ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.04.2014

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL J.

Civil Misc. Writ Petition No. 131 of 2008

Shri Satya Dev-Shakuntala Devi Educational Trust... ....Petitioner
Versus
A.D.J./Special Judge (SC&ST) Act, Etawah & Ors. .....Respondents

Counsel for the Petitioner:
Sri Anil Kumar Sharma

Counsel for the Respondents:-

C.P.C.-Order VI Rule-17- Amendment Application-rejected on ground of delay-suit for permanent injunction-the defendant taken plea of sale deed dated 13.09.76-executed in favor of his wife-sale deed produced in the year 2001-amendment application filed 05.08.04 e.g. within three years-can not be beyond time-both Court below committed great illegality by rejecting amendment application-order quashed-direction for fresh consideration given.

Held: Para-24
Bearing the aforesaid principle in the mind, the reasons mentioned by the trial court and the revisional court rejecting the amendment application on the ground of the delay and the limitation is unsustainable. Accordingly, both the orders dated 06.11.2006 and 27.09.2007 are set aside. The matter is remitted to the Trial Court to consider the amendment application afresh in accordance with law.

Case Law Discussed:
2002(10) SBR 298; (2006) 6 SCC 498; (2009) 10 SCC 626; (2009) 10 SCC 84; (2012) 2 SCC 300.

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

1. This writ petition is directed against the order dated 27.09.2004 passed by the Additional Civil Judge (Junior Division), whereby he has rejected the amendment application moved by the petitioner/appellant under Order VI-Rule17 CPC and the order dated 27 September 2007 passed by the Revisional Court, dismissing the revision.

2. Briefly stated the facts are; the petitioner instituted a suit for permanent injunction in the Court of Civil Judge (Junior Division)-II, Etawah. The petitioner/plaintiff's case in the Suit is that the plaintiff Sri Satya Dev-Shakuntala Devi Educational Trust is a registered Trust and one Sri Rajendra Kumar Sharma, who has joined the suit in the capacity of the Managing Trustee, manages the affairs of the Trust. The defendant/respondent, who is the tenant in the Trust property, had stopped the payment of the rent from April 1995 and when he was asked to vacate the premises he started illegal construction on the land of the Trust. The respondent/defendant filed his written statement and contested the suit on the ground that a sale deed was executed in favour of wife of defendant/respondent no. 3 regarding the property, in which he is in possession.

3. The plaintiff/petitioner filed an application under Order VI Rule 17 CPC for amendment of the pleadings. It was pleaded in the amendment application that the defendant has filed an original copy of the sale deed said to be executed on 13 September 1976 by Satya Dev, on 23.11.2001 in the Trial Court. It is stated that the said sale deed was not a registered document and the plaintiff had also verified from the office of the Sub-Registrar. The enquiry revealed that the alleged sale deed dated 13 September 1976 was not a registered document therefore, the sale deed has no evidentiary value in the eyes of law.

The respondent no. 3 filed his objections to the amendment application. By the impugned order the Trial Court has rejected the amendment application of the petitioner and his revision also came to be dismissed.

4. I have heard learned Counsel for the parties.

5. Learned Counsel for the petitioner submits that no cogent reason has been given by the Trial Court for rejecting the amendment application. There was no delay in filing the amendment application as the issue was yet to be framed when the amendment application was moved.

6. Learned Counsel for the petitioner further submits that the view taken by both the courts below in rejecting the amendment was on the ground of delay. The view taken by them is erroneous and factually incorrect. The Court below has failed to consider that the respondent no. 3 has filed the document in support of his claim on 13.11.2001 alongwith the sale deed. The petitioner came to know about the said sale deed when it was filed in the court and he moved the amendment application on 05 August 2004 i.e. within three years. Therefore, the period of limitation has not expired as it is within three years of the date of knowledge. He further submits that it is a well settled law that the amendment of pleadings can be made at any stage of proceeding if it is necessary for the purposes of determining the real question in controversy between the parties.

7. Learned Counsel for the petitioner has placed reliance on the judgement of the Supreme Court in the case of Sampat Kumar v. Ayya Kannu and another, 2002(10) SBR 298, wherein it has been held that a suit for prohibitory injunction can be converted in the suit in declaration of title and recovery of possession at belated stage even then the amendment was allowed on payment of some cost.

8. I have heard learned Counsel for the parties and perused the record.

9. The petitioner has instituted the suit for permanent injunction restraining them from interfering in her possession in respect of the permanent injunction to restrain respondent no. 3 from raising the construction with regard to the property in suit on the ground that he was a tenant of the Trust property.

10. In his written statement the respondent no. 3 contested the case on the ground that a sale deed was executed in favour of his wife (the defendant / respondent no. 3 herein) regarding the property and he is in possession by virtue of the said sale deed. The respondent no. 3 filed the original copy of sale deed on 13.11.2001. The plaintiff/petitioner herein moved an application on 05 August 2004 within three years from the date of the knowledge seeking a declaration that the said unregistered sale deed is a void document. A copy of the amendment application dated 05 August 2004 is on the record as annexure-3 to the writ petition. The said application was rejected on 25.09.2004 on the ground that the sale deed was in favour of the wife of respondent no. 3 Ganga Devi but she is not party in the suit. Thereafter the petitioner/ plaintiff moved a fresh application on 30.04.2005 alongwith an impleadment application to implead Ganga Devi as one of the defendants in the suit.

11. The Trial Court has rejected her application primarily on the ground that it was filed after much delay and on the said cause of action a separate suit and the amendment application is against the Order

I Rule 3 of the Cope of Civil Procedure, 1908.

12. The Revisional Court took the view that the sale deed was filed by the defendant on 13.11.2001 but the amendment application has been filed on 30 April 2005, which was beyond the limitation of the suit.

13. As regards the finding of the Trial Court that the amendment was filed belatedly and was also against the provisions of Order I Rule 3 of CPC is not correct. For the sake of convenience the Order I Rule 3 of CPC is extracted herein below;

"3. Who may be joined as defendants.---All persons may be joined in one suit as defendants where---

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise."

14. At the time of filing of the suit the case of the plaintiff was that the disputed property is a trust property and the defendant was tenant over the said property. During the pendency of the suit the defendant filed an original sale deed, dated 13.09.1976, on 13.11.2001 in respect of the suit property and it was stated that the said sale deed was in favour of the defendant's wife.

15. The stand of the plaintiff was that the said sale deed is unregistered and the plaintiff came to know about the said document when it was filed in the court, therefore, they moved an application for amendment as well as impleadment of Ganga Devi in whose favour the alleged sale deed had been executed.

16. In view of the said facts it cannot be said that Ganga Devi was a necessary party at the time of filing of the suit. Thus the Trial Court has misdirected itself by relying on Order I Rule 3 CPC. The Revisional Court has also erroneously held that the amendment was filed belatedly and the amendment was beyond three years of the limitation. The said finding is factually incorrect.

17. The sale deed was brought on the record on 13.11.2001 and the amendment was filed on 05 August 2004. The plaintiff has explained that they tried to verify and enquire from the office of the Registrar then he came to know that the said sale deed has not been registered.

18. It is a trite law that an amendment can be allowed at any stage of the proceedings, however in 2002 by Act No. 2 of 2002 a proviso has been inserted, which provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that in spite of the due diligence the party could not have raised the matter before the commencement of trial.

19. In the present case it is stated that no issue has been framed in the suit nor any evidence has been adduced by the parties. The said fact has not been disputed by the respondent.

20. Moreover, the said proviso has been considered by the Supreme Court in the case of Baldev Singh and others v. Manohar Singh and another, (2006) 6 SCC 498 in the following words;

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

21. In the Surender Kumar Sharma v. Makhan Singh (2009), 10 SCC 626 the Supreme Court held thus;

"5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

22. The Supreme Court in the case of Ravajeetu Builders and Developers v. Narayanswamy and sons and others, (2009) 10 SCC 84 has culled out the following factors to be taken into consideration while dealing with the applications for amendments;

"39. The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice (see Ganga Bai v. Vijay Kumar1 and Arundhati Mishra v. Ram Charitra Pandey2)

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

"(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and non exhaustive.""

23. As regards the belated amendment is concerned the said issue is also no more res integra. The Supreme Court in a long line of decisions has already held that a belated amendment can also be considered subject to the certain conditions. In J. Samuel and others v. Gattu Mahesh and others, (2012) 2 SCC 300;

"23. Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order 6 Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order 6 Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Vide Aniglase Yohannan v. Ramlatha3, Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N4, Chander Kanta Bansal v. Rajinder Singh Anand5, Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd.6, Vidyabai v. Padmalatha7, and Man Kaur v. Hartar Singh Sangha8.]"

24. Bearing the aforesaid principle in the mind, the reasons mentioned by the trial court and the revisional court rejecting the amendment application on the ground of the delay and the limitation is unsustainable. Accordingly, both the orders dated 06.11.2006 and 27.09.2007 are set aside. The matter is remitted to the Trial Court to consider the amendment application afresh in accordance with law.

25. Thus, the writ petition is allowed.

26. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.04.2014

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

Criminal Revision No. 154 of 2014

Rajesh Singh & Ors.... Revisionists
Versus
The State of U.P. & Anr. .....Opposite Parties

Counsel for the Revisionists:
Shiv Pal Singh

Counsel for the Opposite Parties:
G.A.

<u>Cr. P.C. Section 319-</u>**Summoning without recording satisfaction-applicant being natural father having no concern with family of adopted son-allegation surrounded with demand of dowry only by adopted son-non consideration thereof-**

vitiated-order quashed direction for fresh consideration given.

Held:Para-9
A perusal of the evidence reveals that it has been accepted by P.W.1 that Pravesh Singh was adopted by Bachachu Singh. It has also come in evidence that there was demand of motorcycle and Rs.50,000/-only. No other persons was beneficiary of the demand of the motorcycle except Pravesh Singh. These facts should have been considered by the trial Court while passing under Section 319 Cr.P.C.

Case Law Discussed:
[2014(1)SCALE 241]; 2013(11)SCALE 23; AIR 2009 SC 2792; AIR 2009 SC 1248; AIR 2000 SC 1127.

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

1. Heard Sri Shiv Pal Singh learned counsel for the revisionists and learned AGA for the State.

2. This criminal revision has been preferred by revisionists challenging the order dated 31.3.2014 by which application under Section 319 Cr.P.C. moved by the informant was partially allowed and revisionists were summoned for facing trial under Section 319 Cr.P.C.

3. It was submitted by learned counsel for the revisionists that Pravesh Kumar Singh was adopted by late Bachchu Singh and was living with his adoptive father separately from his natural father, mother and brothers. In this way, there was no occasion for the relatives of natural father demanding dowry.

4. As per factual matrix of the case a first information report was lodged by the opposite party no.2 (Umesh Singh) in Police Station-Kotwali Dehat, District- Bahraich on 6.9.2005 at about 8.15 p.m. against Pravesh Singh, Raja Singh son of Shiv Mangal Singh, Rajesh Singh son of Shiv Mangal Singh, wife of Raja Singh, wife of Shiv Mangal Singh and Rajendra Singh, under Section 498-A, 304-B,201 I.P.C.and 3/4 Dowry Prohibition Act. After investigation charge-sheet was submitted against Pravesh Singh only. After taking cognizance, the case was committed and the Sessions Court after framing of the charge recorded evidence. During evidence of P.W.1 Umesh Singh son of Narendra Pal Singh and P.W.2 Narendra Pal Singh son of Harihar Singh and an application was moved for summoning, Raja Singh, Rajesh Singh, Munni Devi, Rajendra Singh, learned court below has after gone though the evidence on record summoned the revisionists except Kaladevi wife of Shiv Mangal, Rajendra to face trial. Feeling aggrieved this criminal revision has been filed.

5. Learned AGA argued in favour of the impugned order.

7. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. - Power to proceed against other persons appearing to be guilty of offence.-

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

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

(3) Any person attending the Court, although not under arrest or upon a

summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

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

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

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

8. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

6. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

9. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

10. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

11. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

12. In the case of Hardeep Singh v. State of Punjab and others [2014 (1) SCALE 241] the Apex Court has held that:

"86. Section 319 (1) Cr.P.C. empowers the court to proceed against other persons, who appear to be guilty of offence, though not an accused before the court."

7. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

88. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two Judges' Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

89. In Rajendra Singh (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

90. In Mohd. Shafi (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

91. In Sarabjit Singh & Anr. v. State of Punjab & Anr., AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two Judges' Bench of this Court observed:

"....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned......Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied." (Emphasis added)"

92. In Brindaban Das & Ors. v. State of West Bengal, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

8. A similar view has been reiterated by this Court in Michael Machado & Anr. v. Central Bureau of Investigation & Ors., AIR 2000 SC 1127.

"99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C."

9. A perusal of the evidence reveals that it has been accepted by P.W.1 that Pravesh Singh was adopted by Bachachu Singh. It has also come in evidence that there was demand of motorcycle and Rs.50,000/-only. No other persons was beneficiary of the demand of the motorcycle except Pravesh Singh. These facts should have been considered by the trial Court while passing under Section 319 Cr.P.C.

10. In view of this, and also considering the fact that Magistrate has not recorded his satisfaction as has been envisaged in the decision of Hardeep Singh v. State of Punjab and others [2014 (1) SCALE 241], this criminal revision is liable to be allowed and is hereby allowed. Order dated 31.3.2014 is quashed. .

11. The matter is remanded back to the trial court for deciding the application under Section 319 of the Code of Criminal Procedure afresh in the light of the observations made above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE NAHEED ARA MOONIS, J.

First Appeal No.251 of 2014

Gaurav Nigam... **Appellant**
Versus
Smt. Tripti Nigam..... **Respondent**

Counsel for the Petitioner:
Sri M.D. Singh 'Shekhar', Sri R.D.Tiwari

Counsel for the Respondent:
Sri C.M. Rai, Ms. Rajni Ojha, Sri R.N. Chaubey

First Appeal- **Against order of granting interim maintenance as Rs. 32000/-per month without considering objection and expenses-occurred during medical care of the parents of husband/appellant-held-in absence of any documentary evidence regarding expenses-considering salary slip of appellant as Rs. 1,26,000/-amount of interim maintenance-not excessive-appeal dismissed.**

Held:Para-9
The income of the appellant, undoubtedly is Rs. 1,26,000/- and odd, and as per the salary

statement itself, the take home salary is over Rs. 90,000/-. While fixing interim maintenance, a Division Bench of this Court, vide order dated 20.12.2013, passed in First Appeal No. 466 of 2013, had not taken any evidence from the parties and had relied on the statement made by learned counsel for the appellant in that case that the appellant was getting Rs. 60,000/- to 70,000/- per month after all the deductions were made from his salary. Such finding cannot be said to be final and binding on the trial court. The trial court has, in fact, now gone through the evidence and has come to the categorical finding that the take home salary of the appellant is over Rs. 90,000/-. In the light of that, it has fixed the maintenance amount of Rs. 32,000/- per month, which is for the maintenance of the wife as well as the minor child. The same cannot be said to be unjustified so as to call for interference in appeal.

(Delivered by Hon'ble Vineet Saran, J.)

1. This is an appeal filed by the appellant-husband challenging the order dated 21.3.2014 passed on an application filed by the respondent-wife under Section 24 of the Hindu Marriage Act whereby maintenance pendente lite of a sum of Rs. 32,000/- per month has been awarded towards the maintenance of his wife and minor child. Besides this, a sum of Rs. 7,000/- towards expenses has also been awarded. The suit was filed by the appellant for divorce under Section 13 of Hindu Marriage Act in which the said application was filed by the respondent-wife.

2. We have heard Sri M.D. Singh Shekhar, learned Senior Counsel along with Sri R.D. Tiwari-learned counsel appearing on behalf of the appellant and Ms. Rajni Ojha along with Sri R.N. Chaubey-learned counsel appearing for the respondent and have perused the record.

3. Submission of the learned counsel for the appellant is that once the interim maintenance of Rs. 25,000/- per month had been fixed by this Court vide order dated 20.12.2013 passed in First Appeal No. 466 of 2013 arising out of a Petition filed by the respondent-wife under Section 9 of the Hindu Marriage Act for Restitution of Conjugal Right, the enhancement of such maintenance amount to Rs. 32,000/- per month would not be justified. It is also submitted by the learned counsel for the appellant that though the salary certificate was filed by the appellant himself showing the total earnings of the appellant to be Rs. 1,26,461/- and after deduction of provident fund and income tax etc., take home salary to be 90,389/-, but the court below has not taken into account the other expenses and investments which the appellant has to make every month, details of which have been given in para-10 of the affidavit filed in support of the stay application. He has further submitted that in para-9 of the objections filed by the appellant in response to the application for maintenance filed by the respondent-wife before the trial court, the appellant had specifically stated that he has to spend money towards maintenance of his parents, who remain ill and their medical expenses is also to be given by the appellant. In the said paragraph, it has also been stated that the appellant has to spend some amount in travelling for attending various cases filed by the respondent-wife in Kanpur District Court. He thus, stated that without taking these expenses into account the amount of maintenance pendente lite of Rs. 32,000/- has been fixed, which is wholly unjustified.

4. Learned counsel for the respondent however submitted that in support of the

objections raised in para-9, no oral or documentary evidence was adduced/filed by the appellant and as such, the said objection has rightly not been taken into consideration. It has also been stated that the deductions which have been shown in para-10 of the affidavit filed along with the Stay Application in this Court, were never placed before the trial court and that even otherwise the said deductions are in the form of investments being made by the appellant and not expenses incurred by him.

5. Having heard learned counsel for the parties and considered the facts and circumstances of the case, we are of the opinion that this appeal is devoid of merits and is liable to be dismissed.

6. While hearing an appeal, the appellate court has to pass a judgement in the light of the evidence or documents which were placed before the trial court. Documents and certain issues which are raised for the first time before the appellate court are not to be looked into.

7. On being asked, Sri M.D. Singh Shekhar, could not show to the Court any document which had been filed by the appellant in support of the averments made in para-9 of the objections filed before the trial court. In fact, the trial court has considered this aspect of the matter and stated that though the appellant has mentioned that he has to spend money towards medical expenses of his parents but since no documentary proof with regard to the alleged expenses had been adduced, the said plea could not be taken into consideration. In the absence of any proof having been filed, such finding, as has been arrived at by the learned trial court cannot be faulted. Similarly, with regard to the other expenses for travelling etc. of which mention has been made in Para-9 of the objections, no documentary proof to support the same also had been filed by the appellant before the trial court. As such the same has rightly not been considered.

8. The amounts mentioned in para-10 of the affidavit filed in this appeal in support of the stay application are such amounts which relate to insurance premiums and monthly installments paid towards the home loan, which are investments made by the petitioner and cannot be treated as expenses. Even otherwise, there is no mention of such kind of expenses in the objections filed before the trial court and as such, consideration of the same by the trial court was not possible.

9. The income of the appellant, undoubtedly is Rs. 1,26,000/- and odd, and as per the salary statement itself, the take home salary is over Rs. 90,000/-. While fixing interim maintenance, a Division Bench of this Court, vide order dated 20.12.2013, passed in First Appeal No. 466 of 2013, had not taken any evidence from the parties and had relied on the statement made by learned counsel for the appellant in that case that the appellant was getting Rs. 60,000/- to 70,000/- per month after all the deductions were made from his salary. Such finding cannot be said to be final and binding on the trial court. The trial court has, in fact, now gone through the evidence and has come to the categorical finding that the take home salary of the appellant is over Rs. 90,000/-. In the light of that, it has fixed the maintenance amount of Rs. 32,000/- per month, which is for the maintenance of the wife as well as the minor child. The same cannot be said to be unjustified so as to call for interference in appeal.

10. At this stage, Sri M.D. Singh Shekhar-learned senior counsel appearing on

behalf of the appellant submitted that the appellant was not given sufficient opportunity to adduce the evidence from his side before the application under Section 24 of the Hindu Marriage Act filed by the respondent was decided and as such, he may be permitted to file a recall application and/or application for review of the said order and the Court be directed to consider further evidence before deciding the matter of maintenance afresh.

11. It is not for this Court to issue any such directions in this regard and it is always open to the appellant to take such recourse as may be available to him in law.

12. The appeal stands dismissed.

13. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2014

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Special Appeal Defective No. 292 of 2014

State of U.P. & Ors. .Appellants
Versus
Vindhyavasni Tiwari & Ors........Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Sri Ashok Khare, Sri Seemant Singh, Sri K.M. Asthana

Constitution of India, Art.-226- vacancy of S.I. and Platoon Commander advertised on 09.05.2011-selection process started as per U.P. Sub Inspector Service Rules 2008-30000 candidate short listed in 3rd steps test-by 5th amendment Rule 15 relaxing 10 km. Race within 60 minutes for male reduced to 4.8 km. Within 35 minute to 2.4 km. Race within 20 minutes-considering unnatural death of a candidate during race-ultimately misinterpreting interim order entire selection quashed-board decided to re-advertise vacancy as per amended Rule-quashed by Single Judge-no interference called for.

Held:Para-33& 34

33. In the case in hand an exercise with more serious consideration and with expert legal advice should have preceded the decision taken by the senior police officers sitting together, to cancel the entire selection. There is nothing to show that they had taken any legal opinion from State Law Officers, on the interim order passed by the Court giving them option to either pursue with the selections under the old rules or to cancel the entire selections. The State appellant has not placed any material before us that it had taken into consideration the expenditure incurred in the selections advertised in the year 2011, and the public interest to be served in notifying the selections afresh. The expenditure incurred in the selections, the requirement of the police officers at entry level, the aspirations and legitimate expectation of more than 30,000 young men and women of the State, who had crossed the 3rd level in the selections, and the absence of any scientific data which was required to be collected from National Sports Colleges or experts in the Sports Medicine has vitiated the decision to cancel the entire selections. The entire exercise is thus held to be wholly arbitrary and unreasonable.

34. We do not find any good ground to interfere with the judgment of learned Single Judge in setting aside the Government Order dated 3.9.2013 and the consequential orders dated 24.9.2013 by which the selections were cancelled.

Case Law Discussed:
AIR 1983 SC 852; AIR 1983 SC 1143; AIR 1988 SC 2068; 1998(9)SCC 223; 1997(10) SCC 419; (2007) 11 SCC 605; 2007(5) SLR 237; (1994) 6 SCC 151; (2002) 3 SCC 586; (2008

(1) SCC 362); (2008) 3 SCC 512; 2008(7) SCC 11; (1985) 4 SCC 417; (2006) 6 SCC 395; (2013) 4 SCC 540; (1974) 3 SCC 220.

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

1. This intra court Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 is directed against the judgment of learned Single Judge dated 9.12.2013 by which he has quashed the Government Order dated 3.9.2013 and the consequential order dated 24.9.2013 cancelling the entire proceeding of selection/recruitment, initiated vide advertisement dated 19.5.2011 by the UP Police Recruitment and Promotion Board, Lucknow on 3698 substantive posts of Sub Inspector (Civil Police), and 312 posts of Platoon Commander in Provincial Armed Constabulary (PAC). Learned Single Judge has directed the State respondents to complete recruitment commencing from the stage it was stopped, in accordance with the rules as they stood before 5th Amendment Rules, 2013 expeditiously but not later than three months from the date of production of a certified copy of the order before the respondents competent authority.

2. We have heard Shri Piyush Shukla, Standing Counsel appearing for the State appellants. Shri Ashok Khare, Senior Advocate assisted by Shri K.M. Asthana and Shri Seemant Singh have appeared for the respondents, who were petitioners in the writ petitions.

3. Brief facts giving rise to this Special Appeal are that prior to enforcement of U.P. Sub Inspector and Inspector (Civil Police) Service Rules, 2008, and U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules, 2008, the recruitment to Civil Police and PAC was governed by the executive instructions issued from time to time. The Rules made in the year 2008 separately for the Sub Inspector and Inspector (Civil Police) and PAC were notified on 2.12.2008. The U.P. Sub Inspector and Inspector (Civil Police) Service Rules, 2008 has thereafter undergone seven amendments upto 11.12.2013, whereas the U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules, 2008 has undergone four amendments. In this Special Appeal we are concerned with the 1st Amendment dated 2.4.2009 and the Corrigendum dated 10.6.2009, issued to 1st Amendment dated 2.4.2009 amending Rule 15 and the 5th Amendment dated 1.3.2013 by relaxing the standard of Physical Efficiency Test in Column No.II (e) in the Rules of 2008; applicable to recruitment of Sub Inspector and Inspector in Civil Police, whereby the following amendment was carried out:-

(e) Physical Efficiency Test - The candidates who are declared successful in the preliminary written test under clause (d) shall be required to appear in a Physical Efficiency Test of qualifying nature. The male candidates shall be required to complete a run of 4.8 kilometers in 35 minutes and the female candidates a run of 2.4 kilometers in 20 minutes. The procedure for conducting the Physical Efficiency Test shall be such as prescribed in Appendix-2."

4. Similarly the 3rd Amendment dated 6.6.2013 under Rule 18 of the U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules, 2008, has carried out amendments to the same effect relaxing the criteria for the distance and time of run in the physical efficiency test.

5. An advertisement was published on 19.5.2011 by the State Government through U.P. Police Recruitment and Promotion Board, Lucknow for recruitment of 3698 substantive posts of Sub Inspector (Civil Police) including 1849 posts in General Category; 998 in Other Backward Classes, 777 in Scheduled Castes and 74 in Scheduled Tribes. The advertisement also included recruitment of 312 substantive posts of Platoon Commander in PAC including 156 in General Category, 84 in Other Backwar Classes, 66 in Scheduled Castes, and 6 in Scheduled Tribes.

6. In the second column of the advertisement the recruitment procedure was prescribed to be undertaken in six steps namely (1) Physical Standard Test; (2) Preliminary Written Examination; (3) Physical Efficiency Test; (4) Main Written Examination; (5) Group Discussion and (6) Medical Examination. The candidates, who meet the minimum of physical standards could appear in the preliminary written examination in which they were required to secure 50% marks to be eligible for the next step for physical efficiency test. Clause 2.6 of the advertisement provided for the standard of physical efficiency test of qualifying nature. The candidates, who are declared successful in this test, are eligible to appear in the main written examination. Clause 2.6 further provided that male candidates will be expected to complete 10 kilometres race in 60 minutes and female candidates 5 kilometres race in 35 minutes in accordance with the then prevailing Rules of 2008. Steps 1, 2 and 3 are qualifying in nature. The candidates fulfilling the prescribed minimum physical standard; securing 50% marks in the preliminary written examination and completing the physical efficiency test, were eligible to appear in the further steps in the selection.

7. The physical standard test was held and carried out as per advertisement in September-October, 2011 after which the preliminary written test was held on 11.12.2011, in which approximately 2,70,000 candidates appeared. The result of the preliminary written test was declared on 1.1.2013 in which 39,315 candidates qualified to appear in the next qualifying level. The physical efficiency test was scheduled to be held between 5.2.2013 to 22.2.2013.

8. On 18.2.2013 one of the candidates namely Satendra Kumar Yadav, while appearing in the physical efficiency test of the run of 10 kilometres, died while running, before completing the test. The matter was widely published in media, on which on 20.2.2013 an order was issued by the Secretary, Government of UP, to the Chairman of UP Police Recruitment & Promotion Board directing that since one of the candidates had died after he had fallen on the ground, while taking part in the physical efficiency test, the physical efficiency test, which is a part of the selection, is postponed for a period of one month.

9. On a request made by the Chairman, UP Police Recruitment and Promotion Board, Lucknow on 14.3.2012 the Secretary, Government of UP vide his letter dated 11.4.2013 directed him to complete the selection process according to UP Sub Inspector and Inspector (Civil Police) Service (5th Amendment) Rules, 2013 notified on 1.3.2013, for the remaining candidates, who had not completed the test or who were declared unsuccessful or were absent in the physical efficiency test. Consequently a notice/notification was published on

27.6.2013 directing all the candidates, who had not participated in the physical efficiency test or who were declared unsuccessful and were absent to complete the physical efficiency test. The notification provided the revised standards in accordance with the 5th Amendment to the Rules of 2008, namely that the male candidates will be required to complete a run of 4.8 kilometres in 35 minutes and the female candidates a run of 2.4 kilometres in 20 minutes.

10. A Service Single No.91 of 2013 (Kendra Kunwar vs. State of UP and others) was filed at Lucknow Bench of this Court. The petitioner in the writ petition was declared unsuccessful in the physical efficiency test. Learned Single Judge dismissed the writ petition on the ground that the petitioner after participating in the selection was declared unsuccessful in the preliminary written test and thus he has no right to challenge the procedures adopted in the selection.

11. In another Writ A No. 36383 of 2013 (Rajesh Kumar vs. State of UP & another) challenging the notification by which the 5th Amendment to the Rules of 2008 was carried out on 27.6.2013 with regard to the standards of physical efficiency test, learned Single Judge passed following orders:-

"Hon'ble Devendra Pratap Singh,J.

Heard learned counsel for the petitioner and Sri C.B. Yadav, Learned Additional Advocate General for the respondents.

Sri Yadav prays for and is granted three weeks further time to file counter affidavit.

The petitioners in this petition and the petitioners of the connected writ petitions had applied for direct recruitment to the post of Sub-Inspector in accordance with the advertisement issued in 2011 under the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules,2008. They were subjected to physical standard test and preliminary written test and thereafter in the physical efficiency test and all of them cleared the three stages of recruitment. However, a notification was issued on 27.6.2013 amending the rules with regard to physical efficiency test which has been challenged.

The recruitment to the post of Sub-Inspector is by direct recruitment and from rankers.

It is evident that the recruitment process had been initiated and it is settled law that once recruitment process had begun, rules cannot be amended so far as that recruitment is concerned, as rules of the game cannot be altered midway and the respondents cannot invoke the power of rule 28 so far as the direct recruits are concerned.

Accordingly, the respondents are restrained from proceeding further on the basis of altered physical efficiency criteria. However, it would be open for them to carry on that recruitment on the basis of the old rules or if they are so advised, the entire recruitment may be undertaken in accordance with the new criteria but following the law on the issue.

It is clarified that this interim order does not relate to promotion of rankers to the post of Sub-Inspector.

List after three weeks.

Order Date :- 11.7.2013"

12. On 13.7.2013 in compliance with the interim order passed by this Court on 11.7.2013 in Writ A No.36383 of 2013 (Rajesh Kumar vs. State of UP & another) a decision was taken by the Chairman of the UP Police Recruitment & Promotion Board in a meeting in which Director General of Civil Police, and the Director General of PAC participated, that in view of the incident of death in the physical efficiency test and considering the directions issued by the High Court, in public interest, the selection procedure be started afresh and that the vacancies, which have arisen upto June, 2015 on account of promotion/retirement may also be included in the new notification.

13. In pursuance to the resolution in the meeting of the UP Police Recruitment & Promotion Board, a decision was taken by the State Government on 3.9.2013 to cancel the entire proceedings of selection/recruitment initiated by the advertisement dated 19.5.2011, and to start the selection process afresh including vacancies upto June, 2015.

14. The Writ Petition No.17372 of 2013 connected with Writ Petition No.36383 of 2013 (Rajesh Kumar vs. State of UP & another) was dismissed as having become infructuous on the ground that the selections have been cancelled. The interim order dated 11.7.2013 merged in the final order.

15. The State Government has not yet announced the fresh selections so far. In the meantime the petitioners, who are respondents in this Special Appeal filed Writ A No.57576 of 2013 (Vindhyavasini Tiwari and 4 ors vs. State of UP & 2 ors); Writ A No.63093 of 2013 (Manjit Krishna and 16 ors vs. State of UP & 2 ors) and Writ A No.60538 of 2013 (Arvind Kumar vs. State of UP & 2 ors). Learned Single Judge considered the facts and circumstances of the case and the effect of the 5th Amendment to the Rules of 2008 by which the standard of physical efficiency test were altered and held that the amendments carried out in the Rules of 2008, do not show that the amended Rules will govern the recruitment. The State Government by Office Memorandum dated 27.6.2013 notified recommencing of the physical efficiency test on 7.7.2013, providing that besides remaining candidates who were yet to participate in the physical efficiency test in the recruitment process, even failed candidates and absentees would be permitted to complete the physical efficiency test as per amended rules i.e. reduced length of run as also altered period within which the run had to be completed. While rejecting the challenge to the vires of the amendments made by the 5th Amendment of 2013 and the 3rd Amendment Rules of 2013 for recruitment to Sub Inspector (Civil Police) and Platoon Commander in PAC, he held that in the matter of recruitment and appointment the recruitment procedure as was available on the date of occurrence of vacancy must be followed to fill in the advertised vacancies, unless and until the changed procedure or alteration or amendment in the rules has been specifically made retrospective, so as to govern the on going recruitment. When a vacancy occurs the general principle is that it must be filled in according to the procedures applicable at the time when the vacancy occurred.

16. Learned Single Judge relied on Y.V. Rangaiah and ors vs. J. Sreenivasa

Rao and ors AIR 1983 SC 852; A.A. Calton vs. the Director of Education and another AIR 1983 SC 1143; P. Ganeshwar Rao and others vs. State of Andhra Pradesh and others AIR 1988 SC 2068; B.L. Gupta and another vs. M.C.D., 1998 (9) SCC 223; State of Rajasthan vs. R. Dayal 1997 (10) SCC 419; Arjun Singh Rathore and ors vs. B.N. Chaturvedi and ors (2007) 11 SCC 605; State of Punjab and ors vs. Arun Kumar Aggarwal and ors 2007 (5) SLR 237 and a Division Bench judgment of this Court, which has followed the aforesaid decisions, in which it was held that the vacancies existing in 2011 in respect whereof the advertisement was published on 19.5.2011, deserved to be dealt with in accordance with rules as applicable at that time. The subsequent prospective amendments would not govern the selections. The selections for the vacancies, which have arisen after 2011 may be made in accordance with the rules as amended by 5th Amendment to the rules in the year 2013 and the 3rd Amendment to the rules applicable to PAC in the same year of 2013.

17. On the second issue as to whether the competent authority can cancel a recruitment process at any stage unless the decision taken is non-arbitrary and for valid reasons, learned Single Judge held that the only reason assigned in the case is that of interim order dated 11.7.2013 passed in the Writ Petition No.36383 of 2013 (Rajesh Kumar vs. State of UP & ors). The decision, when analysed in depth would show that the respondents have completely misdirected themselves. They have misread the interim order dated 11.7.2013 in which learned Single Judge added the words "but following law on the issue". The respondents did not look into nor considered whether it was permissible in law to continue with the recruitment under the old rules, and decided to cancel the entire selections. The decision was not an informed and reasoned decision. He further held that since the interim order gets merged into final order, the decision taken in pursuance to the interim order cannot be accepted.

18. Learned Single Judge also considered the public interest involved, and held that since admittedly more than 39,000 candidates had participated in physical efficiency test, which is the third stage of recruitment; and in which number of candidates proved their physical efficiency by completing rigorous running test of 10 kilometres for male candidates and 5 kilometres for female candidates successfully as per the old rules, the candidates who have failed had no justification to request for appearing in the re-test; and similarly there was no justification for the candidates, who had failed or had absented in the test to participate in the process.

19. Learned Single Judge thereafter held that those candidates, who have been selected through more rigorous test would be more useful for police force than those who would be selected after reduced standards. In para 57 of the judgement learned Single Judge held as follows:-

"57. Be that as it may, the candidates selected through more rigorous test would be more useful for police force than those who would be selected after reduced standard. It goes beyond comprehension of any person of ordinary prudence how recruitment made with rigorous test, particularly, when the matter relates to uniform force like police, directly responsible besides other for maintenance of public law and order etc., would be less in public interest than having persons recruited with relaxed or reduced standard."

20. Learned Single Judge for the aforesaid reasons held that the decision taken by the State Government to cancel the selection process and to re-start the process afresh was entirely arbitrary and against public interest. The argument, that the rigours of the physical efficiency test, were relaxed to save the life of young candidates, was not accepted. He held that the recruitment in question pertains to police force which must answer the best standards of physical strength, endurance, stress, efficiency etc which must be quite higher than the average common man otherwise the members of police force may not be able to perform the kind of job they are supposed to. The job of a police officer requires courage, valiant, persistent onerous physical stressed duties etc., and therefore, harder standards are needed. These standards have continued for decades together and have stood the test of time. A large number of candidates have successfully achieved the requisite physical test and when such standards were actually met by large number of candidates, a single unfortunate incident could not be a ground to cancel the selections.

21. Learned Standing Counsel appearing for the State appellants submits that the State Government is competent to frame rules or to make any amendments in the rules. The 5th Amendment to the rules made in the year 2013 revising the standard of physical efficiency test was not challenged. The State Government did not act arbitrarily in cancelling the selections and to re-advertise the recruitment under the amended Rules. The arbitrariness or unreasonableness by itself was not a ground to challenge the decision of the State Government to cancel the selections. He submits that where the State Government was satisfied that the operation of any rule regulating the conditions of service of persons appointed to service will cause undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner.

22. Learned Standing Counsel further submits that the decision of the State Government to cancel the selection process is based on the subjective satisfaction, that it will cause undue hardship in selection process, where a candidate had died. The relaxation was made in public interest without wasting any time.

23. It is submitted on behalf of State appellants that in the selection process no candidate has acquired any vested right against the State Government, even if his name is included in the select list. No right had accrued to the petitioners in the selection process to be enforced by the Court. The State Government had a right to withdraw the notification and to start the process of recruitment afresh under the amended rules. Learned Single Judge has not considered the facts and circumstances in its correct perspective and that in the selection process the human approach should not be lost. There has been considerable delay in selections and that considering the shortage of police

officers at the entry level it is necessary to hold selections afresh. He has relied on State of M.P. And others vs. Raghuveer Singh Yadav and others (1994) 6 SCC 151 (paras 5 and 6), in which it was held:-

"5.It is not in dispute that Statutory Rules have been made introducing Degree in Science or Engineering or Diploma in Technology as qualifications for recruitment to the posts of Inspector of Weights and Measures. It is settled law that the State has got power to prescribe qualifications for recruitment. Here is a case that pursuant to amended Rules, the Government has withdrawn the earlier notification and wants to proceed with the recruitment afresh. It is not a case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered of their claims according to the rules then in vogue. The amended Rules have only prospective operation. The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules.

6.The ratio in P Mahendran v. State of Karnataka1 has no application to the facts in this case. In that case, for the posts of Motor Vehicles Inspector, apart from the qualifications prescribed, they issued additional qualifications and selection was sought to be made on the basis of additional qualifications. It was held that since recruitment was sought to be made on the basis of the qualifications prescribed, the additional qualifications prescribed thereafter have no retrospective effect to the recruitment already set in motion. Under those circumstances, additional qualifications were directed not to be taken into account for considering the claims of the candidates on the basis of the original advertisement. The ratio therein is clearly inapplicable to the facts in this case."

24. Shri Ashok Khare has, on the other hand, supported the reasons given in the judgement. He submits that the legal position has been fairly explained by learned Single Judge namely that the selection process must be concluded in accordance with the service rules as are prevailing on the date of the advertisement. There were no such circumstances which could have validly persuaded the State Government to cancel the selections. The unfortunate death of one of the candidate was on account of lack of medical facilities, that there was nothing in the interim order passed by learned Single Judge to have cancelled the selections. He submits that the decision was political in nature inasmuch as in the middle of selection process a new Government had taken over which did not want selection process initiated at the time of old Government to continue. The decision was neither informed with relevant material nor reasonable.

25. Shri Ashok Khare submits that under the executive instructions prevailing prior to the enforcement of the Rules of 2008, the run in the physical efficiency test had to be completed almost within the same time. The death of one of the candidates out of more than 30,000, who had participated could not be a ground to cancel the entire selections as the death could have taken place in circumstances other than the stress of the test. The State Government did not take into consideration nor held any enquiries into the medical condition of the person, who

had died participating in the exercise. He may have been ill or suffering with any disease or in a condition in which he should have been advised not to take the test. He submits that it is difficult to comprehend that the standard of physical efficiency test would be lowered in case of selection in Civil Police and PAC where a higher level of physical efficiency is required for the training and in the job, than in any other service.

26. The legal position that the recruitment in public service has to be completed in accordance with the rules laying down eligibility including qualification and standard during the test in accordance with the rules prevailing at the time of advertisement is not in any doubt. Any amendment in the rules mid way changing the rules of game is not permissible. The amendments in eligibility and selection process have to be applied for selections to be held in future. The change in the rules altering the conditions of recruitment by prescribing qualification and standards, which are higher or lower, affects the entire selection process and the right of persons who participate in the selection process, in violation of guarantee of equality before law, under Articles 14 and 16 of Constitution of India.

27. It is not necessary to add to the precedent of cases referred on by learned Single Judge. It is sufficient to state that the legal position has been further explained and followed by the Supreme Court in K. Shekar Vs. Indiramma (2002) 3 SCC 586 (para 23); B. Ramakichennin Vs. Union of India (2008 (1) SCC 362); K. Manjushree v. State of Andhra Pradesh (2008) 3 SCC 512 and Hemani Mehrotra Vs. High Court of Delhi 2008 (7) SCC 11. An argument in Himani Mehrotra (supra), that the decision in K. Manjushree (supra), did not notice the decision of Ashok Kumar Yadav v. State of Haryana (1985) 4 SCC 417 and K.H. Siraj vs. High Court of Kerala and others, (2006) 6 SCC 395, was met with the following observations:-

"15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both the written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.

16. The contention raised by the learned counsel for the respondent that the decision rendered in K. Manjusree did not notice the decisions in Ashok Kumar Yadav v. State of Haryana as well as in K.H. Siraj v. High Court of Kerela and, therefore, should be regarded either as decision per incuriam or should be referred to a larger Bench for reconsideration, cannot be accepted. What is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the

decisions referred to by the learned counsel for the respondent. While deciding the case of K. Manjusree the Court noticed the decisions in (1) P.K. Ramachandra Iyer v. Union of India; (2) Umesh Chandra Shukla v. Union of India; and (3) Durgacharan Misra v. State of Orissa, and has thereafter laid down the proposition of law which is quoted above. On the facts and in the circumstances of the case this Court is of the opinion that the decision rendered by this Court in K. Manjusree can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

28. In Tej Prakash Pathak and ors vs. Rajasthan High Court and others (2013) 4 SCC 540 a three-Judge Bench of Supreme Court reiterated the principles, which have been ingrained in service law since State of Haryana vs. Subash Chandra Marwa (1974) 3 SCC 220. After considering the entire case law on the subject the Supreme Court held as follows:-

"9. In the context of the employment covered by the regime of Article 309, the "law' - the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non- arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.

10. Under the Scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law making is made only with reference to the creation of crimes. Any other legal right or obligation could be created, altered, extinguished retrospectively by the sovereign law making bodies. However such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16 etc. Changing the "rules of game' either midstream or after the game is played is an aspect of retrospective law making power.

11. Those various cases deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva-voce as was done in the case of Manjusree (supra) or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment [such as driving test as was the case in Maharashtra State Road Transport Corporation (supra).

12. If the principle of Manjusree's case (supra) is applied strictly to the present case, the respondent High Court is bound to recruit 13 of the "best" candidates out of the 21 who applied irrespective of their performance in the examination held. In such cases, theoretically it is possible that candidates securing very low marks but higher than some other competing candidates may have to be appointed. In our opinion, application of the principle as laid down in Manjusree case (supra) without any further scrutiny would not be in the larger public interest or the goal of establishing an efficient administrative machinery.

13. This Court in the case of the State of Haryana v. Subash Chander Marwaha and Others [(1974) 3 SCC 220] while dealing with the recruitment of subordinate judges of the Punjab Civil Services (Judicial Branch) had to deal with the situation where the relevant Rule prescribed a minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks (45%). Only 7 candidates who secured 55% and above marks were appointed and the remaining vacancies were kept unfilled. The decision of the State Government not to fill up the remaining vacancies in spite of the availability of candidates who secured the minimum qualifying marks was challenged. The State Government defended its decision not to fill up posts on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge and issued a mandamus. In appeal, this Court reversed and opined that the candidates securing minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. In the context, it was held:-

12. ......In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for more (sic mere) eligibility.......

14. Unfortunately, the decision in Subash Chander Marwaha (supra) does not appear to have been brought to the notice of their Lordships in the case of Manjusree (supra). This Court in the case of Manjusree (supra) relied upon P.K. Ramachandra Iyer and Others v. Union of India and Others [(1984) 2 SCC 141], Umesh Chandra Shukla v. Union of India and Others [(1985) 3 SCC 721] and Durgacharan Misra v. State of Orissa and Others [(1987) 4 SCC 646]. In none of the cases, the decision in Subash Chander Marwaha (supra) was considered.

15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game' insofar as the prescription of eligibility criteria is concerned as was done in the case of C. Channabasavaiah v. State of Mysore [AIR 1965 SC 1293] etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game' stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

29. In the present case more than 3 lacs persons participated in the selections from which about 30,000 was shortlisted upto the 3rd step which was given up and fresh selections were announced only on the death of one of the candidates. The unfortunate incident by no stretch of imagination could be a ground to cancel the entire selections. In the police force and para military services a candidate participates in the selection and thereafter in training at his own risk. The standards of physical efficiency test, which have stood the test of time and were uniformly applied to all the candidates in which more than 30,000 candidates participated, could not be

treated to be rigorous on the death of one candidate. His medical condition was not subjected to any enquiry. The incident, however, was singular and should not have been taken into consideration except for sympathies to his family of the deceased. The incident, without any proper enquiry could not have been taken into account for relaxing the rule by an amendment during the process of selections and for taking a decision to cancel the entire selections in which about 3 lacs candidates had participated.

30. We are informed that on account of delay in the selections and the pendency of the writ petitions, the State Government has not yet started the exercise of making fresh selections causing serious shortage of police officers at entry level, resulting into deteriorating law and order situation in the State of UP and delay in pending investigations in the criminal cases.

31. In the past the succeeding Governments in the State of UP, have not favoured the recruitment in the police force at the entry level of Constables or Sub Inspectors initiated by the previous Governments. The administration and management of the police force by the Government to their advantage, has been a subject matter of perpetual litigation in courts in the State of UP. The selections of Constables was cancelled twice by succeeding governments in the past resulting into severe shortage of the trained Constables in the State of UP.

32. Every discretionary power in public law has to be structured on objective principles to be exercised with scrupulous care. The powers in public sphere vested in the authorities, for taking administrative decisions is given in order to deal with a case in a just, fair and equitable manner keeping in view the principles of law. The discretion must not be exercised to swallow the objectives for the purposes of which it is vested and to render the basic purpose and object of use of power nugatory.

33. In the case in hand an exercise with more serious consideration and with expert legal advice should have preceded the decision taken by the senior police officers sitting together, to cancel the entire selection. There is nothing to show that they had taken any legal opinion from State Law Officers, on the interim order passed by the Court giving them option to either pursue with the selections under the old rules or to cancel the entire selections. The State appellant has not placed any material before us that it had taken into consideration the expenditure incurred in the selections advertised in the year 2011, and the public interest to be served in notifying the selections afresh. The expenditure incurred in the selections, the requirement of the police officers at entry level, the aspirations and legitimate expectation of more than 30,000 young men and women of the State, who had crossed the 3rd level in the selections, and the absence of any scientific data which was required to be collected from National Sports Colleges or experts in the Sports Medicine has vitiated the decision to cancel the entire selections. The entire exercise is thus held to be wholly arbitrary and unreasonable.

34. We do not find any good ground to interfere with the judgment of learned Single Judge in setting aside the Government Order dated 3.9.2013, and the consequential orders dated 24.9.2013 by which the selections were cancelled.

35. The Special Appeal is dismissed. The respondents will complete the selection process initiated by advertisement dated 19.5.2011 as expeditiously as possible. There shall be no orders as to cost.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2014

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No. 608 of 2014

Vishal @ Satya Prakash @ Chhotu ....Revisionist
Versus
State of U.P. & Anr. ....Opposite Parties

Counsel for the Revisionist:
Sri Arvind Kumar Mishra, Sri Sanjeev Kumar Singh

Counsel for the Opposite Parties:
A.G.A.

Criminal Revision- Against rejection of bail application-offense under section 147, 148, 149, 307, 324, 325 IPC-admittedly the applicant was minor on date of occurrence-as such declared as juvenile on 28.01.2014-order become final-without recording any of the contingencies under section 12 of juvenile justice(care and protection of children) Act 2000-considering welfare of revisionist with hope of associating in main stream of life if released on bail-order passed by Court below set-a-side-released on bail.

Held:Para-11&12

11. The Juvenile Justice Act is a beneficial and social-oriented legislation, which needs to be given full effect by all concerned whenever the case of a juvenile comes before them. In absence of any material or evidence all reasonable ground to believe that the delinquent juvenile, if released on bail is likely to come into association with any known criminal or expose him to moral, physical or psychological danger, it cannot be said that his release would defeat the ends of justice.

12. Keeping in view the aforesaid legislative intent in enacting the Act and considering the welfare of the revisionist with a hope that he may recover himself after being released on bail, by associating himself to the main stream of life, it appears expedient in the interest of justice that his prayer for bail be allowed.

Case Law Discussed:
Cri Law Jounal, Pg. 1373; Crl. Law Journal, Pg. 2957.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. By means of this revision, the revisionist has questioned the legality of the order dated 20.02.2014 passed by Additional Sessions Judge/Special Judge, E.C. Act, Gorakhpur in Criminal Appeal No. 21 of 2014, Vishal @ Satya Prakash @ Chhotu Vs. State of U.P. under Section 52 of Juvenile Justice (Care and Protection of Children) Act, 2000 (Hereinafter referred to as Juvenile Justice Act), whereby the learned Additional Sessions Judge dismissed the appeal filed by the revisionist against the order dated 7.2.2014 of Juvenile Justice Board passed in Case Crime No. 129 of 2013 under Sections 147, 148, 149, 307, 324 and 325 of I.P.C., Police Station Khajni, District Gorakhpur, whereby the learned Magistrate has rejected the bail application moved by the revisionist.

2. Learned counsel for the revisionist has argued that the orders passed by both the courts below are illegal and arbitrary. Both the courts below have not exercised their jurisdiction properly. No plausible reason

has been assigned by the courts below while refusing to release the revisionist on bail. Both the learned courts below have not considered the provision of Section 12 of Juvenile Justice Act in letter and spirit. It has further been argued that there was nothing in the report submitted by District Probation Officer to indicate that after being released on bail there is likelihood of the revisionist coming into association with any known criminal or his release would expose him to moral, physical or psychological danger or his release would defeat the ends of justice. Despite that the learned courts below have refused to release the revisionist on bail without any supporting material on the record. It is settled law that gravity of offence will not be considered while deciding his bail application but both the courts below committed error of law while rejecting the bail application of the revisionist. The revisionist is innocent and has been falsely implicated in the present case due to village politics. No specific role has been assigned to the revisionist. There is delay in F.I.R. The incident is alleged to have taken place in midnight but no source of light has been shown in the F.I.R. The revisionist is a juvenile, so he is entitled to be benefited by the provisions of Juvenile Justice Act. On the aforesaid grounds, it has been prayed by the learned counsel for the revisionist that the revision be allowed. Impugned order be quashed and the revisionist be released on bail.

3. Learned A.G.A. has opposed the revision by contending that the courts below have rightly exercised their jurisdiction by refusing the bail to juvenile and there is no need to interfere in the order impugned.

4. Heard and perused the record.

5. The record shows that the revisionist was declared juvenile on 28.1.2014 by Principal Magistrate, Juvenile Justice Board. The Juvenile Magistrate has observed that the revisionist was 15 years 2 months and 22 days old on the date of occurrence. There is no dispute regarding the age of the revisionist. No appeal has been filed against the aforesaid order declaring the revisionist to be a juvenile on the date of offence and the aforesaid order declaring the revisionist a juvenile has attained finality. In the aforesaid circumstance, both the courts below should have decided the bail application and the appeal in view of the provisions as provided under Section 12 of Juvenile Justice Act, which is reproduced as under:

"12. Bail of Juvenile:-(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1972 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety [or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice"

6. Thus, Section 12 of the Act lays down only three contingencies in which the bail can be refused to juvenile. These are:

(i) If his release is likely to bring him into association with any known criminal, or;

(ii)Expose him to moral, physical or psychological danger, or;

(iii)That his release would defeat the ends of justice.

Both the Impugned orders show that the courts below have opined that if released on bail, the possibility cannot be ruled out that the juvenile would come into association with his family members, who are the co-accused in the same occurrence. The reason given by the Courts below for refusing bail to juvenile does not appear just and proper.

7. The report of District Probation Officer is available on record, in which there is no mention of any abnormal behaviour and his physical/mental condition and social and economic status is shown as normal. The District Probation Officer has also mentioned that the revisionist has no criminal background but the learned Juvenile Magistrate without considering the report of District Probation Officer and without assigning any cogent reason, has refused to grant bail to the revisionist. Learned Appellate Court instead of applying its independent mind to the facts and circumstances of the case has also wrongly concurred with the opinion of the Juvenile Justice Board.

8. In Prakash Vs. State of Rajsthan, 2006, Cri Law Journal, pg. 1373, it has been observed that " at the time of consideration of bail under Section 12 of the Act, the merit or nature of offence has no relevancy. The language of the Section 12 of the Act using the word "shall" is mandatory in nature and providing non obstante clause by using the expression "notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force", he be released on bail..", shows the intention of legislature to grant bail to the delinquent juvenile offender with certain exceptions. It is for the prosecution to bring on record such materials while opposing the bail and to make out any of the grounds/exceptions provided in the Section which may pursuade the Court not to release the juvenile on bail.

9. In Rais Vs. State of U.P., A.C.C. in Criminal Revision No. 860 of 1991 this Court has held as under:

"The word 'known' has not been used by the parliament in the section without purpose. By use of word 'known' the Parliament requires that the court must know the full particulars of the criminal with which the delinquent is likely to come into association."

10..In Sanjay Chaurasiya Vs. State of U.P., 2006, Crl. Law Journal, pg. 2957, it has been observed as follows:

"In case of refusal of the bail some reasonable grounds for believing above mentioned exceptions must be brought before the Court concerned by the prosecution."

11. The Juvenile Justice Act is a beneficial and social-oriented legislation, which needs to be given full effect by all concerned whenever the case of a juvenile comes before them. In absence of any material or evidence all reasonable ground to believe that the delinquent juvenile, if released on bail is likely to come into association with any known criminal or expose him to moral, physical or psychological danger, it cannot be said that his release would defeat the ends of justice.

12. Keeping in view the aforesaid legislative intent in enacting the Act and considering the welfare of the revisionist with a hope that he may recover himself after being released on bail, by associating himself to the main stream of life, it appears expedient in the interest of justice that his prayer for bail be allowed.

13. In view of the above discussion, the revision is allowed. Both the impugned orders passed by Juvenile Justice Board as well as Lower Appellate Court are quashed and the Juvenile Justice Board is directed to release the revisionist on bail on his mother furnishing a personal bond of Rs.1,00,000/- with two solvent sureties each in the like amount to the satisfaction of the Juvenile Justice Board in Crime No.139 of 2013, under Sections 147, 148, 149, 307, 324 and 325 of I.P.C., Police Station Khajni, District Gorakhpur, subject to condition that the mother of the revisionist will take care of his education and betterment and will not allow to indulge him in any criminal activity and will keep constant check on his activities. Both the sureties are directed to be close relatives of the revisionist juvenile.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE NAHEED ARA MOONIS, J.

First Appeal No. 931 of 2012

Amit Agrawal........... **Appellant**
Versus
Pooja Agrawal............ **Defendant**

Counsel for the Appellant:
Sri Krishna Ji Khare, Sri Mritunjay Khare

Counsel for the Respondent:
-

Hindu Marriage Act, 1956-Section 13-B- **Divorce on mutual consent basis-before mediation center-wife given consent for permanent alimony- provided sum of Rs. 500000/-given by husband towards one time maintenance-after accepting amount Division Bench on basis of compromise quash the criminal proceeding against husband-as per terms of compromise divorce petition-on mutual consent basis filed-18 months elapsed-wife did not turn up-family court rejected divorce petition-held-once the wife accepted amount in furtherance of compromise-given joint affidavit- physical present not required-order quashed-divorce decree passed accordingly.**

Held:Para-8
As such, in view of the aforesaid, the presence of the wife on the date fixed before the Family Court was to be presumed as she had accepted all the terms of the compromise and had also acted upon the same by accepting the permanent alimony, and the criminal cases having also been quashed/withdrawn with her consent, and she having signed the papers for divorce by mutual consent. Accordingly, the order dated 12.10.2012 rejecting the application of the parties for grant of divorce on the basis of mutual consent on account of the respondent-wife having not appeared in person deserves to be quashed, and the appellant would be entitled to the decree of divorce by mutual consent.

(Delivered by Hon'ble Vineet Saran, J.)

1. This is an appeal challenging the order dated 12.10.2012 whereby the divorce petition filed by the appellant-husband under section 13-B of the Hindu Marriage Act, 1956 (hereinafter referred to as "the Act") has been dismissed on the ground that the respondent-wife was not present and since more than 18 months

had passed after the filing of the petition jointly by the husband the wife, mutual divorce could not be granted in the absence of the respondent-wife.

2. We have heard Sri Krishna Ji Khare, learned counsel for the appellant. In view of the order of date passed on the order-sheet, whereby service on the sole respondent has been deemed to be sufficient, this appeal is being disposed of at this stage.

3. The facts leading to the filing of the petition under section 13-B of the Act for divorce by mutual consent are that after the marriage of the appellant with the respondent in the year 2006, a First Information Report was lodged by the respondent (wife) against her husband (appellant), which was registered as case crime no. 244 of 2010 under sections 498-A, 323 IPC and section ¾ Dowry Prohibition Act. Challenging the same, the appellant filed Criminal Misc. Writ Petition No. 14341 of 2010. In the said writ petition, the matter was referred to the Mediation Centre of this Court, in which an amicable settlement was arrived at between the parties on 1.5.2011. However, in the meantime, the said Criminal Misc. Writ Petition was dismissed in default, in which a restoration/recall application was filed. Thereafter, on 8.7.2013, the order dismissing the Criminal Misc. Writ Petition no. 14314 of 2010 in default was recalled and the writ petition was allowed with the following order:-

"Heard learned counsel for the petitioners and the learned A.G.A. for the State.

Learned counsel for the parties point out that the dispute has been resolved between the parties and there is a report of the mediation centre dated 8.5.2011 to this effect.

From the perusal of the mediation report, it appears that the petitioners and respondent no. 3 have amicably settled their dispute and they have decided to live separately. The respondent no. 3 is no more interested in prosecuting the petitioners in the present case arising out of Case Crime No. 2442 of 2010 under Sections 498-A, 323 I.P.C. and 3/4 of Dowry Prohibition Act, Police Station Baradari, District Bareilly.

In this view of the matter, the writ petition is allowed and the criminal proceedings arising out of the FIR dated 26.7.2010 registered at Case Crime No. 2442 of 2010 under Sections 498-A, 323 I.P.C. and 3/4 of Dowry Prohibition Act, Police Station Baradari, District Bareilly are hereby quashed. The interim order, if any, stands confirmed."

4. By the said order, the report of the Mediation Centre dated 8.5.2011 confirming the settlement between the parties on 1.5.2011, was accepted. The settlement dated 1.5.2011 had been signed by the appellant and the respondent, as well as their respective counsel. The relevant paragraph 5 of the said settlement is reproduced below:-

"5. The parties hereto confirm and declare that they have voluntarily and of their own free will arrived at this Settlement Agreement in the presence of the Mediator/Conciliator.

a. That Sri Amit Agarwal (petitioner-husband) and Smt. Pooja Agarwal (Respondent no.3-wife) were married on 21.4.2006. After some time of the marriage, the relation between husband and wife became strained and hence they are living separately. Out of the aforesaid wedlock, they were blessed with a female child namely Gauri who born on 24.10.2007.

b. That a joint affidavit in the shape of an agreement between the parties has already filed before the family court, Bareilly on 7.4.2011, in case no. 331 of 201, which is part of this agreement. In view of the aforesaid affidavit, now both the parties have decided to separate/take Mutual Divorce on the condition of a permanent alimony amount of Rs. 5,00,000/- (Rs. Five lacs) being paid through the bank draft in the name of Smt. Pooja Agarwal/wife by Sri Amit Agarwal/husband.

c. That Sri Amit Agarwal/husband has already paid Rs. 5,00,000/- on 7.4.2011 in the following manner:-

(i) Bank draft no. 323949 of Rs. 1,00,000/- drawn on Punjab & Sindh Bank, Dalmiya Eye Hospital, Civil Lines, Rampur, issued on 6.4.2011.

(ii) Two bank draft nos. 961528 dated 6.4.2011 of Rs. 1.5 lakh and 961520 dated 4.4.2011 of Rs. 2.5 lakhs drawn on State Bank of India, Railway Road, Saharanpur.

The aforesaid drafts have already been paid to Smt. Pooja Agarwal by Sri Amit Agarwal/husband and she has received the same. It is made clear between the parties that after receiving the aforesaid amount, Smt. Pooja Agarwal shall not be entitled to claim any kind of maintenance etc. for herself or her daughter Gauri from her husband or his family members.

d. That both the parties have agreed that their daughter Gauri shall remain in the custody of her mother and she will look after the welfare of her daughter in all manner.

e. That it has been agreed between the parties that this compromise will be treated as their consent for mutual divorce and they shall be free to take formal decree of divorce from the court concerned.

f. That in the view of above noted agreement between the parties, both the parties agree that all civil and criminal cases filed by them against each other including the above noted ones, shall be treated to be withdrawn and the decree of divorce to be passed for all practical purposes from today itself. They also agree that they will file proper application before the appropriate court for the purpose."

5. From a perusal of the aforesaid agreement, it is thus confirmed that the respondent Pooja Agrawal (wife) has received a sum of Rs. 5 lacs from the appellant Amit Agrawal (husband) by three Demand Drafts of Rs. 1 lac; Rs. 1.5 lacs and Rs. 2.5 lacs. In terms of the said compromise, the criminal case filed by the respondent-wife against the appellant-husband had also been quashed. Clause (e) of paragraph 5 of the compromise agreement (signed by both the parties) clearly mention that the said compromise would be treated as the consent of both the parties for mutual divorce and they shall be free to take formal decree of divorce from the court concerned.

6. It is not disputed that both the parties have fulfilled their commitment in terms of the said compromise to the extent of

payment of Rs. 5 lacs by the appellant to the respondent, withdrawal of criminal case against the appellant by the respondent and also filing of the divorce petition by mutual consent. However, after having once received the amount of Rs. 5 lacs, and filing of the petition for divorce by mutual consent, it appears that the respondent-wife remained a silent spectator and did not appear before the Family Court to enable the court to pass a decree of divorce by mutual consent. She has also chosen not appear before this Court. The Family Court has taken the view that the presence of the wife was necessary within the stipulated period of 18 months and that the Statute required both the parties to be present, and in the absence of the respondent (wife) the case has been dismissed vide the impugned order dated 12.10.2012.

7. It is true that in cases where divorce is granted on the basis of mutual consent of the parties, the presence of the parties would normally be necessary for allowing such petition but in the facts of the present case, where the respondent-wife has filed an affidavit before the Family Court and thereafter in terms of the settlement arrived at between the parties in the mediation proceedings (on the basis of which the writ petition filed by the appellant was allowed and the permanent alimony, as agreed between the parties, has already been paid to the respondent-wife), the view of this Court would be that consent of respondent-wife can be presumed on the basis of compromise agreement which had been signed by the respondent-wife in presence of the Mediators and has been accepted by the Division Bench of this Court vide order dated 8.7.2013 passed in writ petition no. 14314 of 2010 and also as she has accepted and received the permanent alimony. If this is not so presumed, then the very purpose of the compromise would be defeated. The wife cannot be permitted to accept one part of the compromise and even after accepting the permanent alimony of Rs. 5 lacs and giving her consent for divorce by mutual consent, choose not to appear before the trial court so as to frustrate the very purpose of entering into compromise. The respondent wife has taken the benefit of the compromise agreement and thereafter refused to fulfill her commitment by not appearing in the court, which, according to us, if permitted would encourage the litigants to conveniently withdraw from performing their part of the obligation as enumerated in the compromise agreement, after having taken benefit of the same.

8. As such, in view of the aforesaid, the presence of the wife on the date fixed before the Family Court was to be presumed as she had accepted all the terms of the compromise and had also acted upon the same by accepting the permanent alimony, and the criminal cases having also been quashed/withdrawn with her consent, and she having signed the papers for divorce by mutual consent. Accordingly, the order dated 12.10.2012 rejecting the application of the parties for grant of divorce on the basis of mutual consent on account of the respondent-wife having not appeared in person deserves to be quashed, and the appellant would be entitled to the decree of divorce by mutual consent.

9. For the foregoing reasons, this appeal stands allowed. The order dated 12.10.2012 passed by Family Court, Bareilly in case no. 331 of 2011 is quashed. The case no. 331 of 2011, which was filed under section 13-B of the Hindu Marriage Act for grant of a decree of divorce by mutual consent, is allowed and it is declared that the marriage between the appellant and the respondent stands dissolved.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE SHASHI KANT, J.

Civil Misc. Writ Petition No. 1062 of 2007

M/s Shree Balaji Aromatics Pvt. Ltd. & Anr. .... **Petitioners**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Petitioners:
Sri Pankaj Bhatia

Counsel for the Respondents:
A.S.G.I., Sri B.K.S. Raghuvanshi

Central Excise Act 1961-Section -11BB- Claim of interest-on delayed payment of refund-denial on ground the petitioner orally given consent for not putting any claim for interest-held-if refund delayed beyond 3 month-payment of interest is automatic and mandatory- can not be govern by consent of parties.

Held: Para-13
In view of the above, we are of the view that the petitioner is entitled for the interest under Section 11BB of the Act on the refunded amount, if the amount has been refunded after three months from the date of receipt of the application. Having regard to the facts and circumstances, of the present case, we are not impressed with the argument of learned counsel for the petitioner that the petitioner is entitled for interest on interest.

Case Law Discussed:
2011(273) ELT, 3(SC); 2013(298) ELT, 41(All.); 2006(196) ELT, 257(SC)

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

1. Heard Sri Pankaj Bhatia, learned counsel for the petitioners and Sri B.K.S.raghuvanshi, learned counsel appearing on behalf of the respondents.

2. By means of the present writ petition, petitioner is seeking a direction to the respondents to pay the refund as claimed in various refund claims along with interest thereon, filed under Section 11-BB of the Income Tax Act, 1961.

3. The petitioner filed some of the refund claims in the year 2005, some in the year 2006 and some in the year 2007. The details of the claim are mentioned in the order of adjudication dated 08.05.2007. The said refund claim has been allowed by order dated 08.07.2007. However, interest on the pending refund claim has been denied in view of the letter dated 26.04.2007, the correct date of letter is 20.04.2007, by which the petitioner has informed that they have decided not to claim the interest against the claim.

4. Learned counsel for the petitioner submitted that out of the total refund claims in respect of some of the refund claims, despite the refund claims being allowed, show cause notices have been issued by the Assistant Commissioner to deny the refund claims. However, in respect of some claims, refund has been granted. Submission of learned counsel for the petitioner is that, interest under Section 11BB of Central Excise Act, 1944 (hereinafter referred to as the "Act") being statutory and automatic, is payable without any claim in case, if refund is not made within thirty days from the date of receipt of the application. It does not depend upon the claim and can not be denied on the ground of waiver of the claim of interest by the party. Thus, even though the petitioner has written a letter for not claiming the interest, the claim of interest can not be denied under Section

11BB of the Act as it is mandatory and payable automatically.

5. Reliance is placed on the circular no.670/61/2002-CX, dated 01.10.2002. The decision of the Apex Court in the case of Ranbaxy Laboratories Ltd. Vs. Union of India, reported in 2011 (273) ELT, 3 (SC). The Division Bench decision of this Court in the case of Aroma Chemicals Vs. Union of India, reported in 2013 (298) ELT, 41 (All).

6. He further submitted that for the illegal withholding of the amount of interest, the petitioner is also liable for interest on interest. Reliance has been placed on the decision of the Apex Court in the case of Sandvik Asia Ltd. Vs. Commissioner of Income TAx-1, Pune, reported in 2006 (196) ELT, 257 (SC). He further submitted that the petitioner has waived the claim for interest on the verbal undertaking given by the respondent that the claim of refund would be allowed expeditiously, within a reasonable period but the same has not been allowed within a reasonable period, inasmuch as subsequently out of the total refund claims, despite being allowed, show cause notices have been issued to withdraw the claim, which is pending consideration.

7. Learned counsel for the respondent submitted that the petitioner has written a letter for not claiming the interest and, therefore, the petitioner is not entitled to claim the interest as the petitioner has waived his right to claim the interest.

8. We have considered the rival submissions.

9. Section 11BB of the Act reads as follows:

"Interest on delay refunds.---- If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that application interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or any court against an order of the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise], under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section]."

10. A bare perusal of Section 11BB of the Act, reveals that the payment of interest is not depended on the claim by

the party. It is automatic. In case, if refund is not paid within three months from the date of receipt of the application, the authority concerned is under obligation to pay the interest. In Section 11BB of the Act the word used is "there shall be paid to the applicant." It means that it is not discretionary and has to pay. The payment of interest is statutory and automatically. The waiver of the interest by the party has no relevance and on the said ground payment of interest can not be denied.

11. Circular no.670/61/2002-CX, dated 01.10.2002 reads as follows:

"In this connection, Board would like to stress 2. that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest. Simultaneously, Board would like to draw attention to Circular No.398/31/98-CX, dated 2-6-98[1998 (100) E.L.T. T16] wherein Board has directed that responsibility should be fixed for not disposing of the refund/rebate claims within three months from the date of receipt of application. Accordingly, jurisdictional Commissioners may devise a suitable monitoring mechanism to ensure timely disposal of refund/rebate claims. Whereas all necessary action should be taken to ensure that no interest liability is attracted, should the liability arise, the legal provision for the payment of interest should be scrupulously followed."

12. The Apex Court in the case of Ranbaxy Laboratories Ltd. Vs. Union of India, (Supra) has held that Section 11BB of the Act comes into play only after an order for refund is being made. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11BB of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said section becomes payable on the expiry of a period of three months from the date of receipt of the application under sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable.

13. In view of the above, we are of the view that the petitioner is entitled for the interest under Section 11BB of the Act on the refunded amount, if the amount has been refunded after three months from the date of receipt of the application. Having regard to the facts and circumstances, of the present case, we are not impressed with the argument of learned counsel for the petitioner that the petitioner is entitled for interest on interest.

14. In the result, the writ petition is allowed in part. The authority concerned is directed to calculate the amount of interest under Section 11BB of the Act within a period of one month and pay the same within another period of one month in accordance to law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHWANI KUMAR MISHRA, J.

First Appeal from Order No. 1135 of 2010 Alongwith FAFO No. 977 of 2010 and FAFO No. 1004 of 2010

The Oriental Insurance Co. Ltd. ..Appellant
Versus
Smt. Nirala Shukla & Ors. ...Respondents

Counsel for the Appellant:
Sri Vashu Deo Mishra, Sri Sandeep Kumar Agarwal, Sri Vishal Tahlani

Counsel for the Respondents:
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Motor Vehicle Act-1989-Section-173- Appeal against award of claim Tribunal fastened liability of Insurance Company to pay the awarded amount-with liberty to recover from vehicle owner-subject to validity of insurance policy-submission that instead of giving liberty to recover from owner of vehicle-directly liability should be cost upon vehicle owner itself-held-misconceived-in view of specific provision under section 149(c) of Act coupled with judgment of Apex Court-Tribunal rightly issued direction-warrant no interference-appeal dismissed.

Held:Para-13
Keeping in view the statutory mandate as contained in Section 149 of the Motor Vehicles Act, coupled with the judgment of Hon'ble Supreme Court, we are of the view that the Tribunal has committed no illegality in directing the appellant Insurance Company to pay the compensation and thereafter, recover the same from the owner of the vehicle. Apart from the above, Section 174 provides to recover the compensation as arrears of land revenue. The procedure prescribed under Section 174 Motor Vehicles Act, is not applicable to the cases where compensation is sought to be recovered from the owner of the vehicle. In case the Insurance Company after satisfying the award proceed to recover the outstanding dues from the owner, then the provisions contained in Section 174 of the Motor Vehicles Act shall equally be applicable to recover the outstanding dues as arrears of land revenue from the owner of the vehicle. It shall speed up the recovery process and satisfy the award within reasonable period.

Case Law Discussed:
2013(3) T.A.C. 29(S.C.); 2009(4) T.A.C. 382(S.C.); 2013 ACJ 1944(S.C.).

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

1. These three appeals under Section 173 of Motor Vehicles Act, contain the same controversy and the impugned award dated 7.5.2010 delivered by the Motor Accident Claims Tribunal in Claim Petition No.282 of 1997 and judgment and award dated 7.5.2010 in Claim Petition No.377 of 1997.

2. The appellant Oriental Insurance Company Limited, Lucknow, is aggrieved by the directions issued by the Tribunal to recover the compensation from the owner of the vehicle whereas, the claimant respondents while preferring appeal, make prayer for enhancement of compensation. Since all the three appeals relate to same award, hence they are decided by the present common judgment with the consent of parties counsel.

3. In brief, when on 26.4.1997, when the deceased Amit Kumar Shukla along with his father Pradeep Kumar Shukla, and mother Smt. Nirala Shukla as well as sister Km. Arjita, was on way to residence on Scooter No.UAG-277, from Jankipuram to Daliganj, in the night at about 8:45 p.m., a Mahindra Jeep No.UP-41-A/4435 coming from reverse direction driven rashly and negligently, hit the scooter resulting into accident in question. Deceased Ajit Kumar Shukla and others suffered grievous injuries. All were admitted to Medical College, Lucknow but the life of deceased Amit Kumar Shukla could not be saved and on 27.4.1997, he succumbed to injuries.

4. The claimant respondents approached the Tribunal by preferring claim petitions for payment of compensation. Deceased Amit Kumar Shukla was aged about 4 years and a student of Class-I. The Tribunal framed requisite issues during the pendency of proceedings and recorded finding that accident occurred on account of rash and negligent driving of the vehicle and awarded compensation to the tune of Rs.4,18,000/-

5. The solitary argument advanced by the learned counsel for the appellant is that the Tribunal has not considered the factual averments made before it that the driving license was fake one. However, right to recover the compensation has been given to the appellant on the ground that there was breach of policy condition since the Jeep in question was not having permit. Accordingly, the submission of the appellant's counsel representing Oriental Insurance Company Limited is that instead of giving right of recovery, the compensation should have been recovered from the owner straight way.

6. Learned counsel for the appellant relied upon the case reported in 2013 (3) T.A.C. 29 (S.C.): United India Insurance Co. Ltd., through its Divisional Manager Vs. Sujata Arora and others, and one other case reported in 2009 (4) T.A.C. 382 (S.C.): National Insurance Co. Ltd. Vs. Parvathneni and another.

7. On the other hand, learned counsel for the respondents claimants submits that exercise of power with regard to right of recovery is discretionary power exercised by the Tribunal and should not be interfered with. Learned counsel for the respondents claimants relied upon the case reported in 2013 ACJ 1944 (SC): S. Iyappan Vs. U.I.I.Co. Ltd. [Three Judges Bench D/o 01.07.2013].

8. The judgment relied upon by the learned counsel for the appellant as well as learned counsel for the respondents claimants, seem to contain different ratio based on facts and circumstances of each case. In the case of S. Iyappan (supra) in para 25, their lordships of Hon'ble Supreme Court after considering the earlier judgments, observed as under:-

"(25) The position can be summed up thus: The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due inquiries and bona fidely believed that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the insurance company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimant third parties) from the insured person."

9. Thus, it appears that in some of the cases Hon'ble Supreme Court expressed view that compensation should be recovered from the owner straight away instead of directing the Insurance Company to deposit the compensation and thereafter recover the same from the owner of the vehicle. However, in other case conflicting view has been expressed where in the event of breach of policy, Insurance Company has been required to pay compensation which may be recovered from the owner of the vehicle. It appears that the right of recovery is an issue which is to be dealt with on the basis of facts and circumstances of each case. In appropriate cases, in case Tribunal exercises discretion directing Insurance Company to recover the compensation from the owner in the event of breach of policy condition, then the direction issued by the Tribunal should ordinarily, be not interfered with.

10. The Motor Vehicles Act is a welfare legislation. We cannot close our eyes on the ground realities and where the dependant of deceased run from pillar to post. It is the statutory duty of the Insurance Company to recover compensation from the owner of the vehicle keeping in view the longevity involved in the judicial process. Insurance Companies are discharging welfare statutory burden in public interest. In case the burden is shifted over them to recover the compensation from the the owner of the vehicle, it shall be comparatively better steps on the part of the courts instead of relegating the duty on the part of the claimant to recover dues from the owner of the vehicle. In this country where substantial population is below poverty line and illiterate, it is not easy to recover from owner by indulging in litigation.

11 . Apart from the above, Section 149 of Motor Vehicles Act, contains statutory mandate assigning duty to the ensurer to satisfy the judgment and award against the person ensured for of third party risk. For convenience, relevant portion of Section 149 of the Motor Vehicles Act is reproduced as under:-

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.

1. If, after a certificate of insurance has been issued under sub-section (3) of

section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

2. No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

a. That there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

i. a condition excluding the use of the vehicle--

a. For hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

b. For organised racing and speed testing, or

c. For a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a Transport vehicle, or

d. Without side-car being attached where the vehicle is a motor cycle; or

ii. a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

iii. A condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or Civil commotion; or

b. that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

12. Sub-Section 1 of Section 149 is the statutory mandate with regard to payment of compensation under Motor Vehicle Act. Whereas Section 2 deals with the situation where insurer may defend itself from sharing the liability to pay compensation. The finding recorded by the court or tribunal to pay compensation possessed element of positivity. Whereas non payment of compensation under certain condition as provided by Sub-Section 2 of Section 149 deals with the situation where insurance company may not held to be responsible Sub-section 2 in any case does not deprive the claimant to claim compensation in the event of fatal accident by an insured vehicle.

In case, insurance company is not liable under certain conditions then owner of the vehicle shall be responsible to pay compensation. Keeping in view the mandate as contained in Sub-section 1 of section 149 in case the insurance company is directed to pay compensation with right of recovery it shall fulfill the statutory obligation and intent of legislation. Once vehicle is insured the first charge shall be on the insurance company to pay compensation and only in the event of breach of permit condition the owner may be held responsible to pay compensation or satisfy award. Accordingly, the insurance company may be directed to pay compensation in terms of award to satisfy its statutory obligation and then recover the same from owner in the event of breach of policy conditions in view of sub-section (2) of Section 149.

13. Keeping in view the statutory mandate as contained in Section 149 of the Motor Vehicles Act, coupled with the judgment of Hon'ble Supreme Court, we are of the view that the Tribunal has committed no illegality in directing the appellant Insurance Company to pay the compensation and thereafter, recover the same from the owner of the vehicle. Apart from the above, Section 174 provides to recover the compensation as arrears of land revenue. The procedure prescribed under Section 174 Motor Vehicles Act, is not applicable to the cases where compensation is sought to be recovered from the owner of the vehicle. In case the Insurance Company after satisfying the award proceed to recover the outstanding dues from the owner, then the provisions contained in Section 174 of the Motor Vehicles Act shall equally be applicable to recover the outstanding dues as arrears of land revenue from the owner of the vehicle. It shall speed up the recovery process and satisfy the award within reasonable period.

14. The claimant respondents while preferring the cross appeal has made prayer for enhancement of compensation. The Tribunal awarded the compensation after considering the relevant acts and circumstances as well as the injuries caused and expenses incurred thereon. The attention of the Court has not been invited to any perversity in the impugned award delivered by the Tribunal while awarding compensation. Well reasoned order has been passed by the Tribunal.

15. In view of the above, the appeal preferred by the Insurance Company as well as the claimant respondents fails. Let entire compensation be deposited before the Tribunal within three months and shall be released to the claimant respondents in terms of award by Tribunal within two months. Any application moved by the Insurance Company for recovery, that shall be processed by the Tribunal expeditiously keeping in view the observations made in the body of the judgments. The amount deposited in this Court shall be remitted to the Tribunal forthwith.

The appeals are dismissed. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.04.2014

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

Service Bench No. 1527 of 2000

State of U.P.......................... .Petitioner
Versus
Har Pal Singh. ....Respondent

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondent:
S.P. Singh

(A)Constitution of India, Art.-226-Practice & Procedure-in garb of interim relief-final relief can not be granted-state tribunal while entertaining claim petition instead of staying the operation of impugned charge sheet-stayed disciplinary proceeding-which can be granted only after hearing both parties-order quashed direction for expeditious disposal of claim petition itself given.

Held:Para-7 & 14
7. In view of law laid down in the case of Ram Sukhi Devi (Supra), while deciding the pending claim petition, it was not open for the Tribunal to grant any relief which may amount to a final relief.

14. In view of above, the argument advanced by learned Additional Chief Standing Counsel seems to be correct. The Tribunal has failed to exercise jurisdiction vested in it by passing the interim order which amounts to grant of final relief. It is bad also because it does not assign any reason even precisely for staying the disciplinary proceedings pending in the government. The writ petition deserves to be allowed. The writ petition is allowed accordingly.

(B)Constitution of India, Art.-226-Recording Reasons- Every quasi judicial officer-bound to record the reasons -reason,like sole of the body of order-in absence the order is like body without sole-held-order not sustainable-quashed.

Held:Para-13-
In view of above, the argument advanced by learned Additional Chief Standing Counsel seems to be correct. The Tribunal has failed to exercise jurisdiction vested in it by passing the interim order which amounts to grant of final relief. It is bad also because it does not assign any reason even precisely for staying the disciplinary proceedings pending in the government. The writ petition deserves to be allowed. The writ petition is allowed accordingly.

Case Law Discussed-
(2005) 9 SCC 733; (2011) 2 SCC 741; 2013 (11) ADJ 22; AIR 1975 Supreme Court 2260.

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

1. Inspite of the fact that list has been revised, none appeared for the opposite parties. Heard learned Additional Chief Standing Counsel for the petitioners and perused the record.

2. The instant writ petition under Article 226 of the Constitution of India has been preferred against the Judgment and order dated 17-12-1999 passed by the State Public Services Tribunal, Lucknow in Claim Petition No. 2155/1999 by which the Tribunal has passed an interim order restraining the petitioner-State to proceed with the disciplinary proceeding against the claimant-opposite party no. 1. No interim order was passed by this court at the time of admitting the present writ petition.

3. While assailing the impugned order, Sri Shatrughan Chaudhary, learned Additional Chief Standing Counsel submits that by the orders dated 01-11-1999 and 08-11-1999, the State Government has initiated the disciplinary proceedings and approved the chargesheet of the claimant-opposite party no. 1. The claimant-opposite party no. 1 approached the Tribunal for quashing of the aforesaid orders passed the State Government with regard to initiation of disciplinary proceedings as well as service of Chargesheet.

4. A perusal of the claim petition filed by the claimant-opposite party no. 1 before the Tribunal, reveals that the claimant-opposite party no. 1 has prayed for the following reliefs in his claim petition :-

"(8) RELIEF SOUGHT

On the basis of facts and grounds mentioned in the present claim petition, the petitioner prays for the following reliefs:-

(a) That this Hon'ble Tribunal may graciously be pleased to quash the Annexure no. 1 and 2 to the compilation no. 1 of claim petition and declare that no enquiry is permissible against the petitioner and he is entitled to all the consequential service benefits arising out of the same.

(b) That the cost of the claim petition alongwith any other order, which this Tribunal may deem, fit, just and proper may also be passed in favour of the petitioner.

(9) INTERIM RELIEF IF ANY PRAYED FOR.

For the facts, reasons, and circumstances stated in the present claim petition, it is most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to stay the operation of the Annexure no. 1 dated 1.11.1999 and 8.11.1999 or stay the further proceedings on the basis of order dated 1.11.1999 and 8.11.1999 or pass any suitable order, which is just and proper in the circumstances of the case in favour of the petitioner."

5. The perusal of the aforesaid reliefs on the face of record, reveals that a prayer was made for quashing of the pending disciplinary proceedings against the claimant-opposite party no. 1. While passing the impugned order dated 17-12-1999, the Tribunal has restrained the State Government to proceed further with the disciplinary proceedings.

6. Sri Shatrughan Chaudhary, learned Additional Chief Standing Counsel appearing for the petitioners submits that the Tribunal has granted the interim relief having the nature of the final relief which is not legally sustainable. He has relied upon a case reported in (2005) 9 SCC 733, State of U.P. and Others Versus Ram Sukhi Devi in which Hon'ble Supreme Court after considering various earlier Judgments, held as under :

8.To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations. [See Assistant Collector of Central Excise, West Bengal v. Dunlop India Ltd. (1985 (1) SCC 260 at p. 265), State of Rajasthan v. M/s Swaika Properties (1985 (3) SCC 217 at p.224), State of U.P. and Ors. v. Visheshwar (1995 Supp (3) SCC 590), Bharatbhushan Sonaji Kshirsagar (Dr.) v. Abdul Khalik Mohd. Musa and Ors. (1995 Supp (2) SCC 593), Shiv Shankar and Ors. v. Board of Directors, U.P.S.R.T.C. and Anr. (1995 Supp (2) SCC 726) and Commissioner/Secretary to Govt. Health and Medical Education Department Civil Sectt., Jammu v. Dr. Ashok Kumar Kohli (1995 Supp (4) SCC 214).] No basis has been indicated as to why learned Single Judge thought the course as directed was necessary to be adopted. Even it was not indicated that a prima facie case was made out though as noted above that itself is not sufficient. We, therefore, set aside the order passed by learned Single Judge as affirmed by the Division Bench without expressing any opinion on the merits of the case we have interfered primarily on the ground that the final relief has been granted at an interim stage without justifiable reasons. Since the controversy lies within a very narrow compass, we request the High Court to dispose of the matter as early as practicable preferably within six months from the date of receipt of this judgment."

7. In view of law laid down in the case of Ram Sukhi Devi (Supra), while deciding the pending claim petition, it was not open for the Tribunal to grant any relief which may amount to a final relief.

8. Learned Additional Chief Standing Counsel has relied upon one another case reported in (2011) 2 SCC 741, Raja Khan Versus Uttar Pradesh Sunni Central Waqf Board and Another.

In the case of Raja Khan (Supra), Hon'ble Supreme Court held that while granting any interim relief, the court should not rely upon the material which may be extraneous for the controversy involved therein. It has further been held by their Lordships of Hon'ble Supreme Court that final relief should not be granted at an interim stage. For convenience, the relevant paragraphs from the case of Raja Khan (Supra) are reproduced as under :-

11. It is well settled that by an interim order the final relief should not be granted, vide U.P. Junior Doctors' Action Committee v. Dr. B. Sheetal Nandwani (SCC para 8), State of U.P. v. Ram Sukhi Devi (SCC para 6), etc.

16. We are sorry to say but a lot of complaints are coming against certain Judges of the Allahabad High Court relating to their integrity. Some Judges have their kith and kin practising in the same Court, and within a few years of starting practice the sons or relations of the Judge become multi-millionaires, have huge bank balances, luxurious cars, huge houses and are enjoying a luxurious life. This is a far cry from the days when the sons and other relatives of Judges could derive no benefit from their relationship and had to struggle at the bar like any other lawyer.

17. We do not mean to say that all lawyers who have close relations as Judges of the High Court are misusing that relationship. Some are scrupulously taking care that no one should lift a finger on this account. However, others are shamelessly taking advantage of this relationship."

9. The perusal of impugned Judgment and order dated 17-12-1999 reveals that the Tribunal has passed the impugned order at the initial stage while issuing notice to the respondents of the claim petition. There is no whisper in the impugned order as to why and under what

ground, the Tribunal has stayed the disciplinary proceedings against the claimant-opposite party no. 1.

10. Now, it is well settled proposition of law that every order including an administrative, judicial or quasi judicial order, must be reasoned one. While passing the impugned order, the Tribunal has not assigned any reason or enumerated the ground on which it has formed an opinion to stay the further disciplinary proceedings against the claimant-opposite party no. 1. For convenience, the order dated 17-12-1999 passed by the State Public Services Tribunal, Lucknow in Claim Petition No. 2155/1999 is reproduced as under :-

आदेश दिनांक 17.12.99 की प्रतिलिपि
17.12.99
याची के योग्य अधिवक्ता एवं प्रत्यर्थीगण की ओर से विद्वान प्रस्तुतकर्त्ता अधिकारी उपस्थित।

आदेश

सुना। ग्रहीत एवं पंजीकृत हो। लिखित विवेचन। प्रतिशपथपत्र एवं अन्तरिम अनुतोष पर आपत्ति के लिए दिनांक 11 फरवरी, 2000 नियत करते हुए प्रत्यर्थीगण को नोटिस जारी हो। इस बीच प्रत्यर्थीगण को आदेश दिया जाता है कि वे प्रमुख सचिव, उत्तर प्रदेश शासन के पत्र दिनांक 01 नवम्बर, 1999 (ए–1) और अपर महानिरीक्षक निबन्धन। प्रशासन। के पत्र दिनांक 8 नवम्बर (ए–2) के अनुसरण में कोई विभागीय कार्यवाही आगे सम्पादित न करे।

ह0 / ए.बी. हजेला,

उपाध्यक्ष

11. Learned Additional Chief Standing Counsel invited attention to a Full Bench Judgment of this court in a case reported in 2013 (11) ADJ 22, Ms. Ranjana Agnihotri Versus Union of India, of which we were the Members, held as under:-

196. The Supreme Court in a case reported in AIR 1976 SC 1785 Seimens Engineering and Manufacturing Company of India Limited versus Union of India and another, held as under :

""6.............If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the ad judicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

197. In one another case reported in (2004)5 SCC 568 State of Orissa versus Dhaniram Lunar, their Lordships of Supreme Court held as under :

"8......... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made..........".

198. In Mc Dermott International Inco. Versus Buru Standard Co. Limited and others (2006) SLT 345, their Lordships observed as under :

"...Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration In Re, "proper, adequate reasons". Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons..............."

199. A Division Bench of this Court in a case reported in 2007 LCD 1266 Vijai Shanker Tripathi versus Hon'ble High Court of Judicature at Allahabad has considered the concept of exercise of discretionary power by the State or its authorities including the High Court held that every administrative order passed by authorities must fulfil the requirement of Art. 14 of the constitution.

200. Supreme Court in a case reported in JT 2010(9) SC 590 M/s. Kranti Associates Private Limited and another versus Sh. Masood Ahmed Khan and others held that a cryptic order shall deem to suffer from vice of arbitrariness. An order passed by quasi judicial authority or even administrative authority must speak on its face.

In a case reported in 2010(4) SCC 785 CCT versus Shukla and Brothers, their Lordships held that the reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. To quote relevant portion from the judgment (supra), to quote :

"Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principle are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements."

201. The aforesaid view with regard to reasoned order by authorities which include judicial and quasi judicial authorities has been consistently reiterated by the Supreme Court in earlier judgments. Their Lordships of Hon'ble Supreme Court held that the authorities have to record reasons, otherwise it may become a tool for harassment vide K.R. Deb versus The Collector of Central Excise, Shillong, AIR 1971 SC 1447; State of Assam and another versus J.N. Roy Biswas, AIR 1975 SC 2277; State of Punjab versus Kashmir Singh, 1997 SCC (L&S) 88; Union of India and others versus P. Thayagarajan, AIR 1999 SC 449; and Union of India versus K.D. Pandey and another, (2002)10 SCC 471.

In a recent judgment reported in AIR 2013 SCW 2752 Union of India versus Ibrahimuddin(para 33), their Lordships of

Hon'ble Supreme Court reiterated that every order passed by the administrative authority, judicial or quasi judicial must be a reasoned order.

202. From the foregoing discussion with regard to passing of a reasoned order by administrative, quasi judicial or judicial authorities, it appears that the law on the question has travelled a long way."

12. The impugned Judgment and order passed by learned Tribunal being a non speaking one, seems to be hit by Article 14 of the Constitution of India. While passing an interim order, the authority, judicial or quasi judicial or Tribunal, must assign justifiable reason while forming an opinion for granting the interim relief or adjudicating a controversy.

13. It has been rightly argued by learned Additional Chief Standing Counsel Sri Shatrughan Chaudhary that speaking and reasoned order is necessary not only to protect the fundamental rights guaranteed under Article 14 of the Constitution of India, but, also it is necessary for the maintenance of Rule of law. In a democratic polity, order or a decision where the citizen's civil right is affected or functioning of the government is interfered, must be speaking so that the citizen or government may know the ground which has necessitated to form an opinion. In the event of disagreement, the citizen or the government may approach the appropriate form for judicial review of the order passed by the court, authority or Tribunal.

Attention of the court has been invited to a case reported in AIR 1975 Supreme Court 2260: Smt. Indira Nehru Gandhi Vs. Raj Narain. Relevant portion (para 205) of the said case, for convenience, is reproduced as under :-

"205. Rule of Law postulates that the decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is not predictable and such decision is the antithesis of a decision taken in accordance with the rule of law."

14. In view of above, the argument advanced by learned Additional Chief Standing Counsel seems to be correct. The Tribunal has failed to exercise jurisdiction vested in it by passing the interim order which amounts to grant of final relief. It is bad also because it does not assign any reason even precisely for staying the disciplinary proceedings pending in the government. The writ petition deserves to be allowed. The writ petition is allowed accordingly.

15. A writ in the nature of certiorari is issued quashing the impugned Judgment and order dated 17-12-1999 passed by the State Public Services Tribunal, Lucknow in Claim Petition No. 2155/1999, Har Pal Singh Versus State of U.P. & Another with consequential benefits.

A writ in the nature of mandamus is also issued directing the State Public Services Tribunal, Lucknow to decide the pending Claim Petition 2155/1999, in case already not decided, expeditiously say preferably within a period of three months from the date of receipt of a certified copy of the present order. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.03.2014

BEFORE
THE HON'BLE ZAKI ULLAH KHAN, J.

U/S 482/378/407 No. 1773 of 2011

Anil Kumar Tripathi..................Petitioner
Versus
State of U.P & Anr.... .. ..Respondents

Counsel for the Petitioner:
A.K. Tripathi (In Person)

Counsel for the Respondents:
Govt. Advocate

Cr. P.C.-Section 482-Application to set-a-side charge sheet offence under section 332, 353, 504, 506 IPC-applicant practicing Advocate tried to pass his car-some how informant a police constable-escaped-after parking the car applicant came back caused heart by slopping complainant-duty of complainant was to control the traffic and not to check inside the car-merely by passing car-can not be termed intention to cause harm-no occasion for applicant to stoppling complainant after parking the car-did not deter the complainant from discharging public duty-ingredients for offence under section 332, 353 not-attracted-Magistrate without scrutinizing the matter under section 190(1) Cr.P.C.-passed impugned charge-sheet-if proceeding allowed to continue-amount to abused the process of Court-charge sheet quashed.

Held:Para-8
The court has mechanically passed the order and took cognizance without scrutinizing the contents of the charge-sheet. The court should have scrutinized the matter in view of Section 190(1) Cr.P.C., it was the duty of the court to ascertain as to what are the offences and whether the offences are made out or not. If the facts do not constitute the offence, it would not be proper for the court to just take cognizance. The cognizance means the constitution of the offence. In the aforementioned circumstances, there is nothing like voluntarily causing hurt. The allegations appear to be plain that the applicant-Advocate passed the vehicle besides the complainant, who escaped unhurt but there is nothing like voluntarily causing hurt. Therefore, the application under Section 482 Cr.P.C. is liable to be allowed.

Case Law Discussed:
(2008) 1 SCC 474; (2006) 7 SCC 296

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

1. The instant application under Section 482 Cr.P.C. has been filed by Shri Anil Kumar Tripathi, a practicing Advocate of the High Court, in person, challenging the summoning order dated 02.03.2009 passed by A.C.J.M., C.B.I, Lucknow. By the impugned application, the applicant has prayed that the Court may set aside the charge-sheet dated 27.12.2008 (Annexure No.2) relating to Case Crime No.567 of 2008, under Sections 332, 353, 504 and 506 I.P.C., Police Station Wazirganj, District Lucknow.

2. Shri Anil Kumar Tripathi, Advocate, arguing in person, challenged the F.I.R. lodged by Raj Kumar Yadav (H.C.No.0558). The applicant alleged that the complainant in his F.I.R. stated that on 28.11.2008 at about 10:00 a.m. an advocate whose name is Anil Kumar Tripathi came in his vehicle at the gate where the complainant was guarding and the applicant tried to pass the vehicle besides the complainant and he escaped unhurt as he saw the incoming vehicle from opposite direction; that the applicant immediately after parking the vehicle came to Gate No.5 of the High Court and he cautioned that this time the complainant escaped unhurt but in future he will be run over by his car; that when the complainant questioned that how he could

run over his car, then the applicant-Advocate voluntarily caused hurt by slapping the complainant and threatened that one day he will run over the car on him, then he will not be in a position to check the car.

3. The applicant arguing in person alleged that the F.I.R. did not constitute any offence under Sections 332, 353, 504 & 506 I.P.C. because while driving the car he neither run over the complainant nor he made any gesture and he also did not utter any word to insult the Home guard. On the contrary, the Home Guard alleged that after parking the car the applicant-Advocate came and then slapped him and threatened that next time he will pull down the Home Guard so that he will not be in a position to check the car. The applicant argued that the Home Guard has no power to check the car. Since he was only placed to guard the gate but he has no jurisdiction to check the car, all the allegations made against the applicant are uncalled for and allegations did not constitute any offence as alleged. Therefore, the F.I.R. is liable to be quashed and any action taken on the F.I.R. is liable to be quashed.

4. Heard Shri Anil Kumar Tripathi, applicant in person and learned A.G.A. for the State.

5. Learned A.G.A. rectified the arguments advanced by the applicant and specified that H.C. does not mean Home Guard. It is H.C and not H.G. The complainant is Head Constable and not Home Guard and he has got every right to check the vehicle. Although, hurt has not been caused by the vehicle but subsequently the applicant came and slapped the complainant while he was discharging his duty and threatened, therefore, the offence is complete. Since the cognizance has been taken on charge-sheet submitted by the police, the Court is seized with the power under Section 482 Cr.P.C. and the matter cannot be quashed. Section 482 Cr.P.C. is reproduced herein below:-

"482. Saving of inherent power of High Court:- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

6. Section 482 Cr.P.C. clearly reveals that ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of justice. Hon'ble the Apex Court has laid down this ratio in Hamida vs. Rashid, (2008) 1 SCC 474. It means that the duty of the court is to scrutinize whether it would result in miscarriage of justice if the order is not expunged. The view is directly suggests that inherent jurisdiction under Section 482 Cr.P.C. should be exercised sparingly, carefully and with caution but only when such exercise is justified by the tests specifically laid down in the section itself. The powers under Section 482 Cr.P.C. are so wide that the High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercise in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings; Popular Muthiah v. State, (2006) 7 SCC 296. As far as the powers of the High

Court under Section 482 Cr.P.C. are concerned, these powers are unlimited and inherent in nature, therefore, the arguments placed by learned A.G.A. are that charge-sheet has been submitted will not stop from exercising the powers under Section 482 Cr.P.C.

6. It is, therefore, necessary to look into the merits and demerits of the case. The Head Constable has alleged that after parking the vehicle, the applicant-Advocate slapped the Head Constable and threatened him that in future he will run over the car and he will not in a position to check the vehicle. It is interesting to note that the duties of the constable posted outside the High Court is only to check the incoming and out coming vehicles to facilitate the traffic and not to check individual car. However, if there is some hindrance, they can report for individual checking to superior officer posted there. His duty is only to facilitate the traffic and to regularize the traffic. As per allegations, the applicant has only tried to pass the vehicle besides Head Constable. There was no intention to cause hurt. The complainant immediately withdrew himself from the path, therefore, there was no incident and he was not hurt. Section 332 of I.P.C. is reproduced as under:-

"332. Voluntarily causing hurt to deter public servant from his duty.-- Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

7. The essential ingredients of voluntarily causing hurt; that means the applicant-Advocate must have voluntarily caused hurt while parking the vehicle. He did not cause any hurt nor deter the complainant from observing the performance of his duty. It was just a sheer chance that the vehicle passed besides the complainant. Similarly, Section 353 of I.P.C. is reproduced as under:-

"353. Assault or criminal force to deter public servant from discharge of his duty.-- Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person to the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

8. The ingredients of Section 353 Cr.P.C. are also not attracted as the applicant-Advocate did not deter the public servant from discharging of duty. It was routine manner in which he passed by his vehicle. It is the subsequent act of the applicant-Advocate that creates the offence as per the allegations of complainant-Head Constable, after parking the vehicle, the applicant-Advocate came and slapped him. The main allegation of the complainant is that he has been slapped while he was performing his duty. The question is that whether he has been deterred from performing the duty, as such, the ordinary course could have been that aggrieved by his behaviour, the Head Constable should have reported the matter to the Registrar of this Court or to any higher police officer nearby and then lodged the F.I.R. because the circumstances do warrant

since the Head Constable is supposed to be dedicated person and while in duty he should perform his duty meticulously. The Advocate has no grudge against duty personnel and he parked his vehicle and while coming to Gate No.5 he has no business to challenge the constable. There was no occasion for him to make altercation with the constable because he did not create any hindrance either in parking the vehicle or elsewhere and he even did not check him while he was driving. The allegations are that subsequently he came and challenged, it appears that the offence under Sections, 332 & 353 are not attracted and, therefore, it would not be proper for prosecution to continue the proceedings unnecessarily and to waste precious time of Court and definitely it will cover gross abuse of the powers of any court because the Court has exercised the jurisdiction without observing the due formalities as mentioned in the Act. The court has mechanically passed the order and took cognizance without scrutinizing the contents of the charge-sheet. The court should have scrutinized the matter in view of Section 190(1) Cr.P.C., it was the duty of the court to ascertain as to what are the offences and whether the offences are made out or not. If the facts do not constitute the offence, it would not be proper for the court to just take cognizance. The cognizance means the constitution of the offence. In the aforementioned circumstances, there is nothing like voluntarily causing hurt. The allegations appear to be plain that the applicant-Advocate passed the vehicle besides the complainant, who escaped unhurt but there is nothing like voluntarily causing hurt. Therefore, the application under Section 482 Cr.P.C. is liable to be allowed.

9. The application is allowed and Charge-sheet dated 27.07.2008 relating to Case Crime No.567 of 2008, under Sections 332, 353, 504 and 506 I.P.C. is hereby quashed, which is pending before A.C.J.M., C.B.I., Lucknow.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.04.2014

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA, J.

Service Single No. 2228 of 2014

Prakash Agarwal... ....Petitioner
Versus
Registrar General Allahabad High Court Allahabad & Ors... ....Respondents

Counsel for the Petitioner:
Dr. Ghanshyam Das Mishra, Pawan Kumar Tiwari

Counsel for the Respondents:
Manish Kumar

<u>Constitution of India, Art.-226-</u> Compassionate appointment-can not be denied on financial ground-except the requirement under Rule 5-consideration should be made within three month in absence of period prescribed under rule-if qualified for class III post be appointed only on class III and not on class 4th - certain guide lines issued-order denying appointment on financial consideration-wholly beyond statutory requirement-if appointment denied-reason be recorded.

<u>Held: Para-22 & 30</u>
22. Rule 5 makes its incumbent upon the appointing authority to give suitable employment if applicant fulfills the conditions contemplated under Rule 5. State Government has reserved the right to condone the delay in case applicant moved the application beyond five years, taking into consideration the undue hardship in any particular case. Appointee under Rules has been obligated to maintain other members of the family

of the deceased who were dependent upon him before his death and are unable to maintain themselves. Failure to maintain them would result in termination of service.

30. From the above, it can be culled out that under Rule 5, appointing authority has to satisfy itself that spouse or the applicant himself is not employed under the Central Government or State Government or the Corporation owned or controlled by the Central or State Government, he fulfills the educational qualification prescribed for the post and is otherwise qualified i.e. does not suffer from any disqualification. Appointing authority will further satisfy itself that candidate will be able to maintain the minimum standards of work and efficiency and is suitable in all respect, he is physically and mentally fit and has not more than one wife living if applicant is male and if applicant is female, she has not married a person already having a wife. Except these requirements, no other requirement is contemplated under the Rules.

Case Law Discussed:
1994(4) SCC 136; {(2012) 9 SCC 545}; UPLBEC 2014(1).

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

1. This petition is directed against the order dated 28.09.2013 passed by District Judge rejecting application for compassionate appointment.

2. Heard Sri Pawan Kumar Tiwari, learned counsel for the petitioner and Sri Manish Kumar, learned counsel for respondents.

3. Petitioner claims appointment on the death of his father a Class-IV employee in the judgeship of Sitapur. Petitioner's mother had also moved an application before District Judge, Sitapur stating that her son Prakash Agarwal (present petitioner) may be given compassionate appointment as there is no other source of livelihood.

4. It appears that on above application, District Judge constituted a Committee which sought information vide order dated 25.09.2013 regarding financial status of employee. This information was to be furnished within a week.

5. Submission is that District Judge vide order dated 28.09.2013 rejected the petitioner's application without giving effective opportunity; consequently, order cannot be sustained.

6. Sri Manish Kumar, learned counsel for the respondents has produced the original record before the Court pertaining to petitioner's case.

7. I have perused the order passed by District Judge, Sitapur dated 28.09.2013. District Judge observed that petitioner has not submitted the details of property as directed by the Committee.

8. D.J. has referred to report of Grievance Redressal Committee dated 28.09.2013.

9. A perusal of report dated 28.09.2013 shows that Committee has acknowledged the issuance of letter dated 25.09.2013 by chairman of committee asking Prakash Agarwal to give details of income and property. By this letter a week's time was allowed to give details. Surprisingly, report has been submitted on 28.09.2013 before expiry of the time. It is not clear what prompted the Committee to act in such a haste. Committee should have waited till the expiry of period given in the letter. In any case District Judge having passed order on 28.09.2013, action of Committee looses significance.

10. Learned District Judge has relied upon the decision of Hon'ble Apex Court given in the case of Umesh Kumar Nagpal Vs. State of Haryana reported in 1994(4) SCC 136 wherein it has been held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased.

11. Rule required District Judge to examine the financial condition of the family of the deceased or the applicant but the order has been passed before expiry of the period given to petitioner to furnish the financial details, as such finding recorded in this regard cannot be sustained. Consequently, impugned order being illegal, has to be quashed.

12. Sri Manish Kumar, learned counsel for the respondents has relied upon decision given in the case of Umesh Kumar(supra). Relevant part of the judgment is reproduced below:

" The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution."

13. He has also placed reliance upon the judgment of Apex Court given in State of Gujarat and others Vs. Arvind Kumar T. Tiwari and another {(2012) 9 SCC 545]. Relevant para 8 is reproduced below:

"It is a settled legal proposition that compassionate appointment cannot be claimed as a matter of right. It is not simply another method of recruitment. A claim to be appointed on such a ground, has to be considered in accordance with the rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of the family of the deceased. Such a category of employment itself, is an exception to the constitutional provisions contained in Articles 14 and 16, which provide that there can be no discrimination in public employment. The object of compassionate employment is to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing, and not to confer any status upon it. (Vide: Union of India & Ors. v. Shashank Goswami & Anr., AIR 2012 SC 2294)."

14. Judgment of Hon'ble Apex Court given in the case of Union of India and another Vs. Shashank Goswami and another [(2012) 11 SCC 307] has also been placed. Relevant part of Para 10 is being reproduced below:

"Thus, applicant cannot claim appointment in a particular class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

15. From the above, it is apparent that relevant Rules on the subject are to be followed.

16. Governor of U.P. has framed the Rule i.e. 'U.P. Recruitment of Dependents of Government Servants dying-in-harness Rules, 1974' which has been made under proviso to Article 309 of the Constitution of India ('Rules' in short).

17. Rule 5 provides that employment to dependent of deceased be given subject to following conditions :

(a) Spouse is not employed with Central Government, State Government or with any Corporation owned or controlled by State or Central Government.

(b) Applicant is also not employed as indicated above.

If these conditions are fulfilled, suitable employment has to be offered.

18. Enquiry into financial status of the deceased is not contemplated under Rule 5 of the Rules. Importing any other condition would amount to reading something more in the Rules which is prohibited.

19. Courts cannot add or substract to what is provided under the law. Employment can be offered to a post which is not within the purview of U.P. Public Service Commission. Applicants are thereby offered Class-IV or Class-III posts. If somebody is willing to accept the appointment on these menial posts, his need visa-vis financial condition can be well visualized. Applicant might be having residential house but not getting any rent or paltry amount as rent. Can it be said that he does not need regular income. Even to maintain a house, money is needed as it has to be repaired, taxes are to be paid.

20. U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 are complete code and provide for full mechanism to deal with all the situations. Malady of sudden financial crisis on account of death of bread earner is sought to be remedied by statutory rules framed in exercise of powers conferred under proviso to Article 309 of the Constitution of India. Rules display the legislative intent. What is just should be seen through law. Governor of State of U.P. has decided to make rules making provision for appointment on compassionate ground which should be read in entirety.

21. Rule 4 of the Rule, 1974 has given overriding effect to these rules.

22. Rule 5 makes its incumbent upon the appointing authority to give suitable employment if applicant fulfills the conditions contemplated under Rule 5. State Government has reserved the right to condone the delay in case applicant moved the application beyond five years, taking into consideration the undue hardship in any particular case. Appointee under Rules has been obligated to maintain other members of the family of the deceased who were dependent upon him before his death and are unable to maintain themselves. Failure to maintain them would result in termination of service.

23. Rule 6 provides for contents of the application which should be addressed to the appointing authority and apart from providing the other particulars i.e. date of birth, details of other member of family,

income details or financial condition of the family, have also to be mentioned.

24. Rule 7 provides the mechanism for resolving the dispute if more than one member of family claim appointment under the Rules.

25. Rule 8 enables appointing authority to satisfy itself about the suitability of candidate to maintain the minimum standards of work and efficiency expected for the post.

26. Rule 8(3) is important which provides that even if there is no vacancy, a supernumerary post shall be deemed to have been created for facilitating such appointment.

27. From the above, it is apparent that applicant has to mention in his application the details of the financial condition of the family as well as details of employment and income of all members of family.

28. Rule 9 is important which provides that appointing authority shall satisfy itself about the character of candidate as well as physical and mental fitness and in case applicant is male, he has not more than one wife living and in case of female candidate, she has not married a person already having a wife living.

29. Rule 10 gives power to remove difficulty to the State Government in implementation of any provision of these rules.

30. From the above, it can be culled out that under Rule 5, appointing authority has to satisfy itself that spouse or the applicant himself is not employed under the Central Government or State Government or the Corporation owned or controlled by the Central or State Government, he fulfills the educational qualification prescribed for the post and is otherwise qualified i.e. does not suffer from any disqualification. Appointing authority will further satisfy itself that candidate will be able to maintain the minimum standards of work and efficiency and is suitable in all respect, he is physically and mentally fit and has not more than one wife living if applicant is male and if applicant is female, she has not married a person already having a wife. Except these requirements, no other requirement is contemplated under the Rules.

31. Thus, it is apparent that while applicant is bound to give the details of financial condition, appointment cannot be refused on the ground of financial status. U.P. Rules do not authorize appointing authority to refuse the appointment on the ground that applicant is financially sound, if he otherwise fulfills the requirements of Rules 5, 8 and 9. If applicant who lost the bread-earner of family is willing to work on Class-III or Class-IV post, his need to such post is quite manifest.

32. In the case of Umesh Kumar Nagpal (supra), Hon'ble Apex Court has held that such deviation to the constitutional provisions contained in Article 14 & 16 is permissible and Rule is justifiable and valid. It has rational nexus with the object sought to be achieved.

33. No decision has been placed before this Court showing that under Rule 5 of U.P. Rules, 1974, appointment can be refused on the ground of financial status. The judgments referred by Sri Manish Kumar pertain to the cases where there is

scheme or departmental instructions containing such an embargo. U.P. Rules are silent in this regard and prescribed limit whereunder appointing authority has to work. Therefore, appointing authority while exercising the power under Rule 5 of the U.P. Rules, 1974 cannot refuse the appointment on the ground of financial status.

34. Sri Manish Kumar has cited a recent decision of Full Bench of our Court reported in UPLBEC 2014 (1) page 589, Shiv Kumar Dubey Vs. State of U.P. and others. Relevant para 29 is being reproduced below :

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family."

35. There is one more aspect which very often dithers the appointing authority while making appointment under these rules. Very often Appointing Authority tends to offer appointment on Class IV post even when applicant is eligible to be appointed on Class III post.

36. It is true that applicant cannot insist that a particular post be given to him but rules prescribed that suitable employment on the post has to be offered.

37. Rule 5 further says that 'suitable employment in government service on the post' has to be given. This post should not be within the purview of U.P. Public Service Commission but candidate has to have educational qualification prescribed for the post.

38. State Government is supposed to be a model employer and therefore it is expected that government and it's officers will work strictly in accordance with rules.

39. If applicant is qualified for being appointed on Class-III post, then he should not be offered appointment on Class-IV post merely on the ground that his father was a Class-IV/III employee. Everyone has a right to augment his income and everyone has a right to give better education to his children. Every educated child has a right to be considered for a post commensurate with his qualification. Any deviation from the rules is not permissible. If applicant is qualified to be appointed on Class-III post, appointing authority should offer him suitable employment. If he is qualified to be appointed as Class-IV employee, he should be offered appointment on Class-IV post. This suitability has to be judged in the light of qualifications of the applicant vis a vis educational qualifications prescribed for the post. Appointing authority acts contrary to the rules if he deliberately offers a lower post i.e. Class-IV post although applicant is eligible for appointment on Class-III post.

40. Unavailability of post cannot be a ground to refuse appointment on Class III if applicant is otherwise eligible. Financial status also can not be a relevant consideration while considering case for appointment on Class III.

41. In order to mitigate the sufferings of dependents, State Government has directed to relax the computer knowledge for a period of one year so that immediately on death employment can be provided. This shows the concern of the State Government which helps in inferring the intent of legislature.

42. It is clarified that applicant has no right to choose the particular post but appointing authority should offer suitable employment and therefore, these two

things should not be mixed or confused. Appointing authority has been given discretion to judge the suitability. This discretion is not to be exercised on caprice or whims but in a judicious manner and must be informed of reasons. Appointing authority should give reasons for not offering the appointment, claimed by the applicant. It is once again clarified that applicant has no right to choose the post and appointing authority is not bound to offer the post claimed by applicant but refusal must accompany the reasons for finding him non suitable.

43. It is not at all in the interest of administration that a qualified person is appointed on Class IV post rather it would serve the administration better if eligible and qualified person is given the appropriate task. There is no law that ward of Class IV employee should always be employed on Class IV Post, even if he is well qualified for Class III post.

44. If under qualified person claims appointment on Class IV post, it can be declined by saying that he is not eligible, but where applicant is eligible for appointment on Class III post, then there has to be a strong reason for declining the same and reason must form part of the order. In order to eliminate element of arbitrariness, reasons for finding applicant non suitable for a particular job have to be given.

45. While it is true that rule 8 & 9 do not contemplate any inquiry into the financial status but appointing authority can definitely examine the correctness of the application in the light of Rule 6 which requires details of income of the family. While appointment cannot be refused on the ground of financial status, this can be a relevant criterion for offering a suitable employment. In this manner, all the rules can be read harmoniously.

46. Offering Class IV job to dependent merely because deceased was Class III or IV employee militates against very mandate contained in Article 38 of the Constitution of India and is an affront to 'dignity' of individual emphasized in preamble thereof.

47. When no time is prescribed, legislative intent is to be taken into account which is to provide immediate financial support to the family of deceased. The intention of legislature is manifest, as such, a prompt exercise is expected from the appointing authority. In the absence of any specific mention, three months time can be the reasonable time to pass orders on the application for compassionate appointment.

48. It has been observed in the case of Priyanka Tripathi Vs. State of U.P. and another [Writ petition No. 6168 of 2009(SS)] and Sunil Kumar Vs. District & Sessions Judge Balrampur and others [Writ Petition No. 2975 of 2007 (SS)] relying upon various decisions of Hon'ble Apex Court that three months is a reasonable time when no time is prescribed.

49. From the above, following principles can be deduced on interpretation of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974:

(a) Application should be disposed of within three months from the date dependent applies for a job. Under Rules, no time limit is prescribed but intent of the rule is to provide immediate relief to the bereaved family to meet immediate financial crisis [Shiv Kumar Dubey (supra)]. In this background, Appropriate Authority is supposed to dispose of such applications within a shortest possible time. In any case, application should not be kept pending for more than three months.

(b) Appointment under the Rules cannot be refused merely on the ground that financial status of the applicant is sound. Nor payment of retiral benefits at the time of death, furnishes any ground for refusal.

(c) Non availability of posts is no ground to refuse appointment.

(d) Appointment on Class III post cannot be refused merely on the ground that deceased was Class III/IV employee.

(e) Appointment has to be offered according to qualification and suitability of candidate and the applicant should be given an appointment commensurate therewith. If appointing authority does not give appointment on the post claimed by applicant because of non-suitability, reasons have to be recorded by the appointing authority.

(f) Dependent of deceased has no right to claim particular position or place and it is in the discretion of the appointing authority to pass appropriate order warranted in the facts and circumstances of the case.

50. In the instant case, although District Judge was fully justified in calling for details of financial status, but since time prescribed for furnishing details of property had not expired, rejection of the application before expiry of the period was not correct. Consequently, finding given by District Judge regarding non-submission of details of properties is uncalled for.

51. From the affidavit filed by Meera Agrawal, Prashant Agrawal, Prabhat Agrawal and Smt. Harpyari Devi, petitioner's financial status and need is quite apparent but it is to be seen by District Judge.

52. In view of above, impugned order cannot be sustained and writ petition deserves to be allowed.

53. Writ petition is allowed. Order dated 28.09.2013 is quashed. District Judge is directed to pass fresh order in accordance with law and observations made herein above within three weeks.

54. Copy of the order be sent to Principal Secretary, appointment/ personnel with direction to circulate it among various department of State Government for compliance.

55. Record be sent back.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.04.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE KALIMULLAH KHAN, J.

Government Appeal No. 2869 of 1984

The State of U.P.................. .. Appellant
Versus
Nawab....................Accused-Respondent

Counsel for the Petitioner:
Sri S.N. Tripathi (A.G.A.)

Counsel for the Respondent:
Sri G.R.S. Pal

Cr.P.C.-Section-378-Govt. Appeal against acquittal-offence under section 392, 397,

411 I.P.C. -all the accused well known to informant number of cases pending between them-recovery memo prepared at public vicinity-neither the prosecution is named witness nor any independent public witness produced-story of firing 10 times also falsify the police story-license acquittal held-where reasonable debts are there-High Court not to interfere-unless acquittal-found wrong and involves miscarriage of justice-no interference by Appellate Court requiring-according dismissed.

Held:Para-39

The factum of robbery as well as recovery of aforesaid articles from the possession of accused Nawab and Gandhi Rana renders unreliable and, therefore, they have rightly been disbelieved by the learned trial court.

Case Law Discussed:

1991 Cr.L.J.2020

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

1. We have heard Sri S.N. Tripathi, learned A.G.A. appearing for the appellant-State, and Sri G.R.S. Pal, learned counsel appearing for the respondents-accused. Perused the record.

2. This government appeal is preferred under Section 378 Cr.P.C. on behalf of State of U.P. against the accused-respondents, namely Nawab son of Ashik Husain and Gandhi Rana son of Moti Rana. The appellant challenges the validity and correctness of the impugned judgment and order dated 4.7.1984 passed by Assistant Sessions Judge, Badaun in S.T. No. 59 of 1984.

3. As per report of C.J.M. Badaun, dated 17.4.2012 and order of the Court dated 9.7.2012, accused-respondent no. 2, Gandhi Rana has died during pendency of appeal hence, appeal against him is abated.

4. The accused-respondents were put on trial for the charges under Sections 392/397 and Section 411 I.P.C. by the Police Station-Kotwali, District-Badaun and acquitted by the impugned judgment and order dated 4.7.1984, aforesaid.

5. The prosecution case before the sessions court in brief was that on 25.6.1983 complainant Mohar Singh along with Malik Jalil Ahmad Tonkbala were going to Astana Alia Tonknagla at about 9.00 A.M., two accused persons appeared and one of them put his tamancha on the chest of Mohara Singh and directed to handover all his belongings and also threatened to kill him if he raised any hue and cry. His other companion standing with tamancha, snatched his purse containing Rs.120/- or 125/- and certain documents and the wrist watch. Accused persons also took a search of Jalil Ahmad but nothing was found on his person. Thereafter, the accused persons ran away towards Sahbajpur. On an alarm being raised by the complainant, some member of the public reached there and chased the assailants, but due to fear of tamancha they were unable to apprehend them.

6. Subsequently, complainant Mohar Singh lodged a first information report of the incident at Police Station- Kotwali, District-Badaun at about 9.35 A.M. on 25.6.1983 naming accused Nawab with his address under Section 392 I.P.C..

7. On an information received from the informer that two accused persons were standing near the Kothi of Harish Chandra Singh, the police party proceeded along with informer. When the accused persons saw the police party, they tried to run away, but complainant and

other members of public succeeded in arresting the accused persons during which some injuries were caused to the accused persons by the police in their self defence as accused are said to have fired with their country made pistol at police personnel.

8. On their search, Nawab was found in his possession of a Purse of Mohar Singh containing Rs.120/- and an extract of Khatauni. A tamancha and three live cartridges were also recovered from his possession. From the possession of Gandhi Rana, wrist watch of Mohar Singh, one tamancha and four live cartridges, were also recovered.

9. After recovery, the relevant recovery memos were prepared and the case was investigated and charge sheet was submitted against the accused persons under Sections 392/411 IPC and a separate charge sheet was also submitted under Section 397 IPC against them which was tried in Sessions Trial No. 403 of 1983: State of U.P. Vs. Nawab and Gandhi Rana, Sessions Trial No. 404 of 1983: State of U.P. Vs. Gandhi Rana under Section 25 of Arms Act, and Sessions Trial No. 405 of 1983: State of U.P. Vs. Nawab under Section 25/27 of Arms Act. The accused persons pleaded not guilty to the charges and claimed their trial.

10. The prosecution in support of its case examined Mohar Singh (P.W. 1), Malik Jalil Ahmad (P.W. 2) and V.S. Yadav (P.W. 3).

11. On appreciation of the facts and evidence on record, the sessions court acquitted all the accused persons by the impugned judgment and order dated 4.7.1984, mainly on the grounds; that besides the two victims prosecution did not produce any independent witness although these two witnesses admitted that other witnesses from public were also present there; that there was no mention in the first information report regarding specific role played by the two miscreants and there is contradiction in their statements; that the reliability of the prosecution witnesses was doubtful and that the accused persons were entitled for benefit of doubt.

12. Aggrieved, State of U.P. has filed present appeal.

13. We have heard Sri S.N. Tripathi, learned A.G.A. and Sri G.R.S. Pal, counsel for the accused-respondents. Perused the record.

14. Learned A.G.A. has assailed the impugned judgment and order on the grounds; that it was broad day light incident regarding which first information report was lodged promptly and the accused persons were arrested soon after the crime and looted properties were recovered from their possession; that learned trial court wrongly rejected the testimony of victims only on the ground of non-mentioning of specific role of the accused persons in the first information report; that the trial court wrongly treated the omission in the first information report as contradictions,in as much as, the first information report in which it was clearly mentioned that one accused placed tamancha on his chest and the other was looting the victims. Thus, there was no contradictions at all in between the statement of the prosecution witnesses and the FIR. He has also assailed the impugned judgment and order on the

ground that finding of the trial court that such an act of robbery could not have been committed in day light on a busy road is merely based on surmises and conjectures; that recovery memos fully corroborate the prosecution version as mentioned in the first information report; that prompt action on the part of the police has wrongly been criticised by the trial court when from the evidence, it is clear that there was hardly any time to make out a false case against the accused persons; that recovery of illicit arms and ammunitions were fully proved by the prosecution by examining reliable and independent witnesses, but the same has been wrongly rejected by the trial court.

15. Per contra, learned counsel for the accused-respondent has submitted that the view taken by the learned trial court is possible view. The prosecution has failed to prove its case beyond all reasonable doubts. No independent witness has been produced either to prove the incident of loot or recovery of looted property. Both the witnesses are interested witness and belong to one group, therefore, they are not trustworthy. According to him appeal lacks merit and deserves dismissal.

16. Before making re-appraisal of the prosecution evidence available on record we would prefer to discuss the legal position of the matter involved in this case.

17. Section 392 I.P.C. reads as under:-

"S. 392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."

"Robbery has been defined in Section 390, I.P.C. Section 392, I.P.C. contemplates that the accused should have from the very start, the intention to deprive the complainant of the property and should, for that purpose, either hurt him or place him under wrongful restraint. The charging section is Section 392."

18. Section 390 I.P.C. reads as under:-

"S. 390. In all robbery there is either theft or extortion.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, any commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation - The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."

19. Lord Macaulay, the Authors of Code have remarked, "There can be no

case of robbery which does not fall within the definition either of theft, or of extortion. But in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft, or an extortion. A large proportion of robberies will be half theft, half extortion.

20. When an accused is guilty of robbery he is to be convicted under Section 392, I.P.C. When accused is found guilty under Section 392 for committing robbery and under Section 411 for retaining stolen property, his conviction under Section 411 I.P.C. is improper. For considering the language of Section 411, dishonest retention is contradistinguished in that section from dishonest reception. The act of dishonest removal within Section 379 constitutes dishonest reception within Section 411 and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately.

21. Therefore, in the case in hand accused cannot be convicted under Section 392, I.P.C. as well as under Section 411, I.P.C. in the facts and circumstances of this case because the articles which are said to have been recovered from their possession are said to have been looted soon before its recovery, from first informant Mohar Singh P.W.-1, by the same accused.

22. Section 411 I.P.C. reads as under:-

"S. 411. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

23. Section 410 explains what comes under the words 'stolen property'. Things which have been stolen, extorted, or robbed, or which have been obtained by criminal misappropriation or criminal breech of trust come under extended significance given to these words. The essence of the offence of receiving stolen property under Section 411 consists in the receipt or retention, with full knowledge at the time of receipt or retention that the property was obtained in one of the ways specified in Section 410. It is immaterial whether the receiver knows or not who stole it. The section does not apply to the actual thief. The class of persons against whom it is directed is a class to whom these alternative words apply- "knowing or having reason to believe the same to be stolen property.

24. In Triambak vs. State of M.P., AIR 1954 SC 39 : Criminal Law General 335. The Supreme Court laying down the ingredients of offence under Section 411, I.P.C. lays down that the prosecution is to establish : (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property.

25. To sustain conviction under Section 411, the identity of the property recovered from the possession of the accused with the property stolen must be established.

26. Offence of theft being distinct from the offence of receiving stolen

property, the person charged for offence of theft only cannot be connected for receiving or retaining stolen property.

27. Section 397 I.P.C. reads as under:-

"S. 397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any persons, the imprisonment with which such offender shall be punished shall not be less than seven years."

28. Sections 397 and 398 do not create any offence but merely regulate the punishment already provided for robbery and dacoity. This section fixes a minimum term of imprisonment when the commission of robbery and dacoity has been attended with certain aggravating circumstances, viz., (1) the use of a deadly weapon, or (2) the causing of grievous hurt, or (3) attempting to cause death or grievous hurt.

29. Section 397, I.P.C. does not make any act an offence. It only provides minimum punishment for some offences under certain circumstances i.e. when deadly weapon is used for grievous hurt is caused or attempt to cause death or grievous hurt is made. Section 397, I.P.C. only provides for enhancement of the term of imprisonment in certain cases when offender uses a deadly weapon or causes grievous hurt to any person. Conviction should be under Section 392 read with Section 397, I.P.C. if the charges are found proved.

30. Section 397, I.P.C. cannot be applied constructively. It relates only to the offender who actually uses the deadly weapon himself or caused grievous hurt or attempted to cause death or grievous hurt at the time of committing loot or dacoity.

31. Charging accused under Section 397, I.P.C. simpliciter, framing of charge under Section 397 only is defective. It is to be famed along with Section 392 or Section 395, as the case may be. Section 397, I.P.C., being not a substantive offence, but only a rider to Section 392, I.P.C. a single charge need be formed for an offence under Section 392, read with Section 397, I.P.C.

32. To bring home the enhanced penalty under Section 397, I.P.C. the prosecution is to establish (a) that the accused persons committed robbery or the accused (five or more) committed dacoity, (b) that any of them while committing dacoity either used a deadly weapon or caused a grievous hurt to any person or attempted to cause grievous hurt or death to any person. Then enhanced punishment would be attracted to the very accused who used deadly weapons or attempted to cause death or grievous hurt or caused grievous hurt.

33. In view of the aforesaid legal position, accused cannot be convicted and sentenced separately under Section 397, I.P.C.

34. In the backdrop of the aforesaid legal position of the offences punishable under Section 392 read with Section 397 and 411, I.P.C. we have reconsidered and made reappraisal of the evidence led by prosecution to prove the charges framed against accused.

35. Perusal of impugned judgment shows that both the witnesses i.e. P.W. 1

and P.W. 2, were pre-known to each other, although they had expressed their non-acquaintance to each other. Mohar Singh, P.W.1 has admitted that in number of criminal cases lodged by him another witness, Malik Jalil Ahmad, P.W. 2 had stood prosecution witness for him and Malik Jalil Ahmad, P.W. 2 has similarly admitted that in more than one case instituted by him, Mohar Singh, P.W. 1 has stood prosecution witness for him. Both the witnesses, P.W. 1 and P.W. 2 have deposed that looted articles were recovered from the possession of accused persons, but none of those articles have been produced by the prosecution. Non production of case properties during trial undermines the sanctity of recovery.

36. In the first information report, P.W. 1, Mohar Singh has named the accused Nawab son of Ashik Husain with his address, but he has not disclosed as to whether the aforesaid accused Nawab had put his country made pistol at his chest to frighten him in order to loot or he was the person who actually looted the victim. The learned trial court has rightly held that had Mohar Singh, P.W. 1 been pre-acquainted with accused Nawab, he would have assigned the specific role against him, but non assigning the specific role against accused Nawab tells heavily against the prosecution.

37. It has come in the evidence of I.O. (P.W. 3) of the case that during the course of recovery accused persons had fired upon the police party who were more than ten in number, but non sustaining injury by police party casts a serious doubt on the veracity of mode and manner of recovery and the arrest of the accused persons. The police does not claim that in order to apprehend the accused persons they fired upon them in self defence. This appears to be improbable and unnatural.

38. Recovery memo, ex. Ka-2 and Ka-3, disclose that there were two prosecution witnesses, namely Pooran Lal son of Lochi Murao and Surendra Kumar Saxena son of Rang Bahadur Saxena, but none of them have been produced to prove the factum of recovery. The place of recovery is a busy road. Incident took place in broad day light but none of the independent witness came forward to support the recovery. It is fatal to prosecution.

39. The recovery memos prepared show that Rs.122/-, khatauni extracts and an application along with two plain papers and a small chit of papers were recovered from the possession of the accused Nawab, but Mohar Singh, P.W. 1 says that only cash, application and khatauni extracts were recovered from him. Meaning thereby that no other thing was recovered from him. Malik Jalil Ahmad, P.W. 2 has deposed that from the purse a paper extract containing address was recovered from the possession of accused Nawab. He had not deposed that plain papers were also recovered from him. Similarly as regards recovery of watch of Mohar Singh, P.W. 1 according to the prosecution, it was recovered from the accused Gandhi Rana. Mohar Singh, P.W. 1 deposed that on the day of incident it was given to him by his brother, but contradicting this fact, the I.O. (P.W. 3) has deposed that the aforesaid Mohar Singh, P.W. 1 had given statement to him under section 161 Cr.P.C. that he was wearing this watch since long and it was given to him by his father himself. The factum of robbery as well as recovery of aforesaid articles from the possession of accused Nawab and Gandhi Rana renders unreliable and, therefore, they have

rightly been disbelieved by the learned trial court.

40. Since prosecution has failed to prove its case beyond reasonable doubt, there is no need for the Court to probe into the defence case stated by accused in their examination under Section 313 Cr. P.C. where in accused, Gandhi Rana stated that he had come to Piyara from where he was arrested by the police to kill him in a fake encounter, but police party could not succeed in their effort due to interference by some persons of public, hence they falsely implicated him in this case. Likewise, accused Nawab stated that he was arrested from his house on 24.6.1983 and was brought to a jungle to kill him in a fake police encounter, but on account of arrival of public they could not do so and ultimately, he was falsely implicated in this case.

41. Para 8 of the judgment delivered by Division Bench of this Court in State of U.P. Vs. Ram Ajorey & others, 1991 Cr. L. J. : 2020 reads as under:-

"8- The law is well settled that appeals from acquittal are allowed only in exceptional circumstances. It is an extraordinary remedy. The appeal by Government should be made judiciously and only in cases where the judgment is so clearly wrong that its maintenance would amount to a serious miscarriage of justice or when a principle is involved or the question is one of great importance or of great public importance. The burden is on the Government to show that the acquittal is wrong and strong and urgent grounds must be made out to justify interference. When there is reasonable doubt as to the guilt of deceased, the High Court will not interfere nor will it interfere merely because upon evidence the lower court might have come to the conclusion of guilt, unless it is quite clear that the acquittal is wrong. The High Court will not also interfere merely because it might itself, as an original court, have arrived at a different conclusion. Where an appeal against acquittal turns on the facts it would only succeed if the judgment of acquittal is clearly wrong and involves a miscarriage of justice or when the trial judge has erred in failing to draw the clear, indubitable and irresistible inference from the facts or when the trial courts appreciation of evidence is vitiated by failure to take note of a very important fact or where finding of fact is based on an erroneous rejection of evidence. Thus the High Court will only interfere if it is proved without any doubt not only that the accused is guilty, but that he has been acquitted on unreasonable grounds. "

42. The view taken by the learned trial court is the appropriate view in the facts, circumstances and in the light of evidence adduced by the prosecution, therefore, the aforesaid impugned judgment and order dated 4.7.1984 needs no interference by this appellate Court.

43. In view of the above, appeal lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.03.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Service Single No. 4782 of 2010.

Deen Bandhu (deceased)...... Petitioner
Versus
The State of U.P. .... .Respondent

Counsel for the Petitioner:
R.C. Saxena, R.C. Saxena

Counsel for the Respondent:
C.S.C., U.S. Sahai

Constitution of India, Art.-311(2)-dismissal order-class 4th employee refused to work as domestic servant at house of manager-dismissal without supply of enquiry report-on vague allegation about which already warned-held-non supply of enquiry report-cause prejudice to petitioner-enquiry not conducted to judge misconduct but to victimize an illiterate class IV employee-dismissal order amounts malicious exercise of power-passed with retrospective effect from date of suspension-quashed-with all consequential benefit with with 6% interest @-with cost of Rs. 50,000/- payable by manager.

Held:Para-31
As discussed above, the petitioner was terminated illegally on vague and fanciful charges, disciplinary proceedings was initiated for ulterior purposes i.e. not to judge the misconduct of the petitioner but to victimize him. The petitioner is entitled to full back wages.

Case Law Discussed:
2011(29)LCD SC; 2010(28) LCD 1688 SC; 2010(28) LCD 1744; 1999(17) LCD 586; 1985 SCC (L& S) 815; 2002(20) LCD 156; 1974(3) SCC 459; 2010(1) SCC (L& S); 2009(1) SCC (L&S) 398; 2011 (29) LCD 820; 2011(29) LCD 2024; 2008(26) LCD 1044; 2008(8) SCC 236; 2009(27) LCD 1412; 2009(27) LCD 926; 1993 SCC (L& S) 723; 1993 SCC (L&S)1184; 1991 SCC (L&S) 612; (1993) 4 SCC 727; (2001) 6 SCC 392; (2008) 9 SCC 31; (2010) 9 SCC 496; (SCC p. 95, para 25); [(2009) 3 UPLBEC 2774]; (2006) 5 SCC 88; (2002) 7 SCC 142; [(2009) 3 UPLBEC 2139]; [2004 (22) LCD 770]; (2013) 10 SCC 324; (2007) 2 SCC 433; [2013(136) FLR 908]; (2013) 11 SCC 622.

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

1. Heard Sri R.C.Saxena, learned counsel for the petitioner, Sri U.S. Sahai, learned counsel appearing for the respondent nos. 3 and 4 and the learned Standing Counsel appearing for respondent nos. 1 and 2.

2. During the pendency of this writ petition, Deen Bandhu-the petitioner died on 15.9.2013. The legal heir of the petitioner, Smt. Anita has been substituted on 13.12.2013.

3. For the sake of convenience the deceased is being referred to as petitioner. The brief facts of the case is that the petitioner was appointed as class IV employee on 01.08.1963 with the respondent-college,namely, Khem Karan Inter College, Laharpur, District Sitapur which is a college recognized under the Intermediate Act and the Rules and Regulations framed thereunder. The petitioner was suspended on 30.12.1991 and thereafter he was issued charge-sheet dated 18.1.1992 containing as many as 12 charges. The petitioner submitted his reply on 20.02.1992 to the charge-sheet, denying the allegations and further stated that he did not have faith in the inquiry officer. The inquiry officer fixed 13.3.1992 for inquiry and the petitioner, before the date fixed for inquiry, submitted an application dated 9.3.1992, to the inquiry officer, stating that the appointment of the inquiry officer is illegal.

4. The petitioner did not participate in the inquiry and the inquiry proceeded exparte. The inquiry officer after conclusion of the inquiry submitted inquiry report dated 26.3.1992. The disciplinary authority i.e. the Principal of the College, issued show cause notice dated 8.4.1992 to the petitioner as required under the Regulations. The inquiry report was not supplied alongwith show cause notice. The respondent no.4 passed the impugned order dated 1.6.1992

dismissing the petitioner from service holding that all the charges has been proved by the inquiry officer.

5. This Court, vide order dated 29.3.2012 directed the District Inspector of Schools to decide the appeal/representation of the petitioner. The District Inspector of Schools, vide order dated 1.5.2012 dismissed the representation stating that since it was made after 17 years, the same was barred under Regulation 31 of the Regulations.

6. The submission of Sri R.C. Saxena, learned counsel for the petitioner, is that the petitioner was not supplied with the inquiry report and hence petitioner has been prejudiced. It has further been stated that even, in case the petitioner had not participated in the inquiry but he has submitted his reply, it was incumbent upon the inquiry officer to have considered his objections and then discussed the material in order to prove the charges. It was specifically stated in the memo of appeal that inquiry report has not been furnished. The said fact has also been pleaded in the writ petition. This factum is not denied by the respondent that inquiry report was not made available to the petitioner, neither it has been filed along with the counter affidavit. The inquiry is vitiated on the ground of bias as no order was passed on the application of the petitioner for change of enquiry officer.

7. Sri R.C. Saxena, learned counsel for the petitioner has relied upon the following judgments in support of his arguments. Sharda vs. District Deputy Director Consolidation 2011 (29) LCD SC, Sant Lal Gupta vs. Modern Corporation Group 2010 (28) LCD 1688 SC, Memendra Pratap vs. Deputy Registrar 2010 (28) LCD 1744, Smt. Sandhya Gupta vs. D.M., Auraiya 1999 (17) LCD 586, Anil Kumar vs. Presiding Officer & others 1985 SCC (L&S) 815, P.C. Chaturvedi vs. U.P. State Textile Corporation 2002 (20) LCD 156, S. Parthasarathi vs. State of A.P. 1974 (3) SCC 459, State of U.P. vs. Saroj Kumar Sinha 2010 (1) SCC (L&S), Roop Singh Negi vs. P.N.B. 2009 (1) SCC (L&S) 398, 2011 (29) LCD 820, Yog Narain Dubey vs. M.D. 2011 (29) LCD 2024, Vijay Kumar Singh vs. Dy. Director 2008 (26) LCD 1044, State of Uttranchal vs. Kanak Singh 2008 (8) SCC 236, Sher Bahadur Singh vs. Phoolpati 2009 (27) LCD 1412, Gyan Das Sharma vs. State of U.P. 2009 (27) LCD 926, D.R. Yadav vs. JMA Indushraj 1993 SCC (L&S) 723, M.D. ECIL vs. B. Karunakar 1993 SCC (L&S) 1184, U O I vs. Mohd. Ramzan Khan 1991 SCC (L&S) 612.

8. In rebuttal, it has been argued that a fair inquiry procedure was followed. The petitioner has failed to show that he has been prejudiced by non- supply of the inquiry report and at no point of time any demand was made for supply of the inquiry report. The inquiry has proceeded ex parte and thereafter on the basis of material which was available on record, charges was proved, on the basis of inference drawn from the inquiry report.

9. Sri U.S. Sahai, learned counsel for respondent Nos. 3 and 4 has relied upon the judgements in the case of Managing Director, ECIL, Haiderabad and others vs. B. Karunakar, (1993) 4 SCC 727, State of U.P. vs. Harendra Arora and another (2001) 6 SCC 392 and Haryana Financial Corporation and another Vs. Kailash Chandra ahuja (2008) 9 SCC 31.

10. Rival contentions fall for consideration.

11. It is admitted between the parties that inquiry report was not supplied to the petitioner. The question of prejudice caused to the petitioner can be examined by perusal of the impugned order dated 1.6.1992, passed by the disciplinary authority.

12. From perusal of the impugned order, it is evident that charges has been partially reproduced and the reply of the petitioner has been recorded in two sentences and thereafter it has been stated that the disciplinary authority agrees with the findings of the inquiry officer and hence the charge is proved. There is no discussion of the evidences as to how the inquiry officer has reached his conclusion nor the discussion of the inquiry officer has been referred to. There is no whisper in the impugned order to show what weighed upon the mind of the enquiry officer in drawing his conclusion, the evidence and the material/record that was placed before him. The impugned order is cryptic and unsustainable. The appeal that was directed to be decided, the District Inspector of Schools has adopted a hyper technical approach in dismissing the appeal on the ground of laches. The District Inspector of Schools did not decide the appeal on merit inspite the order of the Court. There is no finding of the District Inspector of Schools as to whether inquiry report was made available to the petitioner or not.

13. In Kranti Associates Private Ltd. vs. Masood Ahmad Khan, (2010) 9 SCC 496 the Supreme Court emphasized that judicial courts and quasi -judicial authorities must pass reasoned order. The principles culled out in that judgment are extract below:

"a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision-making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process"."

14. The aforesaid principles was reiterated by the Supreme Court in Sharda's case (supra) as well as Sant Lal Gupta's case (supra).

15. In Roop Singh Negi's case (supra), the Supreme Court held that departmental proceeding is a quasi-judicial proceeding. The inquiry officer performs a quasi-judicial function. The inquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The inquiry officer should appreciate the evidences and the conclusion should be based on evidence. The inquiry report if based on conjectures and surmises cannot be sustained. Suspicion howsoever high, cannot be a substitute for legal proof.

16. Yet again in M.V. Bijlani v. Union of India this Court held: (SCC p. 95, para 25)

"25. ....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

17. In Saroj Kumar Sinha's case (supra), the Supreme Court held that in

case the government servant fails to appear, the inquiry officer can proceed ex parte. Even in such circumstances, it is incumbent on inquiry officer to record statement of witnesses mentioned in charge-sheet and thereafter assess whether unrebutted evidence is sufficient to hold that charges are proved. Para 30, 31 and 32 is as follows:-

"30. When a department 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 enquiry 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.

"31. In Shaughnessy v. United States (Jackson, J.), a Judge of the United States Supreme Court has said: (L Ed p. 969)

32. The effect of non disclosure of relevant documents has been stated in Judicial Review of Administrative Action by De Smith, Woolf and Jowell, Fifth Edition, Pg.442 as follows:

"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and other adjudicating bodies. If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence ex parte which is not fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked."

18. In Harendra Arora's case (supra) the delinquent was seeking the order of his dismissal to be quashed on the ground of non-compliance of rule 55A Civil Services CCA Rules for not furnishing the inquiry report. The Supreme Court has rejected the plea that the principle of non-supply of inquiry report cannot be applied mechanically unless prejudice or failure of justice is shown, or noticed. Para 11, 12 and 13 is as follows:-

"11. From a minute reading of the decision in the case of ECIL, it would appear that out of the seven questions framed, while answering question nos. (vi) and (vii), the Constitution Bench laid down that the only exception to the answer given in relation to those questions was where the service rules with regard to the enquiry proceedings themselves made it obligatory to supply a copy of the report to the employee. While answering the other questions, much less answer to question no. (v) which relates to prejudice, the Bench has nowhere categorically stated that the answer given would apply even in a case where there is requirement of furnishing a copy of the enquiry report under the statutory rules. As stated above, while answering question nos. (vi) and (vii), the Bench has expressly excluded the applicability of the same to the cases covered by statutory rules whereas such exception has not been carved out in answer to question no. (v) which shows that the Bench having found no difference in the two contingencies one covered by Article 311(2) and another covered by statutory rules has not made any distinction and would be deemed to have laid down the law uniformly in both the contingencies to the effect that if enquiry report is not furnished, the same ipso facto would not invalidate the order of punishment unless the delinquent officer has been prejudiced thereby more so when there is no rationale for making any distinction therein.

12. Thus, from the case of ECIL, it would be plain that in cases covered by the constitutional mandate, i.e., Article 311(2), non- furnishing of enquiry report would not be fatal to the order of punishment unless prejudice is shown. If for infraction of a constitutional provision an order would not be invalid unless prejudice is shown, we fail to understand how requirement in the statutory rules of furnishing copy of enquiry report would stand on a higher footing by laying down that question of prejudice is not material therein.

13. The matter may be examined from another view point. There may be cases where there are infractions of statutory provisions, rules and regulations. Can it be said that every such infraction would make the consequent action void and/or invalid? The statute may contain certain substantive provisions, e.g., who is the competent authority to impose a particular punishment on a particular employee. Such provision must be strictly complied with as in these cases the theory of substantial compliance may not be available. For example, where a rule specifically provides that the delinquent officer shall be given an opportunity to produce evidence in support of his case after the close of the evidence of the other side and if no such opportunity is given, it would not be possible to say that the inquiry was not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. Even amongst procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case the theory of substantial compliance may not be available, but the question of prejudice may be material. In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available and in such cases objections on this score have to be judged on the touchstone of prejudice. The test would be, whether the delinquent officer had or did not have a fair hearing. In the case of Russel vs. Duke of Norfolk & Ors., 1949 (1) All E.R. 109, it was laid down by the Court of Appeal that the principle of natural justice cannot be reduced to any hard and fast formulae and the same cannot be put in a straitjacket as its applicability depends upon the context and the facts and circumstances of each case (supra)."

19. The principle of prejudice caused was reiterated by Supreme Court in Kailash Chandra Ahuja's case (supra). Para 36 and 39 is as follows:-

"36. 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.

39. . In B. Karunakar's case (supra), this Court considered several cases and

held that it was only if the Court/Tribunal finds that the furnishing of the report "would have made a difference" to the result in the case that it should set aside the order of punishment. The law laid down in B. Karunakar was reiterated and followed in subsequent cases also (vide 'State Bank of Patiala v. S.K. Sharma, M.C. Mehta v. Union of India."

20. Applying the law in the facts of the present case, the charges are vague and not specific, for some charges warning had already been issued in the past, the same allegation could not be included in the charge. The petitioner had given a detailed reply dated 20.2.1992 to each charge, stating therein that the charges are not only false, but has been issued to victimize the petitioner, as the petitioner had refused to work in the house of the manager as domestic servant. The motor of the tube-well was not stolen but was in the house of the manager. The clerk in connivance with the manager used to extort part of the salary, if not paid, the employees were subjected to harassment. Petitioner had filed a complaint with CJM. A widow class IV employee and the another employee were also subjected to the same treatment for refusing to work at the manager's house. The petitioner is illiterate and the clerk used to obtain signatures on papers, which is now being used against the petitioner. The order impugned does not reflect any averment of the petitioner's reply.

21. The charges are vague, details of the substance of the imputation of the allegations of misconduct is missing. The enquiry report deliberately has not been filed. The enquiry has not been conducted bonafide and the enquiry was an empty formality to victimize an illiterate class IV employee, as he refused to succumb to the exploitation of the officiating principal and the manager. The duty is to act fairly, not so much to act judicially. Action should be impartial and should be free from appearance of unfairness, unreasonableness and arbitrariness.

22. Non supply of enquiry report, in the present, case has caused prejudice to the petitioner. The petitioner has a right to know as to how his detail reply, to the charges, has been dealt with by the enquiry officer and on which material/evidence the charges has been substantiated. The impugned order is a non-speaking order, it does not give any reasons for substantiating the charges, it merely draws the inference of guilt of the petitioner.

23. The law of the subject is settled in Sher Bahadur Singh (dead) substituted by Smt. Phoolpati and Sant Kumar Singh Versus State of U.P. and others [(2009) 3 UPLBEC 2774] relying upon M.V. Bijlani v. Union of India and others, (2006) 5 SCC 88; Sher Bahadur v. Union of India and others, (2002) 7 SCC 142, held that in case the delinquent employee does not cooperate even then it shall be incumbent upon the enquiry officer to proceed ex-parte and record oral evidence in support of the allegations contained in the charge-sheet. After receipt of the report from the enquiry officer, it shall be necessary for the punising authority to serve show cause notice along with copy of the enquiry report, and thereafter, pass appropriate order in accordance with law. Refer State of Uttar Pradesh and others v. Prem Kumar Dubey and another, [(2009) 3 UPLBEC 2139], Ambika Prasad Srivastava v. State Public Services Tribunal, Lucknow and others, [2004 (22) LCD 770]

24. The impugned order is malicious exercise of power, the charge-sheet dated 18.1.1992 was issued fixing the date of enquiry on 13.8.1992, the petitioner submitted his reply dated 20.2.1992 however did not participate and the enquiry was concluded and enquiry report dated 26.3.1992 was submitted. No other date was fixed ex parte for the enquiry. The entire enquiry was concluded within thirteen days. The allegation of the petitioner that he is being victimised is established. The entire enquiry was a camouflage, the purpose of enquiry was not misconduct but victimization.

25. The order of termination has been passed from a retrospective date i.e. 30.12.1991 i.e. from the date of suspension that itself is illegal. The order of termination cannot be retrospective or prospective.

26. The contention of the learned counsel for the respondent that no prejudice was caused to the petitioner and, therefore, no inquiry report was required to be supplied can not be accepted. The impugned order is bald, cryptic and devoid of reasons. Had the enquiry report been supplied to the petitioner, the order impugned could be sustained, as in that eventuality the disciplinary authority would not be required to give separate reasons from that of the enquiry officer. Non-supply of enquiry report, required the disciplinary authority to state the reasons that weighed with the enquiry officer in arriving at the conclusions in respect of each charge. Non disclosure of reasons seriously prejudices the cause of the petitioner.

27. The learned counsel for the petitioner submits that the petitioner will be entitled to back wages as the termination is illegal. The argument has been opposed by the respondents.

28. The law on grant of back wages on reinstatement, as applicable to industrial jurisprudence, has been settled by the Hon'ble Supreme Court in various judgments.

29. In Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others (2013) 10 SCC 324, the Court held, in case of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. Where the Court reaches a conclusion that the inquiry was held in respect of frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the punishment is a result of such scheme or intention. In such cases, the principles relating to back wages will be the same as those applied in the cases of illegal termination. (Refer)

30. J.K. Synthetics Ltd. vs. K.P. Agrawal (2007) 2 SCC 433, Assistant Engineer Rajasthan Dev Corp. and another versus Gitam Singh, [2013(136) FLR 908], Shiv Nandan Mahto vs. State of Bihar (2013) 11 SCC 622.

31. As discussed above, the petitioner was terminated illegally on vague and fanciful charges, disciplinary proceedings was initiated for ulterior purposes i.e. not to judge the misconduct of the petitioner but to victimize him. The petitioner is entitled to full back wages.

32. The impugned orders dated 1.5.2012 and 1.6.1992, passed by District Inspector of Schools, Sitapur and Principal respondent no. 4 respectively is hereby quashed. The back wages as well

as post retirement benefits shall be paid by the District Inspector of Schools, Sitapur within a period of four months from the date of service of this order, failing which interest @ 6% shall be paid from the date of termination.

33. The writ petition is allowed with all consequential benefits.

34. Costs assessed as Rs.50,000/- to be paid by the Committee of Management respondent no. 3.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2014

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 5553 of 2013

Meva Lal........................... Petitioner
Versus
State of U.P. & Ors....... ....Respondents

Counsel for the Petitioner:
Sri Kamlesh Shukla, Sri S.C. Gupta

Counsel for the Respondents:
A.G.A.

<u>Constitution of India, Art. 226-</u>Release of vehicle-offence under section 3/7 E.C. Act-rejected by Court below-as Truck in question carrying 400 bags uria-on patrolling police found uria bags unloaded from truck and loaded with tractor trolly-nothing whisper about knowledge of any illegal activities of driver-in view of law laid down by Apex Court in case of Surendra Bhai Ambalal Desai-Truck still standing police station with 400 bags uria un-attand getting junk day by day-no useful purpose to remain with police station-order by Court below quashed-direction for release given.

<u>Held:Para-12</u>
The facts of the case in hand show that the truck of the petitioner was seized on 7.9.2012 and it is still standing in the premises of Police Station Bindki, District Fatehpur unattended getting junk day by day, which situation is in clear violation of the law laid down by Sunderbhai Ambalal Desai (Supra) case cited above.

<u>Case Law Discussed:</u>
{2003(1) JIC 615(SC)}

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. By means of this writ petition, the petitioner has prayed for quashing of two orders first dated 19.11.2012 passed by the District Magistrate, Fatehpur and the second dated 12.3.2013 passed by Additional District and Sessions Judge, Court No.2, Fatehpur, refusing to release the truck of the petitioner bearing No.UP-70 BT 8968 seized under section 3/7 Essential Commodities Act.

2. Apart from praying for a writ of certiorari for quashing both the aforesaid orders the petitioner has also prayed to issue writ of mandamus commanding the respondents to release the Truck No. UP-70 BT 8968 in his favour.

3. The respondent no. 4 Zila Krishi Adhikari, District Fatehpur and respondent No. 6 Sub-Inspector Lallan Singh have filed counter affidavits, which are on record.

4. Heard learned counsel for the petitioner and learned AGA appearing on behalf of respondents.

5. Some background facts in brief are that on 7.9.2012 at about 9-10 p.m. when the police was on patrolling duty, Truck No. UP-70 BT 8968 loaded with 400 bags of urea fertilizers of IFFCO was

found standing on Marhara road near Palesar factory belonging to one Pappu @ Surya Pratap Singh. The bags of urea after being unloaded from the aforesaid truck were being loaded into a tractor trolley. When the truck Driver Lal Chandra Patel and assistant Driver Indrajeet Bhatia were enquired by the police about the loading of urea from the truck into tractor trolley, they informed that a bilty of 400 bags of IFFCO urea fertilizer was given to Om Prakash Singh in-charge of IFFCO Godown, Bindki, but he sent Pappu Singh @ Surya Prakash Singh who was unloading the aforesaid fertilizer into the tractor. The authorities were informed that the urea was being unloaded for the purpose of black marketting. FIR was lodged against Om Prakash Singh, Pappu @ Surya Pratap Singh and driver and assistant driver of the truck. Criminal case was registered and the truck along with urea was confiscated under the direction of Tehsildar.

6. Learned counsel for the petitioner submits that the petitioner is the valid owner of the truck. He has no concern with black marketing of urea fertilizer. Learned counsel for the petitioner has submitted that the entire prosecution story is concocted. The real facts are that in the night of 7.9.2012 when his Truck No. UP-70 BT 8968 was going towards IFFCO Bindki Godown, in the way at Marhara road, the truck got punctured and the driver was told that puncture can be repaired only at Bindki. Meanwhile, Inspector Lallan Singh (respondent no.6) reached there along with one Constable Rajan Singh and enquired about the truck. He started demanding illegal gratification and on refusal, got a false and fictitious FIR registered resulting in confiscation of his truck.

7. Learned counsel for the petitioner has contended that according to the FIR when the truck was seized the bags of urea were found being unloaded from truck into a tractor trolley but neither the tractor trolley was seized nor it has been mentioned as to how many bags of urea were found loaded on the tractor-trolley and how many bags were remained in the truck. The truck is still standing in the premises of police station loaded with 400 bags of urea. Learned counsel has submitted that all these facts clearly show that the entire story has been manipulated by the Sub-Inspector. After knowing that his truck has been kept at P.S. Bindki, Fatehpur, the petitioner moved an application for its release but the learned District Magistrate without any sufficient ground rejected the release application of the petitioner by the order impugned dated 19.12.2012. Against the order passed by the District Magistrate, the appeal no.113 of 2012 was filed by the petitioner before District & Sessions Judge.The District & Sessions Judge also dismissed his appeal by order dated 12.3.2013. The petitioner had no knowledge that the driver of the truck has done any illegal act so there was no "mensrea" on his part but in both the impugned orders, there is not even a whisper about the fact that the petitioner had any knowledge that the driver has done any illegal act.The petitioner is not named as an accused in the FIR, he is ready to comply with the conditions imposed by the authority concerned so his petition be allowed and the respondents be directed to release his Truck No. UP-70 BT 8968.

8. Per contra, learned AGA has opposed the petition and has submitted that both the courts below have passed a legal order which are not liable to be set aside.

9. After hearing learned counsel for the petitioner and learned AGA for the State, this Court is of the view that the instant writ petition deserves to be allowed for the following reasons:-.

10. The impugned order shows that there is no dispute regarding the fact that petitioner is the owner of Truck No. UP-70 BT 8968. The District Magistrate has refused to release the truck only on the ground that the truck concerned is the case property. Learned appellate court has also dismissed the criminal appeal filed by the owner of the truck (petitioner) on the same ground. It appears that both the courts below, while passing the impugned order have become oblivious of the well settled legal proposition, laid down by Hon'ble Supreme Court in the case of Sunderbhai Ambalal Desai and C.M. Mudaliar vs. State of Gujarat {2003 (1) JIC 615 (SC) in which the Apex court has observed as under :-

"In police station premises seized vehicles are kept unattended and all those vehicles become junked day by day. There is no use to keep such seized vehicles at the police station for a long period and the Magistrate should pass appropriate orders immediately for the release of those vehicles after taking appropriate bond and guarantee for the return of the said vehicles if required by the Court at any point of time"

11. The Hon'ble Apex Court has directed the Magistrate to follow the procedure provided u/s 451 and Section 457 Cr.P.C. regarding seized property by observing as under:-

"In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:

(1) Owner of the article would not suffer because of its remaining unused or by its misappropriation;

(2) Court or the police would not be required to keep the article in safe custody;

(3) If the proper panchnama before handing over possession or article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

(4) This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles....."

"We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under section 451 Cr.P.C. are properly and promptly exercised and articles are not kept for a long time at the police station in any case for not more than 15 days to one month."

12. The facts of the case in hand show that the truck of the petitioner was seized on 7.9.2012 and it is still standing in the premises of Police Station Bindki, District Fatehpur unattended getting junk day by day, which situation is in clear violation of the law laid down by Sunderbhai Ambalal Desai (Supra) case cited above.

13. No purpose is going to be served in keeping the truck remain at police station hence the writ petition is allowed.

14. The order dated 19.11.2012 passed by the District Magistrate, Fatehpur and the order dated 12.3.2013 passed by Additional District and Sessions Judge, Court No.2, Fatehpur are hereby quashed.

15. The respondents are directed to release the Truck No. UP-70 BT 8968 in favour of the petitioner immediately after

taking appropriate bond guarantee, security and undertaking to produce the said vehicles as and when required at any point of time by the court concerned. So far as 400 bags of IFFCO urea is concerned, no purpose is going to be served in retaining those urea bags at the premises of police station in the open therefore the respondents are directed to dispose of the urea bags according to the guide lines given by the Apex court in Sunderbhai Ambalal Desai case (Supra).

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE RAJAN ROY, J

Civil Misc. Writ Petition No. 6034 of 2014

Om Prakash Rai.......... Petitioner
Versus
State of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Singh, Sri Vinod Kumar Rai

Counsel for the Respondents:
C.S.C.

<u>Constitution of India, Art.-226</u>-**Withdrawl of personal security-under threat perception-petitioner getting security-withdrawl in Dec. 2013-petitioner being practicing advocate-involving criminal activities-in absence of definition of 'threat perception in any government order-Court no role to play-should be assessed by state investigation Agencies-keeping in view of Gaur Hasan case as well as directions contained in PIL-no interference called for-petition dismissed.**

<u>Held:Para-18</u>
We also find that the respondents were justified in downgrading the security and providing security only for the purpose of taking the petitioner from his residence to the Court and back. In the light of the aforesaid, we do not find any reason to interfere in the action of the State.

<u>Case Law Discussed:</u>
2009(1) ACR 515; W.P. No. 6509 of 2013.

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

1. Heard learned counsel for the petitioner as well as Sri Ravi Prakash Srivastava, the learned Standing Counsel.

2. The petitioner is an advocate in Sonebhadra. On 1.05.2012, the petitioner's son was murdered, in which the petitioner is an eye-witness. For this incident a first information report was lodged and upon investigation, charge-sheet was filed. A Special Operation Group (SOG) arrested certain persons on 30th September, 2012 and during interrogation, it was found that these persons were planning to kill the petitioner. Another first information report was lodged and based on this information, security was provided to the petitioner from October, 2012 which continued till December, 2013, when it was withdrawn. The petitioner being aggrieved by the withdrawal of the security has filed the present writ petition praying for restoration of the gunner facility, which was provided by way of security measure.

3. The petitioner contends that the threat perception is still existing and as per government orders issued from time to time, it is the obligation of the State to protect its citizens and provide security.

4. The State filed a counter affidavit admitting the averments made in the writ

petition and submitted that as on date, security is provided to the petitioner to take him from his residence to the Civil Court and back. This new arrangement was however, denied by the petitioner in his rejoinder.

5. A supplementary affidavit has been filed by the petitioner intimating the Court that he possesses two weapons, namely, a double barrel gun and a revolver, which was given to him for his protection when the plan to kill him surfaced and became known to the police authorities.

6. The State Government for security reasons has also placed a sealed cover which the Court has perused, in which the State has indicated the reasons for withdrawal of the gunner facility.

7. We find from a perusal of the government order dated 25th April, 2001 that a security is provided as per the recommendation of the District Level Committee for a period of one month which can be extended for a maximum of three months and further extension could only be given by the State Government on specific recommendation being given by the District Level Committee. The government order further provides that a review of the matter would be taken by the committee on a monthly basis in order to review whether security is to be provided further considering the threat perception.

8. What constitutes the threat perception has not been indicated in the government order. A threat perception is, therefore, a question of fact which can only be assessed by the State Investigating Agencies and it is not the domain of the Court to consider whether a threat perception exists in favour of a particular person or not.

9. From a perusal of the Government Order of 2001, the Court further finds that the State Government has emphasized that no security should be provided to a person, who is indulging in criminal activities and against whom, it is feared that the provision of security to them could be misused.

10. In the light of aforesaid government order, this Court in Gayur Hasan Vs. State of U.P. and others 2009 (1) ACR 515 held:

"15. Moreover, irrespective of any reason whatsoever, if a person has indulged in criminal activities and thereby has enhanced perception of threat to his life and liberty, he himself is responsible for the same, and cannot look to the State to provide him separate security at the cost of common man when he himself is responsible for enhancing threat perception due to his anti-social activities. Whatever position an individual occupy in our democratic system, if he is engaged in anti social criminal activities, in our view, there is no justification to provide him security at the cost of tax payer society and common people of the State. His criminal activities are against the society. It is inconceivable that such a person shall be provided extra security at individual level to ensure that such activities at his level may continue with impunity. This in fact amounts to an encouragement to anti-social criminal elements to go ahead with such criminal activities and also enjoy an edge over his counter parts by obtaining State's security cover at the cost of common man."

11. We have considered the submissions of the learned counsel for the petitioner and the learned Standing Counsel and considering the government order of 2001, we are in complete agreement with the observations made by a Division Bench of

this Court in Gayur Hasan's case (supra). Threat to the life of such persons who are indulging in criminal activities is mainly on accounts of enmities and attacks on such persons who mainly seek revenge. Even though the State is under an obligation to provide security to its citizens and there is an obligation to protect them, nonetheless individual security can only be provided in exceptional circumstances. But where a person indulges in criminal activities and thereby enhances the threat to his life, in such a situation, the said person is alone responsible and therefore, the State in such a situation will not come forward and provide security. We are of the opinion that it is not desirable to provide personal security to such persons because such persons would threaten others and indulge in criminal activities unhindered with the aid of protection provided to them by State.

12. Recently in Nutan Thakur Vs. State of U.P. & Ors., in Writ Petition No. 6509 of 2013, a Division Bench of the Lucknow Bench of this Court, by an order dated 3rd March, 2014 held that security provided by the State to persons having criminal activities should be removed immediately and thereafter a review should be conducted by the State for providing security to those persons after considering objectively the evaluation of threat. The Court held:

"We, thus, provide that security to all such persons shall be removed within a period of ten days and thereafter review regarding threat perception may be conducted by the State Government at appropriate level within next fifteen days and depending upon the evaluation of threat perception in the manner provided herein above in this order, the State Government will consider for providing the security only if it is found that there is actual and real threat perception to the individuals concerned."

13. In the instant case, we find that initially there existed a threat perception in favour of the petitioner. The State provided him security which continued for a considerable period of time but from December 2013 onwards, the security was withdrawn for reasons disclosed in the sealed cover.

14. We have perused the contents indicated by the State in the sealed cover and for the reasons indicated therein, we are of the opinion that the State was justified in the facts and circumstances, in withdrawing the security.

15. Without divulging the details, we only observe that the petitioner was indulging in criminal activities and in the light of the government order of 2001 and the observations made in Gayur Hasan's case, we are of the opinion that it is not desirable to provide personal security to the petitioner.

16. A person who indulges in criminal activities is not entltied for the protection from the State. In Gayur Hasan's Case, the Court observed that there is one police man for every one thousand citizens. In such circumstances providing security personel for the purpose of providing individual security would be putting a common ordinary man at enhanced risk to their life and liberty at the cost of individual security which is not the obligation of the State.

17. As per the government orders and decisions of this Court, threat perception is required to be reviewed periodically. What particular category of security cover or its upgradation or downgradation, is essentially the domain of the concerned Government

Agencies and it is not a matter in which the Court should interfere. In the light of the aforesaid, we find that the authorities were justified in withdrawing the security.

18. We also find that the respondents were justified in downgrading the security and providing security only for the purpose of taking the petitioner from his residence to the Court and back. In the light of the aforesaid, we do not find any reason to interfere in the action of the State.

19. Writ petition accordingly fails and is dismissed.

20. We also direct the District Level Committee to review the threat perception on a month to month basis and thereafter take further action of providing security.

21. The report which was provided to us in a sealed cover which the Court has perused, will be kept in the sealed cover and shall become part of the record.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2014

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 7534 of 2010

Smt. Rashida Bano.....................Petitioner
Versus
State of U.P. & Ors..............Respondents

Counsel for the Petitioner:
Sri Brijesh Yadav

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

Constitution of India, Art.-226-readwith U.P. Gangsters & Anti Social Activities(Prevention) Act 1986-Rejection-to release the house by the District Magistrate as well as Special Court-on presumption the house owned from illegal criminal activities of her husband-inspite of producing the document of ITR, Bank Loan, as well as Sale deed-Registered 7 years ago-from registration of gangsters case- without considering objection-rejection held illegal-order passed by authorities quashed-D. M. To pass well reasoned speaking order within 6 month.

Held:Para-15
For the aforesaid reasons and in the wake of legal position cited above, both the impugned orders passed by the District Magistrate Varanasi and Special Judge, Gangster Varanasi are liable to be quashed because both the courts have failed to assign any reason as to how the property purchased about 7 years prior to the registration of the case under Gangsters Act against the husband of the petitioner was attached by District Magistrate under section 14 of the Gangster Act.

Case Law Discussed:
2012(76) ACC 164.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. By means of this writ petition, the petitioner has prayed for quashing the order dated 10.2.2010 passed by Special Judge, Gangster Act, Varanasi and the order dated 6.8.2009 passed by the District Magistrate, Varanasi.

2. The petitioner has also prayed to command the respondents by issuing a writ of mandamus to release his property consisting of House No.C-17/41, situated at Mohalla Lahang, P.S. Sigra, District Varanasi in favour of the petitioner.

3. Heard Shri Brijesh Yadav, learned counsel for the petitioner, learned AGA appearing for the State and perused the record.

4. Some background facts in brief are that a criminal case under Section 3 (1) U.P. Gangsters& Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as " Gangster Act") was lodged against the husband of the petitioner at Crime No.729 of 2008 at P.S. Sigra, Varanasi. In Gang chart two separate offences were shown against the applicant i.e. Case Crime No. 11 of 2006 under section 302, 120-B IPC P.S. Sigra, Varanasi and Case Crime No.297 of 2008 under Section 302 IPC and Section 7 Criminal Law Amendment Act at P.S. Sigra, District Varanasi.

5. The S.O. Sigra submitted a report on 28.11.2008 through S.S.P., Varanasi to District Magistrate, Varanasi stating that the property of the accused, (the details of which are mentioned above), was acquired by him as a result of commission of offence triable under the Gangster Act. The District Magistrate, Varanasi issued a notice to the applicant/petitioner and attached the property vide his order dated 15.1.2009.

6. The applicant-petitioner filed her objections along with her affidavit before the District Magistrate, Varanasi, but the District Magistrate Varanasi, refused to release the attached property in favour of the petitioner. As per the provisions of Section 16 (1) of Gangster Act, the District Magistrate, on 17.8.2009 referred the matter to Special Court constituted under Gangster Act, Varanasi. Being aggrieved by such order of refusal, the applicant also moved an application under Section 16(2) of the Gangster Act.

7. The learned Special Judge, Gangster Act, Varanasi vide order dated 10.2.2010 rejected her application on the ground that the applicant has failed to produce any document to show from what source of income the said house was purchased in the year 1999 and from what source of income the petitioner and her husband have raised further constructions in the house.

8. Learned counsel for the petitioner has challenged both the aforesaid orders passed by District Magistrate and Special Judge, Vranasi by contending that the property that has been attached was not acquired by the husband of the applicant/petitioner as a Gangster. The said house was purchased by the applicant by their joint income as both of them are in the business of glass for last more than 15 years. They have raised the house further by obtaining a loan of Rs.8,00,000/- from Kashi Gramin Bank. Learned counsel for the petitioner has argued that in order to prove these averments the petitioner/applicant had filed before the courts below the income tax returns of herself and her husband. She had also filed the original copy of notice of Kashi Gramin Bank dated 27.11.2009 issued to applicant and her husband with regard to loan. But learned District Magistrate and learned Special Judge without any reason, presumed that the property was acquired by the husband of petitioner by commission of crime.

9. Learned counsel for the petitioner has further argued that two cases shown in the Gang Chart on the basis of which the case under Gangster Act was instituted against the petitioner's husband pertain to year 2006 and 2008 whereas the house was purchased in the year 1999 i.e. about 7 years prior to the institution of the two criminal cases. In these circumstances, it cannot be said that the house was purchased by committing any crime. There was no history of any offence against the husband of the petitioner prior to the two cases registered in the year 2006 and 2008, so the house could not have been attached under Section 14 of

Gangster Act. But due to the illegal attachment of the house the family members of the petitioner are on road because they have no other house to live. It has further been alleged that the glasses of window panes were also broken by the police causing huge loss to the petitioner.

10. Learned AGA appearing on behalf of respondent no.1 has opposed the writ petition. Counter affidavit has been filed on behalf of respondent no.3, i.e.S.S.P. Varanasi.

11. After hearing learned counsel from both the sides and after a careful perusal of the legal provisions and the relevant records, this court is of the view that the writ petition deserves to be allowed for the following reasons:-

12. The relevant provision regarding the attachment and release of property, provided in Gangster Act are Section 14 and 15. Section 14 of the Act is reproduced below:-

Section-14.Attachment of Property.-(1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment."

13. Thus the Act clearly provides that before passing orders for attachment of property under section 14 of the Act, the District Magistrate must have reasons to believe that the property has been acquired by a Gangster as a result of the commission of an offence triable under this Act. But the facts of the case in hand depicts otherwise and specially the facts as mentioned in para 10 of the counter affidavit filed on behalf of SSP, Varanasi, raise doubts and put a big question mark on the legality of the orders passed by the District Magistrate, and Special Judge, Varanasi. In para 10 of the counter affidavit filed on behalf of S.S.P., Varanasi it has been stated that although the husband of the petitioner was indulged in commission of crime since 1997-98 but the criminal cases were registered against him in the year 2006-2008. This statement of S.S.P. Varanasi appears ridiculous and on the basis of this statement, only two conclusions can be drawn. First either the police become so much lethargic and irresponsible that despite knowing that a gangster was indulging in criminal activity since the year 1997-98, it registered the case against him in the year 2006-2008 i.e. after expiry of about 10 years. The second conclusion is that it was a deliberate act on the part of police in order to provide illegal help to the gangster by abstaining from taking lawful measures against him and if that was so, the concerned police officers may face prosecution under Section 3(2) of Gangster Act.

14. In a land mark case Smt. Afzal Begam vs. State of U.P.., 2012 (76) ACC 164 it has been held that :

Property-Subject matter of attachment ? "It is now well settled that the property being made subject matter of an attachment under section 14 of the Act must have been acquired by a Gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record his satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under Section 15 of the Act and in case he refuses to release the property on such representation, he is to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the enquiry held by him under Section 16 of the Act. If the Court came to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached. If the conclusion for the Court is otherwise, it may pass such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof or otherwise........."

"The court is not expected to act as a Post Office or mouth piece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the gang chart can be attached by the District Magistrate under Section 14 of the Act..."

15. For the aforesaid reasons and in the wake of legal position cited above, both the impugned orders passed by the District Magistrate Varanasi and Special Judge, Gangster Varanasi are liable to be quashed because both the courts have failed to assign any reason as to how the property purchased about 7 years prior to the registration of the case under Gangsters Act against the husband of the petitioner was attached by District Magistrate under section 14 of the Gangster Act.

16. Accordingly, the writ petition is allowed. The order dated 10.2.2010 passed by Special Judge, Gangster Act, Varanasi and the order dated 6.8.2009 passed by the District Magistrate, Varanasi are hereby quashed.

17. It is further directed that if the petitioner moves an application/representation before the District Magistrate, Varanasi for release of her house with a certified copy of this order and other relevant documents, the District Magistrate, Varanasi shall dispose of her representation by a reasoned and speaking order in accordance with law within a period of six weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.04.2014

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA, J.

Service Single No. 7910 of 2010

Rachna Gupta............ ....Petitioner
Versus
Union of India..... ....Respondent

Counsel for the Petitioner:
Sri Vijay Dixit
Counsel for the Respondent:

A.S.G.,Sri Alok Mathur, Sri I.H. Farooqui, Sri Kamal Kumar Singh,
Bisht, Sri P.N. Chaturvedi

Constitution of India, Art.-12-Army School affiliated to CBSE Board-getting grant in aid cent percent from central government-performing statutory duty cast upon government institution being within instrumentality of State-petition maintainable.

Held:Para-20
Thus, there is no difficulty in holding that Army Public School is certainly amenable to writ jurisdiction of this Court. Consequently, preliminary objection is overruled.

Case Law Discussed:
[(2012) 12 SCC 331]; [(1989)2 SCC 691]; [WP(C) 4412 of 2005]; (2005) 4 SCC 649; [WP(C) No. 4277 of 2010]; [2005(106) FLR 111].

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

1. Sri Alok Mathur, learned counsel for the respondents raised preliminary objection to the maintainability of writ petition on the ground that Army Public School is not 'State' within the definition of Article 12 of the Constitution of India. He referred to a decision of Division Bench of this Court given in the case of Army School, Kunraghat, Gorakhpur Vs. Smt. Shilpi Paul [2005(2) LBESR 457 (All)]. In Para 18 of the judgment it has been held that Army School is not 'State' under Article 12 of the Constitution of India, hence writ petition itself was not maintainable.

2. A reference has been made to the decision of Hon'ble Apex Court dismissing the SLP directed against the order of Hon'ble Jammu & Kashmir High Court wherein similar question was raised. In para 22 of the judgment, Division Bench of J & K observed that Army Welfare Education Society is not an instrumentality of the State under Article 12 of the Constitution.

3. In reply to the above submission, Sri Vijay Dixit, learned counsel for petitioner placed reliance upon the judgment of Hon'ble Supreme Court given in Civil Appeal No. 7355 of 2008 directed against the order passed by Division Bench of Uttarachal High Court. It was a case of Army Public School, challenging the order of termination in Writ Petition No. 398 of 2004(S/B) (Km. Vimi Joshi Vs. Chairman School Managing Committee and others) in which Court had granted interim order which was challenged in Special Leave Petition. Hon'ble Apex Court dismissed the appeal holding that Army Public Service School was a public enterprise. Apex Court further directed to decide the writ petition. Ultimately writ petition was allowed.

4. Reliance has been placed before this Court upon the decision of Hon'ble Apex Court given in the case of Ramesh Ahluwalia Vs. State of Punjab and others [(2012) 12 SCC 331]. Para 12 and para 14 of the judgment of Ramesh Ahluwalia are quoted below:

(12) We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment rendered by this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust there can be no doubt that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. Provided, of course, the private body is performing public functions which are normally expected to be performed by the State authorities.

(14) In view of the law laid down in the aforesaid judgments of this Court, the judgment of the learned Single Judge as also the Division Bench of the High Court cannot be sustained on the proposition that the writ petition would not be maintainable merely because the respondent institution is a purely unaided private educational institution."

5. Furthermore, learned counsel has placed reliance on the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others Vs. V.R. Rudani and others [(1989) 2 SCC 691] wherein Court has observed that writ petition cannot be said to be not maintainable merely because respondent institution is purely unaided private educational institution.

6. Learned counsel has relied upon another decision of Hon'ble Delhi High Court rendered in the case of Smt. Swapna Sood Vs. Directorate of Education and others [WP(C) 4412 of 2005]. Relevant portion of the referred judgment is as under:-

"I also do not find any force in the arguments of the counsel for respondent No.2 that respondents No.2 and 3 being not the State, the writ petition under Article 226 of the Constitution of India is not maintainable. Admittedly, respondents No.2 and 3 are discharging important public functions, namely, imparting education to the children, therefore, to that extent the respondents are performing the functions of the State and recruitment of teachers to achieve the said object is also in discharge of the public function by respondents No.2 and 3. The teachers who impart education have an element of public interest in the performance of their duties."

7. Supreme Court in the case of (2005) 4 SCC 649 entitled Zee Telefilms Ltd. and Anr. vs Union of India & Others has held that in such matters writ is maintainable. It will be relevant to reproduce the following paragraphs from the judgment :

"31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.

32. This Court in the case of Andi Mukta Sadguru Shree muktajee Vandas Swami Swarna jayanti Mahotsav Smarak Trust vs. V.R. Rudani has held:

"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to „any person or authority. The term „authority used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights."

8. In the case of Shalu Kataria Vs. Director of Education and others [WP(C) No. 4277 of 2010], the facts were identical as aforesaid writ petition was allowed by High Court of Delhi. Hon'ble Apex Court dismissed SLP. It was a case of Army School.

9. There is another decision of Uttarakhand High Court given in the case of Trilochan Singh Vs. Committee of Management, Army School, Hempur and others (Special Appeal No. 371 of 2012), wherein Bench observes that :

"society and the schools established by the society are directly and substantially part of the Indian Army and, accordingly, it cannot be said that the society and its schools are not authority within the meaning of Article 12 of the Constitution of India."

10. Taking note to Right of Children to Free & compulsory Education Act, 2009 (Act 35/2009) as well as amended Article 21-A of the Constitution of India, a Division Bench of this Court in the case of Shreyaskar Tripathi Vs. State of U.P. and Others (Special Appeal No. 1501 of 2007) decided on 26.11.2010 has observed that writ petition under Article 226 of the Constitution of India can be filed keeping in view that private body is discharging public duty or public obligations of public nature. Relevant part of para 32 is reproduced below:

"32 A writ petition under Art.226 of the Constitution is maintainable against the State, and authorities exercising powers of the State, statutory body, and instrumentality or agency of the state, a company financed and owned by the State, private body run substantially on State funding, a private body discharging public duty or public obligations of public nature and person or a body under liability to discharge any function under any statute, to compel it to perform statutory functions. A writ of mandamus may also be issued to any person or authority performing public duty owing positive obligation to the affected party. The Supreme Court as long back as in 1976 in Executive Committee of Vaish Degree College, Shamli & Ors. Vs. Laxmi Narain & Ors., (1976) 2 SCC 58, held that writ petition is maintainable against the Committee of Management of a society running an educational institution discharging statutory duties."

11. Army Public School affiliated with Central Board of Secondary Education has to perform functions according to the provisions of the Act, instructions and regulations framed by the CBSE. Army Public School is imparting education from class I to class XII which is a public function. Since public duty has been imposed by the Act 35 of 2009 in view of Article 21A of the Constitution of India, a writ is certainly maintainable.

12. It is contended that Army Public School receives grants from the Welfare Fund of the Adjutant Generals Branch, Integrated Head Quarters of Ministry of Defence (Army). In view of various decisions quoted above question of funding now does not remain significant.

13. Division Bench decision in the case of Army Public School Vs. Shilpi Paul

was given in 2005, much before the enactment of Act 35 of 2009 which has made all such schools amenable to writ jurisdiction as observed by division bench of this Court in the case of Shreyaskar Tripathi. Para 33 of the judgment of division bench of this Court given in the case of Shreyaskar Tripathi (supra) reads as under:

"33. We find substance in the submission of Shri Ashok Khare that the learned Single Judge did not appreciate that the educational institutions recognised under the U.P. Intermediate Education Act, even if it is unaided, has to carry out several statutory functions. The teachers of such institutions have statutory conditions of service prescribed under Government Order dated 10th August, 2001 issued in exercise of power under Section 7AA (3) of the Act. Now by the enforcement of Art.21A of the Constitution of India by the Right of Children to Free and Compulsory Education Act, 2009, all the schools including unaided schools are under statutory obligation to provide education to children. It is thus difficult to accept the submission that writs under Art.226 of the Constitution of India cannot be issued to such institutions. The opinion expressed by learned Single Judge, is contrary to law and is unacceptable."

14. Division Bench of Uttaranchal High Court in Writ Petition No.398 of 2004 (SB), Km. Vimi Joshi Vs. Chairman, School Managing Committee and others, speaking through Hon'ble Barin Ghosh, CJ has observed as under in para (9) :

"In paragraph-20 of the judgment of Hon'ble Supreme Court, referred above, the Hon'ble Supreme Court, in no uncertain terms, has held that the School is a 'Public Enterprise'. In view of such pronouncement of the Hon'ble Supreme Court, we hold that the School is an Authority within the meaning of Article 12 of the Constitution of India and, accordingly, is answerable for each of its actions, which is tainted.

15. In view of the authoritative pronouncements of Hon'ble Supreme Court, enactment of Act 35 of 2009 and division bench judgment of this Court given in the case of Shreyaskar Tripathi, there is no need to refer the decision of Shilpi Paul to a larger Bench.

16. Reliance has also been placed upon the judgment of Madhya Pradesh High Court given in writ petition filed by Nazma Arif Vs. Managing Committee, Army School, Sagar Cantonment and others [2005(106) FLR111]. It was mentioned in the judgment that the school is affiliated to the Central Board of Secondary Education and has been established by the Army Personnel Welfare Society, Lucknow. The institution is receiving, cent percent grant-in-aid from the Central Government (Defence Budget). Court quashed the order of termination and ordered reinstatement.

17. Rajasthan and Punjab High Court have also taken the similar view.

18.Settled position appears to be that writ petition filed against Army Public School is maintainable.

19. There is no reason why a restricted view regarding prerogatives of High Court contemplated by Article 226 of the Constitution of India be taken.

20. Thus, there is no difficulty in holding that Army Public School is

certainly amenable to writ jurisdiction of this Court. Consequently, preliminary objection is overruled.

21. Sri Alok Mathur, Counsel for the respondent is directed to file counter affidavit within three weeks. List thereafter.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 11589 of 2014

Suresh Singh............................ Petitioner
Versus
Board of Revenue & Ors.......Respondents

Counsel for the Petitioner:
Dr. Vinod Kumar Rai, Sri Ashok Kumar Singh

Counsel for the Respondents:
C.S.C.

<u>U.P. Land Revenue Act, 1901-Section-191-</u>Transfer of case pending before Additional Commissioner to other-without having consent from concern commissioner without notice to other side-while direction for expeditious disposal already there-in absence of procedure to deal with transfer cases-provisions of section 24 CPC be followed-order entailing civil consequences can not be passed-Board exceeded its jurisdiction while transfer application already filed before commissioner and comments sought from concern Court-held-such order arbitrary and illegal.-quashed.

<u>Held:Para-24</u>
It is settled principle of law that justice should not only be done, but it appears to have been done. The manner in which the learned Member Board of Revenue proceeded to decide the transfer application cannot be said to be a fair and transparent particularly in the circumstances when the transfer application has been allowed on the allegation of the malafide.

<u>Case Law Discussed:</u>
(1957) 1 All ER 49 p. 53: 1957 AC 436(HL); AIR 1967 SC 1877; AIR 1989 SC 317; AIR 1989 SC 159 Page 162; (2004) 6 SCC 254 Page 259; (1978) 1 SCC 248:(1978) 2 SCR 621; (1998(8) SCC 1; (2005(6) SCC 321); ((2007) 6 SCC 668); (2008(3) ESC 433(SC).

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

1. Heard Dr. V.K.Rai, along with Sri Ashok Kumar Singh, learned counsel for the petitioner and the learned standing counsel for the respondents.

2. Considering the facts of the case the writ petition is taken up for final disposal without issuing notice to the private respondent with liberty to him to file an application seeking variation/ recall /modification of the order which is going to be passed.

3. This writ petition has been filed with the following prayer:

I)Issue a writ of certiorari to quash the order dated 21.2.2014 passed by respondent no.1 in transfer application no. 597 (LR2001-14 (Kailash Nath Singh vs. Suresh);

II)issue a writ of mandamus directing to the respondent no.2 to decide the appeal no.2 of 2009 Suresh Singh versus Uday Chand Singh and others, expeditiously.

III)Any other relief order and direction, which this Hon'ble Court may deem fit and proper in the interest of justice..

IV)Costs of the petition be awarded to the petitioners.

On 24.10.2014 this Court has passed the following order:

"Heard Dr. Vinod Kumar Rai along with Sri Ashok Kumar Singh, learned counsel for the petitioner.

While assailing the impugned transfer order 21.1.2014 passed by the learned Member Board of Revenue in Transfer Application No. 597/LR/2013-14, learned counsel for the petitioner contends that the transfer was sought by the otherside on the basis of malafide against the learned Additional Commissioner. The learned Member Board of Revenue without having comment of the learned Additional Commissioner and without there being any notice to the petitioner has passed the impugned order. In his submissions, earlier on 7.5.2013, a direction was issued by this Court in Writ-C No. 16790 of 2013 (Kailash Nath and another Vs. State of U.P. and others) to decide the appeal expeditiously. The other side, after this order was passed, has filed transfer application for transferring the case from the court of Additional Commissioner. On that, comment was sought for by the Commissioner from the Additional Commissioner. Pending that, he has filed another transfer application before the Board of Revenue, on which impugned order has been passed.

Learned Standing Counsel is directed to get the entire records of Transfer Application No.597/LR/2013-14 and Transfer Application No. 65.

Put up on 4th March, 2014 as fresh as first case."

4. On 11.3.2014 learned standing counsel has produced the record.

5. The facts giving rise to this case are that vide order dated 21.1.2014 passed on transfer application 597/LR/2013-14 (Kailash Nath Singh vs. Suresh Singh), learned Member Board of Revenue has allowed the transfer application and transferred Appeal No. 2 of 2009 (Suresh Singh vs. Kailash Singh and others) from the court of Additional Commissioner, Varanasi Division Varanasi, (the respondentno.2) to the Court of Commissioner, Varanasi Division, Varanasi, respondent no.3. The transfer was sought on the allegation that the behaviour of the learned Additional Commissioner was such as if he was siding with the other side with the further allegation that the respondent no.2 has got interpolated the record by calling the appellant, Suresh Singh (the petitioner) in his chamber and in this way the respondent applicant became confident that in case the matter is heard by the respondent no.2 injustice may be done to the contesting respondent no.4, namely, Kailash Singh.

6. Learned Member Board of Revenue by the impugned order believing the allegation made in the transfer application true, has allowed the transfer application without there being any notice or opportunity of hearing to the petitioner as well as the respondent no.2.

7. It is stated that with respect to the aforesaid pending case before the court below this Court was earlier approached through Writ-C No. 16790 of 2013 (Kailash Singh and others vs. State of U.P. And others) and this Court Court has disposed of the writ petition vide order dated 7.5.2013 with the direction to the respondent no.2 to decide the appeal expeditiously without

granting unnecessary adjournment to the learned counsel for the parties.

8. It appears after the aforesaid order was produced before the respondent no.2, he has proceeded to decide the appeal. The respondent with a view to delay the proceeding has filed Transfer Application No. 65 before the respondent no. 3. On this transfer application the respondent no.3 has sought comments of the respondent no.2 fixing 10.12.2014. It is stated in paragraph 7 of the writ petition that respondent no.2 has sent his comment to the respondent no.3. A copy of the transfer application and the comment of the respondent no.2 has been brought on record as Annexure 4 to the writ petition. It is stated in paragraph no. 8 of the writ petition that concealing the material facts respondent no.4 has filed another transfer application No. 59 /2013-14 before the learned Member Board of Revenue which has been allowed by the impugned order.

9. Submission of the learned counsel for the petitioner is that the impugned order is unsustainable in the eye of law as the same has been passed without affording an opportunity of hearing to the petitioner. In his submission the transfer application ought ought to have been rejected for the reason that the respondent no.4 has filed transfer application No. 65 before the respondent no.3 which is still pending and concealing this fact second transfer application was filed.

10. On this fact normally this Court would have issued notice to the contesting respondent but considering the nature of the order which has been passed in a summary proceeding inviting of the counter affidavit will unnecessarily delay the disposal of the appeal on merit either by respondent no.2 or by respondent no.3, therefore the case is taken up for final disposal with the consent of the learned counsel representing the parties.

11. The basic question which requires address of this Court is as to weather this kind of order can be sustained in the eye of law in which allegation has been made against the court by the party seeking transfer of case and the learned Member Board of Revenue without inviting comment of the court concerned and without affording an opportunity of hearing to the other side can pass such type of order.

12. Learned standing counsel appearing for the State submitted that from the perusal of the impugned order and the record available with him perhaps he cannot defend the order to the extent to which the same has been passed without affording opportunity of hearing but simultaneously he has also submitted that while allowing the transfer application since no comment has been made either against the respondent no.2 against whom allegation has been made or against the petitioner, therefore, considering the nature of the proceeding which is summary in nature as no prejudice has been caused to the parties as substantial justice has been done to them, therefore, this Court should not interfere with the impugned order.

13. Section 191 and 192 of the U.P. Land Revenue Act, 1901 (hereinafter referred to as the Act) empowers the Collector/Commissioner/Board of Revenue to transfer the case from one revenue court to another revenue court.

"191. Power of Board or Commissioner to transfer cases. - The Board or a Commissioner may transfer any case or proceeding arising under the provisions of this Act, including a partition case, from any subordinate Revenue Court or Revenue Officer to any other Court or officer competent to deal therewith.

192. Power to transfer cases to and from subordinates.- The Collector, an Assistant Collector in charge of a sub-division of district, a Tahsildar, a Record Officer, or a Settlement Officer may make over any case or class of cases arising under the provisions of this Act or otherwise, for inquiry or decision, from his own file to any of his subordinates competent to deal with such case or class of cases; or may withdraw any case or class of cases form any Revenue Officer subordinate to him and may deal with such case or class of cases himself or refer the same for disposal to any other such Revenue Officer competent to deal therewith."

14. On being confronted as to weather there is any rule or any provision in the Revenue Court Manual how to decide the transfer application filed either before the Board of Revenue or Collector/ Assistant Collector/ Incharge of Division, learned standing counsel states that neither there are any rule nor any provision under the Revenue Court Manual which prescribe method to decide the transfer application. Learned counsel for the petitioner also joins hand with the learned standing counsel in this regard.

15. The question would be in absence of any procedure prescribed under the rules what procedure should have been adopted by the Court while dealing with the transfer application where transfer has been sought on the ground of mala fide against the court concerned.

16. It is well settled principles of interpretation of the statutes that for achieving the aim and objects of the statute if there are other pari materia statutes then with a view to make the statute workable, help of other statutes may be taken. Such type of extension of the rule is always permissible, as stated by Lord Mansfield "where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other." A.G. v. HRH Prince Ernest Augustus of Hanover, (1957) 1 All ER 49, p. 53 : 1957 AC 436 (HL). This view has been followed by the Apex Court in the case of Shah & Co. Bombay Vs. State of Maharashtra, AIR 1967 SC 1877, Sirsilk Ltd. Vs. Textiles Committee A.I.R. 1989 SC 317, Jugul Kishore Vs. State of Maharashtra, AIR 1989 SC 159 Page 162 and Kusum Ingots and Alloys Ltd. vs. Union of India, (2004) 6 SCC 254 Page 259 and in many other cases. In these judgments the Apex Court has taken the view that statute on the same point, pari materia have to be read in a complementary manner so that they do not create contradictions while operating in the same field.

17. As has been noticed since there is no provision how to deal with transfer application filed either under section 191 or 192 of the Act therefore provisions contained in Section 24 of the Civil Procedure Code, which is meant for transferring the cases from one court to another court on principle can be made applicable, which reads as under:

"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 desire 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

(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 re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purpose 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.

18. It would transpire from the bare reading of sub-section (1) of Section 24 of the Civil Procedure Code that after receipt of transfer application the court has to issue notice to the parties only after hearing them order has to be passed. However, in some cases the court on its own wish can transfer a case without notice but when order is to be passed after notice or without notice this has not been elaborated. I am of the opinion that in a situation where the court is passing an order transferring the case on his own motion in that eventuality notice is not required but when the transfer is sought on the ground of malafide certainly without having comment of the court concerned against whome malafide was made and hearing the affected parties transfer application cannot be allowed.

19. Here in this case since the transfer has neither been sought on the administrative ground nor personal inconvenience of the person concerned but on the basis of the allegations made against the presiding officer, therefore, the learned Member, Board of Revenue, in my view, has erred in allowing the application without having comment of the respondent no.2 against whom allegation was made without verifying the genuineness of the grounds taken in the transfer application and also without there being any notice to the other side.

20. The matter may be examined from another angle also. The Apex Court in the case of D.K.Yadav Vs. J.M.A. Industries Ltd. (1993,SCC 259) has made the following observations:

"The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily effecting the rights of the concerned person."

21. In State of Orissa Vs. (Misss) Birapani Dei (1967 AIR S.C. 1269) Hon'ble Apex Court has held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

22. In Maneka Gandhi Vs. Union of India (1978) 1 SCC 248: (1978) 2 SCR 621 a Bench of seven judges of the Apex Court has held that the substantive and procedural laws and action taken under them will have to pass the test under article 14. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirement of natural justice.

23. This view has been consistently followed by the Hon'ble Apex Court in number of cases namely, Whirlpool Corporation vs. Registrar of Trade Marks (1998 (8) SCC 1, Canara Bank vs. V.K.Awasthy (2005 (6) SCC 321), Bidhannagar (Salt Lake) Welfare Ass. vs. Central Valuation Broad and Others ((2007) 6 SCC 668) and Devdutt vs. Union of India and others (2008(3) ESC 433(SC).

24. It is settled principle of law that justice should not only be done, but it appears to have been done. The manner in which the learned Member Board of Revenue proceeded to decide the transfer application cannot be said to be a fair and transparent particularly in the circumstances when the transfer application has been allowed on the allegation of the malafide.

25. Learned Member, Board of Revenue was exercising power of the court and in court proceeding this kind of order can never be passed particularly in the circumstances when relief has been sought on the ground of malafide against the court.

26. In view of the foregoing discussions I am of the considered opinion that the impugned order dated 21.1.2014 passed by respondent no. 1 on the Transfer Application No. 597 (LR-2001-14) Kailash Nath Singh vs. Suresh) is an illegal, arbitrary order, not inspiring faith in judicial system having colour of insolency, therefore, it is hereby quashed. The writ petition succeeds and is allowed.

27. Learned Member, Board of Revenue is directed to pass a fresh order in accordance with law only after having comment of respondent no.2 and hearing the petitioner, if possible within a period of three months from the date of production of a certified copy of the order of this Court without granting any unnecessary adjournment of learned counsel appearing for the parties. In case any adjournment is sought that may be granted only after imposing cost with the direction to deposit the same by the next date fixed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2014

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

Civil Misc. Writ Petition No. 12102 of 2011

C/M Major Asharam Inter College, Merruet & Anr. Petitioners
Versus
Regional Committee & Ors. Respondents

Counsel for the Petitioners:
Sri Indra Raj Singh, Sri R.P. Singh
Sri R.P. Mishra, Sri Ram Gopal Tripathi

Counsel for the Respondents:
C.S.C., Sri S.P. Singh

Constitution of India, Art.-226-Validity of order passed by Regional Committee-challenged-on ground admitted election held on 17.06.05-term of management is five years-after recognition by DIOS of resolution dated 25.06.07 management enrolled 150 new members as per scheme of administration of clause of membership fee can be deposited only through bank draft-admittedly membership fee deposited by case-held as per D.B. Judgment of Shiv Nath Singh case-as well as per clause of 7 of administration-those 150 members can not participate in election-warrants no interference with order of Regional level committee-petition dismissed.

Held:Para-
In view of the law laid down in the said case and also in view of admitted facts of this case, this Court finds that the procedures laid down in Clause-7 of the Scheme of Administration has not been followed in the present case.

Case Law Discussed:
[2008(89) ADJ 540 (DB)]

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

1. The petitioners have preferred this writ petition for quashing the orders dated 03.07.2010 and 29.01.2011, passed by respondent nos. 2 and 1, whereby the membership of 150 newly enrolled members have been rejected by the Regional Level Committee and a direction has been issued for holding a fresh election.

2. The brief facts of the case are that Major Asharam Inter College, Ganeshpur, Meerut (for short, "the institution"), is a recognized institution, which receives aid out of State fund and thus the provisions of U.P. Intermediate Education Act, 1921 and the U.P. High School & Intermediate College (Payment of Salaries of Teachers and other Employees Act, 1971), are

applicable to the institution. The institution is run by the Committee of Management in accordance with the approved scheme of administration under Section 16-A of Intermediate Education Act. The last undisputed election of Committee of Management of the Institution was held on 17.06.2005. The term of the Committee of Management is five years. In the said election, one Sri Riksh Pal Singh was elected as President and the petitioner no. 2 - Sri Kure Singh was elected as Manager of the institution. Said election was recognized by the D.I.O.S. Meerut on 27.12.2005. It is stated that on 25.06.2007 a resolution was passed by the General Body of the Committee of Management of the institution to enroll fresh members in the General Body. It is averred in the writ petition that in pursuance of the said resolution, requisite membership fees from 50 persons for life members and from 100 members for ordinary members were collected and the same was deposited in the bank account of the institution. It is stated that after acceptance of membership of newly enrolled members in the meeting of Committee of Management held on 29.05.2009, a meeting of General Body was held on 28.06.2009, wherein newly enrolled members were accepted as members of the institution. Subsequently, a fresh election was held on 14.06.2010, wherein the newly enrolled 150 members were also allowed to participate. It is stated that the said election was held in terms of the scheme of administration and the Election Officer was appointed by the District Inspector of School, Meerut. However, some objections were filed before the D.I.O.S in respect of electoral college and the election held on the basis thereof. The D.I.O.S disapproved the said election on 03.07.2010, on the ground of enrollment of 150 new members in the General Body and their participation in the said election. A copy of the order of dated 03.07.2010 has been brought on the record as Annexure-23 to the writ petition.

3. Aggrieved by the said order of D.I.O.S, the petitioners preferred a writ petition being Writ - C No. 41608 of 2010 (C/M Major Asharam Inter College, Ganeshpur & Anr. Vs. D.I.O.S & Ors.), which was disposed of by this Court on 20.07.2010 with a direction to the Regional Level Committee to consider the matter afresh as the D.I.O.S has no jurisdiction to adjudicate the matter. In compliance of this court's order dated 20th July, 2010, the Regional Level Committee, after affording opportunity to all the concerned parties, has passed the impugned order dated 29.01.2011, whereby it found that newly enrolled members were not valid members as the procedures provided in the scheme administration have not been followed. Against this background, the petitioners have filed this writ petition.

4. I have heard Sri Ram Gopal Tripathi and Sri R.P. Mishra, learned counsel for the petitioners, and Sri S.P. Singh, learned Advocate, who appears for respondent no. 5, and learned Standing Counsel for the State functionaries.

5. Learned counsel for the petitioners Sri Ram Gopal Tripathi submits that the findings of the Regional Level Committee with regard to the election and enrollment of fresh members is not correct as it is based on number of members, who were enrolled by depositing the cash in the Bank. He further submits that the said practice was

followed in the present case also and admittedly the cash collected from the newly enrolled members were deposited in the Bank Account of the institution.

6. Learned counsel for the respondents Sri S.P. Singh submits that the procedure for enrollment of members has been given in the scheme of administration and the newly enrolled members are admittedly enrolled in the teeth of Clause-7 of the Scheme of Administration.

7. I have considered the respective submissions advanced by the learned counsel for the parties and perused the record.

8. It is a common ground that the affairs of the institution are managed by a Committee of Management, which has a duly approved scheme of administration, a copy whereof has been brought on records as Annexure-1 to the writ petition. From a perusal of the scheme of administration, it is evident that a detailed procedure has been laid down under Clause-7 for enrollment of new members. The Clause-7 of the scheme of administration reads as under:-

"7– साधारण सभा के सदस्य बनने की प्रक्रियाः

कोई भी व्यक्ति जो संस्था का शुभ चिन्तक हो चाहे वह किसी भी जाति अथवा धर्म का हो, साधारण सभा का सदस्य हो सकता है। यदि वह पागल न हो, और उसकी आयु कम से कम 21 वर्ष की हो, सदस्यता शुल्क विद्यालय के नाम बैंक ड्राफ्ट द्वारा जमा करना होगा। यह बैंक ड्राफ्ट किसी भी पदाधिकारी सदस्य द्वारा प्राप्त कर कोषाध्यक्ष को दिया जा सकेगा। कोषाध्यक्ष अध्यक्ष को भेजेगें जो प्रबन्ध समिति की अगली बैठक में विचार हेतु रखेगें।

प्रबन्ध समिति यदि किसी को सदस्य बनाना स्वीकार नहीं करती तो यह प्रकरण पुनः विचार हेतु साधारण सभा की बैठक में रखा जायेगा। यदि साधारण सभा सदस्य बनाना स्वीकार नही करती है तो वह सदस्य बैंक ड्राफ्ट की तिथि से ही सदस्य माना जायेगा। इसी प्रकार प्रबन्ध समिति द्वारा स्वीकार करने पर भी बैंक ड्राफ्ट की तिथि से ही सदस्य माना जायेगा। यदि साधारण सभा प्रबन्ध समिति के मत को स्वीकार कर किसी को सदस्य बनाना स्वीकार नही करती है तो बैंक ड्राफ्ट वापिस कर दिया जायेगा। साधारण सभा के इस निर्णय के विरूद्व कोई भी अपील निरीक्षक को एक मास में ही दी जा सकेगी जिसका निर्णय अन्तिम होगा।"

9. The Regional Level Committee has found that Clause-7 provides to deposit the membership by way of bank draft in favour of the institution, however in the present case none of the members have deposited their membership fee through a bank draft. The Regional Level Committee has also found that some of the office bearer and members have filed their notarized affidavits, stating that they are not aware of the enrollment of new members between 22nd May and 29th May, 2010. The Regional Level Committee has further found that no meeting of the General Body was held to accept the Membership of newly enrolled members, in absence whereof the membership can not be accepted.

10. Learned counsel for the petitioners Sri Ram Gopal Tripathi has very fairly submitted that the finding of the Regional Level Committee that members have not deposited their membership free through the Bank Draft, is correct. However merely because the members were enrolled by accepting the fee in cash, can not be a ground for setting aside the matter, which is based on record and admitted fact that none of the members had deposited the requisite fee.

11. Learned counsel for the petitioners has drwan the attention of the Court to the judgment of this Court in Shiv Nath Singh & Ors. Vs. State of U.P & Ors. [2008 (89) ADJ 540 (DB)]. In the said case, Clause-7 of the scheme of administration is verbatim of the scheme of administration of this institution.

In the said case also, there was violation of Clause-7 of the scheme of administration. The Court held that it is in the interest of the institution, if the provision for deposit of membership fee through a bank draft is a requisite. For the sake of convenience, paragraphs 10 & 11 of the judgment are extracted below:-

"10. It is urged by the learned counsel for the appellants that the treasurer had full authority to accept membership fee by cash for enrolling new members. He urged that there is no bar in accepting membership fee by cash and clause 7 of the Scheme of Administration was not mandatory and was directory in nature and its non-compliance would not be fatal and the new 130 members have to be treated as void members.

11. We have given our anxious consideration to the question as to whether clause-7 of the Scheme of Administration is mandatory or directory. It has not disputed by the learned counsel for the appellants that new members enrolled on 14.07.2007 had deposited their membership fee by cash and they had not deposited the fee through a bank draft. The approved Scheme of Administration in clause-7 provides that for enrollment of a new member, the membership fee has to be deposited through a bank draft but if the general body decides not to make him a member the bank draft would be returned. Clause 7 of the Scheme of Administration has a definite purpose. It avoids dispute with regard to fictitious claim of membership. It also avoids frivolous litigation. it acts as a check on unscrupulous person who wants to grab the management of an institution by enrolling members of their choice and by creating artificial dispute of membership of the general body of manufacturing papers. It may be possible to manufacture papers regarding membership but a bank draft cannot be manufactured. If clause-7 mandates that a thing to be done in a particular manner then it has to be done in the same manner, and not in any other manner. The provision of clause 7 of the Scheme of Administration providing for deposit of membership fee through a bank draft is the larger interest of the registered society and the institution and clearly intends that it should be followed and has to be held as imperative in nature and its non-compliance would be fatal. Thus, 130 new members enrolled on 14.07.2007 are liable to be held invalid members. Therefore, we are of the considered opinion that clause-7 of the Scheme of Administration providing for deposit of membership fee through a bank draft, by a person who wants to become a member of the general body of the society is mandatory in nature."

12. In view of the law laid down in the said case and also in view of admitted facts of this case, this Court finds that the procedures laid down in Clause-7 of the Scheme of Administration has not been followed in the present case.

13. After careful consideration of the matter, I find that the findings of fact recorded by the Regional Level Committee are based on evidence on record and do not call for any interference under Article 226 of the Constitution of India.

14. Learned counsel for the petitioners has not raised any other submission.

15. In view of the above, the writ petition lacks merits and is accordingly dismissed.

16. Learned counsel for the petitioners submits that a direction may be issued to the respondents to hold the election expeditiously.

Said request has not been opposed by the learned standing counsel and Sri S.P. Singh, learned counsel, who appears for the private respondent.

17. Having considered the aforesaid request, a direction is issued to the Authorized Controller to hold the election of Committee of Management of the Institution as expeditiously as possible preferably within a period of three months from the date of receipt certified copy of this order.

18. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 13335 of 2014

Wahid Hussain......................... Petitioner
Versus
Indian Oil Corporation & Ors. Respondents

Counsel for the Petitioner:
Sri D.K. Pandey

Counsel for the Respondents:
C.S.C., Shri Prakash Padia

<u>Constitution of India-Art.-226-</u>disability certificate-issued to R-4 after due verification-corporation acted upon-grievance of petitioner that R-4 not suffering 40% disability-petitioner could have approach before medical Board-Court is no medical expert-held-entire-complaint-misconceived- can not interfered by Civil Court.

<u>Held:Para-8</u>
There is no challenge raised to the certificate issued to the respondent no. 4 by the petitioner on any substantial material to support the allegations. This Court is no medical expert to receive any material and medically assess the disability certified by the medical authority. The petitioner could have approached the authority competent dealing with the medical board as per any rules therein but it appears that instead of that the District Magistrate was handed over a complaint.

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

1. The petitioner is aggrieved by the selection of the respondent no. 4 under the physically handicapped category alleging that the certificate of physical disability that has been relied upon by the respondent no. 4 is not correct and the respondent no. 4 does not suffer from any blindness.

2. This complaint was sought to be resolved by moving a representation before the Indian Oil Corporation and thereafter filing a Writ Petition No. 41353 of 2013 where a direction was issued to the Corporation to examine the complaint of the petitioner and pass an appropriate order. The judgment of this Court dated 31.7.2013 is Annexure 1 to the writ petition.

3. It appears that the respondent-Corporation thereafter proceeded to make an inquiry about the status of the certificate of the respondent no. 4 from the Chief Medical Officer, Moradabad who has informed the corporation that the certificate of physical disability tendered to the respondent no. 4 is genuine. A photostat copy of the said information dated 13/20.8.2013 which has not been filed along with the writ petition, has been produced by Sri Prakash Padia learned counsel for the respondent-Corporation. The same is extracted hereinunder:-

कार्यालय मुख्य चिकित्सा अधिकारी, मुरादाबाद।

संख्याः सीएमओ/वि0प्र0पत्र /पुष्टि/2013/9535 दिनांक 13.08.2013

सेवा में,

सदस्य एफ0वी0सी0

3बी/362 बुद्धि विहार मझौला,

दिल्ली रोड, मुरादाबाद।

विषय : विकलॉगता प्रमाण पत्र संख्या–35 दिनांक 29.09.2009 की पुष्टि किये जाने के संबंध मैं।

उपरोक्त विषयक अपने कार्यालय के पत्र संख्याःबी0ए0ओ0/एम0बी0डी0/संभल/3, दिनांक 03.08.2013 का संदर्भ लेने का कष्ट करें। जिसके द्वारा आपने श्री मुनेन्द्र सिंह को जारी किये गये विकलॉगता प्रमाण पत्र के सम्बधं में पुष्टि चाही है। उक्त के सम्बंध में अवगत कराना हे कि श्री मुनेन्द्र सिंह पुत्र श्री मदन सिंह निवासी मन्नी खेड़ा पो0 दहया, जिला मुरादाबाद को निर्गत विकलॉगता प्रमाण पत्र संख्याः35, दिनांक 29.09.2009 इस कार्यालय द्वारा ही जारी किया गया है।

सूचनार्थ प्रेषित।

मुख्य चिकित्सा अधिकारी
मुरादाबाद

4. In the aforesaid situation, we find that the Corporation at its level has carried out its responsibility of verifying the status of the physical disability certificate.

5. Learned counsel for the petitioner then contends that the actual complaint of the petitioner has not been verified. He contends that the disability itself should have been examined by the Corporation in order to find out the truth of such claim by the respondent no. 4.

6. We are unable to agree on this issue inasmuch as the physical disability certificate has to be granted under the relevant Act and Rules which has already been indicated in the brochure of the respondent-Corporation which is extracted hereinunder:-

"I. Physically Handicapped Category (PH) :

Candidates would be considered eligible under this category in case the candidates are orthopaedically handicapped to the extent of minimum of 40% permanent (partial) disability of either upper or lower limbs; or 50% permanent (partial) disability of both upper and lower limbs together. For this purpose, the standards contained in the Manual for Orthopaedic Surgeon in evaluating Permanent Physically Impairment brought out by the American Academy of Orthopaedic Surgeons, USA and published on its behalf by the Artificial Limbs Manufacturing Corporation of India, G.T. Road, Kanpur, shall apply.

Deaf, Dumb and Blind persons with minimum degree of 40% disability will also be eligible to apply for all RGGLVs under this category. However, totally blind persons will not be eligible.

Candidate applying under this category should produce a certificate (as per the standard format given in the application format) issued by a Medical Board duly constituted by the Central/State government as per the Gazette of India Extraordinary New Delhi, No. 154 dated June 13, 2001 on Guidelines for evaluation of various disabilities and procedure for certification."

7. Thus, the Corporation has appropriately proceeded to receive the information about the genuineness of the certificate as extracted hereinbefore and the same has been responded to by the Chief Medical Officer.

8. There is no challenge raised to the certificate issued to the respondent no. 4 by the petitioner on any substantial material to support the allegations. This Court is no medical expert to receive any material and medically assess the disability certified by the medical authority. The petitioner could have approached the authority competent dealing with the medical board as per any rules therein but it appears that instead of that the District Magistrate was handed over a complaint.

9. In such circumstances, the entire complaint is misdirected and accordingly we are not inclined to interfere with the impugned order on any of the grounds raised. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE ATTU RAHMAN MASOODI, J.

Civil Misc. Writ Petition No. 13514 of 2014 connected with W.P. No. 17090 of 2014 and W.P. No. 15122 of 2014

M/S Shokumbhari Pulp & Paper Mills Ltd. ....Petitioner
Versus
U.P.P.C.L. & Ors. .... Respondents

Counsel for the Petitioner:
Sri Mayank Agarwal

Counsel for the Respondents:
Sri Nipendra Mishra

U.P. Electricity Reform Act-1999-Section 24(7)-readwith U.P. Electricity Regulatory Commission(Conduct & Business) Regulation 2004, Regulation 138, 139-readiwith electricity supply code 2005-clause-38-Application of tariff notification- with retrospective effect-against statutory provisions-quashed-with consequential direction.

Held:Para-8&13
8. A plane reading of the relevant provisions of law reproduced hereinabove lead to a clear conclusion that the revision of tariff as may be promulgated by the Commission when published and notified by the U.P. Power Power Corporation shall not be made applicable retrospectively so long as the statute permits to do so or the intention of statute is capable of such an interpretation. In the present case there is a clear bar under the statute to enforce the revision of tariff notification retrospectively.

13. In view of the position of law stated above, there is merit in the contention of the learned counsel for the petitioners and challenge to the retrospective application of the impugned notifications is liable to succeed.

Case Law Discussed:
2009 11(SCC) 244

(Delivered by Hon'ble Vineet Saran, J.)

1. This set of writ petitions involve a common question of law, as such, the writ petitions were heard together and are being decided by a common judgment.

2. We have heard Sri Mayank Agrawal, learned counsel for the petitioners as well as Sri Nripendra Mishra, Sri Chandan Agrawal and Sri Shivam Yadav learned counsel appearing for the respondents Corporation and perused the record.

3. The dispute in all the writ petitions is confined to the applicability of the revised tariff as was finally determined by the U.P. Electricity Regulatory Commission on 19.10.2012 (annexure-2) and published by U.P. Power Corporation on 23.10.2012 (annexure-3) and notified by the Corporation on

25.10.2012 (annexure-4). In the publication order made by the respondent Corporation on 23.10.2012, at the foot of publication notification, it is mentioned that the revised rates would be applicable w.e.f. 1.10.2012. Relevant noting in the said publication is quoted below:

"The above Rate and Charges as approved by U.P. Electricity Regulatory Commission shall become applicable with effect from 1st October, 2012 in all four DisComs and KesCo. The approved tariff order and Rate schedule are also available at the website of U.P. Power Corporation Ltd. & U.P. Electricity Regulatory Commission at www. uppcl. org & www. uperc.org respectively."

4. The dispute arises as to the retrospective application of the revised rates of tariff w.e.f. 01.10.2012. The learned counsel for the petitioners while assailing the retrospective application of the tariff notification published and notified on the respective dates i.e. 23.10.2012 and 25.10.2012 respectively has submitted that the revision of tariff as per law cannot be made applicable retrospectively. In this regard, the learned counsel for the petitioners drew our attention to the various provisions of law which we may refer to for the purposes of adjudicating the controversy at hand.

5. In the first place, the learned counsel for the petitioners drew our attention to Section 24 (7) of the U.P. Electricity Reforms Act, 1999 and the same is reproduced below.

"24(7) Each holder of supply license shall publish in at least two daily newspapers, widely circulating in the area of supply, and made available to the public on request, the tariff for the electricity within its area of supply and such tariff shall come into force after seven days from the last date of such publication, and any tariff implemented under this Section,-

(a) shall not show any preference of favour to any consumer of electricity, but may differentiate on the ground of the consumer's load factor, or purpose of use of power factor, the consumer's total consumption of electricity during any specified period, or the time during which the supply is required;

(b) shall be just and reasonable and be such as to promote economy and efficiency in the supply and consumption of electricity; and

(c) shall accord with all other relevant provisions of this Act and the conditions of license."

6. In the year 2003, the Electricity Act, 2003 came into force and as per the provisions of the Act, the supply of electricity to the consumers at large for the purposes of tariff is subjected to Section 62 of the Electricity Act, 2003, according to which, the power is vested in the State Regulatory Commission to determine the tariff for the purposes of retail sale. The tariff framed by the Commission is sent to the Power Corporation for publication in accordance with U.P. Electricity Regulatory Commission (Conduct and Business) Regulations, 2004. Learned counsel for the petitioners has referred to Regulation 138 and 139 which are reproduced below:

"138. (1) Subsequent to the licensee furnishing the complete information required by the Commission, and upon hearing the licensee and other interested parties, the commission shall make an order and notify the applicant of its decision on the revenue calculations and tariff proposals.

(2) while making an order under(1) above or at any time thereafter the commission may notify the tariff which the licensee or generating company shall charge from different categories of consumer in the ensuing financial year. Any Order issued by the Commission shall be published by the Licensee in the prescribed manner, unless an appeal or review is preferred by the Licensee against the Order.

139. (1) The licensee or the generating company shall publish the tariff or tariffs approved by the Commission in at least two daily newspapers (one English and one Hindi) having circulation in the area of supply as provided in subsection (7) of Section 24 of the U.P. Electricity Reforms Act. The publication shall, besides other things as the Commission may require, include a general description of the tariff amendment and its effect on the clauses of the consumer.

(2) The tariffs so published under (1) above shall become the notified tariffs applicable in the area of supply and shall come into force after seven days from the last date of such publication of the tariffs, and shall be in force until any amendment to the tariff is approved by the commission and published. The Commission shall, within seven days of making the order, send a copy of the order to the state Government, the Authority, the concerned licensees and to the person concerned."

7. In the backdrop of statutory provisions extracted above, U.P. Power Corporation has also promulgated Electricity Supply Code 2005 for the purposes of carrying out the objects of Electricity Act, 2003 and other laws applicable in this behalf. Clause 3.8 of the Electricity Supply Code 2005 for ready reference is reproduced below:

"3.8 Charges for Supply

(a) Tariff and other charges for the supply of electricity shall be announced by the Licensee with the approval of the Commission in accordance with Section 24 of the U.P. Electricity Reforms Act, 1999 to the extent consistent with provisions of the Electricity Act, 2003. Such tariffs or charges shall take effect only after seven days from the date of publication in at least two daily Newspapers having wide circulation in the area of supply."

8. A plane reading of the relevant provisions of law reproduced hereinabove lead to a clear conclusion that the revision of tariff as may be promulgated by the Commission when published and notified by the U.P. Power Power Corporation shall not be made applicable retrospectively so long as the statute permits to do so or the intention of statute is capable of such an interpretation. In the present case there is a clear bar under the statute to enforce the revision of tariff notification retrospectively.

9. In support of the contention made by the learned counsel for the petitioners, he has relied upon a judgement of the Hon'ble Supreme Court reported in 2009 11 (SCC) 244, Binani Zinc Limited Vs. Kerala State Electricity Board and Others, wherein the Hon'ble Supreme Court in

para 36 of the judgement has observed as under:

"The commission has been empowered to frame tariff. It has, however, not been empowered to frame tariff with retrospective effect so as to cover a period before its constitution. The matter might have been different if such a power had been conferred on the Commission. It is now a well settled principle of law that the rule of law inter alia postulates that all laws would be prospective subject of course to enactment of an express provisions or intendment to the contrary."

10. The observations made by the Hon'ble Apex Court clearly support the stand advanced by the counsel for the petitioners and contrary view in the facts and circumstances of the case cannot be possibly taken.

11. The learned counsel for the respondents tried to defend the validity of the tariff notification primarily on the ground that the petitioners have an alternative remedy before the Tribunal. However, no satisfactory explanation could be advanced as to the authority under which the impugned notification was made applicable retrospectively.

12. The argument of an alternate remedy at this stage of proceedings carries no weight particularly when the pleadings between the parties have already been exchanged and the question involved in the writ petition is a pure question of law. Even otherwise, the respondent corporation clearly lacks legal authority under which it could enforce the impugned notifications retrospectively. Therefore, the plea of alternative remedy cannot be construed to be a bar for entertaining the present writ petitions under Article 226 of the Constitution of India

13. In view of the position of law stated above, there is merit in the contention of the learned counsel for the petitioners and challenge to the retrospective application of the impugned notifications is liable to succeed.

14. In the result, writ petitions are allowed to the extent that the revised tariff promulgated by the U.P. Electricity Regulatory Commission on 19.10.2012, published on 23.10.2012 and notified on 25.10.2012 shall be affective from 1.11.2012 and the applicability of the tariff as notified from 1.10.2012 retrospectively is thus, quashed. The amount, if any, realized from the petitioners treating the tariff effective from 01.10.2012 shall be adjusted by the respondent corporation in the future bills of the respective petitioners in the bunch of writ petitions mentioned hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 15248 of 2014

Wasim Raja Khan..... Petitioner
Versus
Board of Revenue U.P. & Ors. Respondents

Counsel for the Petitioner:
Sri Yogesh Kumar Singh, Sri Subhash Singh Yadav

Counsel for the Respondents:
C.S.C.

<u>Constitution of India, Art.-226-</u>order passed by Commissioner as well as Board of Revenue-challenging on ground-once revision time barred-in absence of delay condonation application-only course was to dismiss revision as time barred-contrary to that notices issued-revision against order

passed by S.D.O. under Section 33/39 L.R. Act-without issue notices to the affected parties while accepting report by Naib Tehsildar-held-if the order passed by Commissioner set-a-side illegal order of SDO come into existence-hence illegal order would revive can not be interfered-the SDO directed to decide the proceeding after hearing to all concern within time bond period.

Held: Para-16

In view of the aforesaid legal position, if the order dated 15.7.2013 is interfered with and quashed, another illegal order dated 30.4.2010 would revive. It is settled that if by quashing of an illegal order, another illegality revives in that eventuality, the Court should not interfere with such orders under the writ jurisdiction.

Case Law discussed:

2008 14 SCC 445; 2005 Volume 4 SCC 613; (2009) 6 SCC 194; 2001(9) SCC 717; 2013(118) RD 48; (2010) 13 SCC 336; AIR 1966 SC 828; AIR 1970 SC 645; AIR 1999 SC 3609; AIR 2000 SC 2976; AIR 2003 SC 2889; 2003(4) Supreme 44; (2004) 6 SCC 800; (2011) 3 SCC 436; 2013(8) ADJ 424.

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

1. Heard Sri Yogesh Kumar Singh along with Sri Subhash Singh Yadav, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. By means of this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 15.7.2013 passed by the Additional Commissioner(Judicial II) Varanasi Division Varanasi in Revision No. 231 of 2013 (Imran Ansari Vs. Tasrifun and others) and order dated 26.9.2013 passed by the learned Member Board of Revenue in Revision No. 2668/LR/2012-13 (Tasrifun Nisha and others Vs. Imran Ansari and others).

3. Vide order dated 15.7.2013, the Additional Commissioner has allowed the revision by setting aside the order dated 30.4.2010 passed by the Sub-Divisional Officer in a proceeding under Section 33/39 of U.P.Land Revenue Act, 1901 (in short 'the Act'). Whereas by the subsequent order dated 26.9.2013, petitioner's revision has been dismissed with the finding that there is no illegality in the order passed by the learned Additional Commissioner.

4. While assailing the impugned orders, learned counsel for the petitioner contends that the Revision No.231 of 2013 was filed against the order dated 30.4.2010 and the said revision was barred by time. The learned Additional Commissioner has allowed the revision at the admission stage without condoning the delay and without issuing notice to the petitioner and the learned Member Board of Revenue has committed manifest error of law in not interfering with the order dated 15.7.2013 saying that the order was passed on merit.

5. The contention of learned counsel for the petitioner is that once the statute provides period of limitation and also provides that if any person approaches the court after expiry of period of limitation, he can get the benefit of Section 5 of Limitation Act. In that eventuality, if at the time of filing of revision, there was no application for condonation of delay, only course for the revisional court was to dismiss the revision as barred by time and in no case, he could proceed with the matter to decide the case on merit, unless an application is filed for condonation of delay and the delay is condoned after due notice to the parties concerned.

6. The view taken by me finds support from the decision of the Apex

Court in Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur 2008 14 SCC 445, where the Apex Court has held as under :-

" 32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:

" 3. Bar of Limitation.- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not be set up as a defence."

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in the absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

7. In V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and another 2005 Volume 4 SCC 613, following observation has been made by the Apex Court.

20 " The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

8. In the case of Sneh Gupta Vs. Devi Sarup and others, (2009)6 SCC 194, in paragraph 70, the Apex Court has held that in absence of any application for condonation of delay, the court has no jurisdiction in terms of S. 3, Limitation Act, 1963 to entertain the application filed for setting aside of decree after expiry of period of limitation.

9. In 2001 (9) SCC 717, Ragho Singh Vs. Mohan Singh, the Apex Court has held as under:-

" We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs."

10. The same view has been reiterated by this Court in Prabhu and Another Vs. Deputy Director of

Consolidation and others 2013 (118) RD 48, wherein this Court has observed as under :-

In view of foregoing discussions, the controversy can be summarized as under:-

(i) When the statute provides limitation for approaching the Court and a person approaches the Court after the expiry of the period of limitation, then he has to approach the Court along with an application under Section 5 of the Limitation Act praying extension of period of limitation or to condone the delay in approaching the Court.

(ii) Once the application under Section 5 of the Limitation Act is filed and unless the delay is condoned, no order can be passed on merit .

(iii) The delay cannot be condoned without having the version of otherside and for that, otherside is required to be noticed and heard.

11. On being confronted that what is the period of limitation, learned counsel for the petitioner contends that the period of limitation is three years, which has also been endorsed by the learned Standing Counsel.

12. Since the revision was filed in July, 2013 and the period of three years has expired in April, 2013, therefore the revision was barred by time and the first revisional court has erred in allowing the revision without condoning the delay. Learned counsel for the petitioner may be right in his submissions but in the revision, the order dated 30.4.2010 passed by the Sub-Divisional Officer was under challenge, which is reproduced hereinunder :-

" स्वीकृत /तदनुसार परवाना जारी हो ।
ह0 अपठित
एस0डी0ओ0
30.04.2010"

13. The order dated 30.4.2010 was passed on the report of the Naib Tehsildar, Western Mohammadabad, District Ghazipur for recording the name of the petitioner over the land in dispute. The Sub-Divisional Officer without applying his mind and without addressing himself on the contents of the report and without there being any notice to the otherside, has accepted the report.

14. Since the order has been passed in a proceeding under Section 33/39 of the Act, it was incumbent upon the Sub-Divisional Officer to issue notice to the affected parties and only thereafter, he could pass the order. Otherwise also, the order impugned is cryptic one as it do not contain any reason for accepting the report.

15. The Apex Court in Sant Lal Gupta and others vs. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336 has observed as under:-

"27.....The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. [Vide: State of Orissa v.

Dhaniram Luhar AIR 2004 SC 1794; State of Rajasthan v. Sohan Lal & Ors. (2004) 5 SCC 573; Vishnu Dev Sharma v. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. v. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal v. State of Haryana & Ors. (2009) 3 SCC 258; State of Himachal Pradesh v. Sada Ram & Anr. (2009) 4 SCC 422; and The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285).

16. In view of the aforesaid legal position, if the order dated 15.7.2013 is interfered with and quashed, another illegal order dated 30.4.2010 would revive. It is settled that if by quashing of an illegal order, another illegality revives in that eventuality, the Court should not interfere with such orders under the writ jurisdiction.

17. The view taken by me finds support from the judgments of the Apex Court in Gadde Venkateswara Rao Vs Government of Andhra Pradesh & Ors. AIR 1966 SC 828, Champalal Binani Vs. CIT, West Bengal AIR 1970 SC 645, Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar & Ors. AIR 1999 SC 3609, Mallikarjuna Mudhagal Nagappa & Ors. Vs. State of Karnataka & Ors. AIR 2000 SC 2976, Chandra Singh Vs State of Rajasthan, AIR 2003 SC 2889, S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. & Ors. 2003 (4) Supreme 44, State of Uttaranchal & Anr. Vs. Ajit Singh Bhola & Anr. (2004) 6 SCC 800 and State of Orissa & Anr. Vs Mamata Mohanty, (2011) 3 SCC 436.

18. This Court has reiterated the same view in Smt. Shanti And Another Vs. Board of Revenue Lko. And 3 Others, 2013 (8) ADJ 424.

19. In view of foregoing discussions, I am not inclined to interfere with the impugned orders. The writ petition is dismissed.

20. However, in the last, learned counsel for the petitioner contended that a direction may be issued to the Sub-Divisional Officer to pass appropriate order in proceeding on merit after hearing both the sides expeditiously.

21. I find substance in the submission of learned counsel for th petitioners. Therefore, the Sub-Divisional Officer, Mohammadabad, District Ghazipur, is directed to conclude the proceedings in accordance with law after hearing all concerned, expeditiously but not later than ten months from the date of receipt of certified copy of the order of this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 15389 of 2008

Akash Goel..... Petitioner
Versus
State of U.P. and Ors...... Respondents

Counsel for the Petitioner:
Sri L.C. Srivastava

Counsel for the Respondents:
C.S.C., Sri B.P. Singh, Sri Sandeep Singh, Sri Ajay Kumar Sharma, Sri Bhola Nath Yadav.

Constitution of India, Art.-226-Service Law-compassionate appointment-petitioner being adopted son-claim rejected as on the

date deed registered-petitioner was more than 19 years-as such as per section 10(4) of the Act-adoption-illegal-held such approach of authority beyond jurisdiction-when petitioner was 2 years old adoption took place in accordance with law-having no requirement of registration-date of subsequent registration immaterial-order quashed-with follow up direction.

Held: Para-10 & 11

Thus, it is clear that the petitioner was adopted when he was two years old. To legalise the said adoption, adoption deed has been executed on 11.09.2000 and was registered. The said registered adoption deed has not been challenged and it has neither been declared void, improper, ineffective nor inoperation by any of the competent court. The recital made in the adoption deed is not disputed. Therefore, the adoption is deemed to have been made when the petitioner was two years old and thus, it was in accordance to provisions of Hindu Adoption and Maintenance Act, 1956. Sections 12 and 16 of the Act, 1956

11. Section 16 of the Act, 1956 provides that whenever any documents registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. The respondent is not able to dispute that the said adoption deed has been disproved by any of the competent authority. Therefore, it is not open to the respondents to dispute the recital in the adoption deed and validity of registered adoption deed and that the petitioner is not legally adopted son.

Case Law discussed:

2009(3)UPLBEC 2482.

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

1. Heard Sri L.C.Srivastava, learned counsel for the petitioner and Sri Sandeep Singh, Advocate holding brief of Sri B.P.Singh, learned counsel appearing on behalf of the respondents.

2. The petitioner claims himself to be the adopted son of Sushila Kumari, who was working as Assistant Teacher in Primary Pathsala, village Bhalaswa Isapur, Block Balaikheri, district Saharanpur, which was under the Basic Shiksha Adhikari, Saharanpur, is claiming compassionate appointment on her death, in-harness on 11.03.2004. When the claim of the petitioner for the compassionate appointment has not been considered, the petitioner filed Writ Petition No.11620 of 2006, which has been disposed of vide order dated 12.11.2007 asking the Secretary, Basic Shiksha Parishad U.P. at Allahabad to decide the application of the petitioner. In pursuance thereof, the application of the petitioner has been decided by the impugned order dated 23.01.2008 and the same has been rejected. The application has been rejected on the ground that the petitioner's date of birth is 12.03.1981 while the registered adoption deed is executed on 11.09.2000 when the petitioner was nineteen years, five month and twenty days old, while in accordance to Section 10 (4) of Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the "Act, 1956") the adoption of a person below the age of fifteen years can be made and thus, in accordance to Section 10 (4) of the Act, 1956, the petitioner was not eligible for the adoption and accordingly, the claim of compassionate appointment has been rejected.

3. Learned counsel for the petitioner submitted that the petitioner has been adopted at the age of two years by Sushila

Kumari, which is apparent from the adoption deed and such recital is in the adoption deed itself. To regularise such adoption in accordance to law and to give legal shape, the registered adoption deed has been executed on 11.09.2000 and has been got registered. Therefore, the adoption was made in accordance to provisions of Act, 1956. The said adoption deed has not been held void, illegal, ineffective and inoperation by any of the competent court and, therefore, can not be disputed. Further Section 16 of the Act, 1956 raises presumption that whenever any document is registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. In the present case, the said documents has not been disproved by any of the competent authority and, therefore, it stand valid.

4. He further submitted that Section 12 of the Act, 1956 provides that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

5. In the present case adoption took place when the petitioner was two years old, thus, the date of adoption should be deemed on the said date. Merely because the documents is registered in the year 2000, the actual date of adoption at the age of two years old, can not be disputed. He further submitted that the definition of Family as provided in section 2(c) of the U.P. Recruitment of Dependants of Government Servant (Dying-in-Harness) Rules, 1974 includes son, which also includes the adopted son. Reliance is placed on the decision of this Court in the case of Shiv Prasad Vs. State of U.P. and others, reported in 2009 (3) UPLBEC, 2482.

6. Learned counsel for the respondents has relied upon the impugned order and submitted that the petitioner may be deemed to have been adopted on the date when the adoption deed has been executed and has been registered, i.e. on 11.09.2000 and on the said date petitioner was 19 years old and, therefore, in view of Section 10 (4) of the Act, 1956 such adoption deed was not valid and, therefore, the petitioner can not be treated as adopted son and is not entitled for the compassionate appointment.

7. I have considered the rival submission and perused the record.

8. The facts are not in dispute, namely, that the petitioners' date of birth is 12.03.1981. The execution of adoption deed is 11.09.2000 and Sushila Kumari, Assistant Teacher died on 11.03.2004 in harness. There is no dispute that in view of definition of family Section 2 (c) of the Rules, 1976 the family includes the son. The son includes the adopted son. This view has been consistently taken by this Court. In the case of Shiv Prasad Vs. State of U.P. and others (Supra) held that adopted son is included in the definition of son and has been held to fall within the definition of "family" under Rule 2 (c) of the Rules, 1974.

9. Now the question for consideration is whether the petitioner can

be treated as adopted son, pursuant to adoption deed which is annexed as annexure-2 to the writ petition.

10. In the adoption deed there is a clear recital that date of birth of the petitioner is 12.03.1981 and when the petitioner was two years old he has been adopted by Sushila Kumari. In paragraph no.4 of the writ petition, it is stated the petitioner was adopted on 12.06.1983 after performance of "Duttak Hawan" in accordance to Hindu rites. In paragraph no.6 of the writ petition, it is stated that just after the date of adoption, the petitioner was nursed and look after by the adoptive mother to avoid any complications and thereafter, the adoption deed was got registered. Such averments have not been specifically controverted. Thus, it is clear that the petitioner was adopted when he was two years old. To legalise the said adoption, adoption deed has been executed on 11.09.2000 and was registered. The said registered adoption deed has not been challenged and it has neither been declared void, improper, ineffective nor inoperation by any of the competent court. The recital made in the adoption deed is not disputed. Therefore, the adoption is deemed to have been made when the petitioner was two years old and thus, it was in accordance to provisions of Hindu Adoption and Maintenance Act, 1956. Sections 12 and 16 of the Act, 1956 reads as follows:

"12. Effects of adoption.-- An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

16. Presumption as to registered documents relating to adoption.-- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

11. Section 16 of the Act, 1956 provides that whenever any documents registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. The respondent is not able to dispute that the said adoption deed has been disproved by any of the competent authority. Therefore, it is not open to the respondents to dispute the recital in the adoption deed and

validity of registered adoption deed and that the petitioner is not legally adopted son.

12. In the case of Shiv Prasad Vs. State of U.P. and others (Supra) the petitioner therein was adopted when he was two years old and started living with his adoptive parents and adoption deed was also got registered. On consideration of provisions of U.P. Recruitment of Dependants of Government Servant (Dying-in-Harness) Rules, 1974, it has been held that the petitioner therein was entitled for the claim of compassionate appointment.

13. In view of the above, the impugned order is not sustainable and is liable to be set aside and is accordingly, set aside. The petitioner is entitled to be appointed on compassionate ground being adopted son. The respondents are directed to consider compassionate appointment treating the petitioner as adopted son of Sushila Kumari within a period of two months from the date of presentation of the certified copy of this order.

14. The writ petition is, accordingly, allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 16117 of 2004

Smt. Lata Rani....... ....Petitioner
Versus
The State of U.P. & Ors. .....Respondents

Counsel for the Petitioner:
Sri Atul Tej Kulshreshtha

Counsel for the Respondents:
C.S.C.

U.P. Police(Extra ordinary Pension)Rules 1961 read with first Amendment Rule 1975-Rule 3-claim of extra-ordinary Pension-denied on ground-while returning from duty place on way suffered pain in chest-admitted in hospital and dead-can not be treated death during course of discharge of duty-can not be interfered by Writ Court.

Held:Para-28
There may be some occasions to engulf such a situation, but it is not in the present case. In fact, Rule 3 of Rules, 1961 is more restricted than what the provision has been in Act, 1923, which came up for consideration in so many cases above. I have no hesitation in saying that some of the judgments of High Court though help petitioner but in the light of binding decision of Supreme Court, I am left with no option but to hold that in the case in hand, petitioner cannot be held entitled for extra ordinary pension under Rules 1961.

Case Law Discussed:
W.P. No. 47802 of 2010; W.P. No. 55471 of 2009; 1981 TAC 359; 1987 Lab.I.C. 1795; 1984 (2) TAC 56; 1991(1) T.A.C. 140; AIR 1964 SC 193; AIR 1970 SC 1906; 1991 (2) T.A.C. 62; 2003(1) T.A.C. 561; 1996(6) SCC 1; (1977) 2 All ER 420; AIR 1958 SC 881.

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

1. Heard Sri Atul Tej Kulshreshtha, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. A short question up for consideration in this case, "whether petitioner is entitled for extra ordinary pension under U.P. Police (Extra Ordinary Pension) Rules, 1961 (hereinafter referred to as "Rules, 1961") as amended by U.P. Police (Extra Ordinary Pension) (First Amendment) Rules, 1975".

3. The facts, which are not in dispute, are that petitioner's husband, a Constable in U.P. Police Force, was posted at Aligarh. While returning from performing his duty in office, on the way, suffered pain in chest and thereafter he was admitted in hospital where he was declared dead. The petitioner applied for extra ordinary pension under Rules 1961 as amended in 1975. The application was forwarded with favourable recommendation of Senior Superintendent of Police, Aligarh vide letter dated 13/14.6.2002 (Annexure 1 to the writ petition) but has been turned down by Finance Controller, U.P. Police Headquarter, Allahabad vide letter dated 22.4.2003 holding that petitioner's husband has not died in the course of employment and therefore, petitioner is not entitled for extra ordinary pension under Rules, 1961.

4. A short question, up for consideration in the case in hand is, whether, at the time when petitioner's husband suffered heart attack and ultimately died, can he be held to be in mids of performing official duty or not.

5. Rule 3, as amended in 1975 of Rules, 1971 read as under:

''3. यह नियमावली राज्यपाल के बनाए नियम से नियंत्रित होने वाले स्थायी या अस्थायी रूप से सेवायोजित सभी पुलिस अधिकारियों और कर्मचारियों (राजपत्रित और अराजपत्रित दोनों) पर लागू होगी जो डाकुओं या सशस्त्र अपराधियों या विदेशी प्रतिरोधियों से लड़ने में या किसी अन्य कर्तव्यों का पालन करने के दौरान मारे जाएं या जिनकी मृत्यु हो जाये।'

प्रतिबन्ध यह है कि ऐसे पुलिस कर्मचारी के परिवार को जिसे इस नियमावली के अधीन अभिनिर्णय दिया गया हो, उत्तर प्रदेश सिविल सर्विसेज (एक्स्ट्रा आर्डिनरी पेंशन) रूल्स के अधीन कोई अभिनिर्णय नहीं दिया जायेगा और न यू0पी0 लिबरलाइज्ड पेंशन रूल्स, 1961 अथवा यू0पी0 रिटायरमेंट वेनीफिट रूल्स, 1961 के अधीन कोई पारिवारिक पेंशन / आनुतोषिक और न यू0पी0 कन्ट्रीब्यूटरी पेंशन फण्ड रूल्स के अधीन सरकारी अंशदान दिया जायेगा।''

6. Before such amendment, extra ordinary pension was admissible only if Police Officer, governed by Rules, 1961, has died in encounter with docoits, armed criminals and foreign insurgencies.

7. In 1975, scope of Rule 3 was enlarged and now rule also apply to gazetted police officer, if they die or killed, performing some other duties. Learned Single Judge (Hon'ble Dilip Gupta, J.) in the judgment dated 11.8.2010 in Writ Petition No.47802 of 2010 (Smt. Munni Devi Vs. State of U.P. & Ors.) has taken a view that "Rules should be liberally interpreted in such manner that it gives benefit to Police Officers/employees who killed or die, while performing official duties and it should not be restricted to extra risk."

8. His Lordship has also referred to communication dated 23.01.1980, issued by General Secretary, Government of U.P. to the Accountant General expressing opinion of State Government in the matter relating to payment of extra ordinary pension to one Vijay Bahadur Singh and it says:

"The constable in this case will be said to have died in the course of performance of his duty within the meaning of rule 3 and as such he is entitled to benefit therein. The operation of the rule is not confined to case where a member of police force is killed. It also extends to a case where such a person dies in the course of performance of duty even without an encounter with decoits or armed criminals etc."

9. Similar view has been taken by this Court also in Civil Misc. Writ Petition No.55471 of 2009 (Smt. Suneeta Sharma Vs. State of U.P. & Ors.) decided on 19.4.2011, wherein while returning from duty, Police Official fell from train and died. This Court held that death occurred while discharging "any other duties" and extra ordinary pension under Rule 1961 would be admissible in such a case. The Court, in para 5 of the judgment, further said:

"...It also says that it is not confined only when a police official in the aforesaid circumstances is killed but it also applicable if he die while discharging his duties. The provision is a welfare legislation made for the benefit of police officials who sustain fatal injuries or otherwise lost their life while discharging official duties. There is no reason for restricting the aforesaid provision which has been made much wider by 1975 amendment."

10. Therein, this Court also deprecated approach of Finance Controller in finding ways to deny extra ordinary pension to the survivors of deceased Police Officers by giving a restricted interpretation to Rules 1961 taking an approach of exclusion instead of liberal and beneficial interpretation. In para 7, the Court expressed its view as under:

"7. It is really unfortunate that widow of a member of a disciplined service has to engage in a long drawn litigation for the last almost five years for her sustenance, i.e., for claiming extra ordinary pension under statutory rules which is admissible to her but on account of misconceived notions and traditional mindset of respondents for denying everything to a petty employee or his family that this benefit has not reacher her so far. The denial is without any substantial reason. Instead of helping the petitioner, a widow of a police official who sustained fatal injuries while on duty, respondents have tried to find out ways and means to deny benefit of a welfare legislation, compelling her to live life in penury and starvation. This attitude of respondents deserves to be condemned with strongest words. The laxity and an attitude of defiance on the part of respondents is also writ large from the fact that in the impugned order dated 02.07.2006 (Annexure-6 to the writ petition) the Finance Controller has denied benefit observing that petitioner's husband has died in suspicious circumstances and this has been reiterated by Superintendent of Police, Firozabad in its letter dated 11.08.2006 without showing as to what alleged suspicious circumstances were/are. When the petitioner challenges this attitude, in the counter affidavit filed in this writ petition no such defence has been taken and there is not even a whisper that the death took place in suspicious circumstance and on the contrary it is admitted that husband of petitioner died while discharging his duties. In para 9 it has only reiterated the language of impugned letter but nothing has been said about the alleged circumstances which according to respondents were suspicious. This also fortify the recklessness and harassing attitude on the part of respondents to make the bereaved family members of deceased employee to suffer or to surrender for their contentious desires or demand. Learned Standing Counsel despite his best efforts could not give even a single reason to justify denial of extra ordinary pension under 1961 Rules as amended in 1975. In my view the conduct and manner in which the respondents have acted makes them liable to pay not only interest on the dues payable to petitioner but also exemplary costs."

11. In the present case, thus the only question, which has to be seen, whether it can be said that petitioner's husband died while he was discharging his "other official duties" or not.

12. The petitioner's husband was posted in Mounted Police and due to non availability of official accommodation, was residing in a private accommodation. On 27.1.2002, he attended Mounted Police officials counting and thereafter while returning to his private residential accommodation, suffered stroke in his chest and by the time reached his house, his condition became serious. His wife immediately took him to Pandit Dindayal Upadhyay Hospital for treatment but when reached there, doctors thereat declared him dead. The Senior Superintendent of Police, Aligarh has treated this entire process of deceased constables attendance in Mounted Police Constable counting and the period when he was returning to his private residence as a part of official duty and recommended for extra ordinary pension vide letter dated 13/14.6.2002. However, it has not been accepted by higher authorities. The official duty, as per the version of the respondents, came to an end as soon as counting was over and petitioner left official campus proceeding towards his private residence.

13. The petitioner's counsel, however, contended that the employee, when comes to join his work and till he reaches his house back, entire period should be counted in the midst of discharging duties. Certain authorities are also relied on for this purpose.

14. In Indian Rare Earths Ltd. Vs. A. Subaida Beevi and others, 1981 TAC 359, the Court considered the matter arising from Workmen's Compensation Act, 1923 (hereinafter referred to as "Act, 1923"). The workman was residing at about 7 or 8 kilometres away from his work place and for coming to the factory, he used to walk about 3 kilometres from his place of residence to take a bus, and leave him at about 2 kilometres away from the plant where again he used to go by using bicycle. On 1.4.1977, he started from his residence to his work place and when on the National Highway, on his way to work place, met an accident and sustained injuries, ultimately died on 2.4.1977. The question was whether this accident can be treated to be one which has arisen "out of and in the course of his employment". The Court said that residence of workman was not on any bus route wherefore he cannot travel major portion of his way to his work-place by bus. Thus, it is a case where exigencies of his employment and circumstances obliged him and the company allowed him to ride a bicycle to reach the work-place. Otherwise, it was an implied condition on his employment that he may travel to his work-pace from his residence and back home by a bicycle. The Court thus said that when car dashed him on public road, he was there by virtue of his status as a workman working under the industrial employer and therefore, it was in the course of his employment. The Court further said:

"It is by now well settled that the expression "in the course of employment" connotes not only actual work but also any other engagement natural and incidental thereto, including "the course of employment" reasonably extended both as regards work-hours and work-place applying the doctrine of national extension as regards time and place, as laid down by the several decisions."

15. Another decision is Director (T. & M.), D.N.K. Project Vs. Smt. D.Buchitalli, 1987 Lab.I.C. 1795. The deceased employee while coming out of factory premises, attending to his duty in morning hours, fell down at the main gate and on being removed was declared dead. The question was, whether it is arising out of and in course of employment or not. The Workman Commissioner took a

decision against employer that death has taken place out of and in the course of employment. The Court agreeing with the above view, said as under:

"In the present case, no doubt, the evidence is that the deceased had a heart disease earlier, but on the fateful day, as the evidence disclose, the deceased worked for four hours inside the factory premises and while he was coming out of the factory, he profusely sweated and by the time he was taken to the hospital, he was found dead. The stress and strain of the four hours of work the deceased had must be taken to be an accelerating factor in giving the final blow on account of which the deceased died."

16. In Administrator, Municipal Council, Udaipur Vs. Uma Devi, 1984 (2) TAC 56, the workman died as a result of accident when he was going to join his duties in the mid-night. The Court held that since workman was going to join his duties at the octroi out post of Municipal Council, it has to be held that it is an accident in the course of employment i.e. during course of his employment.

17. Surajbai Vs. Cement Corporation of India Ltd. and another, 1991(1) T.A.C. 140, was also a case where workman was going to join duties and met a fatal accident. The accident took place between the sump-pit and the office of the employer i.e. within the premises of the undertaking of industrial unit. The road had been built by Cement Corporation of India Limited for use of its employees. Thus, as a matter of fact, the Court found that accident took place within the premises of undertaking but before the workman could reach his place of duty. Construing the provisions of Act, 1923, liberally, being a welfare legislation, the Court said:

"It was at one time thought that an accident arose out of and in the course of employment only if the workman was injured at the place of his employment. There is of course, no difficulty in accepting such an accident as an accident arising out of and in the course of employment. But this narrow interpretation has not been able to satisfy new challenges created by modern methods of working of industrial undertakings to determine the exact place of employment of a workman in the context t of modern industrial development, is in itself a difficult task. A pilot who is responsible for flying the air-craft is supposed to be working at the cock-pit of the plane and his place of work would be the place wherever the plane flies. A light house workman, particularly in cases where light-house is situated in the middle of sea on some tiny island, is required to be taken to that island by some method before he can actually start working. An underground mine worker reports at the opening of the mine and travels underground to reach his actual place of work. These are the instances of modern industries and such instances can be multiplied. The Mines Act, 1952, provides that a workman joins his duty before he has reached the place of his actual work. Industrial Jurisprudence treats the air-craft pilot and a light-house worker as on duty even before he has actually started working. The modern management methods do not even require a work-man to work. Some of them are kept waiting to be available whenever there is work. These developments had made it wholly unnecessary to consider a workman on duty only when he reaches his place of work or starts working. For purposes of workmen's compensation the law has adopted what is known as "the principle of notional extension of employer's premises". If the place of accident by application of this doctrine can be said to be the place of duty of the workman concerned, the workman is held entitled to compensation even if he had not reached his actual place of work."

18. Thereafter, relying on a decision of Apex Court in General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes, AIR 1964 SC 193, the Court held that accident in question was in the course of employment entitling the heirs of workman for compensation under the said Act. The passage from the Apex Court decision in General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes (supra), relied on by Madhya Pradesh High Court in Surajbai Vs. Cement Corporation of India Ltd. (supra), reads as under:

"The question, when does an employment begin and when does it cease, depends upon the facts of each case. But the Courts have agreed that the employment does not necessarily end when the 'down tool' signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and egress to and from the place of employment. A contractual duty or obligation on the part of an employee to use only a particular means of transport extends the area of the field of employment to the course of the said transport. Though at the beginning the word 'duty' has strictly construed, the later decision have liberalized this concept. A theoretical option to take an alternative route may not detract from such a duty if the accepted one is of proved necessity or of practical compulsion. But none of the decisions cited at the Bar deals with a transport service operating over a large area like Bombay. They are, therefore, of little assistance, except in so far as they laid down the principles of general application. Indeed, some of the laws words expressly excluded from the scope of their discussion cases where the exigencies of work compel an employee to travel public streets and other public places. The problem that now arises before us is a novel one and is not covered by authority."

19. There is another decision of Apex Court in M. Mackenzie Vs. I.M. Issak, AIR 1970 SC 1906, where the Court said:

"The words "arising out of employment" are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered". In other words, there must be a casual relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the one of special danger, the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."

20. In General Manager, Western Railway Vs. Chandrabai alias Narainibai, 1991 (2) T.A.C. 62, Madhya Pradesh High Court again following the decision in General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes (supra) held that notional extension of employer's premises must be applied and therefore, if an employee has died while he was going to join his duty from his house due to an accident, it must be deemed that it was "in the course of his employment".

21. The last decision cited is Senior Divisional Controller, North West Karnataka Road Transport Corporation Vs. Shoba & Ors., 2003(1) T.A.C. 561 of Karnataka High Court. There also the employee was on his way to report his duty when suddenly collapsed and taken to hospital where he died. The Court held that since death has taken on the road and not within the place of employment, it cannot be held that it was during the course of employment.

22. All the decisions are in the context of Act, 1923. However, I find that there is a three Judges judgment of Apex Court in Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, 1996 (6) SCC 1. Therein the matter has been dealt with in detail on a reference made by a two Judges Bench to larger Bench. The Court relied on two decisions, one is the decision of Court of Appeal in England in Regina Vs. National Insurance Commissioner, Ex Parte, Michael, (1977) 2 All ER 420 and another, an earlier decision of itself in Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja, AIR 1958 SC 881. The following passage from observation of Lord Denning in Regina (supra) was quoted with approval:

"Take a case where a man is going to or from his place of work on his own bicycle, or in his own car. He might be said to be doing something "reasonably incidental" to his employment. But if he has an accident on the way, it is well settled that it does not "arise out of and in the course of his employment". Even if his employer provides the transport, so that he is going to work as a passenger in his employer's vehicle (which is surely "reasonably incidental" to his employment), nevertheless, if he is injured in an accident, it does not arise out of and in the course of his employment. It needed a special "deeming" provision in a statute to make it "deemed" to arise out of and in the course of his employment."

23. Similarly, following observation of Hon'ble S.Jafer Imam in Saurashtra Salt Manufacturing Co. (supra) was also quoted with approval:

"It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notional extension extends upto point D, the theory cannot be extended beyond it. The moment a workman left point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment."

24. Following the above, the Court in Regional Director, E.S.I. Corporation (supra) held that following factors have to be proved:

i. There was an accident;

ii. The accident had a casual connection with the employment; and

iii. The accident must have been suffered in course of employment.

25. The Court distinguished the decision in General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes (supra) by observing:

"It was held by Subba Rao and Mudholkar, JJ. (Raghubar Dayal, J. dissenting) that the bus driver was given facility by the management to travel in any bus belonging to the undertaking. It was given because efficiency of the service demanded it. Therefore, the right of the bus driver to travel in the bus was to discharge his duty punctually and efficiently. This was a condition of service and there was an obligation to travel in the said buses as a part of his duty. It was held that in the case of a factory, the premises of an employer was a limited one but in the case of a City Transport Service, the entire fleet of buses forming the service would be "premises". This decision in our view, does not come to the assistance of the employee's case. An employee of a Transport Undertaking was travelling in a vehicle provided by the employer. Having regard to the purpose for which he was travelling and also having regard to the obligation on the part of the employee to travel in the said buses as a part of his duty, the Court came to the conclusion that this journey was in the course of his employment because the entire fleet of buses formed the premises within which he worked."

26. In view of above binding decision of Apex Court, I find that unless death of deceased constable, in the case in hand, can be said to have caused while he was "in discharge of his other official duties" only then extra ordinary pension would be admissible and not otherwise.

27. As already discussed above, the deceased employee attended his mounted police counting at official premises and left for his residence. It is on way to residence, he suffered chest pain, which ultimately resulted in his death. It is difficult to extend the term "in discharge of official duties" to the extent that employee, when commences his journey from his house to official place and while returning from office to house, both these period should necessarily be deemed to be in discharge of his official duties.

28. There may be some occasions to engulf such a situation, but it is not in the present case. In fact, Rule 3 of Rules, 1961 is more restricted than what the provision has been in Act, 1923, which came up for consideration in so many cases above. I have no hesitation in saying that some of the judgments of High Court though help petitioner but in the light of binding decision of Supreme Court, I am left with no option but to hold that in the case in hand, petitioner cannot be held entitled for extra ordinary pension under Rules 1961.

29. The writ petition, therefore, lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2012

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE P.K.S. BAGHEL, J.

Civil Misc. Writ Petition No. 16299 of 2012

Niresh Kumar Srivastava & Anr. Petitioners
Versus
State of U.P. & Ors. ....Respondents

Counsel for the Petitioners:
Sri S.P. Pandey, Sri R.N. Shukla

Counsel for the Respondents:
Sri Akhileshwar Singh, S.C.

Constitution of India, Art.-21-Protection of person and property-inter-religion marriage-even live in relationship-in 21st century-considering honour killing-local police be more alert in protection of three person or property-necessary direction issued.

Held:Para-4
From the aforesaid three judgments, precisely we get three relevant points. Firstly, if one is sui juris, no fetter can be placed upon choice of the person with whom she is to stay nor any one can restrict her. Secondly, any person cannot give threats or commit or instigate the acts of violence and cannot harass the adult person who undergoes inter-caste or inter-religion marriage. Administration/ policy authorities can be directed to see to it so that the couple, upon being major, should not be harassed by any one. Thirdly, live-in relationship between two consenting adults of heterogenic sex does not amount to any offence. It will not be unnecessary to say that there are many States in our country where castism or religionism is so deep-rooted even in the 21st Century that one can go to the extent of honour killing upon being forgetful that their interference might cause unhappiness in the life of their children. Such type of activities are totally in violation of the preamble of the Constitution of India in connection with human dignity of an individual. The country is one and it is pluralistic in nature. No secular idea can be ignored. No person shall be deprived of his life and personal liberty except according to the procedure established by law as per Article 21 of the Constitution of India. Liberty and reasonable restriction are inbuilt in such Article.

Case Law Discussed:
(1976) 3 SCC 234; (2006) 5 SCC 475; (2010)5 SCC 600.

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

Amitava Lala, J.--The present writ petition has been filed by the father-in-law and daughter-in-law for protection of their life and property, since there is serious threat for their inter religion marriage. Presently, the boy is in Germany and he will be able to come to India only in the month of May, 2012 for identification, if necessary, before the Court.

1. The Supreme Court has considered such type of issue repeatedly in the case of Gian Devi v. Supdt., Nari Niketan, Delhi, (1976) 3 SCC 234, at page 235 :

"Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter".

2. Subsequently, the Supreme Court has held in Lata Singh v. State of U.P., (2006) 5 SCC 475, at page 480 :

"This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law".

3. Such judgments were again followed by the three judges bench in S. Khushboo v. Kanniammal, (2010) 5 SCC 600, at page 614 :

"31. .... At this juncture, we may refer to the decision given by this Court in Lata Singh v. State of U.P., wherein it was observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of "adultery"), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or "live with anyone she likes". In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. This Court had entertained a writ petition and granted relief by quashing the criminal trial. Furthermore, the Court had noted that "no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the court".

4. From the aforesaid three judgments, precisely we get three relevant points. Firstly, if one is sui juris, no fetter can be placed upon choice of the person with whom she is to stay nor any one can restrict her. Secondly, any person cannot give threats or commit or instigate the acts of violence and cannot harass the adult person who undergoes inter-caste or inter-religion marriage. Administration/ policy authorities can be directed to see to it so that the couple, upon being major, should not be harassed by any one. Thirdly, live-in relationship between two consenting adults of heterogenic sex does not amount to any offence. It will not be unnecessary to say that there are many States in our country where castism or religionism is so deep-rooted even in the 21st Century that one can go to the extent of honour killing upon being forgetful that their interference might cause unhappiness in the life of their children. Such type of activities are totally in violation of the preamble of the Constitution of India in connection with human dignity of an individual. The country is one and it is pluralistic in nature. No secular idea can be ignored. No person shall be deprived of his life and personal liberty except according to

the procedure established by law as per Article 21 of the Constitution of India. Liberty and reasonable restriction are inbuilt in such Article.

5. Against this background, according to us, there should not be any deprivation of the interests of any adult particularly an adult girl in connection with her living. Administration/police authorities are directed to protect their interest to that extent.

6. It is made clear that the boy and the girl are not debarred from proceeding before the appropriate Court of law in case of any exigency. Generally, the police and the administration will be much more alert and sensitive in dealing with such type of issues. Repeated awareness programme is needed to be made to uproot the social evil and minimise the incidents.

7. With the above observations, the writ petition is disposed of on contest at the stage of admission.

8. However, no order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Misc. Writ Petition No. 16685 of 2007

Dr. Mahendra Shankar Singh & Anr. ...Petitioners
Versus
The Chancellor, University of Allahabad & Ors. ......Respondents

Counsel for the Petitioners:
Sri Manu Khare

Counsel for the Respondents:
C.S.C.. Sri Gautam Baghel,
Sri Ram Gopal Tripathi,Sri V.K. Singh

<u>State Universities Act, 1973-</u>Section 31(3)(c) Regularization-petitioner working as part-time lecturer-rejected by executive council-appointment as guest lecturer-payment of honorarium per lecture basis-not contemplated in Act-despite of being aware-petitioner not applied for regular appointment-not can challenge the selection process-no mandamus can be issued to university contrary to law.

<u>Held: Para-21</u>
In our opinion, the Act No.26 of 2005 does not admit of any method of regularization and the University cannot be mandated to act contrary to law. It is not within the domain of the University to resort to any method of regularization of back-door appointments. The Apex Court in the case of State of Karnataka & Ors. Vs. Umadevi & Ors reported in 2006 (4) SC 420 has specifically prohibited regularization of persons, who have been appointed through back-door in violation of Article 14 of the Constitution of India.

<u>Case Law Discussed:</u>
W.P. No. 52001 of 2000; 2007(1) ADJ 526; W.P. No. 29241 of 2001; (2010) 9 SCC 247; 2006(4) SC 420; 2014 Law Suit (S.C.) 90.

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

1. Heard Sri Manu Khare, Advocate on behalf of the petitioners.

2. Petitioners, who are two in number seeks a writ of mandamus directing the University to take a decision in accordance with the orders of Chancellor dated 20.01.2005 and to quash the appointment of two Lecturers in pursuance to Advertisement dated

14.03.2007 (Annexure 13 to the present writ petition).

3. Facts in short giving rise to the present writ petition are as follows :

4. University of Allahabad, which was earlier a State University, under the U. P. State Universities Act, 1973 is stated to have offered appointment to the petitioners, who are two in number, as Additional Lecturers in the Department of Geography vide order dated 6.04.1995 on a fixed honorarium of Rs.60/- per lecture. A copy of the appointment letter is enclosed as Annexure 1 to the present writ petition.

5. It is the case of the petitioners that they have been functioning in terms of the said appointment since 1995. However, their designation was changed from Additional Lecturers to that of Guest Lecturers and their honorarium was increased to Rs.100/- per lecture from Rs.60/- per lecture subject to maximum of Rs.5000/- per month. According to the petitioners they became entitled for regularization under Section 31 (3) (C) of the State Universities Act, 1973. For the purpose they made a representation before the Chancellor of the University under Section 68 of the State Universities Act, 1973. The Chancellor rejected their representation by means of the order dated 26.03.2002 and the Executive Council of the Committee also rejected the claim of the petitioners for regularization vide its Resolution dated 4.05.2002 after recording that the petitioners had not been appointed prior to the cut off date i.e. 30.06.1991 as provided for under Section 31 (3) (C) of the State Universities Act, 1973 as it then stood.

6. Thereafter, with reference to the judgment passed by the High Court in the case of Dr. Sangeeta Srivastava being Writ Petition No.52001 of 2000 decided on 22.05.2002, the petitioners made a second reference to the Chancellor on 6.09.2002 being Reference No.157 of 2002. This reference was also answered against the petitioners by the Chancellor vide order dated 31.12.2003/5.01.2004. The Chancellor recorded that the petitioners are not covered by the provisions of Section 31 (3) (C) of the State Universities Act, 1973. Their appointment as Guest Lecturers is not contemplated by the State Universities Act, 1973 and accordingly, their representation had no substance.

7. This order of the Chancellor was not subjected to any further challenge and has became final.

8. However, in view of the Act No.6 of 2004 whereby Section 31 (3) (C) of the State Universities Act, 1973 was amended, the petitioners made a fresh representation for they being regularized under the amended provisions of Section 31 (3) (C) of the State Universities Act, 1973. This representation of the petitioners is stated to have been allowed by the Chancellor by providing that their claim may be examined under the provisions of U. P. State Universities Act, 1973 by the Executive Council of the University. It is this order that the petitioners seeks to enforce. They also challenge the advertisement dated 14.03.2007, which had been published for the post of Lecturers of Geography, as were vacant in the department.

9. Manu Khare, counsel for the petitioner could not demonstrate before this

Court as how the petitioners answer the description of Lecturer or Part Time Lecturer so as to fall within the four corner of Section 31 (3) (C) of the State Universities Act, 1973. It could not be established as to how in the teeth of the findings of fact recorded in the earlier order of the Chancellor dated 31.12.2003 and 5.01.2004 qua their nature of appointment how could Section 31 (3) (C) of the State Universities Act, 1973 as amended by Act No.6 of 2004 be attracted in their case.

10. We may record that there is absolutely no material, which can lead this Court to a conclusion that the petitioners answer the description of Lecturer or Part Time Lecturer so as to be covered by 31 (3) (C) of the State Universities Act, 1973 as amended by Act no.6 of 2004. Appointment as Guest Lecturers on payment of honorarium on per lecture basis is not contemplated by the State Universities Act, 1973. In any case petitioners do not answer the description of Lecturer or Part Time Lecturer as provided by Section 31 (3) (C) of the State Universities Act, 1973.

11. For the purpose reference may be had to the Division Bench Judgment of this Court in the case of Dr. Arvind Kumar Singh Vs University of Allahabad & Ors reported in 2007 (1) ADJ 526 wherein the provisions of Section 31 (3) (C) of the State Universities Act, 1973 have been interpreted. The judgment of Apex Court and the case of Dr. Sangeeta Srivastava has been examined in detail.

12. Counsel for the petitioner as a desperate attempt made reference to Clause 10.02 of the First Statutes of Allahabad University (when it was a State University) for suggesting that Part Time Teachers could be appointed and the case of the petitioners is covered by the said Clause.

13. The contention has only been raised to be rejected. Clause 10.02 of the First Statutes of the Allahabad University as it was then applicable reads as follows :

"10.02. Teachers of the University shall be appointed in the subjects on whole-time basis in the scales of pay approved by the State Government :

Provided that part-time lecturers may be appointed in subjects in which, in the opinion of the Academic Council such lecturers are required in the interest of teaching or for other reasons. Such part-time lecturers may receive salary ordinarily not exceeding one-half of the initial salary of the sclae for the post to which they are appointed. Person working as Research Fellow or as Research Assistants may be called upon to act as part-time lecturers."

14. From the records it is apparent that there is no such opinion of the Academic Council for appointment of Part Time Teachers in the department of Geography and further that petitioners were not appointed on the half of the initial salary of the salary applicable for the post they are appointed.

15. From the records, it is established that the petitioners were not paid half of the initial salary applicable for the post of Lecturers. On the contrary, they were appointed as Guest Faculties and were paid a honorarium on per lecture basis.

16. Even otherwise, we may record that the exercise, which has been directed

to be undertaken under the order of the Chancellor dated 31.12.2003/5.01.2004 has lost its efficacy in view of the fact that Allahabad University has been declared to be a Central University by Central Act No.26 of 2005.

17. Section 5 (D) of the Act, 2005 provides that all teachers, who were working earlier shall continue on the same conditions and in same status unless amendments are made in the status. The issue in that regard has already been decided by this Court in the case of Dr. Mohini Verma Vs Union of India & Ors made in Writ Petition No.29241 of 2011 decided on 13.03.2014.

18. For the same reasons we find that there cannot be any direction to the Allahabad University, which is now a Central University, to consider the claim of the petitioners in the matter of regularization nor the petitioners are within the four corners of Section 31 (3) (C) of the State Universities Act, 1973 so as to entitle them for such regularization.

19. We further find that there is hardly any good ground to challenge the process of selections, which has been initiated by the University for appointment on the two vacant posts of Lecturers in the Department of Geography, University of Allahabad. The petitioners despite being aware of the advertisement either did not participate in the process of selection or if they had applied they have not been selected.

20. We may also record that an attempt was made on behalf of the petitioners to suggest that in view of the judgment of the Apex Court in the case of State of Karnataka & Ors Vs M. L. Kesari & Ors reported in (2010) 9 SCC 247 one time exercise is required to be undertaken by the University for the purpose of regularization of persons like the petitioner, who have been working for so many years.

21. In our opinion, the Act No.26 of 2005 does not admit of any method of regularization and the University cannot be mandated to act contrary to law. It is not within the domain of the University to resort to any method of regularization of back-door appointments. The Apex Court in the case of State of Karnataka & Ors. Vs. Umadevi & Ors reported in 2006 (4) SC 420 has specifically prohibited regularization of persons, who have been appointed through back-door in violation of Article 14 of the Constitution of India.

22. We may also refer to the latest judgment of the Apex Court in the case of Renu & Others Vs District & Sessions Judge, Tis Hazari & Anr reported in 2014 Law Suit (S.C.) 90 wherein it has been laid down that if any appointment is made without advertisement, be it temporary or regular, and the appointee becomes entitled to salary from the State Exchequer, then such an appointment would be null and void.

23. In view of the fact that regular selection has already been made in respect of the two vacant posts of Lecturers in the Department of Geography, University of Allahabad, we find no good ground to interfere on behalf of the petitioners.

24. The writ petition is, therefore, dismissed.

25. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 16879 of 2010 connected with W.P. No. 60687 of 2013

Prem Kumar Upadhyaya. ......Petitioner
Versus
State of U.P. & Ors...... .....Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
C.S.C.

U.P.(Civil Police) Constable and Head Constables Service Rules, 2008-Rule-17-out of turn promotion-in pursuance of circular issued by secretary home affairs-claim for promotion-after enforcement of the Rules suppressing all government orders and circulars-except as per rules no promotion can be given out of turn basis-if promoted ignoring the Rules follow up correcting measures be taken-by forthwith-wrong promotion contrary to Rules can not be precedent-petition dismissed.

Held:Para-19
Moreover, when the statutory rules have been framed in supersession of existing rules and orders etc., one cannot rely on an existing Rule or Order, which contemplates a procedure for appointment or promotion, not recognized by subsequently framed statutory rules. This Court, therefore, has no hesitation in holding that, on and after 2.12.2008, no appointment in any manner, whether promotion or otherwise, cannot be made which is not consistent with the provisions of C&HC Rules, 2008 and SI&I Rules, 2008. I further make it very clear that no appointment can be made in contravention of C&HC Rules, 2008 and SI&I Rules, 2008, by taking recourse to Government Order dated 3.2.1994, as amended from time to time, for the reason that the said Government Orders have ceased to operate, on and after enforcement of C&HC Rules, 2008 and SI&I Rules, 2008 and cannot be resorted to for making any "Out of Turn" promotion. In other words, no "Out of Turn" promotion now can be made by taking recourse to Government Orders issued prior to 2.12.2008 as that would be inconsistent and contrary to statutory rules. Such Government Orders cannot be given effect to, on and after 2.12.2008, when the aforesaid Rules of 2008 became operative.

Case Law Discussed:
(2010) 2 SCC 728; AIR 2000 SC 2306; AIR 2003 SC 3983; AIR 2004 SC 2303; AIR 2005 SC 5565; AIR 2006 SC 1142.; AIR 2006 SC 1142.

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

1. In both these matters, the question of law involved is common. Though both were heard on different dates and judgments reserved, but since the issue involved is common, therefore, I am deciding both the writ petitions by this common judgment.

2. The issue of "Out of Turn" promotion in U.P. Civil Force in the light of Government Orders dated 3.2.1994, 2.1.1998 and the Director General of Police, U.P., Lucknow (hereinafter referred to as "DGP")'s Circular dated 29.12.1998 is involved in both the writ petitions.

3. In Writ Petition No. 16879 of 2010 (hereinafter referred to as "First Petition"), Sri Vijay Gautam, learned counsel for petitioner and learned Standing Counsel were heard and the arguments concluded on 20.11.2013 and judgment was reserved. While the

judgment was awaited, similar issue came up for hearing on 6.12.2013 in Writ Petition No. 60687 of 2013 (hereinafter referred to as "Second Petition") in which Sri Sanjay Kuamr, Advocate, advanced his arguments and learned Standing Counsel appeared and made a submission on behalf of respondents. In this case also the judgment was reserved on 6.12.2013. As already said, since the question of law involved in both the matters is common, and this Court had advantage of assistance rendered by different counsels covering entire aspect of the matter, therefore, I am deciding both these writ petitions by this common judgments considering all the issues raised in these matters.

4. Petitioner, Prem Kumar Upadhyaya, in the First Petition, is Constable in U.P. Police Force (Civil Police) having been appointed on 15.2.1988. While he was posted at Mathura, Senior Superintendent of Police, Mathura vide letter dated 12.12.2003, recommended him for "Out of Turn" promotion on the basis of his outstanding performance in service as also his achievements and performance in the sports and athletics. In 2002, during the course of service, petitioner was rewarded with honour of certificate of appreciation. The Deputy Inspector General of Police, Agra Range, Agra accepting the aforesaid recommendation forwarded above proposal vide letter dated 3.3.2004 which was further forwarded by Additional Director General/Inspector General of Police, Kanpur Zone, Kanpur by letter dated 12.3.2004. All the authorities were clearly of the view that petitioner has satisfied all the requirements for being given "Out of Turn" promotion as per Government Order dated 2.1.1998 and Circular dated 29.12.1998. The matter remained pending for consideration before State Government, hence reminders/letters were also sent by Field Officers on 4.9.2006, 1.10.2006 and 4.10.2006. Petitioner, in First Petition then came to this Court in Writ Petition No. 33409 of 2008 which was disposed of finally on 15.7.2008 directing the State Government to take a final decision in the matter within a period of six weeks. It is pursuant thereto, petitioner's matter was examined by the Committee constituted for considering cases of "Out of Turn" promotion. The Committee did not find favour with petitioner's claim for "Out of Turn" promotion. Agreeing to the recommendation of said Committee, DGP also did not find petitioner entitled for "Out of Turn" promotion and passed order accordingly on 13.12.2009. Hence, the First Petition, challenging the aforesaid decision of departmental committee for "Out of Turn" promotion and the consequential decision taken by DGP. To put things straight, some more facts be stated in regard to First Petition. The recommendation of Senior Superintendent of Police, Mathura for "Out of Turn" promotion to petitioner was considered by departmental committee. It rejected the said proposal in its meeting dated 22.11.2007. It is this decision which was communicated to petitioner by order dated 15.9.2008 which he challenged in Writ Petition No. 66053 of 2008 which was allowed on 7.8.2009 and the order dated 15.9.2008 was quashed. Respondents were directed to re-consider the matter strictly in accordance with Government Orders dated 3.2.1994 and 2.1.1998. Again the DGP reiterated decision by means of impugned order dated 13.12.2009. Hence, the First Petition.

5. In Second Petition, Kandwa Kumar Mishra, the sole petitioner was directly appointed as Sub-Inspector in

Civil Police in 2001-2002 recruitment. While he was posted in District Chitrakoot, Superintendent of Police, Chitrakoot, respondent no. 6, made a recommendation vide letter dated 9.12.2011 for consideration of petitioner (in Second Petition) for one rank "Out of Turn" promotion showing act of outstanding gallantry and courage in arresting a rewarded dacoit Kharag Singh on 7.1.2009 after facing indiscriminatory firing and chasing the criminals. Another similar recommendation was made by Senior Superintendent of Police, Varanasi in regard to petitioner's participating in a daring encounter in which a hardened criminal and shooter, Bunti alias Afroz, was killed on 7.10.2008. A third recommendation is said to be made by by Superintendent of Police, Jaunpur vide letter dated 21.5.2013. Since no decision was taken by respondents, a writ of mandamus has been sought in Second Petition directing respondents to consider petitioner for one rank "Out of Turn" promotion in the light of this Court's judgments dated 24.5.2013 in Writ Petition No. 2782 of 2009 (Manoj Kumar Singh and others Vs. State of U.P. and others) and dated 20.12.2011 in Writ Petition No. 66308 of 2006 (Ravindra Kumar Saini Vs. State of U.P. and others).

6. Sri Vijay Gautam, learned counsel for petitioner in First Petition contended that petitioner's claim is squarely covered by policy of "Out of Turn" promotion but respondents have denied the same arbitrarily and illegally though time and again, in a most discriminatory and selective manner, such "Out of Turn" promotions have been allowed to a large number of Police officials. Reference of some such cases have been given in paragraph 29 to 36 of First Petition, which I would be dealing at appropriate stage. Sri Sanjay Kumar has also made similar arguments.

7. Before coming to rival submissions, it would be appropriate to have a bird eye view over the relevant statutes/ statutory provisions, dealing with the recruitment and appointment as also the conditions of service of Police officers of subordinate rank in U.P. Police Force.

8. It is not in dispute that the entire matter relating to recruitment and appointment of persons enrolled in U.P. Police Force (in particular Civil Police and Armed Police), is presently governed by Police Act, 1861 (hereinafter referred to as "Act, 1861). Section 2 thereof reads as under:

"2. Constitution of force.- The entire police establishment under a State Government shall for the purposes of this Act, be deemed to be one police force, and shall be formally enrolled, and shall consist of such number of officers, and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.

Subject to the provisions of this Act the pay and all other condition of service of members of the subordinate ranks of police force shall be such as may be determined by the State Government."

9. Under Section 46 of Act, 1861, power to frame Rules has been conferred upon State Government. It is not disputed by the parties in both these writ petitions that till 2008 there were no Rules framed under Section 2 read with Section 46 of Act, 1861 so as to govern the matter of

recruitment and appointment of Police Officers of subordinate rank, i.e. Constables, Head Constables and Sub-Inspectors. The entire matter earlier used to be governed by various orders issued by State Government from time to time which were considered to be "Statutory Orders" issued/ referable under/to Section 2 of Act, 1861.

10. It is in this context, an Office Memorandum dated 3.2.1994 was issued by Principal Secretary (Home). This Office Memorandum was in reference to the appointment of a Police Inspector/ Company Commander on a non cadre post of Deputy Superintendent of Police where such Police Inspector/Company Commander P.A.C. has shown an act of exemplary courage and gallantry. Conditions on which such appointment against a non cadre post of Deputy Superintendent of Police, was permissible, provided in the Office Memorandum, reads as under:

"1. अदम्य साहस एवम् शौर्य प्रर्दशन करने वाले पुलिस बल के निरीक्षक/ कम्पनी कमाण्डर को पुलिस उपाधीक्षक के निः संवर्गीय राजपत्रित पद का सृजन करके नियुक्ति किया जायेगा।

2. पुलिस बल के ऐसे निरीक्षक/ कम्पनी कमाण्डर अदम्य साहस एवम् शौर्य प्रर्दशन करने वाले निरीक्षक/कम्पनी कमाण्डर की कोटि में आयेगे, जिन्होने कुख्यात आतंकवादी या जघन्य अपराधी के साथ में मुठभेड़ में या उनकी गिरफ्तारी में अदम्य साहस और शौर्य प्रदर्शित किया हो या अपने कर्तव्य पालन के दौरान जोखिम भरा कार्य किया हो।

3. इस सम्बन्ध में पुलिस उपाधीक्षक के निः संवर्गीय पद का सृजन पुलिस महानिदेशक, उत्तर प्रदेश कि संस्तुति पर शासन द्वारा किया जा सकेगा।

4. पुलिस उपाधीक्षक के निः संवर्गीय पद पर नियुक्ति पुलिस महानिदेश की संस्तुति पर शासन द्वारा की जायेगी।

5. यह आदेश इस विषय पर समय समय पर जारी आदेशों में किसी अन्य बात के होते हुए भी प्रभावी होगा।

6. यह आदेश तात्कालिक प्रभाव से लागू होगा।"

English Translation by the Court:

1. Inspectors/ Company Commanders of police force who have shown invincible courage and gallantry shall be appointed to the ex-cadre gazetted posts of Deputy Superintendent of Police by creating such posts.

2. Those Inspectors/ Company Commanders of police force who have shown invincible courage and gallantry in encounters with notorious terrorists or dreaded criminals or in their arrests or have taken risks while discharging their duties, shall be categorized as Inspectors/ Company Commanders showing invincible courage and gallantry.

3. In this regard, ex-cadre posts of Deputy Superintendent of Police shall be created by the Government upon the recommendation of the Director General of Police, Uttar Pradesh.

4. Appointments to the ex-cadre posts of Deputy Superintendent of Police shall be made by the Government upon the recommendation of the Director General of Police.

5. This order shall be effective, notwithstanding anything being in the orders issued on the subject from time to time.

6. This order shall come into force with immediate effect.

11. On the same date, i.e., 3.2.1994 another Government Order No. 605 ¼11½ N&iq&1&24@93 was issued by Principal Secretary (Home) providing for a similar ex cadre "Out of Turn" promotion to Constables and Sub-Inspectors/ Platoon Commander on the

post of Head Constable and Inspector/Company Commander respectively. The conditions of such appointment are similar to the earlier Government Order except of the difference of designations of post and rank but for ready reference, these conditions are also noticed as below:

"1. अदम्य साहस एवम् शौर्य प्रर्दशन करने वाले पुलिस बल के उक्त कर्मियों को यथास्थिति आरक्षी से मुख्य आरक्षी तथा उपनिरीक्षक से निरीक्षक/ कम्पनी कमाण्डर को के निः संवर्गीय पद पर नियुक्ति किया जायेगा।

2. प्रत्यक वित्तीय वर्ष के लिए यथास्थिति मुख्य आरक्षी या निरीक्षक/ कंपनी कमाण्डर के निःसंवर्गीय पदों का सृजन राज्य सरकार द्वारा पुलिस महानिदेशक, उत्तर प्रदेश के प्रस्ताव पर किया जायेगा।

3. पुलिस बल के ऐसे आरक्षीगण उपनिरीक्षक/ प्लााटून कमाण्डर अदम्य साहस और शौर्य प्रर्दशन करने वाले पुलिस कर्मी की कोटि में आयेंगे, जिन्होने कुख्यात आतंकवादी या जघन्य अपराधी के साथ में मुठभेड़ या उनकी गिरफ्तारी में साहस और शौर्य प्रदर्शित किया हो या अपने कर्तव्य पालन के दौरान जोखिम भरा कार्य किया हो।

4. उक्त निःसंवर्गीय पदों पर नियुक्ति पुलिस महानिदेशक के पूर्वानुमोदन के उपरान्त नियुक्ति प्राधिकारी द्वारा की जायेगी।

5. यह आदेश इस विषय पर समय समय पर जारी आदेशों में किसी अन्य बात के होते हुए भी प्रभावी होगा।

6. यह आदेश तात्कालिक प्रभाव से लागू होगा।"

English Translation by the Court:

1. The said officials showing invincible courage and gallantry shall be appointed on the ex-cadre posts from Constable to Head Constable and from Sub Inspector to Inspector/Company Commander, as the case may be.

2.For each financial year, ex-cadre posts of Head Constables or Inspectors/ Company Commanders, as the case may be, shall be created by the State Government upon the recommendation of the Director General of Police, Uttar Pradesh.

3. Those Constables and Inspectors/ Company Commanders of police force who have shown invincible courage and gallantry in encounters with notorious terrorists or dreaded criminals or in their arrests or have taken risks while discharging their duties, shall be categorized as police officials showing invincible courage and gallantry.

4. Appointments to the aforesaid ex-cadre posts shall be made by the Appointing Authority after prior approval of the Director General of Police.

5. This order shall be effective, notwithstanding anything being in the orders issued on the subject from time to time.

6. This order shall come into force with immediate effect.

12. A third Government Order dated 2.1.1998 was issued by Principal Secretary stating that such Constables, who are found suitable for "Out of Turn" promotion on the basis of their outstanding service by DGP or Home Secretary, shall also be entitled for such promotion under Government Order dated 3.2.1994 and earlier Government Order dated 3.2.1994 was amended accordingly. In order to lay down certain guidelines to understand the term "Outstanding Service" a Circular was issued by DGP, Head Quarter, U.P. Lucknow on 29.12.1998, in which yardsticks to find out whether a Constable satisfy requirement of "Outstanding Service" or not, were laid down. The same read as under:

"1– आरक्षी की न्यूनतम 10 वर्ष की सेवा पूर्ण हो।

2– 10 वष की सेवा के दौरान कम से कम 5 वर्ष फील्ड ड्यिूटी में आरक्षी नियुक्त रहा हो।

3– 10 वर्ष के दौरान चरित्रपंजी में वार्षिक मन्तव्य में से 5 वर्ष के मन्तव्य उत्कृष्ट श्रेणी के एवं 5 वर्ष के मन्तव्य कम से कम अति उत्तम श्रेणी के हों।

4– आरक्षी को 'उत्कृष्ण सेवा सम्मान चिन्ह' अथवा सराहनीय सेवा सम्मान चिन्ह से विभूषित किया गया हो।

5– आरक्षी की चरि्त्र पंजी में कोई भी प्रतिकूल प्रतिष्टि अंकित न हो तथा कोई दण्ड प्रदान न किया गया हो।

6– उत्कृष्ट कार्य हेतु कम से कम 20 नकद पुरस्कार प्रदान किये गये हों।

7–उपर्युक्त अर्हता पूर्ण करने वाले आरक्षी के आउट आफ टर्न प्रोन्नति हेतु प्रस्ताव/ संस्तुति सम्बन्धित पुलिस उप महानिरीक्षक/ पुलिस महानिरीक्षक के माध्यम से प्राप्त हो।"

English Translation by the Court:

1. The constable must have completed at least 10 years' service.

2. The constable, during his 10-year service, must have been posted on field duty for at least 5 years.

3. Of the annual entries in the Character Roll in course of 10 years, entries must at least be excellent for 5 years and outstanding for remaining 5 years.

4. The constable must have been awarded with 'an honour for excellent service' or with 'an honour for commendable service'.

5. In the Character Roll, no adverse entry must have been recorded for the constable; nor must he have been awarded with the punishment.

6. He must have been awarded with at least 20 cash rewards for excellent work.

7. The resolution/recommendation for out-of-turn promotion to the constable fulfilling aforementioned eligibility, must have been received through concerned Deputy Inspector General of Police/Inspector General of Police.

13. The above Government Orders being orders relating to recruitment and conditions of service of Police Officers of subordinate rank, hence statutory by virtue of Section 2 of Act, 1861. They had the force of law. The situation, however, changed in 2008 when statutory rules were framed by State Government in exercise of power under Section 2 read with 46 (2) and (3) of Act, 1861 in respect to Constables, Head Constables, Sub-Inspectors and Inspectors (Civil Police) of U.P. Police Force.

14. Two sets of Rules were framed, one, U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as "SI&I Rules, 2008"), which came to be published in U.P Gazette Extraordinary dated 2.12.2008. Another one is U.P. (Civil Police) Constables and Head Constable Service Rules, 2008 (hereinafter referred to as "C&HC Rules, 2008") which were also published in U.P. Gazette Extraordinary dated 2.12.2008. The aforesaid Rules declare that the same are being made in exercise of powers under Sub-section 2 of Section 46 read with Section 2 of Act, 1861 and in supersession of all existing Rules or

Orders issued in this behalf. The aforesaid two sets of Rules have been framed to regulate selection, promotion, training, appointment, determination of seniority and confirmation etc. of the aforesaid cadres of U.P. Police Officers.

15. Under C&HC Rules, 2008, post of Head Constable in it entirety is to be filled in by promotion in the manner provided in Rule 17 thereof, i.e., 50 per cent by departmental examination, and, 50 per cent by promotion on the basis of a selection on the criteria of "seniority subject to rejection of unit", along with physical efficiency test of a qualifying nature.

16. Similarly under SI&I Rules, 2008, post of Sub-Inspector is to be filled in by two sources, i.e., 50 per cent by direct recruitment and 50 per cent by promotion, through a Board, on the basis of departmental examination, from amongst Head Constables and Constables, who fulfill eligibility conditions, i.e., completion of three years service after probation and age, not more than 40 years. The post of Inspector is to be filled in by promotion through a Board on the basis of departmental examination. The above sources of recruitment is provided under Rule 5 of SI&I Rules, 2008. No other manner of appointment/ promotion on any of the posts of Constable, Head Constable and Sub-Inspector is contemplated in the aforesaid Rules.

17. Now it is in these facts and circumstances, there are 2 questions, up for consideration, to answer the issue, raised in both these writ petitions. First, whether petitioners in both the writ petitions are to be governed by Government Orders dated 3.2.1994 and 2.1.1998, even after enforcement C&HC Rules, 2008 and SI&I Rules, 2008; and, second, whether petitioners are entitled for any relief in the facts and circumstances of their individual cases.

18. So far as first issue is concerned, none of the learned counsels for petitioners went to the extent of arguments that the orders issued by State Government, even if they have statutory force in absence of otherwise statutory rules framed under Act, 1861, can still hold the field, when statutory rules have been framed by State Government in exercise of powers under Section 46 read with Section 2 of Act, 1861. It is well settled that an executive order cannot override or prevail over statutory rules. In the present case, the orders issued in 1994 and 1998 may have force of law, since the recruitment and appointment on the post of Head Constable, Constable, Sub-Inspector and Inspector at that time was governed by different Government Orders, issued from time to time; and provisions of a Government Order can be altered, amended, modified etc. by another Government Order, issued in the same manner, but that situation ceased when statutory rules were framed in 2008 in exercise of powers under Section 46 read with Section 2 of Act, 1861 following a different procedure. Even otherwise, the statutory rules, by way of clarification, declare that the same are being issued in supersession of all existing Rules in respect to selection, promotion, appointment, etc. relating to various posts which are governed by the aforesaid Rules of 2008. It thus, goes without saying, that after enforcement of C&HC Rules, 2008 and SI&I Rules, 2008, no appointment/ promotion, even by way of "Out of Turn" promotion, can

be given to any person as that would be in direct teeth of the Rules of recruitment and appointment/ promotion of 2008 and such appointment, if any, would be patently illegal and void-ab-initio. An appointment taking recourse to an executive order cannot be validly made when such procedure is not recognized under the statutory rules holding the field with respect to recruitment and appointment, whether direct or by promotion. Now the appointment shall be made as per the procedure prescribed in the above Rules.

19. Moreover, when the statutory rules have been framed in supersession of existing rules and orders etc., one cannot rely on an existing Rule or Order, which contemplates a procedure for appointment or promotion, not recognized by subsequently framed statutory rules. This Court, therefore, has no hesitation in holding that, on and after 2.12.2008, no appointment in any manner, whether promotion or otherwise, cannot be made which is not consistent with the provisions of C&HC Rules, 2008 and SI&I Rules, 2008. I further make it very clear that no appointment can be made in contravention of C&HC Rules, 2008 and SI&I Rules, 2008, by taking recourse to Government Order dated 3.2.1994, as amended from time to time, for the reason that the said Government Orders have ceased to operate, on and after enforcement of C&HC Rules, 2008 and SI&I Rules, 2008 and cannot be resorted to for making any "Out of Turn" promotion. In other words, no "Out of Turn" promotion now can be made by taking recourse to Government Orders issued prior to 2.12.2008 as that would be inconsistent and contrary to statutory rules. Such Government Orders cannot be given effect to, on and after 2.12.2008, when the aforesaid Rules of 2008 became operative.

20. I may also clarify at this stage that there are some subsequent amendments in Rules of 2008 but I need to go into details thereof for the reason that whatever is the procedure for recruitment and appointment/ promotion under the Rules of 2008, only that will hold the field. The Government Orders issued prior to enforcement of C&HC Rules, 2008 and SI&I Rules, 2008 have became inoperative, invalid and shall not provide validity to any appointment/ promotion, which is not made in accordance to scheme and procedure prescribed in C&HC Rules, 2008 and SI&I Rules, 2008. Therefore, the claim of petitioner in Second Petition, where petitioner is seeking recourse to the Government Order of 3.2.1994 in respect to a cause of action which has arisen after enforcement of Rules of 2008, neither can stand nor is sustainable and, therefore, Second Petition deserves to be dismissed on this ground alone.

21. Now I come to second question which now only survive in respect to petitioner in First Petition. There I find that the eligibility conditions, under the Government Order dated 2.1.1998 read with the Circular dated 29.12.1998, whereby yardstick and entitlement have been laid down to find out outstanding service record of Police Officer concerned, are not satisfied.

22. One of the conditions is that incumbent must have remained posted for five years as a field staff but in the impugned order respondents-authorities have found that petitioner actually worked

as a Clerk etc. and lacked postings in field. On this aspect, learned counsel for petitioner has not, at all, addressed this Court, and it is not his case that this finding is incorrect. In fact, I also do not find appropriate pleadings in writ petition to challenge the above findings of fact recorded in the impugned order.

23. Secondly, it is said that one of the conditions is that Police officer must have earned outstanding entries in five years and very good in another five years in the last ten years of service. Petitioner, admittedly, earned six outstanding entries but only three are very good. He was, therefore, short of requisite entitlement provided in the Circular dated 29.12.1998 so as to justify his performance to be treated as "Outstanding Service". On this aspect also there is neither any pleading nor learned counsel for petitioner did address this Court to show that these findings are perverse or incorrect. What he claims is that in respect to certain other persons, "Out of Turn" promotions have been given, even when such conditions were not fulfilled in their cases.

24. Suffice is to mention that those appointments are not under challenge in the present writ petition. Moreover, if respondents have done something wrong or illegal, the principle of equality is not attracted to claim a negative parity, i.e., parity in the matter of illegality. One cannot claim that since in respect to other persons, an illegality has been committed, therefore, it should be repeated in his case also. Article 14 does not contemplate an equality of opportunity in the matter of illegality. One cannot have a legal right compelling an authority to do something wrong in his case also which such authority has done in respect to one or more others. Moreover, this Court has no justification to compel an authority to do something, which is patently illegal by taking recourse to Article 14. Such assumption on the part of petitioners for claiming parity is clearly misconceived and erroneous. On the contrary, in State of Karnataka & others Vs. Gadilingappa & others (2010) 2 SCC 728, the Court said that it is well settled principal of law that even if a mistake is committed in an earlier case, the same cannot be allowed to be perpetuated.

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

26. In view thereof, even the petitioner in First Petition, in my view, has rightly been held ineligible for "Out of Turn" promotion in accordance with scheme, as it was available before enactment of statutory rules of 2008, and has rightly been declined the said benefit.

27. In the result, both the writ petitions lack merit. Dismissed.

28. There shall be no order as to costs.

29. Learned counsel for petitioner, at this stage, contended that Police force is a uniform disciplined service, governed by rank and file. An illegal benefit conferring higher status and rank to some while denying to others, would disturb the entire edifice which is foundation of strict discipline, based on seniority, rank, status. It is of utmost importance in a disciplined uniform Police force.

30. I find some substance in the submission and in my view, this aspect justify to issue a direction to the Principle Secretary (Home) and Director General of Police U.P. Lucknow to constitute a committee to find out, whether any "Out of Turn" promotion has/have been allowed, after enforcement of C&HC Rules, 2008 and SI&I Rules. If such appointment(s) has/have been made, though it is impermissible in law, in view of above discussion, appropriate correcting measures shall immediately be taken by recalling such orders, after giving due opportunity of hearing to all concerned parties in accordance with law. This exercise shall be completed within six months from the date of receipt of a certified copy of this order, so that no person may continue to retain an illegal benefit, affecting discipline, rank and file in a force, like, U.P Police Service, which otherwise would have a negative impact on the disciplined and orderly behavior of Police Officers of subordinate ranks.

31. The Register General is directed to forthwith send a copy of this judgment to Principal Secretary (Home), and Director General of Police, U.P. Lucknow for information and compliance of the directions, as said above.
