ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.09.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Rent Control No. 74 of 1993

Laxmi Narain Sahu and Ors.....Petitioners
Versus
A.D.J. IV and Ors. ...Respondents

Counsel for the Petitioner:
Sri D.C. Mukherjee

Counsel for the Respondents:
Sri K.P. Srivastava, Sri K.P. Singh

U.P. Act No 13 of 1972-Section 21- Release application bonafide need-filed by father-complicated question of heirs as well as relationship of land lord and tenant-prescribed authority without touching the question of bonafide need and comparative hardships of parties-rent appeal allowed and remanded to decide all questions-writ against order of remand-held-in view of law laid down by Apex Court finding of JSCC subject to out come of civil court-as such order by rent appeal court-not sustainable-quashed-direction issued accordingly.

Held: Para-7
Accordingly in view of Budhu Mal vs. Mahavir Prasad AIR 1988 Supreme Court 1772 plaint should have been returned for filing before regular Civil Court in accordance with Section 23 Provincial Small Causes Courts Act. However, now at this distant juncture no useful purpose would be served by adopting the said course. Supreme Court in Shamim Akhtar vs. Iqbal Ahmad AIR 2001 SC 1 has held that findings regarding title recorded by JSCC in the suit in between landlord and tenant is subject to the result of regular suit based on title. Same principle will apply when such finding is recorded by P.A. in a case under Section 21 of U.P. Act No. 13 of 1972.

Case Law discussed:
AIR 1988 SC 1772; AIR 2001 SC 1.

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

1. At the time of hearing, no one appeared on behalf of contesting respondents (legal representatives of respondent no.2). Even though the case was taken up in the revised cause list. Accordingly the arguments of learned counsel for the petitioners were heard.

2. Petitioner no. 2 M/s Firm Chandu Lal Nagar Mal through petitioner no.2(1) to 2(4) is the tenant. Other petitioners are rival claimants to the ownership of the accommodation in dispute. Release application under Section 21 of U.P. Act No. 13 of 1972 was filed by original respondent no. 2 Prem Chand Sahu son of Nand Kishor Sahu since deceased and survived by legal representatives. In the release application, copy of which is Annexure 9 to the writ petition tenant petitioner no. 2 was impleaded as opposite party no.1 and Laxmi Narain Sahu petitioner no.1 was impleaded as opposite party no. 2.

3. Landlord applicant Prem Chand Sahu was nephew of opposite party no. 2/petitioner no. 1 Laxmi Narain Sahu. Initially the accommodation in dispute belonged to the three brothers i.e. petitioner no.1 Laxmi Narain Sahu, Nand Kishor Sahu father of applicant respondent no. 2 Prem Chand Sahu and Jamuna Prasad Sahu (petitioners no. 5 to 7 are his legal representatives). Through an arbitration award of 1964 partition of the accommodation in dispute took place between the three brothers which was made rule of the Court on 1.6.1967. In the award it was provided that if certain amount which was payable by Nand Kishor to Laxmi Narain Sahu was not paid within the time fix therein, share

of Nand Kishor would go to Laxmi Narain Sahu. Default was committed by Nand Kishor hence decree dated 1.6.1967 was put in execution (Execution Case No. 20 of 1970) and in the execution possession was delivered to petitioner no.1, through order dated 29.8.1970. Nand Kishor Sahu challenged the arbitration award through Civil Suit No. 247 of 1964 which was dismissed on 17.12.1970 by Munsif, Sitapur against which Civil Appeal No.11 of 1971 was filed which was dismissed on 24.5.1976.

4. The applicant respondent no. 2 in the release application giving rise to the instant writ petition took up the case that unregistered agreement had been executed by petitioner no.1 on 31.10.1975 recognizing the right of his father Nand Kishor in the house in dispute. The prescribed authority Munsif, Sitapur where release application had been registered as Case No. 8(R/C) of 1983 Prem Chand Sahu vs. Firm Chandu Lal Nagar Mal and others dismissed the release application on 3.1.1989 holding that no agreement was executed as opposite party no.2/petitioner no.1 denied the signatures on the agreement of 1975 and secondly such an agreement could be arrived at only through registered document. The prescribed authority after recording the said finding did not say a single word about bonafide need or comparative hardship. Against the said order, respondent no. 2 filed R/C Appeal No. 2 of 1989. IV ADJ, Sitapur through judgment and order dated 28.11.1992 allowed the appeal, set aside the order of prescribed authority and remanded the matter to the prescribed authority to decide all the questions together i.e. right of the applicant his bonafide need and comparative hardship after holding that validity and genuineness of the agreement of 1975 should have been decided by the prescribed authority on merit. The said order of the appellate court has been challenged through this writ petition.

5. I do not agree with the remand order passed by the lower appellate court. It is utterly illegal. The prescribed authority after giving reasons held that the alleged agreement had not been executed by petitioner no.1 and it was not valid for want of registration. Lower appellate court did not say anything in this regard.

6. However in my opinion, complicated question of title was involved. In view of earlier litigation in between father of respondent no. 2 and petitioner no. 1 and the alleged agreement of 1975. Respondent no. 2 was himself aware of the complicated nature of the title dispute in between him and petitioner no. 1 hence he himself impleaded petitioner no.1 as opposite party no. 2 in the release application. Earlier suit for eviction had been filed by petitioner no. 1 against the petitioner no. 2 (para 8 of the writ petition) which was compromised.

7. Accordingly in view of Budhu Mal vs. Mahavir Prasad AIR 1988 Supreme Court 1772 plaint should have been returned for filing before regular Civil Court in accordance with Section 23 Provincial Small Causes Courts Act. However, now at this distant juncture no useful purpose would be served by adopting the said course. Supreme Court in Shamim Akhtar vs. Iqbal Ahmad AIR 2001 SC 1 has held that findings regarding title recorded by JSCC in the suit in between landlord and tenant is subject to the result of regular suit based on title. Same principle will apply when such finding is recorded by P.A. in a case under Section 21 of U.P. Act No. 13 of 1972.

8. Accordingly writ petition is allowed. Impugned order passed by lower appellate court is set aside. However liberty is granted to the legal representatives of respondent no.2 to file title suit before regular civil court

on the basis of the alleged agreement dated 31.10.1975 impleading therein the tenant petitioner no. 2 also and seeking relief of eviction against him. If such a suit is filed, it shall be decided without taking into consideration any finding recorded by the prescribed authority in its judgment dated 3.1.1989 or order dated 28.11.1992 passed by the appellate court in appeal filed against the order dated 3.1.1989 or in the revision which was filed against an interim order passed by the P.A. in the said case.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 122 of 2003

State of U.P. ...Appellant
Versus
Surya Lakhan and another...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar, S.C.

Counsel for the Respondents:
Sri R.D. Shukla

Land Acquisition Act- Section 54-first appeal against order by reference court-awarding interest prior to acquisition land-held-not proper-at most-court can award interest only consequent to possession on acquisition-amount of interest modified to wards-damage/rent for unauthorise use and occupation-appeal allowed.

Held: Para-11
There is no difficulty in remanding the matter for awarding damages for the unauthorised use and occupation of the land prior to the period of acquisition but the remand of the matter for the above purpose would add another round of litigation consuming sufficient time and, therefore, to cut short the litigation, I am of the view that the interest of the parties would be subserved and the equities would stand balanced if the interest on compensation awarded by the reference court for the period prior to the notification is converted and is directed to be treated as damages for for use and occupation of the said land for the said period.

Case Law discussed:
2004(4) SCC 79; (2005) 12 SCC 443; (2013) 4 SCC 268

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

1. I have heard Sri Udaibhan, learned Standing Counsel for the appellant and Sri S.D.Shukla, who appears for the claimant/respondent. Sri Shukla, however, submits that he has no instructions in the matter.

2. In this appeal under Section 54 of the Land Acquisition Act the judgment, order and award dated 28.2.1995 passed by the X Additional District Judge, Allahabad in LAR No.13 of 1991 has been assailed on the limited ground that the reference court has awarded interest on compensation for the period prior to the date of notification under Section 4(1) of the Land Acquisition Act (in short 'Act') which is not permissible in law.

3. The notification under Section 4(1) of the Act was issued on 7.12.1987 but admittedly and as per the findings of the reference court possession of the land was taken over in January, 1982. The reference court while enhancing the rate of compensation has awarded interest on it from January, 1982 for a period of one year at the rate of 9% and thereafter at the rate of 15% p.a.

4. The short question arising in this appeal is whether the reference court is justified in allowing interest on compensation for the period prior to

issuance of notification under Section 4(1) of the Act.

5. No doubt Section 28 of the Act provides for awarding interest from the date of possession but the possession contemplated therein is possession in pursuances to the acquisition proceedings i.e. subsequent to the notification issued under Section 4(1) of the Act which is evident from Section 9 of 16 of the Act. Any possession of the acquired land prior to the above notification would not be possession pursuant to the acquisition proceedings rather it would be unauthorized possession by the acquiring body. The land owner or the claimant would therefore be entitle to damages for the unauthorized use and occupation of his land but not the interest.

6. It has been settled by the Supreme Court in the case of **R.L.Jain Vs. D.D.A. and others 2004 (4) SCC 79** that the possession of the acquired land taken over before the issuance of the notification under Section 4(1) of the Act is not the possession under the provisions of the Act. The land owner as such, is entitle to recover possession of the land by taking appropriate legal action or is entitle to get the rent and damages for the use and occupation of the said land from the acquiring body. Therefore, where possession is taken prior to issuance of notification under Section 4(1) of the Act it is just and equitable that the Collector should also determine the rent and damages for the use and occupation of the property for the period prior to the notification.

7. The decision in **R.L. Jain's case (supra)** has been followed by the Supreme Court in the case of **Land Acquisition Officer and Assistant Commissioner and another Vs. Hemanagouda and others (2005) 12 SCC 443 and in Executive Engineer Nagpur, Madhameshwar Canal Vs. Vilas Eknath Jadav (2013) 4 SCC 268.**

8. To put it simply, under the provisions of the Act interest can only be awarded on compensation from the date of possession provided it is pursuant to the notification issued under Section 4(1) of the Act. But where the possession is taken over by the acquiring body, though unauthorizedly prior to the notification, the owner is entitle for rent and damages from the date of possession till the date of notification.

9. In view of the legal position that emerges the issue arising in this appeal is answered in favour of the appellant and against the claimant/respondent and it is held that the reference court is not authorised to award interest on compensation for the period prior to acquisition even if possession of the land was taken from the claimant/respondent before the issuance of notification under Section 4 of the Act.

10. This Court in a similar case where possession was taken over prior to the notification under Section 4(1) of the Act and interest was awarded from the date of the possession, vide judgment and order dated 20th July, 2007 in First Appeal No.699 of 1994 had remanded the matter to the reference court on the limited point for determining the compensation towards the rent and damages for the period prior to the notification.

11. There is no difficulty in remanding the matter for awarding

damages for the unauthorised use and occupation of the land prior to the period of acquisition but the remand of the matter for the above purpose would add another round of litigation consuming sufficient time and, therefore, to cut short the litigation, I am of the view that the interest of the parties would be subserved and the equities would stand balanced if the interest on compensation awarded by the reference court for the period prior to the notification is converted and is directed to be treated as damages for for use and occupation of the said land for the said period.

12. Accordingly, the appeal is disposed of upholding the impugned award but directing that the interest awarded by the reference court on compensation from January, 1982 to 7.12.1987 be treated as part of damages for use and occupation of the land and not interest on compensation.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Revision No. 320 of 1993

Mahadeo Prasad ...Deft-Revisionist
Versus
Sarvar Jahan Begum .... Plff-Respondent

Counsel for the Petitioner:
Sri V. Singh

Counsel for the Respondents:
Sri Navin Sinha, Sri S.M. Iqbal Hasan
Sri Manish Tandon

Civil Revision- Suit for arrear of rent and possession-decreed by judge SCC-arrears of rent w.e.f. 01.06.1972 to 15.12.1978-according to Art. 52 part I of limitation Act-limitation provided 3 years-suit institute 1975 returned for presentation before court having competent jurisdiction-presented only in 1986-held-time barred-decree so for arrears of rent concern-set-a-side-but for possession maintained.

Held: Para-20
The limitation of instituting a suit to recover possession from the tenant under Article 67 Part V of the Limitation Act, 1963 is 12 years from the date of determination of the tenancy. The tenancy was determined vide notice dated 15.2.1974 and the suit on its basis was instituted in the year 1986. It appears that the said suit was within 12 years of the determination of the tenancy, though no exact date of its institution has come on record. It is not the case of the defendant revisionist that the suit for recovery of possession was also barred by time. Thus, apparently the suit for recovery of possession is within time. Accordingly, notwithstanding that the suit for arrears of rent could not have been decreed there is no flaw in decreeing the suit for eviction and awarding damages for its use and occupation after the determination of tenancy.

Case Law discussed:
13 Indian Cases 377; AIR 1929 Privy Council 103; AIR 1973 SC 313; (1997) 9 SCC 688

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

1. Heard Sri V. Singh, learned counsel for the defendant revisionist. Sri Manish Tandon and Sri S. M. Iqbal Hasan, learned counsel have appeared for the plaintiff respondent.

2. The suit of the plaintiff respondent for arrears of rent and eviction of the defendant revisionist from the shop in question has been decreed by the Additional District Judge exercising powers of the Judge of Small Causes Court vide impugned judgment and order dated 11.5.1993.

3. The dispute is regarding a shop which was let out in the year 1968 at a rent of Rs.80/- per month with the stipulation that after one year the rent would stand increased to Rs.85/- per month. The plaintiff respondent vide notice dated 15.2.1974 which is said to have been served upon the defendant revisionist on 22.2.1974 determined his tenancy and required him to vacate the said shop on the allegation that he had failed to pay rent for the period 1.6.1972 till the last date of January, 1975.

4. On the basis of the aforesaid notice, original suit No.48 of 75 claiming arrears of rent from 1.6.1972 to 31.1.1975, damages and for eviction was instituted in the court of Munsif. On 5.8.1978 the plaint was returned for want of jurisdiction for presentation before the Civil Judge. It was represented in the court of Civil Judge and was numbered as original suit No.23 of 1979. Again the plaint of the suit was returned for want of jurisdiction from the court of Civil Judge on 17/19.4.1986 for presentation before the court of small causes. Thereafter, it was presented in the court of small causes and was registered as SCC Suit No.2 of 1986.

5. The suit has been decreed by the impugned judgment and order dated 11.5.1993 for arrears of rent amounting to Rs.6687/- for damages w.e.f. 15.12.1978 @ Rs.85/- per month and for eviction within a period of one month. The court below in decreeing the suit held that the provisions of U.P. Act No.13 of 1972 are not applicable to the shop in question, the notice was duly served upon the defendant revisionist, he is in arrears of rent as claimed in the plaint and that the suit is not barred by limitation.

6. In assailing the aforesaid judgment and order, in this revision under Section 25 of the Small Causes Court Act, the submission of Sri V.Singh, counsel for the defendant revisionist is that the claim for the arrears of the rent from 1.6.1972 to 15.12.1978 had become barred by time and could not have been decreed in a suit instituted in the year 1986.

7. Sri Manish Tandon, in defence has submitted that the suit is not barred by limitation as it was presented in 1975 and when the tenancy stood determined, the defendant revisionist cannot escape the liability of eviction.

8. The findings regarding the shop being outside the purview of U.P. Act No.13 of 1972 and the service of notice have not been assailed.

9. In view of the aforesaid facts and circumstances and the rival submissions made by the counsel for the parties the following three points arise for determination.

(1) Whether the suit would be deemed to be instituted in 1975 or in 1986;

(2) Whether the claim of arrears of rent for the period 1.6.1972 to 31.1.1975 or 15.12.1978 is barred by time; and

(3) Whether despite the claim for arrears of rent being barred by time, the decree of eviction could be maintained.

Point No.1

10. Order IV Rule 1 C.P.C. provides for the institution of the suit by presenting a plaint to the court. The "Court" therein means the proper court of jurisdiction. Therefore, when a plaint of a suit is presented in a wrong court and it is returned for presentation to proper court it

would not amount to institution of the suit. It is only on representation of the plaint to the court of proper jurisdiction it will be deemed that the suit had been instituted. Thus, the presentation of the plaint in the proper court of jurisdiction would be the date of institution of the suit.

11. The earliest decision on the point appears to be of the High Court of Calcutta **U. Hedlot Khasia and another Vs. Karan Khasiani and others 13 Indian Cases 377**. In the said case their Lordships of the court clearly ruled that a suit is to be treated as instituted when a returned plaint is presented in a competent court.

12. In **Ramdutt Ramkissen Dass Vs. E.D. Sassoon and Co. AIR 1929 Privy Council 103** it was laid down that where a suit is instituted in a wrong court having no jurisdiction and it becomes necessary to file a fresh suit in the proper court, the second suit would not be regarded as continuation of the first suit even though the parties and the subject of the suit matter happens to be the same.

13. The three Judges Bench of the Supreme Court in **Amar Chand Inani Vs. Union of India AIR 1973 SC 313** held presentation of a plaint in proper court after it is returned by an earlier court is not a continuation of a suit which was instituted in the wrong court. The court observed that the word "court" means a proper court which has jurisdiction to entertain the suit.

14. In **Hanamanthappa and another Vs. Chandrashekharappa and others (1997) 9 SCC 688** the plaint was returned for presentation to proper court. It was then presented in the proper court of jurisdiction. The High Court treated the said plaint to be a fresh plaint and not a continuation of the earlier one which was returned. The Supreme Court in the above circumstances held that the High Court rightly treated it to be a fresh plaint subject to limitation, pecuniary jurisdiction and payment of court fees.

15. In view of above legal position, the institution of the suit would be on the presentation of the plaint in the proper court of jurisdiction and it would not reckon with the date when it was initially presented to the court having no jurisdiction.

16. In the instant case the plaint of the suit was presented to the court of proper jurisdiction only in 1986. Therefore, the institution of the suit would be of the year 1986 and would not relate back to the date of its initial filing of 1975.

Point No.2

17. The plaintiff respondent had claimed arrears of rent for the period 1.6.1972 till 31.1.1975. The limitation for instituting a suit for recovery of arrears of rent under Article 52 of Part I of the Limitation Act, 1963 is three years from the date when the arrears became due.

18. In view of the limitation provided above, the demand of arrears of rent for the period 1.6.1972 to 31.1.1975 became barred by time on the date the suit was instituted. Accordingly, the court below could not have decreed the suit for arrears of rent for the above period.

Point No.3

19. There is no dispute that the shop was outside the purview of U.P. Act No.13 of 1972. It is well settled that where a

building is not covered by the above Act, the termination of lease and eviction will be governed by the provisions of the Transfer of Property Act, 1882. The suit was based upon the notice dated 15.2.1974. The said notice was a composite notice determining the tenancy and for demand of arrears of rent. The tenancy was determined under Section 106 of the Transfer of Property Act, 1882.The notice makes clear that the plaintiff respondent does not want to keep the defendant revisionist as tenant and therefore, requires him to deliver possession. A notice which requires a tenant to vacate the accommodation and handover possession to the landlord within 30 days is a valid notice determining the tenancy. The validity of the said notice is not even under challenge. It has not been disputed before me. Therefore, there is dispute that the tenancy stood determined by the said notice. The default in paying the rent or that the defendant revisionist is in arrears of rent or arrears, if any are not recoverable being barred by time, are not relevant considerations for eviction where the tenancy has been validly determined.

20. The limitation of instituting a suit to recover possession from the tenant under Article 67 Part V of the Limitation Act, 1963 is 12 years from the date of determination of the tenancy. The tenancy was determined vide notice dated 15.2.1974 and the suit on its basis was instituted in the year 1986. It appears that the said suit was within 12 years of the determination of the tenancy, though no exact date of its institution has come on record. It is not the case of the defendant revisionist that the suit for recovery of possession was also barred by time. Thus, apparently the suit for recovery of possession is within time. Accordingly, notwithstanding that the suit for arrears of rent could not have been decreed there is no flaw in decreeing the suit for eviction and awarding damages for its use and occupation after the determination of tenancy.

21. In view of the aforesaid facts and circumstances, the decree of arrears of rent as passed by the court below is set aside and that with regard to eviction and damages is maintained.

22. The revision is allowed in part. No costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.08.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No. 812 of 2013
(U/s 482 Cr.P.C.)

Chandra Dev Ram Yadav and Anr.
...Petitioners
Versus
State of U.P. and Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Kapil Misra, Sri Sayendra Kumar Singh

Counsel for the Respondents:
A.G.A.

(A)Code of Criminal Procedure Section-167(2)- whether the day of surrender and release on interim bail-would be taken in consideration of 15 days? held-'No'-as on day of surrender the court not changed to custody of applicant either to police or judicial custody.

Held: Para-10-
So far as inclusion of 10th January, 19th January, 25th January and 2nd February, 2013 while calculating first 15 days is concerned, the day on which the petitioners surrendered and release on interim bail shall not deem to be the date of remanded to the judicial custody. No doubt they surrendered before the court concerned themselves to be taken into physical control of the court but the court has not change the custody either to the police custody or

to judicial custody in jail. Therefore, unless the accused are remanded either to the judicial custody or to the police custody by the court it will not be the date of remand within the meaning of Section 167 (2) Cr.P.C.

(B)Code of Criminal Procedure-Section 167(2)- whether court empowered to take applicant from judicial custody to police custody-held-'No' beyond 15 days-as per Section 9 of General Clauses Act 15 days countable from the date of first remand.

Held: Para-8-
The prosecution cannot take advantage of the fact that the order has been passed within 15 days and the court is competent to send the accused from judicial custody to police custody beyond 15 day. This cannot be done in view of the specific provision contained in Section 167(2) Cr.P.C.

Case Law discussed:
2009(3) ADJ 322 (SC); 1992 SCC (Cri) 554; AIR 1980 SC 785; AIR 1963 Alld. 4; 1995 Cri. L.J. 52; AIR 2001 SC 36.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. By means of this petition under section 482 of Criminal Procedure Code (for short 'Cr.P.C.') petitioners have prayed for quashing the order dated 16.02.2013 passed by learned in-charge District & Sessions Judge/ Additional Sessions Judge, Court No.1 Lucknow relating to case Crime 64 of 2012, under Sections 409, 420, 467, 468, 471, 204, 301, 174A, 120B IPC and 7/13(1)d r/w 13(2) of Prevention of Corruption Act, Police Station Hussainganj, District Lucknow remanding the petitioners/accused persons in the police custody from 9AM of 17th Feb, 2013 to 9.00 AM of 18th Feb 2013.

2. The brief facts for deciding the case are that both the petitioners were accused in the above mentioned case and they surrendered before the court for the first time on 10.01.2013 and moved application for their bail before the court concerned. The Court keeping in view the judgement rendered by the Apex Court in **Lal Kamlendra Pratap Singh Vs. State of U.P.). 2009 (3) ADJ 322 (SC)** released the petitioners on interim bail because the bail could not be disposed of on that day. The court fixed 19.01.2013 for hearing of the regular bail. On 19.01.2013 the petitioner again surrendered but the bail application could not be disposed of and case was listed for final disposal on 24.01.2013 and they were released on interim bail till 24.01.2013. As 24.01.2013 was holiday on account 'Barabafat' the petitioners surrendered in court on 25.01.2013. On that date too the bail could not be disposed of and they were released on interim bail till 02.02.2013. They again surrendered on 02.02.2013 and their bail application was rejected and they were taken into custody and remained to judicial custody and send to jail. On 05.02.2013 an application has been moved for police custody remand of petitioners by the investigating officer. The court fix 11.02.2013 for disposal of application. On 11.02.2013 the court directed the police to inform purpose of remand and for showing the provision on 15th February. The case was again adjourned and listed on 15.02.2013. On 15.02.2013 State sought adjournment, consequently the application was fixed on 16.01.2013 for disposal. On 16th February, 2013 the application was allowed and petitioners were ordered for police custody remand from 9 AM of 17.02.2013 to 9 AM of 18.02.2013. They were given in police custody and sent back to the jail in terms of the order passed by the Court.

3. The impugned order was assailed by the petitioners on the following grounds.

(i) That period of first 15 days shall be counted from the date of first remand on 02.02.2013, hence, the 17.02.2013 would be the 16th day as such the remand of the petitioner from 17.02.2013 onwards would be illegal and would be hit by Section 167(2) Cr.P.C..

(ii) That the petitioners were not present in the court when the impugned order has been passed. Hence, in view of provision contained in Clause (b) of proviso of sub-Section 2 of Section 167 Cr.P.C. remanding the petitioners in the police custody on 17.02.2013 would be illegal.

(iii) That the day on which the accused person surrendered before the court i.e. on 10.02.2013, 19.01.2013, 25.01.2013 and 02.02.2013 would be included while calculating first 15 days for the purpose of remaining the petitioner in the police custody. As such the police remand granted in this case beyond period of 15 days would be illegal.

(iv) That accused persons surrendered on 10.01.2013 and they remained on interim bail till 02.02.2013. The period during which they were remained on interim bail shall be deemed to be in custody for the purpose of Section 167(2) Cr.P.C. and 15 days expired during this period, therefore, the petitioners cannot be remained in the police custody. Hence police custody remand granted beyond first 15 days by the impugned order would be illegal.

4. Learned senior counsel appearing for the petitioners Sri Jyotinjay Mishra submitted that the Apex Court in **Central Bureau of Investigation, Special Investigation Cell-1, New Delhi Vs. Anupam J. Kulkarni [1992 SCC (Cri) 554]** has held that police custody remand could be granted initially for first 15 days by single order or in part. It was further submitted that the period of detention shall be computed from the first date of remand. It was further submitted that the Apex Court has categorically held that after expiry of the period of first 15 days of custody further remand for 60 or 90 days as the case may be, under sub-section 2 of sec.167 shall only be to judicial custody. After relying upon the judgement of Apex Court in Niranjan Singh & anr. Vs. Prabhakar Rajaram Kharote & Ors (AIR 1980 SC 785). It has been submitted that even if the accused is on bail he shall deem to be in custody. He also relied upon the judgement of Division Bench of this Court in **Zaheer Abbas Vs. Ganga Prasad (AIR 1963 Alld 4)** and contended that even if the accused is on bail may file petition for habeas corpus and will deem to be in custody for all practical purpose.

5. After relying upon the judgement it has been submitted by learned counsel for the petition that remand of the petitioner from 9.00 A.M. Of 17.02.2013 to 9.00 A.M. Of 18.02.2013 would be illegal.

6. Learned AGA Smt. Suniti Sachan contended on behalf of the State that this petition has become infructuous as the accused has already remanded to judicial custody after police custody remand, hence the petitioner shall have no right to challenge the impugned order and no fruitful purpose would be served even if the impugned order is set a-side. It was further submitted on the strength of authority of this Court in **Amar Pal and Ors. Vs. State of U.P., (1995 Cri. L.J. 52)** that grant or refusal of authorization of detention of an accused in police custody

are bilateral proceedings between the prosecuting agency and the court and accused does not come in picture at all. Hence the presence of the accused at the time of remanding the accused from one custody to other is not at all required, specially when court after hearing the parties pass order to be affected from a particular date after the date of passing the order. The Magistrate would be fully competent to direct the Jail Authorities and the investigating officer for giving and taking the physical custody of an accused i.e. from judicial custody to police custody and again from police custody to judicial custody.

Point No.(i)

7. It is not in dispute that police custody remand would be granted during first 15 days from the date of first remand as held by the Apex Court in Aupam J. Kulkarni's case (supra). It has been held by Hon'ble Supreme Court in Tarun Prasad Chatterjee vs. Dinanath Sharma, AIR 2001 SC 36 that use of word 'from' indicate the beginning, hence the first day of the period ,therefore, is to be excluded in view of sec. 9 of General Clauses Act. Of course, the period of first 15 days shall be counted from the date of first remand, i.e. 02.02.2013 but the day on which the bail of accused person was rejected and taken in physical custody by the court and remanded to judicial custody would be treated to be first day of remand. While calculating first 15 days the calculation would start from 03.02.2013 and 02.02.2013 would be excluded, so the 17.02.2013 would be the 15th days.

8. The prosecution cannot take advantage of the fact that the order has been passed within 15 days and the court is competent to send the accused from judicial custody to police custody beyond 15 day. This cannot be done in view of the specific provision contained in Section 167(2) Cr.P.C.

Point No (ii)

9. So far transfer of custody from judicial custody to police custody is concerned if court direct the jail authorities and the investigating officer to take physical custody of the accused from jail for a certain period would be fall within the domain of the court concerned. In such situation it would not necessary that the accused should be brought first before the Magistrate or the court and then handed over to the police in his presence. The presence of the accused is necessary at the time of hearing of the matter regarding police custody remand. It is not the case that petitioner were not given opportunity of being heard before passing the impugned order. I do not find any substance in any of the submissions raised by learned counsel for the petitioner in this regard.

Point No.(iii)

10. So far as inclusion of 10th January, 19th January, 25th January and 2nd February, 2013 while calculating first 15 days is concerned, the day on which the petitioners surrendered and release on interim bail shall not deem to be the date of remanded to the judicial custody. No doubt they surrendered before the court concerned themselves to be taken into physical control of the court but the court has not change the custody either to the police custody or to judicial custody in jail. Therefore, unless the accused are remanded either to the judicial custody or to the police custody by the court it will not be the date of remand within the meaning of Section 167 (2) Cr.P.C.

Point No.(iv)

11. So far as question of custody is concerned technically the accused if on bail shall deem to be under some restrictions but would not be in physical custody of the court. In **Niranjan Singh'case (supra)** in para 7 this controversy has been set at rest, which is reproduced herein below;

" 7. When is a person in custody, within the meaning of s.439 Cr. P.C. ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of s. 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose"

12. So person cannot be remanded either to judicial custody or in police custody if he is not in actual physical control of the court. An accused on bail cannot deem to be in custody within the meaning of Section 167 Cr.P.C.. Such accused could not be remanded either to judicial or police custody, as in both the situation accused sent to in physical custody of jail authorities or police. as the case may be, which would not be possible if the accused is on bail . This is crystal clear from the scheme of Section 167 Cr.P.C. The perusal of Section 167 (2) Cr.P.C. provides that in case of default of submitting the charge sheet in 60 or 90 days as the case may be, the accused would be entitled for bail, so if the accused already on bail cannot be granted bail in default of filing the charge sheet by the investigation agency in 60 days or 90 days. Hence it cannot be said that accused released on interim or regular bail by the court shall deem to be in custody for the purpose of Section 167 Cr.P.C. I fortified my view with judgement of Apex Court reported in **Mithabhai Pashabhai Patel Vs. State of Gujrat, AIR 2009 SC (Supp) 1658**

13. Having considered all the facts and circumstance of the case and keeping in view the law cited on the subject it is held that the order of remand of the petitioners in police custody from zero hours to 9.00 a.m. on 18. 02.2013 would not a valid remand being beyond first 15 days. The order to that extent is,thus,liable to be set aside. Consequently to that extent this petition deserve to be allowed.

14. Hence petition is partly allowed. The impugned order dated 16.02.2013 remanding the petitioner to police custody remand from 9.00 A.M. of 17.02.2013 to midnight, i.e. till 12.00 A.M. would be valid and upheld but police custody remand from zero hours to 9.00 A.M. on 18.02.2013 would be illegal and is accordingly set a side.

15. However, the petitioners were subsequently remanded in judicial

custody by a valid remand from time to time, the illegality stand cured.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2013

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No. 1118 of 2002
(u/s 482 Cr.P.C.).

Smt. Vijay Devi and Anr. ...Applicants
Versus
State of U.P. ...Opp. Party

Counsel for the Petitioner:
Sri Sushil Shukla, Sri Rama Shankar Mishra

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 482- Application to quash the order rejecting discharge application-offence under section 379/411 IPC readwith 4/10 U.P. Protection of Trees Act 1976-applicant being village pradhan-pursuant to resolution of Gaon Sabha-approved by S.D.O. sale deed word Trees of Shisham, Neem and Sagon of Gaon Sabha Land-auction purchaser deposited the amount of bid in Gaon Sabha fund-I.O.-without considering these documents submitted charge sheet-cognizance taken by Magistrate on mechanical manner-and the discharge application also got the same fate with same manner-no offence made out-entire proceeding consequent to impugned order quashed.

Held: Para-13
Hence in view of the above discussions, no offence against the applicants is made out on the basis of impugned charge sheet. Thus, the entire proceedings based on the impugned charge sheet and the consequential proceedings are hereby quashed.

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

1. Heard Sri Rama Shanker Mishra, learned counsel for the applicants and learned A.G.A for the State.

2. This application under Section 482 Cr.P.C. has been filed for quashing the entire proceeding of Criminal Case No.1203 of 1998 u/s 379, 411 IPC and Section 4/10 of U.P. Protection of Trees Act, 1976, P.S. Salempur, district Bulandshaher, pending currently in the Court of A.C.J.M. Court No.3, Bulandshaher.

3. The prosecution case in brief is that on 22.7.1998 at about 11 p.m. when the police party was on it's patrolling duty, an information was received that Smt. Vijay Devi, the Gram Pradhan of the village and her husband Rameshwar Dayal had got the green woods of Sheesham, Neem and Saijan treeof the Gram Samaj which were cut down and were it hidden in the Jungle and was likely to be taken to some other place in the midnight. On the said information, the two police constables namely Sukhbir Singh and Mohar Singh who were on patrolling duty had reached at Marauni Tiraha at about 11.30 hours. They saw truck No.U.P.13-0828 coming from the village Marauni and the said truck was stopped at that Tiraha and was checked by the constables and they found that the truck was loaded with green woods of Sheesham, Neem and Saijan trees. A person sitting on the said truck Prem Chandra informed the police party that the said trees were cut down by the husband of the Pradhan namely Rameshwar Dayal and he showed some papers of village Pradhan namely Smt. Vijay Devi regarding the said woods on which there was signature of the village Pradhan. It was further informed that they did not have permission for cutting

down the trees. The said truck loaded with the woods were seized and kept in village Parogani. It was informed by the truck driver that the Pradhan had stated that in the night, there is police checking at various places, hence the said truck was being taken to village Dewai. The Police party suspecting that the Pradhan of the village and her husband had sold the said woods in an illegal manner. Hence the case was registered for the offence u/s 4/10 of U.P. Protection of Trees Act, 1976 and Section 379 IPC. The FIR was lodged against one Shyamveer who is said to be the purchaser of the woods of the said trees. Padam Singh was the driver of the said truck and Prem Chand who had got the trees cut down also had share in the woods of the said trees. The driver was not having driving license nor any papers, hence the driver of the truck was also challaned u/s 183, 192, 194, 196 and 207 of Motor Vehicles Act.

4. The FIR of the incident was lodged by a constable of Police Station Salempur, district Bulandshahr as case crime no.60/1998 u/s 379, 411 IPC and 4/10 of U.P. Protection of Trees Act, 1976 on 22.7.1998 at 18 hours. The investigation was carried out and the charge sheet was submitted against the applicants on 26.9.1998 and cognizance was taken by the learned Magistrate. Thereafter applicants moved discharge application before the learned Magistrate and the same was rejected vide order dated 20.7.2001.

5. The contention of learned counsel for the applicants is that the applicant no.1 Smt. Vijay Devi is the Pradhan of the village and her husband applicant no.2 namely Rameshwar Dayal is a Farmer. On 26.6.1998 a general body meeting of Land Management Committee was held in the Gram Sabha which was headed by the applicant no.1 and attended by the other members. In the said meeting one of the member namely Chotey Lal had proposed that certain dry trees are standing on the Gram Sabha land over plot no.209, measuring 0.063 hactare which was cut down by the villagers and were lying on the ground, thus economical loss was being caused to Gram Sabha. He proposed to auction those trees which were lying as dead woods which may add to an income of the Gram Sabha. His proposal was unanimously approved by the Land Management Committee and resolution was passed and necessary permission for auction was obtained from the S.D.M. Shikarpur. Copy of the said resolution of Gram Sabha has been annexed as Annexure no.1.

6. In pursuance of the said resolution, Land Management Committee dated 26.5.1998 necessary permission for public auction of the aforesaid trees was obtained and granted on 15.7.1998 by the S.D.M. Shikarpur after the necessary inquiry in that respect was conducted by the Lekhpal and other revenue officers who submitted the report before the S.D.M. Copy of the report of the Lekhpal and other revenue authorities and the order granting permission for auction of the S.D.M. has been annexed on pages 17-18 of the accompanying affidavit. Ultimately, a general body meeting of the Land Management Committee was held on 19.7.1998 and public auction in respect of the aforesaid trees of Gaon Sabha was held and the highest bidding of Rs.3,200/- was made by one Shyamveer and accordingly his bid was accepted and approved by the Land Management Committee on the same day i.e. 19.7.1998. The said bidder deposited the money in the account of Gram Sabha with Punjab National Bank on 21.7.1998 and formal permission was

granted to the said bidder Shyamveer by the applicant no.1 Smt. Vijay Devi in her capacity of Chairman of Gram Sabha. A photocopy of the receipt of the money deposit is also annexed on page 23 of the accompanying affidavit.

7. It was further urged that the bidder Shyamveer along with other persons were taking away the woods on 27.7.1998 at about 1 p.m. on the truck in question to his destination, the said truck was intercepted by the two constables who without taking into account the aforesaid fact and documents have seized the said truck and lodged a false FIR against the applicants and other persons for illegally cutting down the trees and committing theft of the same which were the property of Gram Sabha. The Investigating Officer of the case without inquiring the correct facts of the case, lodged against the applicants submitted charge sheet against the applicants for offence u/s 379/411 IPC and 4/10 of U.P. Protection of Trees Act, 1976. The learned Magistrate also in most mechanical manner has taken cognizance has summoned the applicants for the aforesaid offence and also illegally rejected the discharge application of the applicants without considering and appreciating the aforesaid documents for the public auction of the disputed trees of the Gram Sabha and the necessary permission of the S.D.M which is also on record.

8. He further submitted that the allegations in the FIR and charge sheet no offence is made out against the applicants.

9. He further submits that though the time was granted to the State to file counter affidavit but till date no counter affidavit has been filed, hence the averments made in the present affidavit filed in support of the 482 Cr.P.C application stands unrebutted.

10. Learned AGA has admitted the fact that till date no counter affidavit has been filed by the State but he has opposed the prayer for quashing and submitted that the proceedings initiated against the applicants are in consonance with law and the charge sheet discloses cognizable offence against the applicants.

11. Considered the submissions of learned counsel for the parties.

12. I have perused the entire material on record from which it is apparent that the applicant no.1 Smt. Vijay Devi who is the Gram Pradhan of the village had passed a resolution for the public auction of the disputed trees along with other members of the Land Management Committee of the Gram Sabha and in the said resolution, a decision was taken for the auction of the disputed trees which was lying as dead woods so that it may not cause any financial loss to the Gram Sabha. The Land Management Committee also sought necessary permission from the S.D.M. for the public auction of the said trees which was granted by the S.D.M. after necessary inquiry from the Lekhpal and other revenue authorities. The public auction was held after the permission of the S.D.M and the highest bidder Shyamveer who had purchased the said trees for Rs.3,200/- and the said amount was deposited by him in the account of Gram Sabha with Punjab National Bank. A copy of the resolution of Land Management Committee and the necessary permission granted by the S.D.M. on the basis of which, a public auction was

made and the money deposited by the highest bidder Shyamveer in the account of Gram Sabha, copy of the deposit receipts of Rs.3,200/- is also on record. The charge sheet submitted in the case by the Investigating Officer has not taken into account the aforesaid documents which were stated to be shown by the applicant no.1 who was the village Pradhan to Investigating Officer of the case and in a most mechanical manner, the investigation was conducted by the Investigating Officer who on the basis of statements of police witnesses a charge sheet was submitted by him and no independent witness has come forward to support the prosecution story. The learned Magistrate who has taken cognizance of the offence against the applicants has also in a most mechanical manner and summoned the applicants for trial for the aforesaid offence. When the discharge application was moved by the applicant that too was rejected by the learned Magistrate without appreciating the fact that there was permission from the S.D.M for the public auction and the money in question has also been deposited by Shyamveer, the highest bidder in the account of Gaon Sabha, the learned Magistrate has rejected the discharge application and passed the order dated 20.7.2001 which is not sustainable in the eyes of law.

13. Hence in view of the above discussions, no offence against the applicants is made out on the basis of impugned charge sheet. Thus, the entire proceedings based on the impugned charge sheet and the consequential proceedings are hereby quashed.

14. The petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2013

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No.1681 of 2013

Vidya Shanker Tiwari ...Petitioner
Versus
Surya Kant Tiwari and Ors...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri Siddharth Nandan

C.P.C.-Order VII Rule 10 readwith Section 24(5)- Transfer of suit by exercising Power under Section 24-consequent to amendment of plaint-enhancing pecuniary jurisdiction-neither issues framed-nor the parties lead any evidence-held-District Judge wrongly exercised its jurisdiction-provisions of Order 7 rule 10 can not be ignored-the moment amendment allowed pecuniary jurisdiction exceeded-effective from the date of institution of suit-civil judge(J.D.) ceased with every jurisdiction-except taking recourse to return plaint for presentation before the Court having pecuniary jurisdiction-transfer order set-a-side.

Held: Para-32
The provision of Order VII Rule 10 CPC are quite specific and deal with a circumstance which has arisen in the present proceedings where when the amendment was allowed to increase the valuation of the suit it related back to the date of institution of the suit before a Court which had no jurisdiction to try the suit and neither the pleadings were completed nor evidence was led hence it was not a case of transfer to proceed from the stage after evidence had been led. The plaint having not been properly

presented in the Court where the suit ought to have been instituted was required to be returned to the plaintiff for presentation before the competent court having pecuniary jurisdiction.

Case Law discussed:
LAWS (ALL)1977 -9-7; LAWS(ALL)1990-12-8; (2012) 6 SCC 348; (2012) 5 SCC 759; (2012) 6 SCC 348; (2012) 5 SCC 759; 2003(1) ARC 515; 2005(23) LCD 749; 2010 (4) ALJ 168; AIR 1960 Patna 244; AIR 1965 SC 1449; AIR 1978 All 106.

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

1. This petition is directed against the order dated 01.10.2012 (annexure 5 to the petition) passed by the District Judge, Deoria in Transfer Application no. 327 of 2012 (Surya Kant Tiwari Vs Vidya Shanker Tiwari and others).

2. The petitioner herein was defendant in a suit filed by the plaintiff respondent no. 1for permanent injunction and demolition before the Civil Judge (Junior Division), Deoria. An exparte injunction order was granted. The petitioner defendant filed his written statement on 05.07.2012 along with his objection to the temporary injunction application raising a dispute regarding valuation of the suit. It was stated by him that the plaintiff respondent had valued this property in suit at Rs. 15,000/- whereas the valuation of the property was more than five lakhs. He stated that the pecuniary jurisdiction of the Civil Judge (Junior Division) was Rs. 25,000/- and since the property in suit was valued at more than rupees five lakhs the suit was not maintainable before the Civil Judge (Junior Division) who had no pecuniary jurisdiction to entertain a suit valued more than Rs.25,000/-. The plaintiff respondent appears to have admitted the fact of under valuation of the suit property hence he filed an amendment application to change the valuation of the suit property to Rs. 5,20,000/- . The said application was allowed by the Civil Judge (Junior Division) on 24.09.2012.

3. The plaintiff respondent no. 1 then filed a Transfer Application no. 327 of 2012 (Surya Kant Tiwari Vs Vidya Shanker Tiwari and others) under Section 24 CPC before the District Judge, Deoria who in turn invited comments from the Civil Judge (Junior Division). The Civil Judge (Junior Division) on 27.09.2012 sent a letter to the District Judge, Deoria that after the valuation of the suit property has been amended in the plaint he had no pecuniary jurisdiction. The District Judge on the said comments has passed the impugned order dated 01.10.2012 transferring the case from the court of Civil Judge (Junior Division), Court no. 10, Deoria to the court of Civil Judge (Senior Division), Court no. 18, Deoria and as such allowed the Transfer Application no. 327 of 2012 filed by the plaintiff respondent. The impugned order dated 01.10.2012 is quoted here under:-

"पेश हुआ।

सुना एवं प्रभारी अधिकारी की आख्या का अवलोकन किया। आवेदकगण द्वारा यह अंतरण प्रार्थना पत्र वाद संख्या 2163 सन् 2009 जो व्यवहार न्यायाधीश, जू0 डि0 कक्ष संख्या 10 देवरिया के न्यायालय में लंबित है, को व्यवहार न्यायाधीश, एस0डी0 कक्ष संख्या 18, देवरिया के न्यायालय करने हेतु प्रस्तुत किया गया है। आधार यह लिया गया है कि वाद का मूल्यांकन 520000/– हो गया है और उक्त न्यायालय को वाद के निस्तारण का क्षेत्राधिकार नही है।

सुना। सुना आधार पर्याप्त है। अतः प्रार्थना पत्र स्वीकार किया जाता है तथा वाद संख्या 2163 सन् 2009 जो व्यवहार न्यायाधीश, जू0डि0 कक्ष संख्या 10

देवरिया के न्यायालय में लम्बित है, को विधिअनुसार निस्तारण हेतू व्यवहार न्यायाधीश एस0डि0 कक्ष संख्या 18, देवरिया के न्यायालय में अंतरित किया जाता है।

अन्तरण की सूचना विपक्षी/विद्वान अधिवक्ता को देने के पश्चात अग्रेतर कार्यवाही की जाय।

4. The petitioner defendant feeling aggrieved against the impugned order dated 01.10.2012 has filed this petition inter-alia stating that the impugned order was passed exparte against the defendant petitioner that the provisions of Order VII Rule 10 CPC have been ignored and violated, that since by the amendment application the valuation of the property in suit was sought to be amended to Rs. 5,25,000/- hence the Civil Judge (Junior Division) having pecuniary jurisdiction only up to Rs. 25,000/- could not have entertained the amendment application or pass any order thereupon and in view of the own admission of the plaintiff in the amendment application regarding valuation of the suit property he could not pass any orders in the suit itself, that the District Judge in exercise of his jurisdiction under Section 24 CPC could not have transferred the suit from the court of Civil Judge (Junior Division) to the court of Civil Judge (Senior Division) in view of the express provisions of Order VII Rule 10 CPC, that the amendment in valuation of the suit and property once allowed on 24.09.2012 would relate back to the date of institution of the suit hence on such date i.e. 21.12.2009 the suit was not competently instituted before the court having pecuniary jurisdiction only upto Rs. 25,000/-.

5. In support of his contention learned counsel for the petitioner has relied upon a decision of a learned Single Judge of this court in the case of **Murari Lal Vs Raman Lal** reported in **LAWS (ALL) 1977 -9-7** to state that the power under Section 24 (5) CPC could be exercised by the District Judge only when the suit was validly instituted in the court of original jurisdiction and therefore any order passed in a suit not validly instituted in the proper court would not get validity.

6. He has referred to a decision of learned Single Judge of this court in the case of **Devendra Singh Vs Bhole Ram** reported in **LAWS (ALL) 1990-12-8** to submit that consent of the parties cannot confer jurisdiction on a court to try a suit and once the amendment in valuation is allowed and the pecuniary jurisdiction of the court has changed the plaint would have to be returned for presentation before the competent court and it could not be transferred and directed to proceed in the court having pecuniary jurisdiction.

7. Learned counsel for the petitioner has also placed reliance on a decision of the Supreme Court in the case of **Kulsum R. Nadiadwala Vs State of Maharashtra and Others** reported in **(2012) 6 SCC 348** to the effect that when the statute prescribes a procedure to do a thing in a particular manner then the thing is to be done in the manner it is prescribed.

8. Learned counsel for the petitioner has further cited a decision of the Supreme Court in the case of **Sinnamani and Another Vs G. Vettivel and Others** reported in **(2012) 5 SCC 759** to state that when the statute requires filing of a suit then it must be instituted only in the manner prescribed and in no other manner.

9. Learned counsel for the plaintiff respondent no.1 has disputed the submission made by learned counsel for the defendant petitioner and has submitted that there is no illegality in the impugned

order dated 01.10.2012 passed in Transfer Application No. 327 of 2012 (Surya Kant Tiwari Vs. Vidya Shankar and others) by the District Judge, Deoria in view of the provisions of Section 24 (5) of the Code of Civil Procedure. He states that the suit was filed before the Civil Judge (Jr. Div.) valuing it at Rs. 15,000/- which was triable by the Civil Judge (Jr. Div.). He states that on the objection filed by the defendant regarding valuation of the suit property, the plaintiff respondent did not contest it but admitted that the suit property was under valued in the plaint hence, the plaintiff respondents filed an amendment application to increase the valuation from Rs. 15,000/- to Rs. 5,20,000/- which was allowed on 24.09.2012. Upon the valuation of the suit being increased to Rs. 5,20,000/- it was no more maintainable before the Civil Judge (Jr. Div.) who had pecuniary jurisdiction only up to Rs. 25,000/-. He states that the plaintiff respondents then filed Transfer Application No. 327 of 2012 under Section 24 of the Code of Civil Procedure before the District Judge praying that the suit be transferred from the Court of Civil Judge (Jr. Div.) to the Court of Civil Judge (Sr. Div.) which is competent to try the suit having valuation of Rs. 5,20,000/-. Learned counsel states that the transfer application filed by the plaintiff respondent has been allowed by the District Judge, Deoria and now the suit has been directed to be transferred to the Court of Civil Judge (Sr. Div.) from the Court of Civil Judge (Jr. Div.). According to him the District Judge has jurisdiction to transfer such suit in view of the specific provisions of Section 24 (5) of the Code of Civil Procedure as such there can be no illegality or jurisdictional error when the District Judge has passed the impugned order dated 01.10.2012 in Transfer Application No. 327 of 2012.

10. In support of his submission, learned counsel for the plaintiff respondents has placed reliance on a decision of learned Single Judge of this court in the case of **Bal Kishna and others Vs. Vith Additional District Judge, Kanpur Nagar and others reported in 2003 (1) ARC 515** and submits that in such circumstance, there was no occasion for returning the plaint and the suit was rightly transferred when the valuation was increased from Rs. 1000/- to Rs. 80,000/-.

11. Learned counsel for the plaintiff respondents has cited another decision of learned Single Judge of this Court in the case of **Lallu @ Chandrika Prasad and others Vs. Lakshmi Narain and others reported in 2005 (23) LCD 749** and states that when the suit was filed before the Munsif Court it was valued at Rs. 240/- and was correctly instituted in the Munsif Court. On a plea raised by the defendant, the Court determined the value of the suit at Rs. 30,000/- which exceeded the pecuniary jurisdiction of the Munsif Court hence the District Judge rightly transferred the suit to the Court having jurisdiction in exercise of his power under Section 24 (5) of the Code of Civil Procedure.

12. Learned counsel for the plaintiff respondents has relied upon a decision of learned Single Judge of this Court in the case of **Chandra Shekhar and others Vs. Rakesh Kumar reported in 2010 (4) ALJ 168** to submit that a suit can be transferred under Section 24 of the Code of Civil Procedure from a Court which has no jurisdiction to a Court of competent jurisdiction and to proceed with the suit from the stage it is transferred and not unnecessarily for a de-novo trial.

13. From the aforesaid submission of learned counsel for both the parties and the decision cited by them in support of their submission the legality of the impugned order dated 01.10.2012 passed in a Transfer Application No. 327 of 2012 by the District Judge, Deoria under Section 24 of the Code of Civil Procedure is required to be adjudicated in this petition. Therefore, the question which arises for consideration is "whether in the facts and circumstances of the present case, the District Judge had jurisdiction under Section 24 (5) of the Code of Civil Procedure to transfer the instant Suit No. 2163 of 2009 or the plaint ought to have been returned to the plaintiff under Order VII Rule 10 of the Code of Civil Procedure by the Civil Judge (Jr. Div.) for it to be presented before the Court of Competent pecuniary jurisdiction".

14. The law is settled that the jurisdiction of the court depends upon the allegations made in the plaint and the forum and jurisdiction of the suit is not dependent upon the defence taken by the defendant. On a defence taken to the jurisdiction of the court in the written statement would invite framing of an issue as provided in Order 14 CPC but even before framing of an issue the courts jurisdiction can be adjudged on the allegations made in the plaint.

15. The facts pleaded in this writ petition are not disputed by the plaintiff respondents to the extent that Suit No. 2163 of 2009 was filed by the plaintiff respondents before the Court of Civil Judge (Jr. Div.) upon a valuation to Rs. 15,000/-. The plaintiff got his plaint amended increasing the valuation of the Suit to Rs. 5,20,000/- and that such amendment application was allowed on 24.09.2012.

16. The dispute is the jurisdiction of the District Judge to transfer the suit after amendment of its valuation to the Court of Civil Judge (Sr. Div.) from the Court of Civil Judge (Jr. Div.). The Provisions of Section 24 of the Code of Civil Procedure are quoted hereunder:-

"**24. General power of transfer and withdrawal.-**

(1). On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and-

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or 3

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2). Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3). For the purposes of this section,-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.]

(4). The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5). A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]"

16. For the purpose of this petition, the provision of Sub-section 5 of Section 24 of the Code of Civil Procedure is relevant which provides that the suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

17. The provision is quite clear that if a Court has no jurisdiction to try a suit the District Judge may at any stage transfer it.

18. The provision of Order VII of the Code of Civil Procedure relate to a plaint. Order VII Rule 10 of the Code of Civil Procedure provides for return of the plaint for being presented to the Court in which the suit should have been instituted.

19. Order VI of the Code of Civil Procedure deals with the pleading which shall mean plaint or written submission. Admittedly in pleadings a party cannot approbate and reprobate and Order VI Rule 17 of the Code of Civil Procedure provides for amendment of plaint.

20. In the present case by the amendment in valuation of the suit property it has taken the suit out of jurisdiction of the Civil Judge (Jr. Div.). Hence the proper course would be either to allow the amendment and then return the amended plaint to the plaintiff for presentation before the Court having pecuniary jurisdiction. If any other procedure is adopted then the question under such circumstances would arise whether the suit was properly instituted. In the present case it is the plaintiff who has applied for amendment of valuation having earlier under valued the suit at the time of its institution. Therefore, when valuation of the suit is to be determined on the basis of the plaint by the Court then the amendment application increasing the valuation of the suit would oust the jurisdiction of the court where the suit was firstly instituted. It is under these circumstances that it has to be seen whether the suit was properly instituted in the Court of competent jurisdiction.

21. The amendment in the plaint would necessarily relate back to the date of the institution of the suit. The law is clear on this point to the extent that if by amendment no new party is added or no subsequent event is pleaded then the amendment in a plaint would relate back to the date of institution of the suit. It has been so held in **AIR 1960 Patna 244 (Shyam Nandan Sahay and others Vs. Dhanpati Kuer and others) AIR 1965 SC 1449 (Raja Soap Factory and others Vs. S.P. Shantharaj and others) AIR 1978 All 106 (Murari Lal Vs. Raman Lal and others).**

22. Once the plaintiff amends the valuation then the amendment would relate back to the date of institution of the

suit and if it is beyond the pecuniary jurisdiction of the court where the suit was initially instituted then it would not be a suit properly instituted.

23. Since upon the valuation, the suit should have been instituted in the court of Civil Judge (Sr. Div.) and with the ouster of the jurisdiction of the Civil Judge (Jr. Div.) the plaint ought to have been instituted in the court having pecuniary jurisdiction. The provision of Order VII Rule 10 of the Code of Civil Procedure has provided for the plaint to be returned to be presented to the court in which the suit should have been instituted hence in the present case in view of the amended valuation of the suit it should have been instituted in the court of Civil Judge (Sr. Div.) but it was earlier instituted in the Court of Civil Judge (Jr. Div) but because the amendment would relate back hence it was not a suit presented to the proper court in which the suit should have been instituted. As soon as the suit was beyond the jurisdiction of the court the provisions of Order VII Rule 10 CPC came into play.

24. The District Judge under Section 24 (5) of the Code of Civil Procedure can transfer a suit properly instituted from a court which has no jurisdiction to try it. Such a suit pending before a Court which has no jurisdiction to try it can be transferred by the District Judge but it would be in reference to a suit presented before a court where it is properly instituted. When the suit is presented before a court which would have no jurisdiction to try the suit then it would be a suit not properly instituted.

25. The result would be that in the present case when the amendment of valuation of the suit was sought by the plaintiff such amendment would relate back to the date of institution of the suit. On that date i.e. 21.12.2009 the suit having valuation of Rs. 5,20,000/- could not be held to be a suit properly instituted in the court of Civil Judge (Jr. Div.) which had a pecuniary jurisdiction of only Rs. 25,000/- hence it was not a suit properly instituted and the court of Civil Judge (Jr. Division) did not have jurisdiction over the suit in view of its pecuniary jurisdiction.

26. Under such circumstances, the jurisdiction under Section 24(5) of the Code of Civil Procedure conferred on the District Judge would be available only in a suit properly instituted in the competent court and it would not be available over a suit not properly instituted.

27. Insofar as the decision in the case of **Bal Kishan (Supra)** relied upon by learned counsel for the plaintiff-respondent is concerned, clearly the Court was considering the grievance that the suit should have been registered again when it was transferred because it would create problem in execution of the decree since it was registered as a suit in the Court of Munsif and subsequently on the basis of valuation it was transferred to the Court of Civil Judge. The High Court held that the defendants of the suit are not affected by such transfer because if there is difficulty in the execution of the decree it is the plaintiff who will face the difficulty and not the defendant. This decision does not apply in the present proceedings.

28. In **Chandra Shekhar (Supra)** the suit for ejectment and arrears of rent and damages was filed in the Court of Small Causes (Jr. Division) but upon increase of its

valuation and at the stage of final argument the transfer application was made and the District Jude under Section 24 CPC directed it to proceed from the stage it was transferred. This decision is very clear since after institution of the suit the pleadings were complete, evidence had been recorded and final argument was to be advanced hence the High Court did not interfere in the order of the District Judge passed under Section 24 CPC. In the present case such is not the circumstance. No evidence has been led and even the replication is yet to be filed, therefore, there was no such circumstance in the present case.

29. In the case of **Lallu @ Chandrika (Supra)** the Court was seized of a matter where it was held that the provisions of Section 24(5) CPC appears to be for convenience of the parties to avoid delay in disposal of the cases and to avoid return of the plaint in every situation which would entail de-novo proceedings making entire exercise done before the previous Court as futile. In the present case the circumstance is quite different. The defendant-petitioner has just put in appearance and neither any evidence has been led nor the pleadings have been completed, therefore, whereas in the above noted case the circumstance for interpreting the jurisdiction of the District Judge under Section 24(5) CPC were different but in the present case they are not so.

30. To ignore the provision of Order VII Rule 10 CPC and affirm an order passed under Section 24(5) CPC the circumstance of the case are very material inasmuch as where after evidence has been led and the suit is at the final hearing stage and then the valuation has been enhanced by a determination made by the Court the power under Section 24(5) CPC was exercised by the District Judge and it was affirmed because a de-novo trial would be inconvenient to the parties and if the plaint was returned under Order VII Rule 10 CPC at that stage then it would entail a complete retrial before the Court having jurisdiction and starting the trial de-novo.

31. As indicated above the circumstance of the three decisions relied upon by learned counsel for the plaintiff-respondent were totally different and the said judgments were in the interest of justice and circumstances of those cases.

32. The provision of Order VII Rule 10 CPC are quite specific and deal with a circumstance which has arisen in the present proceedings where when the amendment was allowed to increase the valuation of the suit it related back to the date of institution of the suit before a Court which had no jurisdiction to try the suit and neither the pleadings were completed nor evidence was led hence it was not a case of transfer to proceed from the stage after evidence had been led. The plaint having not been properly presented in the Court where the suit ought to have been instituted was required to be returned to the plaintiff for presentation before the competent court having pecuniary jurisdiction.

33. Therefore, in the present case the procedure adopted by the plaintiff by filing the Transfer Application before the District Judge to transfer the case because valuation has increased and the District Judge passing an order on the transfer application of the plaintiff under Section 24 CPC was not in accordance with the procedure prescribed under the statute. It is settled law that when the statute provides a thing to be done in a particular manner then that thing has to be done in the manner prescribed as has been held in

the case of A.K. Ray Vs. State of Punjab reported in 1986(4) SCC 326, Babu Bargis Vs. Bar Council reported in 1999(3) SCC 422, Diwan Singh Vs. Rajendra Prasad reported in 2007(1) Supreme 52 and L. Hridaya Narain Vs. ITO reported in AIR 1971 Supreme Court 33 and Kulsum R. Nadiadwala (supra).

34. The first issue raised in this petition is thus answered by holding that if the suit was not properly instituted the District Judge could not exercise his jurisdiction under Section 24 (5) of the Code of Civil Procedure by ignoring the provision of Order VII Rule 10 of the Code of Civil Procedure.

35. The second issue raised in this petition is answered by holding that the plaint ought to have been returned under Order VII Rule 10 CPC.

36. The plaint is therefore directed to be returned to the plaintiff under Order VII Rule 10 CPC for being presented before the Court of Competent pecuniary jurisdiction.

37. For the reasons above mentioned the impugned order cannot be sustained and is liable to be set aside.

38. The impugned order dated 01.10.2012 passed in Transfer Application No.327 of 2012 by the District Judge, Deoria is set aside.

39. This petition is allowed.

40. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.1921 of 2010

The Executive Board of Methodist Episcopal Church and Anr ....Petitioner
Versus
Commissioner Agra and Ors.Respondents

Counsel for the Petitioner:
Sri T.S. Pandey, Sri A.P. Paul, Sri Brij Bhushan Paul
Sri Munna Babu, Sri T.C. Pandey

Counsel for the Respondents:
C.S.C., Sri C.M. Rai, Sri Sanjay Srivastava
Sri Shashi Nandan, Sri Sudeep Harkauli
Sri Udayan Nandan,Sri P.N. Saxena

Socities Registration Act- Section 12 D(2)-Appeal against order-recalling renewal certificate-dismissed as not maintainable-appellate authority committed great error-order quashed-direction to decide appeal on merit-given appeal maintainable even order obtained by playing fraud.

Held: Para-6 & 7

6. From a perusal of the aforesaid provision it is apparently clear that the Registrar has been given various powers for cancelling the registration of the Society. Section 12D(1)(c) which was inserted by U.P. Act No. 11 of 1984 provides that an appeal would also lie against an order where the certificate of renewal has been obtained by misrepresentation or fraud.

7. In the opinion of the Court, the appeal of the petitioner was maintainable and that the appellate authority committed an error in rejecting the appeal on the ground that it was not maintainable.

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

1. Heard Sri B.B. Paul, the learned counsel for the petitioner, Sri P.N.

Saxena, the learned Senior Counsel assisted by Sri Sanjay Srivastava and Udayan Nandan, the learned counsel for respondent no.4, who is the contesting party.

2. The petitioner no.1 alleges itself to be the Executive Board of the Methodist Episcopal Church in Southern Asia, and petitioner no.2 alleges himself to be the General Secretary of this Board. It transpires that the petitioner no.2 moved an application for renewal of the certificate of the Society and also filed a list of the names of the office bearers. It also transpires that the petitioners also moved an application for amending its bye-laws. These applications were duly considered and allowed and the renewal of certificate along with the list of office bearers was granted to the petitioners. When the respondents came to know about it, they filed a detailed objection alleging that a fraud and misrepresentation had been played by the petitioners.

3. The Deputy Registrar, Firms, Societies and Chits, Agra after considering the matter allowed the objection of respondent no.4, and cancelled the renewal of certificate of the registration of the society as well as the list of office bearers and the application for amendment of the bye-laws on the ground that the petitioners had obtained the said certificate, etc. by misrepresentation and fraud.

4. The petitioners being aggrieved by the said order filed an appeal under sub-clause (2) of section 12D of the Societies Registration Act. The said appeal was rejected by the appellate authority on the ground that the appeal was not maintainable in as much as the appeal only lies against the cancellation of the registration of the Society. The petitioners being aggrieved by the said order have filed the present writ petition.

5. For a proper appreciation of the factual position, it would be appropriate to refer to the provisions of Section 12D of the Act which is extracted hereunder.

12D. Registrar's power to cancel registration in certain circumstances.-

(1) Notwithstanding anything contained in this Act, the Registrar may, by order in writing, cancel the registration of any society on any of the following grounds:-

(a) that the registration of the society or of its name or change of name is contrary to the provisions of this Act or of any other law for the time being in force;

(b) that its activities or proposed activities have been or are or will be subversive of the objects of the society or opposed to public policy;

[(c) that the registration or the certificate of renewal has been obtained by misrepresentation or fraud:]

Provided that no order of cancellation of registration of any society shall be passed until the society has been given a reasonable opportunity of altering its name or object or of showing cause against the action proposed to be taken in regard to it.

[(2) An appeal against an order made under sub-section (1) may be preferred to the Commissioner of the Division in whose jurisdiction the Headquarter of the society lies, within one month from the date of communication of such order.

(3) The decision of the Commissioner under sub-section (2), shall be final and shall not be called in question in any court.]

6. From a perusal of the aforesaid provision it is apparently clear that the Registrar has been given various powers for cancelling the registration of the Society. Section 12D(1)(c) which was inserted by U.P. Act No. 11 of 1984 provides that an appeal would also lie against an order where the certificate of renewal has been obtained by misrepresentation or fraud.

7. In the opinion of the Court, the appeal of the petitioner was maintainable and that the appellate authority committed an error in rejecting the appeal on the ground that it was not maintainable.

8. In the light of the aforesaid, the impugned appellate order is quashed. The writ petition is allowed.

9. The matter is remitted back to the appellate authority to decide the appeal of the petitioners after hearing all the parties concerned within 6 months from the date of production of the certified copy of this order.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2013

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE VIPIN SINHA. J.

First Appeal from Order No.1963 of 2003

Masood Ahmad & Anr. ...Appellants
Versus
Sardar Jaswant Singh & Anr...Respondents

Counsel for the Petitioner:
Sri H.P. Dubey

Counsel for the Respondents:
Sri V.C. Tyagi, Sri Pankaj Kumar Tyagi
Smt. Archana Tyagi, Sri P. Tyagi

Motor Vehicle Act.-1988, Section-173 First appeal from order- against order passed by Motor Accident claim Tribunal-although awarded Rs. 5,0000/ under section 140-but held-claim petition not maintainable-as the injury caused-due to blast of tanker-which fell down 20' beside the road-due to collusion between truck and bus-and leakage of petrol-held claim petition is maintainable.

Held: Para-23
Thus in view of aforesaid facts and circumstances of the case and in view of the law as laid down by the Hon'ble Apex Court, it can be clearly held that "claimant shall be entitled to compensation from Insurance Company if it is proved that accident of deceased arose out of use of motor vehicle

Case Law discussed:
AIR 1991 SC 1769; AIR 2000 SC 1930; AIR 1999 SC 136; AIR 2001 SC 485; 2005(1) TAC 404.

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

1. The present First Appeal From Order has been filed against the judgement and order dated 30.04.1997 passed by Sri B.B. Roy, II Additional District Judge, Saharanpur (Acting as Motor Accidents Claims Tribunal) in Accident Claim No. 108 of 1996 which was heard and disposed off by the aforesaid judgement and order.

2. The relief sought by this appeal is that this Court may be pleased to allow the appeal and set aside the judgement and order dated 30.04.1997 passed by II Additional District Judge, Saharanpur (Acting as Motor Accidents Claims Tribunal).

3. Heard learned counsel for the parties.

4. The facts in brief of this case are that; on 13.07.1995, the son of appellants was sitting in a Bus No. U.P-11A-7950 which was about to commence its journey from Gangoh. However, at about 08.00 A.M., a bomb blast took place inside the bus as a result of which, a number of persons who were sitting in the bus along with the son of appellants got injured and ultimately succumbed to injuries.

5. There is no dispute regarding the date or time or place of occurrence and there is also no dispute that there was a bomb blast on 13.07.1995 while the bus was standing at Gangoh in preparation for its onward journey. On account of the said accident, a number of persons had received injuries and some also died. A number of claim cases were filed before the Motor Accident Claims Tribunal. The same being Claim Petition Nos. 128 of 1995, 129 of 1995, 130 of 1995, 1 of 1996, 42 of 1996 and 108 of 1996.

6. However, as far as the present appeal is concerned, it arises out of Motor Accident Claims Petition No. 108 of 1996.

7. A perusal of the record also shows that all the claim petitions were clubbed together and were decided jointly by a common order dated 30.04.1997.

8. It is an admitted position on record that no written statement was filed by either of the opposite parties in Claim Petition No. 108 of 1996 which was preferred by the appellants.

9. The claim petition filed by the appellants was under Section 163A/166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act'). The Claims Tribunal vide its impugned order had though awarded interim compensation to other claimants for a sum of Rs. 50,000/- under Section 140 of the Act however, did not grant any interim compensation to the appellants on the ground that they had not sought any compensation under Section 140 of the Act.

10. However, the Tribunal after going through the evidence on record and various judgements as mentioned in the order itself, came to the conclusion that the claim itself is not maintainable and accordingly, the Claim Petition No. 108 of 1996 was dismissed as not maintainable.

11. Aggrieved against which, the present first appeal has been filed before this Court.

12. The main contention of the learned counsel for the appellants is that the Tribunal has erred in law in rejecting the claim preferred by the appellants holding that the same was not maintainable.

13. Learned counsel for the respondents on the other hand submits that the tribunal was quite justified in rejecting the Claim Petition No. 108 of 1996 along with other claim petitions on the ground of maintainability as there was no rash or negligent act on the part of the driver of the Bus.

14. It was also contended by learned counsel for the respondent that the claim petition could not have been filed by the appellants simultaneously under Section 163A/166 of the Act and also i.e. Saharanpur not being a terrorist affected

or disturbed area and as such no benefit can be claimed merely because a bomb explosion had taken place in the bus which was standing at Gangoh.

15. A number of case law have been cited at the bar. Sri V.C. Dixit has referred few High Court judgements but we are noticing Apex Court's precedents only.

16. After due consideration of the relevant case law on the point, the position which crystallizes is herein as under (with due reference to the citation and the relevant extract):

(A) **Shivaji Dayanu Patil Vs. Vatschala Uttam; AIR 1991 SC 1769.**

17. There was a collision between a petrol tanker and a truck due to which the petrol tanker went off the road and fell at a distance of about 20 feet from the highway leading to leakage of petrol which collected nearby. Later an explosion took place in the petrol tanker resulting in fire. Number of persons who assembled near the petrol tanker sustained burn injuries and few of them succumbed to the injuries. The victims filed the claim petitions which were dismissed by the Claims Tribunal on the ground that the explosion and the fire had no connection with the accident, and was altogether an independent accident. The appeal was allowed by the learned Single Judge of the High Court holding that the explosion was a direct consequence of the accident. The Division Bench of the High Court affirmed the findings of the learned Single Judge against which the matter came up before the Hon'ble Supreme Court.

18. The Hon'ble Supreme Court dismissed the Special Leave Petition holding that the explosion and fire resulting in the injuries and death was due to the accident arising out of the use of the motor vehicle. The findings of the Hon'ble Supreme Court are reproduced herein under:

"25. These decisions indicate that the word "use", in the context of motor vehicles, has been construed in a wider sense to include the period when the vehicle is not moving and is stationary, being either parked on the road and when it is not in a position to move due to some break-down or mechanical defect. Relying on the above mentioned decisions, the Appellate Bench of the High Court had held that the expression "use of a motor vehicle" in section 92-A covers accidents which occur both when the vehicle is in motion and when it is stationary. With reference to the facts of the present. case the learned Judges have observed that the tanker in question while proceeding along National Highway No. 4 (i.e. while in use) after colliding with a motor lorry was lying on the side and that it cannot be claimed that after the collision the use of the tanker had ceased only because it was disabled. We are in agreement with the said approach of the High Court. In our opinion, the word "use" has a wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle does not cease on account of the vehicle having been rendered immobile on account of a break-down or mechanical defect or accident. In the circumstances, it cannot be said that the petrol tanker was not in the use at the time when it was lying on its side after the collision with the truck.

35. This would show that as compared to the expression "caused by" the expression "arising out of" has a wider connotation. The expression "caused by"

was used in Sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A of the Act, Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under Section 92A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in section 92A enlarges the field of protection made available to the victims of accident and is in consonance with the beneficial object underlying the enactment.

36. Was the accident involving explosion and fire in the petrol tanker connected with the use of tanker as a motor vehicle? In our view, in the facts and circumstances of the present case, this question must be answered in the affirmative. The High Court has found that the tanker in question was carrying petrol which is a highly combustible and volatile material and after the collision with the other motor vehicle the tanker had fallen on one of its sides on sloping ground resulting in escape of highly inflammable petrol and that there was grave risk of explosion and fire from the petrol coming out of the tanker. In the light of the aforesaid circumstances the learned Judges of the High Court have rightly concluded that the collision between the tanker and the other vehicle which had occurred earlier and the escape of petrol from the tanker which ultimately resulted in the explosion and fire were not unconnected but related events and merely because there was interval of about four to four and half hours between the said collision and the explosion and fire in the tanker, it cannot be necessarily inferred that there was no Causal relation between explosion and fire. In the circumstances, it must be held that the explosion and fire resulting in the injuries which led to the death of Deepak Uttam More was due to an accident arising out of the use of the motor vehicle viz. the petrol tanker No. MKL 7461.

(B) Rita Devi Vs. New India Assurance Co. Ltd.; AIR 2000 SC 1930.

19. The deceased was employed to drive an auto rickshaw for ferrying passengers on hire. On the fateful day, the auto rickshaw was parked in the rickshaw stand at Dimapur when some unknown passengers engaged the deceased for journey. As to what happened on that day is not known. It was only on the next day that the police was able to recover the body of the deceased but the auto rickshaw in question was never traced out. The owner of the rickshaw claimed compensation from the insurance company for the loss of auto rickshow. The heirs of the deceased claimed compensation for the death of the driver on the ground that the death occurred on account of accident arising out of use of the motor vehicle. The Apex Court held that the heirs of the deceased would be entitled to compensation. The question as to whether the case of murder would be covered was also gone into. Paras 9 and 10 are relevant and are quoted below:

9. A conjoint reading of the above two sub-clauses of Section 163A shows that a victim or his heirs are entitled to claim from the owner/Insurance Company a compensation for death or permanent

disablement suffered due to accident arising out of the use of the motor vehicle (emphasis supplied), without having to prove wrongful act or neglect or default of any one. Thus it is clear, if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle then they will be entitled for payment of compensation. In the present case, the contention of the Insurance Company which was accepted by the High Court is that the death of the deceased (Dasarath Singh) was not caused by an accident arising out of the use of motor vehicle. Therefore, we will have to examine the actual legal import of the words death due to accident arising out of the use of motor vehicle.

10. The question, therefore, is can a murder be an accident in any given case ? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominent intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

(C) **Samir Chanda Vs. Managing Director, Assam State Trans. Corporation; AIR 1999 SC 136.**

20. The Apex Court upheld the claim for compensation in respect of injuries were suffered by the claimant due to bomb blast inside the vehicle relying on the decision given in Shivaji Dayanu Patil's case (Supra).

(D) **S. Kaushnuma Begum Vs. New India Assurance Co. Ltd.; AIR 2001 SC 485**.

21. The Hon'ble Supreme Court held that the principle of strict liability propounded in Rylands V. Fletcher 11861 AII.E.R 1 was applicable in claims for compensation made in respect of motor accidents. The relevant findings of the Hon'ble Supreme Court are reproduced hereunder:

"12. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands vs. Fletcher (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J, thus:

The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

19. Like any other common law principle, which is acceptable to our jurisprudence, the Rule in Rylands vs.

Fletcher can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently. Hence, we are disposed to adopt the Rule in claims for compensation made in respect of motor accidents.

20. No Fault Liability envisaged in Section 140 of the MV Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the Rule can be applied. It is a statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the MV Act permits that compensation paid under no fault liability can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from Section 140 of the MV Act, a victim in an accident which occurred while using a motor vehicle, is entitled to get compensation from a Tribunal unless any one of the exceptions would apply. The Tribunal and the High Court have, therefore, gone into error in divesting the claimants of the compensation payable to them.

(E) **National Insurance Co. Ltd. Vs. Shiv Dutt Sharma; 2005 (1) TAC 404.**

22. Two sets of claims were made in this case; one relating to the accident in a bus and the other relating to an accident where bullets of terrorists killed the passengers of a bus. The Jammu and Kashmir High Court held as under:

"43. On the basis of the judicial pronouncements and the material which has come on the record, it is concluded:

(i) That a passenger travelling in a bus when he suffers from an injury on account of bomb explosion or on account of any other activity including terrorist activity, he would be well within his rights to claim compensation. This view is spelt out from the decision given by the Supreme Court of India in Shivaji Dayanu Patil v. Vatschala Uttam Mare and the latter decisions noticed above;

(ii) That even if a person is not actually in the vehicle and is standing outside and suffers an injury, even in that case Supreme Court of India has allowed compensation in Shavaji Dayanu Patil v. Vatschala Uttam Mor, . Therefore, merely because some of the victims were taken out of the bus and thereafter shot dead, would not make any difference;

(iii) That the material which has come on the record justified the grant of the compensation and the quantum thereof is accordingly sustained.

9. Following the aforesaid judgements, it is held that the accident in question arose out of the use of the motor vehicle and, therefore, the claimants are entitled to compensation under Section 163-A of the Motor Vehicle Act.

23. Thus in view of aforesaid facts and circumstances of the case and in view of the law as laid down by the Hon'ble Apex Court, it can be clearly held that "claimant shall be entitled to compensation from Insurance Company if it is proved that accident of deceased arose out of use of motor vehicle."

24. Reference may also be made to the judgement of Delhi High Court rendered in the case of **D.T.C. And Ors. Vs. Meena Kumari And Another** in MAC. APP. No. 512-13 decided on

03.02.2010 in which the question arose "as to whether D.T.C. is liable to pay compensation for death of Sansar Pal due to a bomb blast in a D.T.C. bus" and it was held that the claimant would be entitled to compensation.

25. This Court is of the view that the claim petition before the Tribunal would be maintainable.

26. Thus, the judgement and order of the court below dated 30.04.1997 is liable to be set aside. Accordingly, the same is set aside inasmuch as it pertains to Claim Petition No. 108 of 1996. The matter is remitted back to the Tribunal to decide the claim petition on all other issues. It is left open to the parties to raise all issues as they deem fit before the Tribunal including the issue as to whether the claim petition is maintainable under Section 163A/166 simultaneously.

27. The Tribunal after giving opportunity of hearing to both the parties will decide the case preferably within a period of six months from today keeping in view the fact that the appellant at present is a very senior citizen and aged about 77 years.

28. The appeal is allowed and as indicated above is restored to the Tribunal to re-decide the Claim Petition No. 108 of 1996 afresh.

29. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.08.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No.3061 of 2009

(u/s 482 Cr.P.C.)

Prabhat Chaturvedi ...Applicant
Versus
State of U.P. and Anr. ...Opp. Parties

Counsel for the Applicant:
Sri B.M. Sahai, Sri Raj Priya Srivastava

Counsel for the Respondents:
Govt. Advocate, Sri Diwakar Nath Tiwari, Sri I.H. Farooqui, Sri Manoj Kumar Mishra Sri Rajendra Prasad Mishra

Code of Criminal Procedure-Section 188(c)- Requirement of permission by central Govt.-offence under section 498-A, 323, 504, 506 IPC and Section 3/4 D.P. Act-part of offence committed at Riyadh and partly at India-whether without permission of central govt order passed by Magistrate at Lucknow without jurisdiction? held-where complete offence committed at 'Riyadh'-sanction from central government must-part of offence demand of dowry took place at Lucknow-allegation of ill treatment at Lucknow-held-Lucknow court has jurisdiction.

Held: Para-22 and 23

22. In view of factual matrix in case in hand the offence committed at Riyad is complete offence and has no nexus with other offence alleged to have been committed in India. This offence under Section 326 IPC would not be triable without permission granted by the Central Government in view of proviso of Section 188 Cr.P.C. However the other offence which has been committed in India as alleged in the FIR and found to be committed in India during investigation would be tried and decided by the Magistrate. Hence proceeding in respect thereof may continue irrespective of the fact that no permission of the Central Government has been given in this case to prosecute the petitioner for the offence alleged to have been committed at Riyad in Saudi Arab.

23. Now question comes that on the basis of other offence said to have been committed in India whether the court at Lucknow has jurisdiction to try and decide the same. From the perusal of the allegation made in the first information report the dowry was given in Lucknow according to the prosecution version in the FIR. The opposite party No.2 and her mother was ill treated in Lucknow. Hence, it cannot be said that this court at Lucknow has no jurisdiction to try and decide the case.

Case Law discussed:
(2011) 9 SCC 527; (1993) 3 SCC (Crl.) 609; (2004) 2 JIC 666 SC; (1997) (JIC) 827 SC; 2001 (2) JIC 166 SC; 1972(2) SCC 890; 1991(2) SCC 141; 1984(4) SCC 222; (2013)2 SCC 435; AIR 1959(SC)798; 1991(2) SCC 141; 1972(2)SCC 890; 1984(4) SCC 222; (1988) 2 SCC 269; 2001(1) SCC 534; (2006) 13 SCC 470.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. By means of this petition under Section 482 of Criminal Procedure Code (for short 'Cr.P.C.') the order dated 30.07.2009 passed by C.J.M, Lucknow in Case No. 4311 of 2009 taking cognizance against the petitioner for trial under Section 498A, 323, 504, 506, 326 IPC and Section ¾ D.P. Act on the basis of charge sheet No. 28 of 2009 dated 26.05.2009 in Case Crime No. 69 of 2008, P.S. Hazratganj Mahila Thana, district Lucknow sought to be quashed.

2. The brief facts to decide this petition are as under.

3. That opposite part No.2 Smt. Archana Chaturvedi gave a written report against the petitioner and his family on 10.11.2008 to Police Station Aliganj, District Lucknow. On the basis of which FIR has been lodged on the same day under Sections 498A, 323, 504, 506 IPC and Section ¾ D.P. Act in Case Crime No.69 of 2008. The case was sent to Mahila Thana, District Lucknow. The matter was investigated and thereafter on 26.05.2008 Charge sheet has been filed against the petitioner Prabhat Chaturvedi ,the husband of opposite party No.2.. After investigation family members of the petitioner namely Dinesh Chaturvedi, Ramesh Chaturvedi, Smt. Savitri Chaturvedi, Smt. Sudha Chaturvedi, Smt. Rakhi Chaturvedh and Shiv Kumar Chaturvedi were exonerated. The charge sheet was filed under Sections 323, 326,506, 406,498A IPC and Section ¾ Dowry Prohibition Act. The court took cognizance and summon the petitioner vide order dated 23.07.2009.

4. The allegation levelled in the first information report in short are that opposite party No.2 married with Prabhat Chaturvedi the petitioner on 3rd February, 2005 at Lucknow. Sufficient dowry was given at the time of marriage which includes Rs. 51,000/- at the time of 'Bariksha' Rs. 51,000/- were given to mother-in-law Smt. Savitri Chaturvedi and father-in-law Shiv Kumar Chaturvedi as demanded by them. The mother of opposite party No.2 borne entire expenditure of the Barat and staying of the same. Apart from it, other movable item T.V., Music system, Almira, Double bed, utensil, and other domestic use items were given. The ornaments including neckless, three chain, tops, ring total measuring 16 tola and silver item about 500 gm apart from cloths and sarees amounting to Rs.40,000/- given to the family members of petitioner No.1. In Kaleva two gold rings having weight 20gms and clothing of Rs. 55,000/- were

given. After marriage she reached Sasural on 4th February, 2005. On 5th February, 2005 she was harassed and taunted on account of bringing less dowry by the family members and the demand of Rs. 10,00,000/- and a flat was raised by the in-laws. She came back to parental house. Her mother managed to Rs.1,00,000/- and given to in-laws on 7th March, 2005. The petitioner went to Saudi Arab along with his Bhabhi. His elder brother Dinesh was already went to Saudi Arab on 07.03.2006 she was called to Riyad in Saudi Arab by the petitioner but in Riyad she was subjected to cruelty on account of non-fulfilment of dowry. On 20th December, 2007 in Riyad her husband Prabhat Chaturvedi and his brother Dinesh badly beaten her. Her husband Prabhat Chaturvedi pored some black matrial upon her and Dinesh with match stick ablazed her. She was badly burnt in this incident. She raised alarm and thereafter neighbour assembled there. On their persuasion she was admitted in hospital at Riyad. She was threatened that if she will take any action in the matter she will be killed. After discharge from the hospital she came back to Delhi along with petitioner. From Delhi she was came by Shatabdi Train on 27th March, 2008 in bearing cloth alone to Lucknow. The in-laws kept all the belongings and ornaments with them. The petitioner and his brother Dinesh and Smt. Savitri Chaturvedi continuously extended threat to her on phone.

5. On 5th September, 2008 the husband of petitioner Prabhat Chaturvedi, mother-in-law Savitri Chaturvedi, father-in-law Shiv Kumar Chaturvedi came alongwith husband of petitioner at Triveni Nagar, Lucknow and demanded Rs. 10,00,000/- and a flat from her and her mother. When they expressed inability to fulfil the demand she and her mother was badly beaten by them and again demand Rs. 10,00,000/- and a flat and also extended threat that in case any action is taken they will be killed. She treated in Appolo Hospital, New Delhi in which a sum of Rs.2,00,000/- incurred in medical treatment. These expenses were borne by her mother

6. During the course of investigation neither the petitioner nor other witnesses mentioned about incident of 05.09.2008 which said to have been occurred in Triveni Nagar, Lucknow.

7. Aggrieved by the order of summoning and the consequential proceeding initiated by the Chief Judicial Magistrate in pursuance of the charge sheet and summoning order this petition has been filed by the petitioner. From the perusal of the pleadings of the parties the only challenge made in the petition is regarding lack of jurisdiction of the trial court to proceed in the matter. Counter affidavit has been filed wherein it has been mentioned by the opposite Party No.2 that investigation has not been properly conducted so he filed protest against dropping of the name of the other family members in the investigation and also filed an application before the court for further investigation under Section 173 (8) Cr.P.C. She reiterated the allegation made in the FIR. It was alleged that the offence committed is continuing offence and cause of action started from 20.12.2007 to 05.09.2008. In view of sections 177, 178 of 209 Cr.P.C. Section 3(r) of General Clause Act the court has jurisdiction to try the case.

8. In rejoinder affidavit the allegation of the counter affidavit has

been refuted and stated that the petitioner purchased the land in district Lakhimpur Kheri in the name of opposite party No.2 having cost of Rs. 5,00,000, so ,alleged story of demand and harassment and cruelty is not correct. It was further submitted that nothing was happened as stated by the petitioner regarding the incident of burn in Riyad but it was actually a case of accidental burn.

9. This court for the first time vide its order dated 19.08.2011 found that no permission under Section 188 Cr.P.C. was granted by Central Government, hence the Central Government was asked to grant of permission.

10. Initially when petition was filed this court passed an interim order dated 03.09.2009 stating that the prosecution of the petitioner under Section 326 IPC shall remain stayed and permitted the trial court to proceed for the other section. However, on 22.09.2011 the entire proceedings pending before the trial court were stayed on the request of the complainant on the ground that learned counsel for the Union of India informed that State Government is not moved for grant of permission under Section 188 Cr.P.C. so, no permission has been accorded by the Central Government.

11. This Court thereafter proceeded with this case and heard the parties at length.

12. Learned counsel appearing on behalf of the petitioner, Sri. B.M. Sahai argued that the Apex Court in recent judgement in **Thota Venkateswarlu Vs. State of A.P. [(2011) 9 SCC 527]** posed a question in para 12 to be considered in this case; Whether in respect of series of offence arising out of the same transaction, some of which were committed within the India and some out side India, such offences could be tried together, without the previous sanction of the Central Government, as envisaged in the proviso to Section 188 Cr.P.C.?

13. In the case of **Thota Venkateswarlu's case** (supra) the Apex Court in para 12, 13, 14, 15, 16, 17 explained the legal aspect of Section 188 Cr.P.C., is reproduce herein below;

"12.The question which we have been called upon to consider in this case is whether in respect of a series of offences arising out of the same transaction, some of which were committed within India and some outside India, such offences could be tried together, without the previous sanction of the Central Government, as envisaged in the proviso to Section 188 Cr.P.C.

13. From the complaint made by the Respondent No.2 in the present case, it is clear that the cases relating to alleged offences under Section 498-A and 506 I.P.C. had been committed outside India in Botswana, where the Petitioner and the Respondent No.2 were residing. At best it may be said that the alleged offences under Sections 3 and 4 of the 10 Dowry Prohibition Act occurred within the territorial jurisdiction of the Criminal Courts in India and could, therefore, be tried by the Courts in India without having to obtain the previous sanction of the Central Government. However, we are still left with the question as to whether in cases where the offences are alleged to have been committed outside India, any previous sanction is required to be taken by the prosecuting agency, before the trial can commence.

14. The language of Section 188 Cr.P.C. is quite clear that when an offence is committed outside India by a citizen of India, he may be dealt with in respect of such offences as if they had been committed in India. The proviso, however, indicates that such offences could be inquired into or tried only after having obtained the previous sanction of the Central Government. As mentioned hereinbefore, in Ajay Aggarwal's case (supra), it was held that sanction under Section 188 Cr.P.C. is not a condition precedent for taking cognizance of an offence and, if need be, it could be obtained before the trial begins. Even in his concurring judgment, R.M. Sahai, J., observed as follows :- (SCC p. 628, para 29)

"29 Language of the section is plain and simple. It operates where an offence is committed by a citizen of India outside the country. Requirements are, therefore, one -- commission of an offence; second -- by an Indian citizen; and third -- that it should have been committed outside the country.;"

15 Although the decision in Ajay Aggarwal's case (supra) was rendered in the background of a conspiracy alleged to have been hatched by the accused, the ratio of the decision is confined to what has been observed hereinabove in the interpretation of Section 188 Cr.P.C. The proviso to Section 188, which has been extracted hereinbefore, is a fetter on the powers of the investigating authority to inquire into or try any offence mentioned in the earlier part of the Section, except with the previous sanction of the Central Government. The fetters, however, are imposed only when the stage of trial is reached, which clearly indicates that no sanction in terms of Section 188 is required till commencement of the trial. It is only after the decision to try the offender in India was felt necessary that the previous sanction of the Central Government would be required before the trial could commence.

16. Accordingly, upto the stage of taking cognizance, no previous sanction would be required from the Central Government in terms of the proviso to Section 188 Cr.P.C. However, the trial cannot proceed beyond the cognizance stage without the previous sanction of the Central Government. The Magistrate is, therefore, free to proceed against the accused in respect of offences having been committed in India and to complete the trial and pass judgment therein, without being inhibited by the other alleged offences for which sanction would be required.

17.It may also be indicated that the provisions of the Indian Penal Code have been extended to offences committed by any citizen of India in any place within and beyond India by virtue of Section 4 thereof. Accordingly, offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the Indian Penal Code, subject to the limitation imposed under the proviso to Section 188 Cr.P.C."

14. On the strength of this authority it has been submitted that incident which alleged to have been occurred in Riyad is an independent offence and a completed one. It is not continuing offence of the earlier one alleged to have been occurred in Inida. Hence permission of Central Government is required to prosecute the petitioner for the alleged offence

committed by the petitioner at Riyad in Saudi Arab in view of proviso of Section 188 Cr.P.C. However for other offence the trial may go on.

15. The learned counsel for the opposite party No.2 Sri Manoj Kumar Mishra submitted that the offence alleged in the first information report are continuing offence and in case of continuing offence, part of cause of action which has been taken place outside India will not be covered by section 188(1) Cr.P.C. In this regard reliance has been placed upon the judgements

(i) Ajay Aggrawal Vs. State of Union of India [(1993) 3 SCC (Crl.) 609],

(ii) Y. Abraham Ajith & Ors Vs. Inspector of Police, Chennai & Ors. [(2004)2 JIC 666 SC],

(iii) Smt. Sujata Mukherji vs. Prashant Kumar Mukherji [1997 (JIC) 827 SC],

(iv) Mohan Baitha Vs. State of Bihar & Ors. [2001 (2) JIC 166 SC],

(v) State of Bihar Vs. Dev Karan Nenshi [1972 (2) SCC 890]

(vi) Gokak Patel Volkart Ltd. Vs. Dandayya Guru Shiddiah Hiramath [1991(2) SCC 141]

(vii) Bhagirath Kanoria Vs. State of M.P. [1984(4) SCC 222]

16. On the basis of submission made by the counsel for the parties the sole question for consideration before this court is;

(i) whether proviso of Section 188 Cr.P.C would be applicable in this case and without permission of the Central Government the case may proceed for the trial of the petitioner for those offence ,said to have been committed in India?.

(ii) Whether the proceedings pending before Lucknow court are without jurisdiction?

17. So far as question of Section 188 Cr.P.C. is concerned in **Thota Venkateswarlu's case (supra)** the Apex Court after considering the judgement rendered by Supreme Court in Ajay Aggarwal's case (Supra) ruled that offence which are completed in itself and committed outside India the permission under proviso of Section 188 Cr.P.C. of Central Government would be required, but for the offence which are committed within India there would be no impediment in taking the cognizance and the accused persons without previous permission under proviso 2 of Section 188 Cr.P.C. can be prosecuted and court would be competent to proceed with the case and to decide the same.

18. **Ajay Aggarwal's case** (supra) was a case of criminal conspiracy and the Apex Court held that the criminal conspiracy was hatched in India. If some of the part of offence has taken place in pursuance of that conspiracy to achieve objective of the criminal conspiracy outside India no permission of Central Government would be required of proviso to Section 188 Cr.P.C. In Ajay Aggarwal's case (supra) the Apex Court held that criminal conspiracy itself a substantive offence and is continuing one unless object of criminal conspiracy is achieved. This case was considered by the

Apex Court in Thota Venkateswarlu's case (supra) and has been distinguished. on fact. In Thota Venkateswarlu's case (supra) the petitioner left India for Botswana in January 2006 alone. Respondent No.2, the wife went to Botswana to join the petitioner. While she was in Botswana the respondent No.2 alleged to have been severely ill treated by the petitioner. Apart from the above, various demands were also made including demand for additional dowry of Rs. 5,00,000/-. The court while deciding this matter came to the conclusion that offence pertaining to Botswana are in itself completed offence. These are not continuing hence permission of Central Government would be required under the proviso of section 188 Cr.P.C.. However, the offence under Section ¾ D.P. Act was committed in India. Hence the same shall be tried in India.

19. In recent judgement of the Apex Court in **Udai Shankar Awasthi Vs. State of Uttar Pradesh and Another [(2013) 2 Supreme Court Cases 435**] their Lordships held in para 29 is as follows;

"29 Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue."

20. The above judgement in Udai Shankar Awasthi has been rendered by the Apex Court after considering the several judgements of the Apex Court including the following judgements;

(i) Balakrishna Savalram Pujari Waghmare Vs. Shree Dhyaneshwar Maharaj Santhan [AIR 1959 (SC) 798]

(ii) Gokak Patel Volkart Ltd. Vs. Dandayya Guru Shiddiah Hiramath [1991(2) SCC 141]

(iii) State of Bihar Vs. Dev Karan Nenshi [1972 (2) SCC 890]

(iv) Bhagirath Kanoria Vs. State of M.P. [1984(4) SCC 222]

(v) Amrit Lal Chum Vs. Devoprasad Dutta Roy [(1988) 2 SCC 269]

(vi) Raymond Ltd. Vs. M.P. Electricity Board [2001 (1) SCC 534]

(vii) Sankar Dastidar Vs. Banjula Dastidar [(2006) 13 SCC 470]

21. The Supreme Court in Uday Shankar Awasthi's case (supra) explain which offences are continuing offence and which are not.

22. In view of factual matrix in case in hand the offence committed at Riyad is complete offence and has no nexus with other offence alleged to have been committed in India. This offence under Section 326 IPC would not be triable without permission granted by the Central Government in view of proviso of Section 188 Cr.P.C. However the other offence which has been committed in India as alleged in the FIR and found to be committed in India during investigation

would be tried and decided by the Magistrate. Hence proceeding in respect thereof may continue irrespective of the fact that no permission of the Central Government has been given in this case to prosecute the petitioner for the offence alleged to have been committed at Riyad in Saudi Arab.

23. Now question comes that on the basis of other offence said to have been committed in India whether the court at Lucknow has jurisdiction to try and decide the same. From the perusal of the allegation made in the first information report the dowry was given in Lucknow according to the prosecution version in the FIR. The opposite party No.2 and her mother was ill treated in Lucknow. Hence, it cannot be said that this court at Lucknow has no jurisdiction to try and decide the case.

24. Hence this petition is liable to be partly **allowed.**

25. The impugned order taking cognizance for the alleged offence committed in Riyad, Saudi Arab is set aside, but it will remain operative in respect of offences which were committed in India. Learned Magistrate will proceed with the trial in respect of those offence expeditiously in accordance with law keeping in view the provision contained in Section 309 Cr.P.C.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.08.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No. 3769 of 2013(u/s 482 Cr.P.C.)

and Criminal Misc. Case No. 3770 of 2013(u/s 482 Cr.P.C.)

Lokesh Singh ...Applicant

Versus

State of U.P. ...Opp. Parties

Counsel for the Petitioner:
Sri Vaibhav Kalia

Counsel for the Respondents:
Sri K.K. Singh, AGA

Code of Criminal Procedure-Section 24(8), 301- whether an advocate engaged by victim has right to address the Court after conclusion of Trail-held-'yes'

Held: Para-35 and 38

35. Hence, this Court is of the view that after insertion of proviso to Section 24(8) Cr.P.C. if the court permits the victim to engage an advocate of choice, the court thereafter cannot deprive the Advocate to address the court in addition to his right to file the written argument as contained in Section 301 Cr.P.C. after close of evidence.

38. The Advocate appointed by the victim should be permitted to assist the court by supplementing the arguments already advanced by Public Prosecutor by oral submissions in addition to written argument if any filed by him.

Case Law discussed:
2000 JCRC 11(SC); 2012(2) JIC 887(All. H.C.); Cr. Appeal No. 1061 of 2011; 1995(1) SCC 14; (2010) 5 SCC 186; (2009) 8 SCC 431; (2009) 10 SCC 689; (2010) 5 SCC 246; AIR 2000 SCC 1851; (2001) 6 SCC 338; (2003) 6 SCC 230; (2009) 1 SCC 441; (1996) 4 SCC 127; (1997) 11 SCC 720; AIR 2010 SC 1385; (2004) 4 SCC 158; 2001 Cr.L.J.; 1264; (1985) 2 SCC 537

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. By means of these petitions under Section 482 Criminal Procedure Code (for

short 'Cr.P.C.') the petitioners (Lokesh Singh son of deceased (C.P.Singh) has prayed for setting aside the order dated 16.08.2013 (in Crl. Misc. Case No.3769 of 2013) and order dated3.8.2013(in Crl. Misc Case No.3770 of 2013 filed by petitioner (Virendra Singh, first informant of the case) passed by Additional District and Sessions Judge, Court No.1, Lucknow and further directing the trial court to allow the victim/petitioner to address the oral arguments in Sessions Trial No. 341 of 2007, under Section 302, 120B IPC, P.S. Ashiyana, District Lucknow.

2. Very interesting and important question of law has been raised in this petition;

whether an Advocate engaged by victim of the case has right to address the court after conclusion of the trial?

3. Sri Gopal Chaturvedi, learned Senior Advocate appearing on behalf of petitioner assisted by Sri Vaibhav Kalia, Advocate submitted that by Code of Criminal Procedure amendment Act 2008 (5 of 2009) certain amendments were made in the Cr.P.C. to facilitate the participation of victim in criminal prosecution of an offender. Section 2(wa) definition of 'victim' has been added quoted herein below:

"2(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;)

4. In sub-section 8 of Section 24 of Cr.P.C a proviso has been added whereby court was authorised to permit the victim to engage an Advocate of his choice to assist the prosecution. The relevant provision of Section 24(1) and 24(8) are reproduced herein below:-

"**24. Public Prosecutors.**--(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2).....

(3).....

(4.....
(5).....

(6).....

(7).....

(8)The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor."

15[provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]

5. The facts giving rise to present controversy are necessary to be looked into.

6. A sessions trial No. 341 of 2007 (State Vs. Shiv Bahadur and Ors), under Section 120-B and Section 302 IPC is pending in Additional Sessions Judge, Court No.1, Lucknow. Under proviso to Section

24(8) Cr.P.C the petitioners sought permission for advancement of oral argument along with public prosecutor in the aforesaid Sessions trial for extending the necessary assistance and enabling the court to decide the case in proper way. It is not in dispute that entire evidence is over and Public Prosecutor has already finished the argument in the case on behalf of prosecution and only thereafter the right of audience has been claimed by the petitioners being son of the deceased and First informant of the case respectively. This request of both the petitioners were declined by the impugned orders dated 03.08.2013 and 16.8.2013.It was observed by the sessions court that they at the most have a right to file written argument after close of the oral argument of the prosecutor in view of Section 301 Cr.P.C.

7. As both the petitions are based on similar facts and common question of law is involved, hence both these petitions are being decided by this common judgement.

8. Learned counsel for the petitioners submits that the law relied upon by the trial court while deciding the application was not applicable in the present case because amended provision of the Cr.P.C. has not been taken into consideration while delivering the impugned orders.

9. It was further submitted that the victim has also given right to prefer an appeal under Section 372 Cr.P.C. The appeal is in continuous of the suit and in case of appeal filed by the victim he would have a right to address before the appellate court within the meaning of Section 325 Cr.P.C. being party . Than why he should not be given an opportunity to advance argument before the trial court after conclusion of the arguments of public prosecutor. He further submits that if the petitioner's counsel is allowed to advance oral argument it will not at all cause any prejudice to the accused persons in any way specially when victim was authorised to engage his lawyer after the amendment.

10. The learned senior counsel appearing on behalf of the accused intervenor Sri I.B. Singh has submitted that there is specific bar contained in Section 301 Cr.P.C regarding advancement of oral argument by an Advocate engaged by the victim and at the most he has right to file written argument. Hence the court has rightly decided the applications and there is no illegality in the impugned orders. It was further submitted that if after amendment of Section 24(8) Cr.P.C by adding a proviso the legal position cannot be changed because Section 301Cr.P.C already contains a provision regarding rights of lawyer engaged by the victim prior to the amendment in Section 24(8) Cr.P.C.

11. The learned counsel appearing on behalf of accused persons/ intervenor relied upon the judgement of the Apex Court report in **2000 JCRC 11(SC), Shiv Kumar Vs. Hukum Singh and Ors.** wherein rights in this regard of a private counsel has been defined. He also relied upon another judgement of this Court reported in **2012 (2) JIC 887 (All. H.C.) Anil Kumar Vs. State of U.P. and an** order dated 18.10.2011 passed by division bench of this court in **Anand Sen Yadav Vs. State of U.P, Cr.Appeal No.1061 of 2011**. After placing reliance upon these judgement it has been submitted that the Apex Court in light of Section 301 Cr.P.C. provide that private counsel is to act on behalf of Public Prosecutor albeit

the fact he is engaged in the case by private party. If the role of the the Public Prosecutor is allowed to shrink to a supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in section 225 of the Cr.P.C. a dead letter. He after relying upon the judgement of Allahabad High Court in Anil Kumar's case (supra) it has been submitted that the complainant has no right to intervene and independently make any submissions independently in opposing the bail application for interlocutory bail. The division Bench of this Court keeping in view the provision contained in Section 301 Cr.P.C. ruled that complainant has no authority to oppose the bail application. After relying upon the judgement in Anand Sen Yadav's case (supra) it has been submitted that Advocate General or Additional Advocate General too cannot act as public prosecutors as they were not appointed under section 24 of Cr.P.C. From the perusal of the order dated 18.10.2011 passed in Anand Sen Yadav case reveals that the provisions quoted of section 24 of Cr.P.C. in the order does not contain the amended proviso to Sub-sec.8 of Sec 24 of Cr.P.C.

12. I have very carefully heard and considered the argument advanced by learned counsel for the parties and perused the material available on record filed in these petitions.

13. It is not in dispute that the legislature made certain amendment vide Act No.5 of 2009 in Cr.P.C. by adding definition of victim and giving right to victim to engage counsel of his choice during prosecution of accused under section 24 and also giving right to file an appeal under section 372. The statement of object and reason for such amendment given in the bill are quoted herein below :-

"**Amendment Act 5 of 2009- Statement of Objects and Reasons**:- The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy justice and to tone up the criminal justice system has been felt for quite sometime. The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant- cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. Also, as per the Law Commission's 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society's interest in maintenance of peace as well as law and order.

The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system. The application of technology in investigation, inquiry and trial is expected to reduce delays, help in gathering credible evidences, minimise the risk of escape of the remand prisoners

during transit and also facilitate utilisation of police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair trial to persons of unsound mind who are not able to defend themselves."

14. The objective to be achieved by the aforesaid amendment as per proviso added in Section 24(8) of Cr.P.C. seems to extend help the victims and to give more active role in dispensation of the criminal justice and to provide active participation of the victim in the justice delivery system keeping in view the concept of fair trial enshrined under article 21 of the Constitution of India. Prior to the amendment in Section 24(8) Cr.P.C, the Apex Court in **Delhi Domestic Working Women's Forum Vs. Union of India and Others reported in 1995 (1) SCC 14** felt need to issued direction to provide legal assistance to the victim of sexual assault even before the stage of trial and when the matter was at the stage of investigation. The Apex Court also directed to prepare a list of Advocate willing to act in such type of case where the victims are the women or the victim of sexual assault.

15. The Apex Court in **State of Kerla Vs. B.Six Holiday Resorts (P) Ltd (2010) 5 SCC 186** has observed in regard to the insertion of proviso in statute book and held;

'A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendant of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected.'

16. The Hon'ble Supreme Court in **A.Manjulla Bhashini Vs. A.P.Women's Coop. Finance Corporation Ltd. (2009) 8 SCC 431** has considered the use of statement of object and reason while interpreting the statutory provision and observed in para 42 is as follows:

"40 The proposition which can be culled out from the aforementioned judgements is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be rermedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act."

17. Almost similar view has been taken by Apex Court in **Tika Ram Vs. State of Uttar Pradesh [(2009) 10 SCC 689].**

18. The Apex Court in **Zameer Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra [(2010) 5 SCC 246]** ruled about interpretation of the statute. It has been observed that the statute has to be read in its entirety and not in isolation. The provision of law has to be seen in the context in which it is introduced.

19. In **R.Rathinam Vs State (AIR 2000 SCC 1851)** the Hon'ble Supreme Court permitted a lawyer to file an application for cancellation of bail. This view was approved by the Apex Court in **Puran Vs. Rambilas [(2001) 6 SCC 338**. In R. Rathinam's case (supra) the Apex Court held that the frame of sub-Section 2 of Section 439 Cr.P.C. indicates that it is a power conferred on the court mentioned therein. It was held that there was nothing to indicate that the said power could be exercised only if the State or investigating agency or the Public Prosecutor moved an application. It was held that the power so vested in the High Court can be invoked by any aggrieved party he can addressed the court.

20. The Apex Court in **Dawarika Prasad Agarwal Vs. B.D. Agarwal [(2003) 6 SCC 230]** held that party can not made to suffer adversely either directly or indirectly by reason of an order passed by any court of law which is not binding on him. The very basic upon which a judicial process can be resorted to is reasonableness and fairness in a trial. The fair trial is fundamental right of every citizen including the victim of the case under article 21 of our Constitution as held in **Nirmal Singh Kahlon Vs. State of Punjab [(2009) 1 SCC 441.**

21. In view of the aforesaid authorities of the Apex Court the provision of statute to be looked into.

22. Section 301 Cr.P.C. is quoted herein below:-

"301 Appearance by Public Prosecutors.

(1)The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

23. This Section provides that Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear without any written authority before any court in which that particular case is under inquiry, trial or appeal. Sub-section 2 provides that if any private person instruct a pleader to prosecute any person in any court, the public Persecutor in charge of the case shall conduct the prosecution and pleader so instructed shall act therein under the direction of public Prosecutor and may with the permission of the court submit written arguments after the evidence is closed in the case.

24. Section 301 Cr.P.C. has not been amended vide Act No.5 of 2008. The insertion in the statute book ,the proviso to Section 24 (8) added by Act No.5 of 2008, whether in any way, effects the provision of section 301, is sole question for consideration before the Court. Proviso added to section 24(8) Cr.P.C. provides that victim define in Section 2(wa) may be permitted to engage an advocate of his choice to **assist the prosecution** under this sub-section. Sub-section 8 provides appointment of Special Public Prosecutor, different from Public Persecutor appointed under Section 7 of Sub-section 24 of Cr.P.C. The basic distinction drawn in the statute by

introducing the proviso that if the victim defined under Section 2(wa) Cr.P.C. is permitted to engage a lawyer he will acquire status of Special Public Prosecutor subject to riders imposed under the proviso.

25. In proviso added to Section 24(8) Cr.P.C the word used are "assist the prosecution" and not to 'assist the public Prosecutor' as mentioned in Section 301 Cr.P.C. There is difference in the scheme of two sections. From perusal of Sub-section 2 of section 301 Cr.P.C. made it clear that if in any case private person instruct a pleader to prosecute any person in any court even though the Public Prosecutor in charge of case shall conduct the prosecution and the pleader instructed shall act therein under the directions of the Public Prosecutor. Up to this stage no permission of court is needed for appointment of pleader by a private person. The permission is only required to the pleader if he want to file written argument in the case. However after insertion of proviso to Section 24(8) Cr.P.C. the court can permits a victims advocate to assist the prosecution. The status and position of Advocate engaged by the victim would be changed because in that situation the court at the very inception may permit the Advocate of the choice of the victim to participate in the proceeding and to assist the prosecution and not to the public prosecutor. Prosecution include investigation,enquiry,trial and appeal within the meaning of Section 24 Cr.P.C. Section 301 Cr.P.C. deals with only inquiry, trial or appeal. Inquiry has been defined in Section 2(g) Cr.P.C , means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. As such inquiry is different from investigation as defined in section 2(h) Cr.P.C.

26. Neither word 'prosecution' nor 'trial' has been defined in the Cr.P.C. Trial has been defined by the Apex Court in **Union of India Vs. Major General Madan Lal Yadav [(1996) 4 SCC 127]**. It means an act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. Meaning of trial changes in view of specific provision of the code. The expression 'trial' used in Section 306 Cr.P.C. includes both an 'inquiry' as well as 'trial' as held by the Apex Court in **A.Devendran Vs. State of Tamilnadu [(1997) 11 SCC 720.**

27. The prosecution has not been defined specifically in the light of proviso to Section 24(8) Cr.P.C. The meaning of word 'prosecution' as defined in **Webster Dictionary, 3rd Edition** is as follow;

"the carrying out of a plan, project, or course of action to or toward a specific end."

In view of the aforesaid definition the 'end' for which a plan or project is carried out is called prosecution. In respect of proviso to Section 24(8) Cr.P.C. prosecution in respect of an offence begin with putting the law into motion by any individual or sufferer of crime. The 'end' in a prosecution within the meaning of proviso to sub-section 8 of section 24 Cr.P.C. would be adjudication of guilt of an offender who is charged with commission of an offence in accordance with procedure established by law in a court constituted under this code. So the prosecution starts with giving information of commission of crime and continued during investigation or inquiry, trial of offender and if any appeal is filed finally end by an order passed in appeal. This whole process is the part of fair trial inbuilt in Article

21 of our Constitution. The word prosecution is also used in different sense in different situation. When word 'prosecution' is used in defining the parties to criminal case it is used for the party who is siding the victim. When it used in respect of an accused means pending proceeding to ascertain the guilt of the accused. When an offence is committed it certainly committed against the society but the sufferer is called victim. Victim has direct nexus with the damage caused to him but society may have a remote effect. The legislature for the first time insert provision for protection of the right of victim in the Criminal Procedure Code and specially keeping in view being the worst sufferer of crime. Thus, the victim should not be kept aloof from the judicial process in which the wrongdoers is undergoing the process of ascertainment of his guilt for wrong committed by him. In this judicial process, by means of amendment made by Act No.5 of 2008, the status of the victim has been improved from a silent expectator of proceeding before the court to a participant of the proceeding. Therefore the word used in the proviso added to Section 24(8) Cr.P.C. is to 'assist the prosecution' and not to assist the 'public prosecutor'. Therefore there is basic difference in between proviso to Section 24(8) and Section 301 Cr.P.C. It is true that section 301 Cr.P.C. has not been amended by Act No.5 of 2008 but if the principals of harmonies construction is applied while interpreting the different provision of same statute like proviso to section 24(8) and Section 301 Cr.P.C. , the letter and spirit inducted in proviso added to sub-Section 8 of Section 24 of the Cr.P.C. cannot be diluted by saying that no amendment has been incorporated in Section 301 Cr.P.C.

28. The whole scheme if taken into consideration for prosecution and trial of an accused the dominant role is played by the public prosecutor but by insertion of proviso to Section 24(8) Cr.P.C. the Court is now authorised to permit the victim to engage a lawyer of his choice to assist the prosecution. The prosecution of an offender is virtually carried out in the court of law constituted under some statute presided over by a judge and not by any party to the proceedings. The public prosecutors,the advocate of the accused or special counsel appointed by the aggrieved person or the Advocate engaged by a victim, all are officers of the court. They all assist the court to arrive at truth during prosecution of an accused . Therefore in section 24 or in section 301 phrase 'with the permission of court' is used. So, once the permission is accorded to the Advocate of the victim to assist the prosecution his assistance could not not be restricted to the termanalogy of Section 301,i.e. only to assist the prosecutor. The court in view of the same can permit to advance the oral argument too to the Advocate engaged by the victim apart from submission of the written argument. The importances of oral argument cannot be out weight by saying that right to written argument has been given in Section 301 Cr.P.C.

29. In Section 301 Cr.P.C there seems no previous permission to engage a private pleader by any private person even if he has no personal interest. The permission is required only if he intents to file the written argument. However in proviso to Section 24(8) Cr.P.C. permission is accorded to the Advocate of the choice of the victim to assist the prosecution and not to the public prosecutor.

30. Section 301 Cr.P.C does not say that oral argument cannot be permitted to an advocate engage by the victim. It only

prohibits that if a private party engaged a pleader he can assist the public prosecutor and court may permit him to file the written argument. There is difference between the pleader and Advocate. Advocate is treated to be officer of the court and supposed to assist the court in arriving the truth, so, right to address the court to an Advocate cannot be curtailed while representing his client in the light of provisions of Advocates Act. In **Poonam Vs. Sumit Tiwari AIR 2010 SC1385** their Lordship has discussed the importance of assistance of a lawyer in the light of section 35 of Advocates Act and observed that in absence of proper assistance to Court by the lawyer, there is no obligation on the part of the Court to decide the case, for the simple reason that unless the lawyer renders the proper assistance to the Court, the Court is not able to decide the case properly. It is not for the Court itself to decide the controversy. The counsel cannot just raise the issues in his petition and leave it to the Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the Court itself to find out what the points for determination can be and then proceed to give a decision on those points. In case counsel for the party is not able to render any assistance, the Court may decline to entertain the petition. Moreover if the petition is decided in such cases the judgment given may be violative of principles of natural justice as the opposite counsel would not "have a fair opportunity to answer the line of reasoning adopted" in this behalf.

31. In **Zahira Habibulla H.Sheikh v. State of Gujrat,[(2004) 4 SCC 158]** their Lordship of Hon'ble Supreme Court observed that Public Prosecutor is an officer of the Court but there are instances in which the Public Prosecutor is either not competent or act only on the instructions given by the State.

32. The Public Prosecutor simply conduct the trial with sense of detachment whereas the victim remain attached with his case and ventilates his grievance because a decision given in the matter may not have any impact upon Public Prosecutor but it effects the victim.

33. The Apex Court held in **M/S J.K. International Vs. State, 2001 Cr.L.J 1264**, that a complaint is sought to be quashed by accused then the de-facto complainant have a right to be heard.

34. A similar view has been propounded by the Apex Court in **Bhagwant Singh Vs. Commissioner of police, [(1985) 2 SCC 537]** wherein in the case of submission of closer report/final report by the investigating agency the right has been conferred upon the informant/complainant of being heard before acceptance of the same .

35. Hence, this Court is of the view that after insertion of proviso to Section 24(8) Cr.P.C. if the court permits the victim to engage an advocate of choice, the court thereafter cannot deprive the Advocate to address the court in addition to his right to file the written argument as contained in Section 301 Cr.P.C. after close of evidence.

36. Moreover, if the Advocate of victim is allowed to advance oral arguments it will not caused any prejudice to the accused. Of course,this right should not be allowed to be used as a tool in the hand of such advocate to delay or to create hurdles during the trial. The Judge presiding over the Court should monitor the trial keeping in view the concept of fair trial. Fair trial does not mean only to protect the interest of the accused person but it also include to protect the rights of the victim. However, under the

garb of this right a victim cannot be allowed to linger on proceedings.

37. Hence, in view of above this Court is of the view that the orders passed by the trial court are not sustainable and the same are liable to be set aside.

38. The Advocate appointed by the victim should be permitted to assist the court by supplementing the arguments already advanced by Public Prosecutor by oral submissions in addition to written argument if any filed by him.

39. Consequently, these petitions are allowed. The impugned orders dated 3.8.2013 and 16.8.2013 are set aside. The trial court is directed that the Advocate appointed by victim of the case shall be permitted to advance oral argument in addition to written argument if any earlier filed, fixing a date and maximum time which the trial court may think reasonable in one stretch but not less than a day. This will be an opportunity granted only once to the victim alone as defined in Section 2(wa) of Cr.P.C. No further adjournment shall be allowed to the victim in this regard.

40. The interim order stand discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2013

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 4648(M.S.) of 2006

Smt. Saroj ...Petitioner
Versus
State of U.P. and Ors. ...Opp. Parties

Counsel for the Petitioner:
Sri Tripathi B.G.Balak
Counsel for the Respondents:
C.S.C., Sri Brijendra Chaudhary
Sri Raj Kumar Singh

Constitution of India, Art. 226- Insurance claim-husband of petitioner-working as presiding officer in General election of Parliament 2004-death caused due to snake biting-claim denied by company on ground death not covered under II scheduled-as accidental death-held-necessarily a part of accidental death-entitled for claim of Rs. 500000/- alongwith 12% interest from the date of death.

Held: Para-10 & 11

10. Thus, after reading the aforesaid definition, it is apparent that the incident caused by the forceful act can be said to be caused by violent . When the snake bites, definitely it uses its physical force in doing so. Therefore, the said attack of snake cannot be said to be natural or ordinary one but it is an unnatural accidental attack with physical force.

11. Therefore, I am of the view that death caused by snake biting is necessarily an accidental death caused by violent which is covered under the scope of cover as is provided in the part II of the Schedule of the Insurance Policy.

Case Law discussed:
W.P. No. 11981 of 2009

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr Tripathi B.G. Balak, learned counsel for the petitioner as well as learned Standing Counsel.

2. Briefly the facts of the case are described as under:-

The petitioner claims herself as wife of Krishna Chandra, who was deputed on election duty during General Election of Parliament in the year 2004. Petitioner's

husband was a Government employee working as a Pharmacist at Community Health Center, Amargarh district Pratapgarh. During the course of election duty he was deputed to work as a Presiding Officer of Polling Station No. 152, Kannya Primary School, Chandpur South, Pratapgarh, Vidhan Sabha Kshetra No. 102, Pratapgarh. The State Government by means of Circular dated 19 th April, 2004 informed to all District Election officers about its decision to provide the insurance cover to all the persons being on election duty. The election was to be held in three phases. The date of election of first phase was fixed on 26 th April,2004. In this phase of election the period of insurance cover was indicated as from 23.4.2004 mid night to 27.4.2004 mid night ,i.e, about four days.

3. Admittedly, petitioner's husband Krishna Chandra died on 26.4.2004 while he was on election duty. The Deputy District Election Officer, Pratapgarh through his letter dated 5 th august,2004 recommended his case for grant of insurance claim through his wife (Petitioner) to the Insurance Company, namely, I.C.I.C.I. Lombard General Insurance Company Ltd., i. e. Opposite Party No.4. However, Insurance Company refused to executed the insurance benefit to the petitioner on the ground that the Policy does not cover the death caused due to other than accident. In turn the Deputy Election Officer, Pratapgarh informed the petitioner that the Insurance Company had declined to extend the insurance benefits to her.

4. The reason of death of petitioner's husband is snake bite. The Insurance Company says that death due to snake bite is not an accidental death. Therefore, such a death is not covered under the cover of Insurance Policy.

5. Part II of Schedule of Group Personal Accident Insurance Policy speaks about the scope of cover. It says that the policy shall cover the death, permanent disability and partial disability, resulting solely and directly from accident caused by violent, external and visible means independent of any other cause, arising out of and in course of election whilst discharging the election duties.

6. It is not in dispute that the death caused due to snake biting is not a natural death. It is also not the case of respondents that the deceased was suffering from any disease which became the cause of his death. The word " violent" has been defined by the different dictionaries.

7. The Webster's Third New International Dictionary defines the word" violent" as under;

(1)Characterized by extreme force : marked by abnormally sudden physical activity and intensity,

(2) furious or vehement to the point of being improper, unjust or illegal,

(3)extremely or intensely vivid or loud,

(4)produce or effected by force,

(5) tending to distort or misrepresent

(6)extremely excited.

8. The Oxford dictionary defines the word"violent" as under;

"1.Involving or caused by physical force that is intended to hurt or kill,

2. showing or caused by very strong emotion,

3. very strong and sudden"

9. The word" violent" is defined by Collins English Dictionary as under:

1. marked or caused by great physical force or violence:a violent stab 2.(of a person) tending to the use of violence, esp in order to injure or intimidate others 3.marked by intensity of any kind: a violent clash of colours 4.characterized by an undue use of force; severe; harsh 5.caused by or displaying strong or undue mental or emotional force; a violent tongue 6.tending to distort the meaning or intent: a violent interpretation of the text violently adv. ETYMOLOGY C14:from Latin violentus, probably from vis strength."

10. Thus, after reading the aforesaid definition, it is apparent that the incident caused by the forceful act can be said to be caused by violent . When the snake bites, definitely it uses its physical force in doing so. Therefore, the said attack of snake cannot be said to be natural or ordinary one but it is an unnatural accidental attack with physical force.

11. Therefore, I am of the view that death caused by snake biting is necessarily an accidental death caused by violent which is covered under the scope of cover as is provided in the part II of the Schedule of the Insurance Policy.

12. In the same circumstances the High Court of Orissa dealing with the case of death due to snake bite held that such a death is unnatural/accidental death. Therefore, it is covered under the Insurance Policy and extended the benefit of Rupee Five Lac (Rs.5,00000/-) of the insurance amount in favour of the claimant [**Dhruba Chandra Behra Vs. National Insurance Co. Ltd. and others W.P. (C) No.11981 of 2009 decided on 13.1.2011].**

13. Therefore, there is no iota of doubts that the death of the petitioner's husband is covered under the Insurance Policy. That being so, the petitioner being wife of the deceased is entitled to get the insurance amount from the respondents.

14. In the result, the writ petition is allowed with the direction to the opposite parties to make payment of insurance amount, i.e, Rs.5,00000/- (Rupee five lac) to the petitioner within one month from the date of communication of this order along with an interest at the rate of Rs. 12/- per annum accrued from the date of death of the petitioner's husband.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.5077 of 1996

Vijnesh Kumar ...Petitioner
Versus
The D.M & Anr. ....Respondents

Counsel for the Petitioner:
Sri Ramendra Asthana

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 16- Regularization-public appointment without advertisement, without giving equal opportunity to all eligible persons-in absence of statutory provision-relief for absorption-not available.

Held: Para-6

Thus in the absence of any statutory provision and also in view of the admitted factual position that the petitioner's initial recruitment was not in accordance with the constitutional scheme enshrined under Article 16 of the Constitution, the relief sought by petitioner cannot be granted.

Case Law discussed:
2007(3)ADJ 138; 2007(3) ADJ 46; 2004(4) ESC 2470-2005 ALJ 1006; 2004 (54) ALR 85; 2006(4) SCC 1; 2009(3)SCC 250; 2009(3)SCC 35; 2009(7) SCC 205; 2011(2) SCC 429

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

1. Petitioner was engaged in Census Department during the period of census 1991 and claiming absorption pursuant to service rendered for a short time.

2. It is not disputed that the petitioner was never appointed or engaged after the advertisement of vacancies, complying with the provisions of Article 16 of the Constitution of India, i.e., by giving equal opportunity for public employment to all eligible persons. The petitioner also could not place before the Court any statutory provision whereunder he can claim absorption. Similar question was considered in **Imtiaz Ahmad Vs. Regional Deputy Director of Census Operation and others, 2007(3) ADJ 138** and referring to various Government Orders dealing in para 7 it was held as under:

"I have heard learned counsel for the petitioner and perused the record. It is not disputed that in certain broken spells as and when census operations were undertaken by the Government of India, the petitioner was engaged in the census department from time to time. The aforesaid appointment was purely temporary and therefore after completion of the work or due to reduction in the establishment of census department, he was terminated or discontinued whereagainst no grievance was raised by the petitioner at any point of time. His claim is now confined to regular appointment under the State Government considering his status as a "retrenched employee". For the purpose of the present case, even if the petitioner is treated to be a retrenched employee, learned counsel for the petitioner failed to point out any statutory provision or executive order having force of law entitling the petitioner for regular appointment in a class-III or class-IV post under the State Government. The government order dated 22.4.1987 placed on record as Annexure-1 to the rejoinder affidavit shows that the Census Directorate, Government of India communicated to all the Head of Departments, District Magistrates and other employment officers in the State of U.P. that the employees who have worked in the Census Department for about three and half years in 1981 census operations and some of them have crossed maximum age required for employment in the Government service and, therefore, they were allowed relaxation of three years in the age vide Government Order no. 41/2/1967-Karmik-2 dated 13.2.1985 extended upto 12.2.1988, and therefore the said persons may be considered in the service of the State Government extending the said relaxation in age. The aforesaid order, therefore, only provides relaxation in maximum age but nowhere shows that the process of recruitment applicable to class-III and class-IV posts in the state of U.P. shall not be followed for appointment of the said retrenched employees of the census department. Moreover, a bare reading of the aforesaid government order shows that it is

applicable to such employees who continuously worked for three and half years pursuant to 1981 census and were retrenched on 30.6.1984. On the contrary, the petitioner was engaged for short periods in 1981 and 1982 only, but there is no continuous service of three and half years as contemplated in the aforesaid government order. Hence, in no circumstance the said government order help the petitioner in any manner. In the state of U.P., recruitment to class-III posts prior to 1989 was being governed by the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 which were substituted by another set of rules on 16.3.1985, i.e., U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985which continued to hold field until substituted in their entirety by U.P. Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of The U.P. Public Service Commission) Rules 2001. In all the aforesaid Rules, there is no provision for appointment of a retrenched employee without undergoing the process of recruitment. Only certain concessions in the matter of age and educational qualifications etc. have been provided but otherwise a retrenched employee has to participate in the process of recruitment with other eligible candidates as and when the recruitment process is initiated. In the matter of selection and assessment of merit under 2001 Rules, certain weightage is provided but there is no provision for regularization of such employees to the exclusion of regular process of recruitment. In view of the statutory rules, no relief can be granted to the petitioner contrary thereto."

3. A similar view has been taken by a Division Bench of this Court (of which I was also a Member) in **Sayed Mohammad Mahfooz Vs. State of U.P. and others 2007(3) ADJ 46.**

4. Besides above, I may also place on record that in certain cases some persons who were engaged in election office as Junior Clerks for some short span from time to time were directed to be regularised in some of the judgements of Hon'ble Single Judges and one of such judgment is in Writ Petition No. 52586 of 1999, Dinesh Kumar Shukla Vs. State of U.P. and others. The aforesaid judgement as well as others taking similar view were assailed in intra-Court appeals before this Court and all those appeals were allowed, setting aside the judgements of Hon'ble Single Judges and the judgment is reported in **2004(4) ESC 2470=2005 ALJ 1006, State of U.P. and others Vs. Sanjay Kumar Pandey and other**. The Division Bench held that no regularisation or absorption contrary to rules can be claimed. Taking this view it also followed an earlier Division Bench decision in **State of U.P. Vs. Rajendra Prasad, 2004(54) ALR 85.** Against the judgment of Division Bench in **Sanjay Kumar Pandey,** the Special Leave Petition No. 5735 of 2009 has also been dismissed by Apex Court vide judgment dated 22.08.2012.

5. The entire issue can also be looked into in the light of Constitution Bench decision in Secretary, **State of Karnataka Vs. Uma Devi 2006 (4) SCC 1** which has been followed recently also in **State of West Bengal & others Vs. Banibrata Ghosh & others 2009 (3) SCC 250; Council of Scientific & Industrial Research & others Vs. Ramesh Chandra Agarwal & another 2009 (3) SCC 35; General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi & others 2009 (7) SCC 205; and,**

State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429.

6. Thus in the absence of any statutory provision and also in view of the admitted factual position that the petitioner's initial recruitment was not in accordance with the constitutional scheme enshrined under Article 16 of the Constitution, the relief sought by petitioner cannot be granted.

7. The writ petition lacks merit. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.08.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Misc. Single No.5337 of 2013

Ram Yash ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Mata Prasad Yadav
Sri Brijesh Yadav 'Vijay'

Counsel for the Respondents:
C.S.C., Sri Azad Khan

Constitution of India, Art. 227- Mutation order-passed by Tehsildar-based upon patta alleged to be passed prior to 32 years-absolutely no explanation regarding complete-silence for such long spell of time-order passed by Tehsildar-set-a-side-with direction to initiate disciplinary proceeding against erring officer-any proceeding before any authority stand automatically quashed-damage for unauthorise possession- for such period imposed-payable.

Held: Para-4
Accordingly, it is directed that in case petitioner is in possession of the Gaon Sabha land, he must forthwith be dispossessed. No further proceedings in respect of entry of the name of petitioner shall be taken as no patta was granted in 1975-76 to the petitioner. Exercising powers under Article 227 of Constitution of India mutation order dated 27(28).06.2008 is set aside. Any proceeding pending anywhere in respect of the said plots before any of the courts below shall not be proceeded with. Writ of prohibition in this regard is issued.

Case Law discussed:
2012 (3) AWC 2226

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

1. Heard Sri M.P. Yadav, learned counsel for petitioner and Sri Azad Khan, learned counsel for respondent No.5, Gaon Sabha.

2. Petitioner has come up with a fantastic case to the effect that on 20.11.1975, some patta was proposed to be granted to him by the Gaon Sabha of village Bhagwaria and the proposal was approved by the S.D.O. on 01.01.1976. He filed application for mutation on the basis of the said patta on 19.12.2007 (i.e. after 32 years) before Deputy Collector, Amethi. It is inconceivable that in case some patta had been executed in favour of the petitioner in the year 1975-76, his name would not have been entered in the revenue records immediately. There is absolutely no explanation of silence of 32 years. It is very surprising that Tehsildar Amethi on 27 (or 28) June, 2008 passed mutation order in favour of petitioner. Copy of that order has not been annexed. Against the said order Suraj Prasad and others filed revision (Case No.10/22, Sarju Prasad (or Suraj Prasad Vs. Ram

Yash) which was dismissed in default by C.R.O., Sultanpur on 13.10.2009. Not being aware of that, Suraj Prasad and four others filed writ petition against the petitioner complaining that he had usurped the Gaon Sabha property, which was numbered as Misc. Single No.2408 of 2010, Suraj Prasad and four others Vs. State of U.P. and others. It was disposed of on 28.04.2010 directing the Collector to dispose of the revision expeditiously. After passing of the order dated 28.04.2010 by this court, the C.R.O. through order dated 27.02.2013 set aside its earlier order dismissing the revision in default and fixed the date for hearing of the revision. The said order has been challenged through this writ petition.

3. Learned counsel for petitioner has stated that in the earlier writ petition, review petition has been filed. Be that as it may, it is more than evident that petitioner has usurped the Gaon Sabha land comprised in Plot Nos.69 (new 38), 105 (new 64), 493 (new 176), 224 (new 333). It is impossible that if patta had been allotted in 1975, petitioner would have remained silent until 2007. In this regard, paras 22 to 27 of the judgment reported in **U.P. Awas Evam Vkas Parishad, Lucknow Vs. Lajja Ram, 2012, (3) AWC 2226** are quoted below:

"The provision of presumption is provided under Section 114 of Evidence Act, which contains some illustrations also. The said section along with illustrations (e) & (f) is quoted below:

"114. Court may presume existence of certain facts.- The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

The Court may presume-

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular case;"

If the presumption of entry in favour of plaintiff's father for four or seven years is to be presumed then presumption of correctness of discontinuance of entry for 40 years will also have to be drawn.

Life of law has not been logic, it has been experience (O.W. Holmes). This principle applies with greater force on presumptions and human conduct. I have heard and decided hundreds of matters pertaining to agricultural land and my experience is that Gaon Sabha property has been looted by unscrupulous persons on a very large scale by manipulation in the revenue records and forging of orders particularly of consolidation courts. The modus operendi is that a very old entry or copy of order is produced like a rabbit from the hat of a magician and its resumption or recording is sought.

Supreme Court in Civil Appeal No.1132 of 2011, Jagpal Singh and others Vs. State of Punjab, in Para-20 observed as follows:

"20. In Uttar Pradesh the U.P. Consolidation of Holdings Act, 1954 was widely misused to usurp Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging

orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices."

In Dina Nath Vs. State of U.P. 2009 (108) R.D. 321, I held that not making any efforts for getting the name of the petitioner entered in the revenue records on the basis of alleged patta by Gaon Sabha for 29 years proved that no patta was executed. I issued directions to all the Collectors to reopen all such cases where names of private persons were entered in the revenue records over Gaon Sabha land. Matter was carried to the Supreme Court in the form of S.L.P. (Civil) C.C.4398 of 2010 Dina Nath Vs. State. The Supreme Court decided the matter on 29.03.2010 and quoted almost my entire judgment in inverted commas and approved the same.

Accordingly, it is held that whenever a person comes along with the case that Gaon Sabha land was allotted to him or some order was passed by any Court in his favour declaring his right over Gaon Sabha land or some revenue entry was in his favour long before but during last several years his name is not recorded in the revenue records then an irrebuttable presumption amounting to almost conclusive proof must be drawn to the effect that allotment order or entry is forged."

4. Accordingly, it is directed that in case petitioner is in possession of the Gaon Sabha land, he must forthwith be dispossessed. No further proceedings in respect of entry of the name of petitioner shall be taken as no patta was granted in 1975-76 to the petitioner. Exercising powers under Article 227 of Constitution of India mutation order dated 27(28).06.2008 is set aside. Any proceeding pending anywhere in respect of the said plots before any of the courts below shall not be proceeded with. Writ of prohibition in this regard is issued.

5. For the period for which petitioner has illegally remained in possession, damages at the rate of Rs.7000/- per hectare per year shall also be recovered from him like arrears of land revenue.

6. Disciplinary proceedings against the Tehsildar who passed the order dated 27(28).06.2008 shall at once be initiated after suspension.

7. Writ Petition is disposed of accordingly.

8. Office is directed to supply a copy of this order free of cost to Sri Vinay Bhushan, learned Additional C.S.C. and Sri Azad Khan, learned counsel for Gaon Sabha respondent No.5.

9. Office shall also send copy of this order to the Chief Revenue Officer (C.R.O.), Sultanpur.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. 5480 of 2013

Ram Chandra & Ors. ...Petitioners

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

Counsel for the Petitioner:
Sri H.S. Jain

Counsel for the Respondents:
C.S.C., Sri Rajneesh Kumar

Constitution of India, Art. 226- Writ of mandamus-seeking direction to commission to first verify the document of eligibility as well as other required certification-then held written examination-held unless procedure adopted by authority found arbitrary or illegal or against known principle of fair policy-court should refrain to interfere-if petitioner participate in written as well as short hand examination and qualify-their document shall be checked before permitting in computer test-no prejudice going to caused-relief prayed for can not be granted.

Held: Para-21
In the instant case, as per the facts stated hereinabove, the O.P.No. 2/U.P. Public Service Commission on 03.09.2012 in view clause-1 of the advertisement is entitled to hold competitive examination as per the advertisement dated 03.09.2013 issued by the competent authority to hold competitive examination for General Knowledge and General Hindi and the candidates, so this Court while exercising power of judicial review cannot interfere in the said exercise to be conducted by the O.P.No. 2 as it is settled proposition of law that if a decision is being taken by a selecting body for conducting an exercise in order to select a candidate as per the terms of the advertisement then by way of judicial review there is a very limited scope to interfere in the exercise adopted by the selecting body/ O.P.No. 2 and on very limited grounds, such as, illegality or patent irregularity in the Constitution of the committee or violation of the procedure of selection or established mala fide affecting the selection on the basis of which interference can be made.

Case Law discussed:
(1990) 2 SCC 669; 2009(5) SCC 1; AIR 1990 SC 535; 1993 (2) SLR 805; (2003) 9 SCC 401; 2009(5) SCC 1; (1990) 2 SCC 669; (2007) 4 SCC 54

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

1. Heard Sri H.S. Jain, learned counsel for the petitioner, Sri Pankaj Patel, learned Additional Chief Standing Counsel and Sri Rajneesh Kumar, Advocate, appearing on behalf of opposite party No.2.

2. By means of the present writ petition, the petitioner prayed for a direction to U.P. Public Service Commission/ Opposite Party No.2 to scrutinize all the applications received against the Advertisement No. A-5/E-1/2010 dated 25.12.2010, thereafter only those candidates who possess the requisite academic qualification as per the terms of the advertisement may be allowed to appear in the written examination schedule to take place on 22.09.2013.

3. Sri H.S. Jain, learned counsel for the petitioners in order to press the above said relief submits that an advertisement has been issued by the opposite party No.2 for appointment on the post of Additional Private Secretary in U.P. Secretariat, in response to the same the petitioners and other candidates had submitted their applications.

4. On 03.09.2013 a Notification/advertisement has been issued by the Competent Authority (copy of which is annexed as Annexure No.6 to the writ

petition) calling the candidates for appearing in a written test of General Knowledge (in first session) and General Hindi (in second session) as per the tests and schedule mentioned therien.

5. He further submits that the said exercise done by respondent No. 2 is illegal and arbitrary rather contrary to the terms as provided in Clause 5 of the Advertisement.

6. The said clause has been reproduced in English in paragraph No.3 of the writ petition, quoted herein below:-

"That in para 5 of the advertisement the Commission has declared that a candidate must have a minimum speed of eighty words per minute and twenty five words per minute in Hindi shorthand and Hindi typewriting respectively,

and

further that the candidate must possess the knowledge of compute in accordance with the course prescribed for Certificate Course in Computing (CCC) conducted by DOEACC society or the course conducted by the Board of High School and Intermediate Education, U.P. or a course recognized by the Government as equivalent thereto.

It is relevant to point out that in the note appended to para-8 of the advertisement the Commission has clearly mentioned that a candidate must annex requisite certificates along with application from failing which his/her candidature will be rejected."

7. Accordingly, Sri H.S. Jain, learned counsel for the petitioner submits that a mandatory duty has been casted upon the opposite party No.2/ U.P. Public Service Commission as per Clause 5 of the advertisement to scrutinize all the forms received by it, in pursuance of the advertisement and only those candidates who possess the qualification/Certificate Course in Computing (CCC) conducted by DOEACC society or the course conducted by the Board of High School and Intermediate Education, U.P. or a course recognized by the Government as equivalent thereto may be called for written examination schedule to take place on 22 September.2013. As the said exercise has not been done in the present case, so the opposite party No. 2 may be directed to do the said exercise first, thereafter proceed to hold the written examination which is schedule to take place on 22.09.2013, as per the Rule 8 of the U.P. Secretariat Personal Assistant Service (First Amendment) Rules, 2005 read with Rule 15(3) of the Uttar Pradesh Secretariat Personal Assistant Service Rules, 2001

8. In support of his argument Sri H.S. Jain has placed reliance on the argument as raised by following judgment:-

1. A.P. Public Service Commission, Hyderabad and another Vs. B. Sarat Chandra and others (1990) 2 SCC, 669,

2. Ashok Kumar Sonkar Vs. Union of India and others (2007) 4SCC54,

9. Sri Rajneesh Kumar, learned counsel appearing on behalf of O.P.No. 2 on the basis of instructions received to him submits that an advertisement No. A-5/E-1/2010 dated 25.12.2010 has been issued by the U.P. Public Service Commission and as per Clause-1 of the

said adverisement, the O.P.No. 2 has to conduct the competitive examination for the purpose of appointment on the post of Additional Private Secretaries in U.P. Secretariat, so keeping in view the said fact, notification/advervisement dated 03.09.2013 has been issued for holding a written examination on 22.09.2013 for General Knowledge and General Hindi as per the the fact/scheduled mentioned therein.

10. He further submits that the candidates who have appeared in the said examination, thereafter have to appear in Shorthand and Hindi Typing Test, and they should pass/qualify the same as per the terms as mentioned in Clause 5 of the advertisement and those candidates who have passed/qualify the Shorthand Typing Test only will be allowed to appear in the Computer Test after verification of the requisite certificates etc. as per the terms of the advertisement and Rules which governs the field. Lastly, on the basis of marks obtained by the candidates in the abvoesaid exercise will be calculated and accordingly a merit-list will be prepared on the basis of the same appointment will be made on the post of Additional Private Secretaries.

11. Sri Rajnish Kumar, learned counsel appearing on behalf of O.P.No. 2 further submits that so far as the argument advanced by learned counsel for petitioner that the O.P. No. 2 should scrutinize the candidates as per the Clause 5(3) (a) of the advertizement prior to appearing in the written test scheduled to take place on 22.09.2013, whether they possess the course prescribed for Certificate Course in Computing (CCC) conducted by DOEACC society is not a correct argument because the said exercise will be done as per Clause 11(8) of the advertizement only after the candidates who have appeared in the written examination scheduled to take place on 22.09.2013 as well as passed in the typing and shorthand test, computer examination as per the terms of clause-5 of the advertisement.

12. Sri Rajneesh Kumar, learned counsel for O.P.No. 2 submits that all the petitioners along with other candidates have been called for, to appear in the written examination scheduled to take place on 22.09.2013, so no prejudice is caused to them by the said examination, and as the said procedure is within the domain of O.P. No. 2 in accordance with with the terms of advertisement/Rules, hence, the relief as claimed by them at this stage, is premature in view of the law as laid down by Hon'ble the Apex Court in the case of **Andhra Pradesh Public Service Commission Vs. Baloji Badhvath and others, 2009 (5) SCC 1** by which the Public Service Commission is free to adopt the procedure for selection in terms of the advertisement, thus, writ petition is liable to be dismissed.

13. I have heard learned counsel for parties and gone through the record.

14. The object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.

15. The term 'Recruitment", as is used in Article 309 of the Constitution of

India is a comprehensive term and not restricted to its etymological meaning. 'Recruitment/Selection' is said to be just an initial process, which may lead to an eventual appointment in the service, and for recruitment/selection to public employment may take the form of selection or contract. There may or may not exist a pre-existing set of rules for recruitment/selection. In absence of such a rule the recruitment, in whatever method made, are none the less regular.

16. However, when there are prescribed rules, they should be followed to create a valid and legal relationship. Their infractions do not give any justiciable right. As one of the principal objects of the State is to generate opportunities for employment. Such opportunities must be equally available the mode of direct recruitment by selection from the open employment market following a method of competition among contending candidates. This process of selection by open competition ensures that only the best available candidate are recruited for public process. Competition also checks mal-practice and nepotism to a great extent.

17. Thus recruitment/selection to any service or post. Competent Authority shall be free to decide upon the mode and methods to be applied for. As long as there is open competition among the eligible candidates following the provisions of the recruitment rules, fairness in recruitment is presumed. Courts and Tribunals would obviously be slow to interfere as it would require details to support an allegations of mala fide. Onus on the person making such allegations is heavy. As held by Hon'ble the Apex Court with the case of State of Andhra Pradesh v V. Sadanandam AIR 1985 SC 2060 that it is exclusively within the domain of the executive to decide upon the mode of recruitment/selection and the category from which the recruitment to a Service should be made. The relevant portion is quoted under:-

"We need only point out that the mode of recruitment/selection and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment/selection or the categories from which the recruitment should be made, as they are matters of policy decision failing exclusively within the purviews of the executive. As already stated, the question of filling up of posts by persons belonging to other local categories or zones is a matter of administrative necessity and exigency. When the Rules provided for such benefits being effected and when the transfer are not assailed on the ground of arbitrariness or discrimination, the policy of transfer adopted by the government cannot be struck down by Tribunal or courts of law."

18. The Constitution of India provides for establishment of the Union Public Service Commission and a State Public Service Commission for each of the States. These constitutional bodies have their own jurisdictions clearly earmarked, Generally, their primary function is to conduct written competitive examinations, as well as, viva voce tests for preparation of Select Lists/Panels or meritorious candidate. Besides, they are consulted in all matter relating to public appointments.

19. The advertisement issued by the Public Service Commission or State Public Service Commission for selection process comprises of several stages. The process initiates with the issuance of the notification for recruitment and ends with the preparation of select list for appointment. Indeed, it contains various steps from notifying vacancies to preparation of list of successful candidates for appointment. Although a candidate does not get indefeasible right until appointed.

20. Accordingly, it can be said that the recruitment/selection process, the advertisement for recruitment contain various restrictions and contain several instructions. They are deliberately introduced and are not idle formalities. These have otherwise great advantages. Some of them are of substantive nature with potentiality to curb or eliminate chances for malpractice. As selection has always been considered as an administrative function and the administrative authority is regarded the best judge for it. It is the administrative authority that carries out the policy of the State as Public appointments are made to suit the administrator's purpose by appointing those who is considers the best among the available candidates. As long as the function of such authority is within the law, courts will be slow to interfere; rather it has no business to interfere. Court could not assess comparative merits in selection and set aside appointments. The Court does not also function as an appellate forum in selection matters.

21. In the instant case, as per the facts stated hereinabove, the O.P.No. 2/U.P. Public Service Commission on 03.09.2012 in view clause-1 of the advertisement is entitled to hold competitive examination as per the advertisement dated 03.09.2013 issued by the competent authority to hold competitive examination for General Knowledge and General Hindi and the candidates, so this Court while exercising power of judicial review cannot interfere in the said exercise to be conducted by the O.P.No. 2 as it is settled proposition of law that if a decision is being taken by a selecting body for conducting an exercise in order to select a candidate as per the terms of the advertisement then by way of judicial review there is a very limited scope to interfere in the exercise adopted by the selecting body/ O.P.No. 2 and on very limited grounds, such as, illegality or patent irregularity in the Constitution of the committee or violation of the procedure of selection or established mala fide affecting the selection on the basis of which interference can be made. The said position doe not exist in the present case (See. **Dalpat Abasaheb Solunke V (Dr.) BS Mahajan AIR 1990 SC 535**). Accordingly, this Court while exercising power of judicial review cannot encroach upon the power of the U.P. Public Service Commission/O.P.No. 2 in respect to procedure adopted by it for the purpose of selection/appointment on the post of Additional Private Secretaries as per the terms of the advertisement by substituting its own views and opinion (See. **SL Vohra V. Union of India 1993 (2)SLR 805 and Vijoy Syal V. state of Punjab (2003)9 SCC 401**).

22. So, the relief as claimed by the petitioners to restrain the O.P.No. 2 from conducting competitive written examination in respect to the General Knowledge and General Hindi on 22.09.2013 cannot be granted as the same is as per the notification dated 03.09.2013 and in accordance with the terms of the advertisement specially clause -1 & 5 read with sub-clause-8 of Clause-11 and as per

the law laid down by Honble the Apex Court in the case of **Andhra Pradesh Public Service Commission Vs. Baloji Badhvath and others, 2009 (5) SCC 1**, held as under:-

"*Para No. 25* - How the Commission would judge the merit of the candidates is its function. Unless the procedure adopted by it is held to be arbitrary or against the known principles of fair play, the superior courts would not ordinarily interfere therewith. The State framed Rules in the light of the decision of the High Court in S. Jafeer Saheb (supra). Per se, it did not commit any illegality. The correctness of the said decision, as noticed hereinbefore, is not in question having attained finality. The matter, however, would be different if the said rules per se are found to be violative of Article 16 of the Constitution of India. Nobody has any fundamental right to be appointed in terms of Article 16 of the Constitution of India. It merely provides for a right to be considered therefor. A procedure evolved for laying down the mode and manner for consideration of such a right can be interfered with only when it is arbitrary, discriminatory or wholly unfair."

23. Further, in the case of **A.P. Public Service Commission, Hyderabad and Another Vs. B. Sarat Chandra and others (1990) 2 SCC 669** while interpreting the Hon'ble Apex Court held as under:-

"If the word 'selection' is understood ion a sense meaning thereby only the final act of selecting candidates with preparation of the list for appointment, then the conclusion of the Tribunal may not be unjustified. But round phrases cannot give square answers. Before accepting that meaning, we must see the consequences,anomalies and uncertainties that it may lead to. The Tribunal in fact does not dispute that the process of selection begins with the issuance of advertisement and ends with the preparation of select list for appointment. Indeed, it consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment.

24. In the case of **Ashok Kumar Sonkar Vs. Union of India and others (2007) 4 SCC 54** Hon'ble the Apex Court in paragraph 14 at page 63 (relevant portion quoted is held as under) :

"A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for application constituted a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been rejected at the inception itself."

25. Accordingly, keeping in view the law as laid down by Hon'ble the Apex Court in the case of **B. Sarat Chandra (Supra) and Ashok Kumar Sonkar(Supra)** there is

no legal impediment or any infringement of the terms of the advertisement on the part of U.P. Public Service Commission/O.P.No. 2 in conducting the written examination to be held on 22.09.2013 for General Knowledge and General Hindi, when admittedly all the petitioners are allowed to appear in the said examination and no prejudice is caused to the petitioners on the part of O.P.No. 2 for conducting the written examination on 22.09.2013.

26. For the foregoing reasons, writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Service Single No. 6994 of 2009.

Naimuddin Khan ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Chandra

Counsel for the Respondents:
C.S.C., Sri N.C. Mehrotra

Constitution of India, Art. 226- Major punishment-on basis of reply after show cause notice-without fixing date time and place for enquiry-even in ex-parte enquiry without examing the witness-without proving the documents-relying for punishment-held-not sustainable-order passed by both authorities-quashed.

Held: Para-8
It is not disputed at bar that department has not examined any of the witness to prove the charges levelled against the petitioner and also the document relied upon by the department were not proved by adducing any witness. The inquiry report reveals that no date, time and place of conducting the inquiry was mentioned in the report and the Enquiry Officer straightway on the basis of the reply of the petitioner submitted the report before the competent authority.

Case Law discussed:
AIR 2010 (10) SCC 3131

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. Heard Sri Amit Chandra, learned counsel for the petitioner, Sri N.C. Mehrotra, learned counsel for the respondents no.2 to 4 and Chaudhary Shatrughan, learned Standing Counsel for the State-respondent no.1.

2. By means of the present writ petition, the petitioner has challenged the order by which major punishment has been awarded to him after conducting inquiry for the charges levelled against him. The punishment awarded are mentioned in the order dated 12.02.2007 (Annexure 1 to the writ petition). The appeal preferred against that order was also dismissed by the State Government vide its order dated 31.07.2009 (Annexure 2 to the writ petition) communicated to the petitioner by letter dated 21.08.2009. Both these orders are sought to be quashed in this writ petition.

3. The relevant facts for deciding the present writ petition are that petitioner-Naimuddin Khan was working as Secretary, Krishi Utpadan Mandi Parishad at the relevant time. Certain irregularities were found against him while working as Secretary. On account of which departmental proceedings were initiated. The Regional Deputy Director, Rajya Krishi Utpadan Mandi Parishad, U.P.,

Gorakhpur-Sri R.D. Pradad was appointed as Enquiry Officer. The Enquiry Officer before completing the inquiry served the charge sheet to the petitioner on 9th October, 2003. Against the charge sheet, the petitioner submitted his reply on 15th October, 2003. Thereafter, on 12th November, 2003 a supplementary charge sheet has been served to the petitioner and the reply to the supplementary charge sheet has been given by the petitioner on 21.01.2004. Thereafter, the Enquiry Officer submitted its report on 12.02.2004 and by the impugned order dated 12.02.2007, the appointing authority after giving personal hearing to the petitioner awarded major punishment of reversion in the same pay scale at the lowest in which the petitioner was working. Two increments were also withheld with cumulative effect and an adverse entry was also recorded in his character roll and directed that he shall not be posted in Grade-A Committee in future. His integrity was also withhold. Apart from it, a recovery of Rs.4,17,202/- was also ordered after making a provision that the amount which was realized from the traders be reduced from the aforesaid amount. Aggrieved by the aforesaid orders, the petitioner preferred appeal to the State Government which has been dismissed vide order dated 31.07.2009 communicated to the petitioner vide letter dated 21.08.2009.

4. Learned counsel for the petitioner has submitted that no date, time and place was fixed for conducting the inquiry proceedings and straightway after the reply submitted by the petitioner against the charge sheet, the Enquiry Officer completed the inquiry and submitted his report to the competent authority, who passed the impugned order dated 12.02.2007. Hence the same is arbitrary in nature, contrary to law as well as against the principles of natural justice.

5. It has further submitted that no opportunity to produce defence has been given to the petitioner nor any opportunity has been given by the Enquiry Officer to controvert the evidence relied upon by the department. It has also been submitted that no witness has been examined from the side of the department to prove the record produced against the petitioner in support of the charges levelled against him. Therefore, the inquiry report cannot be relied upon which is based on the documents which are not admitted to the petitioner.

6. However, learned counsel for the opposite parties has submitted that principles of natural justice has not been violated as not only at the stage of inquiry conducted by the Enquiry Officer, the petitioner was given opportunity to defend his case but also the competent authority given an opportunity of personal hearing to the petitioner and thereafter passed the impugned order.

7. I have careful considered the submissions of learned counsel for the parties and gone through the record of the case.

8. It is not disputed at bar that department has not examined any of the witness to prove the charges levelled against the petitioner and also the document relied upon by the department were not proved by adducing any witness. The inquiry report reveals that no date, time and place of conducting the inquiry was mentioned in the report and the Enquiry Officer straightway on the basis

of the reply of the petitioner submitted the report before the competent authority.

9. The Apex Court in **State of U.P. and others v. Saroj Kumar Sinha, AIR 2010 (10) SCC 3131** held that even if the inquiry proceeded ex-parte against the deliquescent, it was mandatory on the part of the department to examine the witnesses mentioned in the charge sheet. The principles of natural justice must be followed and should not be violated in a departmental inquiry and reasonable opportunity to defend must be provided to delinquent because the inquiry conducted against an employee is not a casual exercise. The relevant portion of the judgment is quoted hereinbelow:

"Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry office shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant.

Apart from the above , by virtue of Article 31(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate the punishment being imposed on the employee.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with the closed mind. The inquiry officer has to be wholly unbiased. 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 a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal / removal from service."

10. A Division Bench of this Court in the case of Lucknow Kshetriya Gramin Bank and others Vs. Shri Devendra Kumar Upadhyay, 2009 (27) LCD 990 has held:

"In case an employee is charged of misconduct and charge-sheet is issued, it is to contain precise and specific charges along with the evidence which the department wants to rely upon, in proving the charge and the charges along with the copy of document should be provided to the delinquent. After asking the reply from the delinquent , the enquiry is to proceed where he charges are to be proved by the department concerned, on the basis of the evidence which the department chooses to produce, oral as well as documentary. The delinquent also has to be provided, adequate and reasonable opportunity to lead evidence in rebuttal, may be oral or documentary or both. It is on the basis of evidence so led and the material available on record that the Inquiry Officer has to apply his mind to find out whether the charge levelled against him stands proved or not."

11. The appellate court has also not considered the aforesaid aspect while

affirming the order of the competent authority and, therefore, the appellate order can also not be allowed to sustained.

12. In view of the aforesaid discussion, the impugned orders cannot be allowed to sustain and are liable to be set aside and the writ petition deserves to be allowed.

13. The writ petition is allowed and the impugned order dated 12.02.2007 and the order of the appellate authority dated 31.07.2009 along with inquiry report dated 12.02.2004 submitted by the Enquiry Officer are set aside.

14. The matter is remitted back to the Director, Krishi Utpadan Mandi Parishad, U.P. to proceed with inquiry afresh from the stage of submission of the reply by the petitioner after fixing date, time and place and after giving adequate and reasonable opportunity of being heard to the petitioner to adduce his defence, proceed to conclude the inquiry as expeditiously as possible preferably within a period of three months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.08.2013

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE VINAY KUMAR MATHUR, J.

Misc. Bench No.7041 of 2013

Yagya Shanker Trivedi & Ors. .Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Surendra Kumar
Sri Nisha Srivastava

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art. 226- Quashing FIR-stay of arrest-offence under Section 308, 504, 506 IPC-punishable with 7 years R.I.-considering amended provision of Section 41(1)(b)-Police can arrest only after recording reasons subject to order by Court-with contingencies contained in amended provision itself-interference not required-AGA to communicate this order for strict compliance by S.S.P/S.P of Distt. concerned-petition dismissed.

Held: Para-5
Also under the newly introduced provision, section 41 A Cr.P.C. (which has also been added by Act No. 5 of 2009, effective from 1.11.2010), in all cases where the arrest of such an accused is not needed in view of the provisions of section 41 (1) Cr.P.C., the police officer concerned is required to issue a notice directing the accused to appear before him at a specified place and time. However if at any time the accused fails to comply with the terms of the notice, or fails to identify himself, or the police officer is of the opinion that the arrest is required, he may arrest the said accused after recording his reasons for the same. The police powers of arrest will however be subject to any orders that may have been passed by the Competent Court.

(Delivered by Hon'ble Imtiyaz Murtaza, J.)

1. Heard learned counsel for the petitioners and learned Additional Government Advocate.

2. This writ petition has been filed for quashing an F.I.R and staying the arrest of the petitioners in Case Crime No. 255 of 2013, under Sections- 308,504,506 I.P.C. at P.S.-Kotwali Haidergarh, District-Barabanki.

3. By the amendment vide Act No. 5 of 2009, which has come into effect from 01.11.2010, it has been provided in Section 41(1)(b) Cr.P.C. that a person against whom credible information of being involved in a cognizable offence punishable with imprisonment of 7 years or less is reported to the police officer, the police officer, can only arrest an accused if he is satisfied that:

(a) there is probability of the accused committing another offence,

(b) for proper investigation of the offence,

(c) to prevent such person from causing the evidence of the offence to disappear or his tampering with the evidence in any manner,

(d) to prevent such person from making any inducement, threat or promise to the witnesses to disclose such facts to the court or to the police,

(e) unless the person is arrested, his presence in court could not be ensured and the police officer has to record the reasons in writing before making such arrest.

4. The present case is one punishable with imprisonment upto 7 years. The petitioner should, therefore have no apprehension that he would be arrested unless there are conditions justifying his arrest as mentioned above and provided under section 41(1)(b) Cr.P.C.

5. Also under the newly introduced provision, section 41 A Cr.P.C. (which has also been added by Act No. 5 of 2009, effective from 1.11.2010), in all cases where the arrest of such an accused is not needed in view of the provisions of section 41 (1) Cr.P.C., the police officer concerned is required to issue a notice directing the accused to appear before him at a specified place and time. However if at any time the accused fails to comply with the terms of the notice, or fails to identify himself, or the police officer is of the opinion that the arrest is required, he may arrest the said accused after recording his reasons for the same. The police powers of arrest will however be subject to any orders that may have been passed by the Competent Court.

6. Let a copy of this order also be given to the A.G.A. within three days, for communication to the SSP/SP of the district concerned, for ensuring compliance of this order and the provisions of section 41 (1) and section 41 A Cr.P.C. in the present case, as well as all other cases punishable upto 7 years in his district by directing the investigating officers to refrain from arresting the accused routinely, unless the exceptional circumstances mentioned in sections 41(1)(b) or 41A Cr.P.C. exist in any case, whereupon the arrests may only be effected after recording the reasons for the same. The SSP/SP shall also monitor the genuineness of the reasons given by the investigating officer in the cases where he has arrested an accused.

7. Subject to the aforesaid observations no ground exists for interfering in the matter.

8. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2013

BEFORE
THE HON'BLE RAVINDRA SINGH, J.
THE HON'BLE ARVIND KUMAR TRIPATHI, J.

Criminal Misc. Writ Petition No. 7173 of 2010

Km. Rachana Goswami ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri S.M. G. Asghar, Sri V.M. Zaidi

Counsel for the Respondents:
A.G.A., Sri Anurag Khanna
Sri N.I. Jafri, Sri V.P. Srivastava
Sri Vipin Kumar

Constitution of India, Art. 226- Change of Investigation from Civil Police to C.B.I.-due to interference of Political Leader-to take the administrative control of temple-on apprehension-FIR lodged under section 364 I.P.C.-Police under influence submitted closure report-being perplexed the Mahant taken Jal Samadhi-whether death was accidental or suicide-to be investigated by C.B.I.-without being prejudice with fact whether final report by civil police accepted or not-as same stand quashed.

Held: Para-11
Hence in view of the fact of this case, irrespective of the fact that final report has been submitted and the same has been accepted or not, the C.B.I. is directed to investigate the matter with regard to Case Crime No.264/2010 under section 302 I.P.C. PS.Cantt, Bareilly and to submit the report within a reasonable time before the court concern in accordance with law. If final report submitted by the civil police has already been accepted the same stands quashed.

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

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

2. The present writ petition has been filed with the prayer to issue writ of mandamus commanding the respondents no.1 & 2 to transfer the investigation of the Case Crime No.264/10 under section 364 I.P.C. PS. Cant District Bareilly from local police to some other independent agency to get fair investigation of the same according to law.

3. The case of the petitioner is that she is resident of 339, PS Sadar Bazar, Police Line, PS. Cant, District Bareilly. There is temple of petitioner's family known as Dhopeshwar Mahadev Birajman Mandir Bhopa, Sadar Bazar Bareilly. The grand father of the petitioner Late Mahant Gokaran Giri, aged about 95 years was the Mahant and Manager of the said temple. In respect of the properties belonging to the temple there was a old grant in favour of Hindu Community and the ancestor of the petitioner's family were looking after the management and Puja. The said temple is situated in Cant area District Bareilly. The temple consists of building of the temple, Thakurdwara, New Durga Mandir, Vaishno Ji Mandir, Hanumanji Ka Mandir, Sai Dev Mandir, Ardhnarishwar and Gufa, Dhopeshwar Nath Park, Dhopeshwar Nath Tank. Apart from the said building/property of the temple Dhopeshwar Nath Mahadev Temple, there are six residential houses situated in Mohalla Sadar Bazar, Cant Bareilly within the premises of the said temple. There are ten shops. Out of ten shops, five shops are in possession of the respondent no.5 who has put his locks and closed the same. There is open land adjacent to the premises of the said temple measuring

about 15 bighas. The entire constructed and open land which are in possession of the family of the petitioner and belongs to the said temple are measuring about 30 bighas. Hence there are huge movable and immovable property which were being managed by and under control of late Mahant Gokaran Giri for the last several years. The respondent no.5 Virendra Singh Gangwar, M.L.A of the then ruling party in the State, wanted to grab the management and properties of the said temple with the help of his supporters and the district administration was also supporting him. In connivance with the District Administration and certain officials of the cantonment board he tried to create a trust and constituted a committee of management, for management of the properties of the Mandir consisting off his own persons. He also tried to interfere in the management and affairs of the temple. He had also given threat to the life and properties of late grand father of the petitioner namely Mahant Gakaran Giri regarding which complaint was lodged to the concerned authorities but due to influence of respondents no.5 no action was taken to protect the life and property of late Mahant Gokaran Giri and property of the temple. As there was threat to grand father of the petitioner and other family members to their lives, hence the representation was sent to the National Human Right Commission, New Delhi and other concerned authorities. When there was no response from the above mentioned authorities, then the Writ Petition No.34761/2009 was filed to issue direction to the district administration and S.S.P. Bareilly, to consider the claim of the petitioner for providing protection to his life and liberty. The division bench of this Court disposed off the writ petition on 21.7.2009, directing the District Magistrate, Bareilly to consider the claim of the petitioner, late Mahant Gokaran Giri filed a copy of the order before the District Magistrate, Bareilly, however, he did not decide the representation and no step was taken for protection and he was not communicated regarding any decision and order passed by the District Magistrate, hence the contempt petition was filed. Thereafter again the Writ Petition No.67407 was filed for providing security for protection of the life of late Mahant Gokaran Giri and other family members. In that writ petition the respondent.5 was also arrayed as respondent no.6 and that writ petition was decided by order dated 11.12.2009 with direction to consider and decide the representation of the petitioner. Again an application was filed to provide protection or to pass any order on the representation. The petitioner was not communicated by any order. Subsequently when the counter affidavit was filed in the present writ petition it was communicated that the representation was decided by the District Magistrate. Inspite of pressure and threat from the side of the respondent no.5 and his supporters late Mahant Gokaran Giri did not surrender before him. Thereafter on 13.2.2010 respondent no.5 along with his associates illegally entered into the premises of temple and abducted late Mahant Gokaran Giri, the grand father of the petitioner, regarding which the First Information Report was lodged on the same day and registered as Case Crime No.264/10 under section 364 I.P.C. at Police Station Cantt, Bareilly, subsequently the dead body was recovered from the pond. The investigating officer who was under the influence of the respondent no.5, failed to make fair investigation and due to

political pressure forwarded final report dated 4.4.2010 stating therein that the deceased Mahant Gokaran Giri committed suicide by observing Jal Samadhi but the Circle Officer/Additional S.P. before whom the final report was forwarded, found some contradiction in the investigation and as such directed for further investigation. However, again final report dated 17.7.2010 was submitted under to influence of respondent no.5, disclosing the opinion, that it was an accidental death and not a murder.

4. It was further submitted that ordinarily reinvestigation is not permissible only the direction can be issued for further investigation.

5. However, in exceptional circumstances since there is gross abuse of power and failure of justice, hence the Hon'ble Court may direct for reinvestigation also. In view of the decision of the Apex Court in the case of Babu Bhai vs. State of Gujrat and others, 2011(1) SCC (Crl.) 336 he further contended that in the present case since the investigation was under influence and political pressure of the respondent no.5, the then ruling party M.L.A. and as such in the interest of justice the direction be issued for fresh investigation by independent agency i.e. C.B.I.

6. Learned Standing Counsel and counsel for the respondent no.5 opposed the aforesaid prayer of the petitioner for transfer of the investigation.

7. Learned A.G.A. submitted that earlier after investigation, the Investigating Officer came to the conclusion that late Mahant Gokaran Giri committed suicide due to some family dispute and problems and no offence under section 364 and 302 I.P.C. was made out, hence final report dated 4.4.2010 was submitted. Since it was found by the Circle Officer, City III that there was contradiction in the investigation, he directed for further investigation. After further investigation it was found that there was no evidence of commission of offence and crime under section 364, 302 I.P.C. The investigating officer recorded the statement of the witnesses including doctor who conducted post mortem examination on the body of the deceased Baba Gokaran Giri and no external injuries were found on the body of the deceased. The statement of the independent witnesses and diverse were also recorded. Videography and status of body was mentioned in the post mortem examination report. The deceased Baba Gokaran Giri was aged about 95 years who had gone to pond on 13.1.2010 and he himself fell therein due to sudden slip and as such the investigating officer submitted the expunge report dated 17.5.2010 as no offence was made out. The investigation was not under the influence of any person or party and as such the present petition is liable to be dismissed.

8. Counsel appearing on behalf of the respondent no.5 submitted that the First Information Report was lodged and registered on 13.2.2010 under section 364 I.P.C. against 11 persons. However, in the present writ petition only one person respondent no.5 has been arrayed as party, hence there is non joinder of the party. The allegation that the respondent no.5 and other co-accused wanted to grab the property of the temple though from the perusal of the First Information Report

and copy of the trust deed it would be clear that any of the accused mentioned in the First Information Report have no concerned in respect to the trust deed and management of the temple. Subsequently trust was created by cantonment board. However, the respondent no.5 was not shown as trustee. There was direction for further investigation. However, it was again found that no offence was made out. There was no anti mortem injury and cause of death was found asphyxia due to anti mortem drowning. The temple is property of cantonment board. No one has right over the property of the temple just to maintain peace and harmony the Chief Executive officer of the cantonment board created a trust for management of the temple. The trust deed was executed in the name of Dhopeshwar Nath temple on 6.6.2005. He further contended that the final report was submitted and as the petitioner/complainant has a right to file the protest petition. However, inspite of knowledge of notice petitioner did not appear before the court of C.J.M. and instead of filing the protest petition the present petition has been filed. If she has any complaint against the investigation, the protest petition might have been filed. The representations filed by the family members and the pairokar of late Mahant Gokaran Giri were decided by the district magistrate. The allegations are incorrect and misconceived that the respondent no.5 wanted to grab the property. He never gave threat to the deceased Mahant Gokaran Giri or his family members. The investigation was free and fair. No evidence was available regarding involvement of the respondent no.5 or other co-accused. Rightly the final report was submitted and as such the present petition is liable to be dismissed.

9. Considered the submissions of learned counsel for the parties.

10. In view of the complaint made on behalf of late Mahant Gokaran Giri by his pairokar and by his family members and the writ petition filed on his behalf before this Court it is clear that as per allegation there was threat to his life and life of his family members and there was threat to grab the property of the temple. Had the grievance of late Mahant Gokaran Giri been considered by the district administration, this unfortunate incident dated 13.2.2010 might have not taken place. The investigation is not required to be transferred merely because there is request either on behalf of the accused or on behalf of the complainant but if it is found that there was unfair investigation and investigation might have been done under influence and the same was biased and tented then in the interest of justice to prevent miscarriage of the justice, direction can be issued not only for further investigation but in view of the fact and circumstances even the direction can be issued for reinvestigation/fresh investigation In the present case there was complaint on behalf of late Mahant Gakaran Giri regarding threat to life and properties and subsequently the incident took place on 13.2.2013 causing his death. The circumstances shows that there was no chance of free and fair investigation. First time when the case was investigated, the opinion of the Investigating Officer was that it was a case of suicide due to family dispute and problems. Subsequently the supervisory officer/circle officer found that there was contradiction in the investigation and directed for further investigation. After further investigation the opinion of the investigating officer was that it was case of accidental death as late Baba Mahant Gakaran Giri had gone to the pond on 13.2.2010 and he himself fell down due to sudden slip. Whether it is a case of abduction and murder as mentioned in the First Information Report, as submitted on behalf

of the petitioner or it is a case of suicide or accidental death due to sudden slip, is required to be investigated by independent agency. According to the allegation late Mahant Gokaran Giri was forcibly taken away by respondent no.5 and his supporter and there was apprehension that he might be killed, hence the report was lodged under section 364 I.P.C. Subsequently after recovery of the dead body, section 302 I.P.C. was added. Admittedly late Mahant Gokaran Giri was aged about 95 years, hence he was not expected to go alone near pond without taking any help or without accompanied with any disciple or supporter. The question is not whether respondent no.5 and those persons who are named in the First Information are involved in the incident but firstly the question is whether it was a murder or suicide or accidental death and if it was a preplanned abduction and murder then who are the persons, who are involved in the incident dated 13.2.2013. The matter requires investigation by independent agency to find out truth and to place the same before the court concerned.

11. Hence in view of the fact of this case, irrespective of the fact that final report has been submitted and the same has been accepted or not, the C.B.I. is directed to investigate the matter with regard to Case Crime No.264/2010 under section 302 I.P.C. PS.Cantt, Bareilly and to submit the report within a reasonable time before the court concern in accordance with law. If final report submitted by the civil police has already been accepted the same stands quashed.

12. On the request of Investigating Officer, C.B.I. the requisite papers of case diary shall be handed over.

13. Accordingly this writ petition is hereby allowed. However, no order as to cost.

14. Let a copy of this order be supplied to Mr.Aurag Khanna/Mr. N.I.Zafri, learned counsel for C.B.I. for follow up action, to communicate the authorities concerned for compliance of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.08.2013

BEFORE
THE HON'BLE SHIVA KIRTI SINGH, CHIEF JUSTICE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc. Bench No. 7444 of 2013(P.I.L.)

Ashok Pande ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Asok Pande(In Person)

Counsel for the Respondents:
A.S.G.

Constitution of India, Art. 226- Public Interest litigation-petition seeking prohibition of publishing photographs of such political leader-bearing no portfolio in government-like Sonia Gandhi and to recover part of cost of such publication-held-it will be hazardous to lay down any ideal relationship between government or their leader-petition dismissed.

Held: Para-10
Ultimately, in a public interest litigation, the petitioner is required to show that the prayer, which he is seeking, shall promote public interest. It is very difficult for the Court, considering the set of facts and controversial issues, to come to any final conclusion that the petitioner's prayer, if granted, shall promote public interest. Functioning of a democracy in a healthy and vibrant

manner requires establishment of healthy practices and conventions. All such matters cannot be governed by statutory law. For example, one can see the functioning of Government of United Kingdom. England has no written constitution but its system is known to be mother of all democracies. It is the responsibility of those in power to establish healthy practices and conventions which can alone be the root of democracy in this country, which has achieved independence recently. It would not be proper for this Court to interfere in such matters of policy.

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

1. Heard Mr. Ashok Pande, the petitioner who has appeared in person and learned counsel for the Union of India. Mr. Pande also happens to be an Advocate of this Court.

2. The prayer made in this writ petition filed as a public interest litigation is to issue a mandamus directing the Cabinet Secretary and Secretary, Ministry of Information and Broadcasting (respondents no. 1 and 2) of the Government of India to prohibit all the departments and Public Sector Undertakings from publishing photographs of political leaders who are not holding any government office and that such prohibition should also cover photographs of Ms. Sonia Gandhi because she is holding no post in the Union of India but is actually the Chairperson of United Progressive Alliance, in various advertisements which are published by different departments from time to time in the Newspapers, Television or anywhere else. There is further prayer to direct the respondents no. 1 and 2 to recover part of the cost of advertisements issued with the photographs of Ms. Sonia Gandhi during last nine years, from her party, the Indian National Congress. The last prayer is to quash the order or letter dated 6.8.2013 of respondent no. 2 along with the note of Directorate of Advertising and Visual Publicity (DAVP), respondent no. 3 dated 22.7.2013 on the ground that in the note dated 22.7.2013, there are materials to indicate that DAVP itself does not have any authority in the matter raised by the petitioner.

3. A similar writ petition was filed by the petitioner bearing Writ Petition (M/B) No. 4102 of 2013. That was also filed as a public interest litigation. As appears from the order dated 17.5.2013 contained in Annexure-3 to the writ petition, that writ petition was dismissed as premature because the petitioner had rushed to this Court immediately after raising his grievance through a representation dated 15.5.2013. However, this Court granted liberty to the petitioner that, if so advised, he may approach this Court after reasonable time, such as two-three months.

4. As noticed above, the main response of the respondent communicated to the petitioner is the note of DAVP dated 22.7.2013 contained as part of Annexure-5. That note acknowledges that the comments were on account of reference dated 20.5.2013 received from the Cabinet Secretariat on representation of the petitioner on the subject noticed above. Paragraph-1 of that note simply indicates the role of DAVP in publishing different kinds of advertisements received from various departments of Union of India. Paragraph-2 discloses two reasons in support of the governmental action under challenge. First stand is that the contents of the publicity material is the prerogative of individual Ministry/Department and DAVP has no role to play in it. The second stand is

that 'the achievements and programmes of the Government are publicized through the advertisements and it is an acceptable and established practice to include the photographs of the leaders under whose benign guidance and leadership such achievements have been made'.

5. The petitioner has submitted that the second point made out in the notice dated 22.7.2013 only talks of acceptable and established practice to justify the publication of photographs of leaders without disclosing any law which may support or permit such an action. With regard to first point in paragraph 2, the petitioner has criticized the respondents that when the contents of publicity material is prerogative of individual Ministry/Department, the representation should not have been sent to DAVP and should not have been disposed of by the Ministry of Information and Broadcasting, respondent no. 2 on the basis of said note, rather the matter should have been decided by the competent authority, such as Cabinet Secretary who represents respondent no. 1, the Union of India.

6. Learned counsel for the Union of India, on the other hand, has replied that executive authority of the Union of India is as wide as its legislative authority and it is not necessary that each executive decision must be in terms of some statutory provision or law. According to him, it is for the petitioner to show and establish that the impugned action is contrary to the constitutional or statutory provisions in existence. With regard to the issue of competence of the DAVP to reply the representation, it has been submitted that the note itself discloses that the matter was referred to DAVP by the Cabinet Secretariat and, therefore, it has taken the stand that it is acceptable and established practise to include the photographs of leaders whose guidance and leadership are required to be acknowledged.

7. So far as the legal issue as to whether any law is required to permit the Union of India to issue such advertisements which have been objected to by the petitioner, we are in respectful agreement with the submissions made on behalf of the Union of India that it is within the powers of the Union of India to take appropriate executive decisions and the only limitation on such powers is that the decisions must not run counter to any constitutional or statutory provisions which prohibit the respondents from deciding the contents of publicity material or to include as an acceptable and established practice the photographs of some leaders whose guidance and leadership are considered fit to be acknowledged.

8. The contents of the note, too, do convey that the DAVP has no control over the contents of the publicity material but since a reference was made by the Cabinet Secretariat, it has endeavoured to answer the objection raised in the representation of the petitioner by referring to acceptable and established practice. It cannot be held, in such circumstances, that the DAVP has acted without jurisdiction in taking a stand with regard to grievance of the petitioner in his representation.

9. Some affairs of the Union of India may relate to more than one departments and when the Cabinet Secretariat refers a representation to a particular department, reply of such department cannot be quashed

on the ground that it is without jurisdiction. In executive and administrative matters, such flexibility is required in the interest of working of the Government and an issue on this kind of allocation of responsibility can be made or raised only if some law is shown to have been violated.

10. Ultimately, in a public interest litigation, the petitioner is required to show that the prayer, which he is seeking, shall promote public interest. It is very difficult for the Court, considering the set of facts and controversial issues, to come to any final conclusion that the petitioner's prayer, if granted, shall promote public interest. Functioning of a democracy in a healthy and vibrant manner requires establishment of healthy practices and conventions. All such matters cannot be governed by statutory law. For example, one can see the functioning of Government of United Kingdom. England has no written constitution but its system is known to be mother of all democracies. It is the responsibility of those in power to establish healthy practices and conventions which can alone be the root of democracy in this country, which has achieved independence recently. It would not be proper for this Court to interfere in such matters of policy.

11. So far as the issue of wastage of public funds is concerned, it is not the case of the petitioner that Government cannot issue advertisements in Newspapers or Television. Admittedly, different Governments at different levels have been doing so since long time. If visual image is published or telecast in a format which includes more than one or two photographs then as to how much additional financial burden would be involved, is difficult to be ascertained or appreciated.

12. Further, it will be hazardous to lay down, in concrete terms, the ideal relationship between the party in power and the Government which it has provided. That relationship is itself a tender and delicate relationship which should not be disturbed by extraneous forces. Only exceptional situation can invite intervention of the Court when the constitutional provisions are under threat or have been breached.

13. We do not find any good reasons to grant the prayers made in this writ petition. The writ petition is, therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.11551 of 2013

Smt. Gyan Wati ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri M.C. Chaturvedi, Sri Rajendra Sonker
Counsel for the Respondents:
C.S.C., Sri Hariom Singh
Sri V.S. Parmar

Constitution of India, Art. 226- Appointment of Angan Bari Karyakarti-post advertised 31.01.11-selection list finalized-on complaint-Naib Tehsildar in report dt. 15.10.12 found income certificate-wholly genuine document-but no final order passed by D.M.-in between by G.O. 04.09.12 ban on selection of Angan Bari Karyakarti imposed-whether appointment can be denied in garb by G.O. 04.09.12-having prospective effect ? held-'No' ban applicable where selection under process and not in such cases where selection completed and approval pending since long.

Held: Para-21 & 22

21. It is true that in the present case, validity of last para of G.O. dated 04.09.2012 in so far as it covers certain cases of earlier vacancies, has not been challenged. But, that will not help the respondents in any manner, for the reason that this Court is not striking down the last paragraph of G.O. dated 04.09.2012, but a reasonable plain reading thereof and also the legal exposition of law as discussed above, is sufficient to make its construction in the manner, that, it shall operate only in those cases where selection has not been finalized upto the stage of preparation of select list and submitted to the District Magistrate, rendering the selection committee functus officio. Approval of District Magistrate would only make the way clear to Zila Vikas Pariyojna Adhikari to proceed to make appointment but approval of District Magistrate as such, will not empower selection committee to treat it as continuing. Since this court is making a purposive reasonable construction of the G.O. dated 04.09.2012, and not striking it down, the factum that the petitioner has not challenged its validity, will be of no help to the respondents.

22. Moreover, the fact remains that the authorities themselves did not pass any order, which they ought to have, in order to avoid any confusion or misconception/misinterpretation, in respect of earlier selection, wherein the petitioner was already selected.

Case Law discussed:

Spl. Appeal No. 49 of 2013; AIR 1983 SC 852; 1983(1) SCALE 296; AIR 1983 SC 1143; AIR 1988 SC 2068-1988(Supple.) SCC 740; 1998(9) SCC 223; W.P. No. 13347 of 2001; Service Bench No. 9 of 2013.

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

1. This writ petition is directed against advertisement dated 04.01.2013, published by District Programming Officer, District Kanpur Nagar, respondent no.3, for recruitment/selection of Angan Bari Karyakatri (worker) in various Gram Panchayat of Ghatampur Block, district Kanpur Nagar. In this case, dispute relates to village panchayat Sajeti .

2. It is said earlier an advertisement was published on 31.01.2011 for the aforesaid post and some others pursuant whereto, the petitioner applied, selected and recommended by respondent no.4. A complaint was made by respondent no.5, Smt. Ram Shree, wife of Dhirendra Singh, regarding income certificate of petitioner, whereupon an inquiry was made by Naib Tehsildar, Ghatampur, District Kanpur Nagar. He submitted report dated 02.06.2011 verifying genuineness of income certificate having been issued by Tehsildar Ghatampur to petitioner, verifying her income as Rs. 18,000/- per annum. It appears that another report was also submitted by Naib Tehsildar on 15.10.2012 wherein also income certificate of the petitioner was certified to be genuine. Since no letter of appointment was issued to petitioner, she submitted an application on 06.11.2012 but instead of passing any order thereon, the impugned advertisement has been published. The petitioner has been informed that the aforesaid advertisement has been published in view of the Government Order dated 04.09.2012 (Annexure 10 to the writ petition).

3. The case set up by petitioner is that once the selection is finalized, if there is any fault/delay on the part of respondent authorities in issuing appointment letter, that will not provide a ground to cancel entire selection and to proceed for selection afresh in the light of new policy formulated by Government Order (for short "G.O.")dated 04.09.2012.

4. A detailed counter affidavit has been filed on behalf of respondents no. 3 and 4. It is said that for selection and appointment of Angan Bari Karyakartri, procedure and other details were provided in G.O. dated 16.12.2003 (Annexure CA-2 to counter affidavit), which was amended to some extent by G.O. dated 21.02.2007 (Annexure CA-3 to the counter affidavit). In accordance therewith a selection was made after advertising vacancies, on 31.01.2011, and select list included the name of petitioner. However, a complaint dated 02.04.2011 was received regarding income certificate and, therefore, a selection committee, while forwarding names of other selected candidates of different centres, to District Magistrate, made an endorsement and kept petitioner's matter in abeyance.

5. The Child Development Project Officer, Ghatampur directed Tehsildar to make verification of income certificate of petitioner. While the aforesaid inquiry was still continuing, in the meantime , a G.O. dated 04.09.2012 was issued by State Government whereby all the selections made before issuance of aforesaid G.O. were cancelled, as a result whereof, earlier selection was cancelled and the respondents have proceeded to make a fresh selection by issuing impugned advertisement in the light of G.O. dated 04.09.2012.

6. The short question up for consideration in the matter is whether G.O. dated 04.09.2012 can justifiably cancel earlier selection proceedings and direct for a fresh selection in respect of earlier existing vacancies.

7. There are two aspects to be considered in this regard. Firstly, what has been said by G.O. dated 04.09.2012 with respect to previous selection, which is sought to be cancelled and secondly, whether it is legally permissible or not.

8. It is not in dispute that G.O. dated 04.09.2012 has been issued in supersession of all existing Government Orders. It lays down down procedure for selection and appointment of Angan Bari Karyakartri. A modified procedure has been laid down in the aforesaid G.O. From a bare reading, it however, does not show that it has any retrospective effect, inasmuch as, earlier existing G.Os. have been superseded by the aforesaid G.O. and from a bare reading, it is evident that supersession is prospective.

9. Now the last paragraph which relates to cancellation of selection reads as under:

''कृपया इस शासनादेश का कड़ाई से अनुपालन सुनिश्चित कराया जाय तथा इस शासनादेश के निर्गत होने के पश्चात यदि पूर्व में कोई चयन कार्यवाही जनपद में प्रारम्भ की गयी हो तो उसे निरस्त कर दिया जाय। समस्त जिलाधिकारीगण से यह अपेक्षा की जाती है कि वे अपने कुशल नेतृत्व एवं प्रभावी नियंत्रण में उक्त कार्यवाही को पूर्ण उत्तरदायित्व के साथ सम्पादित करायेगे।''

(emphasis added)

"Please get ensured strict compliance of this Government Order and, if any selection proceeding has already been initiated in the District, after issuance of this Government Order, the same shall be cancelled. All the District Magistrates are expected to get the aforesaid G.O. implemented under their efficient guidance and effective control with full responsibility." (English translation by Court)

10. What has been said therein is that the selection proceedings in a district,

if has commenced earlier, after issuance of the aforesaid G.O. dated 04.09.2012, such selection proceedings shall be cancelled. Selection procedure is prescribed in para 3 in the earlier G.O. dated 16.12.2003, which lays down a detailed procedure with respect to selection, needs to be followed by selection committee, constituted in para 4 thereof. Bal Vikas Pariyojna Adhikari of the concerned Block under Child Development Project, would be the Chairman of Selection Committee which will have 5-6 members who are also detailed in para 4 of the aforesaid G.O. The selection committee shall prepare a list of selected candidates and the concerned Bal Vikas Pariyojna Adhikari shall proceed to issue letter of appointment on honorarium basis to the selected persons. Para 3 provides that there shall be no necessity of prior approval of any senior officer, on recommendation made by Selection Committee but a copy of select list shall be forwarded to District Magistrate and Chief Development Officer on the same date on which it is prepared.

11. The subsequent G.O. dated 21.02.2007 which supposedly has made some amendment in the procedure of selection laid down in the G.O. dated 16.12.2003, only provides that selection shall be finalised by concerned selection committee as per G.O. dated 16.12.2003 but before issuing "appointment letter", Bal Vikas Pariyojna Adhikari shall obtain approval of District Magistrate through District Project Officer. Therefore, so far as selection procedure is concerned, that by itself does not require any prior approval of District Magistrate, so as to attain finality but that selection shall be acted upon by issuing appointment letter only after approval is obtained from District Magistrate. In the present case, entire selection procedure is over, as is evident from respective pleadings and what is awaited is only approval of District Magistrate for appointment. It is strange to find that a select list was finalized by selection committee as long back as on 26.3.2011 and thereafter for the last more than 1½ years, it continued to await approval of District Magistrate. It is true that the District Magistrate was examining complaint made by one of candidates, not selected, who had complained about genuineness of income certificate of petitioner, a selected candidate, but the fact remains that this inquiry continued to remain pending for almost 1½ years. In the meantime, impugned G.O. has come and going behind the aforesaid G.O., entire selection has been cancelled so as to issue a fresh advertisement, which is impugned in the instant writ petition.

12. A Division Bench of this Court while construing last paragraph, as quoted above, of G.O. dated 04.09.2012, in Smt. **Sangeeta Yadav And Another vs. State Of U.P. And Others** (Special Appeal No. 49 of 2013 decided on 6.2.2013), held that there is nothing in the aforesaid G.O. which would apply to cancel selection, which has been finalized, though no appointment has been made. In my view, a careful reading of G.O. dated 04.09.2012 makes it very clear that intention of Government is only to cancel such selection proceedings which have just commenced before issuance of G.O. dated 04.09.2012 but where selection has been completed by selection committee and only the matter relating to appointment is pending before District Magistrate, for his approval, such cases would not be covered by the aforesaid G.O.

13. One of the reasons which can justifiably be found in adopting the aforesaid interpretation, is that, the purpose of appointment of Angan Bari Karyakartri would be frustrated if the process of selection is kept pending for years together and no actual appointment is allowed to be made. After all selection of Angan Bari Karyakartri is proceeded with a basic objective and purpose for which such appointment has been found necessary. Process of selection is only a method to find out a right person who has to be given responsibility of executing the basic plan/purpose/objective. If execution of such plan etc. is made to await the very selection for years to come, it shall obviously frustrate its very purpose. No doubt, there is stress on the words that "selection process has commenced" but as a matter of fact, the intention of State Government is that it is with respect to only those cases, where selection process is at the stage of commencement, and not, where the entire selection has completed at the level of selection committee and a select list has been communicated to District Magistrate concerned. Only a formal approval by District Magistrate is pending and that too, for appointment, which is not to be made by selection committee. It is different aspect that finding some procedural or otherwise substantive irregularities in the selection, the District Magistrate may decline to approve selection and order for fresh selection. That would be a different case but otherwise, a selection which has already commenced and completed, the selection committee in that case would become functus officio. Its role is over after submission of select list to District Magistrate. Such a select list, in my considered view, would not be covered by the last para of G.O. dated 04.09.2012.

14. Principles of interpretation require that there should not be any addition, subtraction or reduction of any word, if the language of a provision is simple and very clear, but interpreting a provision, the Court must also take into consideration the intention and purpose, for which, the provision has been enacted. Where the language of statute is capable of more than one construction, purposive interpretation shall be given to make the scheme of the statute reasonable, rational and functional, which would aid in achieving real objective. I, therefore, find no hesitation in holding that in the facts and circumstances of present case, and the stage, where selection has already reached, it would not be governed by the last para of G.O. dated 04.09.2012. The District authorities have completely misdirected themselves in assuming that selection in question shall stand cancelled by G.O. dated 04.09.2012 so as to justify fresh selection in accordance with this new G.O.

15. There is another legal angle which is directly involved in the matter. When a vacancy occurs, general principle is that it shall be filled in, according to the procedure applicable at the time when the vacancy occurred. In the present case, relevant facts have been disclosed by respondents in the counter affidavit, demonstrating that vacancy occurred admittedly in July 2010. It has been stated in para 4 of counter affidavit that the petitioner Smt. Gyanwati was earlier selected as Angan Bari Karyakartri on 30.10.2004. She joined the aforesaid post on 06.11.2004 but subsequently she resigned from the said post on 21.07.2010 which resignation was accepted by competent authority on the same day, i.e., 21.07.2010. At that time, the procedure laid down vide G.Os. dated 16.12.2003 and 21.02.2007, was operating and applicable. The respondents rightly,

therefore, proceeded to make selection and appointment in accordance with the aforesaid procedure. Subsequent G.O. dated 04.09.2012, therefore, cannot be applied to the vacancies which occurred earlier and the same has to be filled, in accordance with the procedure operating and applicable at the time of occurrence of vacancy.

16. The Apex Court in the case of **Y.V. Rangaiah And Ors. vs J. Sreenivasa Rao And Ors. AIR 1983 SC 852 =1983 (1) SCALE 296** in para 9 it was observed:

"9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Register Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules." (emphasis added)

17. In **A.A. Calton Vs. The Director of Education and another, AIR 1983 SC 1143** and **P. Ganeshwar Rao and others Vs. State of Andhra Pradesh and others, AIR 1988 SC 2068=1988 (Supple.) SCC 740** the same view was reiterated. Again in **B.L. Gupta and another Vs. M.C.D., 1998 (9) SCC 223,** the Apex Court in para 9 of the judgment held as under:-

"When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arises earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr Mehta to a decision of this Court in the case of N.T. Devin Katti Vs. Karnataka Public Service Commission. In that case after referring to the earlier decisions in the cases of Y.V. Rangaiah Vs. J. Sreenivasa Rao, P. Ganeshwar Rao Vs. State of A.P. and A.A. Calton Vs. Director of Education it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed. This being the correct legal position, the High Court ought to have directed the respondent to declare the results for 171 posts of Assistant Accountants and not 79 which it had done." (emphasis added)

18. Following the aforesaid decisions, a Division Bench of this Court

(of which I was also a Member) took similar view in **Ram Prakash and others Vs. Farrukhabad Gramin Bank, Farrukhabad and others** (Writ Petition No. 13347 of 2001, decided on 8th May, 2007).

19. In certain cases, an explanation has been carved out where amendment in the rules, providing procedure for selection has been made with retrospective effect, otherwise the amended procedure would be applicable to the vacancies occurring after such amendment and not to the earlier ones.

20. In the present case, learned Standing Counsel could not dispute that the Government Order in question is prospective in nature and supersedes existing erstwhile Government Orders from the date of issuance of G.O. dated 04.09.2012 and not from an earlier date. That being so, vacancies which occurred earlier, i.e. before issuance of G.O. dated 04.09.2012, are liable to be filled in, according to procedure laid down in the previous Government Orders and not by the subsequent G.O.

21. It is true that in the present case, validity of last para of G.O. dated 04.09.2012 in so far as it covers certain cases of earlier vacancies, has not been challenged. But, that will not help the respondents in any manner, for the reason that this Court is not striking down the last paragraph of G.O. dated 04.09.2012, but a reasonable plain reading thereof and also the legal exposition of law as discussed above, is sufficient to make its construction in the manner, that, it shall operate only in those cases where selection has not been finalized upto the stage of preparation of select list and submitted to the District Magistrate, rendering the selection committee functus officio. Approval of District Magistrate would only make the way clear to Zila Vikas Pariyojna Adhikari to proceed to make appointment but approval of District Magistrate as such, will not empower selection committee to treat it as continuing. Since this court is making a purposive reasonable construction of the G.O. dated 04.09.2012, and not striking it down, the factum that the petitioner has not challenged its validity, will be of no help to the respondents.

22. Moreover, the fact remains that the authorities themselves did not pass any order, which they ought to have, in order to avoid any confusion or misconception/misinterpretation, in respect of earlier selection, wherein the petitioner was already selected.

23. Further in the writ petition the reasons have been assigned by the petitioner for not making any specific plea for challenging the G.O. dated 04.09.2012, by stating in para 17 thereof that G.O. dated 04.09.2012 has been held contrary to the Central Government's circular dated 03.06.2011 and holding that the State Government cannot issue any order which would be contrary to the circular formulated by the Central Government. Reference has been made of a Division Bench decision of Lucknow Bench of this Court, in **Provincial Child Development Project Officers' Welfare Association Vs. State of U.P. and others** (Service Bench No. 9 of 2013), decided on 07.01.2013. However, a careful reading of Division Bench decision shows that only a part of G.O. dated 04.09.2012 has been quashed, i.e., only to the extent of reservation and not in its entirety.

Hence, this shall not help the petitioners at all.

24. Be that as it may, since the law is well settled that vacancies occurring earlier should be filed in by the procedure laid down under the statute, operating at the time of occurrence of vacancies, G.O. dated 04.09.2012, need not be quashed to the extent it provides in the last para. Considering prayer (b), the respondents need be directed to consider the matter of appointment on the post of Angan Bari Karyakartri at village panchayat Sajeti, Ghatampur Block, district Kanpur Nagar in the light of selection made according to procedure laid down, applicable at the time of occurrence of vacancy, without being influenced by any subsequent G.O., laying down different procedure or method and the discussion made above.

25. In view of above discussion, the writ petition succeeds and is allowed. The impugned advertisement dated 04.01.2013 (Annexure-9) to the writ petition, published by District Programming Officer, District Kanpur Nagar, respondent no.3, insofar as it pertains to the post of Angan Bari Karyakartri, which is subject matter of dispute in the present writ petition, is hereby quashed. The respondent competent authority is directed to consider the claim of petitioner for appointment to the post of Angan Bari Karyakartri in the light of her selection made pursuant to advertisement made on 31.01.2011. However, it is made clear that this order shall not preclude the competent authority to examine the matter, with respect to genuineness of any document relating to eligibility etc. of petitioner and if anything is found wrong, therein appropriate order may be passed by it, giving reason(s), after observing principles of natural justice.

26. The writ petition stands decided accordingly in the manner as said above.

27. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2013

BEFORE

THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 12796 of 2011

Smt. Neetu Sood ...Petitioner
Versus
The State Transport Appellate Tribunal & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.K. Agarwal, Sri Ashok Saxena
Sri Nitin Srivastava

Counsel for the Respondents:
C.S.C., Sri G.K. Singh
Sri V.K. Singh, Sri G.K. Malviya

Motor Vehicle Act 1988-Section 72-read with M.V. Rule 1998, Rule 68- Application for permit to play the bus in two different states-rejection on ground not residing in concern state-held-no such statutory requirement-tribunal committed mistake on face of record itself-direction for fresh consideration given.

Held: Para-18
The Court is of the view that the owner of the vehicle may be a permanent resident of a particular place, but, at the same time, he can carry on his business at another place. There is no bar under any law that a owner of a vehicle, who is a permanent resident of a particular place, cannot ply his vehicle in a

different region and cannot keep his vehicle in that region for business purposes.

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

1. Heard Sri Alok Saxena, the learned counsel for the petitioner and Sri V.K.Singh, the learned counsel assisted by Sri G.K.Malviya, the learned counsel for the respondents.

2. There is an inter-State route known as Pichhore-Jhansi via Dinara, Biloa, Panihar which is 70.06 kms. in length. A major portion of the route, i.e., 49.06 kms. lies in the State of Madhya Pradesh and 21 kms. lies in the State of Uttar Pradesh. As per the reciprocal agreement arrived at between the two States, a strength of two permits for four trips is fixed from the Uttar Pradesh side.

3. It transpires that a vacancy of one permit for two trips was made available from the Uttar Pradesh side. For this purpose, the petitioner applied for grant of a stage carriage permit on the route in question under Section 72 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") read with Rule 62 of the Uttar Pradesh Motor Vehicles Rules, 1998 (hereinafter referred to as "the Rules"). In this application, the petitioner showed her address of Jhansi. The application of the petitioner and others remained pending before the State Transport Authority, Lucknow. Accordingly, the petitioner filed Writ Petition No.4485 of 2009 (M/B), before the Lucknow Bench of this Court, which petition was disposed of with a direction to the authority concerned to consider and decide the application of the petitioner.

4. The State Transport Authority considered the grant of stage carriage permit on the route in question in its meeting, held on 20.5.2009. It transpires that four applications were received and was considered by the authority. The sole criteria adopted by the State Transport Authority was the model of the vehicle to be used on the route in question. The State Transport Authority in its meeting date 20.5.2009 granted the permit in favour of respondent No.3, Arvind Kumar Yadav, on the ground, that he offered a vehicle which was a 2004 model, whereas, the petitioner offered a 2002 model.

5. The petitioner, Neetu Sood, being aggrieved by the grant of stage carriage permit in favour of respondent No.3, filed an appeal before the State Transport Appellate Authority, Lucknow, under Section 89(1)(a) of the Act. The appeal of the petitioner was allowed and was remanded to the regional transport authority to consider the issue of the superiority of the model of the vehicle given by respondent No.3. This direction was issued, on the ground, that the appellant had also offered a vehicle of 2005 and 2009 model and had sought time to file the papers, which was granted by the State Transport Authority and that the appellant had filed the necessary affidavit on 21.5.2009. It was also alleged by the petitioner that whereas the respondents offered a 2004 model, the vehicle, which was endorsed on the permit, was of a 2000 model. The Tribunal also directed the Regional Transport Authority to consider as to whether the petitioner Neetu Sood was a resident of Uttar Pradesh or not and consequently, eligible to apply for a stage carriage permit.

6. The respondent No.3, being aggrieved by the order of the Tribunal, filed Writ Petition No.71620 of 2010, which was allowed and the order of the

Tribunal was set aside. The Writ Court directed that since the Appellate Tribunal had coextensive powers, it should have decided the matter itself on merits instead of remitting the matter to the State Transport Authority.

7. Based on the said direction of the Writ Court, the Tribunal again heard the matter and dismissed the appeal by an order dated 11.2.2011. The Tribunal held, that the appellant, Neetu Sood, was not a permanent resident of Uttar Pradesh, inasmuch as, the appellant had shown her address of Gwalior which is in the State of Madhya Pradesh in the memo of appeal and consequently, held that she was not entitled to hold a permit. The Tribunal further held, that even though the appellant had offered a superior model, but, since she is not a permanent resident of Uttar Pradesh, she is not entitled for any relief. The petitioner, being aggrieved by the order of the Tribunal, has filed the present writ petition.

8. The learned counsel for the petitioner contended that the petitioner has been non-suited only on account of the fact that she had mentioned her temporary address of Gwalior in the memo of appeal, without considering the other documents filed before the Tribunal, to indicate that she was a permanent resident of Jhansi, which is in the State of Uttar Pradesh. The learned counsel for the petitioner submitted that the Tribunal has not considered these documents nor there is any discussion about these documents in the order.

9. On the otherhand, the learned counsel for the respondents submitted that all the documents, which had been filed by the petitioner were procured after the meeting was held on 20.5.2009 and therefore, such documents cannot be taken into consideration. It was also contended that the petitioner's application for grant of a permit was not in accordance with Rule 62 of the Rules and, therefore, her application was liable to be rejected and consequently, the petitioner was not entitled for any relief from the Writ Court.

10. In rejoinder, the learned counsel for the petitioner contended that the application of the petitioner was filed in accordance with the provision of Rule 62 of the Rules and assuming without admitting that the petitioner had filed an incomplete application, the same could not be rejected on technical grounds.

11. Having heard the learned counsel for the parties, the Court finds that the State Transport Authority can grant a stage carriage permit under Section 72 of the Act on such terms and conditions contained therein. Rule 62 of the Rules provides that the application for a permit shall specifically mention about the ownership of the bus and general reputation or character of the applicant.

12. Section 69 of the Act is relevant for the purpose of deciding the controversy involved in the present case. For facility, the said provision is extracted therein:

"69. General provision as to applications for permits- (1) Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles :

Provided that if it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the

application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies, and in case the portion of the proposed route or area in each of the regions is approximately equal, to the Regional Transport Authority of the region in which it is proposed to keep the vehicle or vehicles;

Provided further that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, by notification in the Official Gazette, direct that in the case of any vehicle or vehicles proposed to be used in two or more regions lying in different States, the application under that sub-section shall be made to the State Transport Authority of the region in which the applicant resides or has his principal place of business."

13. A perusal of the aforesaid provision indicates, that where the vehicle is proposed to be used in two or more regions lying within the same State, the application would be made to the Regional Transport Authority of the region in which a major portion of the proposed route lies, and in case the portion of the route is equal, then the application would be made to the Regional Transport Authority of the region in which the applicant proposes to keep its vehicle. The proviso to sub section (1) of Section 69 of the Act indicates that where the vehicle, which is proposed to be used in two or more regions lying in different States, the application would be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.

14. In support of this contention, the learned counsel for the respondents vehemently contended that the word "resides" means a permanent residence. In support of his contention, the learned counsel placed reliance upon a decision of the Supreme Court in Union of India and others vs. Dudh Nath Prasad, A.I.R. 2000 SC 525 and Smt. Jeewanti Pandey vs. Kishan Chandra Pandey, A.I.R. 1982 SC 3.

15. The learned counsel tried to impress the Court that in view of the aforesaid decisions, the word "resides" means where a person has a permanent residence or has stayed for a considerable period of time. The submission of the learned counsel for the respondents cannot be accepted.

16. The word "resides" used under Section 45 of the Motor Vehicles Act, 1939, is pari materia to Section 69 of the present Act. A Division Bench of the Madhya Pradesh High Court in Ratan Lal vs. State Transport Appellate Authority, Madhya Pradesh and others, A.I.R. 1969 MP 204 held, that having regard to the object and purpose of Section 45 and the second proviso, the word "resides" must be construed as including both permanent and temporary residence.

17. The Supreme Court in Jagir Kumar vs. Jaswant Singh, AIR 1963 SC 1521, in the context of the jurisdiction of the Magistrate under Section 488 of the Code of Criminal Procedure, 1898 for entertaining a petition of a wife, for

maintenance, considered the meaning of the word "resides" and held-

"The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings including domicile in (sic) and the most technical sense and temporary residence. Whichever meaning is given to it one thing is obvious and it is that it does not include a casual stay in, or flying visit to a particular place. In short, the meaning of the word would, in the ultimate analysis depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. that the said meaning"

18. In the light of the aforesaid, the Tribunal committed a manifest error in non-suiting the petitioner, on the ground, that the petitioner had given her address of Gwalior in the memo of appeal, without considering the explanation as to why she had given the address of Gwalior and without considering other documents relating to her residence and Section 69 of the Act. The Court is of the view that the owner of the vehicle may be a permanent resident of a particular place, but, at the same time, he can carry on his business at another place. There is no bar under any law that a owner of a vehicle, who is a permanent resident of a particular place, cannot ply his vehicle in a different region and cannot keep his vehicle in that region for business purposes.

19. In the light of the aforesaid, the Tribunal has not considered the provision of Section 69 of the Act. It is not necessary that the petitioner should be a permanent resident of that region where she has filed an application for grant of a stage carriage permit. The order of the Tribunal on this issue cannot be sustained.

20. The learned counsel for the respondents contended that the finding of the Appellate Tribunal, on the question of superiority of the vehicle offered by the petitioner, was incorrect and that the petitioner could not challenge this finding as there was no occasion for the respondents to challenge it since the appeal of the petitioner was dismissed. The learned counsel submitted that the vehicle offered by the petitioner, which has led the Appellate Tribunal to give a finding that the petitioner offered a superior model vehicle could not be taken into consideration since the said vehicle was already being used in a permit granted to the petitioner for another route. The learned counsel submitted that the same vehicle cannot be used for two routes. In support of this submission, the learned counsel placed certain documents before the Court to prove that the vehicle offered by the petitioner was already being used on another route. The learned counsel further submitted that the application of the petitioner was incomplete and was liable to be rejected. The said application could not be cured by filing an affidavit after the date of the consideration for the grant of permit by the State Transport Authority.

21. In the light of the submissions made by the learned counsel for the respondents, the Court finds, that since the impugned order of the Tribunal, on the question of permanent residence, cannot be sustained, the Court is of the opinion that the entire order has to be set aside and the matter has to be reconsidered by the Tribunal afresh. The

Court is of the view that the order of the Tribunal, relating to the superiority of the model, offered by the petitioner shall also be reconsidered afresh.

22. In the light of the aforesaid, the impugned order of the Tribunal dated 11.2.2011 is quashed. The writ petition is allowed. The matter is again remitted to the Tribunal to decide the appeal of the petitioner afresh within three months from the date of the production of a certified copy of the order, on the question of residence and model of the vehicle. It would be open to the parties to file fresh evidence on the question of residence and superiority of model of vehicle.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.13918 of 1996

Ram Awatar Mishra and Ors...Petitioners
Versus
Uttar Pradesh Basic Shiksha Parishad and Ors.... Respondents

Counsel for the Petitioners:
Sri B.R. Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- claim about training-without being validly appointed-without possessing minimum requisite qualification-can not be enforced by writ court-petition dismissed.

Held: Para-5
In view of above decision of Division Bench, after promulgation of statutory rules, mandating that no appointment shall be made if a person does not possess requisite minimum educational qualification including training, the question of engagement of an untrained person after promulgation of rule and thereafter directing him to sent for training, does not arise.

Case Law discussed:
Special Appeal No. 10 of 2007.

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

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

2. The petitioners admittedly were not trained upto 1981 and claimed that they were sent for inservice training in 1983 though such training was meant for only those teachers who were validly appointed at the time when statutory rules providing minimum qualification including training were not existed.

3. This aspect has been considered in the light of relevant Government order by a Division Bench of this Court (in which I was a member) in **Special Appeal No. 10 of 2007, State of U.P and others Vs. Shailesh Kumar Dwivedi and others,** decided on 17.12.2008. This Court held as under:

"In view thereof, this appeal is disposed of directing the competent authority to consider the case of the petitioners-respondents in the light of two conditions provided in the judgment of the Hon'ble Single Judge, impugned in this appeal, as well as in the light of the conditions provided by the Division Bench in its judgment in the case of Kali Charan Singh Arya (supra). Further, if the petitioners have been appointed after the enforcement of 1975 Rules of 1970 Rules in Junior Primary School or Junior High School, as the case may be, in violation of the provisions thereof and without possessing training qualification, such petitioners cannot be allowed to undergo

training pursuant to the Government Order dated 6.9.1994. Thus, only those petitioners-respondents, who fulfill all the aforesaid requirement and directions, shall be allowed to complete their training and their result shall also be declared."

4. Thereafter a recall application was also filed in the aforesaid appeal which was heard at length and decided vide order dated 04.09.2009. With reference to statutory rules this Court noticed contentions of Sri Ashok Khare, learned Senior Advocate and held as under:

"Thus, under the Rules, there is a clear mandate that a person who does not possess requisite qualification shall not be appointed. Therefore, after the enforcement of the above two set of Rules, any appointment, if made on the post of Assistant Teacher in a Primary School governed by the aforesaid Rules, without adhering to the above Rules, is clearly in the teeth of the aforesaid Rules. In the absence of any provision empowering the State Government or any other authority to relax any of the provision pertaining to qualification etc. under the rules, such appointment cannot be said to be valid in law. However, since the appointment of none of the petitioners-respondents were under challenge before us, we did not quash their appointments but while considering the question of the applicability of the Government Order dated 6.9.1994, we have to read the aforesaid Government Order in order to make it valid, consistent with the aforesaid Rules. It is well settled that an executive order which is inconsistent with a statutory rule is invalid and cannot be acted upon. We, therefore, by making the observation that the Government Order dated 6.9.1994 permitting training to such Assistant Teacher, who are working and were appointed before the enforcement of 1975 and 1978 Rules, as the case may be, in the institution governed by the aforesaid Rules respectively, would only be governed by the said Government Order dated 6.9.1994, have tried to harmonize the Rules as well as the said Government Order. The aforesaid Government Order cannot be read in a manner so as to validate appointments made in the teeth of the statutory rules particularly when the Rules do not confer any power of relaxation either on the State Government or any other authority.

The contention that the State Government has not raised any such plea in earlier matters or that during the pendency of the appeal the judgment of the Hon'ble Single Judge has been implemented pursuant to the order passed in the contempt proceeding initiated by the petitioners-respondents would not render the appeal infructuous. We are not impressed that the said subsequent proceeding would amount to rendering the appeal infructuous, inasmuch as, the intra Court appeal has been preferred against the judgment of the Hon'ble Single Judge and the correctness thereof has to be judged by this Court. Merely for the reason that no interim order was passed by this Court and, therefore, during the pendency of the appeal, under the compulsion of the proceeding of contempt initiated by the petitioners-respondents, the appellants acted to implement the judgment of the Hon'ble Single Judge would not deprive the appellants of their right to assail the judgment of the Hon'ble Single Judge before this Court in such manner and to such extent as they find expedient. Any action of compliance in a pending matter, neither would render the statutory remedy

meaningless nor the doctrine of res-judicata has any application in such cases. The issue raised before this Court by the learned Standing Counsel while arguing the appeal was legal and it has to be decided by us in the light of the statutory provisions and the exposition of law applicant in this regard.

The correctness of legal principle observed by us in the judgment could not be disputed by the learned counsel for the applicants. He could not say or argue that the said Government Order if tried to be applied to all the teachers, who have been appointed in contravention of 1975 or 1978 Rules, as the case may be, would be in the teeth of the relevant rules and, therefore, the observation of this Court that in such case the said Government Order will not apply legally is neither erroneous in law nor otherwise can be assailed. But he argued that in view of the subsequent events this Court should refrain from passing any order which may affect the petitioners-respondents otherwise, which submission is not acceptable since this Court is more concern with maintaining rule of law and not to confer whimsical benefit upon certain individuals in breach of law. No other point has been argued and despite having given full opportunity to the learned counsel for the applicants, he failed to point out any error crept in our judgment dated 17.12.2008. We, therefore, do not find any reason to recall the same.

The application is, accordingly, rejected."

5. In view of above decision of Division Bench, after promulgation of statutory rules, mandating that no appointment shall be made if a person does not possess requisite minimum educational qualification including training, the question of engagement of an untrained person after promulgation of rule and thereafter directing him to sent for training, does not arise.

6. In view of above discussion the relief sought cannot be granted.

7. The writ petition lacks merit. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2013

BEFORE
THE HON'BLE RAM SURAT RAM(MAURYA), J.

Civil Misc. Writ Petition No.14404 of 2013

Smt. Prema Devi and Anr. ..Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Naresh Singh
Sri Govind Krishna
Counsel for the Respondents:
C.S.C., Sri Praveen Kumar Giri
Shri Ashok Kumar Maurya

Constitution of India, Art.-226- Petitioner-being landless agricultural labour-granted patta of surplus land-under ceiling proceeding-the tenure holder-revised their choice duly accepted by authorities-consequently parwana issued for delivery of possession-recall application by petitioner already rejected as have no locus to question the validity of ceiling proceeding-challenge made on ground after grant of patta-invested huge amount to make fertile once choice acted upon and plots in question declared surplus can not be reverted back-held-vesting of land under section 14 with state government-right to choice includes right of revise choice also-petition dismissed.

Held: Para-14

So far as the arguments of the counsel for the petitioner that the tenure holder, voluntarily gave choice of the surplus land on 22.08.1980, which has been accepted by the Prescribed Authority by order dated 30.08.1980. The land which was opted for surplus land on 22.08.1980 was infertile land. After allotment, the petitioners invested huge amount and made the land fertile, as such, the tenure holder cannot be permitted to change the surplus land and the tenure holder is estopped from resiling from his earlier admission and give another land as his choice for surplus land, it is stated that no question of admission arise at all. Doctrine of estoppel is not applicable against the statute. The statute provides right to the tenure holder to give his choice. Right to give choice includes right to revise choice till the land is vested in State of U.P. under Section 14 of the Act as held above. As such principles of estoppel has no application in this matter. The pattas of the petitioners were temporary and any investment made by them was on their own risk. It will not bind the tenure holder.

Case Law discussed:

AIR 1988 SC 612; (1998) 7 SCC 654; 1977 AWC 407; 1979 AWC 70; 1979 ALJ 274; 1980 ALR 68; 1982 ALJ 134; 1985 RD 14; 1988 RD 134(DB); 2002 (93) RD 736; 1988 RD 723; 2003(95) RD 231.

(Delivered by Hon'ble Ram Surat Ram(Maurya), J.)

1. Heard Sri Govind Krishna and Sri Shiv Naresh Singh, for the petitioners and Standing Counsel and Sri Ashok Kumar Maurya holding brief of Sri Praveen Kumar Giri, for the respondents.

2. The writ petition has been filed for quashing the order of Collector, Mirzapur (respondent-2) dated 22.01.2013, rejecting the representation of the petitioners and holding that lease granted to the petitioners of the surplus land came to an end on 10.09.1996 and 22.11.1996, when the surplus land has been restored to the tenure holder under the provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the Act). It has been further prayed that mandamus be issued directing respondent-2 to protect right, title and possession of the petitioners over the land in dispute.

3. In the proceedings under Section 10 of the Act, initiated against Anand Deo Giri (now represented by respondents-5 and 6), the Prescribed Authority by order dated 31.05.1977 declared certain area of land as surplus with him. Anand Deo Giri filed an appeal from the order of Prescribed Authority. It appears that during pendency of the appeal, Anand Deo Giri gave his choice for surplus land on 22.08.1980, which has been accepted by the Prescribed Authority by order dated 30.08.1980. Thereafter, Deputy Collector, Lalganj, Mirzapur (respondent-4) granted pattas to the petitioners of the surplus land on 13.02.1987 and 11.04.1987. It appears that after decision in the appeal, the tenure holder revised his choice and prayed for taking possession over the land, other than the land mentioned in his choice dated 22.08.1980. Prescribed Authority by order dated 10.09.1996 accepted the revised choice of the tenure holder. The tenure holder then filed an application for restoring possession over the land which was earlier taken as surplus land. The application of the tenure holder was allowed and parwana for restoring possession to the tenure holder over it was issued on 22.11.1996.

4. On behalf of the petitioners, an application for recall of the orders dated 10.09.1996 and 22.11.1996 was filed. Prescribed Authority by order dated 23.07.1997, rejected the application of the

petitioners. Thereafter the litigation between the tenure holder and lease holders was gone before the revenue courts for deleting the mutation of the names of the petitioners and recording the name of the tenure holder over the land, which was earlier declared as surplus by order dated 30.08.1980, which was also decided in favour of the tenure holders.

5. After lapse of about 15 years, the petitioners filed representations dated 18.10.2012 before the Collector that Anand Shekhar Giri and Deo Shankar Mishra (respondent-5 and 6) were terrorizing them and trying to take forcible possession over the land allotted to them. When no order has been passed by the Collector, the petitioners filed Writ-C No. 59569 of 2012 before this Court, claiming for various reliefs. However the writ petition has been disposed of by order dated 29.11.2012, directing the Collector to decide the representations of the petitioners within a period of one months. In compliance of the order of this Court, the Collector by order dated 22.01.2013 held that the surplus land declared by order dated 30.08.1980 had been revised by order of Prescribed Authority dated 10.09.1996 and the surplus land declared by order dated 30.08.1980 was reverted to the tenure holder and parwana for restoring his possession was issued by the Prescribed Authority on 22.11.1996. On the surplus land being reverted to the tenure holder, the leases granted to the petitioners came to an end. The Tahsildar in his report has mentioned that after 1998, the tenure holder was in possession over the land in dispute and the pattedars were not in possession. Since, surplus land has been reverted to the tenure holder as such the petitioners are not entitled to get possession over it. On these findings representations of the petitioners have been rejected. Hence this writ petition has been filed.

6. The counsel for the petitioners submitted that petitioners were granted pattas of the surplus land according to the provisions of Section 27 of the Act in the year 1987. Their names were duly mutated in the revenue records. No proceeding for cancellation of the pattas of the petitioners has ever been initiated under Section 27 (4) of the Act, nor their pattas have been cancelled. The petitioners have become bhumidhar with non-transferable right of the land allotted to them under Section 131 (d) and Section 131-B of U.P. Act No. 1 of 1951. The petitioners are not liable to be dispossessed from the land in dispute. The Collector is bound to restore and protect the possession of the petitioners over the land in dispute. The tenure holder, voluntarily gave choice of the surplus land on 22.08.1980, which has been accepted by the Prescribed Authority by order dated 30.08.1980. The land which was opted for surplus land on 22.08.1980 was infertile land. After allotment, the petitioners invested huge amount and made the land fertile, as such, the tenure holder cannot be permitted to change the surplus land. The tenure holder is estopped from resiling from his earlier admission and give another land as his choice for surplus land. The petitioners, who are landless agricultural labourers, will suffer grave hardship in case they are dispossessed from the land allotted to them as they have invested huge amount in developing the land in dispute after its allotment to them. He submits that as the various allegations made in the writ petition have not been controverted by

any of the respondents as such be accepted as correct.

7. I have considered the arguments of the parties and examined the record. The first point arises as to whether the various allegations made in the writ petitions are liable to be accepted as proved as no counter affidavit has been filed in the writ petition, controverting those facts. Basic principle of the Evidence Act as contained in Section 101 is whoever desires any Court to give judgment as to any legal right dependent on the existence of facts which he asserts must prove that those facts exists. Supreme Court, in **Governing Body of Dayanand Anglo Vedic College Vs. Padmanabha Padhy, AIR 1988 SC 612** held that burden of proving necessary facts for grant of relief is on the writ petitioner and in the absence to necessary evidence to prove the allegations, the desired relief cannot be granted. It is also well established that the various facts mentioned in the impugned order, will be taken to be correct unless contrary is proved. Theory of un-controverted affidavit has been applied while granting relief in the restoration/recall application. So far as title over the immovable properties is concerned, no decree or order can be granted in the absence of unimpeachable evidence establishing the title and only for the reasons that affidavit remained un-controverted or the allegation has been accepted by the other side.

8. The Collector has recorded the findings in the impugned order that the tenure holder had revised his choice of the surplus land which has been accepted by the Prescribed Authority by order dated 10.09.1996 and the surplus land which he had voluntarily given on 22.08.1980 has been changed. Thereafter, Prescribed Authority issued parwana dated 22.11.1996 for restoration of the possession of the tenure holder over the land which was earlier declared as surplus by order dated 30.08.1980. Jageswar, husband of petitioner-1 filed an application for recall of the orders which was rejected by the Prescribed Authority on 23.07.1997. From the report of Tahsildar, the tenure holder is in possession over the land in dispute since 1998. The petitioners have not denied nor challenged in the writ petition that these facts are incorrect. Thus the cause of action arose to the petitioners in the year 1996 and their application for recall of the orders dated 10.09.1996 and 22.11.1996 has been rejected on 23.07.1997. These orders have not been challenged and allowed to become final. After 15 years of the aforesaid orders, second round of litigation has been started without any basis.

9. The petitioners have filed photostat copies of the pattas granted to them. It is blurred at various places. Neither the date of patta nor period of lease has been mentioned in it. In the khatauni filed as Annexures-3 and 4 of the writ petition, the names of the petitioners were recorded for interim period as such from the khatauni it appears that the land in dispute was let out to the petitioners for a limited period and they cannot acquire right of 'bhumidhar with non-transferable right' over the land allotted to them under Section 131 (d) and Section 131-B of U.P. Act No. 1 of 1951. On the land being reverted to the tenure holder, the pattas automatically came to an end.

10. The other point argued by the counsel for the petitioner that the tenure

holder voluntarily gave his choice on 22.08.1980 as such he was estopped from changing the choice of surplus land. Section 9 of the Act, requires that as soon as may be after the date of enforcement of the Act, the Prescribed Authority shall, by general notice, published in the Official Gazette, call upon the tenure holder holding land in excess of the ceiling area applicable to him on the date of enforcement of this Act, to submit him within 30 days of the date of publication of this notice, a statement in respect of all his holdings in such form and giving such particulars as may be prescribed. The statement also indicate the plot or plots for which he claims exemption and also those, which he would like to retain as part of ceiling area applicable to him under the provisions of this Act. If a tenure holder fails to submit his statement under Section 9 of the Act, the Prescribed Authority shall issue notice to the tenure holder under Section 10 of the Act, which will contain statement of the plots proposed to be declared as surplus land. Sections 11 and 12 deal with the determination of surplus land by the Prescribed Authority and Section 13 provides for appeal from the order of Prescribed Authority. Section 14 of the Act provides for acquisition of surplus land by the Collector at any time (i) in case where the order passed under Sub-Section (1) of Section 11 has become final, or (ii) in case where no appeal has been filed under Section 13, the date of expiry of the period of limitation provided therefor or (iii) in case, where an appeal has been preferred under Section 13, the date of its decision.

11. Under Section12-A of the Act the Prescribed Authority is required to determine the surplus land. Under this section, it has been provided that 'as far as possible' the Prescribed Authority shall accept choice indicated by the tenure holder. Supreme Court in **Rajendra Singh v. State of U.P., (1998) 7 SCC 654** held as follows:

"Section 9 provides that the prescribed authority shall by a general notice published in the Official Gazette, call upon every tenure-holder holding land in excess of the ceiling area applicable to him, to submit a statement in respect of all his holdings wherein he shall also indicate the plots which he would like to retain as part of his ceiling area. It is this choice which is referred to in Section 12-A and it is provided that the prescribed authority shall, as far as possible, accept the choice indicated by the tenure-holder as to the plots which he would like to retain as part of his ceiling area. It is at this stage that the discretion can be exercised by the prescribed authority and he may not take over those plots as part of the surplus area. It is thus "discretion" and not "compulsion" which constitutes the core of this statutory provision. It is obvious that before taking over any area as surplus area or leaving any area as ceiling area of the tenure-holder, the prescribed authority shall first take into consideration the choice indicated by the tenure-holder and if it is not possible to act wholly upon the choice, for which there may be a variety of reasons, the prescribed authority will proceed in his own way to leave the area determined by him as the ceiling area with the tenure-holder and take over the other area as surplus area."

12. Thus from the aforesaid proposition, it is clear that stage of considering the choice come at the time of taking possession over the surplus land. It has been consistently held by this Court in **Bharat alias Bharat Singh Vs. State, 1977 AWC 407, Bhagwan Swaroop Vs. State 1979 AWC 70, Tek Chandra Vs. State, 1979 ALJ 274, Balesar Vs. State, 1980 ALR 68, Smt. Ram Kali Vs. State**

of U.P., 1982 ALJ 134, Raj Kumar Vs. State, 1985 RD 14, Charan Singh Vs. State, 1988 RD 134 (DB), Shashi Kant Rai Vs. State, 2002 (93) RD 736, that tenure holder can revise his choice till his right is extinguished under Section 14 of the Act. The discretion vests in the Prescribed Authority to accept the choice. The Prescribed Authority by his order dated 11.09.1996 has accepted the revised choice of the tenure holder.

13. It has been further held by this Court in **Moti Lal Vs. State of U.P., 1998 RD 723 and Chidda Vs. Azizur Rehman, 2003 (95) RD 231** that allottees have no right to challenged the order of the Prescribed Authority accepting choice of the tenure holders.

14. So far as the arguments of the counsel for the petitioner that the tenure holder, voluntarily gave choice of the surplus land on 22.08.1980, which has been accepted by the Prescribed Authority by order dated 30.08.1980. The land which was opted for surplus land on 22.08.1980 was infertile land. After allotment, the petitioners invested huge amount and made the land fertile, as such, the tenure holder cannot be permitted to change the surplus land and the tenure holder is estopped from resiling from his earlier admission and give another land as his choice for surplus land, it is stated that no question of admission arise at all. Doctrine of estoppel is not applicable against the statute. The statute provides right to the tenure holder to give his choice. Right to give choice includes right to revise choice till the land is vested in State of U.P. under Section 14 of the Act as held above. As such principles of estoppel has no application in this matter. The pattas of the petitioners were temporary and any investment made by them was on their own risk. It will not bind the tenure holder.

15. In view of the aforesaid discussion, the writ petition has no merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.31181 of 2013

Satyam Kumar and Anr. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioners:
Sri Haribans Singh, Sri Chandrika Prasad

Counsel for the Respondents:
C.S.C., Sri Devesh Vikram

Constitution of India, Art.-226- Married couple-seeking protection of their matrimonial life-marriage certificate issued by an advocate-as marriage officer-while no any advocate has been given such power-though out the state-due to death of such erring advocate no question of drastic action-no protection can be given.

Held: Para-10
No advocate has been delegated or assigned any powers of the Marriage Officer, therefore, the aforesaid Kamta Prasad is not a person authorized to act as a Marriage Officer and to register any marriage. The aforesaid marriage certificate as such is a nullity and a void document.

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

1. Heard Sri Chandrika Prasad, learned counsel for the petitioners and Sri Devesh Vikram, learned counsel for the respondent No.4. Learned Standing Counsel has appeared for respondents No. 1,2 and 3. Sri Daya

Shankar Pandey, Nagar Magistrate/Marriage Officer, Nagar Khestra, Mirzapur is also present.

2. Petitioners Satyam Kumar and Meera Singh Yadav have jointly filed this petition seeking protection to their married life on the allegation that they have married of their own freewill before the Marriage Officer on 10.1.2012. The affidavit in support of the petition is sworn by petitioner No.2 Meera Singh Yadav.

3. Sri Devesh Vikram on behalf of respondent No.4 has filed counter affidavit which is sworn by none other than petitioner No.2 Meera Singh Yadav.

4. The two affidavits on record are in conflict with one another. In one affidavit petitioner No.2 states that she has married with petitioner No.1 and in the other she denies the marriage.

5. It appears that petitioner No.2 submitted the first affidavit on the dictates of petitioner No.1 with whom she is said to have married. Her other affidavit which is in the form of counter affidavit appears have been given by her under-pressure from her father as presently she is in his care and custody.

6. Petitioner No.2 Meera Singh Yadav, is present in court. She states that she is presently living with her parents but is not happy as she wants to live with petitioner No.1 and does not want to remarry with any person of the choice of her parents. However, she is unable to explain as to in what way or manner her marriage with petitioner No.1 was solemnized. She says that the marriage took place before the Registrar of Marriage/Marriage Officer.

7. The Marriage Officer, Mirzapur is present with the record i.e. the register and he informs that no marriage between the petitioners was ever solemnized or registered before him on 10.1.2012 and the marriage certificate which has been enclosed with the writ petition as part of annexure-4 is not a certificate which has been issued from his office.

8. A perusal of the aforesaid marriage certificate on page 22 of the writ petition reveals that it does not anywhere bear the name and seal of the said Marriage Officer, District Mirzapur rather it discloses that it has been issued by one Kamta Prasad, M.A., B.Com. L.L.B. Advocate exercising power of the Marriage Officer.

9. Sri Pandey, confirms that the aforesaid Advocate was never a Marriage Officer authorized to register any marriage.

10. No advocate has been delegated or assigned any powers of the Marriage Officer, therefore, the aforesaid Kamta Prasad is not a person authorized to act as a Marriage Officer and to register any marriage. The aforesaid marriage certificate as such is a nullity and a void document.

11. In view of the aforesaid facts and circumstances, as there is no reliable proof of marriage of the petitioners, their marriage cannot be recognized in law specially in exercise of writ jurisdiction.

12. The marriage, if any, between the petitioners would be subject to declaration of their rights/status thereof by the competent court or due and proper registration of their marriage in accordance with law.

13. The court wanted to take stern action against the advocate issuing the

marriage certificate unauthorizedly but the learned Standing Counsel informs that on inquiry being made from the residence of the aforesaid Advocate it has been revealed that he has died on 22.12.2012 and his death is registered with the Registrar of births and deaths Mirzapur. In view of the above and the photocopy of death certificate produced which is taken on record, no action for unauthorizedly issuing marriage certificate can be taken against the Advocate.

14. Accordingly, the protection which has been claimed in this writ petition cannot be extended to any of them. No case for exercise of discretion in favour of the petition has been made out.

15. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.32662 of 1993

Ratan Samaj High School ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri R.N. Bhall, Sri R.C. Pal

Counsel for the Respondents:
S.C.

U.P. High School & Intermediate Education(Payment of salaries of Teacher and other employee)Act 1971-Section 13-A- Payment of salary-Junior High School running under grant in aid-after upgradation all teaching and non teaching staff denied salary from state fund-held-entitled for salary from state exchequer.

Held: Para-13

In view of the above, I am of the view that even prior to insertion of Section 13-A in Act 1978 on 1.11.2000, the position of law was same, namely the teacher and the staff of Junior High School, which was aided prior to upgradation to High School, will continue to get the salary and allowances from the State Government even after upgradation to High School. To remove the doubt, Section 13-A has been inserted in Act 1978, which clearly stipulate the above position. Section 13-A is, therefore, clarificatory in nature and applies retrospectively.

Case Law discussed:
1998(1) LBESR 471; (2001) 1 UPLBEC 213; 2003-LBESR-2-671; (1994) 3 UPLBEC 2037; (2001) 1 SCC 43; 2010(1) ESC 44 (SC).

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

1. Heard Sri R.C. Pal, learned counsel for the petitioner and Sri Pankaj Rai, learned Standing Counsel.

2. The undisputed facts of the present case are that the petitioner was running a Junior High School. The institution was covered under the provisions of the U.P. Recognised Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 (hereinafter referred to as the Act 1978). Since the Junior High School was under the grant-in-aid, therefore, the salary of the staff was being paid by the Basic Shiksha Adhikari and Basic Lekha Adhikari, Agra. On 22nd March, 1993, by the order of the Regional Secretary, Madhyamik Shiksha Parishad, Meerut, the Institution has been upgraded from Junior High School to High School level and the same has been granted recognition. Aid was not given to the level of High School by the State Government and, therefore, it did not fall within the purview of the U.P. High School and Intermediate Education (Payment of Salaries of Teachers and other Employees) Act, 1971.

3. It appears that up to the June, 1993, the staff of the Junior High School had received the salary from the respondent nos. 3 and 4, but thereafter the payment of salary has been stopped. The payment of salary has been stopped on the ground that after upgradation to High School it ceases to be Junior High School and does not fall within the purview of Act 1978.

4. Challenging the action of the respondent nos. 3 and 4, the petitioner filed the present writ petition. On 15th September, 1993, as an interim measure, this Court has directed respondents to pay the salary to the staff of the petitioner institution as it was being paid till June, 1993.

5. The question involved in the present writ petition is whether after upgradation to the High School, the staff of the Junior High School, who were getting the salary from respondent nos. 3 and 4, the institution being under the grant in aid, are entitled to get the salary from the State Government.

6. Learned counsel for the petitioner submitted that when the petitioner-institution was Junior High School, it was under the grant in aid and the staff of the Junior High School was getting salary from the respondent nos. 3 and 4 and even after the upgradation to the High School, they are entitled to get the salary till the institution falls within the purview of Act of 1971. He submitted that for the payment of salary during the transitory period, the Legislature has inserted Section 13-A in Act of 1978. The said Section is clarificatory in nature. He further submitted that the issue involved in the present petition is squarely covered by the decision of the Division Bench of this Court in the case of **Dev Murti Shukla v. State of U.P. and others, in Writ Petition No. 21602 of 1987**, which has been followed by another Division Bench of this Court in the case of **Ramesh Chandra Yadav v. State of U.P. and others, reported in 1998(1) LBESR 471 and has also been followed by the Learned Single Judge of this Court in the case of Committee of Management, Shaheed Bhawani Dutt Joshi (Ashok Chakra) Higher Secondary School, Chaprun Tharali, Chamoli v. State of U.P. and others, reported in (2001) 1 UPLBEC 213**. He also placed reliance on the decision of the learned Single Judge of this Court in the case of **Nasiruddin Siddiqui v. State of U.P., reported in 2003-LBESR-2-671 and Ram Singh Savita and others v. State of U.P. and others, reported in (1994) 3 UPLBEC 2037.**

7. Learned Standing Counsel submitted that once the institution was upgraded to the High School, it ceases to be Junior High School and, therefore, the provision of the Act 1978 does not apply and the salary to the staff of the Junior High School cannot be given by the Government.

8. I have considered rival submissions.

9. The issue involved in the present case is no more **res intigra**. In the case of **Dev Murti Shukla vs. State of U.P. (Supra)**, under the similar circumstances that the institution was Junior High School and was under the grant in aid, but after upgradation to the High School, it was not under the grant in aid and, therefore, the salary to the staff of the institution has been denied by the State Government, the Division Bench of this Court, on the aforesaid facts, has directed the concerned

authorities to pay the salary and other emoluments to the duly appointed staff of the College. In the case of **Ramesh Chandra Yadav v. State of U.P. and others (Supra)**, following the decision of the Division Bench in Dev Murti Shukla's case, a direction has been given to pay the salary to the duly appointed employees. The aforesaid two decisions have been followed by the learned Single Judge in the case of **Nasiruddin Siddiqui v. State of U.P. (supra), and Ram Singh Savita and others v. State of U.P. and others** (supra).

10. It appears that in order to clarify the position, the Legislature has introduced Section 13-A in Act 1978 by U.P. Act No. 34 of 2000, published in U.P. Gazette, Extra, Part I, Section (Ka) 1st March, 2000, which reads as follows:-

"13-A. **Transitory provision in respect of certain upgraded institutions**.- (1) Notwithstanding anything contained in this Act, the provisions of this Act shall, mutatis mutandis, apply, to an institution which is upgraded to High School or Intermediate standard and, to such teachers and other employees thereof in respect of whose employment maintenance grant is paid by the State Government to such institution.

(2)For the purpose of this section the reference to the students wherever they occur in Section 5, shall be construed as reference to the students of classes up to junior high school level only."

11. It is clear that Section 13-A has been introduced to protect the interest of those Junior High School Institutions, which were under the grant-in-aid and subsequently upgraded to High School and were not getting any maintenance aid from the State Government. It provides for payment of salary to the teachers and other staff of such institutions, who were duly appointed and in respect of whose employment maintenance grant is paid by the State Government to such institution.

12. In the case of **State of U.P. and others vs. Ram Charitra (2001) 1 SCC 43**, the Apex Court has held that the position was same even prior to insertion of Section 13-A in the Act of 1978.

13. In view of the above, I am of the view that even prior to insertion of Section 13-A in Act 1978 on 1.11.2000, the position of law was same, namely the teacher and the staff of Junior High School, which was aided prior to upgradation to High School, will continue to get the salary and allowances from the State Government even after upgradation to High School. To remove the doubt, Section 13-A has been inserted in Act 1978, which clearly stipulate the above position. Section 13-A is, therefore, clarificatory in nature and applies retrospectively.

14. It will also be useful to refer a recent decision of the Apex Court in the case of **State of U.P. and others v. Committee of Management, Mata Tapeswari Sarswati Vidya Mandir and others, reported in 2010 (1) ESC 44 (SC).** Though this decision is not directly on the issue involved, but it has some bearing on the issue. In the said case, the Junior High School Sections were not under the grant in aid. They have been denied benefit of grant in aid. The expectation of the institution were negated when by the notification dated 7th September, 2006, the Directorate of Basic Education, U.P., decided to bring one thousand unaided permanently recognised (A-Class) Junior High Schools on its grant in aid list, but included a

condition. It was categorically indicated that the institution imparting education below or higher than Class 6 to 8 would not be eligible to apply. As a result of the above, some institutions were completely excluded from the grant in aid list scheme inasmuch as a decision had been taken by the State Government not to provide grant in aid to educational institutions of Junior High School after their upgradation as High School or Intermediate College and an exception was made in respect of the institutions, which had been receiving grant in aid for their Junior High Schools Sections, despite the fact that the said institution had been upgraded. In the writ petition, Condition No. 2(iii) and Condition No. 12 of the Government Order dated 7th September, 2006 were challenged. Learned Single Judge has allowed the writ petition and quashed the aforesaid two conditions being discriminatory and violative of Article 14 of the Constitution of India. The decision of the learned Single Judge has been upheld in the Special Appeal. The State Government filed Appeal before the Apex Court. The Apex Court has upheld the order of the learned Single Judge and the order of the Division Bench in Special Appeal. In the said decision, it has been held that when one thousand educational institutions were to be provided such benefit, non-inclusion of the respondent institutions from being considered for the grant in aid for the Junior High School Sections is wholly unjustified and cannot be sustained, merely because on account of the cut off date of grant of recognition. They had not been brought within the ambit of grant in aid scheme on account of their seniority position, namely, upgradation to the High School. The Apex Court has also considered Section 13-A inserted in 1978 Act, which provides assistance to those institutions, which had already been covered by the grant in aid scheme. The aforesaid position of law is only beneficial for the limited purpose that even after upgradation to the High School, Junior High Schools were held entitled for the benefit of the grant in aid.

15. In view of the foregoing discussions, the writ petition is allowed. The respondents are directed to pay the salary to the staff of the Junior High School of the petitioner-institution, who were duly appointed till the institution may come within the purview of 1971 Act.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2013
BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.33172 of 2013

Narendra Pal Singh and Anr. .Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Pal

Counsel for the Respondents:
C.S.C., Sri Garun Pal Singh

Constitution of India, Art.-226- Protection of married couple-date of birth of girl as stated by petitioner-15.02.95-as per report date of birth shown 15.12.96-as per record of board-date of birth found mentioned as 15.12.96-certificate produced by petitioner being forged document-petition dismissed with cost of rs. 25000/-further direction to lodge FIR.

Held: Para-13&14

13. The Deputy Secretary, U.P. Board who has produced record on examining the original certificate as produced by learned counsel for the petitioners states that the certificate is not genuine as there is a colour difference and the paper used therein is not stout enough.

14. In view of the above, the original certificate produced by learned counsel for the petitioners and the copy as annexed with the writ petition is apparently forged and fictitious which has been filed to deceive the Court so as to obtain favourable order.

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

1. Heard Sri Rajesh Kumar Pal, learned counsel for the petitions and learned Standing counsel for the respondents. Sri Garun Pal Singh has appeared for respondent no. 4.

2. In the petition it has been stated that the petitioners have married on 11.5.2013 at Radha Rani Mandir, Mathura. Since the petitioners have married against the wishes of their parents, the respondents especially the parents of petitioner no. 2 are interfering in their married life and there is danger to their life and liberty. Therefore, in the petition they have prayed for a direction commending the respondents not to interfere in their peaceful matrimonial life and to provide security to them.

3. The petition is supported by the affidavit of petitioner no. 1.

4. In paragraph 4 of the petition it has been stated that the date of birth of petitioner no. 2 is 15.2.1995 and in support thereof photo copy of the certificate cum mark sheet of the High School examination 2012 of petitioner no. 2 dated 8th June 2012 has been filed wherein her date of birth has been mentioned as 15.2.1995 both in words and number.

5. On the last occasion ie. 30.7.2013 Sri Garun Pal Singh, learned counsel for respondent no. 4 had produced a photocopy of the High School certificate of petitioner no. 2 which disclosed her date of birth as 15.12.1996.

6. Thus, there was a clear discrepancy in the date of birth of petitioner no. 2 as per the certificates produced.

7. Accordingly, learned counsel for the petitioners was asked to produce the original certificate of the photocopy which was enclosed with the petition. The original certificate was readily produced by the counsel and it was taken on record.

8. The original as produced by the learned counsel for the petitioners do disclose the date of birth of the petitioner no. 2 as 15.2.1995.

9. In view of the discrepancy in the date of birth in two certificates produced by the parties, the Secretary of the High School and Intermediate Education, U.P. Board, Allahabad was required to send the complete records relating to the petitioner no. 2 who had appeared in the High School examination 2012 from the ASS Inter College, Mathura and through some competent officer and to present it before Court.

10. In pursuance to the said order, an assistant and the Deputy Secretary of the U.P. Board along with the record, have attended the Court.

11. The record of the Board reveals that petitioner no. 2 Hema, daughter of Shiv Charan and Bhoodevi with Roll No. 0267507 had appeared in the High School examination 2012 as a student of ASS Inter College Kheri Ghari, Mathura and was issued certificate bearing serial no. 0528602 which contains her date of birth as 15.12.1996.

12. The record of the Board establishes that the date of birth of petitioner no. 2 is 15.12.1996 and that no certificate to her was issued mentioning her date of birth as 15.2.1995.

13. The Deputy Secretary, U.P. Board who has produced record on examining the original certificate as produced by learned counsel for the petitioners states that the certificate is not genuine as there is a colour difference and the paper used therein is not stout enough.

14. In view of the above, the original certificate produced by learned counsel for the petitioners and the copy as annexed with the writ petition is apparently forged and fictitious which has been filed to deceive the Court so as to obtain favourable order.

15. Accordingly, as the date of birth of petitioner no. 2 has been established to be 15.12.1996 she is not of a marriageable age and is a minor. Her marriage with petitioner no. 1 solemnized on 11.5.2013 is void in view of Section 5 (iii) of the Hindu Marriage Act, 1955.

16. In the above circumstances, the writ petition is not only dismissed but the Secretary, High School and Inter Medicate Examination Board U.P., Allahabad is directed to lodge a criminal complaint/FIR against the petitioners for fabricating a false and fictitious certificate of the Board and to ensure that the investigation thereof reaches its logical conclusion. The Secretary of the U.P. Board is further directed to take effective steps ensuring that in future no false and fictitious certificate of the Board is manufactured and is used to abuse the process of the Court.

17. The petition is dismissed with cost of Rs. 25,000/- which shall be deposited by the petitioners within two weeks with the District Magistrate, Mathura, failing which the Collector would ensure the recovery of the said amount as arrears of land revenue.

18. The original record produced is permitted to be returned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.34441 of 1996

Veer Singh ...Petitioner
Versus
Dy. Registrar Coop. Societies & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.B.L. Gour

Counsel for the Respondents:
Sri Abhishek Mishra, Sri K.N. Mishra

U.P. Cooperative Societies Act, 1965- Regulation 85- Principle of Natural Justice-dismissal order-without affording opportunity of oral hearing-even if employee failed to participate in disciplinary proceeding-employer bound to proved the charges by oral and documentary evidence-order-unsustainable quashed.
Held: Para-24
Adverting to the case in hand, it is not in dispute that the services of petitioner is governed by Regulations 1975. As the procedure laid down in Regulation 85 thereof was not followed inasmuch as no oral inquiry, as prescribed under Regulation 85 was not held, the impugned order cannot sustain and the writ petition deserves to be allowed.

(B)Disciplinary Authority- being quasi-judicial officer-bound to act as an independent officer-to find truth.

Held: Para-22

It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in the enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case the charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

Case Law discussed:

(2010) 2 SCC 772; (2009) 2 SCC 570; 2000(1) UPLBEC 541; 2001(2) UPLBEC 1475; 2010(1) UPLBEC 216; 2008(3) ESC 1667; (2011) 2 ILR 570; 2012(1) UPLBEC 166; Writ-A No. 43331 of 2000; AIR 1984 SC 273; AIR 1996 SC 1669; (2009) 10 SCC 32.

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

1. Heard Sri A.B.L.Gaur, learned counsel for the petitioner and Sri Abishek Mishra holding brief of Sri K.N.Mishra learned counsel for the respondent.

2. This writ petition is directed against the order dated 31.07.1996, whereby punishment of dismissal has been given to the petitioner after alleged departmental enquiry conducted against him in the matter of certain charges relating to embezzlement and absence etc.

3. It is contended that no oral enquiry has been held by the Enquiry Officer/ Enquiry Committee and merely for the reasons that the petitioner could not attend proceeding before the committee on the date fixed. Enquiry Committee/ Officer submitted report and thereupon the impugned order of punishment has been passed.

4. Learned counsel for the respondent submitted that disciplinary authority had given opportunity of hearing to the petitioner and therefore, it cannot be said that adequate opportunity of defence was not given.

5. Admittedly, conditions of services of petitioner is governed by U.P. Co-operative Societies Employees Service Regulations, 1975 (for short "the Regulations,1975"), framed in exercise of power under section 122- A of the U.P. Co-operative Societies Act,1965 (for short "Act, 1965"). Regulation 85 of

6. A detailed procedure for disciplinary proceedings is provided in Regulation 85. It is apposite at this stage to set out Rule, so far as material:-

"**85. Disciplinary proceedings**:- (i) The disciplinary proceedings against an employee shall be conducted by the Inquiry Officer (referred to in Clause (iv) below) with due observance of the principles of natural justice for which it shall be necessary-

(a) The employee shall be served with a charge-sheet containing specific charges and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charges within reasonable time which shall not be less than fifteen days;

(b) Such an employee shall also be given an opportunity to produce at his own cost or to cross examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires;

(c) If no explanation in respect of charge sheet is received or the explanation submitted is unsatisfactory, the competent authority may award him appropriate punishment considered necessary.

(ii) xxxx"

7. A close look at the gamut of the aforesaid Rule instantly brings out that observance of procedural safe guard is statutory requirement.

8. A long line of decisions have settled that even if the statutes are silent or there are no positive words requiring observance of Natural Justice, yet it would apply unless the statutes specifically provides its exclusion. In the case in hand the rule itself has used the word 'Natural Justice'.

9. It is vehement contention of learned counsel for the petitioner that as procedure for major penalty was initiated, it was mandatory on the part of respondents authority to hold oral inquiry in the matter, but no such inquiry was conducted, therefore, entire proceedings including punishment order is vitiated.

10. The question that calls for determination is whether oral inquiry is necessary when the employer intents to impose major punishment.

11. I may usefully refer to a discussion on this issue by a recent judgments of the Supreme Court and a series of decisions of this Court. The authorities in abundance are available of this Court.

12. The Supreme Court in the **State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772** held that :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant 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. 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 a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

13. Similar view was taken in **Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570:-**

"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."

14. This Court has also taken same view in **Subhas Chandra Sharma v. Managing Director and another reported in 2000(1) UPLBEC 541**:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice.

In **Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719**, the Supreme Court observed "It is an elementary principle that a person who is required to answer a 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 to 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 before the result of the enquiry can be accepted".

In **S.C. Girotra v. United Commercial Bank 1995 Supp. (3) SCC 212**, the Supreme Court set aside a dismissal order which was passed without giving the employee an opportunity of cross-examination. In State of U.P. v. C. S. Sharma, AIR 1968 SC 158, the Supreme Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. The Court also held that in the enquiry witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence. In Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160, (vide para 66) the Supreme Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in **A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396, and in Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).**

Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex-parte enquiry where evidence must be led vide **Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All)."**

15. The above judgment was followed by a Division Bench in **Subhas Chandra Sharma v. U.P.Co-operative Spinning Mills and others reported 2001 (2) UPLBEC 1475** the Court held thus:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in **Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541**, against which SLP has been dismissed by the Supreme Court on 16-8-2000."

16. One of us (Justice Sudhir Agarwal) in **Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported in 2010 (1) UPLBEC 216** observed as under after detail analysis:

"Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in **State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831** as well as by a Division Bench of this Court in **Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541**.

17. The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of **Salahuddin Ansari Vs. State of U.P. and others, 2008(3) ESC 1667** and the Court has clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment.

18. The Division Bench of this Court in the case of **Mahesh Narain Gupta v. State of U.P. and others reported (2011) 2 ILR 570** had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in exparte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. In another case in **Subhash Chandra Gupta v. State of U.P. reported 2012 (1) UPLBEC 166** the Division Bench of this Court after survey of law on this issue observed as under:

"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541."

20. Similar view has been taken in a recent decision of a Division Bench of this Court (of which I was also a member) in **Sohan Lal Vs. U.P. Co-operative Federation Ltd. & Another (WRIT - A No. 43331 of 2000** decided on 11th January, 2013).

21. The principle of law emanating from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

22. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in the enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case the charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

23. I may hasten to add that the a above mentioned law is subject to certain exception. When the facts are admitted or no real prejudice has been caused to employee or no other conclusion is possible, in such situation the order shall not be vitiated.

Reference may be made to the some of the decision of Supreme Court in **K.L.Tripathi v. State Bank of India reported AIR 1984 SC 273 ; State Bank of Patiala v. S.K. Sharma reported AIR 1996 SC 1669 and Biecco Lawrie Ltd. v. West Bengal reported (2009) 10 SCC 32.**

24. Adverting to the case in hand, it is not in dispute that the services of petitioner is governed by Regulations 1975. As the procedure laid down in Regulation 85 thereof was not followed inasmuch as no oral inquiry, as prescribed under Regulation 85 was not held, the impugned order cannot sustain and the writ petition deserves to be allowed.

25. In the result, the writ petition is allowed. The impugned orders dated 31.07.1996 (Annexure-10 to the writ petition) is hereby quashed. Petitioner shall get all consequential benefits. However, the respondents shall be at liberty to pass fresh order in accordance with law.

26. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Civil Misc. Writ Petition No.35332 of 2013

Smt. Samya Chaudhary ...Petitioner
Versus
The Union of India & Ors. ..Respondents

Counsel for the Petitioner:
Archana Singh
Counsel for the Respondents:
A.S.G.I., Sri Vikas Budhwar

Constitution of India, Art.-226- Doctrine of promissory Estoppel-explained-petitioner applied for dealership L.P.G.-on draw of lots found selected-on spot verification certain short comings highlighted-instead of producing regd. lease deed-petitioner given notary affidavit-if allowed to continue-amount to continue illegalities for ever-in absence of minimum eligibility criteria-no question of applicability of promissory estoppel.

Held: Para-31-
In view of above discussion, it transpires that though ground no. 1 on which candidature of the petitioner has been rejected is not sustainable in law, the second ground is valid and legal and the candidature of the petitioner has rightly been cancelled as she did not meet the minimal eligibility criteria of having a registered lease on the date of the application. A fortiori, no exception can be taken to the ultimate decision of the BPCL cancelling the candidature of the petitioner.

Case Law discussed:
2008(3)AWC 2987; (2008) 9 SCC 31; (2000)7 SCC 529; (2011) 10 SCC 420; (2012) 11 SCC 1; (2003) 1 SCC 152.

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. Aggrieved by order dated 30.5.2013, whereby the petitioner was informed by the Bharat Petroleum Corporation Limited (for short "BPCL") that upon field verification, the information furnished by her in the application for LPG distributorship was found to be at variance and, therefore, her candidature is being rejected, has filed the instant writ petition for quashing the aforesaid order and for commanding BPCL to offer the LPG distributorship in question to the petitioner.

2. During pendency of the writ petition, the petitioner came to know that

BPCL is proceeding to hold re-draw for selection of LPG distributorship from amongst the remaining eligible candidates and the aforesaid action was also subjected to challenge by filing an amendment application, which was allowed. Yet another amendment was sought challenging the order dated 21.6.2013 whereby the representations made by the petitioner vide her letters dated 7.6.2013 and 17.6.2013 were rejected. The said amendment was also duly allowed by order dated 24.7.2013.

3. The facts in brief giving rise to the instant petition are that the petitioner had applied for LPG distributorship at Naubasta, Kanpur under SC Category pursuant to the advertisement dated 22.10.2011. The Territory Manager, LPG, BPCL, Lucknow informed the petitioner that there are certain shortcomings in the affidavits submitted by her and she was required to remove the defects by 8.2.2013. Pursuant thereto, the petitioner claims to have submitted a fresh affidavit, and thereafter by letter dated 28.2.2013 sent by Territory Manager, LPG, Lucknow she was informed that she has qualified for the draw of selection of LPG distributorship to be held on 21.3.2013 and she may remain personally present on that date. According to the petitioner, she was successful in the draw of lots and thereafter field verification was carried out to ascertain her credentials and to verify the information submitted by her in the application. At the time of field verification, it was noticed that in the registered lease-deed of the land, which was offered by her for construction of godown, by inadvertence, in place of Plot No. 1040, Plot No. 1050 has been mentioned. On coming to know of the said typographical error, she immediately got the registered lease rectified by getting a registered titimma executed on 8.5.2013 in which it was mentioned that in the original lease deed, in place of plot no. 1050, the correct plot no. 1040 be read. The further case of the petitioner is that she immediately intimated the BPCL vide her letter dated 9.5.2013 that the mistake in the registered lease deed has been corrected by substituting plot No. 1040 in place of plot no. 1050. According to the petitioner, no further discrepancy was found in the field verification. However, she was taken aback on receipt of the impugned order dated 30.5.2013 whereby her candidature has been rejected. The relevant portion of the aforesaid letter containing two grounds is reproduced below:

"We regret to inform you that upon field verification of the information submitted by you in your application mentioned above, the following variance was observed.

(1) In your application, you have offered a land at Khasra No. 1050 with size of 27 m x 27 m. However, on verification it has been found that the land bearing Khasra No. 1050 is measuring 100 sq. m only (approx 6.5 m x 15.5 m) and does not meet the requirement of minimum dimensions for LPG Godown. Further, an HT electricity line is also passing through the above plot of land. Hence, land has not been found suitable for LPG Godown as per Clause 7.1(vi) of the brochure for Selection of Distributors.

(2) You have submitted a Notarised Rent Agreement for Showroom and not the Registered Lease Deed as per terms & conditions of the advertisement. Therefore, the shop for Showroom is not suitable as per Clause 7.1 (vii) of the brochure for Selection of Distributors."

4. According to the petitioner, Ground No. 1 on which her candidature

has been rejected is manifestly erroneous in law. She duly got the registered lease-deed(with respect to the plot of land meant for construction of godown) corrected, by execution of a rectification deed (titimma dated 8.5.2013) and which relates back to the date of execution of the original lease deed dated 16.11.2011. The typographical error in the original lease deed was duly brought to the knowledge of the Officers carrying out the field verification and they were requested to submit their report with reference to the boundaries of the land as mentioned in the registered lease deed dated 16.11.2011, but they wrongly took measurement of Khasra no. 1050 . They committed further illegality in submitting their report with reference to Khasra No. 1050. According to the petitioner, if the officers would have verified the land according to the boundaries shown in the registered deed dated 16.11.2011, it would have transpired that it meets the requirement both in terms of dimensions and the location. No high tension electricity line passes over plot no. 1040 which was actually demised by lease deed dated 16.11.2011 and thus, the first ground on which her candidature has been rejected is not sustainable in law.

5. On the other hand, Sri Vikas Budhwar, learned counsel for BPCL submitted that there is no infirmity in the decision of the BPCL rejecting the candidature of the petitioner. According to him, the petitioner has clearly mentioned in her application that the plot of land being offered for construction of godown bears khasra plot no. 1050 and in such circumstances the field verification of khasra plot no. 1050 was rightly carried out. He submits that subsequent rectification of lease deed cannot have the effect of removing the defects which was in existence at the time of submission of the application. He placed reliance on Clause 7.1 of the brochure in emphasizing that the ownership of the land offered for construction of godown has to be seen as on the date of application and any subsequent exercise to remove the defects or to change the location of the site cannot be taken into consideration. He thus, stoutly protected the action of the BPCL.

6. We have considered rival submissions of the parties and perused the records.

7. Admittedly, the petitioner in her application has offered land measuring 27mx 27m which indisputably meets the requirement for LPG godown. The registered lease deed dated 16.11.2011 was admittedly produced at the time of field verification. It is evident therefrom that the boundaries of the land offered for construction of LPG godown were as follows:

East : Property of Lokendra Dwivedi
West: Remaining part of the land.
North: Remaining part of the land.
South: Road.

8. The case of the petitioner is that on account of typographical error, plot no. 1050, was wrongly mentioned in place of plot no. 1040 in the registered lease deed. She claims to have informed about the said mistake to the officers carrying out field verification and requested them to inspect the plot of land as per boundaries mentioned in the registered lease deed; however, they did not pay any heed to her request.

9. In case of ambiguity or variance in different clauses of the same document, the real intention of the parties to the contract is to be culled out. For such

purpose, even aid of extrinsic evidence can be taken. Thus, where discrepancy was noticed in the area and boundaries mentioned in a registered document, it was held that the boundaries will prevail over the area (vide 2**008 (3) AWC 2987 :Govt and Public Sector Employees Welfare Housing Organisation Vs. State of UP and others**). In the Commentary by S.C. Sarkar on Law of Evidence 14th Edition at Page 1320(Vol.1) the renowned Author has laid down as follows:-

Admissibility of Extrinsic Evidence in Cases of Latent Ambiguity Covered by the Section.— "Where lands are described as lying within certain boundaries, and there is a mis-statement as to the area within such boundaries, the boundaries must prevail and the error in the quantity should be considered as a mere false description [Pahalwan v. Maheswar, 16 WR 5 PC: 9 BLR 150; Zeenat Ali v. Ram Dayal, 18 WR 25; Eshan Ch v. Pratap, 20 WR 224; Shib Ch v. Brojonath, 14 WR 301; Abdul Mannath v. Baroda, 15 WR 394; Mohiuddin v. Sandes, 12 WR 439; Virjivandas v. Md Ali, 5 B 208, see also Tribhoban v. Krishnaram, 18 B 283; Karuppa v. Periathambi, 30 M 397; 2 MLT 336; Harimohan v. Rameshwar, 64 IC 737; Shk Bara v. Rajendra, 64 IC 751; Nga Cho v Mi Se, 10 Bur LT 245; Johri v. Jowahra, 58 IC 67; Ritlal v. Spilingford, 57 IC 2; Narain v. Jawahir, 50 PLR 1922; Bholanath v. Mrityunjoy, 59 CLJ 532, and other cases as to false description noted under s 95]. Where there is seeming inconsistency as between boundaries and the area stated in an instrument, it is permissible to have recourse to extrinsic evidence and evidence of user by acts of parties for the purpose of gathering the real intention [Sattendra v. Girijabhusan, 58 C 686 : A 1931 C 596; Basavapunnareddi v. Krishnayaa, A 1966 AP 260]."

The same principle will apply in case of misdescription of plot number in a document. It is the boundaries which will ordinarily prevail. In the instant case, the correct intent of the parties to the lease-deed became manifest on execution of registered rectification deed dated 8.5.2013 whereby it was clarified that the land which is subject of conveyance is in fact plot no. 1040 and not 1050. Such extrinsic evidence was required to be considered to gather the real intention of the parties to the document in question. Admittedly, a copy of the rectification-deed was duly forwarded to the BPCL on 9.5.2013 much before the impugned order dated 30.5.2013 was passed. In such circumstances, it was incumbent upon the BPCL to have considered the rectification deed submitted by the petitioner and to get a re-inspection done of plot no. 1040. However, BPCL acted in a mechanical manner and without paying any heed to the stand of the petitioner, it illegally rejected her candidature on the basis of their report based on plot no. 1050. In such circumstances, ground no.1 on which the candidature of the petitioner has been rejected cannot be sustained in law.

10. As regards the second ground to the effect that the petitioner was not having registered lease deed of the showroom on the date of application, the petitioner submits that the aforesaid discrepancy was never brought to her knowledge. In case there was any such requirement, the petitioner should have been informed about the same, as was done by the BPCL itself vide its letter

dated 18.1.2013 whereby she was required to remove certain defects in her affidavits. Had such notice been given to her, she would have removed the shortcomings. However, since the impugned decision has been taken without giving any notice or opportunity of hearing to the petitioner, the impugned order cannot be sustained.

11. Refuting the submissions made by the petitioner, Sri Vikas Budhwar submitted that under clause 7.1(vii) of the brochure, it was clearly stipulated that the applicant should own a suitable shop in the advertised locality as on the date of the application. He has referred to the definition of 'ownership' given in the brochure, according to which the applicant should be owner of the property or should have registered lease agreement for minimum period of 15 years in his own name or in the name of family members. He submits that admittedly, the petitioner does not have the registered lease agreement for minimum 15 years with regard to the shop offered by her. The aforesaid fact came to the knowledge of the BPCL on field verification wherein the information given by an applicant in his/her application is verified with the original title documents. He further submitted that the policy relating to settlement of LPG distributorship contemplates two kinds of defects. One which are curable and the other which are not curable and relates to the eligibility of a candidate on the date of the application. He also produced the aforesaid guidelines for perusal of this court at the time of hearing of the writ petition. He placed reliance on Clause 15 and 16 of the aforesaid policy regulating the procedure for selection of LPG distributors. According to it, after last date of submission of applications, the applications are subjected to scrutiny by a committee called "Application Scrutiny Committee" (for short "the committee'). The said committee prepares a list of applicants who were found ineligible due to non-technical reasons and their candidature is rejected outrightly. Another list is prepared in Appendix M-2, which relates to candidates who were found ineligible due to technical reasons. Such applicants are informed by registered post about technical defects in their applications and are given time to rectify the deficiency. According to him, the scrutiny of applications by the committee relates only to the documents which are required to be submitted alongwith the applications, the details of which are given at the foot of the application. These are (i) copy of eligibility certificate for the category applied (ii) demand draft being processing fees (iii) Notarised affidavit in Appendix-1 and (iv) Notarised affidavit in Appendix-2. All other informations are taken to be correct on their face value in view of the declaration made by the applicants to the effect that all information furnished in the application are true and correct. It is only on field verification that the other information given in the applications are verified with original title documents. According to Sri Budhwar, at item no. 10 of the application, the applicants are required to mention the date of registration of sale deed/gift deed/lease deed of the land offered for showroom. Thereunder, the petitioner has mentioned 21.11.2011, and which conveys the impression that the petitioner is owner of the land offered for showroom by virtue of registered sale deed/ gift deed/ lease deed dt. 21.11.2011. The said information was taken to be correct on its face value as alongwith the application, the title documents are not required to be appended and even if appended they are not subjected to scrutiny. The aforesaid exercise, according to the brochure for selection of LPG distributors, is carried out at the stage of field verification.

12. Elaborating his argument, Sri Budhwar further submitted that while carrying out field verification of the credentials, the petitioner was required to produce the original title documents relating to shop offered as showroom. It thereafter transpired that the petitioner is only having a notarised lease deed and not a registered one and wherein the tenancy is from month to month. He placed reliance on clause 2 of the said lease deed, according to which, the tenancy starts on first day of each month and determines at the end of each month. Such a lease deed even if registered in future, will not amount to a lease for a period of 15 years. He further submitted that the subsequent registration even if made, will not cure the defect as according to the terms and conditions of the brochure, the eligibility has to be seen with reference to the date of application. Placing reliance on clause-7 of the brochure, he submitted that the petitioner should be having registered lease on the date of application. The petitioner has deliberately suppressed the aforesaid facts in her application and which was detected at the time of field verification. He submitted that since the information given by the petitioner was found to be at variance with the original documents and since it affects her eligibility, she was rightly informed that her candidature is being rejected.

13. He further submitted that in the circumstances aforesaid, there was neither any requirement for giving show cause notice nor it had in any manner prejudiced the case of the petitioner, consequently, the writ petition should be dismissed.

14. For appreciating rival contentions in this regard, it is necessary to refer to certain clauses of the brochure. Clause 7 lays down the eligibility criteria for the individual applicants. Under clause 7.1 (vii) one of the requirements for eligibility is as follows:

"Own a suitable shop of minimum size 3 metres by 4.5 metre in dimension or a plot of land for construction of shop of minimum size 3 metres by 4.5 at the advertised location or locality as specified in the advertisement as on the date of application. It should be easily accessible to general public through a suitable approach road.

"Own' means having ownership title of the property or registered lease agreement for minimum 15 years in the name of applicant / family member as defined in multiple distributorship norms of eligibility criteria."

15. Thus, one of the requirements for an applicant to be eligible for dealership is that he/she should be owner of or should be having registered lease agreement for 15 years with regard to the land / shop offered for showroom.

16. It has not been disputed before us that requirement of having a registered lease of 15 years was sine qua non for eligibility of a candidate. What has been emphasized is that in case the petitioner would have been intimated about such discrepancy or would have been given show cause notice, she could have got the defect cured by getting the deed registered. Thus, the main emphasis is on the breach of the rule of audi alteram partem.

17. It is true that in the instant case, before cancelling the candidature of the petitioner on the ground that she is not having registered lease deed on the date of application, she was not given opportunity of hearing. However, breach

of principles of natural justice is no more a straight jacket formula rendering the action ipso facto invalid unless it could be shown that non-observance thereof has prejudicially affected the person.

18. In cases where despite non-observance of the principles of natural justice, the ultimate result is bound to remain the same; where there is no other view possible even if opportunity of hearing is afforded to the aggrieved parties, then such are the cases where impugned action cannot be struck down on ground of violation of principles of natural justice nor are such cases required to be remitted back to the authorities for a fresh decision after giving show cause notice or opportunity of hearing, as it will be an empty formality, a mere ritual.

19. The Apex Court in its judgment in the case of **Haryana Financial Corporation and another Vs. Kailash Chandra Ahuja reported in (2008) 9 SCC 31** has considered in great detail the consequence of non-observance of principles of natural justice. The Apex Court has held that the recent trend of judgment is that unless prejudice is shown, the impugned order or action cannot be struck down. It has been observed as under:

"The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

In Malloch Vs. Abendeen Corpn., Lord Reid said : (All ER p. 1283a-b)

"....it was argued to have afforded a hearing to the applicant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer".

(emphasis supplied)

Lord Guest agreed with the above statement, went further and stated: (All ER p.1291b-c)

"...A great many arguments might have been put forward but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way".

20. In **Aligarh Muslim University Vs. Mansoor Ali Khan, (2000) 7 SCC 529**, the Court held that though the rules of natural justice have been violated but the order impugned cannot be set aside as no prejudice has been caused. Referring to several cases, and after considering the theory of "useless" or "empty formality" and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that " had the petitioner been given notice", it "would not have made any difference" and, hence, no prejudice has been caused.

21. In the instant case as well, no purpose will be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, in as much as the defect is incurable; no amount of explanation can change the ultimate result, being a fait accompli. For petitioner can by no means negate the admitted fact that on the date of application she was not having registered

lease of the shop offered for show room for a period of 15 years and therefore did not fulfill the eligibility criteria under clause 7 of the brochure. The clock cannot be put back. Subsequent registration will not cure the defect. Consequently, even if no opportunity of hearing was given to the petitioner, she has not been put to any prejudice and therefore impugned order cannot be set aside on the ground of non observance of principle of natural justice.

22. The second limb of the argument of the petitioner is that as per the guidelines for selection of LPG distributor, the established procedure is to scrutinize the applications and thereafter inform applicants about the defects, if any, and provide opportunity to them, to remove the same.

23. To buttress her aforesaid argument, the counsel for the petitioner has placed reliance on the letter of the Territory Manager, LPG, Lucknow dated 18.1.2013 whereby she was called upon to remove the defects in the affidavit submitted by her as per proforma in Appendix-1 and Appendix-2. She submits that in case at the time of scrutiny, such defect would have been pointed out, she could have got the lease deed registered. She pressed the doctrine of promissory-estoppel against BPCL.

24. Perusal of the scheme for selection of LPG distributorship, copy whereof was passed on to the Court at the time of hearing of the writ petition, it transpires that the defects noticed by the scrutiny committee are to be categorised in 2 classes; the first being of those applicants who were found ineligible due to non-technical reasons and list thereof is to be prepared in Appendix-M-1. The other list in Appendix- M-2 is of applicants found ineligible due to technical reasons. Clause 16 requires that in case of applicants under Appendix-M-2, an opportunity is to be given to them to remove the deficiency. In the case of the petitioner as well, the affidavit submitted by her did not bear her signatures and there were certain other technical defects therein and she was given opportunity to rectify such defects. However, the defect relating to non registration of the lease as on date of application cannot be said to be a technical defect for which any notice is required to be given to the petitioner or defect wherein could be cured, in as much as, the requirement was to have a registered lease deed on the date of the application. The defect was fatal in nature. In such cases , no notice was required to be given as per clause 16 of the guidelines for selection of LPG distributors.

25. Other limb of the argument is the plea of promissory estoppel. Before examining the plea of promissory estoppel, it is useful to refer to certain decisions of the Apex court. In one of the recent judgements, in the case of **Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Ltd. (2011) 10 SCC 420**, it was held that :

34. "A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao,

CIT v. V.M.R.P. Firm Muar, Maharashtra SRTC v. Balwant Regular Motor Service, P.R. Deshpande Vs. Maruti Balaram Haibatti, Babu Ram v. Indra Pal Singh, NTPC Ltd. V. Reshmi Constructions, Builders & Contractors, Ramesh Chandra Sankla Vs, Vikram Cement and Pradeep Oil Corpn vs. MCD.)

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

26. In **Monnet Ispat & Energy Ltd. vs. Union of India (2012)11 SCC 1**, the Apex Court, after considering catena of decisions, spelled out the broad principles which are to guide a court when issue of applicability of promissory estoppel arises. They are :-

182.1. Where one party has by his words or conduct made to the other clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

182.2. The doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it.

182.3. The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action.

182.4. For invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise.

182.5. In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or

promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

182.6. It is necessary for invocation of the doctrine of promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel.

182.7. The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the Court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it must not hold the Government or the public authority to its promise, assurance or representation.

Now, we proceed to examine the plea of promissory estoppel on the basis of above principles.

27. Perusal of the application form and the selection procedure would show that alongwith the application, title documents relating to land are not required to be submitted. The committee only scrutinizes the shortcomings which are apparent on the face of the application or the documents which are required to be mandatorily appended to the application. The committee relies on the self-declaration made by the applicant with regard to his/her title. Stage for verification of the title documents arrives much later when field verification is carried out. In this regard, it will be fruitful to reproduce Clause 11 of the brochure which is to the following effect :

"11. FIELD VERIFIDATION OF CREDENTIALS (FVC)

11.1 Verification of the information given in the application by the applicant with the original documents and with the issuing authorities wherever required is called Field Verification of Credentials.

11.2 Field verification will be carried out for the selected candidate as per laid down procedure. If in the FVC, the information given in the application by the applicant is found to be correct, letter of intent (LOI) will be issued with the approval of competent authority.

If in the FVC it is found that information given in the application is at variance with the original documents and that information effects the eligibility of the candidate, then a letter would be sent by Registered Post AD / Speed Post pointing out the discrepancy."

28. In the instant case as well, during the field verification, it was found that though the petitioner in her original application under item no.10 had conveyed an impression of being in possession of a registered lease deed dated 21.11.2011 but on verification from the original title documents, it transpired that declaration made in this regard is incorrect as the petitioner was not having registered lease deed but only a notarised one. Thus, there was clear misrepresentation as regards facts mentioned under Item No.10 of the application form. Promissory estoppel is a doctrine of equity, and in the instant case,

there is no equity in favour of petitioner being herself responsible for conveying a false impression of having a registered lease-deed. Further, the verification of title is at the stage of field verification of credentials and not at the time of scrutiny of the application and therefore there is no question of estoppel coming in the way. Moreover, having registered lease deed on date of application, was a mandatory eligibility criteria and can in no case be relaxed as it renders ineligible the petitioner's candidature and therefore estoppel cannot be pressed. The petitioner cannot be awarded dealership though she does not meet the minimal eligibility criteria. In case, the contention of the petitioner is accepted, it will cause injustice to other eligible candidates and will result in perpetrating a wrong. Therefore, the contention of the petitioner based on doctrine of estoppel is not sustainable in law.

29. In somewhat identical situation, the Apex court in **Central Airmen Selection Board and Anr. v. Surender Kumar Das, (2003)1SCC152** refused to give benefit of the doctrine of promisory estoppel. In that case, the upper age limit for appointment to the post of Airmen was relaxable by 2 years in case of those applicants who have passed intermediate examination. The petitioner in that case, under the column "name of examination passed" mentioned "HSC" and "CHSE+2". Although marksheet attached with the Application form reveals that he had failed in 10+2. He was invited to appear in the written test and was thereafter medically examined and was found suitable for appointment. However, when he reported for joining the duties, he was informed that his selection has been cancelled. It was observed as under:

"7. The question, therefore, is whether in case of this nature the principle of promisory estoppel should be invoked. It is well known that the principle of promissory estoppel is based on equitable principles. A person who has himself misled the authority by making a fake statement, cannot invoke this principle, if his misrepresentation misled the authority into taking a decision which on discovery of the misrepresentation is sought to be cancelled. The High Court has proceeded on the basis that the petitioner had not made any misrepresentation in his application to the effect that he had passed the intermediate examination. As we have found above, this finding of the High Court is erroneous, contrary to record and therefore must be set aside. In his application, the respondent had claimed that he had passed the secondary examination as well as the higher secondary +2 examination, and it is clear from the counter-affidavit filed on behalf of the appellants that his candidaure was considered on the basis that he had passed the higher secondary +2 examination, as in that case he was entitled to caim relaxation in the matter of age. However, the mark-sheet annexed to the application disclosed that the respondent had failed in the subject Chemistry and therefore, his claim in the application, that he had passed the higher secondary +2 examination, was factually incorrect and a clear misrepresentation. In these circumstances we are satisfied that the respondent could not be permitted to invoke the principle of promisory estoppel, and the High Court has clearly erred in law in invoking the said principle in the facts of this case. The judgement and order of the High Court therefore cannot be sustained."

30. There is another aspect of the matter. The requirement to have a registered lease deed for a fixed period of at least 15 years has been inserted to ensure certainity and continuity. The work of distribution of LPG affects the common public at large. It is the duty of Oil Companies, appointing distributors to ensure that they continue undisturbed for long duration, so that the customer attached to them do not suffer. If the tenancy of the showroom is from month to month, as in the instant case, and not for fixed duration of 15 years (which can only be created by a registered document), there will always be apprehension of eviction of lessee (Dealer/Distributor). It will thus not be in public interest to press doctrine of estoppel to compel BPCL to award dealership to the petitioner, who admittedly is not having registered lease of fixed duration of 15 years.

31. In view of above discussion, it transpires that though ground no. 1 on which candidature of the petitioner has been rejected is not sustainable in law, the second ground is valid and legal and the candidature of the petitioner has rightly been cancelled as she did not meet the minimal eligibility criteria of having a registered lease on the date of the application. A fortiori, no exception can be taken to the ultimate decision of the BPCL cancelling the candidature of the petitioner.

32. In the circumstances aforesaid, the writ petition fails and is hereby dismissed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE MANOJ MISRA. J.

Civil Misc. Writ Petition No.36163 of 2013

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

Counsel for the Petitioner:
Sri Ashok Khare, Sri Sunil Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri V.P. Varshney
Sri V.P. Mathur

Constitution of India, Art.-226- Cancellation of candidature-selection of lecturer(Mechanical Engineering)in government polytechnic-canceled on ground petitioner applied as OBC-but could not provide certificate at the time of interview-admittedly petitioner got more marks than last candidate of general category-held-illegal altogether cancellation-not proper-direction to treat general category-given.

Held: Para-8

Having considered the rival submissions of the learned counsel for the parties as also from the record, we find that by virtue of General Instruction No.11, as contained in the advertisement, the candidature of the petitioner could not have been canceled merely on his failure to provide a certificate of his belonging to Other Backward Class. By virtue of the said instruction, the Commission ought to have treated the petitioner as an unreserved category candidate. The undertaking given by the petitioner would not enable the Commission to cancel the candidature of the petitioner as an unreserved category candidate, particularly, when the Commission is bound by its own terms and conditions laid in the advertisement. No doubt, the Commission is at liberty to cancel the

candidature of the petitioner as a candidate belonging to Other Backward Class. But cancellation of his candidature altogether even in the unreserved category is arbitrary and against the own terms laid by the Commission in the advertisement i.e. General Instruction No.11.

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

1. We have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Sunil Kumar Srivastava, learned counsel for the petitioner, Sri V.P. Varshneya appearing for the respondent no.3 (the Public Service Commission, U.P., hereinafter referred to as the Commission) and the learned Standing Counsel appearing for the respondent nos.1 and 2. With the consent of the learned counsel for the parties, this writ petition is being decided finally, at the admission stage itself.

2. Facts giving rise to the instant petition are that the petitioner, pursuant to an Advertisement No.6/2011-12 dated 17.03.2012, inviting applications for filling up several categories of posts in different departments of the State as well as posts of Lecturer in Government Polytechnics, applied for consideration for the post of Lecturer in Mechanical Engineering, under the category of Other Backward Classes. On screening, the petitioner was found successful and was called for interview before the Commission on 20.11.2012. On the date of the interview, an undertaking was obtained from the petitioner that he would submit certificate of his belonging to Other Backward Class on, or before, 11.12.2012. This undertaking was required as there was an objection with regards to Other Backward Class Certificate earlier provided by the petitioner. The petitioner, consequently, obtained a fresh certificate of his belonging to Other Backward Class and submitted the same before the Commission within the stipulated period. However, again objection was raised with regards to the certificate on the ground that it was not in consonance with a Government Order dated 02.07.1997. As a result, the petitioner obtained yet another certificate dated 11.01.2013. In the meantime, the result of the selection was published by the Commission on 04.01.2013 and the petitioner was placed at Sl. No.4 in the select list. However, against the name of the petitioner, in the select list, it was marked "provisional". To delete the entry of "provisional" against his name, the petitioner represented to the Commission vide representation dated 13.05.2013. The petitioner, thereafter, obtained certain information from the Commission under the Right to Information Act, which was supplied to the petitioner under office order dated 03.06.2013. The information reveals that as the petitioner had not deposited the certificate of his belonging to Other Backward Class, within 21 days from the date of the interview, his candidature has been canceled by the Commission.

3. Aggrieved by the cancellation of his candidature, the petitioner has filed the present writ petition on the ground that from the information received under the Right to Information Act it is clear that the petitioner was placed in the select list by treating him to be a candidate belonging to the unreserved category, therefore, even if the petitioner had failed to provide the certificate of his belonging to Other Backward Class, within the period provided in the undertaking, the Commission could not have canceled his candidature and, in fact, ought to have considered his candidature under the unreserved category.

4. During the course of the argument, the learned counsel for the petitioner drew attention of the Court to the General Instruction No.11 contained in the advertisement, which formed basis of the recruitment process. General Instruction No.11, as contained in the advertisement, reads as follows:-

"The candidate coming under the reserved category, desiring benefit of the reservation, must indicate in the prescribed column of the on-line application the category/sub-category (one or more than one) whatever may be, and if they fail to do so, they will be treated like a general candidate and the benefit of reservation will not be admissible to them."

5. Relying on the General Instruction No.11, the learned counsel for the petitioner submitted that there was no occasion to cancel the candidature of the petitioner on the ground of his having not provided the certificate of his belonging to Other Backward Class within the period provided in the undertaking but, instead, the Commission ought to have taken the candidature of the petitioner as that of an unreserved category and proceeded to draw select list accordingly. It was further submitted that since the candidature of the petitioner, while drawing the select list dated 04.01.2013 was, admittedly, taken in the unreserved category, there was no justification to cancel his candidature subsequently, on the ground that he failed to provide the certificate of his belonging to Other Backward Class. The learned counsel for the petitioner also drew attention of the Court to paragraph no.20 of the writ petition where it has been specifically stated by the petitioner that he had secured marks higher than the marks secured by the last candidate selected under the unreserved category. The learned counsel for the petitioner further drew attention of the Court to paragraph no.22 of the writ petition where it has been stated that the petitioner is even otherwise within the permissible age limit and has not claimed any relaxation in the upper age on account of belonging to Other Backward Class. Referring to paragraph no.8 of the counter affidavit the learned counsel for the petitioner submitted that there is no specific denial to the averment of the petitioner that he was placed in the select list as an unreserved category candidate. It has thus been submitted that cancellation of the candidature of the petitioner and consequential deletion from the select list is wholly arbitrary and, as such, liable to be quashed.

6. Per contra, Sri V.P. Varshneya, learned counsel for the respondent no.3, submitted that as the petitioner had given an undertaking, on 20.11.2012, that if he fails to provide certificate by 11.12.2012 that he belongs to "Other Backward Class" then his candidature may be treated as canceled, the petitioner cannot have any grievance if his candidature has been canceled on the ground that he failed to provide certificate of his belonging to Other Backward Class. Sri Varshneya further placed reliance on paragraph 6 of the advertisement, which provided as follows:

"If the claims of the candidates given in their applications are not found true, they can be debarred from all the future examinations and selections made by the Commission including other appropriate penalties."

7. Relying on the aforesaid clause Sri Varshneya submitted that as the statement of the petitioner that he belonged to Other Backward Class was not substantiated by the certificate it should be treated as a false statement and on this ground itself, the petition deserves to be thrown out.

8. Having considered the rival submissions of the learned counsel for the parties as also from the record, we find that by virtue of General Instruction No.11, as contained in the advertisement, the candidature of the petitioner could not have been canceled merely on his failure to provide a certificate of his belonging to Other Backward Class. By virtue of the said instruction, the Commission ought to have treated the petitioner as an unreserved category candidate. The undertaking given by the petitioner would not enable the Commission to cancel the candidature of the petitioner as an unreserved category candidate, particularly, when the Commission is bound by its own terms and conditions laid in the advertisement. No doubt, the Commission is at liberty to cancel the candidature of the petitioner as a candidate belonging to Other Backward Class. But cancellation of his candidature altogether even in the unreserved category is arbitrary and against the own terms laid by the Commission in the advertisement i.e. General Instruction No.11.

9. The argument on behalf of Commission that the candidature of the petitioner could be canceled under paragraph no.6 of the advertisement does not appeal to us. Paragraph 6 of the advertisement relates to the consequences that befall on a candidate when any declaration made by him is not found to be true. Mere inability to file a proper certificate in support of his claim that he belongs to OBC category, without anything further, should not be taken that the statement that he belong to the Other Backward Class was not true, particularly, when there is nothing to indicate that the said statement was false. From the counter affidavit we do not find that the Commission found the claim of the petitioner in this regard to be not true. The stand in paragraph 8 of the counter affidavit is to the effect that as the petitioner did not submit the required OBC certificate, in support of his application, his candidature stood canceled. In such circumstances, we are of the view that the Commission cannot take recourse to paragraph 6 of the advertisement to justify its action.

10. For the reasons recorded above, we find that the Commission was not legally justified in canceling the candidature of the petitioner altogether. The proper course for the Commission was to treat the petitioner as an unreserved category candidate and to place him in the select list subject to his having qualified as an unreserved category candidate.

11. Before parting, we may observe that from the record it appears that the statement of the petitioner, made in paragraph no.20 of the writ petition, that he secured marks higher than the marks secured by the last candidate under the unreserved category and, as such, was shown as selected under the unreserved category in the result dated 04.01.2013 has not been specifically denied in paragraph no.8 of the counter affidavit filed by the Commission, which deals with the reply to the averments made in paragraph nos.20, 21, 22, 23, 24, 25, 26, 27

and 28 of the writ petition. However, we refrain ourselves from expressing any conclusive opinion in this regard, inasmuch as, against the name of the petitioner "provisional" was mentioned in the select list dated 04.01.2013. Therefore, we leave this issue to be considered by the Commission.

12. For the reasons detailed above, the writ petition deserves to be allowed and is, accordingly, allowed. The cancellation of the candidature of the petitioner by the Public Service Commission, U.P. for the post of Lecturer in Mechanical Engineering, in relation to the Advertisement No.6 of 2011-2012 dated 17.03.2012, is hereby quashed. The Commission is directed to consider the case of the petitioner as a candidate belonging to the unreserved category and if the petitioner is found to have succeeded as an unreserved category candidate he would be provided all consequential benefits.

13. The aforesaid exercise will be completed by the respondents within a period of three weeks from the date of production of a certified copy of this order before the respondent no.3.

14. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.42061 of 2013

ConstableNo.52617(830740060/830740044) Asghar Mehdi ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. A. Rizvy, Sri S.Z.A. Rizvi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Service Law-Transfer order challenged on ground-disciplinary proceeding pending since long-secondly being handicapped person can not be transferred-held-since petitioner remained posted for last 30 years at same place-no bar about transfer during pendancy of disciplinary proceeding-transfer being exigency of service-can not be claimed a particular place as matter of right-petition dismissed.

Held: Para-5
So far as pendency of departmental proceedings before Tribunal is concerned, that cannot bar the authorities concerned from transferring petitioner and in particular in exigency of service on administrative ground when the authorities find that during pendency of departmental proceedings the petitioner must be transferred. It is not the case of the petitioner that the impugned order of transfer is against statutory rules or has been passed by an authority not competent to do so or is vitiated on account of mala fide. The service of the petitioner are transferable. The transfer being exigency of service, an employee is liable to be transferred from one place to another and normally no case for interference in Court of law is called for unless the case is within categories, as mentioned above.

Case Law discussed:
1999(2)UPLBEC 1407; AIR 2012 SC 232; 2009 (8) SCC 337; JT 2009 (2) SC 474; 1990(Supp.) SCC 738; 1995(2) SCC 570; 1999 SCC(L&S) 646; AIR 2006 SC 2064; W.P. No. 6095(S/S) of 1996.

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

1. This writ petition is directed against the order of transfer dated 29.07.2013 passed by Commandant B-Group PAC 4th Battalion Allahabad.

2. It appears that PAC Headquarter passed an order on 25.07.2013 transferring petitioner from 4th Battalion PAC to 44th Battalion PAC, Meerut and by means of impugned order the Commandant 4th Battalion PAC has communicated the said order to petitioner directing him that he shall stand relieved on 31.07.2013 so as to join at transferred place.

3. Learned counsel for the petitioner firstly contended that there is a departmental inquiry initiated against petitioner and the matter is pending before U.P. Public Service Tribunal and since the matter is sub-judice, therefore, he cannot be transferred. He further submitted that departmental proceedings have continued for a quite long time, therefore, on the ground of mere delay the same has to be dropped in view of the judgment of this Court in **Mahaveer Prasad Sharma Vs. Cane Commissioner, U.P., Lucknow and others, 1999(2) UPLBEC 1407**. He lastly contended that petitioner is a handicapped and, therefore, on equity ground also he should not be transferred.

4. However, I find no force in any of the above submissions. It is not in dispute that petitioner was posted at Allahabad sometimes in June, 1983, i.e., from the date of his initial appointment, and since then he has been continuing thereat and, therefore, for last 30 years he has been posted there.

5. So far as pendency of departmental proceedings before Tribunal is concerned, that cannot bar the authorities concerned from transferring petitioner and in particular in exigency of service on administrative ground when the authorities find that during pendency of departmental proceedings the petitioner must be transferred. It is not the case of the petitioner that the impugned order of transfer is against statutory rules or has been passed by an authority not competent to do so or is vitiated on account of mala fide. The service of the petitioner are transferable. The transfer being exigency of service, an employee is liable to be transferred from one place to another and normally no case for interference in Court of law is called for unless the case is within categories, as mentioned above.

6. 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....".

7. 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."

8. 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."

9. 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."

10. So far as delay in departmental proceeding is concerned, that is not subject matter of challenge before this Court and even otherwise it cannot be said that departmental proceeding is suo motu liable to be quashed on account of mere delay without considering the other aspect of matter. There is no principle of law that an inquiry would stand vitiated merely for the reason of delay. On the contrary, whether delay in initiating inquiry would be fatal or not would depend on various facts and circumstances. Dealing this question and considering **State of Madhya Pradesh Vs. Bani Singh and another 1990 (Supp.) SCC 738 the Apex court in State of Punjab Vs. Chaman Lal Goel, 1995 (2) SCC 570** said:-

"9. Now remains the question of delay. There is undoubtedly a delay of five and half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing."

11. In Additional Superintendent of **Police Vs. T. Natrajan, 1999 SCC (L & S) 646** Apex Court held as under:-

"It is settled law that some delay in initiating proceedings would not vitiate the enquiry unless the delay results in prejudice to the delinquent officer."

12. The same view was reiterated in **P.D. Agarwal Vs. State Bank of India and others, AIR 2006 SC 2064.**

13. A Division Bench in **Writ Petition No. 6095 (S/S) of 1996 (State of U.P. & another Vs. S.P. Singh Pundhir and another)** decided on 09.08.2007, considering the aforesaid judgements of the Apex Court, has also held as under:-

"There is no hard and fast rule that disciplinary proceedings initiated after a long time would be per se improper or illegal merely for the reason that it has been initiated after long lapse of time but it depends upon the facts and circumstances of that case. For example, if the delinquent employee could show that after long lapse of time he has lost evidence or has no capacity to defend himself due to loss of memory etc. then indulgence can be granted on this ground but mere delay in the proceedings can not vitiate the same."

14. In view of above, the writ petition lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.42288 of 2013

Om Prakash Yadav ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Sinha, Sri Mahesh Sharma

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Service Law-Termination order-challenged after 8 years delay-court declined to interfere on ground of latches coupled with conduct of petitioner-transfer order passed long back in the year 1998-not complied inspite of frequent petition after 4th petition no relief granted-consequently termination order passed-held-delay can be ground for denied to interfere with order impugned.

Held: Para-10-
It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit.

Case Law discussed:
AIR 1989 SC 1433; AIR 2003 SC 1724; (2009) 11 SCC 678; 2007(4) SC 253; 1994 (6) SC 71; 1995(5) SCC 628; AIR 1961 SC 993; AIR 1976 SC 2617; 1976(3) SCC 579; AIR 2007 SC 1330-2007(1)Supreme 455; 2008(4)ESC 2423; 2009(1) SCC 297; 2009(2)SCC 479; 2009(3) SCC 281; (1874) 5 PC 239.

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

1. This is a case where an employee, who was transferred as long back as in May' 1998 could dare to defy order of transfer for years together though there was no authority in the shape of stay order passed by this Court or by the executive authorities.

2. It appears that challenging the order of transfer passed on 29.5.1998, transferring the petitioner from Tube Well Division, Etah, Region Aligarh to Agra, he preferred Civil Misc. Writ Petition No. 33046 of 1998 which was disposed of on 4.10.1998 permitting the petitioner to make a representation and the authorities were directed to decide the same. Admittedly, the order of transfer was neither stayed nor the petitioner was otherwise had any authority not to comply with the order of transfer. The authority concerned rejected petitioner's representation by order dated

5.12.1998. Even till that date, order of transfer was not complied with. The order rejecting representation was challenged in Civil Misc. Writ Petition No. 865 of 1999 which was allowed on 22.11.2001 and the authority concerned was directed to decide petitioner's representation afresh giving reasons. By a detailed order, the representation was rejected vide order dated 23.1.2002, whereagainst petitioner came in third Writ Petition No. 21510 of 2002 which was dismissed on 5.7.2005, whereagainst Special Appeal No. 959 of 2005 was preferred which was also dismissed by order dated 22.8.2005. Even during this entire period, petitioner did not comply with the order of transfer having been passed as long back as on 29.5.1998. Then again petitioner came to this Court in fourth Writ Petition No. 65052 of 2005 seeking a mandamus commanding the respondents to allow him to join at transferred place at Agra. In this writ petition, an explanation was sought by this Court vide order dated 5.10.2005 from authorities concerned as to why no action has been taken against the petitioner for not complying order of transfer passed on 29.5.1998. Ultimately this writ petition was also dismissed on 22.5.2013.

3. The fact remains that the petitioner having not complied with the order of transfer, the competent authority, in the meantime, by order dated 3.10.2005 had terminated him from service.

4. Now this writ petition has been filed challenging this order of termination on the ground of having been passed without holding enquiry and, therefore, vitiated in law.

5. There are at least two major hurdles in petitioner's way. First that the defiance of order of transfer on the part of petitioner is an admitted fact, which has continued for almost six years.

6. In **Gujarat Electricity Board and another Vs. Atmaram Sungomal Poshani AIR 1989 SC 1433,** this Court had an occasion to examine the case of almost similar nature. This Court observed as under:

"*Transfer from one place to another is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other.*"

7. In **Mithilesh Singh v. Union of India and Ors. AIR 2003 SC 1724**, the settled legal position has been reiterated. The court held that absence from duty without proper intimation is indication of a grave misconduct warranting removal from service.

8. The above authorities have been referred to and followed by Apex Court

recently in **Tushar D. Bhatt Vs. State of Gujarat and Anr. (2009) 11 SCC 678**.

9. Besides, the termination order was passed in 3.10.2005 and has been challenged in 2013 by means of this Writ Petition. There is no explanation about this extraordinary delay and laches of eight years in the entire writ petition.

10. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In **New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253**, the Apex Court observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In **M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 7**1 and **M.R. Gupta Vs. Union of India and others 1995(5) SCC 628** it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In **K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993**, it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in **State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617** and **State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579** and the said view has also been followed recently in **Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455** and New Delhi Municipal Council (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in **Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423**. This has been followed in **Virender Chaudhary Vs. Bharat Petroleum Corporation & Ors., 2009(1) SCC 297**. In **S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479** the Apex Court held that it is well settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In **Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281** the Court referred to the observations of Sir Barnesdelay Peacock in **Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239** and held as under:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . . Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

11. In these facts and circumstances, I do not find it a fit case justifying exercise of equitable extraordinary jurisdiction under Article 226 of the Constitution.
