar ...Petitioner
Versus
Pradeep Kumar Jaiswal & Anr. Respondents

Counsel for the Petitioner:
Sri A.C. Nigam

Counsel for the Respondents:
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U.P. Urban Buildings(Regulation of Rent and Letting) Act, 1972-Act No. 13 of 1972-Section 34(1)- Amendment in written statement-after evidence clouser of-by amendment plea of six month prior notice sought-held-if plea not taken at initial stage-shall be deemed waived-this ground-even then in absence of plea of land lord-no other person allowed to raise such plea-trail court rightly rejected amendment application.

Held: Para-10

There may be substance in the submissions of Sri Nigam, but here the first condition, i.e., release application has to be filed by a landlord who has purchased the building wherein the tenant is residing since prior to its purchase by the present landlord, is missing. The six months' prior notice is required in a case where the landlord has purchased the building and filed an application seeking release of the accommodation.

Case Law discussed:

2000(1) SCC 712.

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

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

2. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 3.9.2013 passed by the learned Prescribed Authority / ACMM IX, Kanpur Nagar in Rent Case No. 12 of 2010 (Pradeep Kumar and Another Vs. Mahesh Kumar) by which petitioner's amendment application seeking amendment in the written statement has been rejected.

3. The facts giving rise to this case are that it appears, the respondents-landlords have filed release application no. 12 of 2010 under section 21 (1) (a) of the U.P. Act No. 13 of 1972 (in short, 'the Act') for release of the accommodation in dispute. To the aforesaid application, a written statement was filed. After closing of the evidence of the parties, on 13.8.2013 an application seeking amendment in the written statement was filed under section 34(1)(g) of the Act praying the court to permit the petitioner to amend the written statement by adding ground no. 14-A. To this application, an objection was filed by the respondents-landlords stating that the respondents could have raised the plea of 6 month's notice while filing the written statement and now, at this stage, it cannot be permitted to raise because he has waived his right to raise the plea of notice.

4. Learned Prescribed Authority, taking note of the judgment of the Apex Court in **B.K. Narayana Pillai Vs. Parameswaran Pillai and Others 2000 (1) SCC 712**, has rejected the petitioner's amendment application holding that by not taking this objection at the initial stage, the petitioner has waived his right to raise the plea of six months notice and at the final hearing stage, he cannot be permitted to amend the written statement.

5. Sri Nigam submits that the requirement of six months' notice is mandatory in view of the first Proviso to sub-section (1) (a) of section 21 of the Act. For appreciating the controversy, it would be appropriate to go through the language used in the aforesaid proviso, which is reproduced hereunder:

"21. (1) Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds, mentioned in clause (a), unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years."

6. From the bare reading of the aforesaid Proviso, it would transpire that in case landlord has purchased the

accommodation in dispute in which the tenant is residing since prior to its purchase, while seeking release of the accommodation under section 21(1)(a) of the Act, he must give six months' notice to the tenant to vacate the premises with the stipulation that the release application cannot be filed before expiry of three years from the date of purchase. It would also transpire that six month's notice can be given even before the expiry of three years.

7. Sri Nigam submits that six months' notice is necessary for filing a release application in each circumstance either the release application has been filed by a landlord who has purchased the building or other than this. From the bare reading of the Proviso, I find that learned counsel for the petitioner is misconstruing and misinterpreting the 1st Proviso to sub-section (1) (a) of section 21 of the Act as the language used therein is unambiguous and clear and from its literal reading, it is clear that where the release application is filed by a landlord who has purchased the building, seeking release of accommodation in which tenant is residing, since prior to its purchase, the condition of six months' prior notice is necessary and that will not be available to a landlord other than the landlord who has purchased the building.

8. On being confronted as to whether the landlord, who has filed the release application, has purchased the building in question or he falls in the category of other landlord, Sri Nigam, from the perusal of the records, i.e., release application, written statement or even the amendment application, could not show that the release application has been filed by a landlord who has purchased the accommodation in dispute. Therefore, in my considered opinion, this proviso would not be attracted.

9. Sri Nigam further contended that the court below has erred in rejecting the application by observing that the tenant has waived his right to raise the plea of six months prior notice. In his submissions, the plea can be taken before the final decision of the release application and the principle of waiver may come into play only after decision of the release application in case it is taken in the appeal.

10. There may be substance in the submissions of Sri Nigam, but here the first condition, i.e., release application has to be filed by a landlord who has purchased the building wherein the tenant is residing since prior to its purchase by the present landlord, is missing. The six months' prior notice is required in a case where the landlord has purchased the building and filed an application seeking release of the accommodation.

11. In view of the foregoing discussions, I do not find any merit in the present writ petition and the same is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.52372 of 2013

Smt. Rajni Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Dwivedi

Counsel for the Respondents:
C.S.C.

Constutution of India, Art.-226- Service Law-transfer order challenged on breach of govt.

policy-held-having no statutory force-writ court should not interfere-proper remedy to approach before higher authority-petition dismissed.

Held: Para-9
Besides the judgments of the Apex Court, this Court has also considered the same time and again and has reiterated that the order of transfer made even in transgression of administrative guidelines cannot be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. Some of such authorities are as under.

Case Law discussed:
AIR 1991 SC 532; AIR 1993 SC 2444; 1992(1) SCC 306; 2004(11) SCC 402; W.P. No. 243(SB) of 2007; (1993) 4 SCC-25; (1994) 6 SCC-98; 1996(1)UPLBEC 54; AIR 2012 SC 232; 2009(8) SCC 337; JT 2009(2) SC 474.

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

1. Heard Sri Suresh Chandra Dwivedi, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The writ petition is directed against the order of transfer dated 10.09.2013 passed by Commissioner, Food and Civil Supply, U.P., Lucknow transferring petitioner from Moradabad Region to Bareilly Region.

3. Learned counsel for the petitioner submitted that the impugned order of transfer is in violation of transfer policy laid down vide Government Order dated 18.04.2013.

4. The question, whether violation of transfer policy or guide lines relating to transfer contained in an executive order or executive instructions or policy for a particular period laid down by the Government would result in vitiating the order of transfer, has been considered repeatedly by Apex Court as well as this Court.

5. The enforceability of a guideline laid down for transfer specifically came to be considered by the Apex Court in **Shilpi Bose & Vs. State of Bihar, AIR 1991 SC 532** and it was held that even if transfer order is passed in violation of the executive instructions or orders, the Courts ordinarily should not interfere with the order and instead affected arty should approach the higher authorities in the Department.

6. Again in **Union of India & others Vs. S.L. Abbas AIR 1993 SC 2444** a similar argument was considered and in para 7 of the judgment the Court said, "The said guidelines, however, does not confer upon the Government employee a legally enforceable right."

7. Referring its earlier judgment in **Bank of India Vs. Jagjit Singh Mehta 1992 (1) SCC 306** the Apex Court in S.L. Abbas (supra) observed as under :

"The said observations in fact tend to negative the respondents contentions instead of supporting them. The judgment also does not support the Respondents' contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or Tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterized as mala fide for that reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

8. Same thing has been reiterated by the Apex Court in **State of U.P. Vs. Gobardhan Lal 2004 (11) SCC 402** in the following words :

"Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments."

9. Besides the judgments of the Apex Court, this Court has also considered the same time and again and has reiterated that the order of transfer made even in transgression of administrative guidelines cannot be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. Some of such authorities are as under.

10. In **Rajendra Prasad Vs. Union of India 2005 (2) ESC 1224**, a Division Bench observed, "Transfer policy does not create legal right justiciable in the Court of law."

11. In Division Bench of this Court in **Civil Misc. Writ Petition No. 52249 of 2000 (Dr. Krishna Chandra Dubey Vs. Union of India & others)** decided on 5.9.2009 said, "It is clear that transfer policy does not create any legal right in favour of the employee. It is well settled law that a writ petition under article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breath of statutory duty on the part of the employer."

12. In **Ram Niwas Pandey & others Vs. Union of India & others (Special Appeal No. 769 of 2005**) decided on 29.11.2005 also this Court held that transgression of transfer policy or executive instructions does not give a legally enforceable right to challenge an order of transfer.

13. In **Civil Misc. Writ Petition No. 243 (SB) of 2007 Uma Shankar Rai Vs. State of U.P. & others** decided on 31.7.2007 this Court observed as under:

"Dr L.P. Misra, learned counsel for the petitioner seriously contended that though the transfer of Government servant is made in exigencies of service, yet where transfer policy has been framed, the same is expected to be adhered to and cannot be defied in a discriminatory and selective manner. Any action of the authorities, even in respect of the matter of transfer, if is inconsistent to such policy would vitiate the order of transfer since it would render the same arbitrary and illegal. Referring to para 2 and 3 of the transfer policy dated 11.5.2006, he contended that the respondent no. 4 having completed his tenure of six years in the District and ten years in the Commissionery even at Mirzapur yet he has again been sought to be posted at Mirzapur to accommodate him and the petitioner has been transferred to Varanasi, therefore, the impugned order is patently illegal. In support of the submission that order of transfer, if has

been issued in violation of transfer policy, the same can be assailed since the transfer policy was laid down to adhere to and not to violate, reliance has been placed on the apex Court's decision in Home Secretary, **U.T. of Chandigarh and another Vs. Darshjit Singh Grewal & others (1993) 4 SCC-25; N.K. Singh vs. Union of India and others (1994) 6 SCC- 98; R. vs. Secretary of State (1985) 1 All. ER 40**; and a Division Bench decision of this Court in **Smt. Gyatri Devi vs. State of U.P. and others (1998 (16) LCD- 17).** In other words the learned counsel for the petitioner contends that even through the order of transfer may not be challenged on the ground of mere violation of transfer policy, yet such order can be interfered with if the authorities who are supposed to adhere with the guidelines, have failed to do so.

In our view the submission is mutually destructive and self contradictory. What the petitioner in fact has sought to argue is that the Executive once has laid down certain standards for guidance in its functioning, it must adhere to and any deviation thereof would vitiate the consequential action, which may be challenged in writ jurisdiction. The argument though attracting but in the matter of transfer, however, in our view, the same has no application. Transfer of Govt. servants in the State of U.P. is governed by the provisions contained in Fundamental Rule- 15, which reads as under :-

.....

It is not disputed that the post held by the petitioner is transferable and he is liable to be transferred from one place to another. The employer once possess right to transfer an employee from one place to another, in our view, there is no legal or otherwise corresponding obligation upon him to inform his employee as to why and in what circumstance an employee is being transferred from one place to another. Shifting and transferring of the employee from one place to another involves more than thousand reasons and it is difficult to identify all of them in black and white. The commonest reason may be a periodical shifting of person from one place to another, which does not require any special purpose; the other reasons include necessity of a particular officer at a particular place; avoidance of disturbance or inconvenience in working of the officer on account of a person at a particular place; unconfirmed complaints and to avoid any multiplication thereof; transfer may be resorted to and so on. These are all illustrations. The question as to whether in any of the circumstances when a person is transferred from one place to another without casting any stigma on him, does it infringe, in any manner, any right of such employee which may cause corresponding obligation or duty upon the employer to do something in such a reasonable manner which may spell out either from its action or from the record and when challenged in a Court of law, he is supposed to explain the same, In our view, the answer is emphatic no."

14. It further held :

"In view of the aforesaid well settled principles governing the matter of transfer, the consistent opinion of the Courts in the matter of judicial review of the transfer orders has been that the order of transfer is open for judicial review on very limited grounds; namely if it is in violation of any statutory provisions or vitiated by mala-fides or passed by an authority holding no

jurisdiction. Since the power of transfer in the hierarchical system of the Government can be exercised at different level, sometimes for the guidance of the authorities for exercise of power of transfer, certain executive instructions containing guidelines are issued by the Government so that they may be taken into account while exercising power of transfer. At times orders of transfer have been assailed before the Court on the ground that they have been issued in breach of the conditions of such guidelines or in transgression of administrative guidelines. Looking to the very nature of the power of transfer, the Courts have not allowed interference in the order of transfer on the ground of violation of administrative guidelines and still judicial review on such ground is impermissible unless it falls within the realm of malice in law. The reason behind appears to be that the order of transfer does not violate any right of the employee and the employer has no corresponding obligation to explain his employee as to why he is being transferred from one place to another."

15. The Division Bench judgment in **Uma Shankar Rai (supra)** has been followed by another Division bench in **Jitendra Singh Vs. State of U.P. & another 2009 (4) ALJ 372.**

16. Following the above authorities and also dealing with the similar contention negativing the same this Court in **Constable 289 CP Tahsildar Singh & Others Vs. State of U.P. & Ors., (2010) 1 UPLBEC 124**, in para 46 of the judgment, the Court said :

"No authority of this Court or the Apex Court has been placed before me which has considered this question in the matter of transfer and has taken a different view and is binding on me. In the absence of any otherwise binding precedent, I feel myself bound to follow the law laid down by the Apex Court in **Shilpi Bose (supra), S.L. Abbas (supra), Gobardhan Lal (supra)** etc. and this Court's Division Bench judgments as discussed above."

17. Learned counsel for the petitioner, however, placed reliance on a Division Bench decision of this Court in **Deepa Vashishtha Vs. State of U.P. and others, 1996(1) UPLBEC 54** and Apex Court's decision in **State of Haryana Vs. Balwan and others, JT 1999 (6) SC 461.**

18. So far as the decision in Deepa Vashishtha (supra) is concerned, the subsequent Division Bench in Uma Shankar Rai (supra) has also considered the aforesaid decision and it has been discussed that the executive orders issued in respect of certain matters which relate to right of a person and those which are in respect of a matter in which a person has no rights, stand on different footing. For example, when a person is to be considered for appointment or admission in colleges or for other benefits, he has a right of consideration at par with others, i.e., the right of equality enshrined under Articles 14 and 16 of the Constitution but in respect of the matter of transfer no person has any right, legal or otherwise, to stay at a particular place and also has no right to have a place of posting of his choice. It is the privilege of employer to decide, whom it wants to post where and what work it intends to take from such person in the interest of administration. Unless such exercise of power is shown to be mala fide, the transfer of a person is not to be interfered.

19. Similarly, the decision of Apex Court in **State of Haryana Vs. Balwan**

(supra) was not a matter related to transfer and, therefore, has no application at all in respect to the issue up for consideration in the present case. There the matter relates to the Government policy/instructions which were found relevant in respect of right of life convicts conferring right of early release and the Court held that if such a scheme has been framed, the incumbent may ask the Government to consider his case according to such scheme.

20. Both the judgements, therefore, in my view, do not help the petitioner at all. On the contrary, there are some subsequent authorities of the Apex Court also which have deprecated any attempt to interfere with the orders of transfer very lightly.

21. 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....".

22. 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."

23. 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.

24. 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."

25. In view of above discussions and observations, I find no merit in the writ petition. It is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.52475 of 2013

Sumit Kumar Gupta ...Petitioner
Versus
Debts Recovery Appellate Tribunal & Ors. ..Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Tiwari, Sri N.L. Srivastava

Counsel for the Respondents:
Sri Rahul Sahai, Sri Sandeep Agarwal

Constitution of India, Art.-226- 'Doctrine of forum convenience'-explained-part of cause of action arose at Jharkhand-and partly at Allahabad-considering convenience of both parties residing at Jharkhand-declined to entertain petition-keeping it open to approach before High Court of Jharkhand.

Held: Para-8
In the light of the aforesaid, the Court is not inclined to exercise its discretionary jurisdiction under Article 226 of the Constitution of India and by invoking the doctrine of "forum convenience", the writ petition is dismissed with the observation that it would be open to the petitioner to litigate and agitate the matter before the High Court at Jharkhand.

Case Law discussed:
AIR 1976 SC 331; 2004(6) SCC 254; AIR 2011 Delhi 174; 2012(8) ADJ 61.

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

1. Heard Sri N.L Srivastava, the learned counsel holding the brief of Sri Ashok Kumar Tiwari, the learned counsel for the petitioner and Sri Sandeep Agarwal, the learned counsel holding the brief of Sri Rahul Sahai, the learned counsel for respondent nos. 2 and 3.

2. The petitioner has filed the present writ petition praying for the quashing of the order dated 26th July, 2013 passed by the Debts Recovery Appellate Tribunal, Allahabad as well as the order dated 3rd June, 2011 passed by the Debt Recovery Tribunal, Ranchi in the State of Jharkhand.

3. A preliminary objection was raised with regard to the maintainability of the writ petition before this Court. The Court has heard the learned counsel for the parties at some length and finds that a part of cause of action arose within the territorial limits of this Court, inasmuch, as the appellate order was passed by an authority, which was located at Allahabad, which is within the territorial jurisdiction of this Court.

4. In the light of the various decisions of the Apex Court starting from S**ri Nasiruddin Vs. State Transport Appellate Tribunal, AIR 1976 SC 331** and **Kusum Ingots and Alloys Ltd. Vs. Union of India 2004 (6) SCC 254**, since a part of cause of action has arisen, the writ petition is maintainable. However, the Court in the given circumstances is not inclined to entertain the writ petition for the following reasons:

a. The petitioner is a resident of district East Singhbhum, Jamshedpur in the State of Jharkhand.

b. The respondent nos. 3,4 and 5 are also resident of district East Singhbhum, Jamshedpur in the State of Jharkhand.

c. Notice under the SARFAESI Act was issued by the bank from Jharkhand, which was questioned by the petitioner before the Debt Recovery Tribunal at Ranchi in the State of Jharkhand.

d. The petitioner, being aggrieved by the order of the Debt Recovery Tribunal, filed an appeal before the Debt Recovery Tribunal at Allahabad.

e. All the contesting parties are resident of district East Singhbhum, Jharkhand except respondent no. 1, which is the Debt Recovery Appellate Tribunal, which is located at Allahabad and is only a formal party.

5. The Court is of the opinion that the doctrine of "forum convenience" comes into

play, namely, that in the given circumstances, the Court will decline to exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India and leaves it to the party to file a petition before the appropriate Forum, which in the instant case would be the High Court at Jharkhand.

6. The doctrine of "forum convenience" was examined by a Full Bench of five Judges of the Delhi High Court in **M/s. Sterling Agro Industries Ltd. Vs. Union of India and others, AIR 2011 Delhi 174.** The Full Bench of the Delhi High Court held that, even though, a part of cause of action has arisen in the State, where the appellate authority is located, it does not become the "forum convenience" for a party to challenge that order in that particular State, inasmuch as, it is obligatory on the part of the Court to see the convenience of all the parties. The Full Bench held that the concept of "forum convenience" means that it is obligatory on the part of the Court to see the convenience of all the parties before it, which would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessary for just adjudication of the controversy involved and its ancillary aspects. The balance of convenience is also to be taken into consideration. The Supreme Court in the case of Kusum Ingots (supra) also touched on the aspect of forum convenience while opining that the cause or part of action would entitle the High Court to entertain the writ petition.

7. In similar situation, where the Debt Recovery Tribunal of Madhya Pradesh had passed an order and the Appellate Tribunal at Allahabad had dismissed the appeal, a writ petition was filed before this Court, wherein, the Court declined to entertain the petition and directed the parties to litigate before the appropriate forum in Madhya Pradesh. This judgement, namely, **M/s. Dynamic Education Systems (International) Limited and another Vs. Bank of Baroda and others, 2012 (8) ADJ 61** is fully applicable in the instant case.

8. In the light of the aforesaid, the Court is not inclined to exercise its discretionary jurisdiction under Article 226 of the Constitution of India and by invoking the doctrine of "forum convenience", the writ petition is dismissed with the observation that it would be open to the petitioner to litigate and agitate the matter before the High Court at Jharkhand.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2013

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No.53092 of 2013

Aalam Ali Khan and Anr. ...Petitioners
Versus
Smt. Anjul and Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh

Counsel for the Respondents:

Constitution of India, Art.-226- Appeal against rejection of application-under order 21 rule 97 admitted-prayer for interim order rejected-submission that as per verdict of Apex Court once appeal admitted-interim relief must be given-held-petitioner being stranger failed to produce any evidence either oral or documentary either before lower appellate court or before writ court-rejection of interim relief-held proper.

Held: Para-13 & 14
13. The appeal, admittedly is pending and it is for the petitioners to bring on record evidence to show that the order of the

Executing Court dated 31.07.2013 was passed on wrong assumption of facts if at all. The petitioners have failed to bring before the Executing Court any evidence either oral or documentary in support of their contention that they are competent to obstruct the decree by virtue of their possession. Even in this writ petition there is no document to show the possession of the petitioners except an averment in paragraph 20.

14. Under such circumstances, the rejection of the interim stay application by the Appellate Court would not amount to visiting of adverse civil consequences to the petitioners' since they were not in possession. There is no question of their being dispossessed so as to say that by the impugned order the civil consequences are adverse.

Case Law discussed:
AIR 1997 SC 856; 1983 AWC 121.

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

1. Heard Sri Nipun Singh, learned counsel for the petitioners.

2. Notice need not be issued to the respondents in view of the order being passed herein.

3. This writ petition is directed against the order dated 20.09.2013 passed by the Additional District Judge, Court No.10, Muzaffar Nagar, in Civil Appeal No.94 of 2013 (Aalam Ali Khan and others Vs. Smt. Anjul & others) whereby the stay application paper no.7-C filed by the petitioners alongwith the appeal has been rejected.

4. Learned counsel for the petitioners has placed reliance on a decision of the Supreme Court in the case of **Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal & another** reported in **AIR 1997 SC 856** and **Mool Chand Yadav and another Vs. Raza Buland Sugar Co. Ltd.**, reported in **1983 AWC 121** to submit that when an appeal is admitted against an order then an interim protection should be given to the appellant so as to avoid any adverse civil consequences affecting the parties since the impugned order in the appeal is yet to be adjudicated by the Appellate Court.

5. Learned counsel states that Execution Case No.18 of 2003 arose out of an appellate decree dated 22.05.2000 passed by the Additional Civil Judge (Sr. Division) Court No.2, Muzaffar Nagar in Civil Appeal No.466 of 1998. According to Sri Nipun Singh, learned counsel for the petitioners, the petitioners were not parties in those proceedings and they filed an application dated 30.05.2013 under Order 21 Rule 97 CPC, however, the said application under Order 21 Rule 97 CPC was rejected by the Executing Court by its order dated 31.07.2013 where against they preferred the instant Appeal No.94 of 2013 and filed an application paper no.7-C for grant of interim relief.

6. He states that the Appellate Court while entertaining and admitting the appeal has refused to grant any interim protection for invalid reasons. Sri Nipun Singh states that refusal to grant interim protection by the Appellate Court is only for the reason that there are many respondents in the appeal and they have to be heard. He states that this is not a ground on which the interim protection application can be refused by the Appellate Court after admitting the appeal.

7. Having considered the submission of learned counsel for the petitioners and perused the record, it appears that by the order dated 31.07.2013 passed in Misc. Case No.18 of 2003 the application under Order 21 Rule 97 CPC filed by the petitioners was

rejected. While dismissing the said application it was held that the petitioners are not in possession over the land in question. The Appellate Court while considering the interim application against the said judgment of the Executing Court was of the view that an ex-parte interim order should not be granted during pendency of the appeal since caveat has been filed and further held that no grounds have been made out for staying the execution proceedings. The said view of the Appellate Court is quoted hereunder:-

"मेरे द्वारा उक्त विधि व्यवस्थाओं का ससम्मान परिशीलन किया गया। यह बात सही है कि अपील या निगरानी के दर्ज होने के समय अपीलीय न्यायालय को पक्षकारों के अधिकारों को ध्यान में रखना चाहिए और अवर न्यायालय के आदेश का क्रियान्वयन स्थगित सामान्यतः किया जाना चाहिए जो कि अपीलीय न्यायालय की अधिकारिता में भी है। परन्तु प्रस्तुत प्रकरण में मूल वाद सन 1981 का था और उसमें पारित निर्णय के निष्पादन की कार्यवाही सं0 03 सन 2001 से लम्बित है। अपीलार्थीगण द्वारा निष्पादन न्यायालय के समक्ष अपनी आपत्ति न्ध्व 21 नियम 97 सी.पी.सी. वर्ष 2003 में प्रस्तुत की थी जिसके निस्तारण में भी 10 वर्ष लग गये है। इस प्रकरण में रेस्पोडेन्ट दीपा द्वारा केवियट भी प्रस्तुत की गयी है और 5 रिस्पोडेन्ट इस अपील में पक्षकार है यदि एकपक्षीय रूप से स्थगन का आदेश पारित कर दिया जाता है तो निष्पादन की कार्यवाही निकट भविष्य में पूर्ण नहीं हो सकेगी। ऐसी दशा में निष्पादन की कार्यवाही को रोके जाने का कोई आधार इस स्तर पर यह न्यायालय नहीं पाती है। अतः प्रा0पत्र ग–7 इस स्तर पर तदनुसार निस्तारित किया जाता है।

पत्रावली वास्ते बहस दिनांक 18–10–13 को पेश हो। रेस्पोन्डेन्टस के विरूद्ध नोटिस जारी हो। अपीलार्थी आवश्यक पैरवी अन्दर तीन दिन करें।"

8. A perusal of the aforesaid order indicates that there are two reasons why the Appellate Court has refused to grant interim order. The first is that an ex-parte order of stay is not required because a caveat has been filed and the second is that there is no ground made out for stopping the execution proceedings. It is here that Sri Nipun Singh refers to the decision in the case of **Brahm Dutt Chaudhary (Supra) and Mool Chand Yadav (Supra)** to submit that the said view of the Appellate Court is illegal.

9. In the case of **Mool Chand Yadav (Supra)** it was admitted that Mool Chand Yadav was in possession of and occupying one room of Hari Bhawan. In the suit filed by the corporation an injunction was issued restraining Mool Chand Yadav from occupying the room. An appeal was then filed by Mool Chand Yadav but the Appellate Court although admitted the appeal it declined to grant stay. The Supreme Court under these circumstances found that the possession of Mool Chand Yadav was not disputed then a stay was to be granted during pendency of the appeal since non grant of a stay would have serious civil consequence to Mool Chand Yadav in case his appeal was allowed later.

10. In the case of **Brahmdeo Chaudhary (Supra)** the Supreme Court was considering a case where it held that the obstructor could not be dispossessed under order XXI Rule 97 CPC for the reason that his claim would be adjudicated and then he could move an application under Order XXI Rule 99 CPC.

11. The submission of Sri Nipun Singh tested on the view taken by the Executing Court and Appellate Court indicates that the petitioners are not in possession over the property in question. That being so the order of the Executing Court requires to be gone into. The Executing Court in its order dated 31.07.2013 has recorded as quoted hereunder:-

"इसके अतिरिक्त प्रार्थीगण द्वारा अपने कथन के समर्थन में मौखिक साक्ष्य में साक्षी प.डब्लू.–01 के रूप मे स्वयं प्रार्थी संख्या–02 तसव्वर अली ने अपनी प्रति

परीक्षा में कथन किया है कि यह कहना सही है कि कागजात माल जो मैनें दाखिल किये है इनमें ख0 नं0–938 व 1140 में आबादी अंकित नहीं है। इसी प्रकार साक्षी पी.डब्लू.–02 अययूब ने अपनी प्रति परीक्षा में कथन किया है कि विवादित घेर कौन से ख0 नं0 खेवट में है मुझे नहीं पता, मालिकान को पता होगा। इस प्रकार प्रार्थीगण के उपरोक्त मौखिक साक्ष्य से भी विवादित भूमि पर प्रार्थीगण का स्वत्व साबित नहीं है। इसके अतिरिक्त साक्षी पी.डब्लू.–01 के रूप में स्वयं प्रार्थी तसव्वर ने अपनी प्रति परीक्षा में कथन किया है कि मुझे नहीं पता कि विवादित खेवट में लाला बागेश्वर दयाल व शंकरलाल का इंजन लगा हुआ है या नहीं। मुझे नहीं पता कि घेर विवादित के बारे में लाला शंकर दयाल व बागेश्वर दयाल के हक में कोई किरायानामा लिखा गया था या नहीं। मुझे नहीं पता कि इन लोगो ने कोई किराया अदा किया या नहीं। इस प्रकार प्रार्थी के उपरोक्त साक्ष्य से विवादित सम्पत्ति पर प्रार्थीगण का कब्जा भी साबित नहीं होता।"

12. From the aforesaid extract of the said order it is clear that the petitioners while pursuing their application under Order 21 Rule 97 CPC have failed to bring any iota of evidence that they are in possession and are competent to obstruct the decree. This is not a case where the petitioners obstructor are sought to be dispossessed under Order 21 Rule 97 CPC and after adjudication to be given possession again. This is a case where the petitioners have failed to prove or even to prima-facie indicate that they were ever in possession of the property in question. Under such circumstances, if the Appellate Court grants an interim protection to the petitioners staying the order of the Executing Court it would amount to giving possession to the petitioners of a property over which they are not in possession. As such the case of **Brahm Dutt Chaudhary (Supra)** and **Mool Chand Yadav (Supra)** are not at all applicable in the present case.

13. The appeal, admittedly is pending and it is for the petitioners to bring on record evidence to show that the order of the Executing Court dated 31.07.2013 was passed on wrong assumption of facts if at all. The petitioners have failed to bring before the Executing Court any evidence either oral or documentary in support of their contention that they are competent to obstruct the decree by virtue of their possession. Even in this writ petition there is no document to show the possession of the petitioners except an averment in paragraph 20.

14. Under such circumstances, the rejection of the interim stay application by the Appellate Court would not amount to visiting of adverse civil consequences to the petitioners' since they were not in possession. There is no question of their being dispossessed so as to say that by the impugned order the civil consequences are adverse.

15. The writ petition has no merit. It is, accordingly, dismissed.

16. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2013

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No.54960 of 2013

Gaurav Arya & Ors. ...Petitioners
Versus
The Civil Judge Hathras & Ors. ...Respondents

Counsel for the Petitioners:
Sri Keshari Nath Tripathi, Sri P.K. Singh
Sri C.P. Gupta

Counsel for the Respondents:
Sri Sanjay Kumar Dubey, Sri Rahul Sahai

C.P.C. Order XXI, Rule-198, 101- Execution of decree-petitioner raised objection-from

Amin report-possession of petitioner proved execution court committed error by refusing request to lead oral evidence-in view of law developed in Janaradan S. Jaiswal Case-petitioner entitled to establish and prove their rights-it can not be dispense with unless objection decided otherwise.

Held: Para-20

The impugned order dated 24.09.2013 passed by the Civil Judge (Sr. Division) Hathras in RM-100 of 2013 arising out of Execution Case No.15 of 1998 is set aside and as already observed above he is entitled to lead his oral and documentary evidence. The Executing Court is required to consider the application paper no.21-C-2 of the petitioner in accordance with law keeping in mind the amended provision of Rule 101 of Order XXI CPC.

Case Law discussed:

2005(23) LCD 406; MHLJ 1969-0-512

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

1. Heard Sri Keshari Nath Tripathi, learned senior counsel assisted by Sri C.P. Gupta, learned counsel for the petitioners and Sri Rahul Sahai alongwith Sri S.K. Dubey, learned counsel for the Respondents No.2 & 3.

2. It is informed by learned counsel for the parties that the Respondents No.4 to 8 were the judgment debtor and are as such not affected by any order passed in this writ petition hence with consent of learned counsels this writ petition is being decided today itself.

3. This writ petition is directed against the order dated 24.08.2013 passed in Execution Case No.15 of 1998 arising out of the Original Suit No.349 of 1983 whereby the Executing Court has issued dakhal parwana with police force as also the order dated 18.09.2013 whereby the application paper no.6-C filed by the petitioners in proceedings under Order XXI Rule 97 CPC for grant of interim protection has been refused as also the order dated 24.09.2013 passed by the Executing Court in Misc. Case No.RM-100 of 2013 also arising out of the Execution Case No.15 of 1998 whereby the application 21-C-2 made by the petitioners for permission to lead oral evidence in their support has been rejected.

4. According to Sri Tripathi, learned senior counsel, the petitioners were not party in Original Suit No.349 of 1983 which was decreed in 1986. The appeal was dismissed in 1994 and the S.L.P. there against was also dismissed on 12.08.1996. He submits that the decree holder filed Execution Case No.15 of 1998 which was subsequently dismissed for default on 13.01.2000 but restored in the year 2012. The petitioners claimed to be in possession over the property in question by virtue of it being let out to them on 15.09.1998 by the then decree holder. When the decree was being executed after the execution case had been restored in the year 2012 the petitioners who claimed to be tenants of the premises in question obstructed the decree under Order XXI Rule 97 CPC and the Amin report obtained by the Executing Court indicated that the petitioners are in possession over the property in question.

5. Learned counsel states that alongwith the application under Order XXI Rule 97 CPC the petitioners had made the application for grant of interim injunction against their dispossession which application 6-C was rejected by the impugned order on 18.09.2013 and their application paper no.21-C-2 to lead oral and documentary evidence has also been rejected by the impugned order dated 24.09.2013.

6. The sum and substance of the submission of learned counsel for the

petitioners is that when an application under Order XXI Rule 97 CPC has been entertained by the Executing Court and the Amin Commission has reported that the petitioners are in possession thereof they cannot be summarily ejected in pursuance of the decree and an adjudication as contemplated under Order XXI Rule 98 CPC is to be done. The petitioners who are not the judgment-debtors cannot be first dispossessed in proceedings under Order XXI Rule 97 CPC and thereafter adjudication be done. He states that if that be a circumstance and the petitioners are dispossessed under Order XXI Rule 99 CPC without adjudication of their rights under Rule 98 of Order XXI CPC it shall be an illegal act because in case under adjudication it is found that the petitioners have a vested right as tenant of the property in question let out to them by the erstwhile decree holder they would be entitled to be put in possession again. He states that such a procedure does not have the sanction of law that the obstructor be dispossessed under Rule 99 and be repossessed after adjudication under Rule 98 of Order XXI CPC.

7. Sri Rahul Sahai, learned counsel for the respondent has contested the submissions and has submitted that the Executing Court is enjoined to adjudicate the rights of obstructor under Order XXI Rule 97 & 98 CPC. He states that the interim protection which was claimed by the petitioners by the application 6-C could not have been granted by the Executing Court and, therefore, the impugned order dated 18.09.2013 is an order passed in accordance with law. He further states that in execution proceedings the obstructor cannot be allowed to lead oral or documentary evidence and, therefore, the Executing Court has rightly rejected his application 21-C-2 by the impugned order dated 24.09.2013.

8. Sri Rahul Sahai also defends the impugned order dated 24.08.2013 to state that the decree holder is entitled to dakhal parwana and police force for the purpose of possession as such he states that no error has been committed by the Executing Court in passing the impugned order dated 24.08.2013.

9. In support of his submission Sri Rahul Sahai has placed reliance on a decision of this court in the case of Janardan Singh Jaiswal Vs. IVth Additional District Judge, Mirzapur reported in 2005(23) LCD 406.

10. Having considered the submission of learned counsel for the parties and perused the record, insofar as the order dated 24.08.2013 is concerned, the decree holder is no doubt entitled to an order of dakhal parwana and police force to execute the decree, however, such dakhal parwana has to be executed in accordance with law. Therefore, while not interfering in the order dated 24.08.2013 passed by the Executing Court it is apt to state that such a dakhal parwana can only be executed in accordance with law and since there is an application under Order XXI Rule 97 CPC filed by the obstructor to the decree the dakhal parwana has to wait such adjudication of such an application in accordance with law under Order XXI Rule 98 CPC and till then the dakhal parwana cannot be executed.

11. Insofar as the order dated 18.09.2013 is concerned, the application of the petitioners for interim protection appears to have been refused. Be that at it may, even if the interim protection is not

granted to the obstrutor petitioners they cannot be dispossessed unless in accordance with law, therefore no interference is required in the impugned order dated 18.09.2013.

12. Under Order XXI Rule 98 CPC, it has been specifically provided that there is to be a determination of all the questions raised regarding right title or interest in the property arising between the parties to a proceeding under Order XXI Rule 97 or 99 CPC. Therefore, to say that the obstructor should be dispossessed first under Rule 99 of Order XXI CPC and then adjudication be made under Rule 101 and Rule 98 of Order XXI CPC would be an incorrect proposition. When the application under Order XXI Rule 97 is pending adjudication before the Executing Court the obstructor petitioners can only be dispossessed in accordance with law. Para 14 of the judgment in Janardan Singh Jaiswal (Supra) reads as under:-

"In order to resist possession under Order XXI Rule 95, C.P.C. the occupier must establish his right to occupy the property as a tenant. In the present case, and that the facts and circumstances of the case clearly establish that the objector's father Sri Tej Narain Singh was not the tenant of the property. The petitioner did not become tenant on the death of his father and there is no evidence with regard to his tenancy. In Deo Raj Dagra v. Gyan Chandra Jain, 1981 (2) ACC 615, the Supreme Court held that where the objector claims to be tenant, the question of validity or otherwise of the tenancy may have to be considered and determined in an appropriate proceedings. Order XXI Rule 97, C.P.C. was amended and that Sub-rule (2) provides that where any application is made under Sub-rule (1) by a person resisting and obstructing the possession of immovable property made by the holder of the decree for possession, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained. The object of the amendment made by C.P.C. (Amendment) Act, 1976 was to decide all questions including the right of the tenancy, in the execution proceedings itself. The obstructor must prove not only his possession but has also to establish that he has a right to protect his possession from the auction purchaser. Where he claims tenancy, he must establish the same. In Nooruddin v. K.L. Anand (Dr.), (1995) 1 SCC 242, the Supreme Court held that the scheme of the Code clearly adumbrates that when an application has been made under Order XXI Rule 97, the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties, to a proceeding or between the decree holder and the persons claiming independent right, title or interest in the immovable property and an order in that behalf shall be made. The determination shall be conclusive between the parties as if it was a decree subject to right of an appeal and not a matter to be agitated by a separate suit. The object is to render substantial justice and to prevent resistance to a decree by a person who has no right to occupy the property. Adjudication before execution is a sufficient remedy to prevent the fraud, abuse of the process of the Court or miscarriage of justice."

13. In this decision the Court has clearly held that the obstructor must not only prove his possession but he has also

to establish that he has a right to protect his possession.

14. In the present case the possession of the petitioner cannot be disputed in view of the report of Amin where he has been found in possession. Insofar as establishing any right to protect his possession is concerned, the same is yet under adjudication and such adjudication under the provisions of Order XXI Rule 101 CPC has not yet been done as such in view of the decision in the case of Janardan Singh Jaiswal (Supra) the petitioners obstructor are entitled to an adjudication to establish a right in the property in question and protect their possession thereby.

15. Insofar as the decision of the Trial Court in the order dated 24.09.2013 that no oral evidence can be permitted to the petitioner obstructor is concerned, Sri Rahul Sahai, learned counsel for the respondent has placed reliance on a decision of the Bombay High Court in the case of Tarabai Vishwanath Sabins Vs. National and Grindlays Bank Ltd. reported in MHLJ 1969-0-512 and placed reliance on paragraph 3 therein. According to him, it was clearly held by a Division Bench of the Bombay High Court that the proceedings under Order XXI Rule 97 CPC to Rule 102 CPC are summary proceedings and not intended for decisions to be made by leading oral and documentary evidence tendered on behalf of the parties. He therefore states that the impugned order dated 24.09.2013 is in accordance with law and hence requires no interference.

16. Insofar the above submission is concerned, the said decision of the Bombay High Court was a decision delivered in the year 1968. The Rule 101 of Order XXI CPC has undergone change by an amendment in the year 1976. Rule 101 as it reads prior to 1976 amendment is quoted hereunder:-

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment- debtor, it shall direct that the applicant be put into possession of the property.

17. Rule 101 as amended after 1976 is quoted hereunder:-

"All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application, and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

18. The aforesaid amendment indicates that all disputes are to be settled by the Executing Court under Order XXI Rule 101 CPC. In the present case the petitioners are not the judgment debtor. The petitioners are non-party to the Original Suit and the petitioners claim to be in possession of the property in question by virtue of it being let out to them by the erstwhile decree holder. Therefore this is not a case of an obstruction by a judgment debtor or a person claiming through the judgment debtor. Under such circumstances, the questions which have to be determined under Rule 101 of Order XXI

CPC are with relation to the petitioner who is in possession of the property at the instance of the erstwhile decree holder and are to be determined by the Executing Court which shall have jurisdiction to decide such questions. Therefore in view of the amended provision of Rule 101 of Order XXI CPC the court below could not deny an opportunity to the petitioners obstructor to lead oral or documentary evidence for the purpose of proving his right, title and interest which according to the petitioners has been disputed and denied by the respondents.

19. In view of the aforesaid, the impugned order dated 24.09.2013 passed by the Executing Court in RM-100 of 2013 arising out of Execution Case No.15 of 1998 cannot be sustained. The petitioners obstructor who is in possession through erstwhile decree holder is therefore entitled to lead oral and documentary evidence for the purpose of prove of his right and interest before the Executing Court. In view of the aforesaid circumstances, the writ petition is disposed of as under:-

20. The impugned order dated 24.09.2013 passed by the Civil Judge (Sr. Division) Hathras in RM-100 of 2013 arising out of Execution Case No.15 of 1998 is set aside and as already observed above he is entitled to lead his oral and documentary evidence. The Executing Court is required to consider the application paper no.21-C-2 of the petitioner in accordance with law keeping in mind the amended provision of Rule 101 of Order XXI CPC.

21. The petitioner cannot be dispossessed unless the questions that have arisen in his application under Order XXI Rule 97 CPC are decided under Rule 101 of Order XXI CPC and otherwise in accordance with law.

22. It is made clear that this Court has not adjudicated on the claim made by the petitioner of having status of a tenant in the property and that has to be done by the appropriate Court.

23. As prayed by learned counsel for the parties, since the matter is quite old it is expected that the Executing Court shall decide it as expeditiously as possible without granting any unnecessary adjournments to any of the parties and in accordance with law.

24. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2013

BEFORE
THE HON'BLE V.K.SHUKLA, J.
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No.55108 of 2013

Raj Kumar Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Amit Kr. Rai

U.P.Panchayat Raj(Removal of Pradhans-UP-Pradhan & Members)enquiry Rules 1997-Rule 3,4,6(16)-Petition against revocation of ceasing financial & administrative power of pradhan-based upon enquiry report-challenged by complainant-whether can be treated as 'aggrieved person'?-held-No-objector can participate in regular enquiry but can not challenge the revocation of suspension order-petition dismissed.

Held: Para-35

Thus it is evident from the scheme of the Act and the rules framed there under, the complainant only has a right to participate in the regular enquiry to the extent rules provided for, but he has no locus to challenge the order passed by District Magistrate either on the report of preliminary enquiry or that of final enquiry.

Case Law discussed:
2006(3) AWC 2787; (1975) 2 SCC 702, 710-11; AIR 2005 AP 45,49; (2012) 4 SCC 407; (2013) 4 SCC 465, 466; 2008(2) AWC 2002:(2008) 2 UPLBEC 1256; 2005(4) AWC 3563; 2011(3) ADJ 502; 2010(10) ADJ 11.

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

1. Heard the counsel for the petitioner as well as the learned standing counsel appearing for respondent nos.1 to 5 and the learned counsel appearing for respondent no.7.

2. The petitioner claims to be a social worker who has done various social works in the society and he belongs to the same Village Pijda of which the respondent no.7 is the duly elected village Pradhan. The petition is not a Public Interest Litigation.

3. It is alleged that the respondent no.7 was involved in huge financial irregularities and mis appropriation of funds pertaining to the Gram Panchayat. On the said complaints inquiry was conducted by the Block Development Officer, Block Pardaha, District Mau who submitted a detailed enquiry report dated 29.11.2012.

4. As a result of the said inquiry, the District Magistrate in exercise of its power under section 95(1)(g) of U.P Panchayat Raj Act 1947 vide orders dated 9.1.2012 ceased the financial and administrative power of respondent no. 7 with immediate effect and further constituted a three member committee for exercising financial and administrative power. It is further alleged that in the inquiry, the misappropriation of fund was proved and orders for recovery of the amount was passed.

5. Aggrieved by the order of the District Magistrate dated 9.1.2012 by which the financial and administrative power of respondent no. 7 was ceased and recovery was issued, the respondent no. 7 i.e the Gram Pradhan filed a Civil Misc. Writ Petition No. 17237 of 2012 (Smt.Urmilla versus State of U.P and others), the Hon'ble Court vide order dated 6.4.2012 relying upon a Division Bench judgement dated 31.1.2006 reported in 2006 (3) AWC 2787, (Indu Devi versus District Magistrate, Chitrakoot and others) held that no recovery can be made under section 27 of the U.P Panchayat Raj Act 1947 unless final enquiry was concluded. The court directed that the inquiry be concluded expeditiously and the Gram Pradhan shall cooperate in the said inquiry.

6. It is further stated that the respondent no. 7 filed another writ petition no.17116 of 2013 (Smt.Urmila Singh versus Stateof U.P & others) assailing the order dated 9.1.2012 passed by the District Magistrate under section 95(1)(g) of the U.P Panchayat Raj Act seizing the administrative and financial powers of the Pradhan. This Court vide order dated 22.3.2013 passed the following orders:

"Heard the learned counsel for the parties.

The administrative and financial powers of the petitioner, who is an elected Pradhan, were ceased under the proviso

to Section 95(1)(g) of the U.P Panchayat Raj Act,1947 by the order of the District Magistrate, Mau dated 9.1.2012.

According to the learned counsel for the petitioner thereafter neither any final inquiry has been conducted nor final orders have been passed and the petitioner is continuing without her administrative and financial powers for the last 15 months. In the circumstances it has been prayed that a direction may be issued to the District Magistrate, Mau to get the final inquiry concluded and a final decision taken in the matter within a fixed time frame.

Considering the facts and circumstances, this petition is disposed of with a direction to the District Magistrate, Mau to get the final inquiry concluded and the final decision taken under Section 95 (1) (g) of the said Act within a period of two months from today, failing which it would be open to the petitioner to apply before the District Magistrate, Mau to recall the order dated 9.1.2012 and in case the District Magistrate, Mau finds that the inquiry could not be concluded and the final decision could not be taken not on account of any delay being caused by the petitioner, he shall pass appropriate order withdrawing the earlier order dated 9.1.2012."

7. In pursuance of the aforesaid order, the Inquiry Officer after conducting preliminary inquiry submitted report dated 9.4.2013 to the Chief Development Officer/District Magistrate which is part of the record. The Inquiry Officer was of the opinion that the charges made against the respondent no.7, by the petitioner, is not substantiated and recommended that the suspension of financial and administrative powers be revoked. The District Magistrate in pursuance of the said inquiry report vide orders dated 4.9.2013 revoked the order ceasing financial and administrative powers. However, the District Magistrate was of the opinion that the pending regular inquiry would continue against the respondent no.7. The petitioner aggrieved by the order dated 4.9.2013 revoking the order ceasing financial and administrative powers has filed the present writ petition.

8. The learned standing counsel, as well as, the counsel appearing for respondent no. 7, at the outset have raised an objection that the present writ petition is not maintainable at the behest of the complainant as the petitioner is not an aggrieved person.

9. Section 95(1)(g) of U.P Panchayat Raj Act 1947 provides for the removal of Pradhan on the ground mentioned therein and first proviso to the said section provides that wherein an enquiry held by such person and in such manner as may be prescribed, a Pradhan prima facie found to have committed financial and other irregularities, such 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.

10. The Governor in exercise of the powers conferred by Section 110 read with clause(g) of sub-section(1) of Section 95 of the U.P Panchayat Raj Act, 1947, has framed the U.P.Panchayat Raj (Removal of Pradhans, Up-Pradhans and

Members) Enquiry Rules, 1997 hereinafter referred to as Rules.

11. Rule 3 provides for procedure relating to complaints and it states any person can make a complaint against the Pradhan and send his complaint to the State Government or any Officer that may be empowered in this behalf by the State Government. Sub section (3) provides as to how complaint is to be made and sub section (5) states that complaints which does not comply with any of the foregoing provisions of these rules, shall not be entertained.

12. Rule(4) provides for conducting Preliminary Enquiry with a view to find out if there is a prima facie case for a formal enquiry in the matter.

13. The State Government on the basis of the report referred to in sub section (2) of Rule 4 or otherwise is of the opinion that an enquiry should be held against the Pradhan under proviso to clause (g) of sub section (1) of Section 95, it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub section (1) of Section 95, of the Act and by an order ask and Enquiry Officer, other than the Enquiry Officer nominated under sub-rule(2) of Rule 4, to hold the enquiry.

14. In the present case, the impugned order revokes the order of cessation of financial and administrative powers on the preliminary report submitted by the Enquiry Officer. The petitioner who is complainant in the present case, certainly cannot be an aggrieved person.

15. Object of a preliminary enquiry is to find out if there is a prima facie case for conducting regular enquiry in the matter.

16. Prima Facie means- on the face of it, at first sight, based on the first impression. Sufficient evidence to make a case until it is contradicted or over come by opposing evidence.(CRAIG R.DUCAT- Constitutional Interpretation)

17. It is a term which means the first impression that can be had from the contents on the face of a documents or instrument, if any evidence contrary to it is disregarded.

18. At first sight on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the countrary. (State ex.rel.Harberi v. Whims, 68 Ohio App 39, 38 NE 2d 596,599,22 OO 110).

19. The Enquiry Officer did not find any prima facie case as alleged by the petitioner in his complaint, against the respondent no.7. Further the petitioner being a complainant is also not a person aggrieved by impugned order or the action taken by the District Magistrate in revoking the order ceasing the financial and administrative power of respondent no.7.

20. The meaning of the expression 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meanings is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statutes which do not deal with the property rights but deal with professional misconduct and

morality. (Bar Council of Maharashtra v. M.V.Dabholkar, (1975) 2 SCC 702, 710-11, paras 27 & 28).

21. Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights (Corpus Juris Seundem. Edn. 1, Vol.IV, p.356, as referred in Kalva Sudhakar Reddy v.Mandala Sudhakar Reddy, AIR 2005 AP 45,49 para 10)

22. The expression 'person aggrieved' means a person who has suffered a legal grievance i.e a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something. The petitioner is not an aggrieved person by merely filing a complaint and order of revocation of cessation of financial and administrative powers do not affect him in any manner.

23. Recently Supreme Court in Ravi Yashwant Bhoir versus District Collector, Raigad and others (2012) 4 SCC 407 was dealing with the removal of the President of Uran Municipal Council under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. In the said case, the ex-President was the complainant and the Court was of the opinion that the complainant cannot be party to lis as he could not claim the status of an adversarial litigant. Paragraph 58, 59 & 60 is relevant and is as follows:

"58. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person whosuffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

59.The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro ratione valuntas reasons i.e. a claim devoid of reasons.

60. Under the garb of being necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party. (Vide: Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General ofMaharashtra, AIR 1971 SC 385; Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors., AIR 1976 SC 578; Maharaj Singh v. State of Uttar Pradesh &

Ors., AIR 1976 SC 2602; Ghulam Qadir v. Special Tribunal & Ors., (2002) 1 SCC 33; and Kabushiki Kaisha Toshiba v. Tosiba Appliances Company & Ors., (2008) 10 SCC 766). The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in correct perspective at all."

24. Similarly the Supreme Court in Ayaaubkhan Noorkhan Pathan versus State of Maharashtra and others (2013) 4 SCC 465, 466 was dealing with the issue of caste certificate being challenged by a person who did not belong to the reserved category. The Apex Court imposed cost of one lakh upon the stranger to the lis as he abused the process of the Court to harass the appellant.

25. The Supreme Court held (SCC PP 475-476 paras 9 and 10):

" 9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. Infact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide : State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12; Saghir Ahmad & Anr. v. State of U.P., AIR 1954 SC 728; Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & Ors., AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors., (2009) 2 SCC 784).

10.A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361)."

26. After 73th & 74th constitutional Amendment, the local bodies have been conferred various powers under Part IX

and IX A of the Constitution. Paragraph 22, 23 & 24 of Ravi Yashwant Bhoir case (Supra) is relevant:

"22. Amendment in the Constitution by adding Parts IX and IXA confers upon the local self Government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional Institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the Institution.

23. The democratic set-up of the country has always been recognized as a basic feature of the Constitution, like other features e.g. Supremacy of the Constitution, Rule of law, Principle of separation of powers, Power of judicial review under Articles 32, 226 and 227 of the Constitution etc. (Vide: His Holiness Keshwananda Bharti Sripadagalvaru & Ors. v. State of Kerala & Anr., AIR 1973 SC 1461; Minerva Mills Ltd. & Ors. v. Union of India & Ors., AIR 1980 SC 1789; Union of India v. Association for Democratic Reforms & Anr., AIR 2002 SC 2112; Special Reference No. 1 of 2002 (Gujarat Assembly Election Matter), AIR 2003 SC 87; and Kuldip Nayar v. Union of India & Ors., AIR 2006 SC 3127)

24. It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State."

27. In Suresh Singh versus Commissioner, Moradabad Division, Moradabad and others (1993) 1 UPLBEC 414: 1993(1) AWC 601, this court considering similar case was of the view that Up Pradhan of the Gaon Sabha who was appointed to function as Pradhan during the period ceasing of administrative and financial powers had no right to be heard. Extract of paragraph-4 is as follows:

"4. The Act has conferred on the .....The petitioner, who is Up-Pradhan of the Gaon Sabha and who claims to have made complaints and on the basis whereof an enquiry was conducted against respondent no.4, cannot be said to be a necessary party. He has no locus standi in such a case. He can at the best be a witness in the said enquiry. None of his personal or statutory rights are affected. He has no independent power under the Act except that he exercises the powers of Pradhan temporarily in his absence or in the event of his suspension or removal. It, therefore, follows that if the suspension or removal order is revoked and the Pradhan is reinstated, he has therefore, no right either to file a revision against the order passed by respondent no.2, by which the suspension of respondent no. 4 was recalled and he was reinstated to the post of Pradhan, or to file the present writ petition, as no such right to challenge the impugned order can be said to

have been conferred on any person other than the person concerned, such as who has been suspended or removed....."

28. A Division Bench of this Court in Amin Khan versus State of U.P and others 2008(2) AWC 2002: (2008) 2 UPLBEC 1256 was of the opinion that the complainant who had made a complaint had no locus to challenge the order of the District Magistrate withdrawing the administrative and financial powers of the Pradhan. The Court relied upon Suresh Singh versus Commissioner of Moradabad, Moradabad(Supra) as well as Smt.Kesari Devi versus State of U.P & others 2005(4) AWC 3563.

29. The concept of master servant relationship as applicable in service jurisprudence is not applicable in case of elected heads of local bodies enjoying constitutional status. Full Bench decision in Hafiz Ataullah Ansari versus State of U.P & Others 2011(3) ADJ 502 (FB), considering historical background of the institution of the Local Self Government was of the view that they are no longer statutory bodies but after 73th and 74th constitutional amendments, have acquired Constitutional status. The Court held: (Paragraphs 93, 94 and 97 are reproduced below:

93.Under our Constitution, a head of local body is entitled to continue for his entire term unless he is unseated in an election petition. However, as there is no provision that he cannot be removed even if he is guilty of misconduct, a law can always be

enacted to provide his,

Removal on his committing irregularities; or

Suspension or cessation of financial and administrative powers during pendency of removal proceeding.....

94. A head of a local body is an elected person; he is not a government servant: it would improper to compare these proceeding with the departmental proceeding in service jurisprudence. We are not alone in saying this but are in company of the Supreme Court and another full bench of our court (see below).

97. A head of a local body is elected for a limited term. His term comes to end after five years. If during the removal proceeding, he is denuded from exercising financial and administrative powers then even if he is exonerated in the enquiry, the time spent during enquiry is lost: he does not get his period extended.

30. In the facts of the present case the Pradhan was not allowed to exercise his financial and administrative powers since 9.1.2012 until passing of the the impugned order dated 4.9.2013. Almost twenty months of his tenure was lost. Keeping the elected Pradhan out of office without concluding the enquiry is against the constitutional scheme of providing democratically elected local bodies at grass root level. The loss of tenure cannot be made good unlike in case of civil servants. Therefore, Rule 8 of the Rules mandates that enquiry be concluded within six months from the date of the complaint. (emphasis added).

31. This Court in Vivekanand Yadav versus State of U.P and another reported in 2010(10) ADJ 1 1 (FB) had the occasion to consider the scope of Section 95(1)(g) of U.P Panchayat Raj Act and further whether an opportunity is necessary before passing an order ceasing

financial and administrative power of the Pradhan. Section 95(1)(g) read with its proviso envisages with two enquiries. Paragraph 46 & 47 of Vivekanand Yadav's case (Supra) is as follows:

"46. Section 95(1)(g) read with its proviso envisages two enquiries:

A preliminary or fact finding enquiry: On the basis of this enquiry, financial and administration powers of a pradhan can be ceased and a committee to perform these functions can be appointed. This takes place under rule 4 of the Enquiry Rules read with proviso to section 95(1)(g) of the Act.

The final enquiry: It is done to remove a pradhan. This takes place under rule 6 of the Enquiry Rules read with section 95 (1)(g) clauses (i) to (v) as well as the proviso to section 95(1).

47. Section 95(1)(g) (providing removal of a pradhan) or proviso to section 95(1) (providing reasonable opportunity in the removal proceeding) do not contemplate any formal enquiry or rules to be framed. However the proviso to section 95(1)(g) providing cessation of financial and administrative powers does contemplate a preliminary enquiry by a person and procedure to be prescribed: the rules have to be framed for the same. The Enquiry Rules have been framed because it is so mandated in the proviso to section 95(1)(g) of the Panchayat Raj Act and not because of 95(1)(g) or the proviso to section 95(1)."

32. This Court was of the opinion after considering the decision and reasons detailed in the Hafiz case(Supra) the Pradhan is not entitled to be associated in the preliminary enquiry nor he is entitled to get the copy of the preliminary enquiry report, his only right is to have his explanation or point of view or version to the charges considered before the order for ceasing his financial and administrative power is passed. Paras 68 and 71 of Vivekanand Yadav's case (Supra) is as follows:

"68.In view of our decision and reasons detailed in the Hafiz case, a pradhan is neither entitled to be associated in the preliminary enquiry nor is he entitled to get the copy of the preliminary enquiry report--his only right is to have his explanation or point of view or version to the charges considered before the order for ceasing his financial and administrative power is passed.

71. It is not only necessary that the explanation or point of view or the version of the affected pradhan should be obtained but should also be considered before being prima facie satisfied of his being guilty of financial and other irregularities and ceasing his powers. Of course the consideration of the explanation does not have to be a detailed one. There should be indication that mind has been applied. This has also been explained in the Hafiz case."

33. The proceedings for removal of the Pradhan is to be conducted in accordance with Rules 6 onwards of the Rules, irrespective of the fact whether right to exercise financial and administrative power was ceased or not. However, where right to exercise financial and administrative power is also to be ceased then procedure of Rules 3 to 5 has to be followed. Preliminary inquiry need not precede regular inquiry. Paragraphs 74, 94, and 96 of Vivekanand Yadav's case (Supra) is as follows:

"74.In our opinion there can be a proceeding for removal of a pradhan without ceasing his financial and administrative powers.

94. The procedure provided in rules 6 to 8 is for the final enquiry and not for the preliminary enquiry. A report by an enquiry officer defined under rule 2(c) is also a report by a person prescribed. It is not necessary for the enquiry officer to conduct the preliminary inquiry only on the direction given by the DM. His job is to submit a report, so that the DM may take a decision.

Whether there is prima facie case against the pradhan or not; and

Whether the final enquiry should be held after ceasing his powers.

96.A report by an enquiry officer defined under rule 2(c) is also a report by a person and the manner is prescribed under the Rules--irrespective of the fact that he was so asked by the DM or not. In our opinion, it is also a preliminary report within the meaning of the proviso to section 95(1) (g) of the Panchayat Raj Act."

34. The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence as is provided for in sub section (11) of Section 6 of the Rules and further will also have an opportunity of hearing as contemplated under sub section 16 of Rule 6. Sub section (11) and sub section (16) of Rule 6 reads as follows:

"(11).On the date fixed for the enquiry, the oral and documentary evidence by which the articles of charge are proposed shall be produced and the witness shall be examined, by the Enquiry Officer by or on behalf of the complainant, if there is one, and may be cross-examined by or on behalf of the person against whom the Enquiry Officer is being held. The witnesses may be re-examined by the Enquiry Officer or the complainant, as the case may be, on any point on which they have been cross- examined, but no on any new matter, without the leave of the Enquiry Officer."

(16) The Enquiry Officer may, after the completion of the production of evidence, hear the complainant, if any and the the person against whom the enquiry is being held, or permit them, or him, as the case may be, to file written briefs of their respective cases."

35. Thus it is evident from the scheme of the Act and the rules framed there under, the complainant only has a right to participate in the regular enquiry to the extent rules provided for, but he has no locus to challenge the order passed by District Magistrate either on the report of preliminary enquiry or that of final enquiry.

36. Rule 8 of the Rules provide that the Inquiry Officer shall conclude the inquiry within six months from the date of the receipt of the complaint and forward to the State Government the records of the inquiry. Since the inquiry is pending for the past 20 months, it is expected that it shall be concluded expeditiously within three months from the date of production of certified copy of this order.

37. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI,J.

Civil Misc. Writ Petition No. 56427 of 2013

Ghanshyam Prasad ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-repatriation to parrant department-appointment on basis of deputation-held-after expiry of deputation period-repatriation-held proper.

Held: Para-7
In view of the above, we are of the view that the petitioner has been sent to Minority Welfare Department on deputation and on the expiry of the period of engagement the repatriation of the petitioner to his parent department cannot be said to be justified.

Case Law discussed:
AIR 2000SC 2076; 2007(14) SCC 498; MANU/SC/1536/2009; AIR 1990 SC 1132.

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

1. Heard learned counsel for the petitioner and the learned Standing Counsel.

2. The petitioner was Assistant Development Officer, Block Charganva, Gorakhpur, Social Welfare Department, who has been sent to the Minority Welfare and Waqf Department on deputation for a period of one year. The said period has been extended from time to time and now three years' period has passed, which expired on 31st March, 2013. The respondents have refused to extend the further period of deputation and by the order dated 31st May, 2013, the petitioner has been repatriated back to his parent department, which order is being challenged by means of the present petition.

3. Learned counsel for the petitioner submitted that the petitioner was suspended and after revocation of the suspension, when he has not been allowed to join the post he was holding, he preferred Writ Petition No. 23763 of 2013, which has been entertained and an interim order has been passed, permitting the petitioner to function as the District Minority Welfare Officer, Kushi Nagar and the said interim order is still continuing, therefore, the petitioner is entitled to continue to work as the District Minority Welfare Officer, Kushi Nagar in the Minority Welfare and Waqf Department.

4. We do not find any error in the impugned order and there is no substance in the submission of the learned counsel for the petitioner. The petitioner was the employee of the Social Welfare Department, who has been sent on deputation to the Minority Welfare and Waqf Department only for a period of one year where he worked on deputation for a period of three years and has rightly been repatriated back to his parent department. In the Writ Petition No.23763 of 2013, the claim of the petitioner is that prior to suspension, the petitioner was working as the District Minority Welfare Officer, Kushi Nagar and after revocation of the suspension he has been posted in a different department and has not been permitted to function as the District Minority Welfare Officer, Kushi Nagar. On these facts at that stage, the said writ Petition has been entertained and the interim order has been passed. The interim order passed in the said writ petition is not an impediment in passing the impugned order, repatriating back the petitioner to his parent department, after expiry of the period of deputation.

5. On 4.8.1984, the petitioner was appointed as an Assistant Development Officer in Social Welfare Department. By

the letter dated 4.4.2008 and 27.10.2008 written by the Secretary, U.P. Government to the Principal Secretaries Heads of the various Departments of U.P. applications were invited from those employees, who are willing to for the post of Regional District Minority Welfare Officer/Deputy Director in the pay-scale of Rs.10000-15200 and for District Minority Social Officer in the pay-scale of Rs.0600-10500 on the transfer of service basis. It appears that the petitioner applied for the post of District Minority Welfare Officer. By the order of the Principal Secretary dated 27.7.2009, the petitioner has been appointed as the District Minority Welfare Officer, temporarily on the transfer of service basis for a period of one year or till the selection of the regular candidate by the Public Service Commission. It appears that the period of one year has been extended from time to time and now three years period has been expired on 31.3.2013. The last extension upto the period of 31.3.2013 was given by the Government Order dated 19.10.2012. By the impugned Government Order dated 31.5.2013, the Government has declined to extend the period of deputation on the ground that there is no reason to extend the period in the public interest and has sent back the petitioner to his parent department.

6. There is no dispute that both, the Social Welfare Department and the Minority Welfare Department are two separate departments. There is nothing to suggest by any of the Government Order, referred herein-above, that the petitioner was to be absorbed in the Minority Welfare Department at any point of time. The appointment letter dated 27.7.2009 reveals that the petitioner has been appointed temporarily as a District Minority Officer for a period of one year on transfer of service basis or till the regular selection of the candidate by the Public Service Commission, whichever is earlier, which the petitioner has accepted and joined. There is nothing to show that the petitioner at any stage has been absorbed in the Minority Welfare Department. There is no pleading in the writ petition that the lien of the service of the petitioner in the Social Welfare Department has ceased.

7. In view of the above, we are of the view that the petitioner has been sent to Minority Welfare Department on deputation and on the expiry of the period of engagement the repatriation of the petitioner to his parent department cannot be said to be justified.

8. In the case of Kunal Nanda v Union of India, reported in AIR 2000 SC 2076, the Apex Court has held that the employee who has been sent on deputation has no right to claim absorption.

9. In the case of U.P. Rajkiya Nirman Nigam v P.K. Bhatnagar, reported in 2007 (14) SCC 498, the Apex Court has held that mere fact that he has spent several years in service in the department where he has been sent on deputation will not alter the position from that of a deputationist to a regular employee.

10. In the case of Union of India v S.A. Khailiq Pusha, MANU/SC/1536/2009, the Apex Court has held that the basic principal underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation.

11. In the case of Ratilal B. Soni and others v. State of Gujarat and others, reported in AIR 1990 SC 1132, the Apex Court has held that employee on deputation do not get any right to be absorbed on deputation post and can be reverted back to his parent department at any time.

12. In view of the above, the writ petition, being devoid of merits, fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI,J.

Writ A No. 58263 of 2013, W.P. No. 58266 of 2013, W.P. No. 58269 of 2013, W.P. No. 58271 of 2013, W.P. No. 58388 of 2013, W.P. No. 58389 of 2013

Dr. Shiv Singh & Ors. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri R.P. Dubey

Counsel for the Respondents:
C.S.C., Sri Vivek Varma

Constitution of India, Art. 226-Service law-retirement age-lecturer, reader/professor-in different degree college or post graduate colleges-claiming their age of superannuation as 65 years-in J.P. Sharma case the Apex Court held age of retirement as 62 years-entitle for salary benefit during period they have worked even after achieving 62 years-petition disposed of with same direction to release pensionary benefit-taking into account the age of 62 years-accordingly general mandamus issued.

Held: Para-6

In view of the above, the writ petition is disposed of with the direction that the petitioners are entitled for the salary for the period, during which they have worked in view of the interim order granted by any Court or by the Apex Court even after attaining the age of 62 years but their post retiral benefits shall be calculated on the basis of salary drawn when the petitioners attained the age of superannuation, i.e. 62 years. Respondents nos.2, 3 and 6 are directed to make the payment to the petitioners after necessary verification, within a period of two months as directed above from the date of presentation of the certified copy of this order in accordance to law.

Case Law discussed:
Civil Appeal No. 5527-5543 of 2013

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

1. Heard learned counsel for the parties.

2. The petitioners retired as Readers, Lecturer/Associate Professor/Associate Professor/Reader. They claimed that their age of retirement should be 65 years while the claim of the State Government was that the age of retirement is 62 years. Matter went upto the Apex Court. In Civil Appeal Nos.5527-5543 of 2013, Jagdish Prasad Sharma etc. Vs. State of Bihar & Ors. and in other connected appeals arising from the State of U.P., the Apex Court vide order dated 17.07.2013 has held that the age of retirement is 62 years and the claim of the petitioners that the age of retirement should be 65 years has been rejected. Before the Apex Court, it was also contended that some of the teachers, Professors, Readers etc. worked on the basis of the interim order after 62 years and, therefore, they are also entitled for the benefit of service. In respect of such claim, the Apex Court observed that "However, persons, who have continued to

work on the basis of the interim orders passed by this Court or any other Court, shall not be denied the benefit of service during the said period."

3. Learned counsel for the petitioners submitted that since the petitioners worked after the age of 62 years on the basis of the interim order thus are entitled for the salary for the period during which they have worked in view of the aforesaid directions of the Apex Court.

4. Learned Standing Counsel submitted that in view of the direction of the Apex Court, the petitioners are entitled for the salary for the period during which they worked in view of the interim order of the Apex Court but their post retiral benefits will be calculated on the basis of the salary drawn by the petitioners on the date when they have been superannuated after attaining the age of 62 years.

5. We have considered the rival submissions. We find substance in the argument of learned counsel for the petitioners as well learned Standing Counsel.

6. In view of the above, the writ petition is disposed of with the direction that the petitioners are entitled for the salary for the period, during which they have worked in view of the interim order granted by any Court or by the Apex Court even after attaining the age of 62 years but their post retiral benefits shall be calculated on the basis of salary drawn when the petitioners attained the age of superannuation, i.e. 62 years. Respondents nos.2, 3 and 6 are directed to make the payment to the petitioners after necessary verification, within a period of two months as directed above from the date of presentation of the certified copy of this order in accordance to law.

7. Further it is observed that we find that number of writ petitions are being filed for seeking the aforesaid direction.

8. In view of the above, we may observe that above direction may also apply in case of similarly situated persons and such persons instead of approaching this Court, may place our order before the authority concerned and the authority concerned is directed to comply with aforesaid direction after verification.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ -A No. 62797 of 2012 alongwith W.P. No. 45177 of 2012, W.P. No. 62938 of 2012, W.P. No. 65427 of 2012 W.P. No. 5283 of 2013, W.P. No. 5282 of 2013, 9302 of 2013, W.P. No. 9817 of 2013, W.P. No. 9820 of 2013, W.P. No. 11703 of 2013, W.P. No. 15423 of 2013, W.P. No. 1550 of 2013, W.P. No. 15430 of 2013, W.P. 15546 of 2013, W.P. No. 15548 of 2013, W.P. No. 15428 of 2013 W.P. No. 24737 of 2013, W.P. No. 24738 of 2013, W.P. No. 32140 of 2013 and W.P. No. 32157 of 2013

1601 C.P. Sudeep Kumar &Ors. Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri B.N. Singh Rathore

Counsel for the Respondents:
C.S.C.

U.P. Police Regulation-Regulation 398- petitioners appointed as police constable in Arm Police etc-in view of amended G.O.-17.09.2002 denied the salary-which

provides stipend during training period-held-once appointed and became member of police-entitled full pay and allowances rather to meagre amount of stipend-offending provision of amended G.O. 17.09.02-struck down-petition allowed.

Held: Para-16 & 18

16. The substitution of the word 'stipend', therefore, is patently illegal in as much as, all those who are appointed, constitute a single cadre. There can be no discrimination or distinction by carving out the same cadre officers on the basis of nature of work taken by the Government, like when they are decided to be sent for training after appointment. On appointment, all constitute one class & are entitled for similar treatment.

18. The above observations make it very clear that once the incumbents are appointed and become members of service, they are entitled to full pay and allowances and not a meagre amount of stipend. In this view of the matter, the G.O. impugned in this writ petition is patently illegal, arbitrary and even otherwise, ultra virus . Hence, the G.O. dated 17.9.2002 is struck down as such. The respondents are directed to pay salary and allowances to the petitioners as admissible and payable to the appointees of respective posts.

Case Law discussed:
W.P. No. 54870 of 2004

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

1. In all these writ petitions the question of fact and law are common, therefore, have been heard together and are being decided by this common judgement.

2. The petitioners are non-Gazetted Police Officers in terms of regulation 398 of Police Regulations(hereinafter referred to as 'Regulations') and are working as Constable or Head Constable as the case may be. These posts admittedly, are of Group "C' category. They constitute subordinate Police Officers of general police force in the State of Uttar Pradesh. After their selection in accordance with relevant provisions, all of them have been appointed between 17th September, 2002 to 02nd December, 2008. Earlier the procedure before appointment was that the selected candidates were used to be sent for training and thereafter, appointed on respective posts. During training, the incumbents were paid stipend and after appointment, they used to be placed in regular pay scale with all attending allowances etc.

3. In purported exercise of power under Section 2 of Police Act 1861 (herein after referred to as 'Act 1861'), Government Order (herein after referred to as 'G.O.') was issued on 19th May, 1998, amended vide G.O. dated 08th June, 1998 whereby, policy with regard to appointment of Constables, Sub Inspectors, Platoon Commanders etc. changed. The State Government directed that henceforth, those who are selected for appointment on the post of Constable, Sub Inspector, Platoon Commanders, shall first be appointed and paid salary & allowances etc.; admissible to the respective posts, they shall be sent for training after appointment.

4. Those who were appointed thereafter, were placed in regular pay scale of the respective post(s) and paid salary & allowances admissible to them, as a result whereof, when they were sent for training, they continued to receive salary and allowances of respective post(s).

5. It is this G.O. dated 8th June, 1998 which has been amended again vide G.O. dated 17th September, 2002, (impugned in

this writ petition) only to the extent that in place of "pay and allowances" mentioned in the G.O. dated 8th June, 1998 it shall be read as "stipend".

6. The effect of the amendment brought by the G.O. dated 17th September, 2002 in the earlier G.O. dated 8th June, 1998 is that the persons who are selected for appointment to the post of Constable, Sub Inspector, Platoon Commanders, though shall be appointed first and thereafter, sent for training but from the date of appointment and till completion of training, they shall be paid only "stipend" and not regular pay scale and allowances.

7. It is contended that once incumbent has been appointed substantively on a regular post, whether respondents (employer) deploy them for discharge of normal duty of the post or send them for training, irrespective thereof, the appointee shall be entitled for the salary admissible to the post and the same cannot be denied but substituting by a meagre amount of 'stipend.'

8. Learned counsel for the petitioners contended that before appointment, it may have been permissible for an employer to pay stipend or other allowances, as the case may be, during the period of training, as it may determine, but once the incumbent has been appointed, he is entitled for full emoluments attached to the said post and cannot be denied the same on the basis of nature of duty. Reliance is placed on a decision of this Court in **Writ Petition No.54870 of 2004 Nagesh Upadhyay and Anr. Vs. State of U.P. and Ors**. and other connected matters decided vide judgement dated 12.04.2005.

9. Learned standing counsel, on the contrary submitted that it is a policy decision and warrants no interference by this Court. When an employer is not taking regular duty from the employee concerned, since, before deploying such person, imparting of training is necessary, during this period of training, one cannot insist to be paid requisite pay scale or allowances, which are admissible to a person who is deployed to discharge duty of regular nature attached to the post concerned.

10. Having heard the learned counsel for the parties at length and perused the record, in my view, these writ petitions deserve to succeed. The reason for the view taken above, is detailed as under.

11. Section 2 of Act 1861 empowers the State Government to constitute a Police establishment, and says that for the purpose of Act, 1861, entire Police establishment shall be deemed to be one Police force, the officers and men, be enrolled in the aforesaid Police force, shall be in such a manner, provided by the State Government.

12. The statutory orders and rules have been compiled in part III chapter XXIX of the Regulations which relate to appointment. Regulation 396 provides that the Police force shall consist of Provincial Police, Civil, Armed and Mounted; and, Government Railway Police. They shall be appointed and enrolled under Act 1861. The Police force also consists of Village Chaukidars appointed in Agra under Act XVI of 1873 and in Oudh under Act XVIII of 1876, not enrolled under Act V of 1861.

13. Regulation 539, chapter XXXVII, provides that recruits both for civil and armed police, will be trained at such places and in such manner, as the Inspector General may determine.

Regulation 541 talks of appointment of recruits on probation from the date he begins to officiate in a clear vacancy. The scheme earlier was that a person selected for appointment to a post used to be sent for training first, and after successful completion of training, appointed on a vacancy in the Police force. When he was sent for training, before appointment an amount called 'stipend' used to be paid which was/is much lessor than salary in a pay scale. After appointment, the incumbent becomes entitled for the salary attached with the post.

14. By G.O. dated 8th June, 1998, earlier G.O. dated 19.05.1998 underwent amendment and the Government decided that Constable, Sub Inspector, Platoon Commanders, as the case may be, after their fresh selection, shall first be entitled for emoluments attached to the post, on which, he is appointed. Para 1 of the G.O. dated 8th June, 1998 provides that on appointment, incumbent shall be paid salary/allowances and thereafter, would be sent for training. It is this G.O. which has been partly amended by subsequent G.O. dated 17th September, 2002 whereby, the word "pay and allowances" mentioned in para 1 of the G.O. dated 8th June, 1998 was sought to be deleted by the word 'stipend'.

15. Learned standing counsel could not show any provision whereby, an amount less than regular pay, has been prescribed or attached with a post, to which, a person is appointed. Once appointment is made, the incumbent would hold a lien on the post. All the perks attached to the post shall stand attracted. He would be entitled to payment in accordance with pay scale and other allowances attached with such post, irrespective of the fact, whether employer takes work from him in regular channel or sends him for training, or does not take any work, but emoluments shall be payable to such appointee in the manner, as attached to the post concerned. There is no bar for employer to send a person for training from time to time even after appointment, but emoluments payable to such incumbent, attached to the post, cannot be reduced on the basis of nature of work sought to be taken by the employer after appointment. The very concept of giving 'stipend' to an incumbent appointed on the post is strange and not recognized in service jurisprudence. No provision has been shown to this Court to the effect that for the posts in police force like Constable, Sub Inspector, Platoon Commanders, instead of giving regular pay scale and allowances, only stipend can be made admissible. In other higher service in Police Force like Deputy Superintendent of Police or I.P.S. The incumbent after appointment is sent for training but paid full salary in regular pay scale.

16. The substitution of the word 'stipend', therefore, is patently illegal in as much as, all those who are appointed, constitute a single cadre. There can be no discrimination or distinction by carving out the same cadre officers on the basis of nature of work taken by the Government, like when they are decided to be sent for training after appointment. On appointment, all constitute one class & are entitled for similar treatment.

17. This aspect has also been considered in the case of **Nagesh Upadhyay (Supra).** In para 10 of the judgement the court has said:

"once the petitioners are appointed and became members of service, they were entitled to full pay and allowances. The State Government did not reverse the policy of giving appointment before training. The

policy to first give appointment letters to and then to send the recruits for training continued to be operative. In case the State Government had reversed the policy and had decided to appoint the petitioner only after successful completion of training, they were justified to give such recruits on stipend at the rate prescribed in the O.M. Once the recruits are appointed and became members of service they are entitled to full pay and salary in accordance with the Fundamental Rules."

18. The above observations make it very clear that once the incumbents are appointed and become members of service, they are entitled to full pay and allowances and not a meagre amount of stipend. In this view of the matter, the G.O. impugned in this writ petition is patently illegal, arbitrary and even otherwise, ultra virus . Hence, the G.O. dated 17.9.2002 is struck down as such. The respondents are directed to pay salary and allowances to the petitioners as admissible and payable to the appointees of respective posts.

19. The writ petitions stand allowed in manner aforesaid.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 68185 of 2010

Shri Bahadur ...Petitioner
Versus
State of U.P. and Ors. . ..Respondents

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

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Pandey
Sri Yashwant Singh

Constitution of India, Art.-226- Cancellation of fair Price shop-earlier cancellation order as well as appellants authority order-quashed as no copy of enquiry report given under this background remand for fresh decision after giving copy of enquiry report-instead of that prescribed authority again issued show cause notice-on basis of fresh enquiry report-without supply of enquiry report-canceled license-appeal also get same fate-held-such order in ulter violation of principle of Natural Justice-apart from contempt-both orders quashed-with cost of Rs. 10,000/-govt. to take drastic action against erring officer.

Held: Para-6
Without commenting any further on the conduct of the officer concerned, the Court finds that the impugned orders passed by the Prescribed Authority is violative of the principles of natural justice, inasmuch as, the inquiry report were never supplied to the petitioner nor any opportunity was given to the petitioner to defend himself. If the inquiry report is made the basis of the cancellation of the licence, the authority was required to supply a copy of the report and issue a show cause notice.

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

1. The facts are glaring and depict a sorry state of affairs in the Food and Civil Supply Department.

2. The petitioner was granted a licence to run a fair price shop. On account of certain irregularities alleged to have been committed by him, the licence was suspended and a show cause notice was issued as to why the licence should not be cancelled. The petitioner gave a reply, and eventually, the licence was cancelled by an order dated 19.3.2009, against which the petitioner preferred an appeal, which was allowed on 18.7.2009 and the matter was remitted again to the

prescribed authority to decide the matter afresh. The prescribed authority again cancelled the licence by an order dated 24.8.2009 against which an appeal was preferred, which was also dismissed by an order dated 22.10.2009. The petitioner thereafter filed Writ Petition No.50253 of 2009, which was allowed by a judgment dated 9.3.2010 and the order of the prescribed authority dated 24.8.2009 as well as the appellate order dated 22.10.2009 was quashed. The matter was again remitted to the prescribed authority to pass a fresh order.

3. The Writ Court found, that pursuant to the remand by the appellate authority, a show cause notice was issued to the petitioner to which he submitted a reply and, based on this reply, the prescribed authority asked for a fresh inquiry report and, on the basis of that inquiry report, the licence was cancelled. The Court while considering this aspect held-

"...it was obligatory and incumbent upon the licencing authority to supply a copy of the said inquiry report, which was submitted subsequent to the reply submitted by the petitioner and thereafter further called for explanation from the petitioner qua the said fresh report..."

4. Upon remand pursuant to the order of the Writ Court dated 9.3.2010, the prescribed authority was under an obligation to supply a copy of the inquiry report and issue a show cause notice. The prescribed authority did not do so, instead he ordered a fresh inquiry and a report dated 4.6.2010 was submitted indicating various illegalities and irregularities committed by the petitioner. On the basis of this report, the licence of the petitioner was again cancelled by an order dated 7.6.2010. The petitioner filed an appeal, which was rejected by an order dated 27.10.2010. The petitioner has again filed the present writ petition.

5. The Court finds, that not only the findings given by the Writ Court in its earlier order were not adhered to, the District Supply Officer has committed the same mistake by making a fresh inquiry and without issuing a show cause notice to the petitioner and without asking for his explanation has unilaterally passed the order in gross violation of the principles of natural justice as embodied in Article 14 of the Constitution of India. Such orders, prima facie indicates non-application of mind and a deliberate attempt to disobey the orders of the Writ Court.

6. Without commenting any further on the conduct of the officer concerned, the Court finds that the impugned orders passed by the Prescribed Authority is violative of the principles of natural justice, inasmuch as, the inquiry report were never supplied to the petitioner nor any opportunity was given to the petitioner to defend himself. If the inquiry report is made the basis of the cancellation of the licence, the authority was required to supply a copy of the report and issue a show cause notice.

7. In the light of the aforesaid, the impugned order of the prescribed authority as well as the consequential order of the appellate authority are quashed.

8. The writ petition is allowed.

9. Considering the litigation, which the petitioner has undergone, the Court does not find it fit any further to remand the

matter back to the District Supply Officer to pass a fresh order and direct that the matter stands concluded finally and the licence of the petitioner shall be restored.

10. A certified copy of this order shall be sent by the Registry to the Chief Secretary, who will take appropriate measure against the prescribed authority for the manner in which he has passed the impugned order.

11. The Registry will send a certified copy of the order to the Chief Secretary within ten days. The Chief Secretary will submit the action taken to the High Court within three months.

12. In the circumstances of the case, the petitioner is entitled for cost, which the Court computes at Rs.10,000/-, which will be paid by the prescribed authority to the petitioner within four weeks from today, failing which, it would be open to the petitioner to move an appropriate application in this writ petition itself. The amount so paid can be recovered by the State Government from the erring officer.
