ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.08.2014

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

Misc. Single No. 57 of 2014

Smt. Kusum Srivastav ...Petitioner
Versus
Smt. Rekha Jiwaani & Ors. .Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Mehrotra, Sri Ishwar Dutt Shukla

Counsel for the Respondents:
Sri Manish Kumar, Sri R.K. Srivastava

Civil Procedure Code-Order-I, Rule-10 readwith Section 146-Impleadment application-during pendency of suit-subject of dispute alienated to third person-objection that such transfer hit by provisions of Section 52 of Transfer of property Act-applicant neither necessary nor proper party-held-during consideration of application u/s 146-necessary or proper party consideration not required-nor such transfer termed as void in view of Sarla Bala Dassi case-if the person sought to be impleaded being legal representative-sufficient for impleadment.

Held: Para-13
Thus in view of judgment of Supreme Court in Jayaram Mudaliar's case (supra) that purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward and such a transfer is not void and in view of judgment of Supreme Court in Saila Bala Dassi's case (supra) holding that the object of Section 146 is to facilitate the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense, the orders of Courts below allowing application of respondent-9 for impleadment as defendant in the suit do not suffer from any illegality.

Case Law discussed:
AIR 1935 Oudh 486; AIR 1981 SC 981; AIR 2007 SC 1332; (2012) 2 SCC 628; AIR 2012 SC 2925; 2008 (26) LCD 422 (DB); 2013 (8) ADJ 492; (1972) 2 SCC 200; AIR 2007 SC 1058; (2010) 14 SCC 317; AIR 2013 SC 2389; AIR 1958 SC 394; (2001) 6 SCC 534; AIR 2005 SC 2209; AIR 2013 SC 2389.

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

1. Heard Sri S. K. Mehrotra, for the petitioner and Sri R.K. Srivastav, for respondent-9.

2. The writ petition has been filed against the orders of Civil Judge (Senior Division), Court No. 15, Faizabad dated 17.12.2013, allowing the application of respondent-9 for his impleadment as defendant in O.S. No. 392 of 2009 filed by the petitioner and District Judge, Faizabad dated 17.12.2013, dismissing the revision of the petitioner, from aforesaid order.

3. Smt. Kusum Srivastav (the petitioner) filed a suit (registered as O.S. No. 392 of 2009), for declaration of her title over house No. 3/1/170, situated at mohalla Rikabganj, Faizabad and for permanent injunction, restraining Smt. Rekha Jiwaani and others (respondents-1 to 8) from interfering in her possession over the aforesaid house. It is alleged by the petitioner that after service of summons, the defendants appeared before Trial Court and filed written statement.

Thereafter, issues have been framed. In the meantime, the petitioner filed an application for amendment of the plaint as such evidence was not started.

4. During pendency of the suit Rajiv Kumar, Ashish Kumar, Vishnu Kumar and Smt. Kishori Srivastav for herself and for Anil Kumar through his general power of attorney, (respondents-4 to 7) executed a sale deed dated 20.03.2013 in respect of northern half portion of the house in dispute in favour of Mohd. Zia-ur-rahman (respondent-9). Respondent-9 filed an application (73-C) for his impleadment in the suit as the defendant. The petitioner filed an objection in the impleadment application and stated that defendants-4 to 8 had nothing to do with house in dispute. On the basis of sale deed executed by defendants-4 to 8, Mohd. Zia-ur-rahman has neither become owner nor was given possession over the house in dispute. Defendants-4 to 8 did not take leave of the Court for executing sale deed dated 20.03.2013 in favour of respondent-9 as such he has no legal right for being impleaded as the defendant in the suit. He is neither necessary nor proper party as such the impleadment application was liable to be rejected.

5. Trial Court after hearing the parties, by order dated 20.09.2013 held that Mohd. Zia-ur-rahman purchased the house in dispute from defendants-4 to 8 through sale deed dated 20.03.2013, as such he is necessary party in the suit. Evidence in the suit has not started as such his impleadment will not cause any prejudice to the plaintiff. On these findings impleadment application was allowed. The petitioner filed a revision (registered as Civil Revision No. 126 of 2013) from the aforesaid order. The revision was heard by District Judge, Faizabad, who by order dated 17.12.2013, held that as on the basis of sale deed dated 20.09.2013 interest in the property in dispute has been created in favour of Mohd. Zia-ur-rahman as such he is entitled to contest the suit. Order of the trial court does not suffer from any illegality. On these findings, the revision was dismissed. Hence this writ petition has been filed.

6. The counsel for the petitioner submitted that Section 52 of Transfer of Property Act, 1882 operates as an injunction and restrains the litigants of pending litigation from transferring the subject matter of suit. Any transfer of subject matter of suit without leave of the Court is void. On its basis, transferee pendete-lite has no right to be impleaded in the suit. Section 52 is based upon public policy to save time of Court and unnecessary harassment of the parties as there may several transfers one after others. The plaintiff is a dominus litis and is not obliged to implead transferee pendete-lite in the suit. The impleadment application has been illegally allowed. He relied upon the judgment of Chief Court Oudh, in Jai Indra Bahadur Singh Vs. Deputy Commissioner, AIR 1935 Oudh 486, in which during pendency of suit, Deputy Commissioner was appointed as the manager of the subject matter of the suit under U.P. Court of Ward Act. The Court rejected his application for impleadment in the suit under Order 22 Rule 10 C.P.C. Judgment of Supreme Court in Dev Raj Dogra Vs. Gyan Chand Jain, AIR 1981 SC 981, in which it has been held that subject matter of the suit cannot be transferred so as to affect the right of other party except under the authority of the Court and Section 52 of

Transfer of Property Act, 1882 imposes a prohibition on transfer. Sanjay Verma Vs. Manik Roy, AIR 2007 SC 1332, in which it has been held that it would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendence by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit." Jagan Singh Vs. Dhanwanti, (2012) 2 SCC 628, in which it has been held that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente-lite were permitted to prevail. The Explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. Vidur Implex & Traders (P) Ltd. Vs. Tosh Apartments (P) Ltd., AIR 2012 SC 2925, in which it has been held that the agreements for sale and the sale deeds were executed by respondent 2 in favour of the appellants in a clandestine manner and in violation of the injunction granted by the High Court. Therefore, it cannot be said that any valid title or interest has been acquired by the appellants because they are claiming right on the basis of transactions made in defiance of the restraint order passed by the High Court. Therefore, their presence is neither required to decide the controversy involved in the suit filed by respondent 1 nor required to pass an effective decree. Division Bench Judgment of this Court in Shahzad Ahmad Khan Vs. Mohd. Ahmad, 2008 (26) LCD 422 (DB), in which it has been held that in view of Section 52 of Transfer of Property Act, 1882, no valid transfer can be made during pendency of the suit without leave of the Court and such a transferee is neither proper nor necessary party and cannot be impleaded and Shyoraj Singh Vs. Jahir Ahmad, 2013 (8) ADJ 492, in which it has been held that sale deed executed during pendency of the suit is void.

7. I have considered the arguments of the counsel for the parties and examined the record. In order to appreciate arguments of the parties, relevant provisions of Transfer of Property Act, 1882 and Civil Procedure Code, 1908 are quoted below:-

52. Transfer of property pending suit relating thereto.-- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

146. Proceedings by or against representatives.-- Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Order I Rule 10. Suit in name of wrong plaintiff.-- (1) .....

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

Order 22 Rule 10. Procedure in case of assignment before final order in suit.-- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

8. Section 52 of Transfer of Property Act, 1882 safeguard the right of the litigant from pendete-lite transfer. However it does not impose a complete prohibition of the transfer of subject matter of the suit as the Court is given jurisdiction to grant leave to transfer. The Court has been empowered to have the control over the subject matter of the suit so that decree obtained by successful party would not be defeated by pendente-lit transfer. In Dev Raj Dogra's case (supra), relied upon by the counsel for the petitioner, it has been held that subject matter of the suit cannot be transferred so as to affect the right of other party except under the authority of the Court. In this case Supreme Court has nowhere held that such a sale deed is void. The issue in this respect came for consideration before a bench of three Hon'ble Judges of Supreme Court in Jayaram Mudaliar v. Ayyaswami, (1972) 2 SCC 200, in which it was held that expositions of the doctrine of lis pendence indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the court to deal with it and thus make the proceedings infructuous. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

Supreme Court again in Hardev Singh v. Gurmail Singh, AIR 2007 SC 1058, held that Section 52 of the Transfer of Property Act, 1882 merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect. Same view has been taken in T.G. Ashok Kumar Vs. Govind Ammal, (2010) 14 SCC 317 and Thomson Press (India) Ltd. Vs. Nanak Builders & Investors (P) Ltd., AIR 2013 SC 2389. In view of authoritative pronouncements of Supreme Court, contrary view taken by High Court are not good law and have no binding effect.

9. A Bench of four Hon'ble Judges of Supreme Court in Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394 held that Section 146 was introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. The right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims, and the petition of the appellant to be brought on record as an appellant in Appeal No. 152 of 1955 must be held to be maintainable under Section 146.

10. Supreme Court in Dhurandhar Prasad Singh v. Jai Prakash University, (2001) 6 SCC 534, held that the plain language of Order 22 Rule 10 C.P.C. does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of a party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not

properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Similar view are taken by Supreme Court in Raj Kumar Vs. Sardari Lal, (2004) 2 SCC 601.

11. Supreme Court in Amit Kumar Shaw v. Farida Khatoon, AIR 2005 SC 2209, held that a transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case. This judgment has again been followed in Thomson Press (India) Ltd. Vs. Nanak Builders & Investors (P) Ltd., AIR 2013 SC 2389.

12. So far as the provisions of Order 1 Rule 10 (2) C.P.C. on one hand and Section 146 and Order 22 Rule 10 C.P.C. on the other hand are concerned, there is a basic difference between two provisions. While deciding an application under Order 1 Rule 10 (2) C.P.C., the Court is required to record a finding that person sought to be impleaded as party in the suit is either necessary or proper party. While Section 146 and Order 22 Rule 10 C.P.C. confers right upon the legal representative of a party to the suit to be impleaded with the leave of the Court and continue the litigation. While deciding an application under Section 146 and Order 22 Rule 10 C.P.C., the Court is not require to go in the controversy as to whether person sought to be impleaded as party in the suit is either necessary or proper party. If the person sought to be impleaed as party is legal representative of a party to the suit, it is sufficient for the Court to order impleadment/substitution of such person. Thus the case law relied upon by the counsel for the petitioners under Order 1 Rule 10 C.P.C. has no application.

13. Thus in view of judgment of Supreme Court in Jayaram Mudaliar's case (supra) that purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward and such a transfer is not void and in view of judgment of Supreme Court in Saila Bala Dassi's case (supra) holding that the object of Section 146 is to facilitate the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense, the orders of Courts below allowing application of respondent-9 for impleadment as defendant in the suit do not suffer from any illegality.

14. In view of the aforesaid discussions, the writ petition has no merit and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.08.2014

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE MAHENDRA DAYAL, J.

Special Appeal No. 185 of 2004

Shiv Lal Sonker Inre552 (S/S) 93. Appellant
Versus
State of U.P. . ..Respondent

Counsel for the Appellant:
Sri Vidhu B. Kalia

Counsel for the Respondents:
C.S.C., Smt. T. Somvanshi

U.P. Police Regulation-Regulation 490- dismissal on involvement of marpit under influence of liquor with police officer-without investigation without giving opportunity to cross-examine-without following procedure of Rules-enquiry concluded which held vitiated dismissal-order considering long period of harassment-and improper enquiry-reinstated with 50% of salary-period consumed in litigation shall be treated in service.

Held: Para-21
Taking the holistic view of the matter, we have no hesitation in saying that the inquiry has been conducted in utter disregard to the principles of natural justice. Since the impugned order has been passed on the basis of the inquiry report, which suffers from procedural illegality and violative of principles of natural justice, it vitiates the order of punishment.

Case Law discussed:
AIR 1961 SC 751; (1986) 3 SCC 229; [2003] (21) LCD 610; JT 2008 (9) 205; [(2010) 2 SCC 722]; AIR 1968 SC 158; 1995(Supp) 3 SCC 212; (2010) 10 SCC 539.

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

1. Heard learned counsel for the appellant, Shri S.K. Kalia, learned Senior Advocate, assisted by Shri Ankit Pandey and learned Additional Chief Standing Counsel.

2. This Special Appeal has been preferred against the judgment and order dated 22.3.2002, passed in Writ Petition No. 552 (SS) of 1993 and the judgment and order dated 22.4.2004, passed in Review Petition No.72 o 2002. By the judgment and order dated 22.3.2002, the learned Single Judge dismissed the writ petition preferred by the appellant against the order of dismissal. Thereafter the petitioner filed a Review Petition, which was also dismissed by the judgment and order dated 22.4.2004.

3. Bereft of unnecessary details, in short the facts of the case are that the appellant while working as constable and posted at Police Station Khairabad, District Sitapur, was subjected to disciplinary proceedings. The disciplinary proceedings ultimately culminated in passing an order of dismissal, which was assailed in the writ petition on the ground that the disciplinary proceedings were not only conducted in blatant disregard of the principles of natural justice but relevant documents such as copy of the Medical Report, copy of the enquiry report etcetra which were utilized against him in the enquiry, were never supplied to him. It has also been contended that in disciplinary proceedings he was not only denied the opportunity to cross examine the Station Officer but provisions of Paras 486 and 490 of the Police Regulations were also not followed, causing serious prejudice.

4. Learned counsel for the appellant has contended that it is the case of the respondents that the appellant misbehaved

with the public including one Shri Bakridi and entered into 'Mar-Peet' with them under the influence of the alcohol, while on duty. The alleged misconduct amounts to commission of a cognizable offence under Sections 323, 504, 506 IPC as such as per Para 486 of the U.P. Police Regulations, it was incumbent upon the opposite parties to have first made the police investigation regarding the commission of such offence and only thereafter the proceedings under Section 7 of the Police Act could have been initiated against the appellant.

5. Learned counsel for the appellant submitted that Para 490 of the U.P. Police Regulations provides procedure for the departmental trial of a subordinate Police Officer. Para 490 makes it incumbent upon the Enquiry Officer to record the statement of the witnesses in his own hand writing which was not done in the present case.

6. It has also been asserted that the learned Single Judge while deciding the writ petition failed to appreciate that the Enquiry Officer conducted the departmental enquiry in most illegal and arbitrary manner without affording regular opportunity of hearing to the appellant as he was not provided a copy of the preliminary enquiry report , medical report of the Medical Officer, in which it is stated that the petitioner was under intoxication as held by the Enquiry Officer. The learned Single Judge also failed to appreciate that the Enquiry Officer had relied upon the preliminary enquiry report and overlooked the fact that the same has not been supplied to him. Lastly, it has been contended that the learned Single Judge erred in not appreciating the fact that there was no reason or justification for the Competent Authority to disagree with the punishment of the reduction in pay scale as proposed by the Enquiry Officer and awarding extreme punishment of dismissal from service.

7. On the other hand, learned Standing Counsel has submitted that the disciplinary proceedings were initiated against the appellant under the provision of Section 7 of the Police Regulation Act and on 18.3.1991 a charge sheet was issued to him, to which reply was submitted by the appellant on 9.4.1991 denying the charges levelled against him. After denial of the charges, witnesses of the case were examined in presence of the appellant and ultimately after completing due procedure, the Enquiry Officer reached to the conclusion that the charges levelled against the appellant were found proved and the appellant is guilty for the same. On 13.4.1992 a show cause notice was issued to the appellant by the Superintendent of Police with the direction to submit reply in respect of proposed punishment of dismissal from service. As the reply given by the appellant was not found satisfactory, the Disciplinary Authority passed the impugned order of dismissal dated 31.10.1992. Being dis-satisfied with the order of dismissal dated 31.10.1992 the appellant filed Writ Petition No. 552 of 1993 (S/S), which was ultimately dismissed, as averred above. The review petition filed by the appellant was also rejected. The learned Single Judge did not find any violation of principle of natural justice or any defect as alleged by the appellant. The judgments and orders passed by the learned Single Judge are perfectly justified and legal, therefore, the instant Special Appeal deserves to be dismissed.

8. After considering the material on record, it comes out that the alleged misconduct as disclosed in the charge sheet, amounts to commission of a cognizable offence under Sections 323, 504, 506 IPC read with Section 34 of the Police Act, 1861. As per provisions of para 486 of the U.P. Police Regulations, it was incumbent upon the authorities to have got the alleged offence investigated first and only thereafter the competent authority, i.e., Superintendent of Police should have taken a decision as to whether a Departmental action under Section 7 of the Police Act was liable to be taken against the appellant or not. It was mandatory on the part of the opposite parties to have first got the alleged misconduct, which amounts to cognizable offence, investigated and only thereafter any departmental action could have been taken as held by the Hon'ble Supreme Court in the case of State of U.P. vs. Babu Ram Upadhyay (AIR 1961 SC 751). However, in the present case no Police investigation was done which is contrary to para 486 of the Police Regulation.

9. It is relevant to point that the learned Single Judge while deciding the writ petition failed to appreciate that the Enquiry Officer conducted the Departmental Enquiry in a most illegal and arbitrary manner without affording reasonable opportunity of hearing to the appellant as he was not provided copy of the preliminary enquiry report and medical report of the medical officer in which he was found to be under intoxication, as held by the Enquiry Officer.

10. At this juncture,it would be useful to refer few decisions of the Apex Court rendered with regard to procedure to be adopted during disciplinary proceedings. In Kashinath Dikshita versus Union of India and others; (1986)3 SCC 229 the Hon'ble Supreme Court emphasized that the delinquent employee facing a departmental enquiry cannot effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity has been held to be an essential ingredient in disciplinary proceedings.

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

12. In State of Uttaranchal & ors. V. Kharak Singh, JT 2008(9) SC 205, the Apex Court has enumerated some of the basic principles to be observed while conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

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

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

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

13. In State of U.P. and others v. Saroj Kumar Sinha [(2010) 2 SCC 772] the Apex Court reiterated that departmental enquiry conducted against the Government servant 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 Supreme Court further observed that 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.

14. In State of U.P. v. C.S. Sharma, AIR 1968 SC 158 the Supreme Court held that omission to give opportunity to an employee to produce his witnesses and lead evidence in his defence vitiates the proceedings.

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

16. In Mohd. Yunus Khan v. State of U.P. & Ors. reported in (2010) 10 SCC 539, the Hon'ble Supreme Court has held that enquiry is to be conducted fairly and reasonably and enquiry report must contain reasons for reaching the conclusion that charge framed against delinquent stood proved against him. It cannot be ipse dixit of enquiry officer. Punishment for misconduct can be imposed in consonance with statutory rules and principles of natural justice.

17. At this juncture it is relevant to point out that some of the documents which were demanded by the petitioner were not supplied to him. The law is well settled that if a document has been utilized against a delinquent employee without furnishing the copy of the same to him, it would vitiate the entire disciplinary proceedings. Moreover, such lapse would vitiate the departmental

proceedings unless it was shown and established as a fact that non-supply of copies of those documents had not caused any prejudice to the delinquent in his defence.

18. Having considered the material on records, we are of the view that the learned Single Judge has committed error apparent on the face of record while coming to the conclusion that the medical report, a copy of which was not supplied to the appellant, was not proposed as evidence. In fact in the charge-sheet no document was proposed as evidence and only a list of witnesses was submitted with the charge sheet. While recording the statement of the witnesses the documents such as, medical report and preliminary enquiry report, were relied by the witnesses which were accepted by the Enquiry Officer. Thus, the procedure adopted during the course of inquiry is totally defective and it is a drastic deviation from the established procedure generally adopted in departmental inquiries.

19. It may be added that preliminary enquiry report was submitted by the Station Officer-in-Charge who has reported that the appellant was found drunk while on duty but apellant was not allowed to cross examine him, which vitiates the disciplinary proceedings. There is no dispute to the fact that the Enquiry Officer recommended for reduction in pay scale but Superintendent of Police, Sitapur Shri R.N. Singh, against whom the appellant has alleged malafides, did not agree with the recommendation of the Enquiry Officer and enhanced the punishment into an order of dismissal. No cogent reasons have assigned by the Superintendent of Police Sitapur for enhancing the order of quantum of punishment. This is also a defect which vitiates the order of dismissal.

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

21. Taking the holistic view of the matter, we have no hesitation in saying that the inquiry has been conducted in utter disregard to the principles of natural justice. Since the impugned order has been passed on the basis of the inquiry report, which suffers from procedural illegality and violative of principles of natural justice, it vitiates the order of punishment.

22. In the result, the impugned judgements dated 22.3.2002 and 22.4.2004 and the order of punishment dated 31.10.1992 are hereby quashed. The appellant shall be reinstated in service forthwith. However, it is clarified that the appellant would be entitled for 50% of the backwages from the date of date of dismissal to the date of reinstatement but the period from the date of dismissal to the date of reinstatement shall be treated as period rendered in service for the purposes of pensionary benefits. As the punishment order was passed way back in 1992 and since the petitioner has undergone a series of harassments on

account of long drawn litigation, we are not inclined to give any liberty to the department for initiating fresh inquiry as it would amount to further harassment of the petitioner, who either would be at the fag end of his service or might have attained the age of superannuation recently.

23. The Special Appeal, Review Petition and writ petition shall stand allowed in above terms.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2014

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

Special Appeal No. 467 of 2014

Radhey Lal Verma & Ors. 3743(S/S) 2014
..Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Indu Prakash Singh, Sri Deepak Singh

Counsel for the Respondents:
C.S.C., Sri Chandra Shekhar Pandey

Constitution of India, Art.-226-Writ jurisdiction-practice & procedure-identical writ petitions challenging validity of clause (3) of G.O. 24.07.2012-pending-Single Judge can not single out and dismiss the petition-without considering merit of case-held-order not sustainable-set-a-side-with direction to decide this petition along with identical other bunch cases.

Held: Para-11
Admittedly, a bunch of Writ Petitions is pending wherein validity of Clause-3 of the impugned Government Order dated 24th July, 2012 has been challenged. In the instant case also, the petitioners-appellants have challenged validity of Clause-3 of the Government Order. In any case, dismissal of Writ Petition at this stage, without adjudicating the controversy involved, and without recording a finding in terms of reliefs claimed, seem to be unjustified.

Case Law discussed:
1995 Supp (1) SCC 461.

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

1. Heard Sri I.P. Singh, learned counsel appearing for the appellants and Sri Abhinav N. Trivedi, learned Standing Counsel.

2. With the consent of learned counsel for the parties, we dispose of the Appeal at the admission stage itself.

3. The question with regard to retrospective effect of Government Order dated 24th July 2012 is pending adjudication before learned Single Judge, whereby Clause-3 of the said Government Order, has been impugned. In view of Clause-3 of the Government Order, the State Government has given effect to Government Order with regard to age of superannuation with prospective effect.

4. According to appellants' learned counsel, attention of learned Single Judge was invited to the fact that a bunch of writ petitions are pending whereby Clause-3 of the said Government Order has been impugned.

5. A perusal of order dated 25th July 2014 passed by learned Single Judge in Writ Petition No. 3743 (S/S) of 2014 reveals that the learned Single Judge has declined to apply Government Order

dated 24th July, 2014 relying upon Clause-3, which provides that the age of superannuation has been increased to 60 years prospectively. Accordingly, the writ petition was dismissed.

6. So far as the dismissal of the Writ Petition on merits is concerned, it seems to be based on sound principle of law on the ground that the State Government had applied the Government Order with prospective effect with regard to enhancement of age of superannuation. However, the fact remains that the Government Order dated 24th July 2014 has been impugned in a number of Writ Petitions, which are pending adjudication in this Court. This fact is apparent from order dated 22nd July, 2014 passed in Writ Petition No. 3614 (S./S) of 2014: Ram Pal & ors vs. State of U.P. & ors., a copy of which was filed as Annexure-2 to the Writ Petition preferred by the appellants before the learned Single Judge.

7. A perusal of the reliefs claimed by the appellants in the Writ Petition preferred before the learned Single Judge reveals that the appellants have also challenged Clause-3 of the Government Order dated 24th July 2012. For convenience, the reliefs claimed by the appellants in the Writ Petition are reproduced as under:

"a. issue a writ, order or direction in the nature of certiorari thereby quashing the retirement orders dated 30.06.2012 and 30.12.2011 issued by the opposite parties as well as quash the implementation of letter dated 16.04.2012 (with respect to the petitioners only) written by opposite party no.1 to opposite party no.2 that the retirement age of the corporation need not be enhanced.

b. issue a writ, order or direction in the nature of certiorari thereby quashing the clause 3 of the order dated 24.7.2012 where in it is provided that this order will be effective with immediate effect and the last para of the order 26.7.2012 where in it is provided that this order will be effective with immediate effect, with respect to the petitioners only.

c. issue a writ, order or direction in the nature of mandamus, commanding and directing the opposite parties to allow/treat the petitioners to continue in service till he attains the age of 60 years i.e. till 30.06.2014 and to pay him salary each and every month when it falls due and also give all the consequential benefits to the petitioners.

d. issue any other suitable order or direction which this Hon'ble Court may deem, fit, just and proper under the circumstances of the case in favour of the petitioner.

e. Allow the writ petition of the petitioners with cost. "

8. On the face of the record, not only the petitioners claimed extension of retirement date, but also prayed for quashment of Clause-3 of Government Order dated 24th July, 2012, which is subject matter of dispute in bunch of pending Writ Petitions in this Court. Dismissal of the Writ Petition at this stage, when admittedly a bunch of Writ Petitions wherein identical Clause-3 has been impugned is pending, seems to be unjustified, that too without recording any finding with regard to the validity of Clause-3 of aforesaid Government Order. We are also informed that a number of bunch writ petitions were allowed by this Court. Copy of one such judgment was also placed on record before the learned Single Judge as Annexure-13 to the Writ Petition.

9. It is well settled proposition of law that at the admission stage, while dealing with subject matter, the Court should not single out the petitioner in case other bunch of Writ Petitions is pending with regard to adjudication of the same controversy, that too, without recording a finding on merit in terms of relief claimed by the litigant. It is always appropriate for the Court to proceed in terms of reliefs and pleadings on record, and if, prima facie, case is made out, and the facts and circumstances require, then the respondent(s) may be called upon to file their counter affidavit containing parawise reply to the writ petition so that the controversy involved may be adjudicated on merits after providing opportunity of hearing to the parties.

10. In this regard, we may aptly reproduce the observations of the Hon'ble Apex Court in the case of Vishnu Traders vs. State of Haryana and Ors. Reported in 1995 Supp (1) SCC 461 wherein it was observed:

"In the matters of interlocutory orders, principle of binding precedents cannot be said to apply. However, the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach."

11. Admittedly, a bunch of Writ Petitions is pending wherein validity of Clause-3 of the impugned Government Order dated 24th July, 2012 has been challenged. In the instant case also, the petitioners-appellants have challenged validity of Clause-3 of the Government Order. In any case, dismissal of Writ Petition at this stage, without adjudicating the controversy involved, and without recording a finding in terms of reliefs claimed, seem to be unjustified.

12. In view of the above discussion, the appeal deserves to be allowed. Accordingly, it is allowed. Impugned Judgment and order dated 25th July, 2014 passed in Writ Petition No. 3743 (S/S) of 2014 is set aside. The Writ Petition is restored to its original number and shall be listed before the appropriate Bench in the third week of September, 2014 along with other similar bunch of Writ Petitions. Officer-on-Special Duty (Classification) shall find out and inform the Joint Registrar (Listing) of this Bench with regard to all pending identical matters so that the petitions may be listed and decided simultaneously on merits. Learned Chief Standing Counsel of this Bench shall also provide list of all such identical cases to the Joint Registrar (Listing). In the meantime, learned counsel for the respondents shall file counter affidavit to the present Writ Petition No.3743 (S/S) of 2014 as well as other Writ Petitions.

13. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 900 of 2014

Usha Devi (Smt.) .Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Alok Kumar Yadav, Sri Niraj Tiwari

Counsel for the Respondents:
C.S.C., Anil Tiwari, Sri V.P. Yadav, Sri R.P. Yadav

U.P. Panchayat Raj 1947-Section 95(i)(g)-Cessation of financial and administrative power of village Pradhan on basis of report by District Saving Officer-not a District level authority as envisaged under Rule 2(c) of Rule 1997-in view of Full Bench decision-such report can not be used as material for exercising power under section 95(1)(g) of Act-order impugned quashed-petition allowed.

Held: Para-16
The documents on record show that the only order passed by District Magistrate was addressed to Chief Development Officer to take appropriate action on the complaint. The letter dated 29.6.2013 issued by District Panchayat Raj Officer clearly says that District Magistrate vide order dated 18.6.2013 has appointed District Saving Officer, Jaunpur as Enquiry Officer to conduct preliminary enquiry but no enquiry report has been submitted by District Saving Officer. This fact is not disputed by respondents. It is thus evident that Assistant Director (Saving) was never an officer, appointed by District Magistrate, to conduct enquiry in the matter. He has submitted report, either after receiving some instruction from District Saving Officer or from any other officer, orally. The report therefore, submitted by Assistant Director (Saving), is illegal and without jurisdiction. It would not qualify to be a relevant document on which an order under Rule 3(5) read with Proviso to Section 95(1)(g), for cessation of administrative and financial powers of Gram Pradhan, could have been passed, in view of law laid down by Full Bench in Vivekanand Yadav (supra).

Case Law discussed:
2010(10) ADJ 1 (FB)

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

1. Heard Sri Alok Kumar Yadav, learned counsel for the petitioner Sri V.P.Yadav, learned counsel for the respondents and perused the record.

2. The writ petition is directed against order dated 19.12.2013 (Annexure 9 to the writ petition) passed by District Magistrate, Jaunpur under Section 95(1)(g) of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "Act, 1947") restraining petitioner from exercising financial and administrative powers in the capacity of Pradhan, Gram Sabha Tazuddinpur, Block Mariyahoon and appointing Enquiry Officer to conduct final inquiry under the rules on the basis of a fact finding report submitted by Assistant Director, (Savings), Jaunpur and Junior Engineer, Rural Engineering Services, Mariyahoon in a joint inquiry.

3. The facts giving rise to the present dispute are as under:

4. The petitioner was elected Gram Pradhan of Gram Sabha Tazuddinpur, Tehsil Mariyahoon, District Jaunpur in the election held in 2010. One Manoj Kumar, Son of Raj Bahadur Yadav, on account of animosity, made a complaint dated 06.5.2013, which was allegedly signed by some other villagers also. On the said complaint, District Magistrate, Jaunpur passed an order directing Chief Development Officer, Jaunpur to take "immediate necessary action". District Panchayat Raj Officer, Jaunpur issued a letter dated 29.6.2013 addressed to District Savings Officer informing that on the complaint made by Sri Manoj Kumar with a notarial affidavit, District Magistrate, vide order dated 18.6.2013

has appointed him (District Savings Officer) as Enquiry Officer and therefore, he should submit report within a fortnight.

5. However, an enquiry report thereafter was submitted by Assistant Director (Savings) Jaunpur. Most of the work, he found, was performed but in respect to construction, he found following shortcomings:

''1. कार्य की स्वीकृति नहीं पाई गयी।
2. कार्य का स्टीमेट बनवाया गया किन्तु उसकी स्वीकृति नहीं पाई गयी।
3. कार्य कराकर भुगतान किया गया जिसकी तकनीकी जांच नहीं कराया।''

English Translation by the Court

"1. No approval for the work was found
2. The estimate of the work was prepared but approval therefor was not found to be there.
3. Having the work done payment was made but no technical examination was conducted."

6. He (Assistant Director Saving, Jaunpur) also appended following note in the report:

''नोटः– अवर अभियन्ता ग्रामीण अभियंत्रण विभाग मडियाहु जौनपुर द्वारा उपलब्ध करायी गई जांच आख्या के कालम 6 एवं 7 पर व्यय धनराशि कैश बुक के अनुसार भिन्न पाई गई है।''

English Translation by the Court

"Amounts of expenses as in columns 6 and 7 of the inquiry report made available by the Junior Engineer, Rural Engineering Department, Mariyahu, Jaunpur were found to be different when compared with the Cash Book."

7. The District Magistrate, thereafter issued a show cause notice dated 30/31.10.2013 (Annexure 6 to the writ petition). The petitioner was required to submit reply as to why further action under Section 95(1)(g) of Act, 1947 be not taken against him since petitioner is found guilty of misappropriation of funds of Rs.7,97,744/-. The petitioner filed reply dated 27.11.2013 denying all the allegations but thereafter District Magistrate has passed the impugned order ceasing financial and administrative power of petitioner during regular final enquiry under Section 95(1)(g) of Act, 1947.

8. Counsel for the petitioner contended that no fact finding enquiry or preliminary enquiry has been conducted by inquiry officer appointed by District Magistrate and therefore, the very report, on which District Magistrate has passed impugned order, has been submitted by a person, who was not authorized to do so, hence the entire proceedings are illegal and void ab initio. It is submitted that in view of Full Bench judgment of this Court in Vivekanand Yadav Vs. State of U.P. & Anr., 2010 (10) ADJ 1 (FB), District Magistrate can rely upon report of a person, who is an "Enquiry Officer", as defined under Rule 2(c) of U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as "Rules, 1997") and also if preliminary enquiry has been conducted by District Magistrate himself and not otherwise.

9. The matter has been contested by respondents. A counter affidavit has been filed on behalf of respondents 1 and 2, which has been sworn by Sri A.K.Singh, District Panchayat Raj Officer, Jaunpur.

He has stated therein that after receiving complaint, District Magistrate, vide order dated 30.08.2013, nominated Assistant Director (Savings), Jaunpur, Junior Engineer Rural Engineering Services and Station House Officer, Madiyahoon to conduct a preliminary enquiry. They submitted report showing petitioner, prima facie guilty, of misappropriation/embezzlement of a sum of Rs.7,97,744/- whereupon a show cause notice was given to petitioner and after considering his reply, impugned order dated 19.12.2013 has been passed, which is absolutely valid and in accordance with law and warrants no interference. Copy of enquiry report submitted by Assistant Director (Savings), Jaunpur has also been placed on record as Annexure C.A.1 to the aforesaid counter affidavit.

10. Sri V.P.Yadav, Sri Anil Tiwari and Sri Rajeshwar Prasad Yadav, Advocates, have filed an impleadment application as well as counter affidavit on behalf of Manoj Kumar Yadav, complainant, and therein have annexed copy of their complaint dated 06.5.2013. It is stated that an enquiry was conducted by Assistant Director (Savings), Jaunpur, who submitted tentative report dated 03.08.2013 to District Panchayat Raj Officer, Jaunpur. The report was not complete as on certain technical aspect, no opinion was expressed and therefore, a team was constituted comprising of Assistant Director (Savings), Jaunpur, and a Junior Engineer (Rural Engineering Services), who has technical knowledge. The said team inspected the site, conducted technical inspection and thereafter submitted another report on 28.7.2013, on the basis whereof, impugned order has been passed, which does not warrant any interference.

11. The only question, up for consideration, whether on the basis of so called preliminary report/fact finding report, submitted by Assistant Director (Saving), an order for ceasing financial and administrative powers could have been passed under Section 95(1)(g) of Act, 1947.

12. The law laid down by Full Bench in Vivekanand Yadav (supra) can be summarised as under:

(I) Section 95(1)(g) contemplates removal of Pradhan while Proviso to Section 95(1)(g) talks of enquiry before ceasing financial and administrative powers during pendency of a removal proceeding. If Pradhan is prima facie found to have committed financial and other irregularities, preliminary/fact finding enquiry under Section 95(1)(g) proviso is necessary, which has to be conducted under Rule 4 of Rules, 1997.

(II) Proviso to Section 95(1) would apply to Section 95(1)(g) contemplating removal but not to any other provision like Proviso to Section 95(1)(g).

(III) The proviso to Section 95(1) provides for reasonable opportunity in removal proceedings of a Pradhan under Section 95(1)(g) but it does not apply to Proviso to Section 95(1)(g) providing for preliminary or fact finding enquiry: the purpose of this enquiry is to find out if there is any prima facie case against Pradhan or not.

(IV) Proviso to Section 95(1)(g) providing cessation of financial and administrative powers does contemplate a preliminary enquiry by a person and procedure is to be prescribed: the Rules have to be framed for the same. Rules, 1997 thus have been framed because it is so mandated in the Proviso to Section

95(1)(g) of Act, 1947 and not because of 95(1)(g) or the Proviso to Section 95(1).

(V) The District Magistrate can order a preliminary enquiry on the complaint or report or otherwise. The word 'complaint' or 'report' refers to the complaint by a private person or to the report made by a public servant under Rule 3.

(VI) The District Magistrate has power to refer a case for preliminary enquiry even if there is no complaint or report. In other words, he has power to act suo moto.

(VII) Even if a complaint made is not entertainable in view of Rule 3(5) of Rules, 1997 yet District Magistrate can always refer the matter for preliminary enquiry, if he consider that it should be so enquired; since he can act suo moto.

(VIII) The word "otherwise" in Rule 4 means that District Magistrate has suo motu powers to order a preliminary enquiry, and, he may order a preliminary enquiry even if there is no complaint or report; or a defective complaint, not in accordance with Rules 3(1) to 3(4).

(IX) A Pradhan has no right to object that a complaint is not in accordance with Rules 3(1) to 3(4) of Rules, 1997 and hence no inquiry can be ordered.

(X) A Pradhan is neither entitled to be associated in preliminary enquiry nor entitled to get copy of preliminary enquiry report. His only right is to have his explanation or point of view or version to the charges considered before the order for ceasing his financial and administrative power is passed.

(XI) It is not only necessary that explanation or point of view or version of affected pradhan should be obtained but should also be considered before being prima facie satisfied of his being guilty of financial and other irregularities and ceasing his powers. The consideration of explanation does not have to be a detailed one but there should be indication that mind has been applied.

(XII) The proceeding for removal has to be conducted in accordance with Rules 6 onwards of Rules, 1997, irrespective of the fact whether right to exercise financial and administrative power was ceased or not. However, where right to exercise financial and administrative power is also to be ceased then procedure in Rules 3 to 5 has to be followed, otherwise there is no necessity to follow them.

(XIII) In other words, preliminary enquiry may not be necessary if the proceeding for removal is to be undertaken without ceasing power of pradhan in respect to administrative and financial matters.

(XIV) In order to exercise power under Rule 5, to cease administrative and financial powers of Pradhan under Proviso to Section 95(1)(g) of Act, 1947, District Magistrate can pass order in the following contingencies:

(i) A complaint can be made directly to the District Magistrate who may ask the enquiry officer as defined under Rule 2 (c) to conduct a preliminary inquiry under Rule 4 ; or

(ii) A complaint can be made directly to the enquiry officer defined under Section 2 (c), who may submit a report without the District Magistrate asking for it ; or

(iii) A complaint can be made to the District Magistrate with a copy to enquiry officer, who may submit a report, without the District Magistrate asking for it ; or

(iv) A District Magistrate can himself conduct a preliminary enquiry.

(XV) Any other report can be considered by District Magistrate under

Rule 3(6) of Rules, 1997 for ordering preliminary enquiry but final enquiry with cessation of power cannot be ordered on its basis. In other words, action under Proviso to Section 95(1) (g) can also be taken on the preliminary report of District Magistrate as well as on a report of a person defined as enquiry officer under Rule 2(c) of Rules, 1997. Only these reports would be covered in the word 'otherwise' of Rule 5.

13. Now, in the light of above exposition of law, it has to be examined, in the case in hand, whether enquiry report relied on by District Magistrate, treating it to be a preliminary enquiry report, satisfy the requirement of statute or not.

14. Firstly, I do not find any order passed by District Magistrate appointing any District Level Enquiry Officer to conduct a preliminary enquiry in this matter. Different orders and dates have been mentioned, inasmuch as, in District Panchayat Raj Officer's letters dated 29.6.2013 (Annexure 3 to the writ petition) it is stated that District Magistrate has appointed District Saving Officer, Jaunpur as Enquiry Officer. The relevant part reads as under:

''जिसकी जाचं हेतु जिलाधिकारी महोदय के आदेश दिनांक 18.06.2013 द्वारा आपको जाचं अधिकारी नामित किया गया है।''

English Translation by the Court

"For enquiry whereof, vide District Magistrate's order dated 18.06.2013, you have been nominated as Enquiry Officer."

15. In the counter affidavit filed on behalf of respondents 1 and 2, it has been stated in para 4 thereof that vide order dated 30.8.2013, District Magistrate nominated Assistant Director (Savings), Jaunpur; Junior Engineer, Rural Engineering Service, and Station House Officer, Mariyahoon to conduct preliminary enquiry. In the counter affidavit, filed by complaint Manoj Kumar Yadav, he has referred to a report dated 3.8.2013 submitted by Assistant Director (Saving), Jaunpur to District Panchayat Raj Officer, Jaunpur with reference to his letter dated 29.6.2013 pursuant whereto the said report was submitted. Thereafter another report was submitted by Assistant Director (Saving) with letter dated 28.9.2013 and here also it has referred to District Panchayat Raj Officer's letter dated 29.6.2013 and none else. There is no reference of any alleged letter dated 30.8.2013 of District Magistrate nominating a three members committee to conduct preliminary enquiry and submit report consisting of Assistant Director (Saving), Junior Engineer, Rural Engineering Service and Station House Officer, Mariyahoon.

16. The documents on record show that the only order passed by District Magistrate was addressed to Chief Development Officer to take appropriate action on the complaint. The letter dated 29.6.2013 issued by District Panchayat Raj Officer clearly says that District Magistrate vide order dated 18.6.2013 has appointed District Saving Officer, Jaunpur as Enquiry Officer to conduct preliminary enquiry but no enquiry report has been submitted by District Saving Officer. This fact is not disputed by respondents. It is thus evident that Assistant Director (Saving) was never an officer, appointed by District Magistrate, to conduct enquiry in the matter. He has submitted report, either after receiving some instruction from District Saving Officer or from any other officer, orally. The report

therefore, submitted by Assistant Director (Saving), is illegal and without jurisdiction. It would not qualify to be a relevant document on which an order under Rule 3(5) read with Proviso to Section 95(1)(g), for cessation of administrative and financial powers of Gram Pradhan, could have been passed, in view of law laid down by Full Bench in Vivekanand Yadav (supra).

17. Even otherwise, Assistant Director (Saving) is not a District Level Officer and, therefore, he would not satisfy definition of "Enquiry Officer" under Rule 2(c) of Rules, 1997. His report therefore, also cannot treated to be a "preliminary enquiry report" submitted by a Enquiry Officer, as defined in Rules 1997. That being so, such a report cannot constitute a valid material to pass an order for cessation of financial and administrative powers under Section 95(1)(g) Proviso, read with Rule 3(5) of Rules, 1997.

18. In the result, the writ petition succeeds and is allowed. The impugned order dated 19.12.2013 (Annexure 9 to the writ petition) being wholly illegal and without jurisdiction, is hereby quashed.

19. The petitioner shall be entitled to cost, which I quantify to Rs.5,000/-.

APPELATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.08.2014

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE ASHWANI KUMAR SINGH, J.

Criminal Appeal No. 973 of 2006

Nand Kishore @ Seth Pasi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Amol Kumar, Sri Brij Mohan Sahai
Sri Mukesh Kumar Tewari, Sri Rajendra Prasad Mishra, Sri Vinod Kumar Mishra

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section 374(2)-Criminal Appeal-against conviction of life imprisonment with fine of Rs. 10,000/- u/s 376 IPC-Appeal on ground appellant having no previous criminal history-confined in jail since 2004-according to medical opinion age of victims was between 13 to 14 years-but in opinion of Court less than 16 years-Court has to strike just balance-period of incarceration-enough punishment modified-already undergon-fine imposed by Trail Court confirmed-compensation to victim-be paid without delay-in case of default-have to go 3 years rigorous imprisonment-appeal disposed of.

Held: Para-22 & 23

22. However, having regard to the extenuating circumstances pointed out by the learned counsel in the instant case, especially, the fact that the appellant is in jail for complete ten years as on today, we feel that present period of incarceration is enough and he should not be made to further suffer the consequences of his bestiality.

23. In view of the law, as discussed above, and in view of the facts and circumstances of the case, we find that the ends of justice would successfully meet if the appellant is awarded punishment already undergone by him. The fine imposed by the trial court is upheld. The appellant shall pay the fine, if the same has not already been paid, within sixty days from the date of receipt of record by the learned trial Court, which, shall, in turn, pay a sum of 7000/-, as compensation to the victim, without delay. In the event of default in payment of fine, the appellant shall have to undergo rigorous imprisonment for three years.

Case Law discussed:
2000 Crl. L.J. 2286: (2000) 6 SCC 168.

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

1. This appeal under Section 374(2) Cr.P.C. has been preferred by appellant Nand Kishore @ Seth, son of Ram Dheraj against the judgment and order dated 01.05.2006 passed by Special Judge(S.C./S.T.) Act/Addl. Sessions Judge Court No.2, Balrampur in Sessions Trial No108/2004 (State of U.P. v. Nand Kishore @ Seth) convicting and sentencing the appellant under Section 376 I.P.C. for imprisonment of life and a fine of Rs.10,000/- and in default of payment of fine to further undergo R.I. of three years. Out of the amount of fine, Rs.7000/- was to be paid as compensation to the victim.

2. Briefly stated, the prosecution case is that victim (name withheld by us) daughter of complainant, Chinkau @ Radhey Shyam, was aged about 10 years, on 29.6.2004 at about 5:00 p.m. was playing at the door; Appellant Nand Kishore @ Seth, son of Ram Dheraj, whose house situates next to the house of complainant Chinkau @ Radhey Shyam, enticed the victim and took her to his house; he committed rape on the victim who came back to her house crying. Complainant Chinkau @ Radhey Shyam, who was present at the house, saw blood oozing out from victim's private parts and when he enquired, she narrated that appellant Nand Kishore @ Seth after removing her underpants, committed sexual intercourse with her and when she started weeping she was left.

3. The first information report(Ext. 'Ka'-4) of the present incident was lodged on the same day, i.e. 29.6.2004 at 22:00 hours. The victim was examined at M.I.K. Female Hospital, Balrampur on 30.6.2014 at about 1:30 a.m. by P.W.6 Dr.Arunima Srivastava. On 1.7.2014 P.W.7 Dr.O.PSrivastava,Dental Surgeon took X-ray of mandible lateral/view and opined the victim's dental age to be 10-12 years(Ext. 'KA'-9). Dr.Y.P.Gupta(P.W.8) also X-rayed right elbow, right wrist of victim; epiphysis of Head of radius and lower end of radius & ulna and medial epicondyle of the humerus and found that they were not fused(Ext. 'Ka'-8).

4. The investigation was conducted by S.I.Rajendra Prasad; the accused was arrested on 1.7.2004; after completion of the investigation, charge-sheet was submitted to the court of Chief Judicial Magistrate. The court proceeded with other legal formalities and then committed the case to the Court of Sessions. The accused denied charge framed against him for the offence punishable under Section 376 I.P.C. and claimed to be tried.

5. The prosecution, to prove its case, examined Chinkau @ Radhey Shyam (P.W.1); Ram Pooran (P.W.2); the victim (P.W.3); Investigating Officer S.I. Rajendra Prasad((P.W.4); H.C. Ashok Kumar Singh(P.W.5); Dr. Smt. Arunima Srivastava (P.W.6); Dr. O.P.Srivastava (P.W.7) and Dr. Y.P.Gupta (P.W.8).

6. Ram Narain and accused Nand Kishore @ Seth were examined as D.W. 1 and 2 respectively.

7. I have heard learned counsel for the parties and perused the record of the trial court.

8. The Medical Report of the victim examined by P.W.6 Dr.Arunima Srivastava - the general examination

revealed - the girl child is of 27 kg Wt., Ht. 127 c.m., teeth 6/6; 6/6. pubic and axillary hairs absent. No injury seen over the body but due to internal bleeding her Salwar and lower side of the back flap of Kurta is soaked in blood.

Internal Examination : - Index finger passed with difficulty into the Vagina. There is a linear tear in the right wall of the Vagina.

Investigation - (1) Referred to the Dental Surgeon Memorial Hospital, Balrampur for exact Dental age of the child. (2) Referred to the Radiologist for X-ray of Rt. Elbow - Rt.Wrist for radiological evaluation of the age. (3) Vag. Smear prepared and sealed and sent to the Pathologist, Dufferin Hospital, Gonda. (4) Blood soaked clothes sealed and sent to Pachperwa, Kotwali.

X-ray report was given by Dr. O.P.Srivastava, Dental Surgeon(P.W.7) and Dr.Y.P.Gupta(P.W.8), Radiologist. Both the Doctors opined age of the victim to be 10-12 years.

9. The evidence adduced by Dr.Arunima Srivastava (P.W.6) indicates that, looking to the report (Ext. 'Ka'-8) of Radiologist and report(Ext. 'Ka'-9) of Dental Surgeon and from physical appearance, the victim appeared to be of 12 years. She also stated that it could be in between 13-14 years as well. She also stated that she found blood oozing out from vagina. She has stated in her examination-in-chief that she was playing in front of house of Vishwanath, which is near to her house. Appellant Nand Kishore called her and took her to his house and committed sexual intercourse with her. She wept and raised alarm, she came to her house and narrated the whole incident to her father. This witness further stated that she was medically examined and her statement was recorded in Court. This witness was cross-examined but nothing could be evolved in favour of the defence.

10. For the narrowed compass of consideration in this case i.e. whether the accused was the rapist, the most decisive evidence is the testimony of the victim herself, none else will be more competent than her to tell the Court as to who raped her. The aforesaid materials, i.e. medical evidence and statement of the victim are sufficient to show, beyond any spec of doubt, that the victim was sexually ravaged by appellant Nand Kishore @ Seth.

11. The scrutiny of the total evidence as well as discussions made by learned court below suggests that the learned trial court has analysed the evidence in a pragmatic manner and has reached to the correct conclusion. The learned trial court has wisely discussed and intelligently reached to the conclusion that the offence punishable under Section 376 I.P.C. is made out against appellant Nand Kishore @ Seth.

12. Learned counsel does not dispute the complicity of the appellant in the present crime but prays for considering the sentence awarded to the appellant by the court below. In the present case, appellant Nand Kishore @ Seth has been sentenced for life for the offence committed by him. Thus, while considering the sentence, we have to bear in mind that the offence was committed after the enforcement of Criminal Law Amendment Act (CLAA) No.43 of 1983.

So the provision prescribing more rigorous sentence must apply if the offence falls within the purview of sub-section (1) of Section 376, and then he "shall be punished with imprisonment of either description for a term which shall not be less than seven years". If the offence falls under sub-Section (2)(f) "commits rape on an woman when she is under 12 years of age" the offender is liable to be "punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

13. The question of age of victim is, therefore, important in this area. If she was below the age of 12, on the date of occurrence the minimum sentence would be rigorous imprisonment for 10 years.

14. P.W. 5, Dr.(Smt.)Arunima Srivastava in her cross-examination has stated that the victim could be of 13-14 years in age.

15. P.W.8 Dr. Y.P.Gupta in his examination-in-chief has stated that the victim was less than 16 years and could be aged in between 10-12 years.

16. The trial court has given a finding, after considering the evidence of P.W.6, P.W.7, and P.W.8, that the age of the victim was in between 10-12 years. The trial court ought to have weighed the evidence of age by considering the statement of P.W.6 Dr.(Smt.)Arunima Srivastava given in her cross-examination where she had stated that the victim could be of 13-14 years of age and also the evidence of P.W.8 Dr.Y.P.Gupta who stated in his examination-in-chief that the victim was less than 16 years. Therefore, we feel that it would not be unsafe if we say that the victim had crossed 12 years in age but was less than 16 years.

17. Learned counsel for the appellant has made a serious endeavour to reduce the sentence to the sentence already undergone and to compensate the victim financially.

18. So far as the sentence in the present case is concerned, the court has to strike a just balance. In the present case, the occurrence took place on 29.6.2004, i.e. ten years back, when the appellant was 23 years of age.

19. We are informed that the appellant has no other criminal antecedent. The appellant is in jail since 1.7.2004 and the record reveals that he has not come out from jail even for a single day. These are some of the factors which we need to take into consideration while imposing appropriate sentence on appellant.

20. Learned counsel states that in view of the above special mitigating circumstance, which exists in favour of the appellant, this Hon'ble Court may take a sympathetic view of the matter.

21. In a reported case, T.K.Gopal @ Gopi v. State of Karnataka (2000 Crl. L.J. 2286: (2000) 6 SCC 168), Hon'ble the Supreme Court observed in paras 13, 14, 15 & 18 as under :

"13. In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate: the traditional reaction of universal nature which is

termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation."

"14. Under the punitive approach, the rationalisation of punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community."

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy. [See: Sunil Batra v. Delhi Admn. [(1978) 4 SCC 494 : 1979 SCC (Cri) 155 : AIR 1978 SC 1675 : (1979) 1 SCR 392] , Sunil Batra (II) v. Delhi Admn. [(1980) 3 SCC 488 : 1980 SCC (Cri) 777 : AIR 1980 SC 1579 : (1980) 2 SCR 557] , Charles Sobraj v. Supdt., Central Jail, Tihar [(1978) 4 SCC 104 : 1978 SCC (Cri) 542 : AIR 1978 SC 1514] and Francis Coralie Mullin v. Administrator, Union Territory of Delhi [(1981) 1 SCC 608 : 1981 SCC (Cri) 212 : AIR 1981 SC 746 : (1981) 2 SCR 516] .]"

"18. Here, in India, statutory provision for psychotherapic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places with the intention of treating the offender psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime."

22. However, having regard to the extenuating circumstances pointed out by the learned counsel in the instant case, especially, the fact that the appellant is in jail for complete ten years as on today, we feel that present period of incarceration is enough and he should not be made to further suffer the consequences of his bestiality.

23. In view of the law, as discussed above, and in view of the facts and circumstances of the case, we find that the ends of justice would successfully meet if the appellant is awarded punishment already undergone by him. The fine imposed by the trial court is upheld. The

appellant shall pay the fine, if the same has not already been paid, within sixty days from the date of receipt of record by the learned trial Court, which, shall, in turn, pay a sum of 7000/-, as compensation to the victim, without delay. In the event of default in payment of fine, the appellant shall have to undergo rigorous imprisonment for three years.

24. The Office is directed to send the lower court record along with copy of the judgment to the learned trial court, without delay, so as to ensure that it reaches the learned trial court within twenty days from today.

25. With the above observations, the appeal is disposed of, in such a fashion that it is partly allowed. The conviction is confirmed but the sentence is modified to the extent, as stated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2014

BEFORE
THE HON'BLE SANJAY MISRA, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II, J.

Writ Petition No. 1458(S/B) of 2011

Ram Chandra-II... Petitioner
Versus
State of U.P. & Ors. ... Respondents

Counsel for the Petitioner:
Sri O.P. Srivastava, Sri Virendra Kumar Dubey

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

Constitution of India, Art.-311(2)- Dismissal from service-challenged on ground of violation of principle of Natural Justice-finding recorded by enquiry officer not found in any manner perverse-dismissal order neither arbitrary not could be termed as disproportionate-warrant no interference-petition dismissed.

Held: Para-36
From the perusal of above noted laws and factual position of the case, it is evident that the departmental proceeding has been concluded in a lawful manner and the petitioner has been provided with an opportunity of being heard and to participate in the departmental proceedings. As discussed earlier, charge nos. 1 and 2 have been found proved though the petitioner denied his involvement with the car in question, but the finding of the Enquiry Judge was recorded otherwise based on materials available on record. Hence, the stand taken by the petitioner that the rules of natural justice has been violated while conducting the enquiry is not at all tenable in the eyes of law. The order passed by the State Government dated 15.04.2011, dismissing the petitioner from service, cannot be faulted with in any manner.

Case Law discussed:
[2013 (31) LCD 762]; (2010) 12 SCC 783; (2011) 11 SCC 324; (1997) 6 SCC 339; (1993) 2 SCC 56.

(Delivered by Hon'ble B.K. Srivastava-II, J.)

1. The petitioner was selected by the Lok Sewa Ayog Uttar Pradesh and he joined as Judicial Officer (Munsif Magistrate) on 06.04.1981. The petitioner was promoted in the Uttar Pradesh Higher Judicial Services on 15.05.2001 and posted as Additional District Judge. In June, 2009, the petitioner was transferred as Additional District Judge, Agra where he resumed his charge on 09.06.2009. The petitioner was placed under suspension vide order dated 03.08.2009 in

contemplation of departmental enquiry and attached with the District and Sessions Judge, Etah. The petitioner was served with a charge sheet dated 03.11.2009 on 10.11.2009 in which four charges were levelled against him. The first charge relates to demand of a car by the petitioner from a Police Inspector of Police Station Shahganj, District Agra and that he travelled in the said car from Agra to Vrindaban, Mathura, which was registered in the name of an accused involved in a murder case. The second charge relates to furnishing of a false information by the petitioner to the District Judge, Agra with ulterior motive as after taking permission to visit his home at Allahabad the petitioner visited to another place i.e. Vrindaban. The third charge relates to stay of petitioner in a private guest house after being transferred in Agra Judgeship in the month of June, 2009 even though he has been provided residence in Judges' Compound, Agra. The fourth charge relates to influence the judicial proceedings by the petitioner in some cases during his posting as Judicial Officer in Agra Judgeship.

2. With respect to the incident mentioned in charge nos. 1 and 2, the District Judge, Agra sent a confidential report dated 21.07.2009 to the Administrative Judge stating therein that the incident, which was published in the various news papers, had received wide publication and pursuant to which on 20.07.2009 an exhaustive report was prepared after ascertaining the veracity of the news report and also about the identity of the said officer after a proper enquiry conducted by Special Chief Judicial Magistrate.

3. The Administrative Judge called the petitioner for probing the matter as to validate the facts of the confidential report forwarded by District Judge, Agra. Further, the Administrative Judge wrote a letter dated 23.07.2009 to Hon'ble the Chief Justice regarding the conduct of the petitioner. The letter dated 23.07.2009 was considered by the Administrative Committee in its meeting held on 29.07.2009 and in pursuance of the resolution passed by the Administrative Committee the petitioner was placed under suspension vide order dated 03.08.2009 in contemplation of departmental enquiry and attached with the District and Sessions Judge, Etah. The departmental enquiry was instituted against the petitioner and witnesses were examined. The petitioner was given opportunity to provide his written submission as well as to cross examine the witnesses. The petitioner submitted written statement to the charge sheet on 23.11.2009.

4. The enquiry was proceeded against the petitioner, who was served with a copy of the report of the Administrative Judge. Statement of the petitioner was taken on record on 12.03.2010 by way of cross-examination in the enquiry. The petitioner submitted his written argument before the Enquiry Judge on 25.03.2010. The petitioner was supplied copy of the enquiry report dated 18.05.2010.

5. In the enquiry proceedings charge nos. 1 and 2 were proved against the petitioner and charge nos. 3 and 4 were dropped. The petitioner preferred a representation dated 01.09.2010 against the said enquiry report and the same was placed before the Administrative Committee for consideration along with enquiry report. The Administrative

Committee referred the matter to the Full Court for passing necessary order and the Full Court recommended the petitioner's dismissal from service. Hence, the petitioner has preferred the instant petition with the following reliefs:

"(I) to issue writ order or direction in the nature of certiorari quashing the impugned order of dismissal from service dated 15.04.2011 as contained in Annexure No. 1 to the writ petition with all consequential service benefits.

(II) to issue writ order or direction in the nature of mandamus directing and commanding the opposite parties to treat the petitioner in continuous service by giving him all consequential service benefits as if the impugned order of dismissal from service contained as Annexure No. 1 to the writ petition has never been passed.

(III) to issue any other writ order or direction which this Hon'ble court may deem just fit and proper under the circumstances of the case.

(IV) to allow the cost of the writ petition."

6. We have heard Sri O.P. Srivastava, learned Senior Counsel appearing on behalf of the petitioner, learned Standing Counsel appearing for respondent no.1-State and Sri Manish Kumar appearing for respondent no. 2-The High Court.

7. Argument advanced on behalf of the petitioner is that the impugned order of dismissal has been passed without affording an opportunity of hearing to the petitioner and, hence, the rules of principles of natural justice has been violated while conducting the enquiry. On the other hand, it was contended by learned counsel for respondents that the procedure for investigation and related steps has been followed with due procedure of law and it is also evident from the perusal of records itself that the petitioner has participated in enquiry and also afforded opportunity of being heard and there is no illegality in the impugned order passed as such.

8. Before adverting to the submissions made by learned counsel for the parties, it would be appropriate to consider the settled proposition of law as laid down by Hon'ble Supreme Court while considering the various aspects of disciplinary enquiry.

9. In the matter of Nirmala J. Jhala Vs. State of Gujarat and another reported in [2013 (31) LCD 762, the Hon'ble Supreme Court has dealt with disciplinary enquiry doctrine in following words:

LEGAL ISSUES:

I. Standard of proof in a Departmental Enquiry which is Quasi Criminal/Quasi Judicial in nature:

A. In M.V. Bijlani v. Union of India and Ors. AIR 2006 SC 3475, this Court held:

"... Disciplinary proceedings, however, being quasicriminal in nature, there should be some evidences to prove the charge. 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. (Emphasis added)

(See also: Narinder Mohan Arya v. United India Insurance Co. Ltd. and Ors. AIR 2006 SC 1748; Roop Singh Negi v. Punjab National Bank and Ors AIR 2008 SC (Supp) 921; and Krushnakant B. Parmar v. Union of India and Anr. (2012) 3 SCC 178)

B. In Prahlad Saran Gupta v. Bar Council of India and Anr. AIR 1997 SC 1338, this Court observed that when the matter relates to a charge of professional mis-conduct which is quasi-criminal in nature, it requires proof beyond reasonable doubt. In that case the finding against the delinquent advocate was that he retained a sum of Rs. 15,000/- without sufficient justification from 4-4-1978 till 2-5-1978 and he deposited the amount in the Court on the latter date, without disbursing the same to his client. The said conduct was found by this Court as "not in consonance with the standards of professional ethics expected from a senior member of the profession". On the said fact-situation, this Court imposed a punishment of reprimanding the advocate concerned.

C. In Harish Chandra Tiwari v. Baiju AIR 2002 SC 548, this Court made a distinction from the above judgment stating the facts in the aforesaid decisions would speak for themselves and the distinction from the facts of this case was so glaring that the misconduct of the Appellant in the present case was of a far graver dimension. Hence, the said decision was not of any help to the Appellant for mitigation of the quantum of punishment.

D. In Noor Aga v. State of Punjab and Anr. AIR 2009 SC (Supp) 852, it was held that the departmental proceeding being a quasi judicial one, the principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded there from. Inference on facts must be based on evidence which meet the requirements of legal principles. (See also: Roop Singh Negi v. Punjab National Bank and Ors. AIR 2008 SC (Supp) 921; Union of India and Ors. v. Naman Singh Sekhawat (2008) 4 SCC 1; and Vijay Singh v. State of U.P. and Ors. AIR 2012 SC 2840)

E. In M.S. Bindra v. Union of India and Ors. AIR 1998 SC 3058, it was held:

While evaluating the materials the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim "Nemo Firut Repente Turpissimus" (no one becomes dishonest all on a sudden) is not unexceptional but still it is salutary guideline to judge human conduct, particularly in the field of Administrative Law. The authorities should not keep the eyes totally closed towards the overall estimation in which the delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle of "doubtful integrity" it is not enough that the doubt

fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label 'doubtful integrity'.

F. In High Court of Judicature at Bombay through its Registrar v. Udaysingh and Ors. AIR 1997 SC 2286, this Court held:

The doctrine of `proof beyond doubt' has no application. Preponderance of probabilities and some material on record would be necessary to reach a conclusion whether or not the delinquent has committed misconduct.

G. In view of the above, the law on the issue can be summarised to the effect that the disciplinary proceedings are not a criminal trial, and in spite of the fact that the same are quasi-judicial and quasi-criminal, doctrine of proof beyond reasonable doubt, does not apply in such cases, but the principle of preponderance of probabilities would apply. The court has to see whether there is evidence on record to reach the conclusion that the delinquent had committed a misconduct. However, the said conclusion should be reached on the basis of test of what a prudent person would have done. The ratio of the judgment in Prahlad Saran Gupta (supra) does not apply in this case as the said case was of professional misconduct, and not of a delinquency by the employee."

Scope of Judicial Review:

"(i) It is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. (Vide: State of T.N. & Anr v. S. Subramaniam, AIR 1996 SC 1232; R.S. Saini v. State of Punjab, (1999) 8 SCC 90; and Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan, AIR 2006 SC 1214)

(ii) In Zora Singh v. J.M. Tandon & Ors., AIR 1971 SC 1537, this Court while dealing with the issue of scope of judicial review, held as under:

The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was

irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence." (Emphasis added)

(iii) The decisions referred to hereinabove highlights clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision- making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene."

10. The Hon'ble Supreme Court in the case of Rajesh Kohli v. High Court of Jammu and Kashmir and another reported in (2010) 12 SCC 783 has observed as under:

"32. Upright and honest judicial officers are needed not only to bolster the image of the judiciary in the eyes of the litigants, but also to sustain the culture of integrity, virtue and ethics among Judges. The public's perception of the judiciary matters just as much as its role in dispute resolution. The credibility of the entire judiciary is often undermined by isolated acts of transgression by a few members of the Bench, and therefore it is imperative to maintain a high benchmark of honesty, accountability and good conduct."

11. The Hon'ble Supreme Court in the case of Arundhati Ashok Walavalkar v. State of Maharashtra reported in (2011) 11 SCC 324 has observed as under:

"23. We are, however, unable to accept the aforesaid contention for the simple reason that we could probably interfere with the quantum of punishment only when we find that the punishment awarded is shocking to the conscience of the court. This is a case of a judicial officer who was required to conduct herself with dignity and manner becoming of a judicial officer. A judicial officer must be able to discharge his/her responsibilities by showing an impeccable conduct. In the instant case, she not only

traveled without tickets in a railway compartment thrice but also complained against the ticket collectors who accosted her, misbehaved with the railway officials and in those circumstances we do not see how the punishment of compulsory retirement awarded to her could be said to be disproportionate to the offence alleged against her.

24. In a country governed by the rule of law, nobody is above law, including judicial officers. In fact, as judicial officers, they have to present a continuous aspect of dignity in every conduct. If the rule of law is to function effectively and efficiently under the aegis of our democratic set-up, judges are expected to, nay, they must nurture an efficient and enlightened judiciary by presenting themselves as a role model. Needless to say, a judge is constantly under public gaze and society expects higher standards of conduct and rectitude from a judge. Judicial office, being an office of public trust, the society is entitled to expect that a judge must be a man of high integrity, honesty and ethical firmness by maintaining the most exacting standards of propriety in every action. Therefore, a judge's official and personal conduct must be in tune with the highest standard of propriety and probity. Obviously, this standard of conduct is higher than those deemed acceptable or obvious for others. Indeed, in the instant case, being a judicial officer, it was in her best interest that she carries herself in a decorous and dignified manner. If she has deliberately chosen to depart from these high and exacting standards, she is appropriately liable for disciplinary action."

12. In the case of High Court of Judicature at Bombay v. Shirishkumar RangaRao Patil and another reported in (1997) 6 SCC 339, the Hon'ble Supreme Court has observed as under:

"11. It is true that a resolution came to be passed authorising the Committee off five Judges to deal with imposition of punishment on judicial officers. The question of punishment on judicial officers. The question, therefore, is : whether it requires the Chief Justice and the Committee to initiate disciplinary proceedings? The "delegation of the function of the High Court in respect of punishment of judicial officers" is an expression of width and of wide amplitude to cover within its ambit the power to take a decision by the Committee from the stage of initiation of disciplinary proceedings, if necessary, till its logical and , viz., recommendation to the Government to impose a penalty proposed by the Committee. The recommendation is by the High court, the controlling authority under Article 235 of the constitution. Therefore, it is difficult to accept the contention of Shri Barta that the delegation is only for imposition of punishment on judicial officers. In fact, the High Court has no power to impose any punishment by itself. The appointing authority under the Constitution to impose punishment in accordance with the rules framed for the purpose. Therefore, the entire gamut of procedural steps of disciplinary action is by the High court which is the controlling authority through the committee constituted in that behalf by the Chief justice of the High Court.

14. Therein also, it was further observed that what is required of a Judge is "a form of life and conduct for more sever and restricted than that of ordinary people" and through unwritten, it has been

most strictly observed. The Judicial Officers are at once privileged and restricted; they have to present a continuous aspect of dignity and conduct. If the rule of law is to efficiently function under the aegis of our democratic society. Judges are expected to nurture an efficient, strong and enlightened judiciary. To have it that way, the nation has to pay the price, i.e., to keep them above wants, provide infrastructural facilities and services. There was a time when a Judge enjoyed a high status in society. A government founded on anything except liberty and justice cannot stand and no nation founded on injustice can permanently stand. Therefore, dispensation of justice is an essential and inevitable feature in the civilized democratic society. Maintenance of law and order requires the presence of an efficient system of administration of criminal justice. A sense of confidence in the court is essential to maintain the fabric of ordered liberty for free people and it is for the subordinate judiciary by its action and the High Court by its appropriate control of subordinate judiciary and its own self imposed judicial conduct, on and off the bench, to ensure it. If one forfeits the confidence in the judiciary of its people, it can never regain its lost respect and esteem. The conduct of every judicial officer, therefore, should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or parties influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity. If he tips the scales of Justice, its nippling effect would be disastrous and deleterious. Obviously, therefore, this Court in All India Judges Association case attempted to ensure better uniform conditions of service for subordinate judiciary throughout the country, it recommended that the Superannuation of the subordinate judicial officer at the age of 60 years; and ensured amelioration of their service conditions by giving diverse directions. In 2nd All India Judges' Association case, this Court dealt with the status of the judicial officer as a class and held that they are above the personnel working in other constitutional functionaries, viz., the Executive and the Legislative. Directions were issued by this Court for ensuring due implementation for their better service conditions. Three year's minimum service at the Bar was recommended to be eligible to be a judicial officer in All India Judges' Assn. and Ors. v. Union of India and Ors. (1995)IILLJ664SC (third case). In All India Judges' Association v. Union of India and Ors. (1994)4SCC727 (4th case), direction was issued to ensure accommodation."

13. In the case of Union of India and others v. K.K. Dhawan reported in (1993)2 SCC 56, the Hon'ble Supreme Court has observed as under:

"28. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind

that in present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the conduct Rules. Thus we conclude that the disciplinary action can be taken in the following cases:

i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

iii) if he has acted in a manner which is unbecoming of the government servant;

iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

v) if he had acted in order to unduly favour a party;

vi) if he had been actuated by corrupt motive however, small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great."

14. Various other case laws as cited by respondents' counsel are Thakur Jugal Kishore Sinha vs. Sitamarhi Central Co-operative Bank Ltd. And others (1967) 3 SCR 163; Union of India and others vs. A.N. Saxena (1992) 3 SCC 124; All India Judges Association and others vs. Union of India and others (1993) 4 SCC 288; P.C. Joshi vs. State of U.P. and others (2001) 6 SCC 491; Ramesh Chander Singh vs. High Court of Allahabad and others (2007) 4 SCC 247; V.K. Jain vs. High Court of Delhi and others (2008) 17 SCC 538; R.S.Mishra vs. State of Orissa and others (2011) 2 SCC 689;Mona Panwar vs. High Court of Allahabad and others (2011) 3 SCC 496; C.D. Konek Vs. High Court of Bombay (2004) 2 Mah LJ

157; these cited cases have got no bearing to the present case as the factual position of the present case stands on a different footing.

15. From perusal of the above citations, it is clear that while exercising the writ jurisdiction scope of judicial review is very limited. Needless to say that principles of natural justice are always to be observed. It appears from the record that a departmental enquiry was conducted and after completion of the same the Enquiry Judge submitted report dated 18.05.2010. Under orders of the Hon'ble Chief Justice dated 06.07.2010, a copy of enquiry report was sent to the District Judge, Etah for being furnished to the petitioner for his comments/representation, if he so desires, within 4 weeks.

16. The petitioner submitted comments/representation dated 01.09.2010 to the enquiry report. The enquiry report dated 18.05.2010 and comments dated 01.09.2010 of the petitioner was considered in the meeting of the Administrative Committee held on 28.10.2010 and the matter was placed before the Full Court, the details of which have been discussed in the preceding paragraphs.

17. In view of the resolution of the Administrative Committee dated

28.10.2010, the matter of the petitioner was considered in the meeting of the Full Court held on 27.11.2010 where it was resolved that the petitioner be dismissed from service. Letter dated 06.12.2010 was sent to the Principal Secretary, Appointment Section-4, Government of U.P., Lucknow for issuance of necessary order regarding dismissal of the petitioner. By the Memorandum dated 15.04.2011 issued by the Government the petitioner has been dismissed. The petitioner preferred a representation before His Excellency, the Governor, on 06.12.2010 for reconsideration of his dismissal from service which was sent to the High Court along with letter dated 20.04.2011. Under the order of Hon'ble Chief Justice the representation of the petitioner was considered in the meeting of the Administrative Committed held on 12.07.2011 where it was resolved that there is no scope for consideration of the representation dated 06.12.2010.

18. In the departmental enquiry as many as 13 witnesses were examined. The petitioner was also examined as defence witness. Sri V.K. Arya, Station House Officer of police station Shahganj, Agra was examined as E.W.3. He has deposed that car bearing registration no.U.P35M/1415 had been seized in case crime no.426 of 2009 under section 302 IPC on the basis of first information report lodged against Raju son of Jawahar and others. The owners of the said car were Bhagwandas and Raju who are full blooded brothers. The report in this regard was submitted to the Chief Judicial Magistrate. It was the self same vehicle which found mention in the newspaper reports attended with deposition that the said vehicle had been released on 13.10.2009 pursuant to the orders of Addl. District Magistrate (City) Agra. According to the record maintained at the police station, vehicle had been seized and remained as such in the precincts of the police station and was not given to anyone for use. He denied that the car in question was ever given to the petitioner for use.

19. On a query being put to him, he handed out copy of the release order of the vehicle in question. He also deposed that he had relation with the petitioner prior to joining police service, but denied that the car in question was ever given to the petitioner for his use. He also denied with respect to demand being made by the petitioner for arranging a car nor did he arrange any vehicle for him.

20. Smt. Uma Singh was examined as E.W.5, who has stated that the first information report was lodged by her in which car in question was involved. The car in question was used in the murder of her daughter and her grand-daughter. The car was given to the petitioner for his use and he travelled in the said car upto Vrindaban on 19.07.2009. The aforesaid car was detained by the police in Vrindaban and in this regard she had made a complaint addressed to the High Court.

21. In her cross examination, she stated that in paragraph-5 of her complaint she indicated that the petitioner had been given the car in question for his personal use which had been detained by the police in Vrindaban on 19.07.2009 on suspicion basis.

22. Smt. Sanju wife of Bhagwandas was examined as E.W.6, who has deposed that the car in question was registered in

the name of her husband Bhagwandas. The car had been taken away from her house by the police and was seized. The car in question along with its key was with the police. As soon as she came to know that the car had been illegally used and detained by police of Mathura, she moved application for release of the same.

23. In her cross-examination she stated that when she moved application, the car was present in the precincts of police station of Shahganj and its number plate was intact and it had not suffered any scratching.

24. Sri Vinod Agarwal was examined as E.W.9, who has deposed that he was serving as Principal Correspondent in D.L.A. and news item published in newspaper dated 20.07.2009 was published from news agency. He also attested the news items published at page-7 of the newspapers titled as 'Ajibogarib Halat Me Bach Nikley Judge Saheb' in which photo of the car was also published. He also testified to the title published in the newspapers 'Hatyabhiyukt Ki Gadi Se Panch Ladkiyan Ke Saath Vrindavan Jakar Ajeebogarib Paristhitiyon Ka Shikar Bane Judge Saheb Ko Antateh Ubar Liya Gaya.' He also testified to the title published in the newspapers 'Thana Shahganj Police Ki Nadani Ke Chalte Judge Saheb Ko Thana Jana Pad Gaya Tha.'

25. In his cross examination, he stated that he was not told the name of the Judge. He denied knowledge regarding the photograph of the car published in the newspapers was taken while it was in Vrindaban police station or it was in Shahganj police station.

26. In connection with first charge it is necessary to go through observation made by the Enquiry Judge, which may be reproduced herein:

In the first instance I would deal with the evidence of E.W. 1 namely, Sri N.K. Jain, District Judge Agra. E.W. 1 Distt Judge N.K. Jain has proved his report and stuck to the facts as contained in his report submitted to the High Court. It would appear from his statement that he based his confidential report on the information furnished by the C.J.M. after enquiry from Police Station Shahganj and also on the statement made by the delinquent officer before the Distt Judge on 20.07.2009 when he was summoned by the District Judge in his chamber at 4.40 p.m. The District Judge also deposed that the delinquent officer made the statement before two judicial officers namely C.J.M. namely Anil Kumar Vashishtha Sri Rahul Mishra, the then Addl. District Judge Agra, Sri Anil Kumar Vashishtha has been examined E.W.7 who has propped up in entirety the statement of E.W. 1 that the officer made statement before the Distt Judge on 20.07.2009 at 4.40 p.m. that he had demanded a car for his visit to Vrindavan and that he had gone to Vrindavan in the car provided by S.H.O. Shahganj along with the girls of the family of Shalya Guest House situated at Tajganj. The deposition of E.W. 2 Umesh Kumar who was then C.J.M. Is to the effect that certain information was sought from him and after collecting information from P.S. Shahganj, he furnished the information to the Distt Judge by means of letter dated 7.9.2010. He also deposed that whatever he has stated in his letter aforesaid is based on documentary evidence which are annexed to his letter aforesaid. It is also

noteworthy that although the delinquent officer had conceded that he appeared before the Administrative Judge but denied to have given the version as alleged in the report of the Administrative Judge. In his deposition, the delinquent officer stated that he only explained the circumstances in which he could not occupy the residence allotted to him and he did not given statement on the lines as attributed to him about his visit to Vrindaban or about demanding car from S.H.O. Shahganj or also about using the said car for his visit to Vrindaban alongwith girls.

In the above conspectus, and regard being had to the memorandum prepared by the Distt Judge and also the letter of the District Judge addressed to the Administrative Judge and again regard being had to the report of the Administrative Judge addressed to Hon. Chief Justice, and taking into reckoning the deposition of E.W. 7 namely A.K. Vashishtha, the conclusion is inescapable that the delinquent officer was called in the cambers on 20.07.2009 and he appeared and made the oral statement before the Distt Judge in the presence of Sri A.K. Vashishtha, Special C.J.M. who is arrayed as E.W.7.

I would also like to dwell upon denial made by the delinquent officer in his defence about the statements attributed to him both by the Distt Judge and the Administrative Judge in their respective reports. The defence of the delinquent officer that he did not make the statement as attributed to him by the Administrative Judge in his report addressed to Chief Justice and that the same appears to have been prepared on the basis of the report submitted by the Distt Judge and further that the Administrative Judge mentioned facts in his report ostensibly labouring under some confusion confounded by the District Judge, does not commend to me for acceptance. I have perused both the reports. The report of the Administrative Judge mentions certain facts which are not contained in the report of the District Judge. The relevant facts which are not mentioned in the report of the Distt Judge may be adverted to Para no.2 at page 2 of the report of Administrative Judge being relevant is excerpted below.

"The officer informed me that his two sons are studying in Delhi and that his wife and daughter mostly live at Allahabad. He belongs to Allahabad and his house at Allahabad. He wanted to come to Allahabad on 19th July 2009 to see off his son but changed his mind and decided to visit temples at Vrindaban alongwith family members of the owner of the guest house with whom he has developed acquaintance. The Inspector of Shahganj Agra is known to him from Allahabad and that he requested him to provide a car. The car was driven by him. The guest house owner, his minor daughters in between age group of 6 to 14 and sister in law serving in railway accompanied him. At Vrindaban he had parked his car outside the ISKON temple. He found a photographer taking pictures of the car. On his return at Agra he enquired from the Inspector P.S. Shahganj and found that car is not a case property. It is registered in the name of person, who is an accused in a murder case and was brought by the police to the police station. The officer did not know the owner of the car and his involvement in criminal case."

27. The Enquiry Judge also observed:

" The most intriguing aspect of the matter is the evidence of E.W. 3 V.K.

Arya, S.H.O. Shahganj and also the evidence of E.W. 8 R.K. Singh, S.H.O. P.S. Vrindaban. Both the witnesses repudiated the entire story. E.W. denied that the car ever left the precincts of Police Station Shahganj. He also denied that the officer demanded a car from his or that he provided the car in question to him. When E.W. 8 was queried how his name came to be mentioned in the news report, he expounded that he also read his name in the newspaper but admitted that he did not repudiate the news report in any manner. The witness did not repudiate that photographs was taken while the car was detained at Police Station. He also produced General Diary stating that no entry was made of any car having been detained at P.S. Vrindaban. I would not mince words to say that the cases are not unknown where the police officers gave inaccurate account to help out a colleague from a tight situation of his creation. Similar appears to be the position here. Despite clinching evidence of news papers reports and also photograph having been published of the car while it was detained at P.S. Vrindaban and also the statement of the delinquent officer before the District Judge and also from the Administrative Judge, denial of the incident in entirety has come from the aforesaid two witnesses.

There is nothing on record to support the version of the delinquent officer that he was not summoned nor he made any incriminating statement adverse to him before the District Judge as alleged in his report by the Distt Judge. Reliance on timing of daily sitting is a very fragile and weak ground and therefore, the version of the delinquent officer does not comment to me for acceptance."

28. In connection with the first charge, the Enquiry Judge has recorded finding that the officer used the said car and visited Vrindaban in the said car.

29. The Enquiry Judge has also recorded finding that 'to sum up, the charge nos. 1 and 2 are proved to the extent as stated supra. In so far as charge nos. 3 and 4 are concerned, as stated supra, they are not proved.

30. Judging the conduct by the standard laid down above, I cannot resist temptation that the conduct of the delinquent officer brought infamy to the entire district judiciary. He is a seasoned officer having put in 18 years of service. The officer most unabashedly denied his statement made before two senior dignitaries i.e. the Administrative Judge and the District Judge in the presence of two judicial officers. Had he been fair in not repudiating his statement, it could have been a fit case for a lenient view regard being had to his unblemished record and this deviant behaviour being an individual aberration. Reckoning with all the circumstances, I do not propose any lenient or compassionate view in the matter.'

31. It will appear from the perusal of the record that the Enquiry Judge after considering all materials on record and affording opportunity to the petitioner has recorded his finding. The petitioner was given opportunity to submit objection/reply against the enquiry report and it is only after the reply submitted by the petitioner, the decision has been taken. The copy of the enquiry report has been provided to the petitioner. It appears to us that the Enquiry Judge has conducted the enquiry after meticulously considering the

evidences and statements. It is not a case where it can be said that the principles of natural justice have been violated.

32. In light of the decisions cited herein above, we do not find any reason or ground to hold that the finding of facts recorded by the Enquiry Judge are in any manner perverse so as to warrant any interference in exercise of our jurisdiction under Article 226 of the Constitution of India.

33. We are unable to hold that the disciplinary proceeding as well as punishment order is violative of Article 14, 16 and 311 (2) of the Constitution of India besides being in transgression of the 1999 rules and other statutory provisions. The dismissal order is neither arbitrary nor harsh nor it can be said to be disproportionate to the gravity of the charges.

34. We are conscious of the fact that scope of judicial scrutiny is very limited. Admittedly, a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process.

35. We are also conscious of the fact that the standard of conduct is higher than expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

36. From the perusal of above noted laws and factual position of the case, it is evident that the departmental proceeding has been concluded in a lawful manner and the petitioner has been provided with an opportunity of being heard and to participate in the departmental proceedings. As discussed earlier, charge nos. 1 and 2 have been found proved though the petitioner denied his involvement with the car in question, but the finding of the Enquiry Judge was recorded otherwise based on materials available on record. Hence, the stand taken by the petitioner that the rules of natural justice has been violated while conducting the enquiry is not at all tenable in the eyes of law. The order passed by the State Government dated 15.04.2011, dismissing the petitioner from service, cannot be faulted with in any manner.

37. Accordingly, we find that this writ petition is devoid of merit and is liable to be dismissed. It is dismissed.

38. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.08.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. 2062 of 2007
Along with Service Single No. 9533 of 2006

Sumer Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri S.C. Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Absorption in service-on basis of broker service w.e.f. 1994 to 97-claiming parity with other similarly situated employees who got absorption-held-in absence of statutory provisions-appointment without following mode of recruitment-no right-parity can not make right with two wrongs-petition dismissed.

Held: Para-11
Thus in the absence of any statutory provision and also in view of the admitted factual position that the petitioner's initial recruitment was not in accordance with the constitutional scheme enshrined under Article 16 of the Constitution, the relief sought by petitioner cannot be granted.

Case Law discussed:
2007(3) ADJ 138; 2007(3) ADJ 46; 2004(4) ESC 2470=2005 ALJ 1006; 2004(54) ALR 85; 2006(4) SCC 1; 2009(3)SCC 35; 2009(7)SCC 205; 2011 (2) SCC 429; (2010) 2 SCC 422; (2010) 2 SCC 728; AIR 2000 SC 2306; AIR 2003 SC 3983; AIR 2004 SC 2303; AIR 2005 SC 5565; AIR 2006 SC 1142.

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

1. In both these writ petitions, claim of petitioner for absorption is involved and, therefore, both have been heard together and are being decided by this common judgement.

2. Heard Sri S.C. Srivastava, learned counsel for petitioner, learned Standing Counsel for respondents and perused the record.

3. Petitioner is claiming absorption pursuant to service rendered by him in broken spells during 1994 to 1997 in State Finance Commission. It is stated that some other similarly situated persons have already been absorbed and, therefore, petitioner is also entitled for the same treatment. However, Despite repeated query, learned counsel for petitioner could not show any provisions under which petitioner can claim absorption as a matter of right.

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

"I have heard learned counsel for the petitioner and perused the record. It is not disputed that in certain broken spells as and when census operations were undertaken by the Government of India, the petitioner was engaged in the census department from time to time. The aforesaid appointment was purely temporary and therefore after completion of the work or due to reduction in the establishment of census department, he was terminated or discontinued whereagainst no grievance was raised by the petitioner at any point of time. His claim is now confined to regular appointment under the State Government considering his status as a "retrenched

employee". For the purpose of the present case, even if the petitioner is treated to be a retrenched employee, learned counsel for the petitioner failed to point out any statutory provision or executive order having force of law entitling the petitioner for regular appointment in a class-III or class-IV post under the State Government. The government order dated 22.4.1987 placed on record as Annexure-1 to the rejoinder affidavit shows that the Census Directorate, Government of India communicated to all the Head of Departments, District Magistrates and other employment officers in the State of U.P. that the employees who have worked in the Census Department for about three and half years in 1981 census operations and some of them have crossed maximum age required for employment in the Government service and, therefore, they were allowed relaxation of three years in the age vide Government Order no. 41/2/1967-Karmik-2 dated 13.2.1985 extended upto 12.2.1988, and therefore the said persons may be considered in the service of the State Government extending the said relaxation in age. The aforesaid order, therefore, only provides relaxation in maximum age but nowhere shows that the process of recruitment applicable to class-III and class-IV posts in the state of U.P. shall not be followed for appointment of the said retrenched employees of the census department. Moreover, a bare reading of the aforesaid government order shows that it is applicable to such employees who continuously worked for three and half years pursuant to 1981 census and were retrenched on 30.6.1984. On the contrary, the petitioner was engaged for short periods in 1981 and 1982 only, but there is no continuous service of three and half years as contemplated in the aforesaid government order. Hence, in no circumstance the said government order help the petitioner in any manner. In the state of U.P., recruitment to class-III posts prior to 1989 was being governed by the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 which were substituted by another set of rules on 16.3.1985, i.e., U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985which continued to hold field until substituted in their entirety by U.P. Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of The U.P. Public Service Commission) Rules 2001. In all the aforesaid Rules, there is no provision for appointment of a retrenched employee without undergoing the process of recruitment. Only certain concessions in the matter of age and educational qualifications etc. have been provided but otherwise a retrenched employee has to participate in the process of recruitment with other eligible candidates as and when the recruitment process is initiated. In the matter of selection and assessment of merit under 2001 Rules, certain weightage is provided but there is no provision for regularization of such employees to the exclusion of regular process of recruitment. In view of the statutory rules, no relief can be granted to the petitioner contrary thereto."

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

6. Besides above, I may also place on record that in certain cases some persons who were engaged in election office as Junior Clerks for some short span from time to time were directed to be

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

7. The entire issue can also be looked into in the light of Constitution Bench decision in Secretary, State of Karnataka Vs. Uma Devi 2006 (4) SCC 1 followed in State of West Bengal & others Vs. Banibrata Ghosh & others 2009 (3) SCC 250; Council of Scientific & Industrial Research & others Vs. Ramesh Chandra Agarwal & another 2009 (3) SCC 35; General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi & others 2009 (7) SCC 205; and, State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429.

8. So far as absorption of other persons is concerned, in Union of India & another Vs. Kartick Chandra Mondal & another (2010) 2 SCC 422, the Court has gone to the extent that even if some other persons similarly placed have been absorbed, that cannot be a basis to grant a relief by the Court which is otherwise contrary to statute. In para 25 of judgment, the Court said:

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

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

9. In State of Karnataka & others Vs. Gadilingappa & others (2010) 2 SCC 728, the Court reiterated that it is well settled principal of law that even if a mistake is committed in an earlier case,

the same cannot be allowed to be perpetuated.

10. Learned counsel for petitioner failed to show that absorption of others was consistent with the scheme of statutory provisions and, therefore, was made validly. 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.

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

12. Both the writ petitions lack merit and are dismissed accordingly.

13. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE OM PRAKASH-VII, J.

First Appeal from Order No. 2455 of 2014

National Insurance Co. Ltd. Bulandsahar ...Appellant

Versus

Smt. Pushpa Devi & Ors. ...Claimants

Counsel for the Petitioner:
Sri Saral Srivastava

Counsel for the Respondents:
Sri Dharmendra Kumar Gupta
Smt. Kiran Gupta

Motor Vehicle Act 1988-Section 173-Appeal against award Accident Claim Tribunal-on ground of contributory negligence-HRA not to be assessed as income of deceased-and family pension should be deducted-held-finding recorded by Tribunal-perfectly justified accident caused due to rash and negligent driving of Tata Sumo-in view of law laid down by Apex Court-HRA being part and partial of salary-family pension-being right of the dependent of deceased employee not be deducted-view taken by tribunal-perfectly justified-can not be interfered-Appeal dismissed.

Held: Para-9
So far as submission of learned counsel for the appellant that since after the death of the deceased, legal representative of the deceased has been given the compassionate appointment and the wife is getting the family pension, therefore, to that extent, amount of compensation and loss of dependency should be reduced, has no substance.

Case Law discussed:
JT 2011(4), 232; (2013) 7 SCC 476; 1999(1) SCC 90; First Appeal from Order No. 84 of

1998; First Appeal From Order No. 2646 of 2012.

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

1. This is an appeal under Section 173 of the Motor Vehicles Act, 1988, against the order of Tribunal dated 23.04.2014, by which Tribunal has awarded a sum of Rs.26,55,088/- towards compensation.

2. The appellant is the insurer of Tata Sumo, bearing registration no.UP-81-J-5163.

3. Brief facts stated in the impugned order are that on 19.11.2009 at 6.15p.m. when the deceased was going to Telephone Exchange, Makhaina, near village Amarpur at Kibai-Anoopshahar Road, near village Amarpur, said Tata Sumo being driven rashly and negligently hit the bhaisa-buggi. As a result of hitting the bhaisa-buggi, Tata Sumo became disbalance and hit the motor-cycle, bearing registration no.UP-13-D-8026, which was being driven by the deceased, Pooran Singh and thereafter, again hit one, Hariom, who was going on cycle, causing grievous injuries to Pooran Singh, who died on the spot. The claim petition has been filed by the legal representative of the deceased, Pooran Singh. At the time of accident, deceased, Pooran Singh was 43 years old and was working as Telecom Mechanic in Bharat Sanchar Nigam Limited. He was a permanent employee and his age of superannuation was 60 years. As per the income certificate, filed by the claimants, deceased Pooran Singh was getting the basic pay Rs.13,800/-, DA Rs.3,491/-, HRA Rs.1,380/- In this way, the deceased was getting a sum of Rs.18,671/- per month. Tribunal on the basis of evidence on record and the statement of witness arrived to the conclusion that the accident has been caused solely on account of the negligence of the driver of the Tata Sumo. Tribunal on the basis of the salary certificate has taken the monthly income at Rs.18,670/- and after adding 25% towards future prospect, in view of the Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011. Having regard to the age of the deceased being 43 years and after deducting 1/3rd towards personal expenses and applying the multiplier of 14, estimated the compensation at Rs.26,55,088/-. Tribunal under the aforesaid Rules, 2011 awarded the loss of estate at Rs.10,000/-, consortium at Rs.10,000/- and towards loss of love and affection at Rs.15,000/- and funeral expenses at Rs.5,000/-.

4. Learned counsel for the appellant submitted that there was head-on collision between Tata Sumo and motor-cycle as is apparent from the site plan, annexure-5 to the affidavit, therefore, to some extent Tribunal should have assessed some negligence on the part of the deceased also, who was driving the motor-cycle. Reliance has been placed on the decision of the Apex Court in the case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and others, reported in 2006(1) TAC, 969. He submitted that HRA should not be treated as income and no deduction towards income tax has been allowed. He further submitted that on the death of the deceased, the dependent have been given compassionate appointment and the wife is getting family pension. Therefore, the amount of family pension is liable to be deducted and to that extent there can not be loss of income.

5. We do not find substance in the argument of learned counsel for the

appellant. We have perused the impugned order and site plan. It is not a case of head-on collision. It is the case where Tata Sumo firstly hit the bhaisa-buggi as a result of which became disbalance and, thereafter, has gone to its right side and hit the motor-cycle being driven by the deceased, Pooran Sigh, who was coming towards his left side. The accident has been caused because Tata Sumo became disbalance and the driver lost his control over the vehicle. The velocity and the speed of Tata Sumo appears to be very high for the reasons that first of all it hit the bhaisa-buggi, thereafter, the motor-cycle and then to cyclist and further hit the tree. This situation can only arise when the Tata Sumo must have been running in very high speed and after hitting the bhaisa-buggi the driver of Tata Sumo was not able to control the vehicle. In such a situation, it could not be expected from the deceased, Pooran Singh driver of the motor-cycle to pre-assess the movement of the Tata Sumo, coming towards right side and the deceased could not get the opportunity to avoid the accident. It appears that everything happened spontaneously and deceased could not get opportunity to escape himself from the accident. In the circumstances, on the facts and circumstances, we are of the view that Tribunal has rightly concluded that the accident has been caused due to sole negligence of the driver of the Tata Sumo and there was no negligence on the part of the deceased. The decision of the Apex Court in the case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and others, (Supra) was based on its own facts where there was a head-on collision and it was found that Maruti Car should also made effort to avoid the accident. Such situation is not available in the present case. Therefore, the decision of the Apex Court in the case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and others, (Supra) is not applicable and is clearly distinguishable.

6. In the case of Sunil Sharma Vs. Bachitar Singh, reported in JT 2011 (4), 232, Apex Court held that the amount of HRA, CCA, EPF and GIS should not be deducted from gross income for the calculation of the income. Therefore, the submission of learned counsel for the appellant that HRA should be deducted, has no substance.

7. Now coming to the submission that the amount of income tax should be deducted.

8. So far as legal position is concerned, there is no dispute that the income tax ought to have been deducted but in the present case, there is no evidence that on the income of the deceased, there was any income tax liability. The appellant is not able to demonstrate that any amount has been deducted towards income tax or there was any income tax liability. In the absence of any evidence on record, we are not able to accept the contention of learned counsel for the appellant.

9. So far as submission of learned counsel for the appellant that since after the death of the deceased, legal representative of the deceased has been given the compassionate appointment and the wife is getting the family pension, therefore, to that extent, amount of compensation and loss of dependency should be reduced, has no substance.

10. Apex Court in the case of Vimal Kanwar and others, Vs. Kishore Dan and others, reported in (2013) 7 SCC, 476, Apex Court held as follows:

"The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles act to be termed as 'pecuniary advantage' liable for deduction".

"Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles act. "

11. In the case of Helen C.Rebello Vs. Maharashtra, reported in S.R.T.C., 1999 (1) SCC, 90, Apex Court has observed that the family pension is also earned by an employee for the benefit of his family in the form of his contribution in service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. There is no co-relation between the two.

12. Following the aforesaid decision, the Division Bench of this Court in First Appeal From Order No.84 of 1998, Sharad Kumar Singh and Ors. Vs. Kanhaiya Lal Mishra and Ors., decided on 24.08.2012 and in First Appeal From Order No.2292 of 2012, United India Insurance Co. Ltd. Vs. Smt. Rajni Kumari and others, decided on 30.05.2012 and in First Appeal From Order No.2646 of 2012, The New India Assurance Co. Ltd. Vs. Smt. Roop Tiwari and others, decided on 06.07.2012 has held that the family pension after the death of the deceased is not liable to be deducted for the computation of the income.

13. We do not find any merit in the present appeal, which requires interference by this Court. The appeal fails and is, accordingly, dismissed.

14. Office is directed to remit back the statutory amount to the concerned Tribunal within a period of four weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.08.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. 2753 of 2007

Mohd. Anees Khan ...Petitioner
Versus
U.P. State Transport Corporation & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.R. Siddiqui, Sri Satya Prakash, Sri Som Nath, Sri Virendra Kumar Shukla.

Counsel for the Respondents:

Sri Anuj Kudesia, Sri Jitendra Bahadur Singh, Sri Ritesh Kumar Singh

Constitution of India, Art.-226-Dismissal on basis of award by Motor Accident Claim Tribunal-petitioner not party-police report-established that due to burst of pipe line -break failure-accident took place-no role in Technical or mechanical fault on part of petitioner-without disciplinary proceeding-relying upon award of claim Tribunal-neither dismissal proper nor recovery can be inflicted-petition allowed.

Held: Para-8 & 17

8. In view thereof, I have no hesitation in holding that respondents-UPSRTC has miserably failed to prove charge against petitioner as virtually no inquiry has been conducted against him and therefore, order of recovery is not sustainable.

17. In view of the aforesaid exposition of law and considering the allegations contained in the order and charge sheet, I am of the view that the allegations levelled against the petitioner do not amount to 'misconduct'. The impugned order, therefore, cannot sustain.

Case Law discussed:

[2010 ADJ 1 (SFB) (LB)]; AIR 1979 SC 1022; (1992) 4 SCC 54; 2004 (5) SCC 689.

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

1. Heard Sri Virendra Kumar Shukla, learned counsel for the petitioner and Sri Jitendra Bahadur Singh, Advocate for the respondents.

2. Admittedly, petitioner is a Driver in Uttar Pradesh State Roadways Transport Corporation (hereinafter referred to as "UPSRTC"). On 5.11.1996, he was driving bus no.U.P.42 B/2573 when he met an accident in which a person died. The police made inquiry and found that air pipe of vehicle got burst as a result whereof break and emergency break both did not function and it resulted in the accident.

3. The heirs of deceased person filed a claim petition before Motor Accident Claims Tribunal numbered as MACP No.212/70/96 in which compensation of Rs.1,54,598/- along with interest was granted. Thereafter, a charge sheet was issued to the petitioner and Enquiry Officer submitted report, Annexure 7 to the writ petition, in which instead of getting the charge proved by the department or considering petitioners defence, simply relying on order passed by Motor Accident Claims Tribunal that compensation was awarded therein as a result of accident, petitioner was held guilty of compensating UPSRTC by directing to pay to the extent of amount of compensation was awarded. Pursuant thereto the impugned order of recovery of Rs.1,54,598/- has been issued by Assistant Regional Manager, UPSRTC, Faizabad Region, Faizabad.

4. Counsel for the petitioner submitted:

i. The charge has not been proved by respondent still the impugned order of punishment has been passed.

ii. In any case, once accident occurred on account of technical and mechanical fault in the vehicle, there was no negligence on the part of the petitioner and there was no misconduct whatsoever and no penalty could have been imposed.

5. Counsel for the respondents tried to justify the order impugned in the writ petition on the basis of reasons stated

therein though he admits that except relying on award dated 10.12.1999 passed by Motor Accident Claims Tribunal, there is no other finding in respect to proof of guilt of petitioner.

6. The award of Tribunal could not have been read in evidence so as to prove the guilt of negligence against petitioner, inasmuch as, neither this issue was considered by Tribunal nor petitions was a party therein so as to have any opportunity to defend himself. The Tribunal's award is an evidence only to show that claim was made and a particular order of compensation was passed by Tribunal. It could not have been treated to be an evidence for any other purpose, moreso, to hold petitioner guilty of negligence but neither there was an issue therein nor any finding in this respect after giving opportunity to the petitioner has been recorded.

7. Dealing with admissibility of judgment, as an evidence, the matter has been examined by Special Bench of this Court in The Sunni Central Board of Waqfs U.P. Lucknow Vs. Sri Gopal Singh Visharad, [2010 ADJ 1 (SFB) (LB)] and in the judgment delivered by myself (Hon'ble Sudhir Agarwal, J.) in paras 3038, 3039, 3040, 3342 to 3344, said:

"3038. Moreover, a judgment by itself is not a piece of evidence except to the extent it is provided under Section 41 to 43 of the Evidence Act.

3039. In the context of Section 43 of Evidence Act, it is no doubt true that a judgment is admissible provided it is a relevant fact in issue as held in Seth Ramdayal Jat Vs. Laxmi Prasad (Supra). In a civil case, the judgment of a Criminal Court may be relevant where the fact in issue is about the existence of such a judgment or not, but not more than that. The evidence discussed in the judgment of a Criminal Court or the fact that a person has confessed his guilt in his statement is not admissible in evidence in a civil suit. This is what was held in Perumal Vs. Devarajan & others AIR 1974 Mad. 14 and was quoted with approval in Seth Ramdayal Jat (supra). The Apex Court also approved a Patna High Court decision in Lalmani Devi & others Vs. Jagdish Tiwary & others AIR 2005 Pat. 51. The Court said that acquittal or conviction in a criminal case has no evidentiary value in a subsequent civil litigation except for the limited purposes of showing that there was a trial resulting in acquittal or conviction, as the case may be. The findings of the Criminal Court are inadmissible. The Apex Court also followed its earlier decision in Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & others AIR 1955 SC 566 taking the same view. There appears to be a somewhat different authority in Shanti Kumar panda (supra) where an observation was made that an order passed by the Executive Magistrate in proceedings under Section 145/146 Cr.P.C. is an order by a Criminal Court based on a summary inquiry. The order is entitled to respect and weight before the competent Court at the interlocutory stage. In Ramdayal Jat (supra), the Apex Court observed that this observation in Shanti Kumar Panda (supra) is per incurrium being in conflict of a three-Judges decision in K.G. Premshanker Vs. Inspector of Police & another JT 2002 (8) SCC 87. The argument of possibility of conflict in decisions was rejected in Seth Ramdayal Jat (supra) stating:

"27. In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the

decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment."

3040. The Court further held that the Civil Court must decide a suit on its own keeping in view the evidence which have been brought on record before it and not in the light of the evidence brought on record in the criminal proceedings. The Court also observed that an earlier decision in M/s Karam Chand Ganga Prasad & another Vs. Union of India & others 1970 (3) SCC 694 holding that the decision of the Civil Court will be binding on the Criminal Courts but the converse is not true was overruled in K.G. Premshanker (supra) and this fact has been noticed also in Syed Askari Hadi Ali Augustine Imam & another Vs. State (Delhi Administration) & another JT 2009 (4) SC 522."

"3342. Moreover, admissibility of judgements as evidence has to be considered in the light of the provisions of Evidence Act. A document may be classified for this purpose in three heads, (1) documents which are per se inadmissible; (2) recitals in judgements not inter parties; and (3) documents or judgements post litem motam. If a judgement is not admissible, not falling within the ambit of Sections 40-42, it must fulfil the conditions of Sections 43 otherwise it cannot be relevant under Section 13 of the Evidence Act. The words 'other provisions of this Act' used in Section 43 would not extend to Section 13, because the Section 13 does not deal with judgements at all. The judgements in personam do not fulfil the conditions mentioned in Section 41 of the Evidence Act, hence, inadmissible. The judgements not inter parties are inadmissible in evidence barring exceptional cases. It would be useful to refer in this regard the Apex Court's decision in State of Bihar and others Vs. Sri Radha Krishna Singh (supra) paras, 123, 126, 127, 128, 129, 131, 133 and 134 as under:

"123. It is now settled law that judgments not inter parties are inadmissible in evidence barring exceptional cases which we shall point out hereafter. In Johan Cockrane v. Hurrosoondurri Debia and Ors.(1854-57) 6 Moo Ind App 494, Lord Justice Bruce while dealing with the question of admissibility of a judgment observed as follows:

"With regard to the judgment of the Supreme Court, it is plain, that considering the parties to the suit in which that judgment was given, it is not evidence in the present case.... We must recollect, however, not only that that suit had a different object from the present, independently of the difference of parties, but that the evidence here is beyond, and is different from, that which was before the Supreme Court upon the occasion of delivering that judgment."

"126. In the case of Gujju Lall v. Fatteh Lall, (1881) ILR 6 Cal 171 a Full Bench exhaustively considered the ambit and scope of Ss 40 to 43 of the Evidence Act and observed thus:

"On the other hand, when in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prefaced by the title "Judgments of Courts of Justice when

relevant," that seems to be a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

... ...

I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well the observations of my brother Pontifex, in both of which I generally concur, and for the reasons there stated, and those which I have shortly given, I consider the evidence inadmissible."

And Garth, C. J. made the following observations:

". . . it is difficult to conceive why, under Section 42, judgments though not between the same parties should be declared admissible so long as they related to matters of a public nature, if those very same judgment had already been made admissible under Section 13, whether they related to matters of a public nature or not.

... ...

I am, therefore, of the opinion that the former judgment was not admissible in the present suit."

(Emphasis ours)"

"127. In Gadadhar Chowdhury and Ors. v. Sarat Chandra Chakravarty and Ors.(1940)44 Cal WN 935: (AIR 1941 Cal 193) it was held that findings in judgments not inter parties are not admissible in evidence."

"128. This, in our opinion, is the correct legal position regarding the admissibility of judgments not inter parties."

"129. . . . . so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English law.

"The judgment is not inter parties, nor is it a judgment in rem, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue; and if the existence of the judgment is relevant under some of the provisions of the Evidence Act it is difficult to see what inference can be drawn from its use under these sections"

"Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much 'indirect laying' might be expected to follow therefrom"(Emphasis supplied)"

"131. We entirely agree with the observations made by the Privy Council which flow from a correct interpretation of Sections40 and 43 of the Evidence Act."

"133. . . . . judgment which is not inter parties is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit. In these circumstances, therefore, it is not open to the plaintiffs-respondents to derive any support from some of the judgments which they have filed in order to support their title and relationship in

which neither the plaintiffs nor the defendants were parties. Indeed, if the judgments are used for the limited purpose mentioned above, they do not take us anywhere so as to prove the plaintiff's case."

"134. . . . .Declarations by deceased persons of competent knowledge, made ante litem motam, are receivable to prove ancient rights of a public or general nature. The admission of declarations as to those rights is allowed partly on the ground of necessity, since without such evidence ancient rights could rarely be established; and partly on the ground that the public nature of the rights minimises the risks of mis-statement."

3343. In respect to the delcarations made post litem the Apex Court in the above case made observations in para 135 and 136 as under:

"135. . . . . It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must be not only before the actual existence of any controversy but they should be made even before the commencement of legal proceedings.....

"To obviate bias, the declarations must have been made ante litem motam, which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject matter of the declarations. . . . ."

"136 . . . . The reason for this rule seems to be that after a dispute has begun or a legal proceeding is about to commence, the possibility of bias, concoction or putting up false pleas cannot be ruled out. This rule of English law has now been crystallised as one of the essential principles of the Evidence Act on the question of admissibility of judgments or documents. . . . In fact, Section 32(5) of the Evidence Act itself fully incorporates the doctrine of post litem motam the relevant portion of which may be extracted thus:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant

(5) ...the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

3344. Here we may also refer to para 143 of the above judgments where the Apex Court summerized ratio of the various authorities on the above aspects of the matter and said:

"143. Thus, summarising the ratio of the authorities mentioned above, the position that emerges and the principles that are deducible from the aforesaid decisions are as follows:

(1) A judgment in rem e. g., judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible irrespective of whether they are inter parties or not,

(2) judgments in personam not inter parties are not at all admissible in evidence except for the three purposes mentioned above.

(3) On a parity of aforesaid reasoning, the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties.

(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam."

8. In view thereof, I have no hesitation in holding that respondents-UPSRTC has miserably failed to prove charge against petitioner as virtually no inquiry has been conducted against him and therefore, order of recovery is not sustainable.

9. There is another aspect of the matter more serious and goes to the root of the case. The Police submitted report holding that air pipe of vehicle burst as a result whereof break and emergency break failed and did not work, which resulted in the accident. It is nobody's case that petitioner has any role in such mechanical fault of vehicle. It may be due to lack of maintenance on the part of UPSRTC itself, but if something has happened on account of mechanical fault of the vehicle, can it be said that consequence thereof i.e. accident, which occurred and a person died, can be constitute to be such a negligence on the part of the petitioner that it amounts to a misconduct, may be minor, i.e. recovery from the petitioner. In my view, the answer is clearly 'no'. The term 'misconduct' has come across for consideration before this Court time and again and no longer res integra. I have no hesitation in observing that petitioner cannot be said to be guilty of misconduct. On this aspect, my reasons are as under.

10. 'Misconduct' has been defined in Black's Law Dictionary, Sixth Edition at page 999:

"A transgression of some established and definite rule of action a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness."

11. 'Misconduct in Office' has been defined as:

"Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act."

12. P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987 at page 821 defines "misconduct' thus:

"The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term

occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

13. The meaning of 'misconduct' came up for consideration before the Apex Court in the case of Union of India Vs. J. Ahmed, AIR 1979 SC 1022, wherein, explaining the term 'misconduct' the Hon'ble Court held as under :

"It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the contest of disciplinary proceedings entailing penalty." (para 10)

"Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pearce v. Foster) (1988) 17 QBD 536 (at p.542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspaper)]. (1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Supdt., Central Railway, Nagpur Divn., Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K. Vaghela v. Moosa RazaF, (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under: -

"Misconduct means, misconduct arising from ill motive; act of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434: (AIR 1966 SC 1051), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India, (1967) 2 SCR 566: (AIR 1967 SC 1274), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in

P.H. Kalyani v. Air France, Calcutta, (1964) 2 SCR 104: (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intraveious injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co.-op. Department Stores Ltd., (1978) 19 Guj LR 108 at p.120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty." (para 11)

14. Again in the case of State of Punjab and others vs. Ram Singh Ex-Constable, (1992) 4 SCC 54 the Hon'ble Apex Court has held as under: -

"Thus it could be seen that the word "misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order." (para 6)

15. In the context of Section 31 of Advocates Act, 1961, the Apex Court in

Noratanmal Chouraria Vs. M.R. Murli & another 2004 (5) SCC 689 said:

"Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct and indiscipline, which, however, is wide enough to include wrongful omission or commission whether done of omitted to be done intentionally or unintentionally. It means, "improper behaviour, intentional wrongdoing or deliberate violation of a rule or standard of behaviour".

Misconduct is said to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law."

16. In Baldev Singh Gandhi Vs. State of Punjab & others AIR 2002 SC 1124, with reference to the provisions of Punjab Municipal Act, the Apex Court, considering the term 'misconduct' held as under :

" 'Misconduct' has not been defined in the Act. The word 'misconduct' is antithesis of the word 'conduct.' Thus, ordinarily the expression 'misconduct' means wrong or improper conduct, unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc."

17. In view of the aforesaid exposition of law and considering the allegations contained in the order and charge sheet, I am of the view that the allegations levelled against the petitioner do not amount to 'misconduct'. The impugned order, therefore, cannot sustain.

18. In the result, the writ petition is allowed. The impugned order dated 10.4.2007 (Annexure 11 to the writ petition) is hereby quashed. The petitioner shall be entitled to all consequential benefits besides costs, which I quantify to Rs.25,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2014

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

Service Single No. 3991 of 2014

Nagendra Nath Tripathi ...Petitioner
Versus
State Cane Service Authority Lko & Ors. ...Respondents

Counsel for the Petitioner:
Sri Virendra Kumar Dubey

Counsel for the Respondents:
C.S.C., K.S. Pawar

U.P. Cane Cooperative Service Regulation 1975, Regulation 69-read with Art. 351(A) of Civil Services Regulation-Dismissal from service of employee governed by provision of Cooperative Service Regulation-provision CCA rules not applicable-no provisions to continue the disciplinary proceeding-even after retirement-defence of Court direction-not available-in view of Apex Court decision of Bhagirathi Jena case-disciplinary proceeding automatically lapse-dismissal order quashed with all consequential benefits.

Held: Para-10
From a perusal of the U.P. Cane Cooperative Service Regulations, 1975 it is noticed that there is no provision similar to or pari materia with Article 351 (A) of the Civil Service Regulations, which may permit the respondent authorities to proceed with the disciplinary proceeding against a retired

employee. Therefore, the only conclusion that can be drawn in the absence of any such provision is that, once the employee has retired and the disciplinary proceeding have not been concluded, for whatever reason, such disciplinary proceedings shall automatically lapse with the retirement of the employee.

Case Law discussed:
Civil Appeal (S) No. 5848-49 of 2014; Special Leave Petition(Civil) Nos. 29550-29551 of 2010; (2007) 7 SCC 81; (1999) 3 SCC 666.

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

1. Counter affidavit filed today is taken on record.

2. The petitioner is aggrieved by the order of penalty dated 22.10.2013 and the appellate order dated 27.05.2014.

3. According to the petitioner he was working as Senior Assistant. He was placed under suspension by order dated 30.06.2006. Aggrieved the petitioner filed Writ Petition No.5971 (S/S/) of 2006 and the Court by order dated 14.07.2006 was pleased to stay the operation of the order of suspension as being without jurisdiction. The petitioner thereafter was reinstated in service. A chargesheet was issued to him on 30.04.2003, to which the petitioner submitted his reply on 07.08.2003. An Enquiry Officer was appointed and departmental enquiry was held. Subsequently by the order dated 28.12.2006 the petitioner was dismissed from service and a recovery of Rs.1,28,184.31 was ordered from him. The petitioner challenged the order of dismissal by filing Writ Petition No.715 (S/S) of 2007. The same was allowed by order dated 22.07.2013 and the order of dismissal dated 28.12.2006 was quashed. However, in the meantime since the petitioner had attained the age of superannuation on 28.02.2011, liberty was granted to the respondents to initiate departmental proceedings from the stage which has been found to be initiated in that judgment with a further direction that the petitioner shall be given copy of the enquiry report and also be given an opportunity of hearing. It is in pursuance thereof that the impugned order dated 22.10.2013 has been passed and recovery of certain amounts were ordered against the petitioner. Aggrieved, the petitioner preferred a departmental appeal which was also rejected vide order dated 27.05.2014.

4. I have heard Sri O.P. Srivastava, learned Senior Counsel assisted by Sri V.K. Dubey, for the petitioner, Sri K.S. Pawar, learned counsel for the respondents no.1 & 4 and the learned Additional Chief Standing Counsel for the respondents no.2 & 3.

5. The principal ground for attacking the impugned order taken by the learned senior counsel for the petitioner is that after the petitioner had already retired from service the departmental proceedings could not have been proceeded against him inasmuch as the provisions of Article 351 (A) of the Civil Service Regulation are not applicable to the U.P. Cane Co-operative Federation and in any case no Rules or Regulations or any other provision of law pari materia to the provisions of Article 351 (A) of the CSR are available in the U.P. Cane Co-operative Service Regulation, 1975. It is submitted that in the circumstances the entire proceedings after the petitioner had already retired from service were ab initio void.

6. Sri K.S. Pawar, on the other hand, submitted that the proceedings were

continued against the petitioner in view of the liberty granted by this Court in Writ Petition No.715 (S/S) of 2007 in its judgment and order dated 22.07.2013. A counter affidavit has been filed and in paragraph 38 thereof it has been stated that the impugned order dated 22.10.2013 has been passed in purported compliance of judgment of the Court dated 22.07.2013. The averments in paragraph 38 of the counter affidavit are in reply to the averments made in para 44 of the writ petition, wherein the petitioner has taken a specific stand that there is no provision in the 1975 Regulations under which the disciplinary proceedings could be continued against a retired employee.

7. Sri O.P. Srivastava, learned Senior Counsel has placed reliance upon a recent decision of the Supreme Court in Civil Appeal (S) No.5848-49 of 2014 arising out of Special Leave Petition (Civil) Nos.29550-29551 of 2010, Dev Prakash Tiwari Vs. U.P. Co-operative Institutional Service Board, Lucknow and Ors. it is submitted that in the case before the Supreme Court, the Supreme Court considered the provisions of U.P. Co-operative Employees Service Regulations, 1975. It is submitted that these Rules have been framed by virtue of powers conferred under Section 122 of the U.P. Co-operative Societies Act, 1965 and it is submitted that the U.P. Cane Co-operative Employees Service Regulations 1975 has also been framed in exercise of powers under Section 122 of the Act, 1965 and in both the Regulations there is no power conferred by the Regulations upon the authorities to proceed against a retired employee. The Supreme Court was also considering its earlier judgment in the U.P. Co-operative Federation Ltd. and Others Vs. L.P. Rai, reported in (2007) 7 SCC 81, wherein the disciplinary proceeding against the employee was quashed by the High Court since no opportunity of hearing was given to him and the Management in its appeal before the Supreme Court sought for grant of liberty to hold a fresh enquiry and the Supreme Court has held that the charges levelled against the employee were not minor in nature and therefore it would not be proper to foreclose the right of the employer to hold fresh inquiry only on the ground that the employee has since retired from service and accordingly liberty was granted to the Management to proceed with the disciplinary proceeding against the employee. The facts of U.P. Co-operative Federation are identical to that in the case of the present petitioner. However, the Supreme Court has held that while deciding the case of L.P. Rai (supra) the earlier judgment of the Supreme Court in the case of Bhagirathi Jena Vs. OSFC (1999) 3 SCC 666 had not been brought to the notice of the Court wherein the Court had held that in the absence of a provision to that effect in the Regulations, departmental proceedings could not have been continued after the employee had retired from service. The Supreme Court therefore, held that once the employee had retired from service, there is no authority vested with the respondents for continuing the disciplinary proceeding even for purposes of imposing any reduction in the retiral benefits payable to the appellant. In the absence of any authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

8. Paragraphs 6 to 11 of the judgment of the Supreme Court read as follows:

"6. We have carefully considered the rival submissions. The facts are not in

dispute. The High Court while quashing the earlier disciplinary proceedings on the ground of violation of principles of natural justice in its order dated 10.1.2006 granted liberty to initiate the fresh inquiry in accordance with the Regulations. The appellant who was reinstated in service on 26.4.2006 and fresh disciplinary proceeding was initiated on 7.7.2006 and while that was pending, the appellant attained the age of superannuation and retired on 31.3.2009. There is no provision in the Uttar Pradesh Co-operative Employees Service Regulations, 1975, for initiation or continuation of disciplinary proceeding after retirement of the appellant nor there is any provision stating that in case misconduct is established a deduction could be made from his retiral benefits. An occasion came before this Court to consider the continuance of disciplinary inquiry in similar circumstance in Bhagirathi Jena's case (supra) and it was laid down as follows:

" 5. Learned Senior Counsel for the respondents also relied upon Clause (3) (c) of Regulation-44 of the Orissa State Financial Corporation Staff Regulations, 1975. It reads thus : "When the employee who has been dismissed, removed or suspended is reinstated, the Board shall consider and make a specific order :-

(i) Regarding the pay and allowances to be paid to the employee for the period of his absence from duty, and (ii) Whether or not the said period shall be treated as a period on duty."

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

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

7. In the subsequent decision of this Court in U.P. Coop. Federation case (supra) on facts, the disciplinary proceeding against employee was quashed by the High Court since no opportunity of hearing was given to him in the inquiry and the management in its appeal before this Court sought for grant of liberty to hold a fresh inquiry and this Court held that charges levelled against the employee were not minor in nature, and therefore, it would not be proper to foreclose the right of the employer to hold a fresh inquiry only on the ground that the employee has since retired from the service and accordingly granted the liberty sought for by the management.

8. While dealing with the above case, the earlier decision in Bhagirathi Jena's

case (supra) was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

9. Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

10. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and upto the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him.

11. The appeals are, therefore, allowed and the judgment and order of the High Court are set aside and the respondents are directed to pay arrears of salary and allowances payable to the appellant and also to pay him his all the retiral benefits in accordance with the rules and regulations as if there had been no disciplinary proceeding or order passed therein."

9. In the present case also the U.P. Cane Co-operative Federation Employees Service Regulations, 1975 have been framed in exercise of powers under Section 122 of the U.P. Co-operative Societies Act, 1965. Regulation 69 of the U.P. Cane Co-operative Service Regulation, 1975 reads as follows:

"69. At the conclusion of the disciplinary proceedings, the competent authority may impose any or more of the following punishment according to the nature and gravity of the offence:

(a) Censure.

(b) Withholding the increment or increments including stoppage in efficiency bar or promotion.

(c) Reduction to a lower post or time-scale or to a lower stage in time-scale.

(d) Fine.

(e) Recovery from the pay of the whole or part of the pecuniary loss caused to the institution or institutions placed under his charge by his negligence or breach of orders.

(f) Removal from service.

(g) Dismissal from service.

Note-Dismissal disqualifies an employee from re-employment in the service."

10. From a perusal of the U.P. Cane Cooperative Service Regulations, 1975 it is noticed that there is no provision similar to or pari materia with Article 351 (A) of the Civil Service Regulations, which may permit the respondent authorities to proceed with the disciplinary proceeding against a retired employee. Therefore, the only conclusion that can be drawn in the absence of any such provision is that, once the employee has retired and the disciplinary proceeding have not been concluded, for whatever reason, such disciplinary proceedings shall automatically lapse with the retirement of the employee.

11. In this view of the matter the impugned orders dated 22.10.2013 and 27.05.2014 cannot survive being illegal and without jurisdiction and the same are accordingly quashed.

12. The writ petition is allowed.

13. The respondents are directed to pay the entire arrears of salary and allowances payable to the petitioner and also to pay him all his retirement benefits in accordance with Rules and Regulations as if there had been no disciplinary proceedings or order passed therein.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.08.2014

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

Service Single No. 9694 of 2006

Bhibhuti Narain Singh ...Petitioner
Versus
Food Corporation of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri T.B. Singh, Sri Sudhir Pandey
Sri Sunil K Singh

Counsel for the Respondents:
Sri Ashutosh Kr. Singh, Shree Chandra Misra

Constitution of India, Art.-226-Writ petition-territorial jurisdiction-order impugned passed at Chandigarh-even appeal and mercy petition dismissed at New Delhi-merely because posted at Barabanki-disciplinary proceeding initiated at Lucknow-hence has jurisdiction-held-in view of law laid down by Full Bench in Rejendra Kumar Misra case as well as Supreme Court in Lt. Col. Khajoor Singh-petition before Lucknow Bench , Allahabad High Court-not maintainable.

Held: Para-15
From the impugned orders, it is noticed that the chargesheet was issued to the petitioner on 19.07.1995 when he was working at Faridkot from the Regional Office of the Food Corporation of India, Chandigarh. In the meantime he was transferred to Lucknow. The appellate order was passed by the Zonal Manager, Zonal Office (North), Food Corporation of India, New Delhi, the review order dated 09.09.2000 was also passed by the Managing Director, Food Corporation of India, Headquarters, New Delhi. The mercy petition of the petitioner was also rejected by the Chairman for and on behalf of the Board of Directors, Food Corporation of India, Headquarters, New Delhi. The only order which has been passed within the State of U.P. is the communication order dated 09.02.2001 passed by the District Manager, Food Corporation of India, District Office, Faridkot communicating the appellate order dated 09.09.2000. Merely because the order has been communicated to the petitioner when he was posted as Assistant Manager, Barabanki or Lucknow, U.P. will not confer any jurisdiction upon the Lucknow Bench of the Allahabad High Court. None of the orders, impugned in the writ petition have been passed by any authority in NOIDA or Lucknow within the State of U.P.

Case Law discussed:
(1995) 6 SCC 634; (2007) 7 SCC 309; AIR 1966 SCC 1313; AIR 1974 296(V.61, C.66); W.P. No. 6492 of 2010; AIR 1961 SC 532; 2005(5) AWC 4542(FB)

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

1. The petitioner has filed this writ petition seeking quashing of the orders dated 07.10.1998 (Annexure-1 to the writ petition) passed by the General Manager (Punjab) Food Corporation of India,

Chandigarh, respondent no.5, the appellate order dated 29.09.1999 (Annexure-2 to the writ petition) passed by the Executive Director (N) Food Corporation of India, NOIDA, the Review order dated 09.09.2000 (Annexure-3 to the writ petition) passed by the respondent no.1, Chairman, Food Corporation of India, New Delhi, the order dated 09.02.2001(Annexure-4 to the writ petition) passed by the District Manager, Food Corporation of India, Faizabad communicating to the petitioner that his appeal/review against the order dated 09.09.2000 has been rejected and the order dated 20.07.2006 (Annexure-5 to the writ petition) passed by the Chairman, Food Corporation of India, Headquarters, New Delhi rejecting the mercy petition of the petitioner.

2. I have heard Sri Sudhir Pandey, learned counsel for the petitioner and Sri Shree Chandra Misra as well as Sri Shikhar Anand, learned counsel for the respondents.

3. Sri Shree Chandra Misra has raised a preliminary objection that no cause of action has accrued to the petitioner within the State of U.P. and all the impugned orders have been passed either at New Delhi or Chandigarh and therefore, the High Court either at Allahabad or the Lucknow Bench of the Allahabad High Court does not have jurisdiction to entertain this writ petition and mere communication of some order by the District Manager, Faizabad communicating the above orders to the petitioner would not confer jurisdiction on the Lucknow Bench of the Allahabad High Court to entertain the writ petition.

4. In order to determine the preliminary objection raised by the learned counsel for the respondents brief facts of the case would be necessary to be narrated. The petitioner while posted as Assistant Manager (Quality Control) at Faridkot, Punjab in the Food Corporation of India was served with a chargesheet vide memo dated 19.07.1995 under Regulation 58 of the Regulations, copy of the chargesheet has been filed as Annexure-6 to the writ petition. A perusal of the same will demonstrate that it has been issued by the Senior Regional Manager, Regional Office of the Food Corporation of India, Chandigarh, Punjab. This chargesheet was communicated to the petitioner through the District Manager, Food Corporation of India, Gurudaspur as disclosed in the chargesheet. By an order dated 15.06.1998 the petitioner was transferred to Lucknow. He was relieved on 03.08.1998 and he joined the Lucknow office of the Food Corporation of India on 04.08.1998. In pursuance of the chargesheet which was issued to him, a departmental enquiry was held. The charges were proved against the petitioner and thereafter the impugned punishment order dated 07.10.1998 (Annexure-1 to the writ petition) was passed and a penalty of stoppage of two increments of pay with cumulative effect effective from 01.01.1999 was passed against the petitioner in exercise of powers under Regulation 56 of the Food Corporation of India (Staff) Regulations 1971. This order has been passed by the Senior Regional Manager, Regional Office, Food Corporation of India, Chandigarh, Punjab. Aggrieved the petitioner filed a departmental appeal which was also dismissed by an order dated 29.09.1999 passed by the Zonal Manager, Zonal Office (N), New Delhi, copy of which has been filed as Annexure-2 to the writ

petition. Aggrieved by this order, the petitioner filed a review petition, which has been rejected by an order dated 09.09.2000 passed by the Managing Director, Food Corporation of India, Headquarters, New Delhi. This order was communicated to the petitioner by letter dated 09.02.2001 by the District Manager Incharge Food Corporation of India, District Office, Faizabad. The petitioner preferred a mercy petition which has also been rejected by the Chairman for and on behalf of the Board of Directors, Food Corporation of India, Headquarters, New Delhi, copy of which has been filed at page 43 of the writ petition.

5. The submission of Sri Sudhir Panday, learned counsel for the petitioner are three fold:

1. That, the writ petition does not suffer from vice of non-maintainability on ground of territorial jurisdiction;

2. That, the impugned order of penalty has been passed by the Senior Regional Manager, Chandigarh, Punjab although as per the Schedule-II of the Regulations (copy filed at page 30 to the writ petition), the Zonal Manager is the competent authority to award major penalty since the penalty of withholding of two increments with cumulative effect is a major penalty.

3. That, the Zonal Manager, is the appellate authority of the Senior Regional Manager and that the appellate authority of any order passed by the Zonal Manager is the Managing Director, Food Corporation of India.

6. The inferential submission, therefore, is that the order of penalty having been passed by the Senior Regional Manger is without jurisdiction and as a consequence the appellate order passed by the Zonal Manager is also without jurisdiction.

7. The second submission of the learned counsel for the petitioner is that since the orders have been passed by the authorities, who were not competent to pass the same, the doctrine of merger, namely, that the order of disciplinary authority would merge in the order of the appellate authority does not apply. Before the second and third submissions of the learned counsel can be considered it would be appropriate and in the fitness of things that the first and preliminary objection with regard to the territorial jurisdiction be examined, discussed and decided.

8. Learned counsel for the petitioner has also placed reliance upon the following decisions of the Supreme Court:

1. (1995) 6 SCC 634, Allahabad Bank Vs. Prem Narain Pande and Others

2. (2007) 7 SCC 309, Municipal Corporation of Delhi Vs. Qimat Raj Gupta and Others.

3. AIR 1966 SCC 1313, State of Punjab Vs. Amar Singh Harika

4. AIR 1974 296 (V.61, C.66), Serajuddin and Co. Vs. State of Orissa and Others. 5. Writ Petition No.6492 (S/S) of 2010, Janmejai Sachan Vs. State of U.P. and Others.

9. Learned counsel for the petitioner submitted that the judgment of the Supreme Court in the case of Prem Narain Pande (supra) and Janmejai Sachan (supra) would be directly applicable with regard to his submission on the question of territorial jurisdiction of the Lucknow

Bench of the Allahabad High Court. In the circumstances, it would be necessary to discuss the facts of the case of Prem Narain Pande (supra) and Janmejai Sachan (supra). In the case of Prem Narain Pande (supra), the respondent in the Special Appeal was working as Junior Management Scale-I posted in the Regional Office of the Allahabad Bank at Lucknow. He was served with a chargesheet dated 24.08.1983 with regard to his working as Manager of the Allahabad Bank, District Lakhimpur Kheri. The chargesheet was served upon the respondent no.1 while working at the Central Zone, Lucknow. In the meantime, on 15.07.1985, the respondent no.1 was transferred from Lucknow to Ranchi, Bihar. After transfer, the Assistant General Manger, Zonal Office, Allahabad Bank, Patna Zone took over as the Disciplinary Authority in respect of the pending enquiry against the respondent no.1. An enquiry was held and thereafter the Assistant General Manager, Zonal Office, Patna passed the order dated 21.03.1986 dismissing the respondent no.1 from service of the Bank. The respondent challenged the order of dismissal by filing writ petition in the Lucknow Bench of the Allahabad High Court taking the plea, inter alia, that the disciplinary proceedings were initiated against him by the Deputy General Manager, Central Zone, Lucknow and therefore the Assistant General Manager, Zonal Office, Patna had no authority or jurisdiction to pass the impugned dismissal order and it was the disciplinary authority which initiated the proceedings which was competent to pass the final order of penalty. The Supreme Court in paragraph 12 of the judgment has held that if the Deputy General Manager has initiated the disciplinary proceedings against the delinquent officer and if at the stage of passing final orders he is substituted by another competent disciplinary authority like Assistant General Manger, then in such a case, the penalty order though passed by the Assistant General Manager will have a linkage with the initiation of the disciplinary proceedings by the Deputy General Manager as disciplinary authority and in such an eventuality the appeal would lie to the General Manager, who is also one of the appellate authorities as mentioned in the amended Schedule and in either case the reviewing authority against the appellate authority will remain the same, namely, the Chairman and Managing Director. The Supreme Court, therefore, held that it cannot be held as assumed by the High Court that under the Regulations it is the disciplinary authority which initiates the proceedings that has necessarily to complete the proceedings till the stage of Regulation-7 and it is that very authority who must pass the final orders of penalty. It is on this short ground that the decision of the High Court was held to be non-sustainable. In my opinion, the aforesaid judgment has no application to the facts of the present case and in fact the Supreme Court only upset the judgment of the High Court on the question where the High Court held that since the proceedings had continued at Patna, therefore, the Assistant General Manager, Patna was not competent to complete the enquiry and it was only the disciplinary authority, namely, the Deputy General Manger, Lucknow who was competent to continue the departmental enquiry. In my opinion the said judgment does not answer the preliminary objection of the respondents that the writ petition is not maintainable in the Allahabad High Court, Lucknow Bench on the ground that

no cause of action has accrued within the State of U.P.

10. In Janmejai Sachan (supra) the Superintendent of Police Unnao had awarded censure entry to the petitioner. The petitioner during pendency of the disciplinary proceedings was transferred from Unnao to Sitapur. The learned Single Judge, by the interim order dated 15.09.2010 held that only the Superintendent of Police, Sitapur was competent to pass the order of punishment. Reliance was placed by the learned Single Judge upon the case of Prem Narain Pande (supra). The said judgment is an interim order and not the final order, therefore, does not constitute a precedent unless the Court has finally decided the issue. This judgment also does not meet the preliminary objection regarding non-maintainability of the writ petition.

11. Learned counsel for the petitioner next relied upon the judgment of the Supreme Court in Amar Singh Harika (supra), wherein it was held that mere passing of an order of dismissal is not effective unless it is published and communicated to the officer concerned. The judgment of Amar Singh Harika (supra) is in its own facts. That was a case in which the respondent was sought to be dismissed and an order of dismissal was passed on 03.06.1949. This order was communicated to 6 persons but not to the respondent himself, the respondent on 29.01.1951 made a representation to the Government of Pepsu, in which he asked for being given a copy of the report of the Committee, a copy of the allegations on which the said report was based, and a copy of the chargesheet. In reply he was informed on 16.04.1951 by the Pepsu Government that his report could not be considered as he has tendered his resignation. However, on 28.05.1951 he was informed that he had been dismissed from service with effect from the date of his suspension. It is on this date that the respondent for the first time came to know about his dismissal. The facts of the said case also have no application to the facts of the present case.

12. In the case of Qimat Rai Gupta and Others (supra), the Supreme Court in paragraph 27 has held that an order passed by a competent authority dismissing a Government servant from service requires communication. Reference was made to the judgment of the Constitution Bench of the Supreme Court in the case of Amar Singh Harika (supra). The said judgment also has no application to the facts of the present case as in the case of present petitioner the penalty order dated 07.10.1998 had been communicated to the petitioner and he also filed a departmental appeal against the same on 08.01.1999 which was rejected by the order dated 29.09.1999.

13. The judgment of the Division Bench of the Calcutta High Court in the case of Serajuddin and Company (supra) is a matter where the revisional order under the Mineral Concession Rules, 1960 was found to be a nullity for not complying with the principles of natural justice and it was held that where the order itself was a nullity such defects could not be cured by giving any opportunity of hearing. This judgment also, in my opinion, has no application to the facts of the present case.

14. This Court cannot examine the question as to whether the impugned order

in the present case are valid or not, or whether if there is any defect in the impugned orders, the same can be cured or not since the question to be considered by the Court is a preliminary objection with regard to the maintainability of the writ petition itself in the Lucknow Bench of the Allahabad High Court and therefore, the Court cannot enter into the merits of the case.

15. From the impugned orders, it is noticed that the chargesheet was issued to the petitioner on 19.07.1995 when he was working at Faridkot from the Regional Office of the Food Corporation of India, Chandigarh. In the meantime he was transferred to Lucknow. The appellate order was passed by the Zonal Manager, Zonal Office (North), Food Corporation of India, New Delhi, the review order dated 09.09.2000 was also passed by the Managing Director, Food Corporation of India, Headquarters, New Delhi. The mercy petition of the petitioner was also rejected by the Chairman for and on behalf of the Board of Directors, Food Corporation of India, Headquarters, New Delhi. The only order which has been passed within the State of U.P. is the communication order dated 09.02.2001 passed by the District Manager, Food Corporation of India, District Office, Faridkot communicating the appellate order dated 09.09.2000. Merely because the order has been communicated to the petitioner when he was posted as Assistant Manager, Barabanki or Lucknow, U.P. will not confer any jurisdiction upon the Lucknow Bench of the Allahabad High Court. None of the orders, impugned in the writ petition have been passed by any authority in NOIDA or Lucknow within the State of U.P.

16. To the contrary a Seven-Judge Constitution Bench of the Supreme Court in Lt. Col. Khajoor Singh vs. Union of India,AIR 1961 SC 532 has very succinctly laid down the law on the question of jurisdiction in para 13 which reads as under:-

"13.Now it is clear that the jurisdiction conferred on the High Court by Article 226 does not depend upon the residence or location of the person applying to it for relief : it depends only on the person or authority against whom a writ is sought being within those territories. It seems to us therefore that it is not permissible to read in Article 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High Court. That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. Thus, if a person residing or located in Bombay, for example, is aggrieved by an order passed by an authority located, say, in Calcutta, the forum in which he has to seek relief is not the Bombay High Court though the order may affect him in Bombay, but the Calcutta High Court where the authority passing the order is located. It would, therefore, in our opinion, be wrong to introduce in Article 226 the concept of the place where the order passed has effect in order to determine the jurisdiction of the High Court which can give relief under Article 226."

17. The legal principles propounded in Lt. Col. Khajoor Singh (supra) have been followed by a Full Bench of this Court in 2005 (5) AWC 4542 (FB) Rajendra Kumar Mishra vs. Union of India and others.

18. Thus in view of the law laid down by the Supreme Court in the case of Lt. Col. Khajoor Singh (supra) and the Full Bench in Rajendra Kumar Mishra (Supra) this writ petition filed in the Allahabad High Court, Lucknow Bench is not maintainable and is dismissed as such.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 14637 of 2010

Ranjit Sharma ...Petitioner
Versus
General Manager-Personal Service, UCO Bank Kolkatta & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sharad Malviya, Sri A.N. Pandey

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

Constitution of India-Art.-226-Writ Petition-challenging dismissal order-on ground non compliance of principle of Natural Justice-concealed material fact that the disciplinary proceeding conducted strict in accordance with law with full opportunity-due to fraud and manipulation committed by petitioner-termination due to loss of confidence-petitioner guilty of suppressing material fact,-disciplinary authority taking different view than enquiry officer-issued show cause notice-instead of filing reply-present petition-not maintainable-dismissed with cost of 20,000/-payable to bank.

Held: Para-28
The petitioner was given ample opportunity, the evidence was led by the bank against the petitioner which was proved on the basis of records available in the normal course of business. The factum of the allegations is not being denied by the petitioner, however, explanations have been given. Since the bank has lost money by fraud and manipulation committed by the petitioner while working as Computer Terminal Operator, his services was rightly terminated for loss of confidence and unsuitability by the Bank. The petitioner is guilty of not approaching the Court with clean hands.

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

1. Heard Sri Sharad Malviya assisted by Sri A.N. Pandey, learned counsel appearing for the petitioner and Sri T.P. Singh, Senior Advocate assisted by Sri V.K. Srivastava, learned counsel appearing for the respondents.

2. The petitioner was working as Computer Terminal Operator (CTO) in Laxman Patti Branch of UCO Bank at Bhadohi, for committing irregularities was placed under suspension, a charge-sheet containing seven charges was issued to the petitioner. The petitioner submitted reply to the charge-sheet on 12.9.2006 denying the allegations, hence, an Enquiry Officer was appointed who after conducting the enquiry recorded a finding on 18.2.2009 that charge nos. 2 and 5 are proved and charge nos. 1, 3, 4, 6 and 7 are not proved against the petitioner.

3. The Disciplinary Authority disagreed with the findings of the Enquiry Officer in respect of charge nos. 1, 3, 4, 6 and 7, but agreed with the finds in respect of charge nos. 2 and 5 vide order dated 31.3.2008 and issued notice calling upon the petitioner to show cause. The petitioner submitted his reply on 9.4.2008 to the Disciplinary Authority pertaining to the charge nos. 1, 3, 4, 6 and 7. The Disciplinary Authority after giving

opportunity of personal hearing, recorded a finding that the allegations against the petitioner stood proved and by the impugned order dated 16.5.2008 imposed major penalty in terms of para 6(a) of Memorandum of Settlement dated 10.4.2002 dismissing the petitioner from service.

4. Aggrieved the petitioner preferred an appeal before the General Manager, Personal Services, UCO Bank, Head Office, Kolkata, the Appellate Authority considered the appeal and by detailed order dated 4.5.2009 affirmed the findings of the disciplinary authority, recording that for the reason of unsuitability and loss of confidence, quantum of punishment was being upheld.

5. Aggrieved, the orders dated 16.5.2008 and 4.5.2009 are being assailed in the writ petition.

6. Submission of learned counsel for the petitioner is that the petitioner had denied the allegations and once the Enquiry Officer had only proved two of the charges but the Disciplinary Authority without considering the findings and reasoning recorded by the Enquiry Officer has held all the charges proved thus holding the petitioner guilty, the findings are based on conjectures and surmises, no show cause notice was issued by the Disciplinary Authority on disagreement with the findings of the Enquiry Officer, the findings are ex parte without adequate opportunity and the quantum of punishment is not commensurate to the guilt.

7. In rebuttal, learned Senior Advocate submits that the procedure, as prescribed under the agreement was duly followed, the petitioner was given ample opportunity to explain, the Enquiry Officer proved two charges and for the findings on other charges, Disciplinary Authority disagreed, accordingly, a show cause notice was issued to the petitioner, to which, the petitioner replied, considering the reply and giving personal hearing the impugned order was passed. The Appellate Authority has also considered the appeal and recorded a finding affirming the findings of the Disciplinary Authority. Further the Senior Advocate submits that the petitioner has not approached the Court with clean hands, as the petitioner nowhere disclosed that the Disciplinary Authority had disagreed with the findings of the enquiry report in respect of unproved charges and a show cause notice was issued which was replied to by the petitioner, hence the petition is liable to be dismissed on this count alone. In support of his submission, learned Senior Advocate has relied upon the following judgments; State Bank of Patiala and others vs. S.K. Sharma (1996) 3 SCC 364; Lucknow K. Gramin Bank (Now Allahabad, U.P. Gramin Bank) & Anr. vs. Rajendra Singh AIR 2013 SC 3540 and S.R. Tewari vs. Union of India and another (2013) 6 SCC 602

8. Rival submissions fall for consideration.

9. The Supreme Court in the case of State of Madras vs. G. Sundaram AIR 1965 SC 1103 had explained the scope of judicial review::-

"7. It is well settled now that a High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in

a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence. It was so held in State of Orissa v. Murlidhar, AIR 1963 SC 404, where it was said at p. 408:

"Whether or not the evidence on which the Tribunal relied was satisfactory and sufficient for justifying its conclusion would not fall to be considered in a writ petition. That in effect is the approach initially adopted by the High Court at the beginning of its judgment. However, in the subsequent part of the judgment the High Court appears to have been persuaded to appreciate the evidence for itself, and that, in our opinion, is not reasonable or legitimate."

8.Similar view was emphatically expressed in State of Andhra Pradesh v. Sree Rama Rao, AIR1968 SC 1728, wherein it was said at p. 1726:

"The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant; it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. But the departmental authorities are, if the enquiry is otherwise properly held the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

9. It is, therefore, clear that the High Court was not competent to consider the question whether the evidence before the Tribunal and the Government was insufficient or unreliable to establish the charge against the respondent. It could have considered only the fact whether there was any evidence at all which, if believed by the Tribunal, would establish the charge against the respondent. Adequacy of that evidence to sustain the charge is not a question before the High Court when exercising its jurisdiction under Article 226 of the Constitution. This view was reiterated in Union of India v. H. C. Goel,."

10. In State Bank of India vs. Ramesh Dinkar Punde (2006) 7 SCC 212 Hon'ble Supreme Court has held that:-

"13. We are, therefore, clearly of the view that the High Court was erred both in law and on facts in interfering with the findings of the Inquiry Officer, the Disciplinary Authority and the Appellate Authority by acting as a court of appeal and re- appreciating the evidence.

In the case of T.N.C.S. Corpn. Ltd. and Ors. (appellants) v. K. Meerabai (respondent) (2006) 2 SCC 255, the plea of no loss or quantum of loss was rejected by the Court. It was pointed out at page SCC 267 para 29 as under:

"29. Mr. Francis also submitted that a sum of Rs. 34,436.85 being 5% of the total loss of Rs. 6,88,735/- is sought to be recovered from the respondent and that the present departmental proceedings is the only known allegation against the respondent and there was no such allegation earlier and, therefore, a lenient view should be taken by this Court and relief prayed for by both the parties can be suitably moulded by this Court. We are unable to agree with the above submission which, in our opinion, has no force. The scope of judicial review is very limited. Sympathy or generosity as a factor is impermissible. In our view, loss of confidence is the primary factor and not the amount of money mis-appropriated. In the instant case, respondent employee is found guilty of mis- appropriating the Corporation funds. There is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or mis-placed sympathy on the part of the judicial forums and interfering therefor with the quantum of punishment awarded by the disciplinary and Appellate Authority."

11. The Supreme Court recently in Nirmala J. Jhala vs. State of Gujarat and another (2013) 4 SCC 301) after considering earlier judgments has again reiterated the principle of judicial review in disciplinary proceedings and held that in the departmental enquiry, the nature and standard of proof is not at par with the quasi judicial and quasi criminal proceedings; the principle of preponderance is applicable and not the doctrine of proof beyond reasonable doubt.

12. The Apex Court further considered the parameter of the Court's power of judicial review of administrative action or decision. The relevant portion of the judgment of Nirmala J. Jhala (supra) is as follows:-

"The decisions referred to hereinabove highlights clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides,dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision- making process, the Court must exercise its discretionary power with great caution keeping in mind the larger

public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene."

13. Supreme Court in the case of S.R. Tewari vs. Union of India and another [(2013) 6 SCC 602] observed as follows:-

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide: Rajinder Kumar Kindra v. Delhi Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677; Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589; and Babu v. State of Kerala, (2010) 9 SCC 189).

31. Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible."

14. I have perused the record, it is not disputed by the learned counsel for the petitioner that there has been any illegality or infirmity in the procedure followed in conducting the disciplinary proceedings. The charges, briefly, against the petitioner is as follows:-

(1)While working as, Computer Terminal Operator (CTO), petitioner by using the pass word of Sri Paltoo Ram, Assistant Manager, in making entires i.e. debit and credit in the various books of accounts in spite of the petitioner having a separate pass word.

(2)While working as CTO the basic duty of the petitioner is to sit on the computer for doing the data work with the computer but for the last two months he was doing the balancing work of CFD and GLB under the instructions of the Manager. But on verification of records no such office order was issued to the petitioner for doing balancing work.

(3)The petitioner was taking the voucher lots from Sri Krishna Madhab continuously for some days for balancing work and used to return the vouchers in late hours. It was observed that while fluids was intentionally dropped on the account holders signature of Saving Banks Account Nos. 474 and 2323 on bearer cheque no. 342796 dated 3.8.2006 which was paid on 7.8.2006 thus the petitioner has tampered with the vouchers/cheque(s) to distort the genuineness of a/c holders signatures.

(4)While working as CTO the petitioner entered the cheque book serial nos. in in-operative Savings Bank Account of Sri Rama Shankar Yadav and the same serial numbers was again entered in the in-operative Savings Bank Account no. 2323 of Smt. Pramila Devi on 1.6.2006 by changing the cheque series thus the petitioner by entering the cheque book in the in-operative savings accounts by using the pass word of Sri Paltoo Ram, Assistant Manager.

(5)Petitioner has obtained motor-cycle loan of Rs. 24,000/- from H.D.F.C. Bank without obtaining permission from Bank. Thus violating the rules of the bank.

(6)Due to aforesaid act committed by the petitioner, fraud of Rs. 1,75,500/- was committed in the in-operative Savings Banks Account and as such bank may suffer or likely to suffer a loss of the above amount(s).

(7)Petitioner was also issued charge-sheet on 27.12.2004 in connection with the composite frauds case at Branch Office Bhadohi where loss of Rs. 3.60 lacs. The petitioner was punished with recovery of Rs. 40,000/- for causing loss. Keeping in view of the petitioner's past record and involvement in fraud case in Branch Office Bhadohi, it appears that the activities/action of the petitioner is suspicious in nature and might have been involved in tampering of record/vouchers by using pass word of Sri Paltoo Ram, Assistant Manager.

15. The petitioner in his reply to the charge-sheet did not dispute the factum of the allegations but explained, by stating, that on the verbal orders of the Branch Manager, the petitioner was doing the work of balancing the accounts books apart from the allotted work, however, denied that he had used the pass word of Sri Paltoo Ram, who operate the computers, neither the signatures of Paltoo Ram nor of the petitioner have been found on the vouchers, regarding the irregularity of the cheque serial number, petitioner submitted that every employee of the bank is aware of the serial numbers, thus, denying that the petitioner had committed any fraud or misrepresentation, but admitted that fraud was committed in respect of the serial numbers using the pass word of Paltooram.

16. Enquiry Officer conducted the enquiry, which was held on several dates, as mentioned in the enquiry report, the petitioner pleaded his case himself and did not appoint any defense representative. The bank appointed its presenting officer and produced over 44 exhibits which include the copy of the cheques, signatures, vouchers, employment register, security print register, Assistance register, cheque leave status, withdrawal slip of savings bank account.

17. Apart from the exhibits, the presenting officer produced the witnesses on behalf of the bank.

18. The Enquiry Officer after considering the evidences found charges no. 2 and 5 proved and the rest not proved.

19. The disciplinary authority disagreed with the findings of the Enquiry Officer on the non-proved charges and issued a show cause notice on 31.3.2008 conveying to the petitioner the disagreement on the Enquiry Officer's report dated 18.2.2008. The disciplinary authority recorded that the Enquiry Officer failed to understand the modus operandi applied by the petitioner, who has very cleverly executed and succeeded in perpetrating the fraud of Rs. 1,75,500/- from in-operative accounts and clandestinely got authorized by using the pass word of Sri Paltooram.

20. Pursuant to the dissent note, petitioner submitted a detailed reply on 9.4.2008. Disciplinary Authority after considering the reply, issued a show cause

notice on 2.5.2008 regarding the proposed penalty, after considering the reply by a detailed order dated 16.5.2008, after giving personal hearing to the petitioner, imposed punishment of dismissal. Aggrieved the petitioner preferred an appeal, reiterating the facts stated in his reply to the charge-sheet as well as, to the show cause notice, which was considered and rejected by the appellate authority by order dated 4.5.2009. The operative portion of the appellate order is extracted below:-

"I have considered all aspects in the matter independently with an unbiased mind and find that although the involvement of Sri Sharma in the fraud was not conclusively proved in the enquiry beyond doubt but Disciplinary proceedings is not a criminal trial and is based on preponderance of probability and not a proof beyond a reasonable doubt. The charges leveled and proved in the enquiry against Sri Sharma are serious and grave in nature. Bank is a financial institution and it cannot afford to have such employees in whom the Bank has lost faith. Therefore, there is no room for showing any leniency in the matter. Accordingly I, as Appellate Authority, am not inclined to interfere with the order dated 16.5.2008 passed by the Disciplinary Authority and uphold the penalty imposed by him upon Sri Sharma. Hence, the appeal dated 31.5.2008 preferred by Sri Sharma to reinstate him in service, is rejected."

21. It is thus evident that the entire procedure as prescribed was followed, the petitioner was given ample and reasonable opportunity. The factum of the allegations is not denied by the petitioner, however, explanations was furnished which was not agreed to by the disciplinary authority as well as by the appellate authority. The Court finds no illegality with the impugned orders.

22. It is also relevant to point out that the petitioner has not approached the Court with clean hands, nowhere in the writ petition it has been pleaded that disciplinary authority had disagreed with the findings of the Enquiry Officer and a show cause notice was given to the petitioner to which the petitioner submitted his reply, rather a specific stand and ground has been taken that no show cause notice was issued by the disciplinary authority while disagreeing with Enquiry Officer.

23. In paragraph 7 of the writ petition it has been stated that on the basis of enquiry report, the petitioner was dismissed from service without giving any further notice calling upon the petitioner to submit his reply with regard to the proposed punishment.

24. Learned counsel for the petitioner emphasized on the plea that no show cause notice was issued to the petitioner by the disciplinary authority while disagreeing with the findings of the enquiry report, thus, the enquiry stood vitiated, in support of his argument he has relied upon the judgment rendered in Punjab National Bank vs. Kunj Bihari Mishra AIR 1998 SC 2713. The Court on 5.8.2014 directed the learned counsel for the respondent to inform the Court, as to whether any show cause notice was issued by the disciplinary authority while disagreeing with the findings of the enquiry officer. On 11.8.2014 a second supplementary affidavit was filed on behalf of the bank, brining on record, the show cause notice issued by the disciplinary authority, as well as, the reply

filed by the petitioner pursuant thereof, thus, it is evident that the petitioner has tried to misrepresent with a view to obtain favourable order, thus, has not approached the Court with clean hands .

25. Supreme Court in the case of V. Chandrashekaran and another vs. Administrative Officer and others [(2012) 12 SCC 133 observed that a petition or affidavit containing misleading or inaccurate statement amounts to abuse of process of Court, a litigant cannot take in consistent positions. The Court imposed cost of Rs. 25 lacs. Paras 45, 46 and 47 are as follows:-

"45. The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court.

46.In Dalip Singh v. State of U.P. & Ors., (2010) 2 SCC 114, this Court noticed an altogether new creed of litigants, that is, dishonest litigants and went on to strongly deprecate their conduct by observing that, the truth constitutes an integral part of the justice delivery system. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings. A litigant who attempts to pollute the stream of justice, or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

47. The truth should be the guiding star in the entire judicial process. Every trial is a voyage of discovery in which truth is the quest. An action at law is not a game of chess, therefore, a litigant cannot prevaricate and take inconsistent positions. It is one of those fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings. (Vide: Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors., (2010) 10 SCC 677; and Amar Singh v. Union of India, (2011) 7 SCC 69).

26. In Ram Chandra Singh vs. Savitri Devi (2003) 8 SCC 319 Hon'ble Supreme Court held:-

"23. Recently this Court by an order dated 3 rd September, 2003 in Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education held: (SCC pp. 316-317, paras 13-15)

"13. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry v. Peek (1889) 14 AC 337)

14. In Lazarus Estates v. Beasley the Court of Appeal stated the law thus: (All ER p. 345 C-D)

"I cannot accede to this argument for a moment "no Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to

stand if it has been obtained by fraud. Fraud unravels everything". The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

15. In S.P. Chengalyaraya Naidu v. Jagannath this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

27. Recently the Supreme Court in the case of Smt. Badami (Deceased) vs. Bhali 2012 (11) SCC 574 after considering earlier judgements was of the view that a party, who secures any order or judgement by taking recourse to fraud should not be enabled to enjoy the fruits thereof. Para 24 is reproduced:-

"Yet in another decision Hamza Haji vs. State of Kerala and Anr. MANU/SC8416/2006 AIR 2006 SC 3028 it has been held that no Court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgement by taking recourse to fraud should not be enabled to enjoy the fruits thereof."

28. The petitioner was given ample opportunity, the evidence was led by the bank against the petitioner which was proved on the basis of records available in the normal course of business. The factum of the allegations is not being denied by the petitioner, however, explanations have been given. Since the bank has lost money by fraud and manipulation committed by the petitioner while working as Computer Terminal Operator, his services was rightly terminated for loss of confidence and unsuitability by the Bank. The petitioner is guilty of not approaching the Court with clean hands.

29. In view of the law and reasons stated, herein above, the writ petition fails and is, accordingly, dismissed.

30. Cost of Rs. 20,000/- is imposed upon the petitioner, payable to the respondent Bank within three months, for dragging the respondents into litigation on misrepresentation and suppression of material facts.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 17689 of 2001

A.S.P. Sealing Products Ltd. J.P. Nagar ...Petitioner

Versus

Dy. Labour Commissioner Moradabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shakti Swarup Nigam

Counsel for the Respondents:
C.S.C.

U.P. Industrial Peace (Timely Payment of wages) Act, 1978-Section-3-Recovery against petitioner/management-for Rs. 26530/- recovery certificate issued with collection charges-argument that amount not exceeding 50,000/-R.C. Without jurisdiction-held-wage to bill below Rs. 50,000/-beyond perview of Act-without jurisdiction-quashed-any amount deposited in pursuance of interim order shall be refunded.

Held: Para-5

Having heard learned counsel for the petitioner, learned standing counsel and

perused the impugned recovery certificate dated 30.03.2001 in the light of the aforesaid pronouncements, I am of the considered view that the petitioner being in default of Wage Bill not exceeding Rs.50,000/-, the provisions of Section 3 were not attracted. Impugned certificate is without jurisdiction. The reference in the recovery certificate to the fact that the amount in default is Rs.26530/- but the Wage Bill is Rs.50000/- appears to be under a misconception about the application of the Act of 1978. If the total wage-bill is Rs.50,000/- and default is of only Rs.26530/- then it is not a default in the payment of wage-bill of all the workmen in the establishment, thus, outside the purview of Act, 1978. If the wage-bill of workmen as a whole is only Rs.26530/- and is in default, then also, it is less than Rs.50000/- as such, out of the purview of the said Act.

Case Law discussed:
AIR 1994 SC 536; 2013(3) 1207 (All)

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri S.S. Nigam, learned counsel for the petitioner and learned standing counsel for the respondents.

2. By means of this writ petition, the order dated 30.03.2001 by which a recovery certificate has been issued by the Deputy Labour Commissioner under Section 3 of the U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 for recovery of an amount of Rs.26,530/- plus ten percent recovery charges, i.e. total amount of Rs.29183/- has been challenged. This court by means of an interim order dated 11.05.2001 ordered that in case the petitioner deposited a sum of Rs.20,000/- with respondent No.1 within two weeks, the recovery proceedings against the petitioner shall remain stayed, therefore, the impugned recovery proceedings have remained in abeyance during pendency of the writ petition.

3. The contention of Sri Nigam is that the Wage Bill in respect of which, the petitioner was allegedly in default did not exceed Rs.50,000/- as is evident from the amount mentioned in the recovery certificate itself, therefore, the controversy was beyond the purview of the aforesaid Act of 1978 and the recovery certificate is without jurisdiction. In this regard he has placed reliance upon a judgment of the Supreme Court reported in Modi Industries Ltd. Vs. State of U.P. and others, AIR 1994 SC 536. The relevant extract of the said judgment relied upon by Sri Nigam is being quoted hereinbelow:

"3.....Section 2(a) of the Act defines "industrial establishment" to mean "any factory, workshop or other establishment in which articles are produced, processed, adopted or manufactured with a view to their use, transport or sale". "Wage-bill" is defined by Section 2(d) to mean "the total amount of wages payable by an industrial establishment to its workmen". Sub-section (1) of Section 3 then states that where the Labour Commissioner is "satisfied" that the occupier of an industrial establishment is in default of payment of wages and that the "wage-bill" in respect of which such occupier is in default "exceeds fifty thousand rupees", he may, without prejudice to the provisions of Sections 5 and 6, forward to the Collector, a certificate ... specifying the amount of wages due from the industrial establishment concerned. Sub-section (2) of that section states that upon receipt of "the certificate" referred to in sub-section (1), the Collector shall

proceed to realise from the industrial establishment, the amount specified therein, besides recovery charges at the rate of ten per cent, as if such amount was an arrear of land revenue. Sub-section (3) of that section states that the amount so realised shall be placed at the disposal of the Labour Commissioner and he shall disburse the same among the workmen entitled thereto. Sub-section (4) states that when the amount so realised falls short of the wage-bill in respect of which there has been a default, the Labour Commissioner may arrange for disbursement of such proportion or respective proportions of the wages due to "various categories of workmen", as he may think fit. Subsection (5) then states that the liability of the occupier towards each workman in respect of payment of wages shall to the extent of the amount paid to such workman, stand discharged. Section 4 specifies the powers of the Labour Commissioner when he entertains the complaint of the default of payment of the wage-bill. It states that for the purposes of ascertaining the "wage-bill" of an establishment in respect of which default has been committed, the Labour Commissioner shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of enforcing the attendance of witnesses, examining them on oath and compelling production of documents, and shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Section 5 prescribes penalty. It states that no occupier of an industrial establishment shall at any time be in default of a wage-bill exceeding Rs 1 lakh, and every occupier who is so in default shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to three years and shall also be liable to fine. The Court is given power to impose a sentence of imprisonment for a term of less than three months for adequate and special reasons to be recorded in writing. Section 6 provides, for punishment of persons when the offence is by the company, which includes firms and association of individuals.

It will thus be clear from the preamble, the statement of objects and reasons and the provisions of the Act that, firstly, the Act has been placed on the statute book to ensure timely payment of wages by the bigger establishments, the incidence of disturbance of industrial peace being greater in such establishments on account of the default in payment of wages. Secondly, the Act deals with defaults in payment of the wage-bill of all the workmen in the establishment. It is not meant to provide a remedy for the default in payment of wages of individual workmen. That can be taken care of by the provisions of the Payment of Wages Act, 1936 which provisions are found inadequate to ensure timely payment of wages of the whole complement of workmen in an establishment. Thirdly, it is not in respect of the default in payment of every wage-bill but only of a wage-bill exceeding Rs 50,000 that the Labour Commissioner can be approached under the Act for redressal of the grievance. Fourthly, the Act is not applicable to all establishments but only those establishments which produce, process, adopt or manufacture some articles. It will, therefore, be evident that the Act does not supplant or substitute the Payment of Wages Act, 1936 but supplements the said Act, in the limited area, viz., where the establishment, as

stated above, (i) produces, processes, adopts or manufactures some articles, (ii) where there is a default in the wage-bill of the entire such establishment and (iii)where such wage-bill exceeds Rs 50,000. The object of the Act as stated above is not so much to secure payment of wages to individual workmen but to prevent industrial unrest and disturbance of industrial peace on account of the default on the part of the establishment in making payment of wages to their work force as a whole. It appears that many establishments had a tendency to delay the payment of wages to their workmen and were playing with the lives of the workmen with impunity. This naturally led to a widespread disturbance of industrial peace in the State. Hence the legislature felt the need for enacting the present statute. This being the case, the inquiry by the Labour Commissioner contemplated under Section 3 of the Act is of a very limited nature, viz., whether the establishment has made a default in timely payment of wages to its workmen as a whole when there is no dispute that the workmen are entitled to them.

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

4. He has also placed reliance upon a pronouncement of this court reported in M/s. Shakumbari Sugar and Allied Ind. Ltd. Vs. Deputy Labour Commissioner, 2013 (3) ESC 1207 (All). Paragraphs 8, 9 & 10 of the said judgment relied upon by him are being quoted hereinbelow:

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

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

"8. The inquiry under Section 3 being thus limited in its scope, the Labour

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

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

The Supreme Court in Modi Industries Ltd. (supra) clearly indicates that the claim of the workers as a whole could only be filed and that claim of individual workers was not sustainable under the Act.

In the light of the aforesaid, the claim of the workers in question against the principal employer was not maintainable, though it was maintainable against the contractor. The Court further finds that the question of applicability of the Minimum Wages Act vis-a-vis the notification issued therein was never an issue, which was not raised by the workers in their claim application. Their only grievance was that their wages for the month of April and May, 2010 was not disbursed by the contractor."

5. Having heard learned counsel for the petitioner, learned standing counsel and perused the impugned recovery certificate dated 30.03.2001 in the light of the aforesaid pronouncements, I am of the considered view that the petitioner being in default of Wage Bill not exceeding Rs.50,000/-, the provisions of Section 3 were not attracted. Impugned certificate is without jurisdiction. The reference in the recovery certificate to the fact that the amount in default is Rs.26530/- but the Wage Bill is Rs.50000/-

appears to be under a misconception about the application of the Act of 1978. If the total wage-bill is Rs.50,000/- and default is of only Rs.26530/- then it is not a default in the payment of wage-bill of all the workmen in the establishment, thus, outside the purview of Act, 1978. If the wage-bill of workmen as a whole is only Rs.26530/- and is in default, then also, it is less than Rs.50000/- as such, out of the purview of the said Act.

6. The Impugned order is quashed.

7. The amount deposited by the petitioner in pursuance to the interim order dated 11.05.2001 shall be refunded to the petitioner.

8. It shall, however, be open for the workmen to pursue the remedy available to them under the Payment of Wages Act, 1936.

9. Subject to above, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2014

BEFORE
THE HON'BLE SHEO KUMAR SINGH, J.
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 26182 of 2014

Rakesh Kumar Nayak ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri H.R. Mishra, Sri K.M. Mishra
Counsel for the Respondents:
C.S.C., Sri Ajay Kumar

Case Law discussed:

AIR 1995 SC 94; [(2012) 1 SCC 333]; [2014 (3) ADJ 595].

Constitution of India, Art. 342(2)-Cast certificate-'Nayak'-included as SC by amendment of 2002-any executive order contrary to that-not sustainable-petitioner being Nayak by cast applied in S.C. Quota-qualified in written examination-but not allowed to participate in interview-on ground Nayak belongs to B.C. And not SC candidate-held-illegal-direction issued to hold interview and if aggregate found more than last selected candidate-of SC OR General category-Public Service Commission to -make recommendation.

Held: Para-38

In the peculiar facts and circumstances of this case, it is accordingly ordered that the caste certificate of the petitioner as issued in the year 2007 and as affirmed by the decision of the State Level Scrutiny Committee dated 29.06.2011 and consequential order of the Tehsildar, Farenda dated 16.01.2012, shall stand restored and the petitioner shall be treated as belonging to the scheduled tribe. Consequently, the U.P. Public Service Commission is directed to consider the candidature of the petitioner in the Uttar Pradesh Combined Upper Subordinate Services Examination, 2010 under the category of scheduled tribe by holding an interview for the said purpose and assigning appropriate marks accordingly. If after calculating marks obtained by the petitioner, in the said examination, it is found that he has secured more marks than the last selected candidate under the scheduled tribe category or under the general category, then suitable recommendation shall be made, accordingly, to the State Government for the purpose of appointment and the latter shall offer appointment to the petitioner, either against an existing available vacancy relating to the selection of 2010 or against future vacancy, within a reasonable time. The consequences shall follow in accordance with law.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri H.R.Misra, learned Senior Advocate assisted by Sri K.M.Misra on behalf of the petitioner, Sri R.B.Pradhan, learned Additional Chief Standing Counsel for the State and Sri Ajay Kumar, learned counsel for the Commission.

2. This writ petition has been filed seeking the following reliefs:

"(i) issue a writ, order or direction in the nature of mandamus commanding the respondents to direct the Uttar Pradesh Public Service Commission, Allahabad to conduct the interview of the petitioner of the Uttar Pradesh Combined Upper Subordinate Services (Mains) Examination, 2010 as a Scheduled Tribe category and thereupon to declare his result;

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents authorities to consider the candidature of the petitioner for appointment against the available vacancies in the Scheduled Tribe category on the basis of the over all marks obtained by the petitioner (written and interview examination) in case the marks obtained by the petitioner is found higher than the last selected candidate of Uttar Pradesh Combined Upper Subordinate Services (Mains) Examination, 2010;

(iii) issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to consider the candidature of the petitioner for his appointment over and above the candidates finally selected in the Scheduled Tribe category on the basis of over all marks secured by the petitioner on the basis of written and interview examination in Uttar Pradesh Combined Upper Subordinate Services (Mains) Examination, 2010;"

3. On 9th May, 2014, this Court passed the following interim order.

"Heard Sri H.R.Misra, learned senior counsel for the petitioner and Sri Ajay Kumar, learned counsel for the respondent no. 2, the U.P.Public Service Commission as well as learned Standing Counsel for the respondent no. 1, the State.

The petitioner has come up praying for a Mandamus directing the U.P.Public Service Commission to consider his candidature in respect of interviews to be conducted for the U.P.Combined Upper Subordinate Services (Mains) Examination, 2010 under the Scheduled Tribe category.

The petitioner claims himself to be of 'Nayak' caste and submits that he is entitled to the benefit of such reservation keeping in view the Presidential Order dated 7th January, 2003, copy whereof has been filed as Annexure 1-A to the writ petition.

Sri H.R.Misra, learned senior counsel for the petitioner points out that the dispute of inclusion of the caste of the petitioner, has already been settled by the Lucknow Bench of this Court by the judgment dated 24th February, 2014, copy whereof has been filed on record and urged that in spite of the same, the State Government has yet not issued any direction in compliance thereof as a consequence whereof the petitioner is suffering recurring loss.

Learned counsel submits that the petitioner is pursuing this litigation for long, yet he has not been successful in getting the benefit of the said caste as Scheduled Tribe. Sri Misra has also placed reliance on a Full Bench decision of Madras High Court in the case of Tamilnadu Public Service Commission vs. R.Manikandan & others [2011 (Vol. 5) ESC 3146 (paragraphs 26 & 27 (E)] to urge that in view of the status of the petitioner and his caste, as provided in the Presidential Order, the petitioner is entitled to the consideration and appointment as Scheduled Tribe.

In our considered opinion, primafacie, the State Government has now to take appropriate steps for intimating the U.P.Public Service Commission about the status of the petitioner and his caste as per the judgement of the Lucknow Bench dated 24.02.2014. The respondent State Government is therefore, put to show cause and produce the order passed in compliance of the judgment of the Lucknow Bench dated 24.02.2014 by the next date of listing.

List on 26.05.2014."

4. On 26th May, 2014, when this matter was taken up, learned Additional Chief Standing Counsel appearing for the State, informed that a meeting of the State Level Screening Committee was scheduled to be held on 3rd June, 2014, therefore, the Court adjourned this case to 2nd July, 2014, on which date, the decision so taken was to be communicated to the Court as also to the respondent Commission.

5. Ultimately, on 4th July, 2014, matter was taken up and learned Additional Chief Standing Counsel placed before us copy of a letter dated 30th June, 2014 containing the decision taken by the State Level Screening Committee in its meeting dated 3rd June, 2014, which has been taken on record and a perusal thereof reveals that in spite of several rounds of litigations regarding caste status of the petitioner and despite pronouncement of the Lucknow Bench of this Court dated 24th February, 2014 in writ petitions filed by the petitioner earlier, being Writ Petitions (M.B.) Nos. 8803 & 2606 of 2012, the State Level Screening Committee has again, without assigning any plausible reason, taken a decision for re-enquiry at the local level and has accordingly issued directions to the District Magistrate, Maharajganj.

6. We are constrained to observe that the decision so taken by the State Level Screening Committee is bereft of any valid reason, therefore, we proceed to decide this case.

7. Coming to the facts of this case, it appears that the petitioner was issued a caste certificate on 1st November, 2007 declaring him to be a scheduled tribe being 'Nayak', on the basis whereof, he applied for the Uttar Pradesh Combined Upper Subordinate Services Examination, 2010 as a scheduled tribe candidate.

8. On 18th November, 2008, said caste certificate was cancelled by the Tehsildar.

9. Being aggrieved, the petitioner filed Writ Petition No. 7218 (SS) of 2008 before Lucknow Bench of this Court, which was disposed of with a direction to the Principal Secretary Social Welfare to decide petitioner's representation and look into his grievances.

10. In the mean time, the petitioner was declared successful in the written examination held by the Commission but

due to uncertainty about his caste status, he was not allowed to appear in the interview.

11. However, in pursuance of the direction dated 19.11.2008 of Lucknow Bench of this Court passed in Writ Petition No. 7218 (SS) of 2008, matter was placed before the State Level Scrutiny Committee, which called for a report from the Vigilance Cell in accordance with the dictum laid down by the Supreme Court in the case of Kumari Madhuri Patil & another vs. Additional Commissioner Tribal Development and others reported in (AIR 1995 SC 94). The Vigilance Cell submitted its report in favour of the petitioner whereupon it was decided to get the same verified by the Director Tribal Welfare in terms of paragraph 2 (6) of the Government Order dated 5th January, 1996, which was in accordance with the pronouncement of the apex Court in the case of Kumari Madhuri Patil (supra).

12. The Director, Tribal Welfare submitted a favourable report endorsing the report of the Vigilance Cell. Accordingly, the State Level Scrutiny Committee, on 29th June, 2011, decided that the petitioner was entitled to be issued a caste certificate of scheduled tribe. The decision dated 29th June, 2011 is quoted herein-below:

"मा0 उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या– 7218/एस0एस0/2008 राकेश कुमार नायक बनाम उ0 प्र0 राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 19.11.2008 के अनुक्रम में प्रमुख सचिव समाज कल्याण विभाग की अध्यक्षता में गठित स्कूटनी कमेटी की बैठक दिनांक 15.6.2011 को आयोजित की गयी। उक्त बैठक में निदेशक, अनुसूचित जाति एवं अनुसूचित जनजाति शोध एवं प्रशिक्षण संस्थान, उ0प्र0, लखनऊ तथा निदेशक जनजाति विकास उपस्थित हुए साथ ही सतर्कता प्रकोष्ठ के अपर पुलिस अधीक्षक भी उनपस्थित थे। स्कूटनी कमेटी के समक्ष अपना पक्ष रखने हेतु प्रकरण में वादी श्री राकेश कुमार नायक उपस्थित हुए।

2– इस संबंध में समिति द्वारा निदेशक पिछड़ा वर्ग कल्याण के पत्र दिनांक 28.3.2011 के माध्यम से उपलब्ध करायी गयी सतर्कता प्रकोष्ठ की जांच आख्या का संज्ञान लिया गया। सतर्कता प्रकोष्ठ ने अपनी जांच आख्या में श्री राकेश कुमार नायक को अनुसूचित जनजाति का प्रमाणपत्र निर्गत किये जाने की संस्तुति की है। अपनी जांच आख्या में उनके द्वारा सारांशतः यह उल्लेख किया गया है कि न्यायहित में किसी व्यक्ति अथवा जनपद विशेष के नायक जाति के व्यक्तियों के साथ अन्य जनपदों के नायक जाति के लोगों की तुलना में भेदभाव किया जाना समीचीन नहीं है। अतः जांच में उद्धत साथियों के कथन एवं अन्य साक्ष्य के प्रकाश में श्री राकेश कुमार नायक को अनु0 जनजाति का प्रमाणपत्र निर्गत किया जाना नियम विहित होगा।

3– उक्त तथ्यों के दृष्टिगत समिति द्वारा सम्यक विचारोपरान्त यह निर्णत लिया गया कि सतर्कता प्रकोष्ठ की जांच आख्या के दृष्टिगत निदेशक, जनजाति विकास, उ0प्र0 लखनऊ कार्मिक विभाग के शासनादेश संख्या– 22/16/92–का–2/1996–टी0सी0–III दिनांक 05.01.1996 के प्रस्तर–2 (6) के अनुसार कार्यवाही करते हुए नायक जाति के संबंध में सुसंगत नियमों के परिप्रेक्ष्य में श्री राकेश कुमार नायक के जाति प्रमाणपत्र को सत्यापित करने के संबंध में स्वतः स्पष्ट आदेश जारी करें।

बी0बी0सिंह निदेशक, बलविन्दर कुमार
निदेशक, जनजाति विकास, प्रमुख सचिव,
अनु0जाति उ0प्र0 लखनऊ समाज कल्याण विभाग,
एवं अनु0जानजाति
शोध एवं प्रशिक्षण संस्था

13. Aforesaid decision was communicated to the Public Service Commission on 20th September, 2011.

14. Pursuant to the said decision, Tehsildar, Farenda vide order dated 16th January, 2012 restored the scheduled tribe caste certificate issued to the petitioner to its original serial no. 3588/ 01/ 11/ 2007. The said decision was also communicated by the petitioner to the Commission for consequential action and consideration of his candidature for the Uttar Pradesh

Combined Upper Subordinate Services Examination, 2010, as the sole hurdle in this regard stood removed. However, the Commission did not do the needful.

15. On 24/27.02.2012, the Director Tribal Welfare on his own re-considered the matter and came to the conclusion that 'Nayak' caste belongs to backward class.

16. Here, it is relevant to point out that 'Nayak' was included in the list as scheduled tribe only for certain districts of Uttar Pradesh including the district Maharajganj, of which the petitioner was original inhabitant, by means of the Scheduled Caste and Scheduled Tribe Orders (Amendment) Act, 2002 (herein after referred to as the Amendment of 2002) by which relevant constitutional Orders were amended and there is no dispute in this regard.

17. Being aggrieved by the aforesaid order of Director Tribal Welfare, the petitioner filed a writ petition being Writ Petition (M.B.) Nos. 2606 of 2012 before this Court at Lucknow Bench, and said order of Director Tribal Welfare was stayed on 11.04.2012.

18. In the mean time, the State Level Scrutiny Committee took another decision on 26.04.2012 cancelling its earlier decision as also the caste certificate issued to the petitioner. This decision was also challenged by the petitioner before Lucknow Bench of this Court by means of Writ Petition (M.B.) No. 8803 of 2012.

19. Based on the aforesaid decision of the Committee, a show cause notice was issued by the Commission to the petitioner on 12.10.2012 for having misrepresented and fraudulently appeared in the examination in question as a scheduled tribe candidate. The petitioner submitted his reply to the show cause notice.

20. As the petitioner was not allowed to appear in the aforesaid examination, he filed writ petition no. 41545 of 2013 for provisional consideration of his candidature by the Commission as the matter was being unnecessarily delayed.

21. Writ Petitions (M.B.) Nos. 8803 & 2606 of 2012, which were clubbed together, were heard and finally decided vide judgement and order dated 24.02.2014, whereby decision of the Director Tribal Welfare dated 24/27/02.2012 and the decision of the State Level Scrutiny Committee dated 26.04.2012, were quashed. The relevant extracts of the said judgment are being quoted herein-below:

"Considered the submissions made by the parties. From the record it transpires that on 8.1.2003, the Parliament inserted Entry 6 declaring 'NAYAK' caste as Scheduled Tribe in the specified districts. The relevant portion of the Gazette Notification published on 8.1.2013 reads as under:-

"6. Gond, Dhuria, Nayak, Ojha, Pathari, Raj Gond (in the districts of Mehrajganj, Siddarth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh, Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra)."

Thus, it is clear that so long the Presidential Order is not declared ultra vires, persons belonging to 'Nayak' shall continue to be the Scheduled Tribe. Further, in view of the law laid down by the Constitution Bench in State of Maharashtra versus Milind [(2001 (1)

SCC 4] and State of Maharashtra versus Mana Ahim Jamat Mandal [(2006) 4 SC 98], no enquiry by the State Authorities is permissible to interpret/modify/add the entry of the Presidential Order.

It is relevant to point out that the Apex Court in Kumari Madhuri Patil vs Addl. Commissioner [1994 (6) SCC 241] has held in clear words that once the State Level Scrutiny Committee found the Caste Certificate genuine on the basis of Vigilance Cell Report, the Director or Committee did not have jurisdiction to review the said decision particularly, when no fresh report of Vigilance Cell was called or taken into consideration.

Though the Standing Counsel has produced a Government Order, it is of no help as it pertains to the year 2001 and he fails to produce any Government Order where the Nayak Caste has been considered as Scheduled Tribe after amendment. Since the caste of the petitioner has not been considered in light of the aforesaid Notification, the impugned orders are bad in law.

In view of what has been stated above, the impugned order dated 21.6.2012 passed in Writ Petition No.577 (MB) of 2013, order dated 24/27.2.2012 passed in Writ Petition No.2606 (MB) of 2012 and order dated 26.4.2012 passed in Writ Petition No.8803 (MB) of 2012 are set aside and the matter is remitted to the Government for re-consideration of Nayak Caste, which falls in Scheduled Tribe category, in light of the The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 2002. The State Government shall pass necessary orders in this context within two months, in light of the observations made here-in-above.

All the writ petitions are allowed in above terms."

22. Even after the aforesaid judgment dated 24.02.2014, the respondents did not take consequential action nor did they give consequential benefits to the petitioner.

23. As no decision was taken by the State Level Scrutiny Committee, the petitioner filed this writ petition wherein an interlocutory order, as quoted above, was passed on 9th May, 2014. Thereafter, the matter was taken up on 26th May, 2014 and 2nd July, 2014 but requisite decision of the State Level Scrutiny Committee could not be placed before the Court and it was ultimately placed on 4th July, 2014, when the matter was taken up, heard and judgement was reserved.

24. Considering the history of litigation, facts of the case and the settled legal position, as also the fact that the respondents have procrastinated in the matter sufficiently long and have caused grave prejudice to the petitioner jeopardizing his right of fair consideration in the matter of public employment and the benefits of reservation available to him as a scheduled tribe candidate, we did not deem it fit to grant any further time to the State for filing a response.

25. The Supreme Court, way back in the year 1994 laid down the procedure to be followed for determination of the caste status of a person so as to ensure speedy decision in this regard vide its dictum laid down in the case of Kumari Madhuri Patil (supra), the relevant extracts of which are quoted herein-below:

"12. The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spur may ious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate. It is, therefore, necessary that the certificates issued are scrutinised at the earliest and with utmost expedition and promptitude. For that purpose, it is necessary to streamline the procedure for the issuance of social status certificates, their scrutiny and their approval, which may be the following:

1. The application for grant of social status certificate shall be made to the Revenue Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such officer rather than at the Officer, Taluk or Mandal level. 2. The parent, guardian or the candidate, as the case may be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub-castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the19 Directorate concerned.

3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six months in advance before seeking admission into educational institution or an appointment to a post.

4. All the State Governments shall constitute a Committee of three officers, namely, (1) an Additional or Joint Secretary or any officer higher in rank of the Director of the department concerned, (11) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the

candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or 'doubtful' or spurious or falsely or wrongly claimed, the Director concerned should issue show-cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the educational institution concerned in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receipt of the notice. In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the candidate/parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-a-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the Caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalising the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or

appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the educational institution concerned or the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate from further study or continue in office in a post.

13. Since this procedure could be fair and just and shorten the undue delay and also prevent avoidable expenditure for the State on the education of the candidate admitted/appointed on false social status or further continuance therein, every State concerned should endeavour to give effect to it and see that the constitutional objectives intended for the benefit and advancement of the genuine Scheduled Castes/Scheduled Tribes or backward classes, as the case may be are not defeated by unscrupulous persons."

26. Here, it may also be stated that the directions contained in aforesaid judgement in Kumari Madhuri Patil's case (supra), has been affirmed by the apex Court in its recent pronouncement in the case of Dayaram vs. Sudhir Batham & others reported in [(2012) 1 SCC 333] except direction no. 13 thereof.

27. The State Government also appears to have issued a Government Order dated 5th January, 1996 in keeping with the aforesaid dictum by the Supreme Court. The said Government Order as well as the judgement of the apex Court referred above, have been taken into consideration by a Division Bench of this Court in the case of Bindra Prasad Gond vs. State of U.P. & others reported in [2014 (3) ADJ 595].

28. In the instant case 'Nayaks' were included in the list of scheduled tribe under Article 342 (2) of the Constitution of India by the Amendment of 2002, as already referred earlier and there is no dispute in this regard. It is trite that the aforesaid entries in the aforesaid Constitutional Order, cannot be modified, either by any executive order or by the Court. In view of this, it was not open for the authorities to take the plea that 'Nayaks' in district Maharajganj were not scheduled tribe but belong to backward class in view of some Government Order.

29. We have no manner of doubt that once the State Level Scrutiny Committee took a decision on 29.06.11 in the matter, after following due procedure as prescribed by the apex Court in the case of Kumari Madhuri Patil (supra), i.e. after calling for a Report of the Vigilance Cell and getting it verified by Director Tribal Welfare, there was no occasion for the Director Tribal Welfare to have undertaken a review subsequently i.e. 24/29.02.12, specially on an absolutely misconceived ground based on a Government Order that 'Nayaks' belong to backward class wholly oblivious of the amendment in the Constitutional Order whereby said caste was included in the list of scheduled tribe relating to district Maharajganj in the State of U.P.

30. The aforesaid order of the Director, Tribal Welfare was stayed by the High Court on 11.04.2012, yet the State Level Scrutiny Committee took the decision on 26.11.2012 cancelling the caste certificate issued to the petitioner and directing the District Magistrate to act accordingly. The said decision of the Committee has been quashed by the High Court subsequently on 24.02.2014, as referred earlier.

31. A perusal of the directions issued by the apex Court in Kumari Madhuri Patil's case (supra), shows that a time frame was prescribed for issuance of the certificate of caste status of a person so that prejudice may not be caused to a genuine person and the fraudsters may not claim benefits which are not due to them and in the above quoted point no. 10 of paragraph 12, provisional admission/appointment was directed to be provided. In the instant case, in spite of decision of the State Level Scrutiny Committee dated 29.06.2011, no such provisional consideration was done by the Commission, thereby causing grave prejudice to the petitioner, as such, it is necessary for this Court to undo the wrong done by the respondents.

32. The violation of fundamental right of fair consideration in matters of public employment when established, as in the instant case, the respondents cannot be allowed to go scot free nor the victim be left to suffer merely because the process of examination may have been completed during pendency of the aforesaid litigation. The petitioner has already suffered a lot on account of repeated litigation as a consequence of arbitrary and illegal actions on the part of the respondents.

33. In view of above discussion, it is amply clear that the petitioner who belongs to a scheduled tribe, was entitled to be considered for selection and appointment to the Combined Upper Subordinate Services in pursuance of the examination process initiated in the year 2010, as a scheduled tribe candidate, but the said right and benefit was denied to

the petitioner without any justifiable reason. Once the State Level Scrutiny Committee took the aforesaid decision dated 29.06.2011, it was obligatory upon the Commission to have acted accordingly and it should have considered the candidature of the petitioner as a scheduled tribe candidate but this was not done.

34. In this regard the petitioner has submitted that though he was treated differently, others belonging to the same caste were given benefit of reservation. In support of his contention, he has mentioned the name of Rajesh Kumar Nayak, who was declared successful in the examination in question against the posts reserved for the scheduled tribe candidates. Sri Rajesh Kumar Nayak secured 942.41 marks as per the Select List issued by the Commission and has been appointed whereas the petitioner has been denied fair consideration in the aforesaid examination for no justifiable reason.

35. The petitioner has also mentioned in paragraphs 30 to 33 of the writ petition that he was declared successful in the written examination having secured 881.96 marks but was not allowed to appear in the interview for the reason aforesaid. The submission is that in case he would have secured even the minimum 80 out of 200 marks allocated for the interview, he could have secured 961.96 marks, which would have been much more than several finally selected candidates of the scheduled tribe category.

36. Be as it may, this Court is of the opinion that once the State Level Scrutiny Committee vide its decision dated 29.06.2011 held the petitioner entitled to the status of the scheduled tribe and the subsequent decision of the Director Tribal Welfare dated 24/27.02.2012 has been declared without jurisdiction and unsustainable by this Court vide judgement dated 24.02.2014 and the subsequent decision of the State Level Scrutiny Committee dt. 26.11.2012 has also met the same fate vide the same judgement, the irresistible conclusion is that the petitioner was rightly issued the caste certificate on 01.11.2007 and he was rightly declared as belonging to the scheduled tribe by the State Level Scrutiny Committee vide its decision dated 29.06.2011, consequently, he is entitled to the benefits of reservation available to the candidates of scheduled tribe category in the Uttar Pradesh Combined Upper Subordinate Services Examination, 2010 irrespective of the fact that the process of the said examination may have been completed and the appointments may have been made. The respondents cannot be allowed to take advantage of their own wrongs by taking the plea as raised by the Commission that the examination process was initiated way back in the year 2010. The respondents are under an obligation to make good the wrong committed by them and to rectify their mistake. The petitioner cannot be made to suffer for the wrongs done by the respondents.

37. The State Level Scrutiny Committee while directing re-inquiry on 30.06.2014, has neither expressed any doubt regarding report of the Vigilance Cell as affirmed by it earlier on 29.06.2011 nor has given any reason for such a decision. Such a resolution is not in terms of the dictum in Kumari Madhuri Patil's case (supra). There cannot be an unending inquiry into the status of petitioner. We therefore, disapprove of the decision dated 30.06.2014 placed

before us. The earlier decision dated 29.06.2011 was in accordance with Kumari Madhuri Patil's case (supra).

38. In the peculiar facts and circumstances of this case, it is accordingly ordered that the caste certificate of the petitioner as issued in the year 2007 and as affirmed by the decision of the State Level Scrutiny Committee dated 29.06.2011 and consequential order of the Tehsildar, Farenda dated 16.01.2012, shall stand restored and the petitioner shall be treated as belonging to the scheduled tribe. Consequently, the U.P. Public Service Commission is directed to consider the candidature of the petitioner in the Uttar Pradesh Combined Upper Subordinate Services Examination, 2010 under the category of scheduled tribe by holding an interview for the said purpose and assigning appropriate marks accordingly. If after calculating marks obtained by the petitioner, in the said examination, it is found that he has secured more marks than the last selected candidate under the scheduled tribe category or under the general category, then suitable recommendation shall be made, accordingly, to the State Government for the purpose of appointment and the latter shall offer appointment to the petitioner, either against an existing available vacancy relating to the selection of 2010 or against future vacancy, within a reasonable time. The consequences shall follow in accordance with law.

39. Before parting with the case, it may also be clarified that during the course of arguments a letter dated 18th June, 2014 of National Commission for Scheduled Tribes was placed before us by the learned Additional Chief Standing Counsel, which refers to certain caste certificates of scheduled tribes having been issued to Brahmins, Nayaks & Brahmin Ojha community of Uttar Pradesh and based thereon, he submitted that the State Government is seized with the matter and an enquiry is required to be made with regard to the same. The said letter does not refer specifically to the case of the petitioner. In any event, it is always open for the State Government to conduct such enquiries and during such enquiry, if some clinching and conclusive evidence is found to the effect that the petitioner does not belong to scheduled tribe, then it shall be open for it to take consequential actions and in that eventuality, the appointment offered to the petitioner, as directed above, shall be treated to be provisional.

40. It is made clear that these directions have been issued in the peculiar facts and circumstances of the instant case and will not be treated as a precedent.

41. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 27132 of 2014

Hazi Abdul Hakim ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Shrma, Sri Prabhat Kumar, Srivastava, Sri Anand Prakash Srivastava

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

Constitution of India, Art.-226-Writ Petition-maintainability-once Civil suit got dismissed as withdrawn with liberty to file fresh suit-Writ Petition for same cause of action-held-not maintainable.

Held: Para-5
Once, the petitioner had filed a suit and was permitted to withdraw the same with liberty to file a fresh suit, this does not entitle him to file a writ petition for the same cause of action. This issue has been squarely settled by a Division Bench of this Court in the case of M/S Akay Organics Pvt. Ltd. Vs. ONGC and Ors. reported in 1992 AWC pg. 792 (paras 5 to 7) that relies on the ratio of Sheonath Dubey Vs. DIOS Mainpuri as reported in 1985 UPLBEC pg. 1374 (paras 11 to 14).

Case Law discussed:
1992 AWC pg. 792; 1985 UPLBEC pg 1374.

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

1. Heard Sri Prabhat Kumar Srivastava, learned counsel for the petitioner.

2. Sri Srivastava has filed two supplementary affidavits today which are taken on record.

3. However, before proceeding on the merits of the case, the Court finds that the petitioner had filed Original Suit No. 1293 of 2013 on 10th March, 2014. The said suit was dismissed as withdrawn with liberty to file a fresh suit on the ground that the petitioner had failed to serve the notice under Section 80 of the C.P.C. on the defendant.

4. This writ petition has been filed for the same cause of action. Sri Srivastava states that this was done in an urgency. The matter was entertained and the learned counsel was granted time to file supplementary affidavits.

5. Once, the petitioner had filed a suit and was permitted to withdraw the same with liberty to file a fresh suit, this does not entitle him to file a writ petition for the same cause of action. This issue has been squarely settled by a Division Bench of this Court in the case of M/S Akay Organics Pvt. Ltd. Vs. ONGC and Ors. reported in 1992 AWC pg. 792 (paras 5 to 7) that relies on the ratio of Sheonath Dubey Vs. DIOS Mainpuri as reported in 1985 UPLBEC pg. 1374 (paras 11 to 14).

6. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 33595 of 2010

Mohd. Sageer ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.P.S. Chauhan

Counsel for the Respondents:
C.S.C.

Indian Stamp Act, 1899-Art.-35-Schedule I-B-as amended by U.P. Act No. 9 of 2001-adding clause (c)-lease of shop granted for premium of Rs. 19,000/- with monthly rent of Rs. 200/-without fixing any time limit-shall be governed by explanation (2) and not by Section 35(c)(i)-collector to find out whether stamp paid is sufficient or not-petition partly allowed.

Held: Para-6 & 7

6. The mere fact that no term or period of lease is prescribed, I find it difficult to accept the view taken by authorities below that the document in question would be governed by Article 35(c)(ii).

7. In the case of any discrepancy or doubt in taxing statute the interpretation which is in favour of subject must be adopted. Taking clue therefrom, in my view, the petitioner would be liable to pay stamp duty under Article 35(c)(i). Applying the same the duty has to be calculated taking into account the amount or value of premium as payable on the lease. It is true that in the lease deed, as such, the amount of premium is not mentioned but it has come in the orders of authorities below that premium paid was Rs. 19,000/-, the stamp duty would be payable accordingly and not otherwise.

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

1. Heard Sri R.P.S. Chauhan, Advocate for petitioner and learned Standing Counsel for the respondents.

2. The questions up for consideration are, whether the lease deed dated 12.09.2006 provides for a lease of more than three years or it is a lease for less than 12 months and secondly, whether the authorities below are justified in determining the payability of stamp duty on the basis of circle rate instead of lease rent.

3. The record shows that shop in question was allotted to petitioner on a premium of Rs. 19,000/- and the monthly rent determined was Rs. 200/-. The agreement was executed between parties, i.e., petitioner and Nagar Palika Parishad on 12.09.2007. However, no period of lease has been mentioned therein.

4. Article 35, Schedule 1-B of Indian Stamp Act, 1899 (hereinafter referred to as the "Act, 1899") has been amended by U.P. Act No. 9 of 2001 w.e.f. 25.04.2001 by substitution of Clause (b) and (c) therein. Clause (a) is applicable to such leases where rent is fixed but no premium is paid or delivered. Admittedly that would not be applicable hereat. Clause (b) is applicable where a lease is granted for a fine or premium, or for money advanced or for where no rent is reserved. Even this clause is not applicable. Hence, Clause (c) is applicable in the present case, which reads as under:

(c) Where the lease is granted for a fine, or premium or for money advanced in addition to rent reserved.

(i) Where the lease purports to be for a term not exceeding thirty years

The same duty as conveyance [No. 23, Clause (a)] for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in which would have been payable on such lease. If no fine or premium or advance had been paid or delivered:

Provided that in a case when an agreement to lease is stamped with the ad valorem stamp required for lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed fifty rupee.

(ii) Where the lease purports to be for term exceeding thirty years

The same duty as a conveyance [No 23, Clause (a)] for a consideration equal to the market value of the property which is the subject of the lease.

5. Now the question is Article 35(c)(i) is applicable where the term of

lease is not exceeding 30 years while clause (ii) is applicable where term of lease exceeds 30 years. In the present case, as such the lease document does not contain any period except that 10% monthly rent would be increased after five years. It is a lease without any definite term as is evident from Explanation (2), which reads as under:

"(2) A lease from month to month, or year to year, without any fixed period or one for a fixed period with a provision allowing the lessee to hold over thereafter for an indefinite term, shall be deemed, for the purposes of this Article, to be a lease not purporting to be for any definite term."

6. The mere fact that no term or period of lease is prescribed, I find it difficult to accept the view taken by authorities below that the document in question would be governed by Article 35(c)(ii).

7. In the case of any discrepancy or doubt in taxing statute the interpretation which is in favour of subject must be adopted. Taking clue therefrom, in my view, the petitioner would be liable to pay stamp duty under Article 35(c)(i). Applying the same the duty has to be calculated taking into account the amount or value of premium as payable on the lease. It is true that in the lease deed, as such, the amount of premium is not mentioned but it has come in the orders of authorities below that premium paid was Rs. 19,000/-, the stamp duty would be payable accordingly and not otherwise.

8. In view of above, the writ petition is partly allowed. Impugned orders dated 19.12.2009 and 14.05.2010 are hereby quashed and the matter is remanded to Collector to find out the stamp duty payable and whether already paid by petitioner is sufficient or not. The Collector shall pass consequential order within a period of three months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No.34915 of 2011

Jag Pal Singh ...Petitioner
Versus
M.D, Kanpur Electricity Supply Co. Kanpur Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava, Sri S.K. Srivastava

Counsel for the Respondents:
Sri Sandeep Kumar Srivastava, Sri Ayank Mishra, Sri Pranjal Mehrotra, S.C.

Constitution of India, Art.-226-Correction of date of birth-class IV employee-service book date of birth recorded 03.09.49-but in document of company-date of birth reflected as 28.05.55 accordingly continued in service up to 13.05.2011 instead of 30.09.2009-recovery of salary drawn between actual date of retirement and working of fortuous period-petitioner being illiterate man not instrumental in excess working than the actual date of retirement held-no question recovery of excess amount -if already recovered be refunded.

Held: Para-16
The respondents took work from the petitioner and paid his salary for the work, though it was beyond the age of retirement, the petitioner is class IV illiterate employee, there is no fraud or misrepresentation on his part, thus the

respondents cannot recover the amount of salary paid to the petitioner for the period after retirement till 13.05.2011, that too without putting the petitioner to notice, the impugned order was passed without affording any opportunity and is liable to be set aside on that ground alone.

Case Law discussed:
(2012) 8 SCC 417; AIR 1993 SC 1367; AIR 1993 SC 2647; AIR 1995 SC 850; AIR 2003 SC 4209; (2005) 6 SCC 49; AIR 2006 SC 2735; (2005) 11 SCC 465; (2002) 7 SCC 719; AIR 2005 SC 1868; AIR 1937 PC 101; ILR 97 Cal 849; 2000(10) SCC 284; 1997(9) SCC 239; (2009) 3 SCC 117.

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

1. Heard learned counsel for the petitioner and Sri Ayank Mishra, learned counsel appearing for Kanpur Electricity Supply Company, Kanpur Nagar.

2. It transpires from the record that the petitioner was appointed as Class IV employee on the post of Coolie on 01.10.1974. The date of birth of the petitioner i.e. 03.09.1949 was recorded in the service record, however, due to oversight and mistake, in the other documents of the respondent-company, the date of birth was reflected as 28.05.1955, as such, the petitioner was allowed to continue till 13.05.2011 instead of retiring on 30.09.2009.

3. The petitioner has approached this Court assailing the order dated 13.05.2011 passed by the Executive Engineer, Urban Electricity Supply Division (F & R) Sarvodaya Nagar, KESO, Kanpur, respondent no. 3 treating the date of birth of the petitioner as 03.09.1949 thus retiring the petitioner w.e.f. 30.09.2009, the salary paid is sought to be recovered from the gratuity and other retiral dues for the period, the petitioner worked beyond 30.09.2009 till 13.05.2011.

4. Submission of learned counsel for the petitioner is that as per 'Parivar Register', petitioner's date of birth is 28.05.1955, hence the petitioner would retire in 2015, further, petitioner is an illiterate Class IV employee, hence, no recovery should be made from the petitioner for the period of service the petitioner rendered beyond September 2009, there is no fraud or misrepresentation on the part of the petitioner.

5. In rebuttal, Sri Ayank Mishra, learned counsel appearing on behalf of Kanpur Electricity Supply Company, Kanpur Nagar, submits that since the petitioner has worked beyond the actual age of superannuation, the respondents are entitled to recover the salary that was paid by mistake treating the year of birth as 1955, in support of his submission, Sri Mishra has relied upon Chandi Prasad Uniyal Versus State of Uttarakhand,(2012) 8 SCC 417.

6. It is admitted by learned counsel appearing for the petitioner that the service record mentions the date of birth as 03.09.1949, thus, according to the entry in service record petitioner would superannuate on 30.09.2009, however, due to some mistake and oversight of the authorities, the other records of the respondent-company showed the date of birth as 28.05.1995, thus, the petitioner was permitted to continue to work till 13.05.2011, however, when the authorities realised their mistake, the date of retirement of the petitioner taken as 30.09.2009 as per the date of birth

recorded in the service record, hence, it was ordered that the salary paid till 13.05.2011 shall be recovered.

7. The contention of learned counsel for the respondents is that since the petitioner worked beyond the age of superannuation, excess amount paid towards salary is recoverable, cannot be accepted for the reasons that nothing excess was paid to the petitioner, the respondents on their own mistake permitted the petitioner to continue in service beyond the age of superannuation for which the petitioner received salary and there was no fraud or misrepresentation on the part of the petitioner. The ratio of Chandi Prasad Uniyal (supra) is not applicable on the facts of the case as nothing excess was paid to the petitioner by the respondents, the petitioner was paid his salary for the period he worked, even though it was for the period beyond retirement, an illiterate class IV employee cannot be fastened with recovery for no fault of his own.

8. It is settled proposition of law that the date of birth entered in the service record cannot be corrected at a belated stage. Where the entry of date of birth in service record remains in existence for a long time, the same is not required to be disturbed on any ground whatsoever. The onus is on the employee-applicant to prove about the wrong recording of his date of birth in his service record by adducing irrefutable evidence. Court has to insist for clear, clinching and unimpeachable evidence in this regard because the relief sought by an employee, if granted, may entail chain reaction hampering promotional prospects of junior officers and may cause an irreparable injury to them.(Vide Union of India Vs. Harnam Singh, AIR 1993 SC 1367; Secretary & Commissioner, Home Deptt. & Ors. Vs. R. Kirubakaran, AIR 1993 SC 2647; Chief Medical Officer Vs. Khadeer Khadri, AIR 1995 SC 850; State of U.P. Vs. Smt. Gulaichi, AIR 2003 SC 4209; State of U.P. & Anr. Vs. Shiv Narain Upadhyaya, (2005) 6 SCC 49; and State of Gujarat Vs. Vali Mohd. Dosabhai Sindhi, AIR 2006 SC 2735.

9. In U.P. Madhyamik Shiksha Parishad Vs. Raj Kumar Agnihotri, (2005) 11 SCC 465, the Apex Court held that an application for correction of date is to be dealt with giving strict adherence to the Rules, if any, framed in this regard and particularly in respect of limitation etc.

10. In State of Madhya Pradesh & Ors. Vs. Mohan Lal Sharma, (2002) 7 SCC 719, the Supreme Court held that while examining the issue of correction of date of birth, the Court must be very slow in accepting the case of applicant if issue has been agitated at a much belated stage and it must examine the pros and cons involved in the case even if not raised by the parties. In the said case the Tribunal had allowed application for correcting the date of birth placing reliance on the Horoscope and a certificate issued by the retired Head Master of the School showing a different date of birth. The Apex Court revised the said judgment observing that if it was allowed the applicant would have joined the service when he was less than 18 years of age, and therefore, accepting such an application would amount to sanctifying his illegal entrance in service. The Court further observed that no reliance could be placed upon the said certificate and Horoscope at all.

11. In State of Punjab Vs. Mohinder Singh, AIR 2005 SC 1868, the Supreme Court held that horoscope is a very weak piece of material to prove age of a person. A very heavy onus lies on the person, who wants to press it into service, to prove its authenticity. It requires to be proved in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge as regards authenticity of date, time etc. mentioned therein, and in that context, horoscopes have been held to be inadmissible for proof of age. For that purpose, reliance has been placed by the Supreme Court on the judgments in Mt. Biro Vs. Atma Ram & Ors., AIR 1937 PC 101 and also on the judgment of the Calcutta High Court in Satish Chandra, Mukhopadhyaya Vs. Mohindra Lal Pathak, ILR 97 Cal 849.

12. Thus the plea of the learned counsel for the petitioner that the date of birth of the petitioner be treated as 28.05.1955 instead of 03.09.1949 cannot be accepted, further the petitioner has admitted that at the time of entry in service, the date of birth recorded in the service record is 03.09.1949 which has continued, as such, through out his career, the plea that entry made in the service book be corrected as per the date of birth recorded in other documents of the respondent-company cannot be accepted at this belated stage, further the petitioner was not high school at the time of appointment, hence, as per rules the date of birth recorded in the service record shall be treated as final.

13. In Hari Singh v. State of Bihar, 2000(10) SCC 284, the Supreme Court held that since the Government had never put the employee on notice to indicate that the date of birth as entered in the service book was incorrect though it could have done so and since no notice had been given to the employee concerned for accepting a date of birth other than the one entered in the servive book, the order of retirement could not be sustained. It was the duty of the State to put the employee on notice about his date of retirement and not having done so, the appellant was not entitled to recover the excess amount paid to the respondent.

14. In Radha Kishun v. Union of India, 1997 (9) SCC 239, the order was passed to recover the salary from the respondent as he worked after his due date of superannuation, facts of the case is clearly distinguishable as there was no dispute as to the age of retirement of the appellant in that appeal, as there was no controversy in the date of birth of that appeal, there was only one date of birth mentioned, and he had not retired on the basis of his date of birth so entered. Therefore, he had wrongly extended his service beyond the date of his superannuation. But in the present case, there were two dates of birth recorded in the records of the respondents. Therefore, there was a confusion in the mind of the respondent as a result of which the petitioner was continued in service.

15. The Supreme Court in State of Bihar Versus Pandey Jagdishwar Prasad, (2009) 3 SCC 117, considered as to whether salary paid to an employee after retirement can be recovered by the employer, the court in para 23 observed as follows:-

"23. Without going into the question whether the appellant was justified after completion of two years from the actual

13 date of retirement to deduct two years' salary and other emoluments paid to the respondent, we may say that since the respondent had worked during that period without raising any objection from the side of the appellant and the appellant had got works done by the respondent, we do not think that it was proper at this stage to allow deduction from his retiral benefits, the amount received by him as salary, after his actual date of retirement."

16. In Chandi Prasad Uniyal (supra), order to recover excess amount paid for the reason of wrong fixation of pay was upheld as it amounted to unjust enrichment, to which the appellant was not entitled, but if recovery would ensue hardship, then the Court can prohibit the respondents from making recovery. The present case is not a case of payment of any amount on wrong fixation of pay or payment over and above that was due. The respondents took work from the petitioner and paid his salary for the work, though it was beyond the age of retirement, the petitioner is class IV illiterate employee, there is no fraud or misrepresentation on his part, thus the respondents cannot recover the amount of salary paid to the petitioner for the period after retirement till 13.05.2011, that too without putting the petitioner to notice, the impugned order was passed without affording any opportunity and is liable to be set aside on that ground alone.

17. For the facts and reasons stated herein above, the impugned order dated 13.05.2011 passed by the respondent no. 3 is set aside to the extent it provides for recovery. It is provided that the date of birth of the petitioner shall be 03.09.1949, accordingly, the age of superannuation would be 30.09.2009. The post retiral and terminal benefits shall be calculated as due on 30.09.2009, however, the salary paid to the petitioner w.e.f. 01.10.2009 to 13.05.2011 shall not be recovered from the petitioner, and in case, the recovery has been made from the terminal benefits/retiral dues, the same shall be refunded to the petitioner within a period of two months from the date of filing of certified copy of this order before the respondent no. 3, Executive Engineer, Urban Electricity Supply Division (F & R) Sarvodaya Nagar, KESO, Kanpur.

18. Subject to the above, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition (CERTIORARI) No. 37833 of 2013

Ankita Tiwari & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Kumar Pathak

Counsel for the Respondents:
C.S.C., Sri Ashutosh Vaish, Sri Ayank Mishra, Sri P.K. Singh

Uttar Pradesh Recruitment of dependents of Government Servant Dying in Harness Rules 1974-Rule-5(3) read with U.P. Government Servant (Discipline & Appeal) Rules 1999-Duty and responsibility of compassionate appointee-towards maintenance of dependents of deceased employee-if such appointee neglect to maintain other family members-shall be subject to face disciplinary proceedings-direction to deduct 5000/-per month from salary of such employee and pay to these

dependents-namely the petitioner-employer to file affidavit of compliance.

Held: Para-7

The fifth respondent along with the petitioners was dependent upon the deceased at the time of his death, the fifth respondent cannot deprive the petitioners of their right to maintenance from the salary of the fifth respondent which she earns with a condition to maintain other dependents failing which the service of the fifth respondent can be terminated under sub-rule (4) of the Rules.

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

1. Heard learned counsel for the petitioner and Sri Ashutosh Vaish appearing for respondent corporation and Sri P.K. Singh appearing for respondent no. 5.

2. The first petitioner and fifth respondent are sisters and second petitioner their mother.

3. The father of the first petitioner was working in the respondent-power corporation and the Competent Court declared his civil death on 24.11.2005. The fifth respondent was given service under the dying in harness rules by the respondent-corporation in 2006.

4. The contention of learned counsel for the petitioner is that after being employed, the fifth respondent has married and has started living separately and is not maintaining the mother and the unmarried, unemployed sister (first petitioner) as per sub-clause (3) of rule 5 of "The Uttar Pradesh Recruitment Of Dependents Of Government Servant Dying In-Harness Rules, 1974 rules, it is incumbent upon the person being appointed under the dying in harness rules to maintain the other family members, failing which such person can be proceeded under the U.P. Government Servant (Discipline and Appeal) Rules 1999. Sub-rule (3) and (4) of rule 5 of 1974 Rules are as follows:-

"(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

5. Sri P.K. Singh appearing for fifth respondent does not dispute that petitioners were dependent upon deceased employee immediately before his death and are unable to maintain themselves. In the counter affidavit, the fifth respondent has stated that she is maintaining the mother and her sister and in the letters dated 25.3.2013 and 12.4.2013 it has been stated that fifth respondent is prepared to maintain the petitioners. Being confronted with a query as to how much maintenance the fifth respondent is prepared to pay, Sri Singh submits that the fifth respondent has two minor children and it will not be possible for the fifth respondent to pay 50% of her wages, as she is a Class-IV employee, however, Sri P.K. Singh submits that he has instructions to state that the fifth respondent is prepared to pay

reasonable amount per month to the petitioners.

6. Sri Vaish appearing for the respondent-corporation submits that order passed by the Court shall be complied with and the maintenance amount shall be drawn in favour of the petitioners.

7. The object granting appointment on compassionate ground is intended to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner who had left the family in penury without any means of livelihood. Such appointments are made purely on humanitarian consideration with an object to provide the family some sources of livelihood. The appointment on compassionate ground is not a sourse of recruitment, death of the employee is also not the basis for appointment, the only consideration is the distress to which the family is put into, thus all the stake holders viz the dependents upon the deceased employee are entitled to maintenance. The fifth respondent along with the petitioners was dependent upon the deceased at the time of his death, the fifth respondent cannot deprive the petitioners of their right to maintenance from the salary of the fifth respondent which she earns with a condition to maintain other dependents failing which the service of the fifth respondent can be terminated under sub-rule (4) of the Rules.

8. In such view of the matter, the fourth respondent, Executive Engineer, Vidhyut Vitran Khand (IInd) Purvanchal Vidhyut Vitran Nigam Limited, Ghazipur shall w.e.f. 1st September, 2014 pay Rs. 5,000/- per month, by way of cheque, drawn in favour of the second petitioner, Ram Dulari Devi wife of Late Bhola Nath Tiwari, payable from the monthly salary of fifth respondent. The payment shall be made by tenth of each month.

9. On the next date fixed, the fourth respondent as well as the fifth respondent shall file affidavit of compliance.

10. List on 8th September, 2014.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 39862 of 2014

Sunita Sharma ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharam Pal Singh, Sri Manoj Kumar Srivastava

Counsel for the Respondents:
C.S.C., Smt. Manju R. Chauhan

Uttar Pradesh Kshetriya Panchayat & Zila Panchayat Adhiniyam, 1961-Section 15(3)(ii)-No confidence motion-District Magistrate by notice dated 27.06.14-stipulated-meeting can not held only beyond 30 days-but fixed the date of confidence motion meeting as 16.08.14-held-ex-facie illegal under teeth of section 15 of adhiniyam-quashed.

Held: Para-6
In the instant case, the notice is dated 27th June, 2014, and therefore, the meeting could have been convened prior to 27th July, 2014. The said date has already passed by and as such any future date cannot be fixed under the old notice. The

District Magistrate, therefore, has committed an error by proceeding on the strength of old notice dated 27.6.2014.

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

1. Heard Sri Dharam Pal Singh, learned Senior Counsel for the petitioner, learned Standing Counsel for the respondent nos. 1 to 4 and Smt. Manju R. Chauhan for the caveator - Manju Lata.

2. The petitioner is the elected Chairperson of the Kshetra Panchayat, Arniya, District Bulandshahr. A no confidence motion was initiated against her which came to be challenged by the petitioner in Writ Petition No. 37050 of 2014. The challenge succeeded on the ground that there was an absence of 15 days of clear notice as required under Section 15(3)(ii) of the Uttar Pradesh Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961. The writ petition was allowed and the proceedings were quashed.

3. The net result of the said judgment was that since the convening of the meeting was quashed it was open to the members to convene a fresh meeting in accordance with Section 15 of the Act.

4. The District Magistrate, Bulandshahr has passed an order for convening a fresh meeting on the basis of the old notice itself fixing 16th August, 2014.

5. The contention of Sri D.P. Singh is that this cannot be done and a fresh notice has ensued with a clear stipulation that the meeting shall be held not later than 30 days of the date of the notice.

6. In the instant case, the notice is dated 27th June, 2014, and therefore, the meeting could have been convened prior to 27th July, 2014. The said date has already passed by and as such any future date cannot be fixed under the old notice. The District Magistrate, therefore, has committed an error by proceeding on the strength of old notice dated 27.6.2014.

7. Smt. Manju R. Chauhan contends that the writ petition does not implead the members in this writ petition and therefore it is not maintainable.

8. We are unable to agree, in view of the conclusions drawn hereinabove that the order passed by the District Magistrate is ex-facie illegal and in teeth of the statutory provision of Section 15.

9. Smt. Manju R. Chauhan could not successfully defend the impugned order nor could the learned Standing Counsel point out differently.

10. Consequently, on the aforesaid legal position that emerges the impugned order dated 26th July, 2014 is unsustainable and is hereby quashed without prejudice to the rights of the members to bring about a fresh motion in accordance with law.

11. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2014
BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 40266 of 2014

Yatendra Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Dubey

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

Constitution of India-Art.-226-Petition seeking exemption from acquisition-claiming parity of judgment by which same notification quashed-held-once petitioner accepted compensation without questioning acquisition-therein at mercy of authority-also availed remedy for enhancement of amount-no benefit of judgment relied by petitioner available.

Held: Para-5 & 6

4. The petitioners claim benefit of getting back the land on the ground that since in the case of Harkaran Singh Vs. State of U.P. and others, 2011 (6) ADJ 755, the entire Notification has been quashed, therefore, the land deserves to be returned to the petitioners.

5. We are unable to agree with this proposition for the simple reason that this issue about the impact of the said decision which was under reference was squarely dealt with by the Full Bench decision in the case of Gajraj and others Vs. State of U.P. and others, 2011 (11) ADJ Page 1, alongwith the issue relating to those farmers who had filed writ petitions that were dismissed and where those who had not filed their writ petitions where the court in Paragraph Nos. 480 and 481 recorded findings which are extracted herein below:-
"480. There is one more aspect of the matter which needs to be considered. The apex Court in (2010) 4 Supreme Court Cases 17 Om Prakash Vs. Union of India has held that when a declaration is quashed by any Court, it will only for the benefit of those who have approached the Court. Following was laid down in paragraph 74:

Case Law discussed:
2011(11) ADJ; (2010) 4 Supreme Court Cases 17; W.P. No. 67209 of 2013 dated 13.05.2014.

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

1. Heard Sri Pankaj Dubey, learned Counsel for the petitioners.

2. The petitioners have come up for the following reliefs:-

"(i) to issue writ, order or direction in the nature of mandamus commanding the respondents to return back the land comprising of Khasra No.429 Area 0.4215 Hect. of revenue Village Patwari, Pargana Dadri, Dehsil Dadri, District - Gautam Budh Nagar, to the petitioners.

(ii) to issue writ, order or direction in the nature of mandamus commanding the respondents not to take any action and not to make any construction upon the land of the petitioners comprising of Khasra No.429, Area 0.4215 Hect. of revenue Village Patwari, Pargana Dadri, Tehsil Dadri, District - Gautam Budh Nagar.

(iii) to issue any other order or direction which the Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) to award the costs of the petition to this petitioners."

3. At the very outset, Sri Pankaj Dubey, learned Counsel for the

petitioners, states that the petitioners have not filed any writ petition challenging the acquisition proceedings at any stage.

4. The petitioners claim benefit of getting back the land on the ground that since in the case of Harkaran Singh Vs. State of U.P. and others, 2011 (6) ADJ 755, the entire Notification has been quashed, therefore, the land deserves to be returned to the petitioners.

5. We are unable to agree with this proposition for the simple reason that this issue about the impact of the said decision which was under reference was squarely dealt with by the Full Bench decision in the case of Gajraj and others Vs. State of U.P. and others, 2011 (11) ADJ Page 1, alongwith the issue relating to those farmers who had filed writ petitions that were dismissed and where those who had not filed their writ petitions where the court in Paragraph Nos. 480 and 481 recorded findings which are extracted herein below:-

"480. There is one more aspect of the matter which needs to be considered. The apex Court in (2010) 4 Supreme Court Cases 17 Om Prakash Vs. Union of India has held that when a declaration is quashed by any Court, it will only for the benefit of those who have approached the Court. Following was laid down in paragraph 74:

"The facts of the aforesaid cases would show that in the case in hand as many as four declarations under Section 6 of the Act were issued from time to time. Finally when declaration is quashed by any Court, it would only enure to the benefit of those who had approached the Court. It would certainly not extend the benefit to those who had not approached the Court or who might have gone into slumber."

481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India."

6. Apart from this, Sri Ramendra Pratap Singh for the respondent has invited the attention of the Court to the Division Bench judgment of this Court in the

case of Km. Pushpa Yadav and another Vs. State of U.P. and others, Writ Petition No.67209 of 2013 dated 13.5.2014, the operative part whereof is extracted herein below:

"The petitioners, not being a party in any of the writ petitions filed earlier challenging the notifications, have already accepted the initial amount of compensation under an agreement entered into in terms of the 1997 Rules and thereafter have also been given the benefit of payment of additional compensation of 64.70%, which has been accepted by them even after the decision in the case of Har Karan Singh (supra), would now not be entitled to any such benefit of being given back the land, which was acquired under the said notifications.

7. As such the prayer made in this writ petition does not deserve to be granted. The writ petition is accordingly dismissed."

8. Following the ratio of the Full Bench as well as the ratio of the Division Bench decision, the reliefs prayed for cannot be granted.

9. The writ petition is misconceived and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2014

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 41011 of 2014

Jaipal Singh ...Petitioner
Versus
D.D.C. Muzaffarnagar & Ors. Respondents

Counsel for the Petitioner:
Sri Dhirendra Bahadur Singh

Counsel for the Respondents:
C.S.C., Smt. Karuna Srivastava
Sri Santosh Srivastava

U.P. Consolidation of Holding Act-Section 11-read with Rule 109 of Consolidation of Holding Rules-during consolidation operation Chak carved out with name of Mr. 'A' after his death-S.O.C. Held ½ share to each son of deceased Chak holder-the consolidation officer instead of implementing the order with ½ share to each-started partition by meter and bounds-held-instead making entry of ½ share beyond that entire exercise without jurisdiction-partition can be only under 176 U.P.Z. A & L.R. Act-petition allowed.

Held: Para-9
Therefore, this writ petition is liable to be allowed. The orders impugned deserve to be set aside. The Consolidation Authorities are liable to be directed to only make an entry in the relevant revenue records pertaining to chak no. 293 and record the names of the parties showing their respective shares to be 1/2 each therein and any order beyond this will be without jurisdiction. Thereafter it will be open for the parties to file a suit for partition for demarcation of their respective shares by metes and bounds on the spot before the competent court.

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Sri Dhirendra Bahadur Singh, learned counsel for the petitioner and Sri Santosh Srivastava, who has filed caveat on behalf of respondent no. 4, the sole contesting respondent. With consent of the parties this petition is being decided finally without calling for a counter.

2. The facts relevant for deciding the controversy involved in the writ petition are as follows:-

3. It appears that during consolidation operations, a chak was carved out in the name of one Tika Ram, father of the parties. It also appears that Tika Ram died and, thereafter, in title proceedings the shares of the two brothers the petitioner and the contesting respondent were held to be 1/2 each by the S.O.C. in an appeal under section 11 (1) of the Act. It further appears that an application under Rule 109 (A) of the U.P. Consolidation of Holding Rules was filed by the petitioner for implementation of the order dated 1.7.2005 passed by the Settlement Officer, Consolidation granting 1/2 share each to the parties.

4. Instead of merely recording the names of the two brothers, the sons of Tika Ram over the chak no. 293 and further that each was entitled to half share each therein, the Consolidation Authorities in proceedings under Rule 109A proceeded to partition this chak by metes and bounds. In such partition by metes and bound, the petitioner appears to be aggrieved as he is not satisfied by the portion of the chak no. 293, which has been allotted in his share.

5. Be that as it may, the fact remains that the proceedings under Rule 109A were only for implementing the order passed in an appeal under section 11 (1) by the Settlement Officer, Consolidation, which granted half share to the parties. There was no direction for carrying out a partition by metes and bounds.

6. Learned counsel for the respondent has submitted, relying upon Sub Rule 2 of Rule 109-A, that the Consolidation Officer has the power to reallocate affected chaks, after affording opportunity of hearing to the parties concerned and this is what has been done by the impugned orders.

7. Since proceedings under Rule 109A are in the nature of execution proceedings, the executing court cannot go beyond the order that has been passed or grant relief beyond what has been granted by the order sought to be implemented. It is, therefore, clear that the orders impugned in so far as they carry out a partition by metes and bounds are wholly without jurisdiction as no such order was passed by the Settlement Officer, Consolidation.

8. Since the parties had been granted half share in title proceedings and the consolidation operations had come to a close by issuance of a notification under section 52 of the Act, the only remedy available to the parties was to approach the competent court for partition of their 1/2 share by metes and bounds. This could have been done by means of a suit under section 176 of the U.P. Zamindari Abolition and Land Reforms Act. In my considered opinion, the Consolidation Authorities in proceedings under Rule 109 (A) were only required to record the names of the parties along with their respective shares over the chak no. 293, which had been carved out in the name of their father and anything beyond making such entry is wholly without jurisdiction.

9. Therefore, this writ petition is liable to be allowed. The orders impugned deserve to be set aside. The Consolidation Authorities are liable to be directed to only make an entry in the relevant revenue records pertaining to chak no. 293 and record the names of the parties showing their respective shares to be 1/2

each therein and any order beyond this will be without jurisdiction. Thereafter it will be open for the parties to file a suit for partition for demarcation of their respective shares by metes and bounds on the spot before the competent court.

10. Accordingly and subject to the observations/directions above, the writ petition is allowed and the impugned orders dated 2.5.2014, 23.6.2011 and 14.9.2010 are quashed and the matter is remanded to the Consolidation Officer to record the names of the parties over chak no. 293, showing their share therein to be 1/2 each.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 42676 of 2014

Gaurav Pratap Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

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

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

Graduate Medical Education Regulations 1997-Regulation-7(1), 7(5), 7(7)-petitioner passed supplementary examination-seeking direction the principle to treat them in main batch student without loss of year-held-unless criteria fixed under regulation fulfilled-can not be allowed to join second semester along with main batch-no mandamus can be issued against statute-petition dismissed.

Held: Para-12 & 13

12. We are in respectful agreement with the judgment of the Division Bench. The judgment of the Division Bench has also been followed in a judgment of a learned Single Judge of this Court by one of us (Hon'ble Dilip Gupta, J) in Arvind Gautam & 13 Ors., Vs. State of U.P. & Ors., 2.

13. For these reasons, we are unable to grant the reliefs sought in these proceedings. If the petitioners have duly passed the First Professional Examination, they would necessarily have to abide by the discipline of the Regulations in so far as the completion of the requirements for appearing at the Second Professional Examination are concerned and even thereafter.

Case Law discussed:
1986 UPLBEC 540; Writ C 20422 of 2009 decided on 1 September 2009.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The petitioners appeared for the medical entrance examination and were admitted for the MBBS Degree Course at S.N. Medical College, Agra. The petitioners duly completed the first and the second semester course for the First Professional Examination. The First Professional examination was held in the months of October and November 2013. When the results were declared on 20 February 2014, each of the petitioners was declared to have failed in at least one paper. A supplementary examination was held between 29 May and 28 June 2014. The results were declared on 23 July 2014 and it is stated that all the petitioners have duly passed the examination. The reason why the petitioners have moved this Court under Article 226 of the Constitution is that the academic authorities are treating them as constituting a batch separate from

the main batch of the Second Professional Course which, according to the petitioners, would affect their eligibility to appear in the Second Professional Examination scheduled to be held in the months of May and June 2015.

2. Accordingly, in these proceedings, the following reliefs are sought:-

"(a) a writ, order, or direction of a suitable nature commanding the respondents to treat the petitioners as students of the main batch of Second Professional Course in MBBS at S.N. Medical College, Agra, on the basis of their success in the supplementary examination of First Professional Course in terms of Regulation 7(7) of "Regulations on Graduate Medical Education 1997" (Annexure No.3);

(b) a writ, order or direction of a suitable nature commanding the respondents not to treat the petitioners as belonging to a batch other than the main batch of Second Professional Course in MBBS course at S.N. Medical College, Agra."

3. Before we summarize the submissions which have been urged by the learned Senior Counsel appearing for the petitioners and the learned Standing Counsel, it would be necessary for the Court to refer to the relevant provisions of the Regulations which have been framed on Graduate Medical Education by the Medical Council of India under Section 33 of the Indian Medical Council Act, 1956. These Regulations, which are called the Regulations on Graduate Medical Education, 1997 inter alia contain certain provisions which are relevant to the controversy. Regulation 7(1) provides as follows:

"7. Training Period and Time Distribution

(1) Every student shall undergo a period of certified study extending over 4½ academic years divided into 9 semesters (i.e. of 6 months each) from the date of commencement of his study for the subjects comprising the medical curriculum to the date of completion of the examination and followed by one year compulsory rotating internship. Each semester will consist of approximately 120 teaching days of 8 hours each college working time, including one hour at lunch."

4. The period of 4½ years for the MBBS Degree Course is divided into Phase-I which consists of two semesters and Phase-II which consists of three semesters. Regulation 7(7), prior to its amendment on 19 April 2010, provided as follows:

"(7). Supplementary examination may be conducted within 6 months so that the students who pass can join the main batch and the failed students will have to appear in the subsequent year."

5. On 19 April 2010, Regulation 7(7) was amended by the Regulations on Graduate Medical Education (Amendment), 2010. The amended Regulation 7(7) provides as follows:-

"7(7). The supplementary examination for 1st Professional MBBS examination may be conducted within 6 months so that the students who pass can join the main batch and the failed students will have to appear in the subsequent year provided that the students who pass the supplementary examination shall be allowed to appear in the second professional MBBS examination only after he/she completes the full course of study of three semesters (i.e. 18

months) for the second professional MBBS examination irrespective of the examination of the main batch."

6. Now it is in this background that the submissions of learned Senior Counsel for the petitioners would have to be noticed. On behalf of the petitioners, it has been submitted that: (i) under Regulation 7(7) it is contemplated that the supplementary examination for the First Professional MBBS Examination should be conducted within six months so that students who pass the examination can join the main batch; (ii) Regulation 7 (1) provides that each semester will consist of approximately 120 teaching days of 8 hours each and Regulation 7(5) stipulates that didactic lectures should not exceed one third of the time schedule; (iii) if these Regulations are read together, the intent appears to be that the result of a supplementary examination should be declared upon the examination being conducted within six months so that students who had failed earlier but had passed the supplementary examination can join the main batch without the loss of a year; (iv) the petitioners should, in the circumstances, be allowed to pursue their studies for the Second Professional Examination together with the other students who had passed the First Professional Examination in the first attempt and be permitted to appear at the said examination with their batch so as to obviate a loss of time.

7. As we construe the Regulations, it must at the outset be understood that the purpose and object of Regulation 7 is to ensure that a student undergoes a specified period of certified study which would truly equip the student in becoming a qualified medical professional. It is in that perspective that the Regulations prescribe the total duration of study; its division into semesters; the duration of each semester and the contents of the course of studies during a semester. Regulation 7(1) prescribes that every student must undergo a period of certified study which extends over 4½ academic years which are divided into 9 semesters, each of 6 months. Consequently, the clear requirement is that each semester should be over a period of six months. Regulation 7(1) then provides an approximation of 120 days of teaching, each of eight hours, within a semester. The use of the expression "approximately" is suggestive of the fact that the requirement of 120 teaching days is subject to a minor variation but, so that the main purpose of the provision is not ignored. Regulation 7(7), as amended, provides an additional facility of a supplementary examination for students who have appeared at the First Professional MBBS examination. But for such a facility, a student having once failed would not be entitled to appear or claim the benefit of a supplementary examination and would have to appear in the normal course in the examination held in the subsequent year for the First Professional MBBS students. However, the said Regulation grants a facility of allowing students of the First Professional MBBS Examination a chance to appear in the supplementary examination, and it has been stipulated that a supplementary examination should be conducted within six months in order to give a chance to the students to pass the examination and to join the main batch. However, the proviso to Regulation 7(7) clearly indicates that this is subject to the overriding requirement that a student who passes the supplementary examination would be allowed to appear in the Second Professional MBBS Examination only after completing the full course of study of three

semesters of 18 months, irrespective of the examination of the main batch. Regulation 7(7), therefore, leaves no manner of doubt that a facility is granted to students for appearing in the supplementary examination and an effort should be made to ensure the holding of the supplementary examination within six months' so as to allow the students to join the main batch upon passing the examination. The use of the word 'may' is indicative of the position that the holding of a supplementary examination within six months' is a desired goal so that students who pass it can join the main batch. But, this is subject to the overriding condition that such students must complete a full course of study of three semesters spread over eighteen months' irrespective of the examination of the main batch. The student must complete the academic requirements before entering upon the second professional examination.

8. In view of the clear stipulation contained in Regulation 7(7), it would not be open to the Court to issue a mandamus, the effect of which would be to dilute the prescription contained in Regulation 7(7) that before a student can be allowed to appear in the Second Professional Examination, a full course of study spread over three semesters of eighteen months' duration must be completed. This requirement cannot be diluted by taking recourse to the provisions of Regulation 7(1) in so far as they provide that each semester will consist approximately of 120 teaching days of 8 hours each, thereby reducing the number of months for the completion of the semester from six months to four months. That would be impermissible.

9. Moreover, the reference in Regulation 7(1) is to 120 teaching days. Obviously, neither the academic authorities nor the teaching faculty can be compelled to teach students without availing of the normal holidays and days of break. Be that as it may, we are of the view that under Article 226 of the Constitution, the High Court should not adopt any interpretation which would dilute the observance of standards for professional education. Moreover, in the present case, the plain and literal meaning of the Regulation is clear and is not ambiguous so as to call for any interpretational exercise.

10. A judgment of a Division Bench of this Court can be referred to at this stage, though we are conscious that in 1986 when this decision was rendered, the Regulations of 1997 were not in force. However, we consider it appropriate to refer to the decision to indicate the approach of the Court in a similar case and since the principles which have been laid down therein can be adopted in the situation which has arisen in the present case. In Vinod Kumar & Ors., Vs. Principal G.S.V.M. Medical College, Kanpur 1 a group of students failed in the First Professional MBBS Examination and appeared in the supplementary examination held six months later in which they were successful. The students approached the High Court with a case that they may also be permitted to appear in the examination along with their batch-mates who had passed the First Professional Examination in the first attempt. A writ of mandamus was sought to the Principal of the Medical College to accede to the request. The petition was contested on the ground that under the recommendations of the Medical Council of India the duration of the MBBS Course is of 4½ years, which is divided into three professional examinations to be conducted at an interval of 1½ years and after passing the first professional

examination a student has to undergo three years' training in paraclinical and clinical subjects.

11. The Division Bench, while declining to accede to the prayer before the Court by the students, held as follows:-

"5. We find it difficult to accept the argument advanced on behalf of the petitioners. The statutory provisions have to be interpreted according to the normal and well known rules of interpretation of statutes. To accept the argument of the petitioners' learned counsel is to altogether over look and eliminate from consideration, the provisions relating to the duration of studies intervening the first professional examination and the second professional examination. This is obviously neither possible nor proper for this Court to do. The subject matter of controversy relates to the field of Medical Education and the two conditions, though inter related in a way, are surely distinct and separate. Both the conditions have been laid down as statutory conditions in the form of statutes of the University on the basis of the recommendations of the Medical Council of India which as the statutory body entrusted with the task of regulation and maintenance of requisite standards of Medical Education. Courses of studies in a Medical College are conducted in a regulated systematic manner laying down the number of the classes to be taken daily weekly subjectwise involving various teachers, teaching hours, holidays including periodical vacations etc. This has relevance to the relationship with the requirements and regulation of work load connected also with the maintenance of the efficiency and convenience of the teachers and other connected staff. To compel the Medical College Authorities to arrange the special classes would entail obvious practical difficulties besides involving non-compliance of the statutory provision.

6. Learned counsel for the petitioners has failed to satisfy us as to the existence of any legal rights involved in favour of the petitioners; in fact this is not a case where invasion of any legal rights of the petitioners or breach of any statutory requirements is involved: what is sought in the other hand is that Principal of Medical College may be directed to act against the statutory requirements which he as important academic and administrative functionary is expected and required to enforce and carry out. No mandamus can be issued to direct the Principal to act against the law which he is bound to obey and carry out. If the petitioners cannot appear at the second professional examination alongwith their original batchmates it is because of something accountable to them because they failed in some of the subjects at the first professional examination and as a result could not attend the classes alongwith their batchmates from the very beginning of the course of studies for the second professional examination."

12. We are in respectful agreement with the judgment of the Division Bench. The judgment of the Division Bench has also been followed in a judgment of a learned Single Judge of this Court by one of us (Hon'ble Dilip Gupta, J) in Arvind Gautam & 13 Ors., Vs. State of U.P. & Ors., 2.

13. For these reasons, we are unable to grant the reliefs sought in these proceedings. If the petitioners have duly passed the First Professional Examination, they would necessarily have to abide by the discipline of the Regulations in so far

as the completion of the requirements for appearing at the Second Professional Examination are concerned and even thereafter.

14. The petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2014

BEFORE
THE HON'BLE AMRESWAR PRATAP SAHI, J.
THR HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 43918 of 2014

Smt. Ina Varshney & Ors. .Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
C.S.C.; Sri B. Dayal

Constitution of India, Art.-226- Writ Jurisdiction-Alternative Remedy-no absolute bar-where principle of Natural Justice violated-remedy to appeal-not come in way-petition allowed.

Held: Para-7 & 8

7. We are satisfied that the aforesaid order dated 21.11.2014 has been passed without affording any opportunity of hearing to the petitioners and without any opportunity to rebut the report dated 20.5.2014. The report was obtained a day earlier and the order was passed the following day without information to the petitioner.

8. In view of the aforesaid, we are not inclined to relegate the petitioners to the alternative remedy and in the facts and circumstances of the case, the aforesaid order dated 21.5.2014 is hereby set aside leaving it open to the Vice-Chairman, Meerut Development Authority, Meerut to pass a fresh order after affording opportunity of hearing to the petitioners preferably within a period of three months, from the date of production of a certified copy of this order.

Case Law discussed:
1998(9) SCC 1; 2010 (3) SCC 732; 2009 (1) AWC 566.

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

1. Heard learned counsel for the petitioners, learned Standing Counsel for the State and Sri B. Dayal, learned counsel appears for the Meerut Development Authority.

2. The present petition has been filed challenging the order dated 21.5.2014, passed by the Vice-Chairman, Meerut Development Authority, Meerut rejecting the representation of the petitioner regarding sanction of map.

3. At the very outset, Sri B. Dayal, learned counsel for the Development Authority, takes a preliminary objection that the petitioners have a statutory remedy of filing an appeal and as such the petition is liable to be dismissed on the ground of alternative remedy.

4. In reply to the aforesaid prelimianry objection, learned counsel for the petitioners has placed reliance on various decisions of the Hon'ble Apex Court to assert that alternative remedy is not an absolute bar and in case of violation of principles of natural justice, the petitioner shall not be relegated to the alternative remedy. He has placed reliance on the decision of the Apex Court in the

case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others, 1998 (8) SCC 1 and in the case of Secretary and Curator, Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity and others, 2010 (3) SCC 732. He has further placed reliance on the decision of this Court in the case of Mohammad Aslam vs. Rampur Development Authority through Secretary and another, 2009 (1) AWC 566 wherein in paragraph 8 of the judgement, it has been held as under:

We are of the considered opinion that under sub-section(9) of Section 15 it is mandatory for the Development Authority to afford an opportunity of hearing to a person, whose site plan has been earlier approved, disclosing the grounds on which it is proposed to be cancelled, which it is proposed to be cancelled. We, however, find that ground mentioned for cancellation of the site plan, earlier approved in favour of the petitioner, under the impugned order is squarely covered by the conditions mentioned in Section 15 and therefore the provisions of the said section are squarely attracted in the facts of the present case.

5. The contention of learned counsel for the petitioners is that in view of the order dated 11.2.2014 passed by this Court in Civil Misc. Writ Petition No. 8313 of 2014, a representation was submitted before the Vice-Chairman, Meerut Development Authority, Meerut, respondent no. 3 and the same has been decided vide order dated 21.5.2014 on the basis of some inspection report dated 20.5.2014 of a joint team of the Development Authority and the Tehsil, illegally holding that the construction of the Map No. 1548 of 2013 falls in the area acquired by the proposal of Development Authority.

6. The submission is that this order has been passed in violation of principles of natural justice solely on the basis of an ex parte joint inspection report dated 20.5.2014 that was never made known to the petitioner He further submits that even on demand the aforesaid joint inspection report dated 20.5.2014 was not supplied to the petitioners.

7. We are satisfied that the aforesaid order dated 21.11.2014 has been passed without affording any opportunity of hearing to the petitioners and without any opportunity to rebut the report dated 20.5.2014. The report was obtained a day earlier and the order was passed the following day without information to the petitioner.

8. In view of the aforesaid, we are not inclined to relegate the petitioners to the alternative remedy and in the facts and circumstances of the case, the aforesaid order dated 21.5.2014 is hereby set aside leaving it open to the Vice-Chairman, Meerut Development Authority, Meerut to pass a fresh order after affording opportunity of hearing to the petitioners preferably within a period of three months, from the date of production of a certified copy of this order.

9. It is made clear that we have not expressed our opinion on the merits of the claim of the petitioners and fresh orders will be passed independently by the authority.

10. The writ petition is allowed with the observations made hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 45314 of 2014

Smt. Vandana Varma & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rohit Agarwal, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C., Sri Dhirendra Singh, Sri Nikhil Kumar

U.P. Cooperative Societies Act 1965-Section 38 read with U.P. Cooperative Societies Rules 1968-Rule 115- Dismissal on basis of decision of management -charge mentioned in agenda related to Rule 115-can not be passed without holding disciplinary proceeding-under rule 38-held proceeding without jurisdiction-quashed.

Held: Para-24
Since learned counsel for the parties have agreed for final disposal of the writ petition at this stage itself, the writ petition is allowed, the resolution dated 21.8.2014 and the consequential communication dated 22.8.2014 disqualifying the petitioners are hereby quashed leaving it open to the respective authorities to take any action in case so warranted in law in accordance with the rules and procedure as observed hereinabove.

Case Law discussed:
1980 A.L. J. page 1098; 1992 (10) Lucknow Civil Decisions page 263; 2003 (2) U.P.L.B.E.C Page 1132; 1978 (4) A.L.R. Page 949; W.P. No. 5131 of 2013 decided on 31.01.2013; 1998(8) SCC Page 1.

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

1. Heard Sri Shashi Nandan learned Senior Counsel assisted by Sri Rohit Agarwal learned counsel for the petitioners, Sri Nikhil Kumar for the respondent nos. 5 and 6, Sri Dhirendra Singh for the respondent no. 7 through its alleged Director Sri Ashok and the learned Standing Counsel for the respondent nos. 1 to 4.

2. Learned counsel for the parties have agreed that the writ petition be disposed of finally at this stage itself as the respondents do not propose to file any counter affidavits at this stage keeping in view the nature of the order that is proposed to be passed.

3. The contention raised by Sri Shashi Nandan, while questioning the impugned action of removal of the petitioners, who are office bearers of the Society and fall within the definition of "Officer", under the impugned orders dated 13.8.2014 and 21.8.2014, is to the effect that the exercise of powers under which such removal has been made does not fall within the jurisdiction of the Committee of Management of the Society, inasmuch as, the removal of the office bearers can only be done by proceeding to take action under Section 38 of the U.P. Cooperative Societies Act, 1965 and the rules framed thereunder. He submits that the action in the present case has been purportedly taken by invoking Rule 115 read with Rule 453 and Rule 454 of the U.P. Cooperative Societies Rules, 1968 which is a malicious exercise of power that is colorable and unlawfully executed.

4. The contention is that none of the disqualifications have been incurred by the petitioners as envisaged under Rule 453 and therefore Rule 454 cannot be invoked by the respondent no. 7 for the

removal of the petitioners in exercise of such powers. It is a colorable exercise of power and without any material to substantiate the same. He further submits that the procedure also prescribed for the same has not been followed inasmuch as if the action was sought to be taken for charges relatable to Rule 115 then in that event Section 38 is clearly attracted and a notice to that effect ought to have been given by the Society before proceeding to exercise any such powers.

5. Learned counsel submits that an agenda notice for a meeting of the committee is not a notice for the purpose of such exercise of powers under Rule 115, hence the impugned order suffers from manifest illegalities.

6. Sri Shashi Nandan further contends that in view of the law laid down by the two Division Benches of this Court in the case of Madan Pal Singh and another Vs. The Additional District Magistrate, Meerut and others 1980 A.L.J. Page. 1098 and the law laid down in the case of Kamil Kidwai Vs. Stae of U.P. 1992 (10) Lucknow Civil Decisions page 263, it is evident that the exercise of powers to indict under Rule 115 has to be processed only in terms of Section 38 and not under Rule 454.

7. The contention therefore is that the impugned orders under the garb of exercise of such powers under Rule 454 are without jurisdiction and in violation of the procedure prescribed under the Rules.

8. Sri Nikhil Kumar and Sri Singh as well as the learned Standing Counsel for the respondents have opposed the aforesaid arguments contending that the petitioner has an alternative remedy of invoking arbitration as provided for in Rule 454 itself, and even otherwise such disputes can be resolved by the Registrar in exercise of the omnibus power conferred on him under Section 128 of the U.P. Cooperative Societies Act, 1965.

9. On merits, they contend that the procedure even if presumed to be in relation to Section 38, then too the permission and the communication from the Registrar on record does indicate that the Committee of Management has proceeded only after such permission has been granted and therefore the orders impugned cannot be said to be without jurisdiction. They therefore contend that the alternative remedy as indicated above could be invoked by the petitioners for resolution of such disputes. They further contend that so far as the charges are concerned as enumerated in the agenda notice dated 13.8.2014, the same clearly indicate the disqualifications that are relatable to Rule 453 incurred by the petitioners, and in such circumstances this court would be loathe to interfere with the orders.

10. They further urge that even in relation to the charges of Rule 115 no reply was given by the petitioners who had received the notices and instead of giving a reply, they were simply seeking time and vague informations, basically challenging the authority of the Committee of Management to proceed to take action. They also contend that once an opportunity had been given to the petitioners they cannot raise any dispute of violation of principles of natural justice.

11. Learned counsel for the respondent has further relied on the

decision in the case of Dilbag Singh Vs. Deputy Registrar, Cooperative 2003 (2) U.P.L.B.E.C. Page 1132, to urge that the alternative remedy rule should be adhered to. They have also relied on another Division Bench judgment in the case of Uma Nath Mishra Vs. State of U.P. and others 1978 (4) A.L.R. Page 949 to contend that when the provision for arbitration is available, then the discretion under Article 226 of the Constitution of India should not be invoked. This view, according to the respondent, has been consistently followed by this Court including the division bench judgment in the case of Ram Chandra Jaiswal Vs. State of U.P. Writ Petition No. 5131 of 2013 decided on 30.1.2013.

12. Having considered the aforesaid submissions, taking up the issue of alternative remedy first, there is no quarrel that Rule 454, in the event of any dispute of disqualification, requires the party aggrieved to invoke the arbitration clause. There is also no dispute that the Registrar has powers under Section 128 to annul any resolution passed by the Society or the Committee of Management in exercise of such powers.

13. However, coming to the decisions that have been relied on by Sri Nikhil Kumar particularly in the case of Dilbag Singh (Supra) we find that the Division Bench proceeded to observe that alternative remedy is not an absolute bar and if the allegations of violation of principles of natural justice and the order being without jurisdiction are made then this Court may take into consideration such factors.

14. The aforesaid proposition has been canvassed before this Court as well as before the Apex Court time and again and the most celebrated judgment cited at the bar is that in the case of M/s Whirlpool Corporation Vs. Registrar Trade Mark 1998 (8) SCC page 1. To our mind the exceptions entailed therein are attracted on the facts of the present case.

15. The issue therefore is as to whether the exercise of powers by the respondent no. 7 suffers from the vice of jurisdiction or not.

16. We have considered the arguments at length and the impugned action appears to have been taken on two premises, firstly that which is based on the allegations as per Rule 115 of the U.P. Cooperative Societies Rules, 1968. The second on incurring disqualifications under Rule 453 (1) (f), (g), (h) and (q) of the 1968 Rules.

17. For illustration sake the charges against the petitioner no. 1 mentioned in the agenda notice are to the effect that she has acquired her membership in violation of the provisions, she has committed irregularities in ex-cadre selections, she has forcibly occupied the residence of the Secretary of the Bank and that she had misutilized an Innova vehicle of the society. Except the first charge relating to membership, the other three charges clearly indicate that they are in relation to Rule 115 which could not be disputed by Sri Nikhil Kumar and Sri Singh. The procedure provided for taking action under Rule 115 is clearly relatable to Section 38 of the 1965 Act and we have not been able to find any good reason to differ from the view taken by the Division Bench in the cases of Madan Pal Singh and Kamil Kidwai (Supra). A perusal of paragraph 7 of the decision in the case of

Madan Pal Singh would indicate that the same lays down clearly that if the alleged charge is a violation of Rule 115 then the office bearers can be removed only in accordance with Section 38 of the Act.

18. The aforesaid conclusion drawn by the Division Bench, in our opinion, is perfectly in accordance with law and in the absence of any ground to differ from the same we are bound by the said ratio.

19. Paragraph 7 is extracted hereinunder:-

"7. In our opinion respondents 2 to 12 had no jurisdiction acting as members of the Committee of Management to remove petitioner No. 1 from its membership on the ground that he had violated Rule 115. He was an 'Officer' of the Society within the meaning of Section 2 (o) of the Act. Assuming he had violated Rule 115 he could be removed from his office only in accordance with Section 38 of the Act. The Committee of Management could take action against petitioner No. 1 under Rule 454 only if it found that he had incurred one of the disqualifications mentioned in Rule 453, sub-Rule (1). The impugned resolution contains no such finding. The Committee consequently acted beyond its statutory limitations."

20. To the same effect, we find that the ratio of the decision in the case of Kamil Kidwai (Supra) wherein paragraphs 9 and 10 the law has been categorically stated which is as follows and is extracted hereinuder:-

"9. From a perusal of Section 38 (1) which has been reproduced above it will appear that Section 38 (1) relates to the removal of an office of a co-operative society and applies to a case where any officer of a co-operative society has contravened or omitted to comply with any provisions of the Act or the rules or the bye-laws of the society or has forfeited his right to hold office. When it is proposed to take action against an officer of a co-operative society for his removal on the ground that he has forfeited his right to hold office, the provisions of Section 38(1) which deal directly with the matter are attracted. The grounds on which an officer of a co-operative society may forfeit his right to hold office are not specified and, therefore, the provisions being of a general nature would also apply where the right has been forfeited on account of disqualifications, referred to in rule 453, incurred by an officer making him ineligible to be or to continue as a Member of the Committee of Management.

10. Rule 454 which is a piece of delegated legislation under Section 130 of the Act defines the procedure to be followed by a Committee of Management regarding the removal of a member subject to disqualification from the Committee of Management. It is a supplemental provision and has to be read alongwith the provisions of Section 38 (1) and not independent of it. There is no conflict or inconsistency between the two provisions. It is no doubt true that in Section 38(1) provision is that the Registrar may call upon the society to remove within a specified period the officer concerned and in rule 454 it is provided that it shall be the duty of the Committee of Management of a co-operative society to ensure that no person incurring any of the disqualifications continues to hold office of the Member of Committee of Management. At first sight the use of the word "may" in Section 38(1)

may suggest that the Registrar has discretion in the matter of taking action and this may be in conflict with the duty of the Committee of Management mentioned in rule 454. But there is no conflict in reality, for the context in which the power has been conferred on the Registrar by Section 38(1) would envisage that the provisions are mandatory and it is the duty of the Registrar to take action where in his opinion the conditions laid down in the section exist. The failure of the Registrar to take action will amount to permitting the officer of the co-operative society to continue to hold office inspite of the fact that he is guilty of having contravened or to hold office or omitted to comply with the provisions of the Act, rules or bye-laws or he has forfeited his right to hold office. No statutory authority will ever countenance such a situation and will not permit an office-holder to be continued even after infraction of law caused by his own act or omission. In accordance with the dictum of their Lordships in Pundalik's case cited above, the provisions of Section 38(1) and rule 454 should be and they are capable of being interpreted harmoniously. Whenever it occurs to the Committee of Management that an officer of the Society has become subject to any disqualification and is eneligible to hold office, the Committee will approach the Registrar, obtain his sanction under S. 38(1) and proceed to take action for the removal of the officer in accordance with rule 454. This procedure may be considered necessary for the protection of the officer as well as for the smooth management of the affairs of the society. If the Registrar omits to perform the statutory duty imposed on him under Section 38(1) or exercise his powers under that section contrary to the settled principles of law, his action or inaction will always be subject to judicial review and appropriate orders or directions may be issued to him under Article 226 of the Constitution, and this aspect of the matter has not been challenged by the counsel for the respondent."

21. In this situation and on the facts of the present case we find that Rule 115 has been clearly invoked and the charges are relatable to the said rule. Consequently, the only conclusion that can be drawn on the facts of the present case, applying the law aforesaid, is that Section 38 ought to have been invoked whereafter the Society could have proceeded to take action after putting the petitioners to notice on such specific charges that would be in relation to Rule 115 by following the procedure prescribed and not by a circumvented method. The agenda for a meeting of the Committee to take action under Rule 454 cannot amount to a notice as envisaged under Section 38 read with Rule 115, and therefore the entire proceedings on allegations grounded on Rule 115 are clearly without jurisdiction as they do not comply with the procedure prescribed. This method of removal in the present case is malice in law.

22. So far as the second issue relating to the membership and its disqualification as prescribed under Rule 453 is concerned, we find that this action has been mixed up with the allegations in relation to Rule 115 whereas the powers exercisable in both events are through different methods and through different procedures prescribed in law as indicated in Section 38 and Rule 454. The power to disqualify a member is clearly provided in

Rule 454 where it is an obligation on the Committee of Management to take action only when the conditions as explained in the above mentioned decisions are fulfilled.

23. The respondents appear to have proceeded without taking into account the aforesaid distinction between the manner and the procedure that is prescribed for exercise of such powers. The impugned action therefore cannot stand the scrutiny of law and if it is without adhering to the procedure prescribed then there is no occasion for this Court to relegate the petitioners to the alternative remedy for seeking arbitration or even otherwise before the Registrar. The exceptions as enumerated in the ratio of M/s Whirlpool (Supra) and even otherwise the facts of this case, do not bar the entertaining of this petition. The impugned action as concluded above, suffers from malice in law and is therefore liable to be struck down on the facts noted above.

24. Since learned counsel for the parties have agreed for final disposal of the writ petition at this stage itself, the writ petition is allowed, the resolution dated 21.8.2014 and the consequential communication dated 22.8.2014 disqualifying the petitioners are hereby quashed leaving it open to the respective authorities to take any action in case so warranted in law in accordance with the rules and procedure as observed hereinabove.

25. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 64325 of 2008

Mohammad Afzal ...Petitioner
Versus
Smt. Ramesh Kumari ...Respondent

Counsel for the Petitioner:
Sri Satish Mandhyan, Sri B.D. Mandhyan
Sri Om Prakash

Counsel for the Respondent:
Sri R.K. Pandey, Sri R.P. Pandey

Transfer of Property Act, Section 106- Notice-determination of tenancy-15 days provided-sent itself filed before expiry of 30 days-decreed by Court below-held-erroneous approach-in U.P. 30 days notice-mandatory-prior to that suit itself-not maintainable.

Held: Para-14
Therefore, the notice dated 4.3.2005 which forms the basis of the suit is invalid and the tenancy of the petitioner can not be treated to have been validly determined and since the suit has also been instituted before the expiry of the statutory period of notice, it is defective. Thus, the Courts below erred in law in decreeing the suit.

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

1. Heard Sri Om Prakash, learned counsel for the petitioner and Sri R.K. Pandey, learned counsel for the respondent.

2. Petitioner is a tenant. His tenancy is said to have been terminated vide notice dated 4.3.2005 under Section 106 of the Transfer of Property Act, 1882 (in short TP Act) whereupon the respondent landlord instituted SCC Suit No. 8 of 2005 for his eviction. The suit has been

decreed by the courts below holding that the provisions of U.P. Act No. 13 of 1972 are not applicable to the shop in dispute and that the notice was a valid notice terminating the tenancy of the petitioner.

3. The sole ground on which the writ petition has been filed is that notice determining tenancy was invalid as only 15 days notice was given whereas according to U.P. Amendment to Section 106 of the TP Act a notice of 30 days is mandatory.

4. In reply to the above Sri Pandey submits that the U.P. Amendment is of the year 1954. The Transfer of Property Act has been amended in 2002 which provides for 15 days notice for determining the month to month tenancy. Therefore, the U.P. Amendment of 1954 is of no significance and there is no corresponding State amendment.

5. Section 106 of the TP Act as it stood originally is reproduced herein below:-

"106. Duration of certain leases in absence of written contract or local usage---- In the absence of a contract or local law or usage to the contrary, a contractor or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

6. It provides that a month to month lease or tenancy is terminable on part of the lessor or lessee by 15 days notice expiring at the end of the month of the tenancy. Therefore, Section 106 of the TP Act as it stood originally stipulates for 15 days notice for determining the tenancy.

7. The aforesaid section 106 of the Transfer of Property Act in its applicability to the State of U.P. was amended by U.P. Act No. 24 of 1954 w.e.f. 30.11.1954 and it was provided that in place of 15 days notice appearing in Section 106 of the Act, the notice period of 30 days be substituted. It means that instead of 15 days notice 30 days notice is required for determining the tenancy in the State of U.P.

8. Section 106 of the Act has been amended by the Transfer of Property (Amendment Act 2002) w.e.f. 31st December 2002 and the entire provision has been redrafted as under:-

"106. Duration of certain leases in absence of written contract or local usage----

(1) In the absence of a contact or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or

lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being enforce, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

9. The revised section 106 of the TP Act still provides for 15 days notice for determination of monthly tenancy. Therefore, the notice period for determining the tenancy under Section 106 of the T.P. Act remains the same/unchanged despite the amendment of 2002.

10. The said notice period as provided under Section 106 of the TP Act was amended to 30 days in its application to the State of U.P. Since there is no change in the notice period by the Transfer of Property Amendment Act of 2002, the notice period as it stood originally and amended in its applicability to the State of U.P. would continue to hold the field. In other words, in the State of U.P. 30 days notice is mandatory for determining the month to month tenancy.

11. In the instant case, the notice gives only 15 days time for determining the tenancy of the petitioner. Therefore, the notice ex-facie appears to be invalid.

12. The suit on its basis was instituted on 22.3.2005 ie. within 18 days of the issuance of notice. Thus, the institution of the suit was also earlier to 30 days statutory period of notice. It therefore would not be saved even by Sub-section 3 of Section 106 of the TP Act.

13. In view of the aforesaid facts and circumstances, the requirement of law in its applicability to the State of U.P. is for a notice of 30 days for determining the month to month tenancy. The defect of shorter period of notice could have been cured had the suit been filed subsequent to the expiry of the notice period of 30 days as prescribed under the Act in its application to the State of U.P. However, in the present case, not only the notice period is short than prescribed but the suit was also instituted before expiry of 30days period.

14. Therefore, the notice dated 4.3.2005 which forms the basis of the suit is invalid and the tenancy of the petitioner can not be treated to have been validly determined and since the suit has also been instituted before the expiry of the statutory period of notice, it is defective. Thus, the Courts below erred in law in decreeing the suit.

15. Accordingly, the judgment and orders dated 29.11.2008 and 28.7.2008 are quashed and the petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2014

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No.65807 of 2013

Aparna Construction & Supplies, Mirzapur ...Petitioner
Versus
State of U.P. & Ors. . ..Respondents

Counsel for the Petitioner:
Sri P.N. Tripathi, Sri Anil Bhushan

Counsel for the Respondents:
C.S.C.

U.P. Public Money(Recovery of dues) Act 1972-Section-3(i)(d)-public money defined-petitioner a contractor-allowed to complete construction work within 6 month-could not completed due to want of money-instead of releasing amount on demand-work order-canceled and recovery of loss due to non completion of work-as arrears of land revenue-held contractual dues not recoverable as arrears of land revenue-citation-without jurisdiction.

Held: Para-11
In view of the discussions made above, we find that issuance of recovery citation against the petitioner for realization of the contractual dues, alleged to be payable by the petitioner as arrears of land revenue, is contrary to law. The citation issued on 8.11.2013 calling upon the petitioner to pay the amount, therefore, is wholly without jurisdiction and is liable to be quashed.

Case Law discussed:
[(2006) 3 AWC 2412]

(Delivered by Hon'ble Ashwani Kumar Mishra , J.)

1. Petitioner firm is a contractor duly registered with the office of Divisional Forest Officer, Forest Region, Mirzapur. It claims that pursuant to award of contract, a work order was issued by respondents for construction of 30 houses on 12.11.2010. It is asserted that the contract work was satisfactorily completed, whereafter a physical verification was also done on 9.9.2011. Subsequently, a team of officers also conducted physical verification and submitted its report. The Assistant Engineer concerned forwarded the report stating that on 25.10.2012 the verification team found 20 houses to be as per norms. The petitioner thus represented on 2.2.2012 that he has substantially completed the work and the remaining work is withheld only due to non-release of payment against pending bills and sought release of payment. The demand for release of payment was also pressed by the petitioner.

2. The petitioner claims that instead of releasing the withheld payment, it was served with an order dated 24.4.2013, cancelling the contract itself on the ground that the construction since was not completed within a period of six months, as was required in the contract, as such, the contract was cancelled under Clause 44.1 of the agreement for breach of contract. The petitioner was also informed that losses caused were liable to be recovered from petitioner by virtue of Clause 45.1 of the Contract. A recovery thereafter under Z.A. Form 68 has been issued on 8.11.2013 for a sum of Rs. 22,02,454/-, which is under challenge in the present writ petition.

3. We have heard Sri Anil Bhushan, Advocate for the petitioner and learned

Standing Counsel for the respondents-State.

4. Sri Anil Bhushan, learned counsel for the petitioner has submitted that:-

(i) Petitioner has not been heard in the matter before issuing the recovery proceedings and thus the impugned action is violative of the principle of natural justice.

(ii) The liability of petitioner to pay the amount claimed has not been determined in any valid proceedings, and as such, recovery is illegal.

(iii) The amount claimed is in essence a contractual claim, which cannot be recovered as arrears of land revenue.

5. Learned Standing Counsel for the respondents, on the other hand, has submitted that the recovery from the petitioner is of the amount due and payable to the respondents, and is rightly being realized as arrears of land revenue.

6. We have examined the respective contentions and have perused the records. 7.Petitioner has asserted in Para 12 of the writ petition that the order for cancellation of contract was passed mechanically and without any opportunity of hearing to the petitioner. The reply of the respondents contained in Paras 8 and 9 of the counter affidavit is wholly vague. No instance of issuance of any notice to petitioner before determining petitioner's liability has been brought on record. The letters enclosed along with the counter affidavit do not go to show that petitioner was given any notice or opportunity before working out the dues, alleged to be payable by the petitioner. Thus, contention of denial of opportunity to petitioner is borne out from the record.

8. Further contention of Sri Bhushan is that the amount claimed by the respondents, even otherwise, is at best a contractual due, which cannot be realized from petitioner as arrears of land revenue particularly without any prior adjudication of the liability. A supplementary counter affidavit has been filed by the respondents to deal with the argument. The respondents have asserted that they are entitled to recover the amount by virtue of Clause 45.1 of the Contract, which is quoted hereinafter:-

"45.1. If the Contract is terminated because of a fundamental breach of Contract by the Contractor, the DFO, Mirzapur shall issue a certificate for the values of the work done and Materials ordered less liquidated damages, if any less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the values of the work not completed, as indicated in Contract Date : If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be recovered from the security deposit. If any amount is still left unrecovered it will be a debt payable to the Employer."

A perusal of the clause relied upon does not show that any amount due to the employer can be recovered as arrears of land revenue.

9. The citation under challenge has been issued on 8.11.2013 by invoking the jurisdiction conferred under Rule 282 of the U.P.Z.A. Rules, 1950. Rule 282 provides that the proclamation of sale shall be in Z.A. Form 74. Chapter XII of the U.P. Zamindari Abolition and Land Reforms Act, 1950 provides for land revenue and the manner of its realization.

Section 278 of U.P.Z.A. & L.R. Act provides that a statement of account certified by the Tehsildar shall for the purpose of this Chapter, be conclusive evidence of the existence of the arrears of land revenue, of its amount and of the person who is the defaulter. However, other dues payable can also be recovered as arrears of land revenue, if it is so permitted by law. Reliance has also been placed upon Section 3 of The U.P. Public Moneys (Recovery of Dues) Act, 1972, which provides for recovery of certain dues as arrears of land revenue. Section 3(1)(d) contemplates that money payable to the State Government or the Corporation, under an agreement, is recoverable as arrears of land revenue, if conditions contemplated therein are satisfied.

10. In the present case, the agreement which has been relied upon by the respondents contained no stipulation or clause that any sum due thereunder can be recovered as arrears of land revenue. In the absence of there being any provision in law or agreement for recovery of contractual due being realizable as arrears of land revenue, the contractual due cannot be realized as arrears of land revenue. Learned counsel for the petitioner has relied upon a Division Bench of this Court in Mohammad Umar Vs. Collector/District Magistrate [(2006) 3 AWC 2412] wherein after noticing the relevant provisions of the U.P.Z.A. & L.R. Act, it has been held that contract money for realization of Tehbazari dues cannot be recovered as arrears of land revenue. Various other judgments on the point having been relied upon.

11. In view of the discussions made above, we find that issuance of recovery citation against the petitioner for realization of the contractual dues, alleged to be payable by the petitioner as arrears of land revenue, is contrary to law. The citation issued on 8.11.2013 calling upon the petitioner to pay the amount, therefore, is wholly without jurisdiction and is liable to be quashed.

12. The writ petition, therefore, succeeds and is allowed. Impugned recovery citation dated 8.11.2013 (Annexure No.7 to the writ petition) issued by respondent no.3 is quashed. However, it would be open for the respondents to proceed in accordance with the terms of the contract for determination of petitioner's liability and its recovery, if any, in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 66930 of 2013

Rajeev Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh
Sri Manoj Kumar

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav

Constitution of India, Art.-226-Service law-payment of gratuity and pension denied on pendency of criminal appeal-admittedly disciplinary proceeding initiated considering role of petitioner in criminal case-not initiated disciplinary proceeding-held-after retirement neither

the post retiral dues could be withheld-nor disciplinary action can go-petition allowed with direction to pay 9 % interest within 3 month.

Held: Para-21

Civil Service Regulation is applicable upon the employees of the power corporation, regulation 351 AA and regulation 919 A(3), prohibits payment of death-cum-retirement gratuity until the conclusion of departmental or judicial proceeding. Division Bench in Jai Prakash (Supra) has held "judicial proceedings" would necessarily include pendency of criminal case. The question to be answered is as to whether pendency of criminal appeal, against acquittal, will include "pending judicial proceeding" In Amrit Lal (Supra), Division Bench observed pendency of criminal appeal against acquittal is not a ground for withholding the retiral dues. After acquittal there is nothing against the employee, more so, in the facts of the case, the respondents did not choose to initiate any disciplinary proceedings after acquittal nor did they examine the judgement of the trial court to find out, as to whether petitioner was acquitted 'honourably', once failing to exercise their powers under the rule to initiate any proceedings, it is not open for the respondents to withhold retiral dues, merely on pendency of criminal appeal.

Case Law discussed:

(2013) 3 UPLBEC 2369; W.P. No. 19693 of 2012; [2014 (1) AWC 159(SC)]; [(2014) 1 ADJ 207]; [LAWS (SC)-201406014]; (1981) 2 SCC 714; (2006) 4 SCC 265; (2013) 7 SCC 685; (AIR 1991 SC 2010); 2013 (4) SCC 161; 2013 (5) SCC 111; 1993 (3) SCC 196; (2007) 1 SCC (L&S) 292); Civil Appeal No. 7113 of 2014.

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

1. Heard Shri Adarsh Singh holding brief of Shri I.R.Singh and Shri Shivam Yadav appearing for Power Corporation.

2. The petitioner was working as Junior Engineer with the respondent Power Corporation since 1.4.1975, retired on 30.4.2009 on attaining the age of superannuation. During service, petitioner was prosecuted in Criminal Case under section 7/13(2) read with Section 13(1)(D) of Prevention of Corruption Act, 1988.

3. Pursuant thereof, no disciplinary proceedings was initiated against the petitioner. In the trial petitioner was acquitted on 14.3.2005.

4. Aggrieved, Government Appeal No. 2602 of 2002 (State of U.P versus Rajeev Sharma) was filed which was admitted.

5. On superannuation on 30.4.2009 the petitioner approached the respondent authorities for retiral benefits including pension, when no decision was taken , the petitioner approached the court by filing writ petition no. 55327 of 2011 (Rajiv Sharma versus State of U.P and others) which was disposed of by order dated 26.9.2011 directing the authorities to decide the petitioner's representation.

6. By the impugned order dated 22.11.2012 passed, pursuant to the order of the Court, the Chief Engineer (Jal Vidyut), U.P Power corporation Ltd., respondent no. 3 rejected the claim of the petitioner solely for the reason that Criminal Appeal, against acquittal is pending, the retiral dues shall, thus, be paid after decision in the Criminal Appeal No.2602 of 2002.

7. The submission of the learned counsel for the petitioner is that the petitioner was acquitted in the criminal case, during the pendency of the trial or appeal, the respondent authorities did not initiate any disciplinary proceedings

under the rules, the petitioner having since retired, on attaining the age of superannuation, there being no provision under the rules to withhold the petitioner's post retiral benefits pending criminal appeal, thus, the petitioner is entitled to the post retiral dues.

8. In support of his submission, the learned counsel for the petitioner has relied upon State of Jharkhand and others versus Jitendra Kumar Srivastava and another (2013) 3 UPLBEC 2369 and decision dated 1.8.2014 rendered in Writ Petition No.19693 of 2012 (Amir Lal versus Chief Election Officer and others).

9. In rebuttal Shri Shivam Yadav, learned counsel for the respondent Power Corporation submits that since judicial proceedings has not culminated, the state appeal is pending hence the retiral benefits cannot be released even though the petitioner has been acquitted in the criminal trial.

10. Rival submissions fall for consideration:

11. Supreme Court in State of Jharkhand and others vs. Jitendra Kumar Srivastava and another [2014 (1) AWC 159 (SC)] considered as to whether in absence of any provisions in the pension rules, State Government can withhold a part of pension or gratuity during the pendency of the departmental or disciplinary proceedings. Paragraph 11 is as follows:-

"11. Reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension etc. ONLY when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the rules for withholding of the pension/ gratuity when such departmental proceedings or judicial proceedings are still pending."

12. Division Bench of this Court in State of U.P. and others vs. Jai Prakash [(2014) 1 ADJ 207] relying upon Supreme Court judgment held that pension would include gratuity and the gratuity cannot be withheld merely due to pendency of criminal case unless there is a specific provision under the Rules. The Court was dealing with the provisions of Civil Service Regulations, 1920, which provided for withholding of gratuity Paragraphs 8, 9 and 10 are as follows:-

"8. The learned Single Judge, in the present case, has proceeded on the basis that neither in regulation 351 nor in regulation 351-A is a withholding of gratuity contemplated during the pendency of a judicial proceeding. The learned Single Judge, with respect, has overlooked the provisions of regulation 351-AA and a specific bar which is contained in regulation 919-A (3). In view of the specific prohibition which is contained in regulation 919-A (3), no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression 'judicial proceeding' would necessarily include the pendency of a criminal case.

9.In a judgement of a Division Bench of this Court in Shri Pal Vaish vs. U.P. Power Corporation Limited and another, 2009 (9) ADJ 45 (DB), it has been held that clause 3 of regulation 919-A is a

provision which specifically deals with the payment of gratuity during pendency of departmental or judicial proceedings and in view thereof, the payment of gratuity has to be deferred until the conclusion of such a proceeding. The Division Bench also held that the payment of gratuity cannot be made in view of the bar contained in regulation 919-A during the pendency of a criminal case.

10.In a recent judgement of the Supreme Court in State of Jharkhand & Ors. vs. Jitendra Kumar Srivastava & Anr 2, the Supreme Court dealt with the provisions of Rule 43 (b) of the Pension Rules of the State of Bihar as applicable to the State of Jharkhand. Regulation 43(b) was pari materia to regulation 351-A of the Civil Service Regulations in the State of U.P. In that context, the Supreme Court held that Rule 43(b) made it clear that it was permissible for the Government to withhold pension only when a finding is recorded in a departmental inquiry or judicial proceeding in regard to the commission of misconduct while in service and rule 43(b) contains no provision for withholding gratuity when departmental or judicial proceedings are still pending. However, the Supreme Court clarified that though there was no provision for withholding pension or gratuity in the given situation, had there been any such provision in the rules, the position would have been different. In the present case, there is a specific provision contained in regulation 351-AA read with regulation 919-A(3)."

13. A Division Bench of this Court in writ petition no.19693 of 2012 (Amrit Lal versus Chief Election Officer and Others) decided on 1.8.2014 observed as follows:

Firstly the pendency of the Criminal Appeal filed by the State cannot be said to be a valid ground for non payment of gratuity amount and in any case after dismissal of the appeal on 17.5.2012, there can be further no justification for not paying the gratuity amount.

14. The Supreme Court in Dev Prakash Tewari vs. U.P. Cooperative Institutional Service Board [LAWS (SC)-2014-6-14] was considering the case as to whether disciplinary proceedings after retirement of an employee could be continued in absence of any rule to that effect. In paragraph 6 held as follows:-

"6 .....

.....

Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits."

15. In Corporation of the City of Nagpur versus Ramchandra (1981) 2 SCC 714, it is observed that it may not be expedient to continue a departmental enquiry on the very same charges or grounds or evidence, where the accused has been acquitted honourably and completely exonerated of the charges. At the same time, it is pointed out that merely because the accused is acquitted, the power of the authority concerned to continue the departmental enquiry is not taken away nor is its discretion in any way fettered. The same principle is reiterated in Commr.of Police versus Narender Singh (2006) 4 SCC 265.

16. In Commr. of Police, New Delhi and another versus Mehar Singh (2013) 7

SCC 685, Supreme Court observed that "while the standard of proof in a criminal case is that of proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur versus Union of India AIR 1964 SC 787 this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable.

" This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."

17. Enquiry commences with the issue of charge-sheet as held in the case of Union of India vs. K.V. Jankiraman (AIR 1991 SC 2010), Union of India vs. Anil Kumar Sarkar, 2013 (4) SCC 161 and State of Andhra Pradesh vs. C.H. Gandhi, 2013 (5) SCC 111; Framing of the charge-sheet is the first step taken for holding enquiry into the allegations on the decision taken to initiate disciplinary proceedings. Service of charge-sheet on the Government servant follows decision to initiate disciplinary proceedings and it does not precede and coincide with that decision (vide Delhi Development Authority vs. H.C. Khurana 1993 (3) SCC 196). Once the enquiry was not initiated or contemplated or pending before the retirement, the same cannot be continued after retirement, unless there is a rule to that effect. The learned counsel for the respondents has failed to show any rule or circular as to whether disciplinary proceedings could be initiated after retirement and under what circumstances, the retiral dues be withheld after acquittal.

18. The Supreme Court in Mathura Prasad v. Union of India and others, (2007) 1 SCC (L&S) 292), held that when an employee is sought to be deprived of his livelihood for alleged misconduct, the procedure laid down under the rules are required to be strictly complied with:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub-rules are required to be strictly followed: It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in the manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact, for sufficient reasons may attract the principles of judicial review."

19. In a recent judgement rendered by Hon'ble Supreme Court in D.D Tewari (D) Thr.Lrs. versus Uttar Haryana Bijli Vitran Nigam Ltd. & Others in Civil

Appeal No.7113 of 2014 decided on 1st August 2014. The Supreme Court made the following observation in paragraph 4 & 6:

4. It is an undisputed fact that the appellant retired from service on attaining the age of superannuation on 31.10.2006 and the order of the learned single Judge after adverting to the relevant facts and the legal position has given a direction to the employer-respondent to pay the erroneously withheld pensionary benefits and the gratuity amount to the legal representatives of the deceased employee without awarding interest for which the appellant is legally entitled, therefore, this Court has to exercise its appellate jurisdiction as there is a miscarriage of justice in denying the interest to be paid or payable by the employer from the date of the entitlement of the deceased employee till the date of payment as per the aforesaid legal principle laid down by this Court in the judgement referred to supra. We have to award interest at the rate of 9% per annum both on the amount of pension due and the gratuity amount which are to be paid by the respondent.

6.For the reasons stated above, we award interest at the rate of 9% on the delayed payment of pension and gratuity amount from the date of entitlement till the date of the actual payment. If this amount is not paid within six weeks from the date of receipt of a copy of this order, the same shall carry interest at the rate of 18% per annum from the date of amount falls due to the deceased employee. With the above directions, this appeal is allowed.

20. Applying the law on the facts of the case in hand, petitioner was falsely implicated in a criminal case for taking bribe of Rs.500 on 22.7.1991, was enlarged on bail on the same day, thereafter placed under suspension on 27.8.1991 and on 16.11.1992, the petitioner was reinstated in service but no departmental proceedings was ever initiated against the petitioner. The petitioner was acquitted in the criminal case on 14.3.2005, even after acquittal no departmental proceedings was initiated. On 30.4.2009, the petitioner retired. Thus mere pendency of Criminal Appeal would not entitle the respondents to withhold the post retiral benefits as the petitioner was acquitted and no proceedings was initiated by the respondents, further petitioner through out the trial continued in service until retirement.

21. Civil Service Regulation is applicable upon the employees of the power corporation, regulation 351 AA and regulation 919 A(3), prohibits payment of death-cum-retirement gratuity until the conclusion of departmental or judicial proceeding. Division Bench in Jai Prakash (Supra) has held "judicial proceedings" would necessarily include pendency of criminal case. The question to be answered is as to whether pendency of criminal appeal, against acquittal, will include "pending judicial proceeding" In Amrit Lal (Supra), Division Bench observed pendency of criminal appeal against acquittal is not a ground for withholding the retiral dues. After acquittal there is nothing against the employee, more so, in the facts of the case, the respondents did not choose to initiate any disciplinary proceedings after acquittal nor did they examine the judgement of the trial court to find out, as to whether petitioner was acquitted 'honourably', once failing to exercise their

powers under the rule to initiate any proceedings, it is not open for the respondents to withhold retiral dues, merely on pendency of criminal appeal.

22. The impugned order dated 22.11.2012 passed by Chief Engineer (Jal Vidyut), respondent no. 3 and order dated 6.6.2013 passed by Executive Engineer, Electricity Distribution Division, Pilibheet, respondent no. 4 is quashed.

23. The respondents are directed to release arrears of salary for the suspension period, retiral dues and terminal benefits of the petitioner within three months from the date of service of this order before the competent authority. Interest @ 9% is awarded on delayed payment of pension and gratuity from the date of entitlement to the date of actual payment, failing which same shall carry interest @ 18% per annum from the date the amount falls due.

24. With the above directions, the writ petition is allowed.

25. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2014

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

Civil Misc. Review Application No. 78690 of 2011
in
Civil Misc. Writ Petition No. 73515 of 2010

Jaswant Singh & Ors. ...Petitioners
Versus
The State of U.P. & Ors. . ..Respondents

Counsel for the Petitioners:
Sri Manoj Kumar Singh, Sri S.F.A. Naqvi
Sri Faizan Ahmad

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

U.P. Land Acquisition(Determination of compensation & Declaration of Award by Agreement)Rules, 1997-Claim of interest on delayed amount-once on basis of agreement award passed-compensation accepted-after elapsed of six years-claim of interest as per provisions section 34 of the Act-held-once quantum of compensation agreed and paid-ends entire dispute-in absence of specific provision of interest in Rules 1997-in absence of plea taken in writ petition-interest can not be paid by virtue of Review Petition-dismissed.

Held: Para-9
We are thus of the opinion that the provisions of the Rules of 1997 are not in conflict with Section 34 of the Act. The interest part has deliberately not been included in the Rules of 1997 for the clear reason that once the parties agree upon a particular quantum of compensation and party concerned is paid the said amount, that would end the entire dispute and the matter shall stand settled once and for all.

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

Re-Delay Condonation Application

1. Heard learned counsel for the parties. No counter affidavit has been filed to the affidavit filed alongwith the application for condonation of delay.

2. We are satisfied with the explanation given in the affidavit for condoning the delay and accordingly this application is allowed and the delay in filing the review petition is condoned.

Re-Review Petition

3. Heard Sri S.F.A. Naqvi alongwith Sri Manoj Kumar Singh, learned counsel appearing for the review petitioners as well as learned Standing Counsel appearing for the State respondents no. 1 to 3 and Sri Ramendra Pratap Singh, learned counsel appearing for the contesting respondent no. 4 and have perused the record.

4. The land of the petitioners was acquired by notifications issued in the year 2003 and the possession of the land was taken from the petitioners on 22nd August, 2003. By means of an agreement entered into between the petitioners and the respondents which was under the U.P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997, payment of compensation to the tune of Rs. 2,26,78,650/- was made to the petitioners on 16.10.2004. Then, after a gap of nearly six years, on 12.7.2010 the petitioners moved a representation for payment of interest on the compensation amount from the date of taking over possession till the date of payment. In December, 2010 the petitioners filed this writ petition with the following prayers:

"i. Issue a writ, order or direction in the nature of Mandamus commanding the Respondent Authorities to pay the interest at the rate of 9% per annum for the first year and at the rate of 15% interest for the subsequent years for the delayed in payment of compensation to the Petitioners.

ii. Issue a writ, order or direction in the nature of Mandamus commanding the Respondent Authorities to decide the Representation dated 12.07.2010 of the Petitioners within a stipulated period.

iii. Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case."

5. The said writ petition was dismissed by order dated 20.12.2010, the review of which has been sought by this review petition. For ready reference, the order dated 20.12.2010 is reproduced below:

"Heard learned counsel for the petitioners as well as the learned Standing Counsel appearing for the respondents no. 1 to 3 and Sri Ramendra Pratap Singh for the respondent no. 4-NOIDA and have perused the record.

The case of the petitioners is that their land was acquired by the respondent-NOIDA. It is contended that though they have been paid compensation but the interest for the delayed payment has not been paid to the petitioners. Along with this writ petition, the petitioners have not filed any award under which they have been paid compensation.

Sri Ramendra Pratap Singh, learned counsel appearing for the respondent no. 4 states that the payment of compensation has been made to the petitioners on the basis of an agreement entered into between the State and the petitioners.

The petitioners do not deny this fact but surprisingly no copy of the agreement has been filed along with this petition. In the absence of the same, the prayer made in this petition does not deserve to be granted. Even otherwise, if the

compensation has been paid on the basis of the agreement and if there is any breach of agreement, it is for the petitioners to approach the Civil Court and writ would not be the appropriate remedy.

This writ petition is thus dismissed. No order as to costs. "

6. Sri Naqvi, learned counsel appearing for the review petitioners has submitted that the petitioners would be entitled to payment of interest at the rates specified under Section 34 of the Land Acquisition Act as the Rules of 1997, (under which the agreement was entered into), do not provide for payment of interest and since the Rules are silent with regard to payment of interest, the provisions of the Act would automatically be made applicable. He has further submitted that the Rules cannot override the provisions of the Act and once the Act provides for interest to be paid on delayed payment, the same would be applicable even to the cases in which compensation is paid under the Rules of 1997.

7. Learned Standing Counsel, appearing for the State-respondents as well as Sri Ramendra Pratap Singh, learned counsel appearing for the contesting respondent no. 4 have, however, submitted that the compensation is paid under the Rules of 1997 on the basis of compromise and agreement which is entered into between the parties and thus there would no question of payment of interest from the date of taking over possession till the date of payment of compensation as all aspects regarding compensation, solatium and interest etc. are taken care of while determining the amount under the Rules of 1997. It has further been submitted that under the form of agreement as provided under the Rules of 1997 it is specified that no claim for any amount in addition to the amount agreed upon as compensation would be payable and the agreed compensation shall be accepted without any protest. It is thus submitted that once a party has accepted the amount of compensation and agreed not to claim any further amount, the interest as claimed is not acceptable. In support of this submission they have relied upon a decision of the Apex Court in the case of State of Karnataka Vs. Sangappa Dyavappa Biradar AIR 2005 SC 2204. It is submitted that though the matter did not relate to Rules of 1997 but since the same relates to consent award having been passed between the parties, the ratio of the said judgment would be applicable. In the said judgment, in paragraph 9 it has been held that "after the consent awards were passed, statements were also made by the respective villagers declaring that they would not approach any Court for enhancement of the compensation for any other reason." Then in paragraph 15 it is observed that "it is also trite that by reason of such agreement, the right to receive amount by way of solatium or interest can be waived." The same view has also been taken by the Apex Court in the case of State of Gujarat Vs. Daya Shamji Bhai AIR 1996 SC 133 wherein it has been held that once the parties have agreed to the amount under Section 11 (2) of the Land Acquisition Act, then the award need not contain payment of interest, solatium and additional amount unless it is also a part of the contract between the parties.

8. On the contrary Sri Naqvi has placed reliance on a judgment of the Apex

Court in the case of Ivo Agnelo Santimano Fernandes and Others Vs. Government of Goa and Another (2011) 11 SCC 506. Having gone through the said judgment, we are of the opinion that the same does not relate to the award having been passed by way of agreement and hence the ratio of the said judgment would not be applicable to the facts of the present case.

9. Rules of 1997 have been framed by the State of U.P. so that compensation be determined by way of agreement between the parties so that quietus is put to litigation and the dispute between the parties. It does not leave any scope for any further interpretation with regard to payment of interest, solatium etc. Though learned counsel for the review petitioners has vehemently argued that the provisions of the Rules would not override the provisions of the Act and once it is provided under Section 34 that interest at particular rates is to be paid for delayed payment (which would be from the date of taking over possession till the date of payment of compensation), yet we are of the opinion that the said Section 34 would not be applicable in the present case. When there is no provision made for payment of interest on compensation as determined on the basis of compromise or agreement, the other provisions of the Act which relate to interest, solatium etc. would actually not be attracted. Once the parties have agreed upon a particular quantum of compensation to be paid, the same is deemed to be inclusive of all the benefits given under the Act, which may be grant of solatium, interest or any additional amount. We are thus of the opinion that the provisions of the Rules of 1997 are not in conflict with Section 34 of the Act. The interest part has deliberately not been included in the Rules of 1997 for the clear reason that once the parties agree upon a particular quantum of compensation and party concerned is paid the said amount, that would end the entire dispute and the matter shall stand settled once and for all.

10. We have considered this aspect of the matter because such ground has been taken in the review petition, although we may mention that no such specific ground with regard to applicability of Section 34 of the Land Acquisition Act was taken in the writ petition.

11. For the reasons given hereinabove, this review petition is dismissed. No order as to costs.
