REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.12.2014

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Revision No. 60 of 2010

National Insurance Co. Ltd. Revisionist
Versus
Ram Kumar & Ors. ...Opp. Parties

Counsel for the Revisionist:
Sri Deepak Kumar Agarwal

Counsel for the Opp. Parties:

Motor Vehicle Act, 1988-Section-173(2)-Revision against award by Accident Claim Tribunal-amount being less than 10,000/--revision against that-not maintainable.

Held: Para-12
Accordingly, in view of the said facts once the statute has provided an appeal under Section 173 of the Motor Vehicles Act against an award passed by the Motor Accidents Claims Tribunal and further in sub-section (2) of Section 173 of the Motor Vehicles Act provides that no appeal shall lie against any award of a Claims Tribunal, if the amount is less than ten thousand rupees, so the revision filed by the revisionist thereby challenging the award dated 5.2.2010 passed by Motor Accident Claims Tribunal/ Additional Distrct Judge, Balrampur is not maintainable (see also Shipping Corporation of India Ltd. v. Machado Brothers and others AIR 2004 SC 2093)

Case Law discussed:
2004 (22) LCD 40; AIR SC 96; (1998) 3 SCC 237; (2004) 5 SCC 518; (2003) 5 SCC 590; AIR 2003 SC 511; (2003) 5 SCC 134; (2003) 4 SCC 753; AIR 2004 SC 2093.

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

1. Heard Sri Deepak Kumar Agarwal, learned counsel for the revisionist and perused the record.

2. Undisputed facts of the present case are that in an accident which took place on 27.12.2007 one Sri Ram Kumar sustained grievous injuries due to rash and negligent driving by the driver of the Jeep No. U.P.-32/ W-7509 insured with the National Insurance Company Limited/ appellant.

3. In order to get compensation, he filed a Motor Accidents Claim Petition no. 16 of 2008 (Ram Kumar Vs. Sri Ram Gupta and others), allowed by means of judgment and award dated 5.2.2010 passed by the Motor Accident Claims Tribunal/ Additional District Judge Court no.2, Balrampur thereby awarding a sum of Rs. 3520/- with 6% interest per annum from the date of filing of the claim petition. Aggrieved by the same, present revision has been filed by the National Insurance Company Limited under Section 115 of Code of Civil Procedure, 1908.

4. Sri Deepak Kumar Agarwal, learned counsel for the revisionist while challenging the impugned judgment submits that as the award given by Motor Accident Claims Tribunal is less than Rs.10,000/- so in view of the embargo as given in sub-section (2) of Section 173 of the Motor Vehicles Act , appeal is not maintainable . In these circumstances the only remedy which is left to open for the revisionist / Insurance Company to challenge the award by way of revision under Section 115 of Code of Civil Procedure, 1908. In support of his argument, he has placed reliance on the decision given by full Bench of this Court

in the case of Kamla Yadav Vs. Smt. Shushma Devi and others, 2004 (22) LCD 40. the relevant paragraphs is quoted as under:-

" The procedure and powers of the Tribunal are to be found under Section 169 quoted earlier. Interest and costs both can be awarded by the Tribunal. Section 173 provides for an appeal against the award of claims Tribunal to the High Court. Section 174 provides for issuance of Certificate by the Tribunal for recovery of the amount of compensation in the same manner as arrears of land revenue. The jurisdiction of the Civil Court is barred under Section 175 relating to any claim for Compensation which may be adjudicated upon by the Claims Tribunal.

From a perusal of the above provisions, there is no room to doubt that the Claims Tribunal is under obligation to act judicially as on receipt of an application, the Tribunal has to give notice to the parties who have to be afforded an opportunity of being heard. The Tribunal then has to hold an inquiry into the claim before the Tribunal makes an award determining the amount of compensation. It is true that a Tribunal may adopt summary procedure but the provisions regarding notice to the parties and hearing them before making the award cannot be dispensed with. For certain purposes, namely, for taking evidence on oath and enforcing the attendance of witnesses and for compelling the discovery and production of documents and material objects, the Tribunal shall have the powers of the Civil Court . That is to say, it can compel attendance of witness as well as may compel discovery and production of documents and material objects. Sofar the structure and composition of the Tribunal is concerned, we find that one who is or has been a Judge of a High Court or a District Judge or qualified for appointment as a Judge of High Court or as a District Judge are eligible for appointment under Section 165(3) of the Motor Vehicles Act. The above provisions obviously provides for appointment of a person well-versed with the judicial functioning as well as sufficient experience of working in the courts of law. The provisions of the Act do not permit appointment of any other executive authority as member of the Claims Tribunal. The tribunal has to base its determination or award on the evidence adduced an arguments advanced by the parties. It is not based on subjective opinion but objectively based on material brought before it during the course of the proceedings after investigation and inquiry . The awards can also be tested on the basis of the provisions made under the law as under different provisions of the Motor Vehicles Act . The amount of compensation to be awarded has also been indicated. In pursuance of the provisions indicated above, Additional District Judge have been appointed as Motor Accidents Claims Tribunal in different districts of the State. Not alone that Motor Accidents Claims Tribunal acts judicially but it is under obligation to act as such as it has to go through the procedure which is normally adopted in the regular courts of law. A few deviations here and there in the procedure will have no material bearing on the question so long, in substance, it is incumbent upon the Motor Accidents Claims Tribunal to issue notice to the parties, hold investigation into the claim and provide opportunity of hearing to the

parties . During this process, parties adduce their evidence and it has been empowered to exercise the powers of the Civil Court in examining the witnesses on oath and to compel their attendance as well as production of material documents or objects necessary for determination of the claim. Thus an adjudicating body which is composed of or consists of experienced judicial functionaries and it is under obligation to act judicially can hardly be said to be a body which is not a judicial adjudicating body. Appointment of any member of executive or non-judicial authority is not envisaged, rather it stands excluded under the provisions of the Act. It has rightly not been disputed before us that the nature of dispute arising in the claim petitions is a dispute of civil nature. It has also not been disputed that prior to constitution of Motor Accident Claims Tribunals such disputes of claims on account of Motor Accidents were being tried by the Civil Court. It is , thus, clear that it is trial of dispute of civil nature by a Tribunal having a judicial functionary as its member. There is no escape from the conclusion that the Motor Accident Claims Tribunal has all the trappings of a Civil Court. Additional District Judge is also undoubtedly a Civil Court. The only ingredient which has to be seen is that as to whether it is the State's Judicial power which is being exercised by the tribunal or not. The Motor Accident Claims Tribunal has been constituted by the State. Its members are appointed by State. It deals with disputes of civil nature which were being earlier dealt with by the regular civil courts. There is no dispute that the civil courts discharge the "States' Judicial functions" part of jurisdiction of which stands transferred to the Motor Accidents Claims Tribunal,composition,character as well as functioning of which , have already been indicated above. There can (not) also be any dispute that Motor Accidents Claims Tribunal is a court subordinate to the High Court in view of the fact that appeal against an award lies to the High Court which fact has been held to be conclusive on the point.

In view of the discussions held above, we are of the view that the orders of the District Judge/ Additional District Judge passed as Motor Accidents Claims Tribunal will be amenable to revisional jurisdiction of the High Court under Section 115 CPC."

5. Accordingly, it is submitted by Sri Deepak Kumar Agarwal, learned counsel for the revisionist that revision may be allowed and the judgment and award dated 5.2.2010 passed by the Motor Accident Claims Tribunal / Additional District Judge Balrampur may be set aside.

6. After hearing learned counsel for the revisionist and going through the record, the core question which arises for consideration in the present case is whether by way of revision under Section 115 C.P.C., the revisionist/ Insurance Company can challenge the impugned judgment dated 5.2.2010 passed by the Motor Accident Claims Tribunal/ Additional District Judge Court no.2, Balrampur in M.A.C.P. No.16 of 2008 or not?

7. In order to decide the said controversy, it is appropriate to go through Section 173 of the Motor Vehicles Act, 1988. The said section reads as under:-

"173 Appeals- (1) Subject to the provisions of sub-section(2), any person

aggrieved by an award of a Claims Tribunal, may , within ninety days from the date of the award , prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded , whichever is less, in the manner directed by the High Court. Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees."

8. From the perusal of the said section , the postilion which emerge out that the legislature while framing the provisions of Motor Vehicles Act has clearly provided that if the award is given by the Motor Accident Claims Tribunal is less than Rs. 10,000/- , no appeal shall lie against the same .

9. Thus keeping in view the said fact as well as the it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provisions is plain and unambiguous. The Court cannot rewrite, recast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words that are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not got to its aid to correct or make up the deficiency.

10. The Court decide what the law is and not what it should be. The Courts of course adopt a construction which will carry out the obvious intention of the legislature but cannot legislate . But to invoke judicial activism to set at naught legislative judgment is sub serve of the constitutional harmony and comity of instrumentalities. The above said view is reiterated by Hon'ble Supreme Court in the following cases:-

(i) Union of India and another V. Deoki Nandan Agarwal , AIR SC 96

(ii) All India Radio V. Santosh Kumar and another (1998) 3 SCC 237

(iii) Sakshi V. Union of India and others,(2004) 5 SCC, 518

(iv) Pandian Chemicals Ltd. V. CIT (2003) 5 SCC 590

(v) Bhavnagar University V. Palitana Sugar Mills(P) and others, AIR 2003 SC 511.

(vi) J.P.Bansal Vs. State of Rajasthan,(2003) 5 SCC ,134.

11. In Nasiruddin Vs. Sita Ram Agarwal, (2003) 4 SCC 753, the Hon'ble Supreme Court has held that the Court can iron cut of the creases but cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provisions is plain, unambiguous. It cannot add or subtract words to statue or read something into in which is not there. It cannot rewrite or recast the legislation.

12. Accordingly, in view of the said facts once the statute has provided an appeal under Section 173 of the Motor

Vehicles Act against an award passed by the Motor Accidents Claims Tribunal and further in sub-section (2) of Section 173 of the Motor Vehicles Act provides that no appeal shall lie against any award of a Claims Tribunal, if the amount is less than ten thousand rupees, so the revision filed by the revisionist thereby challenging the award dated 5.2.2010 passed by Motor Accident Claims Tribunal/ Additional Distrct Judge, Balrampur is not maintainable (see also Shipping Corporation of India Ltd. v. Machado Brothers and others AIR 2004 SC 2093)

13. So far as the law cited by learned counsel for the appellant in support of his argument of a Full Bench of this Court in the case of Kamla Yadav (supra) is concerned, the same is not applicable in the facts and circumstances of the case as in the said matter this Court has held that if any order is passed by Motor Accidents Claims Tribunal during adjudication of the claim petition then the same is revisable under Section 151 of Code of Civil Procedure as the Tribunal falls within the scope and definition of word" Court".

14. For the foregoing reasons, the revision lacks merits and is dismissed .

15. No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.12.2014

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

Special Appeal No. 716 of 2014
alongwith Special Appeal No. 717 of 2014

Ram Naresh Singh ...Appellant

Versus

Estate of Late Smt. Maiki & Ors.
...Respondents

Counsel for the Appellant:
Sri A.P. Singh

Counsel for the Respondents:
Sri Prashant Singh Gaur

High Court Rules, chapter-VIII, Rules-5-
Special Appeal-against the judgment of Single Judge-exercising Appellate power-in testamentary case-in view of Full Bench decision of Sheet Gupta-special appeal -held-not maintainable.

Held: Para-15
We are, therefore, of the clear view that the present Special Appeal is barred in view of the Full Bench decision in the case of Sheet Gupta (supra), and the report of the Stamp Reporter has to be upheld.

Case Law discussed:
AIR 1974 SC 2048; AIR 2008 SC 1012; 2010 (28) LCD 1045.

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

1. These two Appeals arise out of a common judgment rendered by the learned single Judge in First Appeal No.186 of 2013 and First Appeal No.187 of 2013 that arose out of orders passed for grant of letters of administration under the provisions of Indian Succession Act, 1925.

2. The learned District Judge, Lucknow, granted letters of administration in favour of the appellant in relation to the estate of Late Smt. Maiki and others. Two sets of persons namely Chhote Lal on the one hand and Master and Jangali on the other filed applications for setting aside and revoking the letters of administration dated 6.1.1997.

3. The learned District Judge allowed the said applications and revoked the letters of administration vide order dated 16.11.2013.

4. The learned single Judge, before whom the two first appeals were filed before this Court, after having noticed the arguments, particularly in relation to the powers of revocation under Section 263 of the Indian Succession Act, 1925, assessed the rival contentions and came to the conclusion that the order of the learned District Judge did not require any interference and the appeals were, accordingly, dismissed. It is this judgment dated 19.9.2014 rendered by the learned single Judge of this Court which is under challenge in the present Special Appeals under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952.

5. The Stamp Reporter vide his report dated 28.11.2014 has submitted a report that the Special Appeals against the judgment arising out of such proceedings are not maintainable.

6. Sri A.P. Singh, learned Counsel for the appellants, submits that the aforesaid report of the Stamp Reporter is erroneous and he has relied on two decisions to advance his submissions. The first decision is in the case of Smt. Asha Devi Vs. Dukhi Sao and another, AIR 1974 SC 2048. The second decision is in the case of Gaudia Mission Vs. Shobha Bose and another, AIR 2008 SC 1012. On the strength of these decisions, Sri Singh submits that the Apex Court has held that a Letters Patent Appeal or a Special Appeal against the judgment of a learned single Judge of the High Court would be maintainable and in the instant case would amenable to the jurisdiction of Special Appeals under Chapter VIII Rule 5 of the Allahabad High Court Rules.

7. He submits that in both the above noted decisions, the matter was remitted back to the Division Bench of the High Court to decide the case on merits. Sri Singh submits by placing reliance on the said judgments that a regular appeal is maintainable in such proceedings keeping in view the provisions of Section 384 of the Indian Succession Act, 1925.

8. Opposing the said arguments, learned Counsel for the respondents Sri Gaur has invited the attention of the Court to the provisions of Chapter VIII Rule 5 and has heavily relied upon on the Full Bench decision of this Court in the case of Sheet Gupta Vs. State of U.P. And others, 2010 (28) LCD 1045, to contend that a Special Appeal against the judgment of a learned single Judge in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the Court is clearly barred.

9. Chapter VIII Rule 5 is extracted herein below for ready reference:-

"5. Special appeal.-- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or

statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of Appellate or Revisional Jurisdiction under any such Act] of one Judge.]"

10. A perusal thereof would clearly indicate that the exact bar as spelled out therein as involved herein, was not the subject matter of consideration in any of the decisions of the Apex Court which have been relied upon by the learned Counsel for the appellant. There was no issue framed in relation to the maintainability of a Special Appeal under Chapter VIII Rule 5 and both judgments have proceeded on a presumption and undisputed position before the Court as if a Special Appeal was maintainable against any judgment of a learned single Judge.

11. Secondly, it is to be noted that a Special Appeal is provided against the judgment of a learned single Judge of this Court if a judgment is rendered in the exercise of original jurisdiction by the High Court and not in an appellate jurisdiction. An order passed in testamentary proceedings in the original jurisdiction of the High Court is appealable under Chapter VIII Rule 5 but an order passed in appeal regularly instituted before the High Court against the order of a District Judge would not be further appealable in view of the bar contained under Chapter VIII Rule 5 of the Court.

12. This position has been clearly explained in the Full Bench judgment and paragraph No.14 thereof is extracted hereunder which is clearly binding on us:-

"14. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1.The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2.the order made by one Judge in the exercise of revisional jurisdiction;

3.the order made by one Judge in the exercise of the power of Superintendence of the High Court;

4.the order made by one Judge in the exercise of criminal jurisdiction;

5.the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6.the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of

India in respect of any judgment, order or award of

(i) the Government or
(ii) any officer or
(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

13. It is true that the judgments, which have been relied upon by Sri Singh for the appellants, have not been referred to in the Full Bench judgment in the case of Sheet Gupta (supra) but in our opinion the issue of maintainability of a Special Appeal was not involved either in the case of Asha Devi (supra) or Gaudia Mission (supra) which may have any impact on the Full Bench judgment in the case of Sheet Gupta (supra). Thus, even if the same have not been noticed in the Full Bench decision referred to herein above, it is of no consequence, inasmuch as, as noted above, the issues in both matters were different.

14. To clarify it may be stated that the judgments of the Apex Court that have been relied upon by the learned Counsel for the appellants involved the issue of the scope of appellate powers as to whether the same powers are available when a concurrent jurisdiction is being exercise keeping in view the provisions of Section 96 and Section 100 of the Civil Procedure Code. The question was as to whether in a letters patent appeal or a Special Appeal, the powers of the Court are limited only to substantial questions of law or the powers are co-extensive as that of the subordinate court that had decided the matter. It is in this context that the aforesaid two decisions were rendered and they proceeded on the assumption of maintainability, and also contention of the parties that there was no dispute relating to the maintainability of a Special Appeal. The said decisions, therefore, in our opinion, do not come to the aid of the appellants for maintaining the present Special Appeal.

15. We are, therefore, of the clear view that the present Special Appeal is barred in view of the Full Bench decision in the case of Sheet Gupta (supra), and the report of the Stamp Reporter has to be upheld.

16. Both the Special Appeals are dismissed as being not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Civil Misc. Writ Petition No. 745 of 2014
Connected with W.P. No. 2222 of 2009

Mawana Sugars Ltd. ...Petitioner
Versus
Nagar Palika Parishad, Mawana & Anr. Respondents

Counsel for the Petitioner:
Sri S.D. Singh, Sri Rohan Gupta

Counsel for the Respondents:
Sri Ajay Rajendra

Constitution of India, Art.-226-read with U.P. Municipalities Act, 1916-Section-

143-Alternative remedy-writ petition-against demand notice of house tax and water tax-on enhanced rate-without notice opportunity to petitioner-held order passed in violation of principle of Natural Justice-alternative remedy no bar-demand notice quashed with direction to take fresh decision after complying the procedure contained in Section 143.

Held: Para-8 &10

8. Sri Ajai Rajendra, the learned counsel appearing for the Parisahd contends that against the assessment order passed under Section 143 of the Act, the petitioner has a remedy of filing an appeal under Section 160 of the said Act and, therefore, the petitioner should be relegated to the alternative remedy. There is no quarrel with this proposition. An appeal can only be filed against an assessment order and in the instant case, we find, that there is no assessment order in the eyes of law passed under Section 143 of the Act. Consequently, we are of the opinion, that the petitioner cannot be relegated to the remedy of availing an appeal under Section 160 of the Act in the present facts and circumstances of the case.

10. We direct the Nagar Palika Parishad, Mawana to issue a fresh notice fixing a date intimating the petitioner to appear before them for disposal of its objection. Upon hearing the petitioners, the competent authority will decide the objections and make an assessment order under Section 143 of the Act within six weeks thereafter. Based on such assessment order, the petitioner will take recourse to its remedy as advised to them. During this period, the interim order passed by this Court directing the petitioner to pay Rs.8 lacs will continue to operate.

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

1. Heard Sri S.D.Singh, the learned senior counsel assisted by Sri Rohan Gupta, the learned counsel for the petitioner and Sri Ajai Rajendra, the learned counsel for the Nagar Palika Parishad.

2. The dispute between the petitioner and the Nagar Palika Parishad, Mawana with regard to imposition of house tax, water tax and assessment of the annual value has been going on for the past four decades. The petitioner is resisting the jurisdiction of the Nagar Palika Parishad, Mawana in imposing the taxes upon them. The earlier round of litigation went upto the Supreme Court where they lost the battle and the Parishad became empowered to impose taxes. Based on the decision of the Supreme Court the assessment of house tax, water tax amounting to Rs.5,32,000/- per annum for the period 1987 to 2005 was charged. This assessment order has been challenged by the petitioner in an appeal filed under Section 160 of the U.P. Municipalities Act, 1916 (hereinafter referred to as the "Act"), which is pending consideration before the Civil Court.

3. For the assessment year 2007-2012 the Nagar Palika Parishad, Mawana issued notices to the petitioner proposing to revise the annual value and accordingly, enhanced the water tax and house tax. The petitioner filed its objection under Section 143 of the Act. Without considering its objection a demand notice was issued to the petitioner. It is alleged that the petitioner made a request for supplying the assessment orders, which they failed to receive, but, got certain information under the Right to Information Act. Armed with such information, the petitioner filed Writ Petition No.2222 of 2009 in which an interim order was passed directing the

petitioner to pay a sum of Rs.8 lacs per annum towards taxes during the pendency of the writ petition. Pending this writ petition, fresh notices have been issued for the assessment year 2013-18 whereby the Nagar Palika Parishad proposed to enhance the tax to Rs.25,02,470/- per annum. The petitioner filed its objection and, without disposing of its objection, a demand notice has been issued directing the petitioner to pay the said amount. It is alleged that the assessment order has not been furnished and consequently, the present writ petition No.749 of 2014 has been filed. Both the writ petitions were clubbed together and are being decided on the basis of the counter affidavit filed in the earlier writ petition.

4. We are of the opinion that no counter affidavit is required in this writ petition No.749 of 2014 since no disputed questions of fact are involved for disposal of both the writ petitions.

5. From a perusal of the information supplied to the petitioner under the Right to Information Act, the petitioner contends that the information so supplied is not an assessment order under Section 143 of the Act nor does it disposes the objection. We have perused the said order and we do not find it to be an assessment order disposing of the objection of the petitioner and accepting the proposal of the Committee. The said order is no assessment order in the eyes of law and consequently, the demand cannot be sustained.

6. Section 143 of the Act indicates that the Municipality or the Parishad shall give a public notice and proceed to consider the valuation and after due investigation, dispose of the objection relating to valuation and assessment and cause the result thereof to be noted in a book kept by the Parishad/ Municipality. From a perusal of the provision under Section 143 of the Act it is apparently clear that where the objection are invited in writing, it is implicit that the Municipality or the Parishad, as the case may be, passes an order in writing dealing with such objection which would be in consonance with the principles of natural justice as embodied under Article 14 of the Constitution of India.

7. The proforma of the assessment order indicates that the objection of the petitioner is required to be recorded and the decision of the official or the Committee is required to be indicated, which in the instant case has been left blank.

8. Sri Ajai Rajendra, the learned counsel appearing for the Parisahd contends that against the assessment order passed under Section 143 of the Act, the petitioner has a remedy of filing an appeal under Section 160 of the said Act and, therefore, the petitioner should be relegated to the alternative remedy. There is no quarrel with this proposition. An appeal can only be filed against an assessment order and in the instant case, we find, that there is no assessment order in the eyes of law passed under Section 143 of the Act. Consequently, we are of the opinion, that the petitioner cannot be relegated to the remedy of availing an appeal under Section 160 of the Act in the present facts and circumstances of the case.

9. Since there is no valid assessment order in the eyes of law and the information given to the petitioner, as

annexed in Annexure 11 to the writ petition, purporting to be the assessment orders, we allow the writ petition No.2222 of 2009 and quash all these alleged assessment orders.

10. We direct the Nagar Palika Parishad, Mawana to issue a fresh notice fixing a date intimating the petitioner to appear before them for disposal of its objection. Upon hearing the petitioners, the competent authority will decide the objections and make an assessment order under Section 143 of the Act within six weeks thereafter. Based on such assessment order, the petitioner will take recourse to its remedy as advised to them. During this period, the interim order passed by this Court directing the petitioner to pay Rs.8 lacs will continue to operate.

11. For the reasons stated aforesaid, Writ Petition No.745 of 2014, which is based on identical facts is, accordingly, allowed. The alleged assessment orders, for the period 2014 to 2018, are quashed. The Nagar Palika Parishad, Mawana will proceed in the same fashion as stated aforesaid. For this period, the petitioner will deposit a tentative amount of Rs.10 lacs per annum, which would be subject to fresh assessment orders.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2014

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE DINESH GUPTA, J.

First Appeal No. 910 of 2000
alongwith
W.P. No. 911 of 2000, W.P. No. 912 of 2000 and other connected cases

Ghaziabad Development Authority ...Appellant

Versus

Kashi Ram & Ors. ...Respondents

Counsel for the Appellant:
Sri Mahendra Pratap, Sri Ajay Kumar Misra

Counsel for the Respondents:
Sri D.P. Singh, Sri Shiv Sagar Singh, Sri J.N. Sharma, Sri V.B. Singh, Sri Vijai Sinha

Land Acquisition Act-Compensation land situated near Vasundhara Residential Scheme-surrounded by Industrial area adjacent to BHEL, Dover and other well known units-Delhi-Lucknow national highway-2 km away from Delhi-SLO ignoring certified copy of sale deed relied exumpler of builder-awarded @ 50 per square yard-reference court enhanced Rs. 90/-held-if the claimants deprived from such rate-would be highly prejudicial-and violative to constitutional mandate-entitled to Rs. 297 per square yard-appeal by GDA dismissed-claimants appeal allowed.

Held: Para-36
In the backdrop of the aforesaid facts, it would be highly prejudicial to the interest of the claimants/landloosers to be deprived of such a rate when they are placed in similar circumstances. In our view, such an action would certainly be the arbitrariness and violative of constitutional mandate. Therefore, the claimants are entitled to Rs.297/- per square yard in respect of the land acquired by the aforesaid notification.

Case Law discussed:
[1995(2) SCC 305]; [AIR 2012 SC 446]; AIR 1959 SC 429; [AIR 94 SC 1160]; (2008) 2 SCC 568; 2008 (11) SCC 65:2008(4) Supreme 74; 2009 (4) SCC 402; 2008 (14) SCC 745; 2009 (4) SCC 719; First Appeal No. 34 of 2007; [(2003) 1 SCC 354]; [(2010) 13 SCC 398].

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

1. Heard Mr. Mahendra Pratap, learned Counsel for Ghaziabad Development Authority and Mr. D.P. Singh and Mr. Shiv Sagar Singh, learned Counsel for the claimants.

2. At the outset, it is relevant to mention here that in some of the First Appeals, the appellants/claimants left for heavenly abode and as such, substitution applications were filed on their behalf for bringing on record their legal heirs. There is no objection to these applications. Accordingly, all the substitution applications are allowed, after condoning the delay, if any, in preferring the substitution applications.

3. Let them be substituted in place of claimants during the course of the day.

4. In short, the facts of the case are that the land of the claimants pertaining to the village Makanpur, Pargana Loni, Tehsil Dadri, District Ghaziabad was acquired by the State of U.P. for planned development by the Ghaziabad Development Authority [in short referred to as 'GDA']. The notification under Section 4 (1) of the Land Acquisition Act was issued on 12.9.1986, which was published in the Gazettee on 28.2.1987, whereas notification under Section 6 (1) of the Act was issued on 24.2.1988. The possession of the land in question was taken by the State Government on 14.6.1988 and 29.6.1988. The Special Land Acquisition Officer (SLAO) pronounced the award on 30.12.1989 and granted compensation at the rate of Rs.50/- per square yard relying on the exemplar of plot No.582, area 5 Bigha executed on 28.9.1987 by one Smt. Amarjeet Kaur in favour of GDA @ Rs.50/- per square yard. The respondents and other persons whose land was acquired had filed objections to the said determination of compensation by the SLAO and the matter was referred to the District Judge under Section 18 of the Land Acquisition Act. The IV Additional District Judge, Ghaziabad and VI Additional District Judge, Ghaziabad [hereinafter referred to as the "Reference Court"] passed separate awards dated 19.4.1999 and 31.5.2000, whereby the Reference Court enhanced the amount of compensation from Rs.50/- per Square Yard to Rs.90/- per square yard.

5. Feeling aggrieved, the GDA has filed the above-captioned first appeals description of which is given from Sl. Nos. 1 to 60. In contrast, Appeals mentioned at Sl. Nos.61 to 96 have been filed by the tenure holders-claimants for enhancement of compensation and lowering the deductions from 33% made towards development cost.

6. Since the land of all claimants was acquired by the same Notification, facts pertaining to the said Notification apply to all these respondents. The only difference is in the area of land which was owned by these respondents and has been taken away by the State in acquisition. Therefore, taking general note of the particulars of acquisition and the nature of land, would serve the purpose.

7. From perusal of the impugned award dated 19.4.1999, it reflects that the Reference Court, on the basis of pleadings, had framed five issues, which are as under :

"(1) Whether the compensation awarded by S.L.A.O. is inadequate? If so to what amount of compensation are the petitioners entitled?

(2) Whether the reference is time barred?

(3) Whether the reference is barred by section 9 of Land Acquisition Act?"

(4) Whether the reference is barred by principles of estopple?

(5) To what amount of compensation, if any, are the petitioners entitled?

8. While deciding issue No. 1, the Reference Court had recorded specific findings of fact that the present claimants seem to be very unfortunate because the land of the same village was acquired for 'Avas Vikas Parishad' and NOIDA and those farmers got higher rates, while the land of present claimants acquired for GDA got less compensation. Some land of village Makanpur was acquired for NOIDA and partly acquired for Avas Vikas Parishad and the remaining part was acquired for GDA. Therefore, the Reference Court was of the view that the compensation awarded by the SLAO was inadequate and enhanced the compensation from Rs.50/- to Rs.90/- per square yard.

9. As the appellants have not pressed the issue nos.2 and 3, the Reference Court decided the said issues in favour of the claimants.

10. As regard issue No.5, the Reference Court, after taking into consideration the totality of the circumstances, came to the conclusion that the claimants are entitled to get solatium @ 30% on the market rate and 12% per annum additional amount together with interest @ 9% per annum on the enhanced amount of compensation for the first year from the date of taking the possession and thereafter 15% per annum till the date of payment.

11. The main contention of the GDA is that the claimants accepted the compensation without protest and as such, it was not open for the tenure holders to file Reference under Section 18 of the Act. In this regard, he submits that on some applications, the word 'protest' was written by one different handwriting without signature appended thereto. Since there is an interpolation, it has to be considered that the claimants have accepted the compensation without protest.

12. Further, he submits that certified copies of sale exemplers, relied by the Collector, were produced before the Reference Court, but the Court concerned rejected the same for want of examination of witness. According to him, it is contrary to law as has been held by the Apex Court in P. Rama Reddy v. Special Land Acquisition Officer [1995 (2) SCC 305]. In this judgment, the Apex Court held that in any proceeding under this Act, a certified copy of a document registered under the Registration Act, 1908 (16 of 1908), including a copy given under Section 57 of that Act, may be accepted as evidence of the transaction recorded in such document.

13. While determining the compensation, the Reference Court relied on the sale deeds executed by the Tripati Builders in favour of Subhash Chand and Chandra Mohan. As the sale deeds were executed by the builders instead of the farmers, naturally the value of the land is on higher side and as such the same is liable to be set aside.

14. Next, he contended that in the impugned order dated 19.4.1999, the Reference Court determined the compensation as Rs.90/- per sq. yard, after deducting 33% from Rs.135/-, whereas in the impugned order dated 31.5.2000, the Reference Court fixed the compensation as Rs.90/- per square yard without any deduction. Since there is variance in determination of compensation, this Court's interference is required in setting aside the impugned order.

15. Lastly, it has been vehemently contended by the counsel for the GDA that the Reference Court erred in deducting 33% towards development cost overlooking the fact that the large chunk of land was acquired and sufficient land was to be left for internal developments, like road, sewerage, overhead water tank, water lines, parks, etc. According to him, deduction of at least 70% should have been allowed. To substantiate the aforesaid assertion, reliance has been placed upon Chandrashekar (D) by LRs and others v. Land Acquisition Officer and another [AIR 2012 SC 446]. In para 15 of the report, it has been observed by the Apex Court as under:-

"15. The present controversy calls for our determination on the quantum of the deductions to be applied, to the market value assessed on the basis of the exemplar sale transaction, so as to ascertain the fair compensation payable to the land loser. The only factual parameters to be kept in mind are, the factual inferences drawn in the foregoing paragraph. On the issue in hand, we shall endeavor to draw our conclusions from past precedent. In the process of consideration hereinafter, we have referred to all the judgments relied upon by the learned counsel for the appellants, as well as, some recent judgments on the issue concerned:

(i) In Brigadier Sahib Singh Kalha & Ors. v. Amritsar Improvement Trust & Ors., (1982) 1 SCC 419, this Court opined, that where a large area of undeveloped land is acquired, provision has to be made for providing minimum amenities of town-life. Accordingly it was held, that a deduction of 20 percent of the total acquired land should be made for land over which infrastructure has to be raised (space for roads etc.). Apart from the aforesaid, it was also held, that the cost of raising infrastructure itself (like roads, electricity, water, underground drainage, etc.) need also to be taken into consideration. To cover the cost component, for raising infrastructure, the Court held, that the deduction to be applied would range between 20 percent to 33 percent. Commutatively viewed, it was held, that deductions would range between 40 and 53 percent.

(ii) Noticing the determination rendered by this Court in Brigadier Sahib Singh Kalha's case (supra), this Court in Administrator General of West Bengal vs. Collector, Varanasi, (1988) 2 SCC 150, upheld deduction of 40 percent (from the acquired land) as had been applied by the High Court.

(iii) In Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona & Anr., (1988) 3 SCC 751, while referring to the factors which ought to be taken into consideration while determining the market value of acquired land, it was observed, that a smaller plot was within the reach of many, whereas for a larger block of land there was implicit disadvantages. As a matter of illustration it was mentioned, that a large block of

land would first have to be developed by preparing its lay out plan. Thereafter, it would require carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers (during which the invested money would remain blocked). Likewise, it was pointed out, that there would be other known hazards of an entrepreneur. Based on the aforesaid likely disadvantages it was held, that these factors could be discounted by making deductions by way of allowance at an appropriate rate, ranging from 20 percent to 50 percent. These deductions, according to the Court, would account for land required to be set apart for developmental activities. It was also sought to be clarified, that the applied deduction would depend on, whether the acquired land was rural or urban, whether building activity was picking up or was stagnant, whether the waiting period during which the capital would remain locked would be short or long; and other like entrepreneurial hazards.

(iv) In Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by LRs. & Ors., (1998) 2 SCC 385, this Court arrived at the conclusion, that a deduction of 40 percent as developmental cost from the market value determined by the Reference Court would be just and proper for ascertaining the compensation payable to the landowner.

(v) In Kasturi and others vs. State of Haryana, (2003) 1 SCC 354, this court opined, that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation should be deducted, depending upon the location, extent of expenditure involved for development, the area required for roads and other civic amenities etc. It was also opined, that appropriate deductions could be made for making plots for residential and commercial purposes. It was sought to be explained, that the acquired land may be plain or uneven, the soil of the acquired land may be soft and hard, the acquired land may have a hillock or may be low lying or may have deep ditches. Accordingly, it was pointed out, that expenses involved for development would vary keeping in mind the facts and circumstances of each case. In Kasturi's case (supra) it was held, that normal deductions on account of development would be 1/3rd of the amount of compensation. It was however clarified that in some cases the deduction could be more than 1/3rd and in other cases even less than 1/3rd.

(vi) Following the decision rendered by this Court in Brigadier Sahib Singh Kalha's case, this Court in Land Acquisition Officer, Kammarapally Village, Nizamabad District, A.P. vs. Nookala Rajamallu & Ors., (2003) 12 SCC 334, applied a deduction of 53 percent, to determine the compensation payable to the landowners.

(vii) In V. Hanumantha Reddy (Dead) by LRs. vs. Land Acquisition Officer & Mandal R. Officer, (2003) 12 SCC 642, this Court examined the propriety of compensation determined as payable to the land loser by the High Court. The Reference Court had determined the market value of developed land at Rs.78 per sq. yard. The Reference Court then applied a deduction of 1/4th to arrive at Rs.58 per sq. yard as the compensation payable. The High Court however concluded, that compensation at Rs.30 per sq. yard would be appropriate (this would mean a deduction of approximately 37 percent, as against

market value of developed land at Rs.78 per sq. yard). This Court having made a reference to Kasturi's case (supra) did not find any infirmity in the order passed by the High Court. In other words, deduction of 37 percent was approved by this Court.

(viii) In para 21 of the judgment in Viluben Jhalejar Contractor (Dead) by LRs. vs. State of Gujarat, (2005) 4 SCC 789, it was held that for development, i.e., preparation of lay out plans, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers, and on account of other hazards of an entrepreneur, the deduction could range between 20 percent and 50 percent of the total market price of the exemplar land.

(ix) In Atma Singh (Dead) through LRs & Ors. vs. State of Haryana and Anr., (2008) 2 SCC 568, this Court after making a reference to a number of decisions on the point, and after taking into consideration the fact that the exemplar sale transaction was of a smaller piece of land concluded, that deductions of 20 percent onwards, depending on the facts and circumstances of each case could be made.

(x) In Lal Chand vs. Union of India & Anr., (2009) 15 SCC 769, it was held that to determine the market value of a large tract of undeveloped agricultural land (with potential for development), with reference to sale price of small developed plot(s), deductions varying between 20 percent to 75 percent of the price of such developed plot(s) could be made.

(xi) In Subh Ram & Ors. vs. State of Haryana & Anr., (2010) 1 SCC 444, this Court opined, that in cases where the valuation of a large area of agricultural or undeveloped land was to be determined on the basis of the sale price of a small 12 developed plot, standard deductions ought to be 1/3rd towards infrastructure space (areas to be left out for roads etc.) and 1/3rd towards infrastructural developmental costs (costs for raising infrastructure), i.e., in all 2/3rd (or 67 percent).

(xii) In Andhra Pradesh Housing Board vs. K. Manohar Reddy & Ors., (2010) 12 SCC 707, having examined the existing case law on the point it was concluded, that deductions on account of development could vary between 20 percent to 75 percent. In the peculiar facts of the case a deduction of 1/3rd towards development charges was made from the awarded amount to determine the compensation payable.

(xiii) In Special Land Acquisition Officer & Anr. vs. M.K. Rafiq Sahib, (2011) 7 SCC 714, this Court after having concluded, that the land which was subject matter of acquisition was not agricultural land for all practical purposes and no agricultural activities could be carried out on it, concluded that in order to determine fair compensation, based on a sale transaction of a small piece of developed land (though the acquired land was a large chunk), the deduction made by the High Court at 50 percent, ought to be increased to 60 percent.

16. According to the GDA, if the aforesaid case laws are applied to the instant case, deduction of 70% would serve the purpose.

17. In contrast, learned Counsel for the claimants submits that the compensation is totally based on situation of the land and he has drawn our attention towards the replication filed by Trilok Chand and others [paras 3 to 6 of the replication]. Further, he has relied upon the oral statement of Sri Krishna Tyagi

(PW1), who has stated that if the land was not acquired, he could have easily sold the land in the year 1987 at the rate of Rs.500/- per square yard in open market. By no stretch of imagination, the valuation of the land acquired can be said to be Rs.135/- per square yard less 33% equivalent to Rs.90/- per square yard, as held by the Reference Court. Suffice to say that the valuation of the land should have been fixed by the Reference Court something between Rs.135/- per square yard to Rs.500/- per square yard in view of the statement of PW1 Krishna Tyagi.

18. Next, he contended that the Reference Court has not considered the Exhibit Paper No.37-Ga, the judgment of the Reference Court dated 27.5.1993 passed in L.A.R. No.495 of 1990 in the case of Satish Takural v. State, wherein the Reference Court had determined the value of the land after 20% deduction at the rate of Rs.138/- per. square yard for the land which was acquired on 26.6.1982, whereas in the instant case the land in question was acquired in the year 1987 and the Reference Court determined the value of the land as Rs.90/- per square yard. Therefore, the claimants are entitled for enhancement of compensation.

19. Before concluding his submissions, he has relied upon the case of Mohinder Singh and others versus State of Haryana [(2014) 8 SCC 897], wherein the Apex Court held that the deduction of 40% towards development cost as determined by the High Court was unjustified and the deduction of 1/4th of market value made by the Reference Court was appropriate.

20. Next he has drawn our attention towards the findings of Reference Court, wherein it has been stated that the Hon'ble Court in the case of Baburam and others v. State of U.P. reported in A.I.R. 1980 Allahabad 324 has observed that determining compensation is not an exact science. The question of fair compensation is not algebraic problem which could be solved by abstract formula. There is an element of guess work inherent in most cases involving determination of market value of the acquired land.

21. As regard the assertion of the GDA's Counsel that the claimants had accepted compensation without protest and as such, the Reference was not maintainable, we would like to mention that while deciding issue No.4, the Court below recorded a finding of fact that if the claimants have received the amount of compensation under protest then it cannot be said that they are estopped and cannot raise the plea for enhancement of compensation. In other words, if some of the claimants have received their amount without protest, then they cannot be estopped because mere filing of reference amounts to protest.

22. Before dealing with the controversy involved in the present batch of appeals, it would be apt to refer some of the relevant cases of the Apex Court and this court on the subject, for proper adjudication of the matter.

23. In Special Land Acquisition Officer, Bangalore v. T. Adhinarayan Setty, AIR 1959 SC 429, it was held that in awarding compensation under the Act, the Court has to ascertain market-value of the land on the date of notification under section 4 (1) of the Act. It was also observed that there are several methods of

valuation, such as (1) opinion of experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the land acquired or the lands adjacent to the lands acquired and possessing similar advantages, and (3) a number of years purchase of the actual or immediately prospective profits of the land acquired.

24. Hon'ble Supreme Court in the cases of M/s Printer House Private Limited Vs .Saiyadan reported in [AIR 94 SC 1160], and P. Ram Reddy and others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority reported in 1995 All India Acquisition and Compensation Cases 184 and Atma Singh v. State of Haryana : (2008) 2 SCC 568 has discussed the principles on the basis of which the market value has to be determined. It is now settled law that the building potentiality of the acquired land existing on the date of notification under Sub-section (1) of Section 4 of the Land Acquisition Act, is the correct market value of the acquired property, which has to be judged on consideration of various factors and material which are brought on the record and such building potentiality is not only to be judged merely on the basis of its existing value but also after taking into consideration the future advantages.

25. In 2008 (11) SCC 65 : 2008 (4) Supreme 174 [State of Haryana Vs. Gurbax Singh (Dead) by Lrs. & anr. etc.] it has been considered by the Supreme Court that commercial potentiality of the land is important factor for deciding compensation.

26. Again in 2009 (4) SCC 402 [Mummidi Apparao (Dead) through LRs. Vs. Nagarjuna Fertilizers and Chemicals Limited and another] the Supreme Court has given an emphasis over the location and development all around and its full potential value of developing into housing sites and fast taking up the character. In 2008 (14) SCC 745 (General Manager, Oil and Natural Gas Corporation Limited Vs. Rameshbhai Jivanbhai Patel and another) the Supreme Court held that primarily, the increase in land prices depends on four factors: situation of the land, nature of development in surrounding area, availability of land for development in the area, and the demand for land in the area. In rural areas, unless there is any prospect of development in the vicinity, increase in prices would be slow, steady and gradual, without any sudden spurts or jumps. On the other hand, in urban or semi-urban areas, where the development is faster, where the demand for land is high and where there is construction activity all around, the escalation in market price is at a much higher rate as compared to rural areas. In 2009 (4) SCC 719 (Faridabad Gas Power Project, National Thermal Power Corporation Limited and others Vs. Om Prakash and others) close vicinity of the planned development area was determined as one of the factor for fixation of higher compensation. Thus, these judgements are supporting the contention of the land loosers/tenure holders.

27. Thus, the relevant factors for determination of the amount of compensation are the nature and quality of land, whether irrigated or unirrigated, facilities for irrigation, presence of fruit bearing trees, location of the land, closeness to any road or highway, evenness of the land, existence of any building or structure and a host of other

factors bearing on the valuation of the land. The learned Court below while determining the rate of compensation of the acquired land in his impugned order has considered all these relevant factors and also took into consideration the evidence adduced by the parties.

28. It may be noted that in bunch of First Appeals led by First Appeal No.564 of 1997, Khazan and others Vs. State of U.P. and others pertaining to adjoining villages of Bhangel Begumpur, Nagla and Geha Tilpatabad of Dadri Tehsil relating to land acquisition was decided by this Court granting compensation at the rate of Rs.297/- per square yard, in terms of decision of this Court rendered in First Appeal No.1056 of 1999, Raghuraj Singh and others vs. State of U.P. and others.

29. Again this Court while dealing with a First Appeal No. 644 of 2012, Amar Singh and another Vs State of U.P. and others pertaining to adjacent Village Gejha Tilpatabad, followed the several judgements, passed by this Court including the judgment rendered in the bunch of First Appeals, led by First Appeal No. 564 of 1997, Khazan and others v. State of U.P. and others and this Court enhanced the compensation to Rs.297/- per square yard.

30. Similarly, by means of a detailed and well-considered judgment dated 19.5.2010 passed in First Appeal No.1056 of 1999, a Division Bench held that the claimants are entitled to compensation @ Rs.297/- per square yard alongwith other statutory dues. In this case, the acquired land situates in Tehsil Dadri, District Ghaziabad. The enhancement of compensation to Rs.297/- per square yard in respect of the land situates in village Bhangel Begumpur has been followed by another Division Bench in its judgment and order dated 11.10.2012 passed in First Appeal No. 564 of 1997.

31. The Apex Court in Civil Appeal No.6775 of 2013 Harbhajan Kumar and others Vs. Collector, Land Acquisition and another while deciding similar Civil Appeal, extended the benefit of enhanced compensation made in previous Civil Appeal of similar nature.

32. Recently, a Coordinate Bench of this Court, following the aforesaid judgment, allowed the compensation to the tune of Rs.297/- per square yard vide its judgment and order dated 23.5.2014 passed in First Appeal No.336 of 1998.

33. We would like to point out that in First Appeal No.34 of 2007, Ganeshi Singh and others vs. State of U.P. and others decided on 9.5.2008, a Division Bench of this Court has held that the land owners of a particular land in a subsequent notification are entitled to at least the same rate of compensation as awarded to similarly placed land owners in an earlier notification when the same has been brought to the notice of the Court.

34. There is no dispute to the fact that the land in question falls within the territory of Tahsil Dadri and situates near Delhi, close to Hindan River on Mohan Nagar-Delhi Link Road surrounded by industrial area declared by U.P. government - Bharat Electricals, CEL, Dover and other well known units and Delhi-Lucknow National Highway and just 2 kms. away from Delhi border. On one side Vasundhara Residential Scheme developed by Avas Evam Vikas Parishad

situates near to the developed Kaushambi Residential Colony. On the other side of the National Highway, the area known as NOIDA situates with all civic amenities on the acquired land.

35. As regards the potentiality of the land, the Reference Court has observed as under:-

"In the present case, at my hand, it is established by the evidence and may be noticed by the Court that the land situated at very important point from where Delhi boarder is about 2 kms. It is adjacent to link road, which leads from Mohan Nagar to Delhi and other side National High Way leads from Delhi to Lucknow. At some distance there is an Industrial Area having all the facilities. There are the surrounding circumstances on the basis of which it can be guessed that land in question has much potential value for the abadi purpose and it can also be noticed that subsequently the land was being sold at very high rates. The State acquired the land for G.D.A. to facilitate the people, but G.D.A. is not supposed to act in the manner like Property Dealer."

36. In the backdrop of the aforesaid facts, it would be highly prejudicial to the interest of the claimants/landloosers to be deprived of such a rate when they are placed in similar circumstances. In our view, such an action would certainly be the arbitrariness and violative of constitutional mandate. Therefore, the claimants are entitled to Rs.297/- per square yard in respect of the land acquired by the aforesaid notification.

37. As regard the deduction, it has been argued by the counsel for GDA that 33% deduction is very low and in view of the decision rendered in Chandrasekhar's case (supra) it should be atleast 70%. On the contrary, claimants have argued that deduction @ 33% is highly excessive and wholly unjustified looking to the overall situation of the land and other evidence on record.

38. In Chandrashekhar's case ((supra)) which has been relied upon by the counsel for the GDA the Court took into consideration the two components for deduction. The first component relates to area to be left out for providing basic amenities, like, roads, sewerage, water lines, adjoining pavements, street light, electric sub-stations etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additional development includes provision of civic amenities, like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. The second component is deduction towards expenditure/expenses which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above.

39. At this juncture, we would like to point out that a Division Bench of this Court in Ganeshi Singh's case (supra) has held that there is no legal provision for the deduction from the amount of compensation under the Land Acquisition Act, 1894. Various Courts normally pass such order of deduction on the subjective satisfaction of each case. Therefore, there is no hard and fast rule for making deductions.

40. It may be noted that learned Counsel for the GDA has failed to point out that before the Reference Court it has brought on record the indispensable

amenities and civic amenities which they would provide on the acquired land. Further, when confronted with the question that whether they have demanded excess deduction, as claimed here, before the Reference Court, the answer was in negative and they failed to point out any material in this regard. Since no such plea has been raised at the initial stage, it is not open for them to raise such a plea before this Court at a belated stage.

41. The Apex Court in the case of Kasturi and others vs. State of Haryana [(2003) 1 SCC 354] held that a cut of 20% to the development charges which was lower than the normal 1/3rd was understandable and could be justified. Subsequently, in Charan Dass v. H. P. Housing and Urban Development Authority [(2010) 13 SCC 398], the Apex Court observed that any deduction made should be made on the situation of the land and the need for development and where the acquired land is in the midst of already developed land with amenities of roads, drainage, electricity, etc. then deduction of 40% would not be justified.

42. Recently, in Mohinder Singh's case (supra), the Apex Court held that the deduction of 40% towards development cost as determined by the High Court was unjustified and the deduction of 1/4th of market value made by the Reference Court was appropriate.

43. It may be added that counsel appearing in First Appeal No.700 of 2002 has filed an application brining on record the notification dated 7.11.1977 issued by the District Magistrate, Ghaziabad whereby the Khasra Plot acquired has been brought under municipal limits of Ghaziabad. Therefore, there is no doubt that the land in question of the claimants acquired for the Vaishali Scheme of Village Makanpur has already been brought under the limit of Nagar Palika before issuance of notification under the Land Acquisition Act.

44. In view of the location of land in municipal limits, nature of soil and other factors, referred to above, we find no force in the submissions made by the counsel for the GDA for enhancing the deduction to the tune of 75% and held that 33% deduction made by the Reference Court is fully justified.

45. In view of the aforesaid detailed discussions, the appeals filed by the GDA are hereby dismissed and the appeals filed by the claimants/landloosers for enhancement of the compensation are allowed. The claimants-private respondents shall be entitled for compensation @ Rs.297/- per square yard, as held by us above and they shall be paid the enhanced compensation together with other statutory dues [like solatium, interest etc.], as directed by the Reference Court, within three months from the date of receipt of a certified copy of this order.

46. So far defective appeals are concerned, any defect/s was/were deficiency of court fees, it is directed that same will be recovered/adjusted in accordance with rules, while preparing final decree by the department.

47. All the pending applications shall also stand disposed of accordingly.

48. Parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal No. 961 of 2014

Satya Prakash Chaudhary ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Jai Krishna Tiwari, Sri Radha Kant Ojha

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Suspension-on demand of illegal gratification from the attendant of emergency patient-considering gravity of charges-Single Judge declined to interfere-held-view taken by Single Judge not sustainable-gravity of charges can not take way the Rule of law-where suspension as major of punishment-principle of Natural Justice can not be denied-petition allowed-suspension order quashed.

Held: Para-5
In either view of the matter, the order of suspension that was challenged before the learned Single Judge was unsustainable in view of the flaw which has been noticed above. The learned Single Judge declined to entertain the petition under Article 226 of the Constitution, having due regard to the gravity of charge against the appellant. On this aspect, we need only observe that irrespective of the gravity of an allegation, the rule of law has to be observed and an order of suspension must necessarily abide by the fundamental principles of service jurisprudence as embodied in the applicable service rules.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The appellant had moved a writ petition, under Article 226 of the Constitution, challenging an order dated 9 September 2014 passed by the fifth respondent namely, the Principal, B.R.D. Medical College, Gorakhpur. By the order of the fifth respondent, the appellant was suspended on the ground that he had demanded an illegal gratification from the attendant of a patient in the emergency ward. A direction has been issued to the effect that a reference to the order of suspension be made in the service book of the appellant and that an adverse entry be recorded in his character roll.

2. The learned Single Judge has declined to interfere with the order of suspension, having due regard to the gravity of the charge. However, the second respondent-Director General, Medical Health Services as well as the fifth respondent-Principal, B.R.D. Medical College, Gorakhpur were directed to look into the matter and take a decision on the issue as to who is the authority competent to suspend the appellant.

3. Two submissions have been urged on behalf of the appellant. Firstly, the order dated 9 September 2014 is not an order of suspension passed in contemplation of a disciplinary enquiry. If this is an order by way of punishment, it ought to have been proceeded by a notice to show cause and a departmental enquiry. Secondly, the direction to make an entry in the service book and to record an adverse entry in the character roll, on the basis of the same order, would be consequently unsustainable since the

entire foundation is a misconduct which is still to be proved.

4. The order which was impugned in the proceedings before the learned Single Judge dated 9 September 2014 proceeds to suspend the appellant. Ex-facie the order is not in contemplation of a departmental proceeding. It is well settled that an order of suspension of an employee can be of two types. The first is where a suspension is ordered in contemplation of a departmental enquiry or proceeding. The second is where a suspension is contemplated by service rules as a punishment for misconduct. In the present case, the impugned order does not indicate that it is in contemplation of a disciplinary proceeding. If the order was intended to operate as a punishment for misconduct, compliance of the principles of natural justice in accordance with service rules was necessary.

5. In either view of the matter, the order of suspension that was challenged before the learned Single Judge was unsustainable in view of the flaw which has been noticed above. The learned Single Judge declined to entertain the petition under Article 226 of the Constitution, having due regard to the gravity of charge against the appellant. On this aspect, we need only observe that irrespective of the gravity of an allegation, the rule of law has to be observed and an order of suspension must necessarily abide by the fundamental principles of service jurisprudence as embodied in the applicable service rules.

6. For these reasons, we have come to the conclusion that the judgment and order of the learned Single Judge would warrant interference in appeal. The special appeal is, accordingly, allowed and the impugned judgment and order of the learned Single Judge dated 25 September 2014 is set aside. In consequence, the writ petition (Writ-A No.52394 of 2014) filed by the appellant shall stand allowed and the order passed by the fifth respondent dated 9 September 2014 shall stand quashed and set aside.

7. However, we expressly make it clear that this judgment will not come in the way of the competent authority to pass a fresh order of suspension, if it is considered to be necessary and proper, in contemplation of a disciplinary proceeding in accordance with law.

8. The special appeal is, accordingly, disposed of. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal Defective No. 967 of 2014

State of U.P. & Ors. Appellants
Versus
Con. 840470302 Narendra Pal Singh & Ors. ...Respondents

Counsel for the Appellants:
C.S.C., S.C.

Counsel for the Respondents:
Sri Udai Chandani, Sri Amrit Raj Chaurasiya

Constitution of India, Art.-226-claim of House rent allowance by Constable and Head Constables-staying in Barrack-

allowed by Single Judge considering violation of Art.14 of Constitution-G. O. dated 08.11.13 not brought on record-identical controversy Division Bench dealing with Special Appeal-remanded the matter for fresh consideration by learned Single Judge-till decision taken-direction regarding payment of HRA kept in abeyance-Single Judge rejected review without considering the direction of appellate court-said part not sustainable-to this extent appeal stand allowed.

Held: Para-10

In our view, there is merit in the submission which has been urged by the learned Chief Standing Counsel that the issue which has been raised by the State merits close consideration by the learned Single Judge. It would not be appropriate for the Court to enquire into the correctness of the judgment and order of a coordinate Bench dated 22 April 2014, which had allowed the earlier appeal filed by the State to the extent indicated in the judgment. The learned Single Judge was bound by those directions and ought to have entertained the applications filed by the State on merits. In this view of the matter, we allow the special appeal and set aside the judgment and order of the learned Single Judge dated 15 September 2014 passed in Review Application No.243656 of 2014.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. This special appeal arises from a judgment and order of the learned Single Judge dated 8 November 2013 and an order passed in a review petition dated 15 September 2014.

2. The appellants are Head Constables or, as the case may be, Constables in the Provincial Armed Constabulary1. A writ petition had been filed before a learned Single Judge by 237 Head Constables/Constables, seeking the payment of House Rent Allowance2 on the basis of a Government Order dated 14 June 1999, on the ground that they had not been provided official accommodation. That writ petition was disposed of by a learned Single Judge by an order dated 8 December 2010. The learned Single Judge was of the view that the grievance should be examined by the Principal Secretary (Home) of the State Government and that in order to avoid further litigation, it was desirable for the State to issue a circular either for the payment of HRA to Head Constables/Constables, or if it was not to be so provided, by indicating the reasons for the decision. Following the order of the learned Single Judge dated 8 December 2010, the State Government issued a circular on 25 April 2011 to the effect that the Constables who are housed in barracks would not be paid HRA. Thereafter, a representation was submitted to the State Government which was rejected in the month of February 2012 by the Commandant 44th Battalion PAC, Meerut. That led to the filing of a writ petition before the learned Single Judge, seeking a quashing of the decision of the Commandant. Besides, a mandamus was sought to the State to pay HRA to the writ petitioners together with arrears in accordance with two Government Orders respectively dated 11 June 1999 and 8 December 2008. These two Government Orders apply generally to the employees of the State. The writ petition was allowed by the learned Single Judge by a judgment and order dated 8 November 2013 in the following terms:-

"In the result, the writ petition is allowed. The impugned order is quashed.

The State Government in particular and all the respondents in general are directed to provide appropriate H.R.A. to all the police officials including the petitioners, who are made to stay in 'barracks' and are not allotted appropriate 'residential accommodation' commensurating their status, rank and as per their entitlement. No costs."

3. Prior to the aforesaid decision of the learned Single Judge, a circular was issued by the State Government on 19 October 2013 under which a provision was made for the payment of Family Accommodation Allowance3 to employees of the police department who had been provided accommodation in barracks. As a matter of fact, it appears that the Sixth Pay Commission4 had, in the course of its recommendations, dealt with the issue as to whether HRA should be provided to personnel of Central Reserve Police Force5 who had not been allotted rent free accommodation. The recommendation of the SPC provided as follows:-

"Recommendations -
CILQ
7.19.42, Presently, Compensation in lieu of Quarters (CILQ) is allowed to 100% personnel in the Subordinate Officers (Sos) grade in all CPMFs barring CRPF where only 25% of the personnel in the grade are eligible for which allowance. CRPF has demanded that the facility should be extended to all the SOs in their case as well. The Commission finds merit in this demand. It is recommended that the facility of CILQ should be allowed to 100% personnel in the SOs grade in CRPF as well. Another demand has been made to extend House Rent Allowance (HRA) to all the CPMFs personnel who have not been allotted rent free accommodation or are eligible for CILQ. CILQ is given to a segment of force personnel as per the authorized strength who have not been provided rent-free family accommodation at the duty station. CILQ includes the element of HRA and license fee as per prescribed rates. Personnel who are not eligible for either rent free accommodation or CILQ are expected to stay in the non-family barracks from the functional requirement. While staying in non-family barracks on functional considerations is justified, it may not be appropriate to deny any compensation for housing the family of these personnel. HRA at normal rates cannot be paid to these personnel as they are staying in barracks provided by the Government. However, justification exists for providing a separate family accommodation allowance for housing the family members of this category of employees. In consonance with the recommendations made for similarly placed defence personnel, the Commission recommends that a new Family Accommodation Allowance at the lowest rate of HRA should be paid to all the CPMF's personnel who are not eligible for either rent free accommodation/HRA or CILQ. The rates of this allowance will increase by 25% each time the price index increases by 50%."

4. In pursuance of the recommendation of the SPC, eventually, the State Government issued its Circular dated 19 October 2013 as noted above. The circular of the State Government dated 19 October 2013 was not placed before the learned Single Judge when the writ petition was allowed on 8 November 2013. Against the decision of the learned

Single Judge, a special appeal was filed by the State. The special appeal was allowed by a Division Bench of this Court on 22 April 2014 to the extent as indicated in the judgment. The Division Bench noted that in the grounds of appeal, the State placed reliance on its decision dated 19 October 2013 which provided for a Family Accommodation Allowance to those Constables and Head Constables who had been provided accommodations in barracks. The Division Bench noted that it was an admitted position that the decision of the State was neither annexed before nor placed for the consideration of the learned Single Judge. The judgment and order of the learned Single Judge proceeded only on the basis that barracks could not be treated as residential accommodation and the denial of HRA would be in violation of Articles 14 and 16 of the Constitution. Eventually, while allowing the special appeal to the extent that it did, the Division Bench in its judgment dated 22 April 2014 observed as follows :-

"7. Since the question raised in the writ petition is going to affect thousands of police personnel of the rank of Constables and Head Constables, who have been provided accommodation in barracks, we find it appropriate to remand the matter to learned Single Judge. It will be open to the State appellants to file an appropriate application annexing therewith the Government Order dated 19.10.2013 or any other order which may be relevant for the decision of the issue of payment of house rent allowance to whose employees of the police department, who have been provided barracks.

8. Considering the importance of the matter and complication which may arise if the house rent allowance is paid under the judgment dated 8.11.2013, we also find it appropriate to direct that until decision of the writ petition after the remand the operation of the order dated 8.11.2013 shall remain stayed. An affidavit annexing the Government Order dated 19.10.2013 or any other Government Orders which may concern the issue may be filed by the State Government before learned Single Judge within one month.

9. The Special Appeal is allowed to that extent as indicated above."

5. Following the judgment of the Division Bench, the State filed a review petition before the learned Single Judge. The learned Single Judge has declined to entertain the review petition on the ground that the State had sought to re-argue the case on merits which was not permissible in law, having due regard to the parameters of the jurisdiction in review. In the view of the learned Single Judge, no ground for review was made out and hence the review petition was dismissed on 15 September 2014.

6. On behalf of the State, it has been submitted that the Division Bench in its judgment dated 22 April 2014 allowed the special appeal in part and had remanded the proceedings to the learned Single Judge, having due regard to the fact that the issue raised would affect thousands of police personnel of the rank of Constables and Head Constables in the State. While remanding the proceedings, the Division Bench directed that the order of the learned Single Judge dated 8 November 2013 shall remain stayed.

7. In this background, it has been submitted that the learned Single Judge

should have taken a clear view rather than a technical view of the matter in declining to entertain the review petition filed by the State. The learned Single Judge has, by the original judgment, allowed the writ petition in its entirety, granting the claim for the payment of HRA together with arrears. The date from which the arrears are payable has not been specified.

8. On the other hand, the learned Senior Counsel appearing on behalf of the respondents has supported the view of the learned Single Judge.

9. Evidently, as the record before the Court would indicate, a special appeal against the judgment of the learned Single Judge dated 8 November 2013 came up before the Division Bench. The Court was of the view in its order dated 22 April 2014 that the issue which had been raised by the State on the basis of the decision dated 19 October 2013 would affect thousands of police personnel across the State in the rank of Constables and Head Constables. Unfortunately, the decision of the State dated 19 October 2013 had not been placed before the learned Single Judge though it had been formulated and notified much before the judgment dated 8 November 2013. It was in this background that the Division Bench remanded the proceedings back to the learned Single Judge while allowing the special appeal of the State in part and directed the State to file an affidavit together with the order dated 19 October 2013 and other Government Orders which may concern the issue. Until then, the judgment of the learned Single Judge was stayed. In this background, we are of the view that it would have been appropriate and proper for the learned Single Judge to entertain the application which was filed by the State on merits. The original order of the learned Single Judge allows the petition in its entirety and in fact directs the State to provide HRA to all police officials, including the writ petitioners who are made to stay in barracks and who are not allotted appropriate residential house commensurate with the status, rank and entitlement. While allowing the writ petition, the judgment of the learned Single Judge appears to have also granted relief on arrears which were claimed in the writ proceedings.

10. In our view, there is merit in the submission which has been urged by the learned Chief Standing Counsel that the issue which has been raised by the State merits close consideration by the learned Single Judge. It would not be appropriate for the Court to enquire into the correctness of the judgment and order of a coordinate Bench dated 22 April 2014, which had allowed the earlier appeal filed by the State to the extent indicated in the judgment. The learned Single Judge was bound by those directions and ought to have entertained the applications filed by the State on merits. In this view of the matter, we allow the special appeal and set aside the judgment and order of the learned Single Judge dated 15 September 2014 passed in Review Application No.243656 of 2014.

11. We clarify that though we are not setting aside the judgment dated 8 November 2013 in the present special appeal, that should not be construed as an affirmation of the merits of the decision since by the previous order of the Division Bench dated 22 April 2014, the learned Single Judge would be required to consider the application filed by the State in regard to the legality of the judgment

and order. Hence, we clarify that the correctness of the judgment is left open to be considered by the Learned Single Judge. However, in terms of the earlier order dated 22 April 2014 of the Division Bench, we continue the operation of the stay of the judgment dated 8 November 2013 till the matter is finally disposed of on merits by the learned Single judge.

12. The special appeal is allowed in the aforesaid terms. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.11.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal Defective No. 995 of 2014

Shyam Narayan & Ors. Appellants
Versus
The Union of India & Ors. ...Respondents

Counsel for the Appellants:
Sri Rajeev Misra, Sri Prashant Kumar Tripathi

Counsel for the Respondents:
A.S.G.I., Sri Vaibhav Kaushik, Sri Shesh Mani Misra

Constitution of India, Art.-226-Service law-termination of contractual employee-appointment for specific purpose-in particular project-claiming engagement as per previous terms-held-no right to continue-so for appraisal of work or stigmatic concern-not available-learned Single Judge rightly declined to interfere.

Held: Para-5

In this view of the matter, the appellants being purely temporary employees appointed under a contract of engagement, the learned Single Judge could not have ordered specific performance which is essentially what the writ petition sought. The second submission is that the termination is stigmatic because the letter of termination dated 7 August 2014 states that the performance of the appellants was not found to be satisfactory in the trade test and similarly the appraisal was also unsatisfactory. This appraisal for the purpose of determining whether a contractual employee should be continued any further, cannot result in an order being regarded as a punishment or of a stigmatic nature. Where an employee is engaged for a specified period or for a specified project, the employer is under the terms of the contract entitled to consider whether the continued engagement of the employee is in the interests of the satisfactory completion of the project mode. Such a power is implicit in the very nature of the engagement itself. Consequently, where the employer proceeds to terminate such a contract on the ground that the performance is not satisfactory, the order cannot be regarded as being stigmatic so as to require the initiation of disciplinary proceedings. There is no termination for misconduct in the present case.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The appellants had moved a writ petition seeking three reliefs (i) the setting aside of an order dated 7 August 2014 by which their services as contractual employees were terminated on 7 August 2014 by the Director of the Indian Institute of Information Technology, the fourth respondent; (ii) the payment of salary for the months of July 2014 and for the period of 1 August to 7 August 2014; (iii) a direction that the appellants be permitted to perform their duties as before

in a project of digitization of the IIIT, Allahabad at the High Court of Judicature at Allahabad.

2. The learned Single Judge by the impugned judgment recorded the statement of the respondents that the petitioners-appellants had produced a no objection certificate and consequently directed that the balance of their salary for the previous month together with one month's salary be released to them within 24 hours. The petition was disposed of. The original petitioners are in appeal.

3. The first grievance which has been raised is that the learned Single Judge has not dealt with the first and the third prayers and has disposed of the petition merely on the basis of the second prayer. Now, the first and the third prayers were interrelated. By the first prayer, the appellants sought the setting aside of an order of termination of their contract, while by the third prayer, they sought a direction to enable them to continue to perform their duties.

4. The basic issue is as to whether the appellants have a vested right to continue in service. Admittedly, the contract of appointment indicates that the appointment was purely on a temporary basis and of a project mode and could be terminated at any time without assigning any reason. The IIIT Allahabad is executing a project of digitization at the High Court and the appellants were all project employees who were appointed purely on a temporary basis. They have no vested right to continue and the contract is terminable without assigning any reason.

5. In this view of the matter, the appellants being purely temporary employees appointed under a contract of engagement, the learned Single Judge could not have ordered specific performance which is essentially what the writ petition sought. The second submission is that the termination is stigmatic because the letter of termination dated 7 August 2014 states that the performance of the appellants was not found to be satisfactory in the trade test and similarly the appraisal was also unsatisfactory. This appraisal for the purpose of determining whether a contractual employee should be continued any further, cannot result in an order being regarded as a punishment or of a stigmatic nature. Where an employee is engaged for a specified period or for a specified project, the employer is under the terms of the contract entitled to consider whether the continued engagement of the employee is in the interests of the satisfactory completion of the project mode. Such a power is implicit in the very nature of the engagement itself. Consequently, where the employer proceeds to terminate such a contract on the ground that the performance is not satisfactory, the order cannot be regarded as being stigmatic so as to require the initiation of disciplinary proceedings. There is no termination for misconduct in the present case.

6. The third submission is that the learned Single Judge had in the cause list three other petitions which had been directed to be listed together with the writ petition of the appellants which was dismissed. Moreover, it has been pointed out that on 14 October 2014, the learned Single Judge had directed, in a companion petition the petitioners thereto bring on record no dues certificate.

7. We see no reason to entertain the submission. The petition filed by the

petitioners-appellants was duly heard and has been finally disposed of by the impugned judgment and order. In any event, for the sake of rendering a final and complete adjudication of the issues raised, we have considered all the submissions which have been urged on behalf of the appellants and find no substance in them. The special appeal is, accordingly, dismissed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Special Appeal No. 1037 of 2014

Dr. Ajay Chaturvedi Appellant
Versus
Smt. Shobhana ...Respondent

Counsel for the Appellant:
Sri Suyash Pandey, Sri N.L. Pandey

Counsel for the Respondents:
Sri Rupak Chaubey

High Court Rules, 1952-Chapter VII-Rule V-Special Appeal-maintainability-when order passed by learned Single Judge u/s 24 C.P.C.-appealable? held-'No'-power of superintendence-exercised by Single Judge-special appeal not maintainable.

Held: Para-11
In our opinion, the judgment/order made on the petition under Section 24 of the CPC only a judgment/order of the learned Single Judge in exercise of power of superintendence and nothing beyond it. In view of the interpretation of Chapter VIII Rule 5 of the Rules as above no special appeal against the judgment/order made in exercise of power of superintendence would be maintainable. We hold that the present special appeal as filed by the appellant is not maintainable.

Case Law discussed:
AIR 2001 SC page 883; 1963 SCC ONLINE Mad. 260 (1965) 78 LW 133 (Mad.).

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

1. Heard learned counsel for the parties.

2. This special appeal under Chapter VIII Rule 5 of the High Court Rules, 1952 (hereinafter referred to "as the Rules") is directed against the order of the learned Single Judge, dated 28.10.2014 wherein learned Single Judge in exercise of powers under Section 24 of the Code of Civil Procedure, 1908 (hereinafter referred to "as the CPC") has been pleased to direct transfer of Original Suit No.956 of 2010 filed by Dr. Ajay Chaturvedi, the appellant before this Court, under Section 13 of the Hindu Marriage Act from the Court of 1st Additional District Judge, Bulandshahar to the competent Court at Moradabad.

3. A preliminary objection has been raised with regard to the maintainability of the present special appeal. The issue so raised revolves around the interpretation of the provisions of Chapter VIII Rule 5 of the Rules. It would be appropriate to reproduce the Rules which read as follows:

5. Special Appeal.- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and

not being an order made in the exercise of revisional jurisdiction or in the exercise of its powers of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of Appellate or Revisional Jurisdiction under any such Act] of one Judge]"

4. From a simple reading of the Rules, it is apparent that all the judgment of the learned Single Judge of this Court are appealable before a division Bench of the Court except for the category of the judgments which stands excluded from the purview of such special appeal. The Rule in fact excludes judgments against which Special Appeal will not be maintainable. Therefore, what is to be seen is as to whether the judgment/order made in exercise of the powers under Section 24 of the CPC stands within there excluded from the provisions of the Chapter VIII Rule 5 of the Rules or not?

5. A division Bench of this Court in the case of Vajra Yojna Seed Farm Kalyanpur (M/s) and others Vs. Presiding Officer, Labour Court II and another reported in 2003 (1) U.P.L.B.E.C. page 490 has laid down that ordinarily, following categories of the judgments/orders stand excluded from the purview of the special appeal under Chapter VIII Rule 5 of the Rules which reads as under:

"(i) Judgment of one Judge passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court.

(ii) Judgment of one Judge in the exercise of revisional jurisdiction.

(iii) Judgment of one Judge made in the exercise of its power of superintendence.

(iv) Judgment of one Judge made in the exercise of criminal jurisdiction.

(v) Judgment or order of one Judge made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect of any of the matters enumerated in State List or Concurrent List.

(vi) Judgment or order of one Judge made in exercise or jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award by the Court or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh Act or under Any Central Act."

6. Another division Bench in the case of Amit Khanna Vs. Smt. Suchi Khanna reported in 2008 (10) ADJ page 426 has held that the order made under Section 24 of the CPC does not qualify as

a judgment and, therefore, no appeal under Chapter VIII Rule 5 of the Rules is maintainable.

7. Learned counsel for the appellant vehemently submitted that the division Bench of this Court has not laid down correct law in the case of Amit Khann (supra) inasmuch as the order of the learned Single Judge made on the application under Section 24 of the CPC will qualify as a judgment and, therefore, the special appeal would be maintainable. For the propositions, he has placed reliance upon the judgment of the Apex Court in the case of Employer In Relation To Management Of Central Mine Planning and Design Institute Ltd. Vs. Union of India reported in AIR 2001 SC page 883.

8. The contention so raised on behalf of the appellant may not detain the Court for a long inasmuch as the exercise of powers by the High Court under Section 24 of the CPC is an exercise of power of superintendence. Therefore, the judgment/order of the learned Single Judge on an application under Section 24 CPC would being an order made in exercise of power of superintendence stands excluded from the purview of special appeal as provided for under Chapter VIII Rule 5 of the Rules.

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

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

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

(i) try or dispose of the same; or

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

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

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

2[(3) For the purposes of this section,-

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

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

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

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

9. From a simple reading of the Section 24 CPC, it is clear that transfer of proceedings of suit; appeal etc. can be directed by the High Court/District Court on an application as also suo moto. This

power of transfer is not an exercise of original jurisdiction, it is not an exercise of appellate jurisdiction nor it is an exercise of revisional jurisdiction.

10. The power of transfer of suit and other proceedings is an exercise of power of superintendence. The legal position in that has been explained by the Madras High Court in the case of P. Karuppiah Ambalam Vs. Ayya Nadar reported in 1963 SCC ONLINE Mad. 260; (1965) 78 LW 133 (Mad.) relevant portion of the judgment is reproduced hereinbelow:

"... Section 24 C.P.C., gives power to two superior courts, viz., the High Court or the District Court to withdraw any suit, appeal or other proceedings pending in any court subordinate to it and either try and dispose of the same, or transfer the same for trial or disposal to any Court, subordinate to it and competent to try or dispose of the same. In terms S. 24 confers a very wide power, and it is intended to enable the two superior courts mentioned in it, in their general power of superintendent over subordinate courts, or in the interest of justice to redistribute all civil work of whatever nature pending in subordinate courts for the purpose of disposal. It has also to be used where the interests of justice require, that a particular case should be transferred from one Subordinate Court. The subject matter of the transfer referred in S. 24 C.P.C., as suit, appeal or other proceeding, is of the widest kind, and there is no reason why execution proceedings should be excluded from the scope of other proceeding mentioned in this section. Considering also the general purpose of superintendence, and furthering the interests of justice for which this section is enacted, there is no reason why execution proceedings should be excluded from its scope."

11. In our opinion, the judgment/order made on the petition under Section 24 of the CPC only a judgment/order of the learned Single Judge in exercise of power of superintendence and nothing beyond it. In view of the interpretation of Chapter VIII Rule 5 of the Rules as above no special appeal against the judgment/order made in exercise of power of superintendence would be maintainable. We hold that the present special appeal as filed by the appellant is not maintainable.

12. The present special appeal is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE SHRI NARAYAN SHUKLA, J.

First Appeal From Order No. 1060 of 2004

Shri Ram Kushwaha Appellant
Versus
U.P. State Sugar Corporation Ltd. Meerut & Anr. Opp. Parties

Counsel for the Appellant:
Sri K.S. Kushwaha, Sri Manu Khare, Sri P.V. Singh

Counsel for the Opp. Parties:
Sri R.K. Srivastava, Sri Pranav Chaudhary, Sri Rakesh Bagga, Sri S. Bagga

Evidence Act-Section-74,77-disability certificate-being public document-not required to be proved-on 40% permanent disability-petitioners claim allowed partly-appeal for enhancement

of compensation-appeal allowed with direction to the claim Tribunal-take fresh decision considering the loss of future earnings.

Held: Para-4
In the light of these decisions, we are of the opinion that the Tribunal committed a manifest error in rejecting the disability certificate on the ground that it was not proved by a witness.

Case Law discussed:
AIR 1983 SC 1633; 1989 25 ALR 695; 2007 (67) ALR 580; 2012 (9) ADJ 1 (NOC); 2012 (8) ADJ 534; 2012 (2) SCC 267.

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

1. While travelling in a Tata Sumo, the claimant was injured on account of an accident that occurred on the basis of rash and negligent driving on the part of the driver. The claimant filed a claim petition, which was allowed in part and a sum of Rs. 39,454/- was awarded. The appellant being aggrieved filed the present appeal for enhancement of compensation.

2. From a perusal of the award, we find that the claimant had filed a disability certificate issued by the Chief Medical Officer which also contained the signatures of the other members of the Board, who examined the claimant and found that he has a permanent disability of 40%. This certificate was rejected by the Tribunal on the ground that the same has not been proved by production of any witness, namely, by a doctor.

3. We are of the opinion that a certificate issued by a Chief Medical Officer, being a public document, is not required to be proved as per the Section 74 and 77 of the Evidence Act. The contents of a public document is proved by production of a certified copy under Section 77 of the Evidence Act.

4. In M.M. Rajappa v. Mal Haha Uru Bajappa : AIR 1983 SC 1633 and Pt. Parmanand Katara v. Union of India : 1989 25 ALR 695, the Supreme Court held that if a document is a certified copy of a public document, it need not be proved by calling a witness. A similar view was also given by a Division Bench of this Court in Oriental Insurance Company Limited v. Surendra Umrao and another : 2007 (67) ALR 580. In the light of these decisions, we are of the opinion that the Tribunal committed a manifest error in rejecting the disability certificate on the ground that it was not proved by a witness.

5. Mr. Rakesh Bagga, learned counsel for the Insurance Company contended that the disability certificate by itself will not entitle the claimants to claim an enhancement compensation until and unless the claimant proves that the disability, which he had incurred resulted in a loss of earning. In this regard, the learned counsel has placed reliance upon a decision of this Court in Sunil Kumar v. Smt. Jasvinder Kaur and another : 2012 (9) ADJ 1 (NOC) and in Om Prakash Goyal v. Raghvender Vikram Singh and another : 2012 (8) ADJ 534 as well as a decision of the Supreme Court in Mohan Soni v. Ram Avtar Tomar and others : 2012 (2) SCC 267.

6. In the light of the aforesaid facts, we allow the appeal, set aside the award and remit the matter back to the Tribunal concerned, who will reconsider the disability certificate as well as the loss of earning capacity of the appellant, if any. The Tribunal will decide the matter afresh

within three months from the date of production of a certified copy of this order in the light of the observation made aforesaid.

7. The Registry is directed to remit the record to the lower court within two weeks from today.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Special Appeal No. 1061 of 2014

Jalil Ahmad Ansari ...Appellant
Versus
State Bank of India & Ors. .Respondents

Counsel for the Appellant:
Sri Vivek Kumar Singh

Counsel for the Respondents:
Sri Satish Chaturvedi

High Court Rules, 1952-Chapter 8 Rule 5-Special appeal recovery proceeding-liability of principal debtor as well as guarantor are co-extensive-even on compromise between parties no full payment made-debt Tribunal already fixed liability in the year 2001-appeal dismissed.

Held: Para-7
The liability of the guarantor is co-extensive with that of the principal debtor as has been clearly held by the Supreme Court in the case of Industrial Investment Bank of India Limited (supra). In the present case either on the ground of entering into a compromise or on the ground that the recovery should first be made from the principal debtor and not from the guarantor, the recovery proceedings have been delayed and postponed for over a decade. The law on this point is absolutely clear that the liability of the guarantor is co-extensive. As such in equity also if the principal debtor as well as the guarantor have been postponing the recovery for the last more than a decade firstly by offering to enter into a compromise and thereafter resiling and then challenging the recovery on technical grounds, we are of the firm view that by doing so, the very purpose of The Recovery of Debts Due to Banks and Financial Institutions Acts, 1993 is being defeated. As such, on merits as well as on equity, we do not find any good ground to interfere with the order passed by the writ court.

Case Law discussed:
AIR 1998 SC 157; (2010) 7 SCC 678; (2004) 6 SCC 758; (2009) 9 SCC 478; AIR 1969 SC 297

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

1. Respondents no. 2,3,4,5 and 6 had taken loan from the respondent-State Bank of India for which the appellant was the guarantor. The Debt Recovery Tribunal (hereinafter referred to as the Tribunal) passed an order in the year 2001 for recovery of the defaulted amount from the principal debtors as well as the appellant (as guarantor). Execution proceedings were initiated before the Recovery Officer of the Tribunal in the year 2002. The matter has been pending since then. In the year 2009, on the basis of a compromise made by the principal debtors and the appellant as the guarantor, the auction scheduled to be held was postponed on the ground that the appellant as well as the principal debtors would deposit a sum of Rs. 4.5 lacs with the bank. In response thereto, the appellant is said to have deposited Rs. 2 lacs with the bank but the full amount was not deposited by the principal debtors or the appellant. Recovery proceedings

continued and the appellant claimed that the amount should first be recovered from the principal debtors and if from such recovery proceedings the total amount could not be recovered, then balance should be recovered from the appellant, who is the guarantor. The Tribunal as well as the Debt Recovery Appellate Tribunal rejected such prayer of the appellant. The appellant then filed Civil Misc. Writ Petition No. 45784 of 2009, which has also been dismissed by order dated 15.7.2014. Challenging the same, this appeal has been filed.

2. We have heard Sri Vivek Kumar Singh, learned counsel for the appellant as well as Sri Satish Chaturvedi, learned counsel for the respondent-Bank and have perused the record.

3. The submission of the learned counsel for the appellant is that no recovery could have been made from the appellant (who was merely a guarantor) unless recovery was made first from the principal debtors. He has also submitted that there should be fairness in the action of the State authorities and in first not proceeding against the principal debtors, they have discriminated against the appellant, whose liability would have arisen after the recovery from the principal debtors could not satisfy the payment of the loan amount. He has submitted that the property of the principal debtors had been attached by order of the Recovery Officer of the Tribunal passed in the year 2002 but instead of auctioning such property of the principal debtors they are now proceeding to recover the said amount from the appellant and as such the said action of the recovery officer is arbitrary and liable to be set aside.

4. We may first consider the decisions relied upon by the learned counsel for the appellant with regard to the fairness in the action of the State authorities. Learned counsel has relied upon the judgment of the Apex Court in the cases of Haji T.M.Hassan Rawther vs. Kerala Financial Corporation (AIR 1988 SC 157) and East Coast Railway vs. Mahadev Appa Rao (2010) 7 SCC 678. In the case of Haji T.M.Hassan Rawther (supra), in paragraph 14, the Apex Court has held that public property should generally be sold by public auction or by inviting tenders which is for not only to get the highest price but also ensures fairness in the activities of the State and public authorities. In the case of East Coast Railway (supra) the Supreme Court has held that non application of mind by the authority making the order or non disclosure of proper reasons would be clearly suggestive of the order being arbitrary.

5. There is no dispute about the aforesaid principles of law as laid down by the Apex Court but the same would not be applicable in the present case as here the matter relates to recovery and what is to be determined is as to whether the authorities can proceed against the guarantor only after the recovery cannot be made from the principal debtors. Such being the main question we have to now examine as to whether the liability of the appellant herein was co-extensive with that of the principal borrowers or not. Learned counsel for the appellant has relied on decisions of the Apex Court in the cases of Ashok Mahajan vs. State of U.P. (2006) 10 SCC 332 and Pawan Kumar Jain vx. Pradeshiya Industrial and Investment Corporation of U.P.Ltd. (2004) 6 SCC 758 and has submitted that action against the guarantor cannot be

taken until the property of the principal debtors is first sold of. In the said cases, the Apex Court was dealing with recovery under the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972. The said Act provides for recovery to be first made from the pledged goods and hence it was held that action against the guarantor cannot be taken until the property of the principal debtor is first sold of. The present is not a case under the aforesaid U.P. Act. The learned Single Judge, relying on the judgment of the Apex Court in the case of Industrial Investment Bank of India Limited vs. Biswanath Jhunjhunwala (2009) 9 SCC 478 has dismissed the writ petition on the ground that liability of the borrower as well as the guarantor is always co-extensive and it is for the Bank to proceed either against the borrower or the guarantor. In the said judgment the Supreme Court has relied on various judgments, including that of the Supreme Court in the case of Bank of Bihar Ltd. vs. Dr. Damodar Prasad AIR 1969 SC 297 wherein it has been held that "the very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

6. It is not disputed that in the present case the order of the Tribunal was passed in the year 2001, which had become final and in pursuance thereof, recovery proceedings had been initiated against the principal debtors as well as the appellant, who was a guarantor.

7. The liability of the guarantor is co-extensive with that of the principal debtor as has been clearly held by the Supreme Court in the case of Industrial Investment Bank of India Limited (supra). In the present case either on the ground of entering into a compromise or on the ground that the recovery should first be made from the principal debtor and not from the guarantor, the recovery proceedings have been delayed and postponed for over a decade. The law on this point is absolutely clear that the liability of the guarantor is co-extensive. As such in equity also if the principal debtor as well as the guarantor have been postponing the recovery for the last more than a decade firstly by offering to enter into a compromise and thereafter resiling and then challenging the recovery on technical grounds, we are of the firm view that by doing so, the very purpose of The Recovery of Debts Due to Banks and Financial Institutions Acts, 1993 is being defeated. As such, on merits as well as on equity, we do not find any good ground to interfere with the order passed by the writ court.

8. This appeal is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal From Order No. 3162 of 2014

The National Insurance Co. Ltd.
...Appellant
Versus
Ratibhan Kewat & Ors. ...Respondents

Counsel for the Appellant:
Sri P.K. Sinha

Counsel for the Respondents:
Sri S.D. Ojha

Constitution of India Art.-141, 142- direction of Apex Court to pay compensation to third party-whether mere direction to complete justice between the party-mere direction under Article 142 or having binding precedent under Art. 141-held-in view of latest direction of Apex Court-such direction has binding effect-mere reference to larger Bench-have no disturbing effect to the settled law.

Held: Para-10 & 11

10. It is settled law that mere reference of any question of law to a larger bench would not have the effect of disturbing the law which has been settled by the court until and unless the reference is answered to the contrary.

11. The principle where the vehicle is covered by insurance policy, the insurer is liable to compensate the loss in the first instance and then may recover the amount from the owner of the vehicle in case of breach of any conditions of the policy, as such is binding precedent laid down under Article 141 of the Constitution of India and is not by way of special circumstances to do the complete justice under Article 142 of the Constitution of India.

Case Law discussed:

2014 (142) FLR 638; 2001 (2) TAC 243 (SC); 2004 (1) TAC 321; 2013 (1) TAC 414 (SC)

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

1. Heard Sri P.K. Sinha, learned counsel for the appellant insurance company and Sri S.D. Ojha, learned counsel appearing for the claimant respondents.

2. This appeal under Section 173 of the Motor Vehicles Act, 1988 has been preferred against the judgment and order dated 29.8.2014 passed in Motor Accident Claims Petition No. 82/70/2013 (Rati Bhan Singh and another Vs. Rajiv Lochan Shukla and others) whereby a sum of Rs. 1,72,500/- with 7% interest from the date of presentation of the claim petition has been awarded.

3. The tribunal by the impugned award has directed that the compensation awarded shall be paid and deposited by the appellant insurance company which may be recovered by it from the owner of the vehicle as the vehicle was covered by a valid insurance policy but was driven in breach of the terms and conditions of the policy.

4. In view of the fact that the liability to pay compensation ultimately rests upon the owner of the vehicle and the appellant insurance company has been given right to recover it on payment, no loss is likely to be suffered by it. The compensation payable under the award is actually payable by the owner and not by the appellant insurance company. In this sense of the matter, appellant insurance company is not a party aggrieved by the impugned award so as to entitle it to maintain the appeal.

5. Sri Sinha submits that once the tribunal holds that there was violation of the terms and conditions of the insurance policy, no liability not even to pay the compensation at the initial stage could have been fastened upon the appellant insurance company. Any direction of the apex court in this regard directing the insurer to pay and recover are directions under Article 142 of the Constitution of India and have no binding precedent as has been recently held by the three Judges Bench of the Supreme Court in the Sate of Punjab and others Vs. Rafiq Masih (White washer) 2014 (142) FLR 638.

6. The aforesaid decision of the Supreme Court no doubt lays down that any direction issued by the Apex Court in

exercise of its power under Article 142 of the Constitution of India does not constitute a binding precedent as they are directions for the proper administration of justice so as to do the complete justice between the parties but the question is whether the directions of the Supreme Court to pay and recover given to the insurer are under Article 141 or 142 of the Constitution of India.

7. The Supreme Court in New India Assurance company, Shimla Vs. Kamla 2001 (2) TAC 243 (SC) probably for the first time while considering the liability of the insurer vis-a-vis the owner of the vehicle considering the various provisions of the Act held that when there is a valid insurance policy in connection with a particular vehicle, the burden is upon the insurer to compensate the third party irrespective of any breach or violation of the conditions of the policy but may recover the said amount from the insured policy holder. The court therefore directed the insurer to first pay and then to recover the amount from the owner of the vehicle. The aforesaid direction of the Supreme Court was under Article 141 of the Constitution of India and not by way of doing complete justice between the parties under Article 142 of the Constitution of India.

8. The aforesaid decision has the approval of the three Judges Bench of the Supreme Court in National Insurance Company Limited Vs. Swarn Singh and others 2004 (1) TAC 321.

9. Recently, the Supreme Court in Manager National Insurance Company Limited Vs. Saju P. Paul and another 2013 (1) TAC 414 (SC) irrespective of the fact that the Division Bench of the Supreme Court in some matter has referred the question regarding liability of the insurance company to first pay the compensation and then to recover it from the owner held that the principal which has been followed for long regarding first pay and then recover, can not be held to be unjustified.

10. It is settled law that mere reference of any question of law to a larger bench would not have the effect of disturbing the law which has been settled by the court until and unless the reference is answered to the contrary.

11. The principle where the vehicle is covered by insurance policy, the insurer is liable to compensate the loss in the first instance and then may recover the amount from the owner of the vehicle in case of breach of any conditions of the policy, as such is binding precedent laid down under Article 141 of the Constitution of India and is not by way of special circumstances to do the complete justice under Article 142 of the Constitution of India.

12. Accordingly, the above principle is a binding principle. I am therefore of the view that the appellant insurance company is not a party aggrieved by the impugned award so as to maintain the appeal.

13. Accordingly, the appeal is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2014

BEFORE
THE HON'BLE BALA KRISHNA NARAYAN, J.

Civil Misc. Writ Petition No. 6429 of 1983

Chhote Lal alias Chhattoo Ram & Anr.
...Petitioners
Versus

D.D.C., Varanasi & Ors. ...Respondents

Counsel for the Petitioners:
Sri N.C. Rajvanshi, Sri V.C. Shukla

Counsel for the Respondents:
Addl. C.S.C., Sri Manoj Kumar Yadav, Sri Ajay Shankar

U.P. Consolidation of Land Holdings Act-Section-9-A-Jurisdiction of consolidation authorities-plot in question being recorded as Talab and Bhita-not covered within the definition of agricultural land-consolidation authorities-have no jurisdiction to decide any claim-C.O.-directed the name of petitioner be struck down and record with name of Gaon Sabha SOC-set-a-side the order being without jurisdiction-DDC wrongly interfered with the order of ASOC and restoring the order of consolidation officer-petition allowed.

Held: Para-16
Thus the Division Bench of this Court in Triloki Nath (supra) after examining the relevant provisions of U. P. C. H. Act and the law on the issue has clearly held that area which is put to a different use other than agriculture would not be covered by the definition of the word 'land' and therefore, the provisions of U. P. C. H. Act would not apply and the land not covered by the provisions of U. P. C. H. Act cannot be the subject matter of a dispute before the Consolidation Courts and such Courts will have no jurisdiction to decide the question of title between the parties thereto. The Division Bench further held that the consolidation Courts will have no power to adjudicate upon any claim for correction of record of rights pertaining to an area not coming within the circumscribed limit over which the consolidation courts have been given jurisdiction to adjudicate upon.

Case Law discussed:
1982 All. L.J. 1113; 1977 AWC 1 FB; 2000 (91) RD 531 (SC); 2001 (92) RD 689; 2009 (107) RD 695; 2009 (108) RD 29.

(Delivered by Hon'ble Bala Krishna Narayan, J.)

1. Heard Sri N. C. Rajvanshi, Senior Advocate assisted by Sri V. C. Shukla, learned counsel for the petitioner, Sri Manoj Kumar Yadav, learned counsel for the Gaon Sabha and Sri Ajay Shankar, learned counsel for the respondent no. 5 and Sri Sanjay Goswami, learned Additional Chief Standing counsel for respondent nos. 1, 2 and 3.

2. The dispute involved in the present writ petition relates to Plot Nos. 101/1 area 1.69 acres and plot No. 102, area 1.23 acres situated in village-Barsara, pargana-Katehar, district-Varanasi (hereinafter referred to as 'the disputed plots').

3. In the basic year khatauni the disputed plot No. 101/1 was recorded in the names of the petitioners in Zaman 4 (occupant without title) and plot No. 102 was recorded as Talab in Zaman 6. Upon commencement of consolidation operations in the village where the disputed plots are situate, the petitioners filed two objections before the Consolidation Officer under Section-9 (A) (2) of the U. P. Consolidation of Holdings Act (hereinafter referred to as the 'C. H. Act') in respect of the disputed plots. With regard to the disputed plot no. 101/1 the petitioners' claim before the Consolidation Officer was that out of the total area of 1.69 acres of the aforesaid plot, 10 decimal area was being used by them as Abadi. They prayed that after demarcating 10 decimal area from plot no. 101/1, petitioners be declared as bhumidhars of the remaining area of the aforesaid plot. Vis-a-vis plot no. 102, which was admittedly recorded as talab, they alleged that they were owners thereof on the

strength of a sale-deed dated 18.1.1960 executed in their favour by its erstwhile zamindars Vishwanath, Nand Lal and Purushottam. Respondent nos. 5 and 6 also filed objections before the Consolidation Officer with the prayer that the names of the petitioners recorded in the basic year khatauni in Zaman 4 be expunged and disputed plots which were in the nature of bhita and talab, be recorded as property of Gaon Sabha. All the objections were considered and decided by the Consolidation Officer by his common judgement and order dated 21.8.1978 (Annexure 5 to the writ petition). The Consolidation Officer after taking into consideration the entire evidence adduced by the parties before him held that no bhumidhari rights could accrue in favour of the petitioners in the disputed plot No. 101/1 which was in the nature of bhita and talab and directed for expunging the entry of occupier of the disputed plot existing in favour of the petitioners in the basic year khatauni for recording the same as property of Gaon Sabha. The consolidation Officer maintained the basic year entry in respect to plot no. 102. The Consolidation Officer however, found that the petitioner were the owners of the old trees existing on the disputed plots.

4. Against the order dated 21.8.1978 the petitioners filed an appeal under Section 11 (1) of the C. H. Act which was numbered as Appeal No. 3084 before the Assistant Settlement Officer of Consolidation-respondent no. 2 and allowed by him by his order dated 28.8.1981 (Annexure 7 to the writ petition). The Assistant Settlement Officer of Consolidation held that once the Consolidation Officer had come to the conclusion that the disputed plots were in the nature of bhita and talab, he should have refrained from passing any order for correction of record of rights pertaining thereto as the area comprised in the disputed plots did not come within the circumscribed limit over which the Consolidation courts had jurisdiction to adjudicate. The respondent no. 2 by his order, after setting aside the order of the Assistant Settlement Officer of Consolidation, restored the basic year entries, with liberty to the parties to get their rights in respect of the disputed plots declared by a competent court. The order dated 28.8.1981 was assailed by the respondent nos. 5 and 6 by filing a revision under Section 48 (1) of the C. H. Act before the respondent no. 1 which was numbered as Revision No. 3110 and allowed by him by his order dated 6.4.1983 (Annexure 9 to the writ petition). The respondent no. 1 while allowing the revision No. 3110 set aside the order of the Assistant Settlement Officer of Consolidation and restored that of the Consolidation Officer.

5. The petitioners by means of this writ petition have prayed for issuing a writ, order or direction in the nature of certiorari quashing the order dated 6.4.1983 passed by the Deputy Director of Consolidation, Varanasi (Annexure 9 to the writ petition).

6. Sri N. C. Rajvanshi, learned counsel appearing for the petitioners submitted that the Revision No. 3110 preferred by the respondent nos. 5 and 6 in their capacity as members of the Gaon Sabha claiming themselves to be the members of Ramleela committee of the village, which itself was an un-registered body, without any authority of Land Management Committee as contemplated

under Rule 110 A of U. P. Z. A. & L. R. Rules, 1952 and para 128 of Gaon Sabha Manual was not maintainable and wholly incompetent. They had no locus standi to challenge the order of the Assistant Settlement Officer of Consolidation and hence the impugned order passed by the respondent no. 1 allowing the revision of the respondent nos. 5 and 6 is totally without jurisdiction.

7. He next submitted that the Assistant Settlement Officer of Consolidation had rightly allowed the appeal preferred by the petitioners against the order of the Consolidation Officer rejecting their claim to be recorded as bhumidhars of the disputed plots for the reason that the disputed plots were in the nature of bhita and talab in which no bhumidhari rights could accrue on the ground that the Consolidation Officer had no jurisdiction to make an order for expunging the entry of occupier of the disputed plot no. 101/1 existing in petitioners' favour in the basic year khatauni and for correction of record of rights, relating to land unconnected with agriculture. He next submitted that the respondent no. 2 while allowing the petitioners' appeal had rightly restored the basic year entries with liberty to the parties to get their rights in respect of disputed plots declared by a competent court, the revisional court clearly exceeded its jurisdiction in interfering with the order of the Assistant Settlement Officer of Consolidation and restoring that of the Consolidation Officer by the impugned order passed by him in a totally incompetent revision preferred by respondent nos. 5 and 6 against the order of the Assistant Settlement Officer of Consolidation. In support of his aforesaid contention, learned counsel for the petitioners has relied upon a Division Bench of this Court reported in 1974 RD; Triloki Nath Versus Ram Gopal and others, 1982 All. L. J. 1113.

8. Per contra, Sri Ajay Shankar, learned counsel appearing for the respondent no. 5 submitted that the respondent nos. 5 and 6 were fully competent to file Revision No. 3110 against the order of the Assistant Settlement Officer Consolidation in their capacity as the members of the Gaon Sabha and the submissions to the contrary made by learned counsel for the petitioners are totally misconceived.

9. He further submitted that even if it is assumed, though without admitting, that the revision preferred before the Deputy Director of Consolidation-respondent no. 1 was not maintainable at the behest of respondent nos. 5 and 6, the same was not liable to be dismissed on the aforesaid ground in view of the settled law on the issue as propounded by a Full Bench of this Court in the case of Amir Hussain Versus D. D. C., Moradabad and others reported in 1977 AWC 1 FB that the Consolidation Authorities can validly direct the name of Gaon Sabha or State Government to be recorded when they find that there is no valid title holder and that under the law the land had vested in the State Government and then in the Gaon Sabha even though Government or Gaon Sabha has not filed any objection. Advancing his arguments further, Sri Ajay Shankar submitted that since the disputed plots were concurrently found by the respondent nos. 3, 2 and 1 to be in the nature of bhita and talab and the petitioners had failed to establish that they were entitled to be recorded as bhumidhars of the disputed plots, neither

the Consolidation Officer nor the Deputy Director of Consolidation can be said to have committed any error in holding that the names of the petitioners recorded in Zaman 4 in the basic year khatauni, were liable to be expunged and the disputed plots were liable to be recorded as navin parti and talab in zaman 6 respectively. The impugned order which is based upon relevant considerations and supported by cogent reasons requires no interference by this Court.

10. I have very carefully considered the submissions made by learned counsel for the parties and perused the material brought on record and the law reports cited on behalf of learned counsel for the parties in support of their respective contentions.

11. There is no dispute about the fact that in the basic year khatauni both the plots were recorded in Zaman 6 which has been defined in para A-124, sub-para (6) of U. P. Land Records Manual as barren land (i) covered with water; (ii) sites, roads, railways, buildings and other lands put to non-agricultural uses; (iii) grave-yards and cremation grounds other than those included in land held by tenure-holders or in the abadi area; (iv) otherwise barren including the land which cannot be brought under cultivation without incurring high cost. Barren land also includes the land held by the Union of India, State Government, Gaon Sabha or any other local authority entered under Class (5) or class (6) shall be recorded in the name of respective departments of the Union of India or of the State Government, or the Gaon Sabha or local authority as the case may be, to denote the administrative control and management. Upon coming into force of U. P. Z. A. & L. R. Act the land vested in the State and thereafter in the Gaon Sabha.

12. In my opinion, without going into the issue whether the respondent nos. 5 and 6 had any locus to file a revision against the order of the Assistant Settlement Officer of Consolidation by which he had allowed the appeal preferred by the petitioners against the order of the Consolidation Officer, this writ petition is liable to be allowed on the second ground on which the petitioners have challenged the impugned order passed by the respondent no. 1.

13. There is no dispute that in the basic year petitioners were recorded as occupiers of plot No. 101/1 in Zaman 4 while plot No. 102 was recorded in Zaman 6 as talab.

14. The Division Bench of this Court in the case of Triloki Nath (supra) had an occasion of dealing with the question of jurisdiction of consolidation authorities and courts to decide the question of title between the parties relating to land or a holding used for the purposes unconnected with agricultural and to adjudicate upon the claims for correction of the record of rights relating to areas not coming within the circumscribed limit over which the consolidation courts have been given jurisdiction to adjudicate.

15. The Division Bench in paras 9 and 13 of aforesaid judgement has held as hereunder:

"9. From the perusal of the aforesaid definitions there can be no doubt that the provisions of Consolidation of Holdings Act can be made applicable only to that

area which is covered by the definition of the word 'land' and with respect to which a Notification may subsequently be issued under Section 5 of the Consolidation of Holdings Act. The land as defined above is narrow in its application and refers to that area alone which is used for agricultural purposes etc. If any area is used for purposes other than agriculture, horticulture etc. it would not be covered by the definition of the word 'land' and as such the provisions of the Consolidation of Holdings Act cannot apply to that area. Section 5 (1) of the Consolidation of Holdings Act speaks of the consequences which would ensure on publication of Notification under Section 4 (2) of the Act. Under Sub-section (C) (i) of Section 5 (1) of the Consolidation of Holdings Act, a tenure holder is forbidden from using his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming. If the tenure-holder desires to use it for non-agriculture purposes, he can only do so with the permission of the Settlement Officer (Consolidation), that is to say that so long as the holding is utilised by a tenure holder for agricultural purposes etc. the provisions of the Consolidation of Holdings Act would apply, but once the tenure holder decides otherwise he has got to apply to Settlement Officer (Consolidation) for obtaining permission for the user of his holding in the manner permitted under the provisions of this Act. Once the Settlement Officer grants that permission, that area will cease to be holding within the definition of that term as laid down above. As soon as it ceases to be holding by virtue of its use for the purpose other than contemplated under this Act, the Settlement Officer will have no further jurisdiction to deal with that specified area which would thereafter be emanable to his jurisdiction of the Revenue or the Civil Courts as the case may be. That area in our opinion, would thence forward be excluded from consolidation operations. Counsel for the applicant in support of his submission referred to above relied upon a Single Judge decision of this Court reported in Alauddin alias Makki Versus Hamid Khan (1) In that case, the learned Single Judge was considering the provisions of Section 143 of the Z. A. Act when a Bhumidhar uses holding for the purpose not connected with agriculture, horticulture etc. He has to make an application to the Assistant Collector who after making an enquiry makes a declaration to that effect. After making of the declaration, that area is demarcated. On the making of the declaration as aforesaid, the provisions of Ch. 8 of the Z. A. Act ceases to apply the Bhumidhar and under sub-section (2) of Section 143 devolution of such land of the Bhumidhar which has been demarcated is governed by the personal law to which he is subject. The learned Single Judge has taken the view that unless the declaration has been granted by the Assistant Collector, the holding of Bhumidhar would continue to remain his holding even though a part of it is used for non-agricultural purposes. The result in effect of this decision is that even though a part of the holding of a Bhumidhar is used for non-agricultural purposes, its devolution would be governed by the provisions of the Z. A. Act. It is only when the declaration has been granted, as mentioned above, and demarcated, that the course of the devolution is changed and the devolution of land not used for agricultural purpose is governed by the personal law to which the Bhumidhar may be subject. The ruling

relied upon by the acceptable so far as provisions of Z. A. Act are concerned but it cannot apply to the provisions contained in the Consolidation of Holdings Act. As mentioned above the Consolidation of Holdings Act merely permits the use of a holding by tenure holder for purposes unconnected with agriculture etc. subject to permission being granted by the Settlement Officer. It may also be noted that the proviso to Section 5 also lays down that a tenure holder may continue to use his holding or any part thereof for any purpose for which it was in use prior to the date prescribed in the Notification under the said Act. Thus from a reading of this proviso also it is clear that this Act contemplates user of the holding or part thereof for purposes not connected with agriculture provided it was under such case before the notification issued under Consolidation of Holdings Act or was permitted such use under the provisions of the Act. In our opinion the use of the holding for purposes unconnected with agriculture whether permitted under the Act or whether commenced before the enforcement of this Act, in either case that area which is put to a different use other than agriculture etc. would not be covered by the definition of the word 'land' and therefore, the provisions of this Act would not apply. In our opinion, therefore, land not covered by the provisions of the Consolidation of Holdings Act cannot be the subject matter of a dispute before the Consolidation Courts and the said Courts will have no jurisdiction to decide the question of title between the parties thereto. In the case before use the facts clearly demonstrate that both parties were claiming title to the disputed plots on the basis of different deeds of transfer. One party Ramgopal claimed title on the basis of deeds executed between the years 1951 and 1956 while Triloki Nath claimed title on the basis of a transfer deeds of 1963 after the publication of the Notification under Section 4 (2) of the Consolidation Act with respect to the Area. In the circumstances such a dispute was not justifiable by the consolidation courts."

10. .....

11. .....

12. .....

13. It cannot be doubted that the provisions of Section 9 to Section 11 of the Consolidation of Holdings Act refer to the correction of records of rights. In our opinion, the procedure prescribed thereunder can only apply provided the area which is the subject matter of dispute fulfills the requirements of the definition of the word 'land' as envisaged in the Act. We do not find anything in these sections which would empower the consolidation courts to correct their records of rights even with respect to those areas which do not come within the purview of the definition of land as contemplated by the Consolidation of Holdings Act. Needless to repeat that, the object of the Act is re-arrangement of the holdings which in terms means the arrangement of land, that is an area used for purpose of agriculture, horticulture, pisciculture etc. If the area does not come within the circumscribed limit over which the consolidation courts have been given jurisdiction to adjudicate, in our view they will have no power to adjudicate upon such claims for correction of their records. Such a correction can only be effected by consolidation courts or by District Deputy Director of Consolidation as mentioned in Section 5 (a) after the rights of the parties have been decided by a competent court. In this view of the matter, we are not inclined to agree with the submission made by counsel for the appellant that

because a duty is cast upon the Deputy Director of Consolidation to maintain the records of rights, he should be presumed to have jurisdiction to decide disputes and questions of title with respect to those areas which are not covered by the provisions of this Act."

16. Thus the Division Bench of this Court in Triloki Nath (supra) after examining the relevant provisions of U. P. C. H. Act and the law on the issue has clearly held that area which is put to a different use other than agriculture would not be covered by the definition of the word 'land' and therefore, the provisions of U. P. C. H. Act would not apply and the land not covered by the provisions of U. P. C. H. Act cannot be the subject matter of a dispute before the Consolidation Courts and such Courts will have no jurisdiction to decide the question of title between the parties thereto. The Division Bench further held that the consolidation Courts will have no power to adjudicate upon any claim for correction of record of rights pertaining to an area not coming within the circumscribed limit over which the consolidation courts have been given jurisdiction to adjudicate upon.

17. Sri Ajay Shankar, learned counsel for the respondent no. 5 relying upon the Full Bench decision of this Court rendered in the case of Amir Hussain supra) has tried to submit that the consolidation authorities can validly direct the name of gaon sabha or State Government to be recorded when they find that there is no valid title holder and that under the law the land had vested in the State Government and then in the Gaon Sabha even though Government or Gaon Sabha has not filed any objection.

18. Learned counsel for the respondent nos. 5 and 6 has tried to impress upon the Court that since the disputed plots were in the nature of talab and bhita, the Consolidation Officer had rightly expunged the entry of occupant recorded in favour of the petitioners in the basic year and directed the disputed land to be recorded as talab and bhita and the Assistant Settlement Officer of Consolidation had clearly exceeded his jurisdiction in allowing the appeal of the petitioners preferred by them against the order of the Consolidation officer and in restoring the basic year entries and the revisional court rightly corrected the mistake committed by the Assistant Settlement Officer Consolidation by his order by which he had allowed the revision of the respondent nos. 4 and 5 filed by them against the appellate order.

19. The Full Bench decision of this Court rendered in the case of Amir Hussain (supra), in my opinion, cannot be said to be an authority on the issue, for the simple reason that the question referred to the Full Bench was whether the consolidation authorities can validity direct the name of the gaon sabha or the State Government to be recorded when they find that there is no valid title holder and under the law the land had vested in the State Government and then in the Gaon Sabha even though the Government or the Gaon Sabha has not filed any objection. The other question referred to the Full Bench is not relevant for our purposes. The Full Bench was not dealing with the issue regarding the jurisdiction of the consolidation authorities to decide a dispute between the parties relating to a land which was not being used for any non-agricultural purpose.

20. The other decision relied upon by Sri Ajay Shankar reported in 2000 (91)

RD 531 (SC); Ram Murat Versus DDC and others, is also of no help to the answering respondents for the simple reason that in the case of Ram Murat (supra) the objection filed by Ram Murat under Section 9A (2) of U. P. C. H. Act claiming sirdari rights over the land which was recorded as talab and pasture land, was allowed by the Consolidation Officer. Although the order of the Consolidation Officer had attained finality but when the aforesaid fact was brought to the notice of the Deputy Director of Consolidation on the application of the members of the land management committee, he directed for expunging the name of Ram Murat and restored the basic year entries. The order of the Deputy Director of Consolidation was confirmed by the High Court. On appeal, the Apex Court held that the consolidation authorities have a duty to protect the interest of gaon sabha. In the aforesaid case the issue of jurisdiction of consolidation authorities to decide title dispute in respect of land not covered by the ambit of the definition of land given in the U. P. C. H. Act, was not being examined by the Apex Court.

21. The third case relied upon by learned counsel for the respondent no. 4 is Hinch Lal Tiwari Versus Kamla Devi reported in 2001 (92) RD 689, is also of help no to the answering respondents. The issue before the Apex court in the case of Hinch Lal Tiwari (supra) was whether the cancellation of allotment of land made for the purpose of use of building which formed part of pond by the Additional Collector by his order dated 25.2.1999 which was set aside in appeal by the Divisional Commissioner but maintained in part by this Court in writ petition preferred by the aggrieved allottees, could be sustained. The apex court allowed the appeal of the State Government holding that no part of pond could be allotted to anybody for construction of house and confirmed the order of the Divisional Commissioner and directed the respondents-allottes to vacate the land within six months and a further direction was given to the State government to restore the pond and develop and maintain the same.

22. Learned counsel for the respondent no. 4 also placed reliance upon Dheeraj Versus D. D. C. and others reported in 2009 (107) RD 695 as well as Mohan and another Versus D. M. / Collector and others reported 2009 (108) RD 29.

23. None of the aforesaid decisions have dealt with the issue involved in this writ petition.

24. For the aforesaid reasons and in view the settled law on the issue as propounded by the Division Bench of this Court in the case of Triloki Nath (supra) the impugned order dated 6.4.1983 cannot be sustained and is liable to be quashed. The respondent no. 1 exercised his jurisdiction with material irregularity in interfering with the order passed by the Assistant Settlement Officer of Consolidation dated 28.8.1981 which is based upon the sound principles of law and supported by cogent reasons and in restoring the absolutely illegal order passed by the Consolidation Officer.

25. Accordingly, this writ petition succeeds and is allowed. The impugned order dated 6.4.1983 passed by the Deputy Director of Consolidation in Revision No. 3110 (Annexure 9 to the writ petition) is quashed and the order dated 28.8.1981 passed by the Assistant

Settlement Officer of Consolidation is restored.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 7143 of 2012

Rama Shanker Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Upadhyay, Sri Anand Mohan Pandey, Sri Prabha Shanker Pandey

Counsel for the Respondents:
C.S.C., Sri A.K. Srivastava, Sri Ranjan Srivastava, Sri Yashwant Verma, Sri Sameer Sharma

Constitution of India, Art.-226- Promotion on post of Sadar Munsarim-criteria for promotion-whether as per provision of Rules 20(3) of subordinate Civil Court Ministerial Establishment Rule 1947 or U.P. Government Servant Service Criteria for Recruitment or promotion Rules 1994-applicable-held-as per law developed by Apex Court in Om Prakash Shukla Case-rule framed by government under Art. 309-provision of U.P. Government Servant Seniority Rules 1991-would cover the controversy-objection that in absence of pleading-about such fundamental question-court can not shut its eyes-nor omission on part of petitioner can validate act of respondent-selection on basis of seniority subject to rejection of unfit-not sustainable-petition allowed with consequential direction.

Held: Para-23,24,27,28

23. A Division Bench of this Court in the case of Omvir Sharma (Supra) was seized with a similar issue i.e. whether the criteria for determination of seniority as laid down in 'Rules 1947' would be applicable or the criteria laid down in the U.P. Government Servants Seniority Rules, 1991 would apply to the cadre of service in the District Courts and after considering the relevant provisions and relying upon the judgment of the Supreme Court in Om Prakash Shukla's case AIR 1986 (SC) 1043, it also came to the conclusion that seniority will have to be determined as per the Seniority Rules of 1991 framed under the Rule making power of the Governor under Article 309 and not 'Rules of 1947, made under the Government of India Act, 1935, in view of the inconsistency, therefore, the view taken in this case is supported by the said Division Bench judgment also.

24. In this context, I am not able to accept the submissions of Sri Sameer Sharma for the reason, firstly, the terms and conditions of service including the criteria of promotion is to be governed by the rules made by the competent authority and not by the consent of the parties nor by alleged acquiescence of any party. The issue of criteria for promotion goes to the root of the matter. It was incumbent upon the selecting authority, as also the appointing authority, to first of all, ascertain the criteria of promotion and the Rule relevant in this context, especially, when a Division Bench of this Court in Omvir Sharma case (Supra) had already considered a similar issue relating to seniority and vide judgment dated 13.07.2010 had already held that it is the Seniority Rules, 1991 issued by the Governor, which would apply and not the 'Rules 1947' made under the Government of India Act, 1935. Merely because this plea has not been raised in the pleadings, the Court cannot shut its eyes to such a fundamental question nor can this omission on the part of the petitioner, validate an apparently unsustainable act of the respondents.

27. The selection was based on comparative assessment of merit of the candidates by holding an interview and

not on the basis of 'seniority subject to rejection of unfit', therefore, it cannot be sustained. The question as to whether interview could be held for assessing the fitness of a candidate, on the basis of criteria of 'seniority subject to rejection of unfit' is left open for being considered by the competent authority in the light of the provisions of law and the past practice which is not contrary to Rules but with the rider that there has to be uniformity in the matter. It would be impermissible to hold interview in one judgeship but not in others.

28. For the reasons aforesaid, the submission that once the petitioner has appeared in the selection it was not open for him to challenge the same, is also not acceptable, as, this principle does not apply in the facts of this case. It is the respondents, who have a committed a folly by applying a wrong rule and a wrong criteria for selection; the issue, is too fundamental to be brushed aside on this submission of Sri Sharma.

Case Law discussed:
2010(9) ADJ 658

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

1. Heard Sri M.K. Upadhyay alongwith Sri A.M. Pandey, learned counsel for the petitioner and Sri Sameer Sharma for the respondent and Sri A.K. Srivastava for the Respondent No.5.

2. This matter was heard earlier and judgment was reserved on 05.12.2014, however, while going through the record and perusing the judgment of this Court in the case of Sayed Muttaqui Raza Vs. District Judge, Banda, reported in 1999 Law Suit (All) 947 it was revealed that there are Rules known as U.P. Government Service Criteria for Recruitment or Promotion Rules, 1994 (hereinafter referred as 'Rules, 1994'), according to which, the criteria for promotion to the post in question would be 'seniority subject to rejection of unfit' and not 'merit with due regard to seniority' as is provided in Sub Rule 3 of Rule 20 of the Subordinate Civil Court Ministerial Establishment Rules, 1947 (hereinafter referred as 'Rules, 1947'). Rules of 1947, accordingly, the matter was posted for rehearing today vide order dated 08.12.2014 which reads as under:-

"The judgment was reserved in this case on 5.12.2014. After going through the records, I find that the parties have not addressed the Court on the issue as to whether U.P. Government Servants Criterion for Recruitment by Promotion Rules, 1994 or Rule 20 (3) of the U.P. Subordinate Civil Courts Ministerial Establishment Rules, 1947 will apply in the instant case. This Court in Syyed Muttaqui Raza vs. District Judge, Banda, 1999 Law Suit (All), 947 took note of this issue but did not give any categorical finding in this regard.

List this case for rehearing on 11.12.2014 at 10A.M. "

3. Today the matter has been heard.

4. The dispute in this writ petition relates to promotion of Respondent No.5 to the post of Sadar Munsarim in the judgeship of Allahabad. There are two posts of Sadar Munsarim. The dispute revolves round promotion on one of the post.

5. Sri Sameer Sharma, learned counsel for the respondent submits firstly that the petitioners have not taken any plea regarding applicability of the 'Rules 1994' in the pleadings, therefore, it is not open for this Court to consider the same

in the absence of any pleading. In fact in paragraph 40 the petitioner has himself pleaded violation of Rule 20 sub Rule 3 of the Rule 1947, therefore, even according to him Rules 1947 apply. In the alternative, Sri Sameer Sharma submitted that assuming though not conceding that the Rules 1994 were applicable, the petitioner was not found fit, therefore, the promotion in question is not liable to be interfered with and no relief can be granted to him. Moreover, there was one person senior to the petitioner, therefore, for this reason also he is not entitled for any relief. He also submitted that once the petitioner has appeared in the selection for promotion then it was not open to him to challenge the process/procedure, including the criteria, adopted therein.

6. Sri A.K. Srivastava, learned counsel for the Respondent No.5 supported the stand of Sri Sameer Sharma and took the same plea.

7. On the other hand, learned counsel for the petitioner submitted that even if, the plea regarding applicability of Rule 20(3) of Rules, 1947 had not been taken, the respondents were under an obligation to determine as to which rule was applicable and to act accordingly.

8. The terms and condition of service relating to the post of Sadar Munsarim are governed by the 'Rules, 1947', which were notified on 01.08.1947 in pursuance to the provisions of Clause (b) of Sub Section (1) and Clause (b) of Sub Section (2) of Section 241 of the Government of India Act, 1935, in suppression of all existing Rules and Orders on the subject, by the Governor of United Provinces, for regulating appointment to the Ministerial establishment of the Civil Court in the United Provinces subordinate to the High Court of Judicature at Allahabad and the Chief Court of Oudh at Lucknow.

9. Even after framing of the Constitution of India the said Rules have continued to govern the terms and conditions of service of the post in question, in view of the provisions contained in Article 313 (Part XIV Chapter 1) of the Constitution of India) and Article 372 thereof.

10. The incumbents of the post of Sadar Munsarim as also those holding the feeder posts in the District Courts in the State of U.P. are Government Servants and there is no dispute regarding their status as such, thus, the provisions contained in Article 309 to 313 of the Constitution of India are applicable to them, as, they are appointed to Public Services and posts in connection with the affairs of the State of Uttar Pradesh.

11. The Government of Uttar Pradesh in exercise of the power vested under the proviso to Article 309 of the Constitution of India has framed the 'Rules 1994', which were notified in the Gazette on 10.10.1994, these Rules were amended firstly in the year 1998 and thereafter on 12.08.2010. Rule 1(3) of the 'Rules, 1994' provides that they shall apply to the recruitment by promotion to a post or service for which no consultation with the Public Service Commission is required on the principle to be followed in making promotion under the U.P. Public Service Commission Limitation of Functions Regulations, 1954, as amended from time to time.

12. It is not in dispute that the post in question is not one for which

consultation with the Public Service Commission is required, therefore, covered by the said Rules. Rule 2 of the said Rule of 1994 gives overriding effect to it over anything to the contrary contained in any other service Rules made by the Governor under the proviso to Article 309 of the Constitution or Orders for the time being in force. Rule 4 of the said Rules, 1994 as amended on 12.08.2010 i.e. prior to the selection in question held on 07.07.2011, reads as under:-

"4. Criterion for recruitment by promotion-Recruitment by promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay Band 4 (Rs.37,400-67,000) and Grade Pay Rs.8,700 or above shall be made on the basis of merit, and to rest of the posts in all services to be filled by promotion, including a post where promotion is made from a non-Gazetted post to a Gazetted post or from one service to another service, shall be made on the basis of seniority subject to the rejection of the unfit."

13. It is not in dispute that the promotion in question was held by the respondents on the basis of criteria of 'merit with due regard to seniority' as prescribed in sub Rule 3 of sub Rule 20 of the Rules, 1947 and not the criteria of 'seniority subject to rejection of unfit' The proceedings of the Selection Committee reveal that there was a comparative assessment of merit of the candidates for selecting the 'most meritorious' which is not done under the criteria of seniority subject to rejection of unfit. The Respondent No.5 was selected, in spite of being junior, as he was of 'Outstanding Merit' and the petitioner, in spite of being senior was not found efficient. This position that there was a comparative assessment of merit as per Rules, 1947 has not been disputed even at the bar. It is also not in dispute that there is one eligible person senior to the petitioner herein and that the Respondent No.5 was the junior most amongst the eligible persons.

14. The question which falls for consideration and which is purely a legal one, is, whether the Rules of 1994 or the Rules of 1947 would apply for the purpose of determining the criteria for promotion to the post of Sadar Munsarim in the District Courts including the judgeship of Allahabad.

15. If it is found that Rule 4 of the 'Rules of 1994' will apply then, in its light, it will have to be determined as to whether the criteria for promotion to the post in question is 'merit or seniority subject to rejection of unfit'. If it is found that it is the latter then the entire proceedings based on the criteria prescribed under Sub Rule 3 of Rule 20 of Rules 1947 i.e. 'merit with due regard to seniority', will stand vitiated and a fresh selection would be required.

16. The 'Rules 1947' were made under the Government of India Act, 1935, prior to coming into force of Constitution of India. However, as per Article 313 of the Constitution of India read with Article 372 thereof, such Rules continued to be applicable to any public service or any post which continues to exist after the commencement of the constitution as an All India Service or as Service or post under the Union or a State, so far as consistent with the provisions of the

Constitution and until other provision is made in this behalf under the Constitution.

17. After coming into force of the Constitution of India and in view of the provisions contained in Article 309 thereof the State Government has framed 'Rules, 1994' as already referred herein above, for regulating the criteria for promotion to the posts mentioned herein. These Rules have been framed in exercise of powers under the proviso Article 309. Rules 1994 have overriding effect over all other Rules, or orders, therefore, in the event of inconsistency the same will override the Rules 1947 also, especially in view of the provisions contained in Article 313 which contain the word, "until other provision is made in this behalf under this constitution".

18. A Division Bench of this Court in the case of Omvir Sharma Vs. State of U.P. & others, reported in 2010(9) ADJ 658 has held that the term 'Service Rules' used in Rule 4(g) of the U.P. Government Servant Seniority Rules, 1991 includes the Service Rules made under the Government of India Act, 1935. Based on the same reasoning the Rules, 1947 are covered under Rule 2 of the Rules, 1994. Paragraph 14 of the judgment reads as under:-

"The crucial words in the Rule 2 as quoted above is that rules shall apply to all Government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor. The submission pressed by learned Counsel for the appellant is that since no rules were framed under proviso to Article 309 of the Constitution of India regarding determination of seniority earlier and the Rules, 1991 supersedes the rules framed under provision to Article 309, it can have no effect on the 1947 Rules. The above submission is fallacious as noticed above. The applicability of Rules can be judged on two scores. Firstly, if the rule under proviso to Article 309 may be framed by the Governor and secondly the Rule under proviso to Article 309 have been made by the Governor. Non framing of any earlier rules under Article 309 is not decisive. The competence of Governor to frame Rule under proviso to Article 309 is sufficient enough to apply the 1991 Rules. It cannot be denied that ministerial staffs of the subordinate courts are within the rule making power of the Governor. 1950 Rules as noticed above have already been held to be applicable to the ministerial staffs of the subordinate courts by the apex Court in O.P. Shukla case (supra). Thus when the Governor is competent to frame rule under Article 309, the 1991 Rules shall be applicable The word service rules have been defined under rule 4 (g). Service rule under rule 4(g) includes administrative instructions issued by the Governor regulating the recruitment and conditions of service of persons, why statutory Rules framed under section 241 of the Government of India Act can be held not to be service rules is not understandable. Rules framed by the Governor prior to the Constitution of India under section 241 of the Government of India Act are also service rules within the meaning of 1991 Rules which shall be overridden by 1991 Rules. Again the said issue has already been decided in O.P. Shukla's case (supra) which has held that 1947 Rules shall be impliedly overruled by 1950 Rules for the subject which has been covered by 1950 Rules."

19. Now, the question for consideration is as to whether there is any conflict between sub Rule 3 of Rule 20 of the 'Rules, 1947' and Rule 4 of the 'Rules 1994'.

20. Not much discussion is required on this issue as a conjoint reading of the said Rules leaves no doubt that there is apparent difference in the two provisions. As per Rule 4, in the matters of promotion to the post of Head of the Department, one post lower in rank to that of the Head of the Department and the posts in any service carrying pay band 4 (37400-67000) and grade pay Rs.8700 or above, shall be made on the basis of' 'merit' and the rest of the posts in all services to be filled up by promotion, including a post where promotion is made from a non-gazetted post to a gazetted post or from one service to another service shall be made on the basis of seniority subject to rejection of unfit. The post of Sadar Munsarim does not carry pay band 4. The pay scale of Sadar Munsarim is (Rs.9300-34800, grade pay 4600), therefore, in view of the aforesaid Rule 4 of the Rules of 1994, the post of Sadar Munsarim is not one to be filled by promotion on the basis of 'merit', in stead, it is a post which is to be filled by promotion on the basis of 'seniority subject to rejection of unfit'. Thus the criteria for promotion under Rule 4 of 'Rules, 1994' is either merit or 'seniority subject to rejection of unfit' depending upon the factors mentioned therein, whereas under Rule 20(3) of Rules, 1947 it is 'merit with due regard to seniority, which is apparently different and inconsistent with the criteria under the Rules 1994. Neither 'merit nor seniority subject to rejection of unfit can be equated with 'merit with due regard to seniority'. The Governor in exercise of his rule making power under Article 309 has also made "The U.P. Promotion by Selection (on post outside the preview of the Public Service Commission) eligibility list Rules, 1986, which have been amended from time to time. These Rules lay down the criteria for preparing the eligibility lists for promotion based on 'merit' and seniority subject to unfit, separately.

21. In view of the above inconsistency in Rule 4 of 'Rules 1994' and Sub Rule 3 of Rule 20 of the 'Rules 1947' it is the former which will prevail and not the latter. In view of the words "until other provision is made in this behalf under this Constitution", occurring in Article 313 of the Constitution of India, the words "but subject to other provisions of this Constitution" occurring in Article 372 and also in view of the non-obstante clause contained in Rule 2 of Rules 1994, the criteria of promotion applicable in this case is seniority subject to unfit and not 'merit with due regard to seniority'.

22. As the promotion in question has been held on the basis of the criteria of 'merit with due regard to seniority' as prescribed under Sub Rule 3 of Rule 20 and not on the basis of the criteria of seniority subject to rejection of unfit as prescribed under Rule 4 of the Rules 1994, therefore, the very premise on which the selection has been held, is contrary to the mandatory provision contained in Rule 4 of the Rules of 1994, accordingly, the same cannot be sustained.

23. A Division Bench of this Court in the case of Omvir Sharma (Supra) was seized with a similar issue i.e. whether the criteria for determination of seniority as

laid down in 'Rules 1947' would be applicable or the criteria laid down in the U.P. Government Servants Seniority Rules, 1991 would apply to the cadre of service in the District Courts and after considering the relevant provisions and relying upon the judgment of the Supreme Court in Om Prakash Shukla's case AIR 1986 (SC) 1043, it also came to the conclusion that seniority will have to be determined as per the Seniority Rules of 1991 framed under the Rule making power of the Governor under Article 309 and not 'Rules of 1947, made under the Government of India Act, 1935, in view of the inconsistency, therefore, the view taken in this case is supported by the said Division Bench judgment also.

24. In this context, I am not able to accept the submissions of Sri Sameer Sharma for the reason, firstly, the terms and conditions of service including the criteria of promotion is to be governed by the rules made by the competent authority and not by the consent of the parties nor by alleged acquiescence of any party. The issue of criteria for promotion goes to the root of the matter. It was incumbent upon the selecting authority, as also the appointing authority, to first of all, ascertain the criteria of promotion and the Rule relevant in this context, especially, when a Division Bench of this Court in Omvir Sharma case (Supra) had already considered a similar issue relating to seniority and vide judgment dated 13.07.2010 had already held that it is the Seniority Rules, 1991 issued by the Governor, which would apply and not the 'Rules 1947' made under the Government of India Act, 1935. Merely because this plea has not been raised in the pleadings, the Court cannot shut its eyes to such a fundamental question nor can this omission on the part of the petitioner, validate an apparently unsustainable act of the respondents.

25. Moreover, as this Court had already put the learned counsels for the respective parties to notice about the aforesaid issue, while posting the matter for rehearing vide its order dated 08.12.2014, and it being purely a question of law, it cannot be said that any prejudice has been caused to the respective parties on account of absence of pleading on the issue, therefore, for this reason also, the submission of Sri Sharma is not acceptable.

26. So far as the fitness or otherwise of the petitioner is concerned, the same is to be assessed by the selecting authority as per the criteria mentioned in the relevant rules, but, the selection in question was held on the basis of a wrong criteria applying an inapplicable rule.

27. The selection was based on comparative assessment of merit of the candidates by holding an interview and not on the basis of 'seniority subject to rejection of unfit', therefore, it cannot be sustained. The question as to whether interview could be held for assessing the fitness of a candidate, on the basis of criteria of 'seniority subject to rejection of unfit' is left open for being considered by the competent authority in the light of the provisions of law and the past practice which is not contrary to Rules but with the rider that there has to be uniformity in the matter. It would be impermissible to hold interview in one judgeship but not in others.

28. For the reasons aforesaid, the submission that once the petitioner has

appeared in the selection it was not open for him to challenge the same, is also not acceptable, as, this principle does not apply in the facts of this case. It is the respondents, who have a committed a folly by applying a wrong rule and a wrong criteria for selection; the issue, is too fundamental to be brushed aside on this submission of Sri Sharma.

29. Sri Sameer Sharma invited the attention of the Court to the 'U.P. State District Courts Service Rules, 2013, which have come into force w.e.f. 04.07.2013, which now regulate the terms and conditions of service of the posts in question. As per Rule 4 read with Scheduled 'B' thereof the criteria of promotion to the post in question is 'seniority cum merit'. Vide Rule 29 thereof the Rules, 1947 have been repealed. In my view this does not make any difference to the case, as, the selection in question herein was held prior to 04.07.2013. The process of selection having been initiated and completed prior to 04.07.2013, in my view, the vacancy will have to be filled in according to the Rues, 1994.

30. The other submissions of the learned counsel for the parties assuming the application of Rule 20(3) of Rules, 1947, need no consideration.

31. In view of the above discussion, the order of promotion of the Respondent No.5 dated 05.01.2012, passed by the District Judge, Allahabad cannot be sustained and is quashed. The selection proceedings on the basis of which the said promotion order was issued are declared a nullity in the eyes of law. However, as the post in question should not remain vacant, it is provided that the Respondent No.5 shall continue to function as Sadar Munsarim on the same terms and conditions on which he has been continuing. No recovery of financial benefits already given shall be made from him. His continuance shall be subject to the fresh selection and promotion to be made by the respondents, expeditiously, if possible, before 15.01.2015. So far as Relief No.2 is concerned, the same cannot be considered at this stage as it will depend upon the fresh selection to be held, as aforesaid. Learned counsel for the petitioner informs that the other post of Sadar Munsarim is lying vacant since 2009, accordingly it is provided that, if there is no legal impediment then the respondents may consider filling up the said post also accordingly.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2014

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

Civil Misc. Writ Petition No. 8309 of 2001

Ram Kishan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shamsher Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-claim of Back wages-petitioner running under suspension w.e.f. 9.5.82 to 27.04.96-on pendency of criminal trail-after acquittal allowed to join-no disciplinary proceeding

initiated-entitled for back wages-in absence of pleading regarding no gainful working -anywhere else-in view of guidelines of Apex Court in Depali Gundu Sarwase-40% back wages would be proper-payable within 4 month.

Held: Para-7

Indisputably, the petitioner was suspended on the ground that criminal proceeding is pending against him. The Department has not initiated any disciplinary proceedings against the petitioner. The petitioner has been acquitted and has also been reinstated by the respondents but he has been denied salary from the year 1982 to 1996 only on the ground of no work no pay. It is a trite law that no work no pay shall be applicable in such circumstances where there is fault of an employee. The petitioner was a Class IV employee, he was kept out of job for twelve years only on the ground of pendency of criminal proceeding against the petitioner. It is also trite law that on the same charges the Departmental proceedings as well as criminal proceedings can go on simultaneously and in case the employee is acquitted in a criminal case the employer is not bound to accept that decision and make it independent view in the disciplinary proceeding holding him guilty as the law of evidence is not applicable in the disciplinary proceedings. But in the present case the department preferred not to initiate any disciplinary proceedings. Therefore, after acquittal of the petitioner he is entitled for full pay for the period when he was kept out of the employment.

Case Law discussed:

(1979) 2 SCC 80; (2006) 1 SCC 479; (2006) 9 SCC 434; (2009) 5 SCC 705; (2010) 2 SCC 70; JT 2013 (12) SC 322.

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

1. The petitioner has preferred this writ petition for quashing of the impugned order dated 12.7.2000 passed by the respondent no.2 and for payment of his salary for the period when he was under suspension i.e. 19.5.1982 to 27.4.1996.

2. The brief facts of the case are that the petitioner was a tube well operator in Irrigation Department. He was placed under suspension on 19.5.1982 on the ground of criminal proceeding under section 161 IPC and 5(2) of Prevention of Corruption Act, 1988 was pending against the petitioner. In the said criminal case he was acquitted by the IV Additional Sessions Judge on 19.5.1992. A copy of the judgment of the Sessions court is on the record. A perusal of the order indicate that petitioner was falsely implicated in the criminal case and prosecution failed to establish the charges against the petitioner.

3. After acquittal on 19.5.1992, the petitioner made several representations for his joining but no action was taken. He preferred Writ petition No. 31430 of 1994 for a direction upon the respondents to pay his arrears of salary and permit him to join his duties. Pending consideration of the said writ petition the second respondent vide order dated 26.4.1996 permitted the petitioner to join his duty at Tube well No.24 NG Sub. Division III, and his suspension order was revoked. After joining the petitioner made a fresh representation for payment of his salary during the period of his suspension.

4. In Writ Petition No. 31430 of 1994 an interim mandamus was issued on 15.10.1997 with a direction to either pay the difference of salary to the petitioner or file counter affidavit within three weeks. The said order was not complied with as neither the difference of salary was made

nor counter affidavit was filed within the stipulated time. The said writ petition was finally disposed of on 2nd August, 1999 with a direction to the authorities to decide the petitioner's representation in accordance with law by a speaking order. In compliance thereof the impugned order has been passed wherein it is mentioned that the petitioner is not entitled for the back wages on the ground of no work no pay.

5. A counter affidavit has been filed. In the counter affidavit the same stand has been reiterated.

6. I have perused the record and heard learned Standing Counsel.

7. Indisputably, the petitioner was suspended on the ground that criminal proceeding is pending against him. The Department has not initiated any disciplinary proceedings against the petitioner. The petitioner has been acquitted and has also been reinstated by the respondents but he has been denied salary from the year 1982 to 1996 only on the ground of no work no pay. It is a trite law that no work no pay shall be applicable in such circumstances where there is fault of an employee. The petitioner was a Class IV employee, he was kept out of job for twelve years only on the ground of pendency of criminal proceeding against the petitioner. It is also trite law that on the same charges the Departmental proceedings as well as criminal proceedings can go on simultaneously and in case the employee is acquitted in a criminal case the employer is not bound to accept that decision and make it independent view in the disciplinary proceeding holding him guilty as the law of evidence is not applicable in the disciplinary proceedings. But in the present case the department preferred not to initiate any disciplinary proceedings. Therefore, after acquittal of the petitioner he is entitled for full pay for the period when he was kept out of the employment.

8. As mentioned above from the perusal of the judgment of the trial court it is evident that there is finding that petitioner was falsely implicated in the case on account of personal enmity between the complainant and the petitioner.

9. The Supreme Court in the case of Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80, held that ordinarily, an employee whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the period he was in employment. The Court held that the back wages is a normal Rule. This case was consistently followed. However, with the passage of time the Court took a pragmatic view that employer may not be compelled to pay to the workman during the period when he did not worked. Reference may be made to the judgment of U.P.State Brassware Corpn. Ltd. v. Uday Narain Pandey, (2006)1 SCC 479; Haryana State Electronics Development Corpn. Ltd. v. Mamni, (2006) 9 SCC 434; P.V.K. Distillery Ltd. v. Mahendra Ram, (2009) 5 SCC705; Reetu Marbles v. Prabhakant Shukla, (2010) 2 SCC 70; and U.P. SRTC v. Mitthu Singh (2006)7 SCC 180.

10. In a recent case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, JT 2013 (12) SC 322 the Supreme Court after analyzing

a large number of its earlier cases again held that in case of removal/termination of service reinstatement with continuity of service and back wages is a normal rule. In the said case the appellant was a teacher in a primary school. The institution was receiving grant-in-aid by the State Government. She was suspended. The Education Officer did not paid her subsistence allowance also. Thereafter she was subjected to the disciplinary proceedings and her services were terminated. Her termination order was quashed by the School Tribunal. The order of the Tribunal was challenged in the High Court in the Writ Petition. The learned Single Judge set aside the direction given by the School Tribunal for payment of back wages. Aggrieved by the said order the teacher preferred Special Leave Petition in the Supreme Court. The relevant part of the judgment read as under :-

"The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii)The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the persons who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore , once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct. Found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned

Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/ illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e. , the employee or workman , who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

vii) The observation made in J.K.Synthetics Ltd. v. K.P.Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to herein above and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

11. In view of the above taking into consideration the facts and circumstances of this case I am of the view that the petitioner is entitled for 40 percent of the back wages. The petitioner shall be paid the said amount within four months from the date of communication of this order.

12. Let a certified copy of this order be issued to learned Standing Counsel free of cost for communication and compliance of this order. Writ petition is allowed.

13. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 41068 of 1996

Smt. Satyabhama Dubey ...Petitioner
Versus
Regional Deputy Director of Education, Agra & Ors. ...Respondents

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

Counsel for the Respondents:
S.C., Dr. Daya Shankar, Sri K.N. Singh, Sri P.K. Jain

U.P. Intermediate Education Act, 1921-chapter II Regulation 3(1)(b)-seniority determination-petitioner as well Respondent-5 appointed as lecturer on same day approval-Respondent-5 joined earlier than petitioner-authority concern without considering the age factor-wrongly held-respondent-5 senior than petitioner-in meantime regular principal retired-management send proposal for officiating principal to respondent-5 approved by DIOS-petitioner retired on 30.06.2000-while respondent-5 on 30.06.2002-admittedly petitioner being senior most lecturer-could not discharge the duty of officiating principal-hence except compensation of Rs. 2 lacs no salary-payable w.e.f. 01.07.96 to 30.06.2002-but fixation of salary shall be made as officiating principal notionally with all other retirement benefits-what so ever amount paid to respondent-5-shall not be recovered.

Held: Para-22
As the respondent no.5 has already worked as officiating Principal in the institution w.e.f. 1.7.1996 to 30.6.2002, she must have been paid salary against the said post, therefore, considering the aforesaid fact and also the fact that the petitioner actually did not function on the said post during the aforesaid period, it is not possible to grant salary of the post of Principal to the petitioner as claimed by her, however, considering the fact that her statutory right was violated on account of arbitrary and illegal action of the official respondent no.1, Deputy Director of Education, Agra Region, Agra, the petitioner deserves to be compensated for the financial loss caused to her. Considering the facts and circumstances of the case an amount of Rs.2 lakh payable by the State Government to the petitioner shall be adequate compensation to the petitioner. The aforesaid amount shall be paid by the respondent State to the petitioner within two months. In addition to the above, it is provided that the salary of the petitioner shall be fixed treating her as officiating Principal of the institution w.e.f. 1.7.1996 notionally and based thereon, the post retirement benefits like pension, etc. be revised and re-fixed, if permissible under the rules, within a period of six months from the date a certified copy of this order is produced before the concerned officer. The salary, emoluments and post retirement benefits already paid to the respondent no.5 and consequential benefits based thereon, shall remain unaffected by this judgement.

Case Law discussed:
2007 Law Suit (All) 90:207(3) ADJ 1; [2011 (4) ADJ 401]; (1998) UPLBEC 181.

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

1. Heard Shri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel for respondents no.1, 2 and 3. None appears for the respondent no.5.

2. The petitioner and respondent no.5 were appointed as lecturer in the respondent institution vide order dated 30.11.1972 and there is no dispute in this regard. It is also not in dispute that in pursuance to the aforesaid order of substantive appointment, the petitioner joined on the post in question on 1.12.1972 whereas respondent no.5 joined earlier, i.e., 30.11.1972. In paragraph 13 of the writ petition a categorical assertion has been made that the aforesaid appointment of the petitioner and respondent no.5 were approved by the competent authority by the same order of the same date passed sometime in December, 1972. This fact has not been categorically and specifically denied by any of the respondents.

3. A seniority list of lecturers was issued by the management in the year 1981-82 wherein the petitioner was shown as senior to the respondent no.5. Thereafter, on 11-3-1985, an order was passed by the respondent no.2 declaring the respondent no.5 as senior to the petitioner on the ground that the respondent no.5 has joined her service prior to the petitioner, as already mentioned in the earlier part of this judgement.

4. Being aggrieved, the petitioner filed a writ petition before this Court challenging the aforesaid order dated 11.3.1985 which was disposed of on 22.1.1996 setting aside the said order on the ground of violation of principles of natural justice with liberty to the respondents to pass a fresh order after giving due opportunity of hearing.

5. In pursuance to the aforesaid, the Deputy Director of Education, Agra Region, Agra, issued a notice to the petitioner and other concerned on 26.4.1996. In response thereto, the petitioner herein, replied and the other concerned persons also filed the reply.

6. In the meantime, while the proceedings were pending before the Deputy Director of Education, Agra Region, Agra, the regular incumbent working on the post of Principal retired on 30.6.1997.

7. On 1.7.1997, an order was passed by the management, appointing respondent no.5 as officiating Principal of the institution which was approved by the official respondent.

8. Being aggrieved, the petitioner herein, filed a writ petition before this Court which was disposed of vide judgment dated 5.8.1996 with a direction to the Deputy Director of Education (Secondary), Agra Region, Agra, to decide the inter se seniority dispute between the petitioner and respondent no.5 within a stipulated period.

9. In pursuance to the aforesaid, the impugned order dated 26.11.1996 was passed, wherein, the respondent no.5 has been held to be senior to the petitioner, consequently, her officiation on the post of Principal of the institution has been affirmed.

10. The contention of Shri Khare, learned counsel for the petitioner is that both the contesting parties having been substantively appointed by an order of the same date and such appointment having been approved by the competent authority on the same date by the same order, it is their age which would be the determining factor in the matter of seniority, in view of the provisions contained in Regulation 3(1)(b) of Chapter II of the Regulations framed under U.P. Intermediate Education Act, 1921 (for short "Act of 1921"). The contention is that the petitioner being elder in age was senior and his seniority was wrongly upset by the respondents resulting in officiating appointment of respondent no.5 and deprivation of right of the petitioner to officiate as Adhoc Principal and causing financial loss to her. The petitioner has mentioned her date of birth in paragraph 9 of the writ petition as 10.8.1939, whereas the date of birth of respondent no.5 is mentioned as 14.1.1942. He contends that this fact has not been denied in the counter affidavit.

11. Learned counsel for the petitioner submitted that keeping in mind

the financial loss caused to the petitioner, she should be treated as officiating Principal w.e.f. 1.7.1996 with consequential salary of the post etc.

12. Shri Khare has contended that as the petitioner was willing to work but was prevented to do so, therefore, the principle 'no work, no pay' will not apply and the petitioner shall be entitled to full salary for such period during which she was prevented from working as officiating Principal.

13. In this regard he has relied upon the judgements of this Court in Brijendra Prakash Kulshrestha v. Director of Education and others, 2007 Law Suit (All) 90 : 207 (3) ADJ 1 and in Kishori Lal v. Chairman Board of Director, Aligarh Gramin Bank Aligarh, [2011 (4) ADJ 401].

14. The contention of learned Standing Counsel is that as the respondent no.5 has joined on the post of lecturer prior to the petitioner, therefore, she has rightly been held to be senior to the petitioner.

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

16. The seniority of teachers in the institution in question is to be determined in accordance with the provisions contained in Regulation 3 of Chapter II of the Regulations framed under the Act of 1921. Regulation3 of the Regulations is extracted as hereinbelow:

"3. (1) The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions-

(a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age;

(bb) Where two or more teachers working inh a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted:

Provided that if such length of service is equal, seniority shall be determined on the basis of age.

पर ज्येष्ठता निर्धारित की जायेगी।

(2) The seniority list shall be revised every year and the provisions of Clause (1) shall mutatis mutandis apply to such revision."

17. The aforesaid provision clearly states that the seniority of teachers shall be determined on the basis of their substantive appointment on the said post. Substantive appointment in this case would be an appointment which is duly approved by the competent authority. Both the petitioner and respondent no.5 were appointed vide order dated 30.11.1972. The averments made in paragraph 13 of the writ petition to the effect that their appointments were duly approved by the same order passed sometime in December 1972 has not been categorically and specifically denied by any of the respondents by asserting to the contrary. A bald denial has been made which is no denial in the eye of law. No

material has been produced before the Court to establish that the respondent no.5's appointment was approved prior to that of the petitioner. The contents of paragraph 9 of the writ petition wherein their respective dates of birth have been mentioned, have also not been denied by the respondents and there is nothing on the record to show to the contrary. The petitioner having been born on 10th August 1939 is older in age to the respondent no.5 herein, who was born on 14.1.1942, therefore, clearly in view of the aforesaid provisions, the petitioner was senior to respondent no.5.

18. On a perusal of the impugned order, I find that the concerned authority has only considered part of the provisions contained in Regulation 3 (1)(b) of the Regulations that too cursorily and superficially. He has only referred to the first line of the provision to the effect that seniority will be determined on the basis of the date of substantive appointment and thereafter has proceeded to consider the date of joining of the contesting parties and has held the respondent no.5 to be senior based thereon, without noticing that the date of joining is not mentioned as a criteria for determining seniority, instead, in the event two or more persons have been appointed on the same date, then, their age is to be the determining factor. He has not at all considered the age of the parties while determining the seniority dispute. Thus, clearly the consideration of the said authority is without adverting to the relevant and complete provisions, referred to hereinabove. In this regard, learned counsel for the petitioner has relied upon a decision of the Lucknow Bench of this Court in Jagat Narain Dwivedi vs. Deputy Director of Education, Ivth Region, Allahabad and others, reported in (1998) 1 UPLBEC 181. In paragraph 4 and 13 of the said judgment it has been held that where the order of appointment and approval are of the same date, then, it is the age that is the determining factor in the mater of seniority of the teachers.

19. As no interim order has been passed in this case, therefore, the respondent no.5 officiated on the post of Principal of the institution w.e.f. 1.7.1996 to the date of her retirement on 30.6.2002.

20. The petitioner herein, retired from service on 30.6.2000 therefore, due to the aforesaid circumstances she was prevented from working as officiating Principal inspite of being senior. It is trite that in absence of regularly selected candidate for the post of Principal the senior most teacher shall officiate as Adhoc Principal. In this regard a provision is contained in Section 16E (ii) read with the Proviso to Regulation 2 of Chapter II of the Regulations made under the Act of 1921 and in Section 18 of the U.P. Secondary Education Service Selection Board Act of 1982. It is nobody's case that the petitioner was otherwise ineligible for such officiation and did not have the requisite qualification. Had the seniority been rightly determined, she would have officiated as Principal of the institution w.e.f. 1.7.1996 till 30.6.2000. There is no dispute that an officiating Principal is also entitled to the salary of the post in question and consequential benefits resulting therefrom.

21. In view of the above, the impugned order cannot be sustained and the same is, accordingly, quashed.

22. As the respondent no.5 has already worked as officiating Principal in

the institution w.e.f. 1.7.1996 to 30.6.2002, she must have been paid salary against the said post, therefore, considering the aforesaid fact and also the fact that the petitioner actually did not function on the said post during the aforesaid period, it is not possible to grant salary of the post of Principal to the petitioner as claimed by her, however, considering the fact that her statutory right was violated on account of arbitrary and illegal action of the official respondent no.1, Deputy Director of Education, Agra Region, Agra, the petitioner deserves to be compensated for the financial loss caused to her. Considering the facts and circumstances of the case an amount of Rs.2 lakh payable by the State Government to the petitioner shall be adequate compensation to the petitioner. The aforesaid amount shall be paid by the respondent State to the petitioner within two months. In addition to the above, it is provided that the salary of the petitioner shall be fixed treating her as officiating Principal of the institution w.e.f. 1.7.1996 notionally and based thereon, the post retirement benefits like pension, etc. be revised and re-fixed, if permissible under the rules, within a period of six months from the date a certified copy of this order is produced before the concerned officer. The salary, emoluments and post retirement benefits already paid to the respondent no.5 and consequential benefits based thereon, shall remain unaffected by this judgement.

23. In view of the aforesaid, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 42092 of 2011

Ashok Kumar Singh & Anr. Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
A.S.G.I., Sri Sanjeev Singh, Sri P.K. Singhal, S.C.

Regional Rural Bank (appointment & promotion) of officer and employees Rules 2010-Part III Rule 10 (i)(d)- Recruitment without advertisement in two national daily news papers having vide circular in locality-merely on basis of application from such candidate registered in employment exchange-held-being violative of Art. 14 and 16 of constitution of India-illegal-petition allowed-with direction to fill up the vacancy-after following mandatory provision of Rule 10 from open market-advertising two widely circulated new paper one in vernacular and other in regional language-on official website.

Held: Para-26
For the reasons stated hereinabove, the vires of rule 10 and paragraph no. 1(d) of part III of Regional Rural Banks (Appointment and Promotion of Officers and Employees) Rules 2010 is declared intravires of the Constitution of India. The mode of calling applications as prescribed under rule 10 would mandatorily include inviting candidates from the open market by advertising in two widely circulated newspapers (one in vernacular language) over which the Regional Rural Bank have to fill up the vacancies including posting the advertisement on the official website.

Case Law discussed:

(2011) 3 SCC 436; AIR 1998 SC 331; [(1996) 6 SCC 216]; (2003) 10 SCC 276; 2014 (2) SCALE 262; AIR 1997 SC 1446; (2006) 2 SCC 482; (2006) 4 SCC 1; (2006) 10 SCC 261; AIR 1962 SC 602 (604); (1994) 3 UPLBEC 1551.

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

1. Prathama Bank Moradabad is a regional rural bank governed by the provisions of Regional Rural Bank Act 1976 (hereinafter referred to as the 'bank'). The petitioners belong to Other Backward Class (O.B.C.) category, are high school pass, the petitioners are not enrolled in the Employment Exchange. The respondent-bank to fill up Group 'C' post invited names of candidates registered with the employment exchanges. Ministry of Finance (Department of Financial Services) vide notification dated 13.07.2010 provided that post of Group 'C' shall be filled in the bank after making reference to the Employment Exchange, Sainik Board or other agencies catering to the welfare of scheduled castes, scheduled tribes, physically challenged persons or other category of persons as recognized by the Central Government or the State Government having jurisdiction over the Regional Rural Bank filling the posts.

2. Petitioners have approached the Court seeking the following reliefs:

"(i) a writ, order or direction of a suitable nature declaring Rule 10 and paragraph no. 1(d) of part III of Regional Rural Banks (Appointment and Promotion of Officers and Employees) Rules 2010 as ultravires the Constitution of India as far as it relates to the appointment in the respondent bank.

(ii) a writ, order or direction in the nature of mandamus commanding the respondents to advertise the Group 'C' posts in the daily news papers and only then proceed to fill up the vacancies.

(iii) a writ, order or direction of a suitable nature commanding the respondents to relax the upper age limit from 28 to 30 years of General Category."

3. The contention of learned counsel for the petitioners is, by inviting names only from the Employment Exchange and not from the open market by advertisement is violative of Articles 14 and 16 of the Constitution of India, thus rule 10 is ultravires of Article 16 as it deprives other similarly situated persons from applying for the post, thus, the action of the bank in not advertising the post is violative of the principles of the equality in employment as enshrined under Article 16.

4. In support of his submission, learned counsel for the petitioners has relied upon State of Orissa and another Versus Mamata Mohanty1.

5. Sri Sanjeev Singh, learned counsel for the respondent-bank, submits that the bank is bound by the provisions of Regional Rural Banks (Appointment and Promotion of Officers and Employees) Rule, 2010 notified by Ministry of Finance (Department of Financial Services) on 13.07.2010, under Section 29 of the Regional Rural Bank Act 1976 read with Section 17 thereof. Rule 10 clearly provides Group 'C' post shall be filled up by the bank after making reference to the Employment Exchange, thus the bank has not committed any illegality or irregularity in filling up the post from the candidates exclusively sponsored by the Employment Exchange and other Boards, further, there is no

provision for inviting applications from open market by advertising the vacancy.

6. Rival submissions fall for consideration.

7. In Mamata Mohanty (supra) one of the question before the Hon'ble Supreme Court was, as to whether, a person can be appointed without following procedure known in law, as the vacancy of the post was never advertised nor was the name of the eligible candidates requisitioned from the Employment Exchange. The Court referring to earlier judgments was of the view that even if the names of candidates are requisitioned from the Employment Exchange, in addition thereto, it is mandatory on the part of the employer to invite applications from all the eligible candidates from the open market by advertising the vacancies in newspaper having wide circulation. Para no. 35, 36 and 37 are as follows:

"35. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., AIR 1992 SC 789; State of Haryana & Ors. v. Piara Singh & Ors., AIR 1992 SC 2130; Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216; Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331; Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors., AIR 2005 SC 2103; National Fertilizers Ltd. & Ors. v. Somvir Singh, AIR 2006 SC 2319; Telecom District Manager & Ors. v. Keshab Deb, (2008) 8 SCC 402; State of Bihar v. Upendra Narayan Singh & Ors., (2009) 5 SCC 65; and State of Madhya Pradesh & Anr. v. Mohd. Ibrahim, (2009) 15 SCC 214).

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such

appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam and others, AIR 1998 SC 1289; Mangal Prasad Tamoli v. Narvadeshwar Mishra, AIR 2005 SC1964; and Ritesh Tiwari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823)."

8. Learned counsel for the respondent-bank has relied upon Arun Tewari and others Versus Zila Mansavi Shikshak Sangh and others2, wherein, the Court had approved the provision of the rule for inviting applications only from the Employment Exchange. Paragraphs no. 19 and 20 are as follows:

"19. The next contention relates to inviting applications from Employment Exchanges instead of by advertisement. This procedure has been resorted to looking to the requirement of a time-bound scheme. The original applicants contended that if the posts had been advertised, many others like them could have applied. The original applicants who so complain, however, do not possess the requisite qualifications for the post. As far as we can see from the record, nobody who had the requisite qualifications, has complained that he was prevented from applying because advertisement was not issued. What is more important, in the special circumstances requiring a speedier process of selection and appointment, applications were invited through employment exchanges for 1993 only. In this context, the special procedure adopted is not unfair. The State has relied upon the case of Union of India & Ors. Vs. N. Hargopal & Ors. (1987 [3] SCC 308), where Government instruction enjoining that the filed of choice should, in the first instance, be restricted to candidates sponsored the first instance, be restricted to candidates sponsored by the Employment Exchanges, was upheld as not offending Article 14 and 16 of the Constitution. In the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors. (1992 [4] SCC 99, at page 111). this Court approved of recruitment through employment Exchanges as a method of preventing malpractices. But in the subsequent and more recent case of Excise Superintended Malkapatnam, Krishna District A.P. V. K.B.N. Visweshwara Rao & Ors.3 this Court has distinguished Union of India V. Hargopal (supra) on the basis of special facts of that case. It was observed that the better course for the State would be to invite applications from employment exchanges as well as to advertise and also give wide publicity through TV, Radio etc. The Court had to consider whether persons who had applied directly and not through employment exchange should be considered. The Court upheld their claim for consideration.

20. There are different methods of inviting applications. The method adopted in the exigencies of the situation in the present case not be labelled as unfair, particularly when, at the relevant time, the two earlier decisions of this Court were in vogue."

9. The issue as to whether for employment in public services, whether the department can restrict the candidates sponsored through the employment exchange for selection, was also considered by the Hon'ble Supreme Court in Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N.Visweshwara Rao and others4. The said decision was rendered by the Hon'ble Supreme Court of India bearing in mind the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, particularly, Section 4(1) of the said Act. In the said decision, the Hon'ble Supreme Court (Three Judge Bench), in Paragraph 6, held thus:-

"6. ..... Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

10. Again the said issue came up for consideration before the Hon'ble Supreme Court in the decision reported in Suresh Kumar and others v. State of Haryana and others5 in respect of recruitment of 1600 Police Constables in the State of Haryana. In the said case, selection of candidates made were not disturbed till the new process was over as directed by the Hon'ble Supreme Court and it was held that no advertisement to the newspaper nor employment exchange was intimated for filling up of the vacancies and further selection was ordered to be conducted by issuing re-advertisement calling for application to fill up those vacancies.

11. It is also relevant, at this juncture, to note that the Three Judge Bench of the Hon'ble Supreme Court, in the decision reported in Renu and others v. District & Sessions Judge, Tis Hazari and another6, reiterated the above said proposition of law and gave a direction to all the High Courts to comply with the purport of Articles 14 and 16 of the Constitution of India while filling up of any vacant post either in the High Court or in the Subordinate Courts throughout India. In the said decision, the Hon'ble Supreme Court held that post shall be filled up by issuing the advertisement in atleast two newspapers and one of which must be in vernacular language having wide circulation in the respective State, apart from calling for a list from the local employment exchange and any vacancy filled up without advertising as prescribed, shall be void ab-initio and would remain unenforceable and inexecutable except the appointment on

compassionate grounds, as per the Rules applicable

12. Applying the law on the facts of the case at hand, the Ministry of Finance notified the 2010 Rules on 13.07.2010 under the 1976 Act. Rule 10 provides for recruitment for the post of Group 'C' which is as follows:

10. Recruitment to the posts of Group 'C'.-

The posts of Group 'C' employee shall be filled in by the Regional Rural Bank after making a reference to the Employment Exchange, Sainik Board or other agencies catering to the welfare of Scheduled castes, scheduled tribes, physically challenged persons or other category of persons as are recognized by the Central Government or the State Government having jurisdiction over the Regional Rural Bank filling the posts.

13. Part III of the Rule provides the mode of appointment to Group 'C' post by 100% direct recruitment and the minimum qualification is 10th standard pass or equivalent. The selection is on the basis of interview, the age prescribed is 18 years to 28 years providing relaxation in case of candidates belonging S.C., S.T. and Other Backward Class (O.B.C.) category.

14. The contention of learned counsel for the petitioners is that they were not aware that the respondent-bank is filling up the vacancies of Group 'C' post as there was no advertisement, thus depriving the petitioners their valuable right as conferred under Article 16 of the Constitution, respondent-bank has taken a plea that they have strictly complied with rule 10 of the Rules of 2010 by inviting the names of eligible persons who were registered with the Employment Exchange, further, the bank is going to fill up 99 posts in the near future after inviting names only from the Employment Exchange.

15. The contention of learned counsel for the respondent-bank cannot be accepted as the bank has to comply with the constitutional mandate enshrined under Article 14 and 16 of the Constitution which is mandatory in public employment, failing which such appointments would be bad in law.

16. The submission on behalf of the respondents that Rule/Order/Notifications have been complied with is preposterous for the simple reason that such Rule/Order/Notification being violative of constitutional mandate is to be ignored in terms of the judgment of the Supreme Court rendered in Ram Ganesh Tripathi and others Versus State of U.P. and others7.

17. A bare perusal of rule 10, it is evident that the rule requires that the post shall be filled by the bank after making reference to the Employment Exchange, Sainik Board or other agencies, but the rule nowhere states that the applications of candidates cannot be entertained from the open market, equal opportunity in employment as enshrined under Article 16 which mandates wide publicity.

18. In order to uphold the vires of rule 10, apart from making reference to Employment Exchange, Sainik Board or other agencies, bank will also have to advertise the vacancies in two leading widely circulated newspapers (one in vernacular language)/electronic media

inviting applications from open market falling within the jurisdiction over the Rural Regional Bank to fill the post.

19. The main object of Art. 16 of the Constitution is to create a constitutional right to equality of opportunity and employment in public offices. The appointment to any post under the State can only be made after making a proper advertisement inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the interse merit of candidates who applied in response to the advertisement made8. An appointment made in violation of Articles 14 and 16 of the Constitution of India would be void. It would be a nullity.9

20. The right guaranteed by Art. 16(1) includes-

(a) The right to make an application for any post under the Government.10 (b) Art. 16(1) further guarantees a right to be considered on the merits for the post for which an application has been made; but not the right to be appointed11,

21. Public employment is a facet of right to equality envisaged under Art. 16 of the Constitution.

22. This guarantee is violated where the Government imposes an arbitrary ban upon the appointment or re-appointment of a particular individual, in the sense that even though he applies for a post, his application will not be considered on the merits, and as such has no relation to his suitability for the appointment to that post.12

23. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, provides for compulsory notification of vacancies to employment exchanges. Sub-clause (1) of Section 4 is as follows:

"After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before filling up any vacancy in any employment in that establishment notify that vacancy to such Employment Exchange as may be prescribed."

24. Section 7 provides for penalties, if any employer fails to notify to the Employment Exchange prescribed for the purpose any vacancy in contravention of sub-section (1) or sub-section (2) of section 4, he shall be punishable for the first offence with fine which may extend to five hundred rupees.

25. Full Bench judgment of this Court in Radha Raizada and others versus Committee of Management and others13, held that the publication for any vacancy on the notice board is no advertisement in the eyes of law. For appointment against substantive vacancy, advertisement of vacancy in two newspaper is mandatory and in absence of such advertisement the appointment would be per se illegal.

26. For the reasons stated hereinabove, the vires of rule 10 and paragraph no. 1(d) of part III of Regional Rural Banks (Appointment and Promotion of Officers and Employees) Rules 2010 is declared intravires of the Constitution of India. The mode of calling applications as prescribed under rule 10 would mandatorily include inviting candidates

from the open market by advertising in two widely circulated newspapers (one in vernacular language) over which the Regional Rural Bank have to fill up the vacancies including posting the advertisement on the official website.

27. In future vacancy, all Regional Rural Banks shall invite applications for posts as mentioned herein above.

28. Copy of the order shall be sent to Ministry of Finance (Department of Financial Services) New Delhi by the Registry for information /circulation and compliance.

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.11.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Application No. 45679 of 2014

(U/s 482 CR.P.C.)

Jai Prakash Maurya ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ashok Kumar Tripathi

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

Cr.P.C.-Section-482-Seeking direction for consideration of bail application on same day-reliance placed upon full Bench as well as the judgment of Apex Court-held direction issued by Apex Court binding upon all Courts, under Article 145 of Constitution-no further direction by High Court required-otherwise would be great travesty of justice-without giving privileges to the trail court to consider the bail on merit-in absence of specific pleadings about violation of Art. 21-no such direction required-application rejected.

Held: Para-25
The applicant has yet to surrender. He has yet to move an application before concerned court. Therefore, to issue a direction for something which is yet to see light of the day, is nothing but requiring this Court to pass an order in anticipation of certain facts which are not pleaded or placed before this Court by means of pleading in application concerned. In other words the applicant is seeking relief on imaginary basis. Unless a case is made out for violation of fundamental right under Article 21 of the Constitution by specifically pleading all relevant facts, in my view, no such direction would be justified to issue as it amounts to issuing futile direction by this Court and that too on superfluous and imaginary basis. The aforesaid decisions, therefore, as cited at the bar in support of submission by learned counsel for the applicant, do not help him in any manner.

Case Law discussed:
Cr.L.J. 1981=1994 (4) SCC 260; 2009(4) SCC 437; 2005(1) AWC 416; 1997 (1) SCC 416; JT 1998 (2) SC 658; 2011 (1) SCC 694.

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

1. This application under Section 482 Cr.P.C. is filed with a prayer to set aside Non Bailable Warrant dated 27.9.2014 issued against applicant in Complaint Case No. 964 of 2014 now Complaint Case No. 3257 of 2012. It has been further prayed that a direction be issued to court concerned to consider their bail application of applicant on the same day in Case Crime No. 230 of 2003 under

Sections 323, 504 and 494 IPC, Police Station Badagaon, district Varanasi in view of the law laid down in Joginder Kumar Vs. State of U.P. 1994 Cri.L.J. 1981=1994(4) SCC 260, Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (4) SCC 437 and Smt. Amarawati and another Vs. State of U.P., 2005(1) AWC 416.

2. From the order sheet, it is evident that consistently the applicant has remained absent, most of the time, and in these circumstances, the court below was fully justified in issuing now bailable warrant. I do not find any illegality therein and therefore there is no justification to interfere.

3. Now taking the submission that the bail application of the applicant should be considered on the same date I propose to examine on this aspect of the matter with deeper scrutiny. It is not the case of applicant that he has already surrendered or that though he has attempted to surrender but there is any illegal, unauthorised obstruction created by respondents in such endeavour of applicant. It is also not the case that any authority of this Court or Apex Court though cited before court concerned but it has refused to consider the same or ignored. No allegations have been made that the court concerned is acting contrary to law or the Presiding Officer has any kind of bias etc. so as to pass an order without looking into the matter in accordance with law.

4. The law laid down by Apex Court by virtue of Article 145 of the Constitution of India, is binding on all courts and authorities across the nation and everybody is supposed to act in the aid and enforcement of such law laid down by Supreme Court. There is no presumption that courts below shall not follow the law laid down by Supreme Court. There is also no presumption that a decision of Supreme Court laying down certain law, if cited, in support of arguments by a party, before a court, they would not be looked into and appreciated by such court. To follow the law laid down by Supreme Court, no sanction or approval or direction of this Court is required. To ask for such direction, when there is no factual foundation in the application, is nothing but doubting the capability, approach and efficiency of subordinate courts, which is not in the larger interest of institution as such. Moreover, in absence of any factual foundation, it is well established that no futile or uncalled for directions are to be issued by this Court. Its hand are already full of work and rather extremely loaded therewith, hence entertaining cases just for futile direction, which ex facie deserved to be dismissed, would be nothing but encouraging avoidable unnecessary burden upon this Court.

5. Even otherwise a direction to follow a decision of Apex Court without appreciating, whether it applies on the facts and circumstances of the case and would be cited by parties concerned, is like anticipating something, which is not existing in presenti and on the facts of the case, may not be applicable.

6. I may illustrate on this aspect by looking into the aforesaid decisions in detail, which the applicants intended to be considered by courts below, under a direction of this Court, though I am not sure whether it would actually be cited by counsel of accused applicants when they

would be presenting their case before court below.

7. In Joginder Kumar (supra), a habeas corpus writ petition under Article 32 of the Constitution was filed before Supreme Court alleging about unlawful detention of petitioner (a practising lawyer) by police authorities and seeking his release. The Senior Superintendent of Police, Ghaziabad appeared before Court and admitted to have detained petitioner for five days, not in detention but for taking his help in inquiry/investigation of an offence of abduction. Since the petitioner was already released by police, the Court found that relief in habeas corpus now cannot be granted. Yet it enquired as to how and in what circumstances, without informing the court concerned, an individual could be detained by police for five days. The Court found it a case of massive violation of human rights, besides the statutory legal provisions relating to arrest etc. The Court held that law of arrest is one of balancing individual rights, liberties and privileges, on the one hand; and, individual duties, obligations and responsibilities on the other hand. The Court said that an arrest cannot be made merely for the reason that a police officer is empowered under law to do so. The existence of power is one thing and justification for exercise thereof is another. Genuine, justified and satisfactory reasons must exist before a police officer should go to arrest a person so as to curtail his fundamental right of life and liberty. A person is not liable to arrest merely on suspicion of complicity of offence. Except in heinous offences, an arrest must be avoided unless there exists reason therefor. That was not a case where after inquiry or investigation by police, a charge sheet was filed and thereupon an incumbent was to surrender himself to the Court, and the power of Court either to release him on bail if so requested, or to sent him in judicial custody was under consideration.

8. This decision then was considered in D.K. Basu Versus State of West Bengal 1997 (1) SCC 416 which was a public interest litigation entertained by Supreme Court taking cognizance of a letter received from Executive Chairman, Legal Aid Services, West Bengal complaining about certain custodial deaths.

9. Apparently the aforesaid decision also strictly has no application to the nature of dispute involved in this application as also the stage at which question, as to whether the applicants should be detained in jail or not, has to be considered. Here it is not the case of exercise of power by police but the judicial discretion of Court and thereto nothing should be anticipated unless an appropriate order is passed by court concerned.

10. The decision in Joginder Kumar (supra) in similar circumstances has been referred and followed subsequently also in K.K. Jerath Vs. Union Territory, Chandigarh and others, JT 1998(2) SC 658 which was a case of anticipatory bail under Section 438 Cr.P.C. apprehending arrest during a C.B.I. inquiry. It was attempted to argue that there is presumption of innocence in favour of each individual until charge against him is established and, therefore, it would not be consistent with philosophy of Constitution that such a person should be subjected to interrogation by application of psychological or ambient pressures much

less physical torture. It was stressed that Apex Court has a duty to protect a citizen against such inroads of these fundamental rights. The Apex Court while dismissing petition observed that in considering a petition for grant of bail, necessarily, if public interest requires detention of citizen in custody for purposes of investigation, it would be allowed otherwise there could be hurdles in investigation even resulting in tampering of evidence. In other words the Apex Court did not find any attraction in the arguments for the reason that a bail application has to be considered in the light of already established principle through various judicial precedents and not on mere asking.

11. There are several subsequent cases also wherein the Apex Court has distinguished the cases where there was no allegation of misuse of power of arrest by police authorities and an incumbent was arrested having been found prima facie guilty of commission of a cognizable offence.

12. In respect to circumstances where a bail application has to be considered by courts, the relevant considerations have been laid down in catena of authorities which are well established and need not to be added hereat. They have to be followed.

13. In Lal Kamlendra Pratap Singh (supra) the matter came to be considered before the Court for quashing of a first information report. Here also apprehending arrest due to mere registration of a first information report, the matter was brought before this Court seeking quashing of first information report. The High Court dismissed the application and thereagainst the matter was taken to Apex Court. A complaint was made that during investigation or inquiry, applicants apprehend their arrest by police authorities in an arbitrary manner. It is in this context the Court reminded police authorities to follow the dictum and direction laid down in Joginder Kumar (supra). When the matter was pending before Supreme Court, the police completed investigation and submitted a charge sheet. The Court then declined to interfere since the charge sheet was submitted and permitted petitioner to approach the court concerned by filing a bail application. The Court approved and reminded a seven Judges decision of this Court in Smt. Amarawati and another (supra) wherein an observation was made that the absence of power of anticipatory bail in State of U.P. would not debar the concerned Court/Magistrate to grant an interim bail if there is any likelihood of delay in disposal of bail application finally.

14. I find that in an earlier case of Som Mittal Vs. Government of Karnataka, JT 2008(2) SC 41, which was a matter relating to anticipatory bail, one of the two Judges constituting Bench (Hon'ble M. Katju, J.) has referred to and approved seven Judges decision of this Court in Smt. Amarawati and another (supra) and observed that non availability of any provision relating to anticipatory bail in State of U.P. is causing extraordinary burden on the High Court and a recommendation was made for reviving such a provision.

15. However, in none of the cases above, it has been said by Supreme Court or this Court, at any point of time, that once a charge sheet is submitted, still an

accused is entitled to be released on bail, on just asking, and the courts below/concerned Magistrate should not apply its mind to the relevant facts and circumstances which would justify whether the concerned person should be granted bail or should be detained in judicial custody. The decision in Smt. Amarawati and another (supra) says otherwise. That being so, expecting this Court to simply stay arrest while directing or permitting the person concerned to approach the court below by filing a bail application and without applying its mind to the relevant facts and circumstances in which bail can be granted, would clearly amount to travesty of justice. It would be an order not in accordance with law and without considering the relevant facts and circumstances. Such an order would clearly travel in the realm of non-application of mind. I am afraid, this Court cannot pass such an order particularly when it is declining to entertain an application under Section 482 Cr.P.C. being satisfied that a prima facie case of commission of cognizable offence has been found against accused resulting in filing of a charge sheet and now the matter must be examined by concerned Magistrate/court regarding bail etc. after considering the relevant facts and circumstances.

16. I may refer here one more aspect. The manner in which the applicant-accused pray that his arrest should be stayed, at the best can be placed at par with anticipatory or interim bail. In fact while granting an order of stay of arrest the court surpasses even those considerations which it is bound to take into account, when pass an order granting anticipatory bail.

17. Now it is well settled that even an order of anticipatory bail cannot be passed on mere asking but has to satisfy consideration of various relevant aspects in this regard. Some of these aspects have been considered recently by Apex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra and others, 2011(1) SCC 694 and in paras 122 to 138 the relevant facts and circumstances which must be considered by the Court before passing an order of anticipatory bail have been noticed in detail. Though these observations are not exhaustive but the aforesaid decision clearly lays down a law that even in passing an order on anticipatory bail, a bald, unreasoned and non-speaking order staying arrest or granting bail should not be passed as that would amount to a material illegality and irregularity and failure to exercise jurisdiction validly if relevant circumstances before passing such orders are not taken into account, weighed and assessed, and thereafter a decision is taken whether such an order would be justified or not.

18. It is true, that, several orders of this Court, show that directions as requested by accused applicants to be issued to the court below, have been issued and in some of the cases arrest has also been stayed but unfortunately I do not find that before such directions the relevant law has been considered, discussed and be cited. The ultimate direction or action of Court do not constitute a binding precedent. What is binding precedent is the ratio, i.e., the law laid down by Court. A law is laid down when an issue is raised, argued and decided. In none of the orders of this Court, I find that any issue, whether these directions, as sought for, should be or can be issued or are justified to be issued, considered and decided. The orders,

therefore, do not constitute a precedent so as to have a binding effect under the law of precedent.

19. Lastly it is said that atleast the court below be directed to consider the bail application of accused applicants on the same day when it is presented. It is pointed out that in many of the cases the concerned courts/Magistrates either grant interim bail or sent accused in jail by deferring any order on the bail application due to paucity of time and that is how the fundamental right of life and liberty of accused is jeopardised for no fault on their part.

20. What is said, if correct, is admittedly something serious and puts a blot on the system of administration of justice. If a person who otherwise does not deserve bail for one or the other reasons is allowed interim bail, only for the reason that concerned Magistrate/court finds no time to apply mind on his application, it would not only be travesty of justice but would be highly dangerous for the society at large. Similarly, if a person is sent to jail, curtailing his liberty, only for the reason that concerned Magistrate/court could not find time to apply mind on his bail application, again this would be a case of grave injustice, besides violation of fundamental rights of a citizen. Both the situations cannot be appreciated. In the circumstances, I would like to hold that if a bail application is moved in time, with due notice to other side, if so required in law, the Magistrate/court concerned must consider the relevant facts and circumstances before passing any order either way and in case the number of applications are such so as not to make it possible to be attended within the court timing, the District Judge concerned shall look into and distribute the work in such manner so that applications are attended by competent courts without any undue delay and no person is sent to jail or released, by way of interim bail, without application of mind by concerned court/Magistrate. If necessary the Court may attend such applications irrespective of the fact that court timing is over. Upholding Constitutional rights and people's freedom vis-a-vis the safety, protection and interest of society is of prime importance and it cannot be compromised in the name of court timings or something for which the parties are not responsible and accountable. If necessary, on this aspect the matter may also be examined on administrative side by this Court after having relevant information with detail facts and detas from concerned district judgeship(s).

21. Learned counsel for the applicant then placed before this Court a judgment dated 03.07.2014 passed in Application under Section 482 No. 21679 of 2014, Munawwar and nine others Vs. State of U.P. and another and claimed that therein this Court has passed an order for taking up the bail application on the same day and the same should be followed by this Court also on the principle of parity. He also placed another order dated 25.09.2014 passed in Application under Section 482 No. 42289 of 2014, Ram Kesh Rao Vs. State of U.P. to press his submission.

22. The order in Ram Kesh Rao (supra), reads as under:

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

The applicant, through the present application under section 482 Cr.P.C. has invoked the inherent jurisdiction of this Court with a prayer that his bail application in complaint case No. 490 of 2014 under Section 406 IPC police station Dharamsinghwa district Sant Kabir Nagar be ordered to be considered expeditiously, if possible on the same day by the court below.

In view of the order passed in Application U/S 482 No. 21679 of 2014 dated 03.7.2014, no further direction is required to be passed in the present application.

Accordingly, present application is disposed of."

23. It is thus evident that nothing has been said in Ram Kesh Rao (supra) which may constitute any binding precedent on this Court. This order has been passed in the light of this Court's order dated 03.07.2014 passed in Munawwar (supra). I have carefully gone through the aforesaid judgment wherein this Court has taken the view that personal liberty of the subject is of utmost importance and, therefore, whenever a matter is brought to this Court to show that there is any violation of fundamental rights under Article 21 of the Constitution, this Court will protect the person from such violation being the guardian of fundamental rights.

24. The proposition in general is unexceptional. It is the actual application of proposition of law in individual case, whether it applies or not. In order to apply aforesaid dictum there has to be a factual foundation laid down in a case demonstrating that fundamental right of life and liberty under Article 21 of the applicants are being infringed by the police or anyone else. For that purpose specific pleadings are needed. In the present case there is no such pleading that applicants have illegally been arrested or that their fundamental rights under Article 21 have been violated due to their illegal arrest and yet their bail application has not been heard by the court below expeditiously or in the manner as already directed by this Court in various authorities, some of which have already been referred hereinabove.

25. The applicant has yet to surrender. He has yet to move an application before concerned court. Therefore, to issue a direction for something which is yet to see light of the day, is nothing but requiring this Court to pass an order in anticipation of certain facts which are not pleaded or placed before this Court by means of pleading in application concerned. In other words the applicant is seeking relief on imaginary basis. Unless a case is made out for violation of fundamental right under Article 21 of the Constitution by specifically pleading all relevant facts, in my view, no such direction would be justified to issue as it amounts to issuing futile direction by this Court and that too on superfluous and imaginary basis. The aforesaid decisions, therefore, as cited at the bar in support of submission by learned counsel for the applicant, do not help him in any manner.

26. In the result, I do not find myself satisfied to accede the request made in this application. The application is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2014

BEFORE
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Criminal Misc. Application No. 47107 of 2014
(u/s 482 CR.P.C)
Sheelu @ Jitendra Mishra & Ors.
Applicants

Versus

The State of U.P. & Anr. Opp. Parties

Counsel for the Applicants:
Sri Manu Khare

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

Cr.P.C.-Section 482-Prayer to quash proceeding-offence under section 323/504 IPC read with 3(i) X of SC/ST (Prevention of atrocities) Act 1989-on ground u/s 14 of SC/ST Act the special judge competent to take cognizance and the Magistrate has no authority-held-in view of Section 193 Cr.P.C. as well as law developed by Apex Court-Session Judge ceased with every jurisdiction of exercising original jurisdiction-except the Magistrate-cognizance taken by Magistrate -justified-need no interference-application rejected.

Held: Para-12 & 13

12. In view of discussion made above it is apparent that Special Court designated for trial of offences under Section 14 of S.C./S.T. Act (Prevention of Atrocities) Act, 1989 is a Court of Session and has no jurisdiction to take cognizance as a Court of original jurisdiction. Therefore Magistrate is only competent to take cognizance for offences punishable S.C./S.T. (Prevention of Atrocities) Act, 1989 and to commit cases under said Act to the Court of Special Judge in accordance with provisions of Cr.P.C.

13. In view of discussion made above it is clear that Magistrate has committed no illegality or irregularity in taking cognizance on charge sheet submitted by police.

Case Law discussed:
AIR 2004 Cr.L.J. S.C. 1890; 2004 (57) ALR 290; 2009 (3) ADJ 322 (SC); 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Akhtar Husain Khan, J.)

1. Heard learned counsel for the applicants and perused application moved under Section 482 Cr.P.C.

2. By filing this application under section 482 Cr.P.C. applicants have prayed to quash proceedings initiated on the basis of F.I.R. dated 3.3.2014 bearing Case Crime No.15 of 2014, under sections 323, 504 I.P.C. & section 3(1) X of S.C./S.T. Act, 1989, Police Station Chilla, District Banda and charge sheet dated 27.4.2014 bearing No. 22 of 2014, under sections 323, 504 I.P.C.& section 3(1) X of S.C./S.T. Act, 1989, Police Station Chilla, District Banda bearing Case No.539/IX/2014 pending before learned IInd Additional Chief Judicial Magistrate, Banda.

3. Learned counsel for applicants contended that incident narrated in F.I.R. is totally false and F.I.R. has been lodged with malafide intention. Police has submitted charge sheet without sufficient evidence on false allegation. Learned counsel for applicants further contended that in view of Section 14 of S.C./S.T. Act (Prevention of Atrocities) Act, 1989 offence punishable under said Act shall be tried by Special Court. Therefore cognizance taken by A.C.J.M. is without jurisdiction.

4. In view of above contention learned counsel for applicants has prayed for quashing of proceedings of aforesaid criminal case.

5. I have considered the submission made by learned counsel for applicants.

6. Accused applicants are named in F.I.R. and police has submitted charge sheet against accused applicants after

investigation whereupon Magistrate has taken cognizance.

Section 14 of S.C./S.T. Act (Prevention of Atrocities) Act, 1989 provides that the State Government shall, with the occurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act.

7. Reading of Section 14 of said Act shows that State Government shall designate a court of Session with the concurrence of the Chief Justice of the High Court as Special Court to try offences under this Act. Thus it is apparent that the Special Court designated for trial of cases relating to this Act shall be a court of Session.

8. Section 193 of Cr.P.C. is relevant which is quoted below:

"Cognizance of offences by Courts of Session - Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

9. In view of above provisions Section 193 of Cr.P.C. it is apparent that no Court of Session Judge shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed by Magistrate.

10. Either in Section 14 of S.C./S.T. Act (Prevention of Atrocities) Act, 1989 or any where in the said Act. There is no provision to show that a Special Court is competent to take cognizance for offences under the Act.

11. In the case Moly Vs. State of Kerala A.I.R. 2004 Cr.L.J. S.C. 1890, Honourable Apex Court has held that the Special Judge appointed under the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act 1989 has no jurisdiction to entertain a complaint under Section 3(1) (X) of the Act to take the cognizance directly and to issue process without the case being committed to it by competent magistrate.

12. In view of discussion made above it is apparent that Special Court designated for trial of offences under Section 14 of S.C./S.T. Act (Prevention of Atrocities) Act, 1989 is a Court of Session and has no jurisdiction to take cognizance as a Court of original jurisdiction. Therefore Magistrate is only competent to take cognizance for offences punishable S.C./S.T. (Prevention of Atrocities) Act, 1989 and to commit cases under said Act to the Court of Special Judge in accordance with provisions of Cr.P.C.

13. In view of discussion made above it is clear that Magistrate has committed no illegality or irregularity in taking cognizance on charge sheet submitted by police.

14. In view of discussion made above I am of the view that there is neither any illegality nor irregularity either in investigation made by police or in cognizance taken by Magistrate.

15. In view of above, I am of the view that no interference is required under section 482 Cr.P.C.

16. At this stage, learned counsel for applicants prayed that a direction should be made for expeditious disposal of bail

application in view of principles laid down by Seven Judges Bench of this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh Vs. State of U.P. reported in 2009 (3) ADJ 322 (SC).

17. A direction for expeditious disposal of bail application in view of principles laid down by this Court as well as by Apex Court in aforesaid pronouncements appears just.

18. In view of above, present application is disposed off with above direction and it is directed that if the applicants appear before Magistrate/Session court within one month from today and move bail application, Magistrate/Session court shall dispose of their bail application expeditiously in view of principles laid down by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh Vs. State of U.P. reported in 2009 (3) ADJ 322 (SC).

19. With above direction application is finally disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 50116 of 2013

State of U.P. .Petitioner
Versus
Shri Raj Kumar & Anr. ...Respondents

Counsel for the Petitioner:
S.C., Sri C.K. Rai

Counsel for the Respondents:
Sri Himanshu Upadhyay, Sri M.P.S. Chauhan, S.C.

Industrial Dispute Act 1945-Section 6-H-read with U.P. Industrial Rule 1957-Rule 33-claim of regular salary-once claim of regularization rejected no question of payment of salary on regular basis-so for award given by Labour Court is concern-Respondent 1 already reinstated in service and as per order of Writ Court 50% amount deposited-shall be returned to workman.

Held: Para-16

The said writ petition was disposed of vide order dated 26.04.2011 with direction to the Executive Engineer to decide the claim of the workman for regularization and finally the Executive Engineer vide order dated 25.05.2011, has rejected the claim of the workman for regularization on the ground that demand of regularization could not be accepted as the same is in violation of Article 14 and 16 of the Constitution of India. Once the claim for regularization of workman on the post of tube well operator has been denied by the petitioner and the same has attained finality, therefore, the benefit of regular salary on the said post cannot be accepted, and the same would be in violation of the principle laid down in the decision of the Apex Court in Case of Secretary, State of Karnataka Vs. Uma Devi (Supra). Therefore, at this stage, this Court has only to look into the matter as to whether the award dated 20.08.2007 had been complied by the department and further the present impugned order passed under Section 6-H (1) can be sustained or not? It is admitted situation that the award has attained finality up to Hon'ble Apex Court and it has also been brought on record that in pursuance to the award dated 20.08.2007 the workman has joined the department. Therefore, while

deciding the application under Section 6-H (1), the respondent No. 1 travelled beyond the mandate of the award passed by the Labour Court and the arrears could only be fixed as per the award and in the garb of award no regular salary could be released, otherwise indirectly his regularization on the said post would take place, which was not under the purview of Section 6-H (1) proceeding and the same had been denied by the petitioner.

Case Law discussed:
AIR 1992 SC 789; AIR 1992 SC 2130; AIR 1996 SC 2638; AIR 1996 SC 3420; AIR 2006 SC 3499; (2006) 2 SCC 716; JT 2013 (9) SC 139; (2006) 4 SCC page 1.

(Delivered by Hon'ble Mahesh Chandra Tipathi, J.)

1. Heard Sri Ravi Shanker Prasad, learned Additional Chief Standing Counsel for the petitioner and Sri M.P.S. Chauhan, learned counsel for the respondent No. 1.

2. By means of the present writ petition, the petitioner (State of U.P. through Executive Engineer, Aligarh Khand, Ganga Canal, District Aligarh) has challenged the impugned order dated 19.04.2012 passed by the Regional Deputy Labour Commissioner, Aligarh-respondent No. 2, by which the claim of respondent No. 1 under Section 6-H of the Industrial Disputes Act (herein after referred as "Act") had been allowed.

3. This Court, while entertaining the present writ petition on 30.09.2013, had passed the following order in favour of the petitioner:-

"Learned Standing Counsel submitted that the application moved under section 6H(1) of U.P. Industrial Dispute Act was not maintainable. The respondent workman was daily wager, hence the wages could not be calculated considering the salary of the regular employee, hence award is illegal and arbitrary.

Learned Standing Counsel further submitted that in pursuance of the impugned award, the amount has already been deposited. However, the same has not been released as yet.

Issue notice to the opposite party no.1 returnable at an early date.

In the meantime till the next date of listing 50% of the amount, if already deposited, shall be released in favour of the respondent workman and remaining 50% shall be kept in Fixed Deposit."

4. Brief facts giving rise to the present writ petition are, that the respondent No. 1 claimed that he was engaged on daily wage basis on the post of Sinchpal in the petitioner-department on 01.08.1998, and continued upto 31.8.1999 and his services were dispensed with on oral termination since 01.09.1999. The respondent no.1 challenged his termination before Labour Court and the case was registered as Adjudication Case No.268 of 2005 (Old Adjudication Case No. 165 of 2000). The Labour Court vide award dated 20.08.2007 directed the petitioner to reinstate the workman alongwith compensation of Rs. 5,000/-. It is also apparent from the record, that the said award has been assailed in the Writ Petition No.31060 of 2008, which was dismissed by this Court vide judgment and order dated 09.07.2008. Against the said dismissal order, the State has preferred Special Leave to Appeal No. 2281 of 2009 (Civil) which was also dismissed by the Hon'ble Apex Court on 7.7.2010. Thereafter, the respondent No. 1

was immediately reinstated in the department. Thereafter, the workman/respondent No. 1 had filed application under Section 6-H (1) of the Industrial Disputes Act, 1945 (herein after referred as Act, 1947) before the Deputy Labour Commissioner, Aligarh, claiming that in pursuance to the judgment and award passed by the Labour Court, he is entitled to get salary to the tune of Rs. 26,688/- from 28.11.2007 to 29.02.2008.

5. Again an application had been filed claiming salary of Rs. 63,566/-. Against the said application detailed objection/written statement had been filed by the petitioner. Thereafter, vide order dated 04.02.2009, the respondent No. 2 directed for payment of Rs. 63,586/- to the respondent No. 1.

6. It appears from the record that the said amount was paid to the respondent no.1. After receiving the said amount again he had filed an application on 01.07.2009 under Section 6-H (1) read with Rule 33 of the U.P. Industrial Rules, 1957 claiming further salary of Rs. 1,44,237/- for subsequent period. Again a detailed objection has been filed by the petitioner and refuted that the respondent No. 1 was never appointed on the post of Sinchpal and he was not entitled for salary of the said post and furether the Labour Court had never directed the petitioner to reinstate him on the post of Sinchpal. While rejecting the claim of the petitioner, the respondent No. 2 vide order dated 15.09.2010 had directed for recovery of Rs. 1,44,237/- which was sent to the District Magistrate, Aligarh for realization. Again respondent No. 1 had moved another application on 10.02.2011 for recovery of Rs. 2,42,045/- from the petitioner under Section 6-H (1) of the Act, 1947. Again the respondent No. 2 directed vide order dated 19.04.2012 for recovery of Rs. 2,42,045/- from the petitioner.

7. It also transpires from the record that meanwhile, the respondent No.1 (workman) had filed Writ Petition No. 24040 of 2011 for a mandamus commanding the petitioner to regularize his services on the post of Sinchpal and for disbursement of the arrears of salary in pursuance to the award of the Labour Court dated 20.08.2007. The said writ petition has been disposed of by this Court vide order dated 26.04.2011 with directions that the appropriate application for regularization of the petitioner may be decided by the department.

8. In compliance of the order passed by this Court, the claim of the workman had been decided by the Executive Engineer vide order dated 25.05.2011 (annexure-14) with observation that in compliance of the award dated 20.08.2008, the respondent has already been reinstated and payments were also made but his services could not be regularized in pursuance to the direction dated 16.03.2007 issued by this Court in Writ Petition No. 45482 of 2004 with further observation that the services of the persons, who had come in the department by the back door entry, could not be regularized, as the same is in violation to the Article 14 and 16 of the Constitution of India. It also appears from the record that the order passed by the Executive Engineer dated 25.05.2011 has attained finality and the same has not been challenged by the workman.

9. Sri R.S.Prasad, learned Additional Chief Standing Counsel submits that the

order impugned dated 19.04.2012 is wholly illegal and arbitrary and the calculation has been made in violation to the order passed by the Labour Court dated 20.08.2007. He further submits that while passing the award, the Labour Court had clearly held that since the workman was working on daily wage basis and during the relevant period, he had not worked as such, he was not entitled for any back wages. He further submits that for his regularization on the post of Sinchpal, the respondent no.1-workman had earlier filed Writ Petition No. 24040 of 2011 which was simply disposed of with a direction to the Executive Engineer of the department concerned to consider his application, and vide order dated 25.05.2011, the Executive Engineer had rejected the claim of the workman for regularization and while rejecting his claim, the Executive Engineer of the department had observed that the workman was engaged by back door entry and his regularization in the department would be in violation of Article 14 and 16 of the Constitution of India. As Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and can not be sustained in view of the judgments rendered by Hon'ble Apex Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors., AIR 1992 SC 789; State of Haryana & Ors. Vs. Piara Singh & Ors. etc., AIR 1992 SC 2130; Prabhat Kumar Sharma & Ors. Vs. State of U.P. & Ors., AIR 1996 SC 2638; J.A.S. Inter College, Khurja, U.P. & Ors. Vs. State of U.P. & Ors., AIR 1996 SC 3420 ; M.P. Housing Board & Anr. Vs. Manoj Shrivastava, AIR 2006 SC 3499; M.P. State Agro Idustries Development Corporation Ltd. & Anr. Vs. S.C. Pandey, (2006)2 SCC 716; and State of Madhya Pradesh & Ors. Vs. Ku. Sandhya Tomar & Anr. JT 2013 (9) SC 139.

10. He further submits that once his claim for regularization has been turned down by the department and the same has not been assailed, then it has attained finality. Therefore, the respondent No. 1 is not entitled for salary on the post of Sinchpal in regular capacity. He further makes submission that the respondent no.1 himself has made a statement before the Labour Court that he was engaged on the post of Sinchpal since 01.08.1998, on daily wage basis and his services were dispensed w.e.f. 01.09.1999, the workman continued to work as daily wager, which is also reflected from the operative portion of the award. The Presiding Officer has also made categorical averment that the respondent had worked as daily wager in the department.

11. He submits that while passing the impugned order, the respondent No. 2 has erred in directing for calculation of the arrears on the basis of salary, which itself is in violation of the award which was passed keeping in mind that the workman was working on daily wage basis and he could only be reinstated in same capacity in the department and calculations were liable to be made as daily wager, otherwise it would be in teeth of Constitution Bench judgment of the Apex Court in Secretary, State of Karnataka vs. Uma Devi, reported in (2006) 4 SCC, page 1).

12. He further makes submission that if the claim set out by the workman is

allowed in this way, then it will be in violation of the judgment of Hon'ble Supreme Court inUma Devi (Supra) and placed his reliance to paragraph 54 of the Constitution Bench decision of the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi, reported in (2006) 4 SCC, page 1, which reads as follows:

"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

In view of the aforesaid observation of the Constitution Bench of the Apex Court, any decisions or directions given by the Courts, which are contrary to the principles laid down by the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi (supra) will stand denuded on their status as precedent.

In view of the above, at this stage, it would be appropriate to refer, the principles laid down by the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi (supra). Relevant paragraphs of the judgment of the Apex Court are being reproduced below:

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief,

it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based

on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation

of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

13. Learned counsel for the respondent No. 1 submits that the present writ petition cannot be sustained as the petitioner had preferred an appeal which was also rejected by the Hon'ble Apex Court, therefore, the award itself has attained finality and the workman is entitled for regular payment.

14. I have heard the rival submissions of the learned counsel for the parties and also perused the record.

15. It is apparent from the record that while passing the award dated 20.08.2007, learned Labour Court has categorically observed that the workman was working in the department in capacity of daily wager and in this background has directed for reinstatement alongwith Rs. 5,000/- cost. It is also admitted situation that in pursuance to the award, the amount has also been paid to the workman and time to time application under Section 6-H (1) had also been allowed and recovery has been made. It has also been averred in the writ petition that the workman had also filed writ petition No. 24040 of 2011 for a direction to the respondents to regularize the services of the workman on the post of Sinchpal (Tubewell Operator) and for a further direction to the respondents to disburse the arrears of salary of Rs. 1,44,237/- due for the period from 1.8.2008 to 31.07.2009 in pursuance to the award dated 20.08.2007.

16. The said writ petition was disposed of vide order dated 26.04.2011 with direction to the Executive Engineer to decide the claim of the workman for

regularization and finally the Executive Engineer vide order dated 25.05.2011, has rejected the claim of the workman for regularization on the ground that demand of regularization could not be accepted as the same is in violation of Article 14 and 16 of the Constitution of India. Once the claim for regularization of workman on the post of tube well operator has been denied by the petitioner and the same has attained finality, therefore, the benefit of regular salary on the said post cannot be accepted, and the same would be in violation of the principle laid down in the decision of the Apex Court in Case of Secretary, State of Karnataka Vs. Uma Devi (Supra). Therefore, at this stage, this Court has only to look into the matter as to whether the award dated 20.08.2007 had been complied by the department and further the present impugned order passed under Section 6-H (1) can be sustained or not? It is admitted situation that the award has attained finality up to Hon'ble Apex Court and it has also been brought on record that in pursuance to the award dated 20.08.2007 the workman has joined the department. Therefore, while deciding the application under Section 6-H (1), the respondent No. 1 travelled beyond the mandate of the award passed by the Labour Court and the arrears could only be fixed as per the award and in the garb of award no regular salary could be released, otherwise indirectly his regularization on the said post would take place, which was not under the purview of Section 6-H (1) proceeding and the same had been denied by the petitioner.

17. Therefore, I am of the considered opinion that the impugned order cannot be sustained and the respondent no.1 is entitled to be paid in pursuance to the award dated 20.08.2007, and status of the respondent no.1 would remain as daily wager specially in the background that for regularization of his claim, the petitioner had already rejected the claim way back on 25.05.2011 and the same has not been assailed by the workman, therefore, it had attained finality.

18. Therefore, in view of above, the order impugned is set aside. However, in the interest of justice, this Court, while granting interim order, had observed that till the next date of listing, 50% of the amount, if already deposited, shall be released in favour of the respondent-workman and remaining 50% shall be kept in Fixed Deposit. If 50% of the amount has already been released in favour of the workman, the same would be adjusted against the admitted amount and the remaining 50%, which was directed to be kept in fixed deposit, may be returned back to the petitioner.

19. In the result, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2014

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 55965 of 2014

Smt. Kamala Devi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri I.K. Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Petitioners seeking protection from harassment by local police-in matrimonial life-false statements regarding registration of marriage with fake documents of marriage certificate-held-not entitled for any protection-petitioner not approach before writ court with clean hand and clean hearted but committed fraud to Court also-petition dismissed with cost of Rs. One lac with direction to lodge FIR against them-petition dismissed.

Held: Para-20 & 22

20. In the present set of facts the petitioners have not approached this Court with clean hands, clean mind and clean heart. They have made false averments in the writ petition. They have filed fake papers along with the writ petition and have also produced before this Court the fake Marriage Certificate. Such matters should be dealt without any leniency.

22. The action shall also be taken under the criminal law. it shall be open for the respondent no. 5 to lodge F.I.R. and if any F.I.R. is lodged then respondent no.2 and 4 shall take all steps for quick and qualitative investigation in the matter in accordance with law.

Case Law discussed:

JT 2000 (3) SC 151; 2004(6) SCC 325; 2003(8) SCC 319; AIR 1994 SC 853; 2012(8) SCC 748; JT 2005(11) SC 439; (1889) 14 AC 337; [(1994) 1 SCC 1]; JT 2005 (6) SC 391; JT 2009 (9) 365; JT 2009 (5) SC 278; JT 2008 (8) SC 57.

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

1. Heard Sri I.K. Mishra, learned counsel for the petitioners and Sri Siddharth Singh Shreenet, learned Standing Counsel for the State Respondent.

2. In compliance to the order dated 16th October, 2014, a counter affidavit of Sri Praveen Kumar Yadav, Registrar, Hindu Marriage/ Sub-Registrar-IInd, Sadar Bareilly has been filed today before this Court. The original of the alleged Hindu Marriage Certificate of the petitioners dated 10th July, 2014 which was kept under sealed cover by the Registrar General under orders of this Court, dated 16th October, 2014 has been placed before this Court. The sealed cover was opened in presence of learned counsel for the parties and the Sub Registrar, Hindu Marriage. The alleged original marriage certificate dated 10th July, 2014 which was produced by the petitioner no.2 before this Court on 16th October, 2014 and a copy of which has been filed as Anenxure No.2 to the writ petition, has been shown today to the Sub-Registrar Hindu Marriage. This alleged certificate is printed in multi colour on glazed paper. Registrar Hindu Marriage states that this marriage certificate showing it to be issued by Registrar Hindu Marriage-IInd, District Bareilly, dated 10th July, 2014 is absolutely fake. He states that the method of issuing marriage certificate and its proforma has already been explained in the counter affidavit. The aforesaid Hindu Marriage certificate was produced by the petitioner no. 2 on 16th October, 2014 before this Court which was kept in sealed cover by Registrar General of this Court as aforementioned. It has now now been handed over by this Court to the aforesaid Registrar, Sri Praveen Kumar Yadav in presence of learned counsel for the parties. He shall keep it safely to take appropriate action in accordance with law including lodging of F.I.R. against the petitioners and the persons who managed or prepared such forged certificate in the name of Government Officers.

3. This writ petition has been filed praying for writ, order or direction in the nature of mandamus commanding the

respondent authorities not to harass / disturb the petitioners in their peaceful life as husband and wife. After going through the counter affidavit of the Registrar, Hindu Marriages, learned counsel for the petitioners states that the petitioners want to withdraw the writ petition. He states that the petitioners do not want to file any rejoinder affidavit.

4. Prayer is rejected for reason that fake papers have been filed alongwith the writ petition and false averments have been made.

5. The petitioners have played fraud on the Court. A trend is being seen in this jurisdiction of security to married coupled that number of writ petitions are being filed annexing fake birth certificate, fake voter ID card and fake marriage certificate.

6. Under the circumstances, after it came to light that the writ petition has been filed making false averments and annexing fake papers, prayer of learned counsel for the petitioner to withdraw the writ petition cannot be allowed.

7. Sri Siddharth Singh Shreenet, learned Standing Counsel submits that this writ petition has been filed by the petitioners making false averment. They have annexed fake papers along with the writ petition. A forgery has been committed by the petitioners. He submits that the respondent no. 1, 2, 4 and 5 be directed to take an action in the matter so that the person who are engaged in preparing fake marriage certificates may be punished in accordance with law and the practice of filing fake papers alongwith the writ petition may also be checked. He submits that infact the jurisdiction of this Court has been abused by the petitioners. They deserve for heavy cost to be imposed by this Court.

8. I have heared learned counsel for the parties.

9. In paragraph no. 6 and 7 of the writ petition, the petitioners have stated as under :-

6. That the petitioners solemnized their marriage on 9.7.2014 at Arya Samaj Mandir Savitri Nagar Kargauna, Bareilly was received in this office and accordingly the said application has been registered on 10.7.2014 at volume no. 11 pages 331 at serial no. 653 of the concerned register maintained in this office. A photo copy of the marriage certificate registered dated 10.7.2014 is being filed herewith and marked as Annexure No. 2 to this writ petition.

7. That the petitioners marriage has been registered and certified that on application under the Uttar Pradesh Hindu Marriage Rules 1973 in the office of Registrar Hindu Marriage IInd Sadar District Bareilly Uttar Pradesh India.

10. The respondent no. 5 has stated in paragraph no. 6, 7, 8 and 9 of the counter affidavit as under : -

6. That, after receiving the said letter it was inquired from the marriage register for the current year and it was found that there was no any such alleged certificate dated 10.7.2014 issued by the deponent in favour of Smt. Kamla Devi and Brijraj Singh. It is further submitted on 10.7.2014 there was only one certificate issued in the name of Dr. Hitendra Kumar Singh and Smt. Sushma Devi, which is registered at Volume No. 51, pages 703 to

726 at serial No. 396. For kind perusal of this Hon'ble Court photo stat copy of relevant extract of marriage register showing the registration at Volume No. 51, pages 703 to 726 at Serial no. 396 and photo stat copy of marriage certificate dated 10.7.2014, issued by the deponent to one Dr. Hitendra Kumar Singh and Smt. Sushma Devi is being filed herewith and marked as Annexure No. 1 collectively to the affidavit.

7. That it is further relevant to mention here that alleged certificate shows volume No. 11, page 333 at serail no. 653, which is not existing. In this regard it is submitted for the current year i.e. 2014 volume No. 53 is running and volume No. 11 is much before issued in earlier year 2007. It is further submitted that on 13.11.2014 the office of deponent issued a marriage certificate in favour of Mr. Pranav Palav and Smt. Sonam Tandan at Volume No. 53, pages 674-699 at serial no. 483. For kind perusal of this Hon'ble Court a photo stat copy of last certificate issued from the office of deponent till 13th November, 2014 is being filed herewith and marked as Annexure no. 2 to this affidavit.

8. That, it is further submitted that in view of the aforesaid facts and circumstances it is clear that the aforesaid certificate dated 10.7.2014 is a forged and fabricated one.

9. That, it is further most respectfully submitted that the certificates issued by the office of Registrar-IInd, Hindu Marriage, Bareilly is totally computerized and system generated which is evident from the certificate annexed herewith in preceding paragraphs of this affidavit.

11. The facts stated in the counter affidavit are not denied or even proposed to be denied by the petitioners by filing rejoinder affidavit. This Court has no doubts in mind that false averments have been made in the writ petition and fake Hindu Marriage Certificate, dated 10th July, 2014 has been filed as Anexnxure No. 2 to the writ petition. The alleged original of the said marriage certificate was also produced by the petitioner before this Court as aforementioned. Petitioners deserve no sympathy because of willful and conscious conduct of making false averments as well as producing fake marriage certificate.

12. A writ petition which is based on falsehood must be dismissed at the threshold. It is settled law that a person who approaches the Court under Article 226 of the Constitution of India must approach with clean hands, clean mind and clean heart.

13. In the case of United India Insurance Company Ltd. V. B.Rajendra Singh and others, JT 2000(3)SC.151, considering the fact of fraud, Hon'ble Supreme Court held in paragraph 3 as under :

"Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "no judegment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702).

14. In the case of Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav, 2004 (6) SCC 325, Hon'ble Supreme Court

considered the applicability of principles of natural justice in cases involving fraud and held in paragraphs 12 and 13 as under :

"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed : (SCC p. 327 paras 15-19)

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. 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 word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18.A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

19. In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit.

13. In view of our findings aforementioned that the respondent was guilty of an act of fraud, in our opinion, the Central Administrative tribunal as also the High court committed a manifest error in setting aside the order of the appointing authority as also the Appellate Authority."

15. In the case of Ram Chandra Singh Vs. Savitri Devi and others, 2003(8) SCC 319, Hon'ble Supreme Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. 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 word or letter.

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be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

37. It will bear repetition to state that any order obtained by practicing fraud on court is also non-est in the eyes of law."

16. In the case of S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853, the Hon'ble Supreme Court held in para 7 as under :

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

17. In the case of Jainendra Singh Vs. State of U.P., 2012 (8) SCC 748, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held in para 29.1 to 29.10 as under :

"29.1 Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3 When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue

in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services. 3

29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."

(Emphasis supplied by me)

18. In the case of Ram Chandra Singh Vs. Savitri Devi and others, JT 2005 (11) SC 439, Hon'ble Supreme Court has elaborately considered the meaning of the word fraud and its effects and held in para 15 to 34 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. 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 word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In Derry v. Peek, (1889) 14 AC 337, if was held:

In an 'action of deceit the plaintiff must prove actual fraud. Fraud is proved

when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit.

20. In Kerr on Fraud and Mistake at page 23, it is stated:

"The true and only sound principle to be derived from the cases represented by Slim v. Croucher is this that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with Derry v. Peek, A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief", said Lord Herschell, "is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so."

21. In Bigelow on Fraudulent Conveyances at page 1, it is stated :

"If on the facts the average man would have intended wrong, that is enough."

22. It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of he prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and 'fraud, upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question."

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 and Ors. reported in JT 2003 (Supp. 1) SC 25 held:

"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).In Lazarus Estate v. Berly [(1956) 1 All ER 341] the Court of Appeal stated the law thus:

"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."

In S.P. Chengalyaraya Naidu v. Jagannath [(1994) 1 SCC 1] this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

24. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would, render the transaction void ab initio. Fraud and deception are synonymous. 25. In Arlidge & Parry on Fraud, it is stated at page 21:

"Indeed, the word sometimes appears to be virtually synonymous with "deception", as in the offence (now repealed.) of obtaining credit by fraud. It is true that in this context "fraud" included certain kinds of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit "under false pretences, or by means of any other fraud". In Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit by fraud but not of obtaining the meal by false pretences: his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a "false front" has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both Jones and the "false front" could now be treated as cases of obtaining property by deception."

26. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

27. In Smt. Shrisht Dhawan v. Shaw Brothers , it has been held that:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct,"

28. In S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1] this Court in no uncertain terms observed:

"...The principle of "finality of litigation" cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the

litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

29. In Indian Bank v. Satyam Fibres (India) Pvt. Ltd. , this Court after referring to Lazarus Estates (supra) and other cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained, by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order".

30. It was further held:

"The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud" on Court, In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the Court's business."

31. In Chittaranjan Das v. Durgapore Project Limited and Ors. , It has been held:

"Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby."

32. Keeping in view the aforementioned principles, the questions raised in these appeals are required to be considered. The High Court observed that the application of intervention filed by the appellant purported to be under Order XXVI, Rules 13 and 14(2) and Order XX, Rule 18 was not maintainable as they do not confer any power to court for setting aside a preliminary decree on the ground that it was obtained by practising fraud. But once the principles aforementioned are to be given effect to, indisputably the court must be held to have inherent jurisdiction in relation thereto.

33. In Manohar Lal Chopra v. Raj Bahadur Rao Raja Seth Hiralal , the law is stated in the following terms:

"The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorized" to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must

be observed, and departure therefrom is not permissible."

34.In Sharda v. Dharmpal , a three-Judge Bench, of which both of us are parties, held that directing a person to undergo a medical test by a matrimonial court is implicit stating:"

(Emphasis supplied by me)

19. Similar principles with regard to fraud have been laid down by Hon'ble Supreme Court in the case of JT 2005(6) SC 391, para 7 to 15, JT 2007(4) SC 186, para 19 to 39, JT 2009(9) SC 365, para 22 and 23, JT 2008 (3) SC 452, para 12.3 to 15, JT 2009(5) SC 278, para 13 to 18 and 28 and JT 2008(8) SC 57.

20. In the present set of facts the petitioners have not approached this Court with clean hands, clean mind and clean heart. They have made false averments in the writ petition. They have filed fake papers along with the writ petition and have also produced before this Court the fake Marriage Certificate. Such matters should be dealt without any leniency.

21. The respondent no. 1, 2, 4 and 5 are directed to take appropriate action in accordance with law against the petitioners and others who prepared fake marriage certificate.

22. The action shall also be taken under the criminal law. it shall be open for the respondent no. 5 to lodge F.I.R. and if any F.I.R. is lodged then respondent no.2 and 4 shall take all steps for quick and qualitative investigation in the matter in accordance with law.

23. Under the circumstances, this writ petition is dismissed with cost of Rs.1,00,000/- on the petitioner no. 2 which shall be deposited by the petitioner no. 2 within a month with High Court Legal Cell Authority, Allahabad.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 56499 of 2011

Rajesh Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

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

Counsel for the Respondents:
A.S.G.I., S.C., Sri Satish Kishore Kakkar

Constitution of India,Art.-226-Termination of probationer temporary employee-without held disciplinary proceeding-in utter violation of principle of Natural Justice-not sustainable quashed.

Held: Para-28
Considering the facts of the case, in the light of the legal principles, discussed herein above, I am of the view that the impugned order of termination is nothing but punitive and stigmatic, therefore, cannot be sustained.

Case Law discussed:
AIR 1958 SC 36; (1999) 3 SCC 60; 1987 (1) SCC 146; (1984) 3 SCC 384; 2010 SC 3493; [(1980) 2 SCC 593]; 1998 (2) SCC 192; ADJ 2013 8 617; 2002 (1) SCC 743.

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

1. The respondent State Bank of India issued an advertisement in August, 2009 inviting applications for the post of Assistant Clerk, the petitioner being eligible applied for the post; appeared in

the written examination on 8.11.2009, on qualifying, petitioner appeared in the interview on 26.4.2010, was declared selected. The respondent bank issued appointment letter on 3.12.2010, pursuant thereof, petitioner joined on 20.12.2010 as Assistant Clerk at Branch Dohrighat, District Mau of State Bank of India. Petitioner was sent on training, on successful completion of training petitioner was posted at Gorakhpur by order dated 13.6.2011. The probation period of the petitioner was enhanced by three months for unsatisfactory work. By order dated 27.8.2011, passed by the Regional Manager, State Bank of India, Gorakhpur, respondent no. 5, the service of the petitioner was terminated for the reason that some person impersonating himself, appeared on behalf of the petitioner in the written examination.

2. The petitioner is assailing order dated 27.8.2011 passed by respondent no. 5.

3. Submission of learned counsel for the petitioner is that the petitioner was not given any opportunity or show cause before passing the impugned order, the order is stigmatic and punitive, the petitioner denied that someone else impersonated the petitioner in the written examination held on 8.11.2009, further, the photographs fixed by the petitioner for the written examination, was the photographs used by the respondents in all the stages of selection.

4. Per Contra Sri S.K. Kakkar, learned counsel appearing for the bank would submit that the facts are not in dispute, however, the petitioner's appointment was subject to the verification of final records, an undertaking, dated 21.12.2010, was taken that in the event, the documents are found incorrect, the service of the petitioner would stand automatically terminated. On receipt of letter from the Zonal Office, re-verification was done, the bank asked the petitioner to submit two photographs and also provide specimen signature. The Gorakhpur Office of the Bank conducted the verification of the photographs and the signatures, it was found that there was some anomaly, thus, on apprehension of impersonation, the Branch Manager vide letter dated 29th April, 2011 requested the Controlling Authority/Administrative Office, Gorakhpur to get the matter investigated by the appropriate authority. It appears, thereafter, the matter was referred to the hand writing expert for verification of thumb impression/signature of the petitioner on the call letter. The handwriting expert opined that the thumb impression on the call letter does not match the specimen thumb impression of the incumbent i.e. the petitioner. Thus, in view of fraud and misrepresentation, the petitioner's services was terminated forthwith, being on probationer. It is admitted that no show cause notice was given to the petitioner, enclosing the report of the handwriting expert, nor any explanation was called from the petitioner.

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

6. The only question for determination is, as to whether, the impugned order terminating the service of the probationer petitioner is stigmatic and punitive.

Probationer

7. Mere form of the order using expressions "terminate", 'discharge' etc, is

not conclusive and despite the use of such innocuous expressions, the Court can examine the matter to find out the true nature of the order terminating the service of the petitioner. This has been the consistent view of the Supreme Court in several Constitution Bench decisions rendered in Parshottam Lal Dhingra vs. Union of India AIR 1958 SC 36, State of Bihar vs. Gopi Kishore Prashad AIR 1960 SC 689, Jagdish Mitter vs. Union of India and others 1964 SC 449, Shemsher Singh vs. State of Punjab and others 1974(2) SCC 831.

8. Supreme Court in Dipti Prakash Banerjee vs. Saytendra Nath Bose National Centre for Basic Sciences, Calcutta and others1 observed as follows:-

"25. In the matter of `stigma', this Court has held that the effect which an order of termination may have on a person's future prospects of employment is a matter of relevant consideration. In the seven Judge case in Samsher Singh vs. State of Punjab [1974 (2) SCC 831], Ray,CJ observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma. "It was also stated in Bishan Lal Gupta vs. State of Haryana [1978 (1) SCC 202] that if the order contained a stigma, the termination would be bad for "the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".

9. In Kamal Kishore Lakshman vs. Pan American World Airways2, Supreme Court explained the meaning of 'stigma' and what amounts to 'stigma' as follows(p150):

"According to Webster's New World Dictionary, it (stigma) is something that detracts from the character or reputation of a person, a mark, sign etc., indicating that something is not considered normal or standard. The Legal Thesuras by Burton gives the meaning of the word to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame. The Webster's Third New International Dictionary gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary `stigma' is a matter for moral reproach."

10. A three Judge Bench decision in Indra Pal Gupta vs. Managing Committee, Model Inter College3 is a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted.

11. Supreme Court in Union of India and others vs. Mahaveer C. Singhvi AIR4 observed as follows:-

"15. The High Court also referred to the Special Bench decision of this Court is Shamsher Singh v. State of Punjab and Anr. MANU/SC/0073/1974: AIR SC 2192: MANU/SC/0073/1974:1974(2) SCC 831 which was a decision rendered by a Bench of seven judges, holding that the decisive factor in the context of the discharge of a probationer from service is the substance of the order and not the

form in determining whether the order of discharge is stigmatic or not or whether the same formed the motive for foundation of the order.

31.....Not only is it clear from the materials on record, but even in their pleadings the petitioners have themselves admitted that the order of 13th June, 2002, had been issued on account of the Respondent's misconduct and that misconduct was the very basis of the said order. That being so, having regard to the consistent view taken by this Court that if an order of discharge of a probationer is passed as a punitive measure, without giving him an opportunity of defending himself, the same would be invalid and liable to be quashed, and the same finding would be also apply to the Respondent's case. As has also been held in some of the cases cited before us, if a findings against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted/to the facts of this case.....This case, in our view, is not covered by the decision of this Court in Dipti Prakash Banerjee's case (supra)".

12. In what circumstances, an order of termination of a probationer can be said to be punitive depends upon whether certain allegations which are the cause of the termination or the motive of the foundation of the order.

13. In Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha5 Supreme Court explained 'foundation' as follows:-

"A termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal. even if full benefits as on simple termination, are given and non-injurious terminology is used.

On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

14. The distinction between "foundation" and "motive" was explained in Dipti Prakash Banerjee (supra):

"If findings were arrived at in an enquiry as to misconduct, behind the back

of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

Expert Opinion

15. Expert opinion is only an opinion and has been considered to be of a very weak nature. The decision of the bank is based on the expert opinion alone to establish the guilt of impersonation.

16. In Gulzar Ali Vs. Sate of Himachal Pradesh6 the Supreme Court observed that the observation of the High Court that there is a natural tendency on the part of an expert witness to support the view of the party who called him, could not be downgraded. Many so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them.

17. This Court considering large number of judgments in Tika Ram vs. Daulat Ram7 held as follows:-

"9. Evidence of an expert is only an opinion. Expert evidence is only a piece of evidence and external evidence. It has to be considered along with other pieces of evidence. Which would be the main evidence and which is the corroborative one depends upon the facts of each case. An expert's opinion is admissible to furnish the Court a scientific opinion which is likely to be outside the experience and knowledge of a Judge. This kind of testimony, however, has been considered to be of very weak nature and expert is usually required to speak, not to facts, but to opinions. It is quite often surprising to see with what facility, and to what extent, their views would be made to correspond with the wishes and interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously deposed, they are incapable of expressing a candid opinion."

18. The Court has made the observation in trial, treating handwriting expert evidence as being opinion evidence. In service jurisprudence allegation has to be proved on preponderance and not beyond reasonable doubt. But the delinquent employee has to be confronted with the evidence as it is rebuttable.

19. Applying the law on the facts of the case, a perusal of the report dated 5.7.2011 submitted by one R. Krishna (B.Sc., L.L.B., M.A. (Criminology & Forensic Science) Consulting Forensic Expert formerly Assistant Professor of Criminology & Forensic Science (Sagar University) rendered the following opinion which is extracted below:-

On a very careful examination of the signatures, thumb impressions and photographs of the above referred person, I am of the following opinion:-

(a) The signatures made on Call Letter at the time of examination does not match with the other standard signatures of Sri Rajesh Kumar. The reasons of my opinion are in Annexure No. 1.

(b) The thumb impression on the Call Letter, which is expected to be of Right Thumb do not match with the specimen thumb of Right Thumb of Sri Rajesh Kumar. The reasons of my opinion are given in Annexure No. 2.

(c) The photographs on the Call Letter of the person who appeared in the examination does not match with the photographs of the person who is joining the Bank. The reasons of my opinion are given in Annexure No. 3.

Opinion: On very careful examination of the above referred signatures and writing written as 'Rajesh Kumar' as in A-2, I am of the opinion, that the signature D-1 is not made by the same person, who has made the signatures and writing S-1 to S-3 and A-1 to A-3.

Reference of Photographs:

(A)= Standard photograph of Sri. Rajesh Kumar Submitted at the time of joining of the Bank.

(B)= Photograph of the Call Letter of the person who appeared in the examination.

Opinion: On very careful examination of the two above referred photographs marked (A) and (B), I am of the opinion, the photograph (A) differs with that of (B) and both the photographs are not of the same person.

The reasons of my opinion are follows:

1. .....

2.The length of face of photograph(A) is more than that of (B).

3.The width of the face of photograph (A) should have been more than that of the face of photograph (B) in the same proportion, but it is not. The width of the face of photograph(A) is lesser than of the face of the photograph (B) as marked by the red line of the photographic enlargement.

4.....

5.....

6.....

20. It is contended on behalf of the respondents that the principles of natural justice would not apply in the facts of the present case, as the petitioner has obtained appointment on the basis of fraud and misrepresentation and in any case, the petitioner was on probation hence, the petitioner's service could be terminated without assigning any reason.

21. The contention is not accepted for the simple reason that the bank instead of simply terminating the services on the ground of unsuitability or poor performance during the probation, conducted an enquiry regarding the conduct of the petitioner for impersonation, fraud and misrepresentation, and after a full fledged enquiry conducted behind his back, evidence was collected by inviting expert opinion to prove the guilt. The motive is not termination simpliciter, the foundation being as to whether the petitioner impersonated in the written examination or not and the bank has acted upon the opinion of an expert taken behind the back of the petitioner without confronting the petitioner, the findings of the handwriting expert.

22. The contention of learned counsel for the respondent that the fact of

impersonation is not rebuttable, even after giving opportunity, the petitioner shall not be able to rebut the findings of the expert opinion, cannot be accepted for the simple reason that the expert opinion can always be questioned by the petitioner. It is not a case where the petitioner had obtained appointment by filling forged verification documents or caste certificate, but is a case of impersonation i.e. act of fraud and misrepresentation which is being sought to be proved on evidences to justify the action and suspicion of the Bank. Fraud and misrepresentation is a question of fact, which has to be pleaded and proved after opportunity to the aggrieved party.

23. A perusal of the impugned order dated 13.9.2011, addressed to the petitioner, the subject is 'cancellation of appointment'. After giving background of the examination conducted, the petitioner appearing in the examination the impugned order records as follows:

Cancellation of Appointment.

"1. With reference to above, we advise that the written test for the captioned recruitment exercise was conducted on 8th, 15th and 22nd November, 2009 and you were required to appear in the written test at Bal Vidya Mandir, Station Road, Charbag, Lucknow on 8th November, 2009 at 9:15 A.M. However, you did not appear in the written test at the scheduled date, time and venue but some body else appeared in the above said test impersonating to be yourself.

2. .....

3. .....

4. Therefore you suppressed this material fact that you did not appear in the written test held on 8th November, 2009 at 9:15 A.M. On Roll No. 2601001887 allotted to you at Bal Vidya Mandir, Station Road, Charbagh, Lucknow and allowed some one else to appear in the written test in your place, as such your so called selection in Bank is void ab-initio. Accordingly, there is no service contract between you and the Bank and any engagement thereto in pursuance to the referred appointment letter is invalid and void ab-initio. However, for the record sake you are informed by this letter that your selection on the referred ground is calcelled in express terms by virtue of this letter which please note. Accordingly, your name has been struck off from the employee's roll/list of the Bank.

5. Please acknowledge receipt of this letter."

24. The discharge order is not order simpliciter, it in clear terms states that the foundation for termination is that the petitioner "did not appear in the written test and somebody else appeared.....impersonating to be yourself" is stigmatic and punitive and reflects upon the character/reputation of a person, it is blemish, imputation, label indicating deviation from a norm.

25. In the case of State of Punjab Vs. Balbir Singh8. The order of discharge mention the words "unlikely to prove an efficient police officer." Further before passing the aforesaid order of discharge it appears that Shri Balbir Singh, who was found to have consumed liquor and misbehaved with a lady constable was medically examined and thereafter discharge order was passed. The appeal, which was filed before the Deputy Inspector General of Police, was rejected and while rejecting the appeal, he referred to the aforesaid facts and stated that the

discharge order was correct. Shri Balbir Singh challenged the order of discharge on the basis of the averments contained therein as well as in the order of the Deputy Inspector General of Police. The Hon'ble Apex Court upholding the aforesaid order of discharge held as under;-

"In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the misbehaviour with a lady constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the light of the standards of discipline expected from police personnel."

26. The term 'stigma' has to be understood in its plain meaning as something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm The assessment of work and performance and recording of satisfaction of the authority concerned that he is not satisfied with the work and performance regarding fitness of the employee concerned would not make the order stigmatic since it is not a blemish on the character and reputation of the person concerned but it reflects on the capacity and efficiency of the incumbent with respect to the work for which he/she was employed.

27. It has been held in various judgments rendered by the Supreme Court that reasons assigned in the termination order, at times may not be punitive or stigmatic, the following words/phrases mentioned in the order have been held to be not punitive.

i.)"want of application'
ii.)"lack of potential"
iii.)"found not dependable"
iv.)"under suspension"
v.)"work is unsatisfactory"
vi.)"unlikely to prove an efficient officer"

(Refer: Dipti Prakash Banerjee vs. Saytendra Nath Bose National Centre for Basic Sciences, Calcutta and others (1999) 3 SCC 60, Paras Nath Pandey vs. Director, North Central Zone, Cultural Centre, Nyay Marg, Allahabad (2009) 1 UPlBEC 274)

28. Considering the facts of the case, in the light of the legal principles, discussed herein above, I am of the view that the impugned order of termination is nothing but punitive and stigmatic, therefore, cannot be sustained.

29. In the result, the writ petition is allowed. The impugned order dated 27.8.2011 passed by Regional Manager, State Bank of India is quashed. The petitioner shall be entitled for reinstatement with all consequential benefits but with respect to arrears of salary, he will be paid 50% of the backwages for the period he remained out of employment pursuant to impugned order of termination. It goes without saying that this judgment shall not prevent to the respondents from proceedings afresh against the petitioner and pass a fresh order in accordance with law.

30. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2014

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 57930 of 2013

Self Finance Colleges Welfare Association, Bijnor & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri V.K. Singh, Sri D.K. Singh, Sri Bhuvnesh Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Vivek Saran, Sri Vivek Varma

Constitution of India, Art.-226-Writ Petition-filed by Association of self financed institution affiliated to MJP Ruhilkhand University-challenges decision of executive council-charging development fee-in absence of any statutory provision-discrimination in charging development fee from un-aided institution -without rational basis-held-petition by registered association-maintainable.

Held: Para-3 & 5

3. The petitioner, being a registered society, is a juristic person. It has filed the present writ petition on behalf of its members, which are Self Financed Colleges, affiliated to the respondent university. The representatives of the 12 institutions, details of which have been given in para nos. 4 & 5 of the supplementary affidavit, are the members of the committee of management of the petitioner institution. Sri G.K. Singh, learned Senior Advocate, has also made a statement that member institutions of the petitioner undertake to be bound by the outcome of the present writ proceedings. In view of the above, I am of the opinion that the petitioner association is entitled to maintain the present writ petition on behalf of its member self financed colleges.

5. In such view of the matter, I am of the opinion that the petitioner is entitled to maintain the present writ petition in respect of the grievance raised, and the objections raised with regard to its maintainability is consequently rejected.

Case Law discussed:
1996 (7) SCC 29

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

1. Petitioner is an association of Self Financed Colleges, affiliated to M.J.P. Ruhilkhand University, Bareilly and has got itself registered as a society under the Societies Registration Act, 1860. Clause-12 of its bye-laws permits the society to institute legal proceedings on its behalf. It has filed the present writ petition challenging the decision taken by the Executive Council in its meeting dated 2.11.2011 and 27.2.2013, as intimated in the communication/order of the Registrar dated 15.7.2013, insofar as a demand of development fee @ Rs. 500/- per student has been levied from the Self Financed institutions.

2. At the very outset, Sri Vivek Verma, learned counsel appearing for the University, has raised a preliminary objection with regard to the maintainability of the writ petition on the ground that petitioner has no locus to maintain the writ petition as it is not a person aggrieved and no student, who alone could have complained, has actually raised an issue and the writ petition, therefore, is liable to be dismissed.

3. The petitioner, being a registered society, is a juristic person. It has filed the

present writ petition on behalf of its members, which are Self Financed Colleges, affiliated to the respondent university. The representatives of the 12 institutions, details of which have been given in para nos. 4 & 5 of the supplementary affidavit, are the members of the committee of management of the petitioner institution. Sri G.K. Singh, learned Senior Advocate, has also made a statement that member institutions of the petitioner undertake to be bound by the outcome of the present writ proceedings. In view of the above, I am of the opinion that the petitioner association is entitled to maintain the present writ petition on behalf of its member self financed colleges.

4. The demand of development fee is restricted only to the self financed colleges and no such demand is contemplated from the students of the aided colleges. It is submitted by the learned counsel for the petitioner that decision of the respondent university to levy development charges from the self financed colleges only is arbitrary, as it discriminates against the students of self financed colleges. There is nothing on record to indicate as to why development fee is being charged only from the students of self financed colleges. The argument of Sri Vivek Verma that fee structure for aided and non aided institutions, is different, is not convincing. The university will have to justify as to why such demand is restricted to students of self financed colleges only. No reply or reason, in this regard, has been brought on record. The status of the institution has no bearing on the demand for payment of development charges. In the absence of any rational basis for the classification, this Court finds substance in the argument that the members of the petitioner are discriminated, as its students are being saddled with extra liability.

5. In such view of the matter, I am of the opinion that the petitioner is entitled to maintain the present writ petition in respect of the grievance raised, and the objections raised with regard to its maintainability is consequently rejected.

6. The demand of development fee from the students of self financed colleges has been challenged on the ground that such a demand is not backed by law. The aforesaid submission is substantiated by Sri G.K. Singh, learned Senior Counsel, by relying upon section 51(2)(j) of the U.P. State Universities Act, 1973 (herein after referred to as 'Act'). It is contended that the fee, which may be charged by an affiliated college, has to be provided in the ordinance of the university. Section 51(2)(j) of the Act is reproduced:-

"51. Ordinances- ---------- (2) Without prejudice to the generality of the provisions of sub-section (1), the Ordinance shall provide for the following matters, namely-

(j) the fees which may be charged by the University or by an affiliated or associated college for any purpose;"

7. Section 52 of the Act provides for the manner in which ordinance would have to be framed. Specific provisions relating to income or expenditure of the university for being incorporated in the ordinance also requires an approval from the State Government. Section 52(3), proviso (c), which is applicable, is reproduced:-

"52. Ordinance how made. --------

(3) Save as otherwise provided in this section, the Executive Council may, from time to time, make new or additional Ordinances or may amend or repeal the Ordinances referred to in sub-sections (1) and (2):

Provided that no ordinance shall be made -

(c) effecting the number, qualifications and emoluments of teachers of the university or the income or expenditure of the university, unless a draft of the same has been approved by the State Government."

8. On the strength of the aforesaid provision, it is contended that unless ordinances are framed, in accordance with law, making specific provision for charging of development fee, the decision to charge the amount itself is in excess of jurisdiction. Reliance has been placed upon the decision of this Court in Committee of Management Public Degree College and others Vs. State of U.P. and others: 2012 (5) ESC 3015. Para 8 of the judgment has been relied upon, which is reproduced:-

"Having heard learned counsel for the parties and having perused the records and the stand of the University, this Court does not find any justification for having a different structure of examination fee for the students of the self-financed institutions at a a higher rate. To my mind there is no rational nexus with the object sought to be achieved namely the examination fees which is in relation to examinations that are common for the self-finance institutions and aided institutions. In the absence of any rational basis for the discrimination, the equality clause as contained under Article 14 of the Constitution of India appears to have been infringed by the University by imposing different fee for the same courses and for the same examination. The status of the institution has no bearing on the nature of the examinations that are common for aided and self-financed institutions. No other material adverse to the petitioners has been placed to draw an inference otherwise. To the contrary the decision of the Finance Committee for the Session 2012-13 vindicates the stand on discrimination raised by the petitioners."

9. Sri Vivek Varma, learned counsel appearing for the university, on the other hand, has attempted to justify the decision, by referring to Section 21(1)(viii) of the Act. Section 21 provides for the power and duties of Executive Council. Section 21(1)(viii) of the Act is reproduced:-

"To fix the fees, emoluments and travelling and other allowances of the examiners."

10. He contends that levy of the development fee by the Executive Council can be traced to the aforesaid provision. He also places reliance upon the judgment delivered by this Court in Writ Petition No. 67119 of 2011, which is reproduced below:-

"Heard learned counsel for the petitioner, learned Standing counsel as well as Sri Sanjay Kumar Singh, Advocate for the respondents University.

Petitioner is an association of Self Finance Education Institutions which is affiliated to Dr.Bhim Rao Ambedkar University, Agra.

State Government on 24th March, 2011 has resolved to increase the amount in question which an incumbent was entitled to get in lieu of examination duly and in In view of service rendered in the examination. Pursuant thereto, university concerned in the meeting of the Finance Committee has resolved on 17.5.2011 by proceeding to enhance the fees of students from Rs. 1000/- to Rs. 1500/- per annum and said resolution of Finance Committee has been accepted by the Executive Council of the University concerned on 9.06.2011. At this stage petitioner has rushed to this Court contending therein that increase which has been so made is unjustifiable and uncalled for.

Once the State Government in its wisdom has taken decision to revise the remuneration of the incumbents, who are attached with the examination work and in this regard definite directives have been issued that remuneration be increased and further amount incurred for the same is to be generated by the University concerned. University concerned in order to generate the funds meeting out such expenses has subsequently resolved by an Expert Committee that is Finance Committee for making increase of Rs. 500/- per student. As far as petitioner is concerned, increase of Rs. 1000/- per annum to Rs. 1500/- per annum has been effected and the said resolution has been accepted by the Executive council. Once when enhancement in question is only from Rs. 1000/- to 1500/- and the decision in question has been taken in regard to meeting out Financial liability as directed by the State Government, then this Court can not come to the rescue of the petitioner by proceeding to interfere with the said policy decision.

A said policy decision neither infringes any Constitutional right nor infringes any statutory right conferred upon the petitioner.

Writ petition is accordingly dismissed."

11. Reliance has also been placed upon the judgment of the Apex Court reported in Municipal Council, Waraseoni and another Vs. Satish Chandra Jain and another: 1996 (7) SCC 29.

12. I have considered the respective submissions advanced and have also perused the materials placed for consideration of this Court as well as the judgements relied upon.

13. A perusal of the scheme of the Act clearly goes to show that charging of fee by the university or affiliated and associated colleges has to be provided in the ordinance. Unless the demand of development fee is backed by framing of appropriate ordinance permitting such levy of development fee, the university would not be entitled to charge such amount. This provision would otherwise restrict the possibility of levying different fee by different institutions arbitrarily. The respondent university, therefore, can levy development fee only if it is so provided by an ordinance. In the instant case, no such ordinance has been brought to the notice of the Court, which permits levy of development fee, and therefore, the charging of amount as development fee is without jurisdiction.

14. The argument of Sri Vivek Verma that source of power for levy of development fee can be traced from section 21(1)(viii) also cannot be accepted. Section 21 deals with the powers of the Executive Council. Section 21(1)(viii) deals with fixation of fee, emoluments and travelling and other

allowances of the examiners only. The power to levy development fee from students of the self financed colleges cannot be traced to section 21(1)(viii) of the Act. So far as the judgement of Hon'ble Single Judge in writ petition no.67119 of 2011 is concerned, it may be noticed that the specific issue requiring adjudication by this Court was not the question under consideration therein. Moreover, the provisions, which have been noticed above, were not pressed, and therefore, the judgement delivered in that matter cannot come to the rescue of the respondent university. The judgement of Hon'ble Supreme Court in Municipal Council (supra) also has no applicability to the facts of the present case inasmuch as the judgement of the Apex Court dealt with the fixation of fee by the municipality and the question was as to whether the levy was a fee or tax. The judgements relied upon by Sri Vivek Verma, therefore, have no applicability to the facts of the present case.

15. Considering the aforesaid facts and circumstances of the case, this Court finds that the demand of the university to levy development fee since is not backed by the appropriate statutory provision, therefore, it cannot be sustained. The law is otherwise settled that if the statute requires a thing to be done in a particular manner, it has to be done in that matter alone and no other procedure for the purpose can be resorted. Once the Act provides the procedure for determination of fee, the university was bound to have charged fee only in such manner and its decision to levy the development fee without complying with the provisions of the Act cannot be sustained. Consequently, writ petition succeeds and is allowed.

16. The decision of the Executive Council held in its meeting dated 2.11.2011 and 27.2.2013 as communicated vide order of the Registrar dated 15.7.2013, insofar as it raises a demand for payment of Rs. 500/- as development fee from the students of self financed institutions, is quashed. This Court had passed an interim order, whereby the amount collected as development fee was directed to be kept in a separate deposit by the university. Since the writ petition has been allowed, it is provided that the amount in this regard, kept with the university shall be returned to the colleges, with a further direction to the colleges to return such amount to the students concerned.

17. No order, however, is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2014

BEFORE
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ MISRA, J.

Civil Misc. Writ Petition No. 58755 of 2014

Arun Kumar Dubey & Anr. .Petitioners
Versus
High Court of Judicature at Allahabad & Anr. ...Respondents

Counsel for the Petitioners:
Sri Jitendra Kumar, Sri Prasoon Tomar

Counsel for the Respondents:
Sri Manish Goyal, Sri Ravi Kant

Constitution of India, Art.-233(2)-Higher judicial services-petitioner declared successful in preliminary examination-aggrieved by corrigendam issued on 26.06.2014 by which 7 years experience shall be read in view of law laid down in Sanjay Agrawal case-meaning thereby the date on which advertisement made-

petitioner must have possess 7 years experience as an Advocate-which as per terms clause 2 of advertisement 7 years was to be counted as on next January of the year-held-corrigendam issued by High Court-being strict in accordance with decision of Supreme Court in Tej Prakash Pathak & C. Channabasavaih-no interference required.

Held: Para-
The list which has been published by the High Court seeks to give effect to the corrigendum by including the names of such candidates who satisfy the essential requirement after excluding those candidates who may have been declared eligible earlier but are actually not eligible. Mere declaration in the earlier list that they were successful in the preliminary examination does not create in them a right to appear at the main examination even if they are not eligible. The decisions of the Supreme Court in Tej Prakash Pathak (supra) and C. Channabasavaih (supra), therefore, do not help the petitioners.

Case Law discussed:
(2013) 4 SCC 540; AIR 1965 SC 1293; (2007) 3 UPLBEC 2558; (2013) 5 SCC 277.

(Delivered by Hon'ble Dilip Gupta, J.)

1. The petitioners, who had responded to the advertisement issued by the High Court for making appointment by direct recruitment to the Uttar Pradesh Higher Judicial Services and had appeared at the preliminary examination held in 2014, have filed this petition for quashing the corrigendum dated 26 June 2014 published by the High Court as well as the list of candidates previously declared successful as now ineligible due to short practice on the date of application in terms of the corrigendum.

2. The minimum essential qualifications as prescribed in the advertisement are as follows

"2.MINIMUM ESSENTIAL QUALIFICATIONS A candidate must be an Advocate of not less than seven years standing as on 01st day of January, 2015. The applicants must fulfil the essential requirements of the post and other conditions stipulated in the Uttar Pradesh Higher Judicial Service Rules, 1975.

Note:Prosecuting Officers/Assistant Prosecuting Officers are treated to be an Advocate and eligible as per the Judgement of Hon'ble Supreme Court in Civil Appeal No.561 of 2013-Deepak Agarwal Vs. Keshav Kaushik & Others."

3. The petitioners submitted their applications which were required to be filled online from 19 May 2014 to 18 June 2014. As the petitioners stated that they were Advocates who would have not less than seven years standing as on 1 January 2015, they were issued admit-cards and they appeared at the preliminary examination held on 20 July 2014. Their names were included in the list of successful candidates declared on 24 July 2014.

4. A corrigendum dated 26 June 2014 had, however, been issued by the High Court which is as follows :

"In the paragraph no.2 (Minimum Essential Qualifications) of the "Instructions" in place of words "....of not less than 7 years standing as on 01.01.2015..." the words "....of not less than 7 years standing as on the date of application ....." shall be read in view of the law declared in High Court of Judicature, Allahabad & Etc. Vs. Sanjay Agarwal & Anr. Etc. and Deepak Agarwal Vs. Keshav Kaushik & Ors. by the Hon'ble Supreme Court."

5. In view of the aforesaid corrigendum, a list of candidates who had previously been declared successful but found to be ineligible due to short-practice as on the date of application was declared on 21 October 2014. The names of the two petitioners are included in the list as they are not Advocates of not less than seven years standing as on the date of application.

6. Learned counsel for the petitioners has submitted that it was not open to the High Court to make any change in the eligibility criteria after the last date of submission of the application as that would be violative of Articles 14 and 16 of the Constitution. In support of his contention, learned counsel for the petitioners has placed reliance upon the judgment rendered by the Supreme Court in Tej Prakash Pathak & Ors. Vs. Rajasthan High Court & Ors.1 and C. Channabasavaih & Ors. Vs. State of Mysore & Ors.2. It is also his contention that once the petitioners had appeared at the preliminary examination and had been declared successful on 24 July 2014, it was not open to the High Court to subsequently declare the petitioners ineligible in view of the revised eligibility criteria contained in the corrigendum dated 26 June 2014. In this connection, learned counsel for the petitioners submitted that though the impugned corrigendum has been issued in view of the law declared by the High Court in Sanjay Agarwal etc. etc. Vs. State of U.P. & Anr.3 and the decision of the Supreme Court in Deepak Agarwal Vs. Keshav Kaushik & Ors.4, but the Supreme Court in Deepak Agarwal (supra) has not held that the candidate must be an Advocate of not less than seven years standing as on the date of application. It is his contention that the advertisement issued by the High Court was in accordance with the provisions of Rule 5(c) of the U.P. Higher Judicial Service Rules, 19755 which provide that the recruitment to the service shall be made by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting the application is published.

7. Sri Ravi Kant, learned Senior Counsel appearing for the High Court assisted by Sri Manish Goyal has, however, submitted that the Division Bench of this Court in Sanjay Agarwal (supra) has declared Rule 5(c) of the Rules to the extent it provides "on the first day of January next following the year in which the notice inviting application is published" as ultra vires Article 233(2) of the Constitution and, accordingly, struck down this portion of the Rule. He has further pointed out that initially an interim order was granted by the Supreme Court in Special Leave Petition No.17212 of 2007 filed by the High Court to assail the order passed in Sanjay Agarwal (supra), but it was ultimately disposed of by the Supreme Court on 21 February 2014 in terms of the judgment rendered by the Supreme Court in Deepak Agarwal (supra). It is his submission that the corrigendum was issued by the High Court on 26 June 2014 to give effect to the judgment of the High Court in Sanjay Agarwal (supra) and the judgment of the Supreme Court in Deepak Agarwal (supra).

8. We have considered the submissions advanced by learned counsel for the parties.

9. Recruitment to the Uttar Pradesh Higher Judicial Service is made in accordance with the Rules. Rule 5(c) of the Rules, which had been challenged in Sanjay Agarwal (supra), reads as follows:

"5. Sources of recruitment.--The recruitment to the service shall be made -

(a) .....

(b) .....

(c) by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published."

10. It was contended before the Division Bench in Sanjay Agarwal (supra) that the aforesaid provision permits even such Advocates who have less than seven years of standing at the bar as on the date of submission of application to be considered for appointment because the cut-off date for the purpose of determining the standing at the bar has been fixed as the first day of January of the next following year in which the notice inviting application is published. In this connection it was pointed out that though the notice in question had been published on 31 March 2007, but the cut-off date was notified as 1 January 2008 which would mean that an Advocate of less than seven years standing at the bar as on 31 March 2007 would also be eligible to appear in the selection. The Division Bench held that Rule 5(c) of the Rules, to the extent it provides "on the first day of January next following the year in which the notice inviting application is published", is ultra vires Article 233(2) of the Constitution and, therefore, struck down that portion. The observations of the Court are as follows :

"(51) A perusal of the aforesaid makes it clear that for the purpose of discharging its function of making recommendation for appointment of District Judges from Bar an advertisement shall be published by the Court in various leading news papers of the State. The applications shall be received by the Registrar of the High Court as well as the District Judges within whose jurisdiction the candidates has been practicing. All the applications shall be accompanied by the certificate of age, academic qualifications, character standing as legal practitioner and other documents. The District Judges while forwarding the applications to the Court would also submit their own comments with respect to each candidate's character and fitness for appointment to the service. All these applications thereafter shall be processed by the selection committee constituted under Rule 16 who shall also conduct examination including interview. Thereafter the selection committee shall prepare a list and submit the record of all the candidates to the Chief Justice alongwith its own recommendation with respect to the names of the candidates in order of merit who in its opinion are suitable for appointment in the service. Rule 18 sub-rule 3 term the entire exercise undertaken by the selection committee as "preliminary selection". Under Rule 18(4) the Court thereafter shall examine the recommendations of the selection committee and prepare a list of selected candidates in order of merit which shall be forwarded to the Governor. Therefore, all the steps commencing from Rule 17(1) to Rule 18(4) are integrally connected with the process of recommendation of the Court and it cannot be said that the 'recommendation' means only the final list sent to the Governor and earlier thereto it is something unconnected and distinct from recommendation. Here the process of recommendation therefore commences on

31.3.2007 which may have completed thereafter. Presently as per directions of the Apex Court outer limit is 2.1.2008. If that be so, for the purpose of eligibility of an advocate for recommendation and appointment as District Judge, the length of his standing as an advocate has to be seen at least on the date when the process of recommendation commences and cannot depend on a date when the formal letter is ultimately issued. Since Rule 5(a) as it initially enacted 1975 Rules has already undergone amendment and presently it is Rule 5(c) which is on the statute book therefore there is no occasion to consider the validity of Rule 5(a) of 1975 Rules. So far as Rule 5(c) of 1975 Rules as it stands vide 6th Amendment dated 9.1.2007, we have no hesitation to hold it inconsistent and contrary to Article 233(2) of the Constitution of India and therefore is ultra vires to the extent it says "on the first day of January next following the year in which the notice inviting application is published", the said rule is liable to be struck down.

(52) Consequently clause 2 of the instructions of the advertisement in so far as it provides the cut off date as 1.1.2008 is also declared illegal and accordingly quashed.

.....

(76) Thus only those petitioners who were enrolled as Advocates and have practiced as such for 7 years are eligible to appear in Higher Judicial Service Examination of U.P. and cannot be disqualified only on the ground that presently they have been appointed as APP/APOs. However, those who were never enrolled as an Advocate under 1961 Act will not be entitled to be considered under Article 233 of the Constitution of India. Issue no. 5 is decided accordingly.

RESULT

1. .....

2. Rule 5(c) of U.P. Higher Judicial Service Rules, 1975 to the extent it reads " on the first day of January next following the year in which notice inviting application is published", is held illegal and ultra vires of Article 233 (2) of the Constitution of India and to that extent it is struck down.

3. Clause (2) of the instructions of the advertisement dated 31.3.2007 in so far as it provides the cut-off date as 1.1.2008 for determining experience of an advocate is declared illegal and to that extent it is quashed.

4. .....

5. .....

6. ....."

11. As noticed above, the High Court had filed a Special Leave Petition in the Supreme Court to assail the order passed in Sanjay Agarwal (supra). Initially an interim order was granted by the Supreme Court but the Special Leave Petition was ultimately disposed of on 21 February 2014 in terms of the judgment of the Supreme Court rendered in Deepak Agarwal (supra). The order passed by the Supreme Court is as follows :

"Heard learned counsel for the parties and also perused the application for appropriate directions.

The Special Leave Petition Nos.17201-17212 of 2007 are taken on record and disposed of in terms of the judgment of this Court in Deepak Agarwal v. Keshav Kaushik & Ors. (2013) 5 SCC 277."

12. In Deepak Agarwal (supra) issues had arisen before the Supreme Court in regard to Haryana Superior Judicial Service Rules, 2007. Rule 11

which prescribes the qualifications for direct recruits is as follows:

"Rule 11. The qualifications for direct recruits shall be as follows :

(a) must be a citizen of India;

(b) must have been duly enrolled as an Advocate and has practiced for a period not less than seven years;

(c) must have attained the age of thirty five years and have not attained the age of forty years on the 1st day of January of the year in which the applications for recruitment are invited."

13. It would be seen that the aforesaid Rule prescribes that in order to be eligible, a person must have been enrolled as an Advocate and practiced for a period not less than seven years.

14. Article 233(2) of the Constitution deals with appointment of District Judges and is as follows :

"A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

15. The expression "if he has been for not less than seven years an Advocate" was interpreted by the Supreme Court in Deepak Agarwal (supra) to mean "seven years as an Advocate immediately preceding the application" and, therefore, the Supreme Court observed that one of the essential requirements articulated by the expression in Article 233(2) is that such person must with the requisite period be continuing as an Advocate on the date of application.

16. Rule 5(c) after deletion of the portion found to be ultra vires by a Division Bench of this Court in Sanjay Agarwal (supra) would read as follows :

"5(c) By direct recruitment from amongst the Advocates of not less than seven years standing."

17. Thus, in view of the decision of the Supreme Court in Deepak Agarwal (supra), no exception can be taken to the corrigendum issued by the High Court for bringing the advertisement in accordance with the decision rendered by the High Court in Sanjay Agarwal (supra) and the decision of the Supreme Court in Deepak Agarwal (supra) by prescribing that the candidate should have not less than seven years standing as on the date of application.

18. The contention of learned counsel for the petitioners that the eligibility criteria cannot be changed after the expiry of last date of submission of the application form cannot be accepted. The advertisement had prescribed essential qualifications in terms of Rule 5(c) of the Rules. The Division Bench of this Court in Sanjay Agarwal (supra), as noticed above, had declared that portion of the said rule which prescribes "not less than seven years standing on the first day of January next following the year in which the notice inviting application is published" to be ultra vires Article 233(2) of the Constitution. The Special Leave Petition filed by the High Court was disposed of by the Supreme Court in terms of the judgment rendered by the Supreme Court in Deepak Agarwal (supra). The Supreme Court, while interpreting Article 233(2) of the Constitution, has observed that the essential requirement is that such person must with requisite period be continuing as an Advocate on the date of the application.

19. The petitioners, therefore, cannot insist that the High Court should continue

with the recruitment on the basis of a qualification prescribed in the advertisement which had been struck down by the High Court in Sanjay Agarwal (supra). The corrigendum seeks to ensure that the essential qualification for recruitment is in terms of the judgment of the Supreme Court in Deepak Agarwal (supra).

20. This apart, the issuance of the corrigendum after the last date of submission of the applications would not be contrary to Articles 14 and 16 of the Constitution as there can possibly be no candidate who can contend that he would have applied if this essential qualification was mentioned in the initial advertisement but has been prevented from submitting the application since the last date has expired. On the other hand, the corrigendum, which seeks to ensure that the advertisement is in accordance with the law declared by the High Court and the Supreme Court, only reduces the number of candidates who had applied.

21. The list which has been published by the High Court seeks to give effect to the corrigendum by including the names of such candidates who satisfy the essential requirement after excluding those candidates who may have been declared eligible earlier but are actually not eligible. Mere declaration in the earlier list that they were successful in the preliminary examination does not create in them a right to appear at the main examination even if they are not eligible. The decisions of the Supreme Court in Tej Prakash Pathak (supra) and C. Channabasavaih (supra), therefore, do not help the petitioners.

22. There is, therefore, no merit in this petition. It is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 60486 of 2014

Ravi Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devesh Kumar Verma, Sri Suresh Chandra Verma

Counsel for the Respondents:
A.S.G.I., Sri Vikash Budhwar

Constitution of India, Art.-226-Legality of Brochure clause-10-definition of 'family' -challenged as discriminatory-Selection of dealership for Regular and Rural out let-affording clause of definition of family included parent, unmarried brother and sister while applicant bachelor-but excludes the parties if married-such discrimination/disqualification without any rational basis-held-distribution of larges of state to suberve the common good of as many as possible-economic and social justice sought to achieved having reasonable nexus between object and prescribed of eligibility criteria-petition dismissed.

Held: Para-7
In view of the decision of the Supreme Court, noted above, such a qualification cannot be said to be arbitrary. Hence, we do not see any merit in the matter. The writ petition is, accordingly, dismissed. There shall be no order as to costs.

Case Law discussed:
(1995) 1 SCC 85

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. By these proceedings the petitioner has sought to question the legality of the definition of the expression "family unit" in clause-10 of the Brochure issued by state owned oil companies for the selection of dealers for Regular & Rural Retail Outlets. Clause-10 of the brochure provides for a disqualification and, insofar it is material, provides as follows:

"10. DISQUALIFICATION

A. Individual Applicants : The persons while meeting the above mentioned eligibility criteria if do not satisfy any of the following requirements will be considered as ineligible for applying for the dealership:-

(i) Fulfill Multiple dealership norms : Multiple Dealership/ Distributorship norms means that the applicant or any other member of 'family unit' should not hold a dealership/ distributorship or Letter of Intent (LOI) for a dealership/distributorship of any Oil Company i.e. only one Retail Outlet / SKO-LDO dealership / LPG distributorship or an LOI of an Oil Company will be allowed to a 'Family Unit'.

'Family Unit' in case of married applicant, shall consist of individual concerned, his/ her Spouse and unmarried son(s)/daughter(s). In case of unmarried person/ applicant, 'Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s)."

2. Under the above condition, a multiple dealership norm has been put into place, under which any other member of the family unit should not hold a dealership, distributorship or a Letter of Intent for the allotment of a dealership or a distributorship of an oil company. In other words only one retail outlet dealership or distributorship of an oil company would be allotted to a family unit. In the case of an applicant who is married, the family unit has been defined to consist of the individual, his or her spouse and unmarried sons and daughters. In the case of an unmarried person, the family unit is defined to include parents and unmarried brothers and sisters.

3. According to the submission of the petitioner, this is a discriminatory provision and violates Article 14 of the Constitution since parents of an unmarried applicant have been brought within the purview of the expression 'family unit', whereas, in the case of a married individual, the parents are excluded.

4. The object and purpose of the disqualification is to ensure that there should not be a concentration of retail outlets, dealerships and distributorships of an Oil Company in one family. These dealerships or, as the case may be, retail outlets and distributorships, are allotted by state owned oil companies. Consistent with the Directive Principles of the State Policy, an effort is made to ensure dispersal of ownership so that a fair and equal opportunity is granted to all members of society to apply for the allotment of such dealerships, distributorships and retail outlets. There can be no gainsaying the fact that these allotments by the state owned oil companies are highly sought after, providing as they do an important source of income to the allottee. Hence the norm that there should

be a dispersal of ownership cannot be faulted since it is based on a criterion which is rational. How a family should be defined for the purposes of the allotment of a retail outlet, distributorship or dealership, is a matter of policy so long as the criterion which is adopted, is based on logic and reason. The definition of the expression "family unit", in the present case, postulates that where an applicant is married, his or her family should be read to consist of the spouse and unmarried children. Where, however, a person is not married, the parents and siblings are included as members of the family.

5. The petitioner has a grievance in regard to the inclusion of parents within the definition of a family in the case of an unmarried applicant. The issue before the Court is whether this assessment by the state owned oil companies for defining a disqualification or, as the case may be, eligibility is arbitrary and perverse. We are unable to hold that it is so. The nature of the definition has a rational nexus with the object sought to be achieved, which is the dispersal of ownership of such distributorships, dealerships and retail outlets.

6. A similar issue was considered in a judgement of the Supreme Court in Mahinder Kumar Gupta Vs Union of India1. In that case, the definition of the expression "close relatives" was defined in a broader sense for candidates who were not physically handicapped as opposed to those who belonged to the physically handicapped category. A person from amongst specified near relatives was made ineligible to apply for another dealership to any nationalized oil company. In the case of a candidate, who was not physically handicapped, the category included the spouse, parents, brother, sister, children, son-in-law/daughter-in-law and parents-in-law. While dealing with the challenge to the definition on the ground that it was arbitrary and repelling the contention of illegality, the Supreme Court observed as follows:

"5. The preamble to the Constitution envisages the securing of economic and social justice to all its citizens; accorded equality of status and of opportunity assuring the dignity of the individual. Article 39(b) postulates that the ownership and control of the material resources of the community are to be so distributed as to best subserve the common good. Clause (c) prevents concentration of wealth and means of production to the common detriment. Since the grant of dealership or distributorship of the petroleum products belongs to the Government largesse, the Government in its policy of granting the largesse have prescribed the eligibility criteria. One of the eligibility criteria is that one among the near relations or partners or associates in other words among a named group of persons alone should have dealership and there should not be any concentration by them in the distribution of its petroleum products through the dealership. The guidelines further intend to prevent frustration of the State policy by process of legal ingenuity or subterfuge. One of the criteria is relationship. The relationship criteria has been prescribed to see that the persons who already had one dealership should not apply so that the above objectives of the Constitution are achieved. In Part III, clause (b) of the relationship category, a person from among specified near relatives has been made ineligible to apply for another dealership to any of the nationalised oil companies. The petitioners/ appellants dehors the guidelines have no independent right to have business or avocation in the distribution or production or ownership of one of the petroleum products. Production and distribution of the petroleum products are the exclusive monopoly of the State under Article

19(6) of the Constitution. As a part of its policy of the distribution of its largesse government have prescribed the eligibility criteria to the persons to obtain dealership for distribution of petroleum products. The distribution of the largesse of the State is for the common good and to subserve the common good of as many persons as possible. The Government of India intended to group together certain near relations as a unit and one among that unit alone was made eligible to apply for and claim for grant of dealership. Further, economic and social justice as envisaged in the preamble of the Construction is sought to be achieved. Therefore, there is a reasonable nexus between the object and the prescription of the eligibility criteria envisages in the guidelines. All those who satisfy the eligibility criteria alone are entitled to apply for the consideration of the grant of dealership. It is true that in case of physically handicapped persons, only three classes of persons were made ineligible. Physically handicapped persons have been treated as a class by themselves. Under these circumstances, any other person other than PH cannot claim parity with PH persons. As far as partnership is concerned, if one of the persons either have a dealership or relations who were found to be eligible under the relationship criteria, and had the dealership, than clause 10 of the said guidelines gets attracted and such partnership also did not become eligible to apply for dealership/ distributorship. The object of clause 10 appears to be that for those partners who either one among themselves or any of the relations of one of the partners had a dealership, the other partner or the specified relations also not be eligible to apply for grant of dealership individually or as a member of the partnership. Therefore the guidelines are based on public policy to give effect to the constitutional creed of Part IV of the Indian Constitution."

7. In view of the decision of the Supreme Court, noted above, such a qualification cannot be said to be arbitrary. Hence, we do not see any merit in the matter. The writ petition is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2014

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 64257 of 2014

Smt. Seema & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kumar, Sri A.R. Nadiwal

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Protection of matrimonial life-girl belongs to Hindu religion-while boy a Muslim religion-in absence of conversion of religion-such marriage alleged to be solemn in Maszid-as per Qurran-no marriage-apart form that both are residing at Bombay-parent of girl also at Mumbai-no territorial jurisdiction-petition dismissed.

Held: Para-13 & 14

13. Since for a valid Muslim marriage both the spouses have to be Muslim as per verses of Holy Quran as noted in the judgment in the case of Dilawar Habib Siddiqui (supra) and since undisputedaly the petitioner no. 1 is a Hindu girl and has

not embraced Islam and as such it cannot be said that there was any valid marriage.
14. Besides above both the petitioners have stated that they and their parents reside in Mumbai and petitioner no. 2 is working in Mumbai and as such even no cause of action has arisen within the territorial limits of this Court.

Case Law discussed:
2010 (69) ACC 997

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

1. Heard Sri Dinesh Kumar, learned counsel for the petitioners and Sri Dinesh Kumar Dubey, learned Standing Counsel for the State- Respondents.

2. This writ petition has been filed praying for a writ, order or direction in the nature of mandamus commanding the respondent authorities to protect the matrimonial life and liberty of the petitioners.

3. Learned counsel for the petitioners submits that the petitioners have married with each other but the respondent no. 4 is interfering and as such mandamus may be issued to the respondents to protect the matrimonial life and liberty of the petitioners. Both the petitioners are present in the Court and have been identified by their learned counsel.

4. Learned Standing counsel submits that there is no religion conversion by petitioner no. 1 who is a Hindu girl and therefore there cannot be a marriage of petitioner no. 2 (a muslim) as per the Holy Quran.

5. I have carefully considered the submission of learned counsel for the parties.

6. During the course of hearing, the petitioner no. 1 offered for recording her statement on oath. Both the petitioners have given their statement on oath before this Court which have recorded in open Court and in presence of learned counsel for the parties. Learned counsel for the petitioners has also identified the petitioners and also put his signature below the signatures of the petitioners on their statement on oath recorded today.

7. The aforesaid statement on oath of the petitioners recorded today (28.11.2014) are reproduced below :-

(i) Statement on oath of Seema (petitioner no.1) :-

याची सं0 1 सीमा ने समक्ष न्यायालय सशपथ बयान किया कि आज दिनॉक 28–11–14 को निम्नलिखित बयान दे रही हूॅ।

मेरा नाम सीमा है। मेरे पिता जी का नाम शिव नारायण है। वह मुम्बई में रहते हैं और वहीं व्यापार करते है।

मैं कक्षा 12 तक पढ़ी हूॅ । मैं सुलतान के साथ दिनॉक 16–11–2014 को इलाहाबाद आई। उन्होंने मेरा निकाह 23–11–14 को हाईकोर्ट के सामने मसजिद में करा दिया। मैंने अपना धर्म परिवर्तन नही किया है। फिर कहा मैंने अपना धर्म परिवर्तन कर लिया है। मेरे पास धर्म परिवर्तन का कोई प्रमाण नहीं है। फिर कहा मैं धर्म परिवर्तन करना चाहती हूॅ।

(ii) Statement on oath of Sultan (petitioner no.2)

याची सं0 2 सुल्तान ने समक्ष न्यायालय सशपथ बयान किया कि आज दिनॉक 28–11–14 को निम्नलिखित बयान दे रहा हूॅ।

मेरा नाम सुल्तान है। मेरे पिता का नाम इसाक अन्सारी है। वह मुम्बई में रहते हैं। मैं मुम्बई में कारपेन्टर का कार्य करता हूॅ। मैं यहॉ पर चार–पॉच दिन पहले सीमा को मुम्बई से इलाहाबाद साथ लेकर आया हूॅ। मैंने इनसे निकाह इलाहाबाद में कर लिया। मैं इस्लाम धर्म मानता हूॅ। मैंने अपना धर्म परिवर्तन नहीं किया है। मैने हाईकोर्ट के सामने इनसे निकाह कर लिया। मैने इनका धर्म परिवर्तन नहीं कराया है। मेरी जन्मतिथि 24–4–93 है। मैं कक्षा 8 तक पढ़ा हूॅ।''

8. In the statement as reproduced above, both the petitioners have admitted that their parents are residing in Mumbai. In paragraph no. 8 of the writ petition, it is stated that the petitioners are neighbor at Thane, Maharashtra. A photostat copy of an alleged Adhar Card of the petitioner no. 1 has been filed in which her address is mentioned as 216/3 , Pushpa Nagar P.P. Marg, Near Smashan Bhumi, Dongari, Virar (West), Thane Virar, Maharashtra-401305. In photostate copy of an alleged voter ID Card address of petitioner no. 1 is mentioned as 216 Rajachatra Pati Shiva Ji Marg, Virar is mentioned. A photostat copy of an alleged passport of petitioner no. 2 has been filed in which his address is shown as P.O. Madhwalia, Mahrajganj (Uttar Pradesh). It has not been explained in the writ petition that if the petitioners and their parents are resident of Mumbai then in what circumstances, the writ petition has been filed before this Court impleading the Senior Superintendent of Police, Mahrajganj, SHO PS Kothibhar, District Mahrajganj as respondnets and the relief in the nature of mandamus has been prayed against them.

9. In the alleged Nikahnama the date and place of Nikah is recorded as under :

''तारीख निकाह – 23.11.2014 वक्त 4 बजे दिन इतवार वरमुकाम हाईकोर्ट, इलाहाबाद''

10. Petitioner no.1 is a Hindu girl and as per her own statement as reproduced above, she has neither renounced Hindu religion nor has embraced Islam prior to the alleged Nikah. She has also not changed her original Hindu name. Petitioner no. 2 has stated that he brought the petitioner no. 1 from Mumbai to Allahabad and performed Nikah in front of High Court. He also stated that the petitioner no. 1 has not changed her religion.

11. From the facts as noted above, it is clear that the petitioner no. 1 was brought from Mumbai to Allahabad by the petitioner no.2. She is a Hindu by religion and has neither renounced her religion nor embraced Islam. She has written her original Hindu name not only in the writ petition but also stated the same in her statement. She has put her signature as "SEEMA" in the writ petition and also on the statement on oath before this Court. No evidence of religion conversion of petitioner no. 1 has been filed along with the writ petition.

12. In the case of Dilbar Habib Siddiqui Vs. State of U.P. and another, 2010 (69) ACC 997, a Division Bench of this Court held as under : -

"The primary question which is to be adjudicated by us is as to whether the impugned FIR can be quashed or not on the peculiar facts of the writ petition? A perusal of the contents of the impugned FIR indicates that Khushboo Jaiswal is alleged to have been abducted by the petitioner three months prior to the lodging of it. By his dexterous manuvours and deceit petitioner had succeeded in not getting the FIR registered against him for all this period. It is informant's allegation that petitioner had abducted her daughter. Writ Petition further reveals that Khushboo never converted herself into Islam. There is no document regarding her such conversion. In our above conclusion we are fortified by the fact that in the affidavit and application filed by Khusboo herself subsequent to her alleged contract marriage she has described herself as Khushboo and not by any Islamic name. As Khushboo she could not have contracted marriage according to Muslim customs. In those referred documents she has addressed herself as Khushboo Jaiswal daughter of Rajesh Jaiswal. Thus what is conspicuously clear unerringly without any ambiguity is that Khushboo Jaiswal never

converted and embraced Islam and therefore her marital tie with the petitioner Dilbar Habib Siddiqui is a void marriage since the same is contrary to Islamic dicta and tenets of Holy Quran. It is recollected here that Nikah i.e. marriage in pre- Islamic Arabia, meant different forms of sex relationships between a man and a woman. Prophet Mohammed brought about a complete change in the position of woman in society through Holy Quran, which is the primary and basic source of Islamic Law. In this respect we can do no better than to refer the verses of Holy Quran. Sura 2 Ayat 221 of The Holy Quran as is mentioned in the text book of Mohammedan Law by I.Mulla, Ist Edition, 2nd reprint, at page 162,provides as follows:-

"Do not marry unbelieving women until they believe..... Nor marry your girls to unbelievers until they believe" .

Here a believing women is referred to such a women who has embraced Islam and has faith in Prophet Mohammed. Marriage in Muslim law is not only a ritual but is also "a devotional act" as Dr.M.U.S. Jang referred it in his book 'Desertion on the Development of Muslim Law in British India' (page 1.2.). I. Mulla in his above text book at page 166 has written thus:-

"Koranic injunctions recognise in Islam, marriage as the basis of society. Though it is a contract, it is also a sacred covenant. Temporary marriages are forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of human race."

Thus what is well recognised in Muslim Law is that marriage is a sacred act. For essentials of a valid muslim marriage, AL-HAJ MAULANA FAZLUL KARIM in his translation and commentary of Mishkat-ul-Masabih , AL- HADIS (BOOK II), CHAPTER XXVII, SECTION 2,has written thus:-

" In tradition, we find that the following qualifications of a bride should be sought. The bride should be (1) a Muslim (2) chaste (3) virgin,(4) beautiful, (5) accomplished, (6) having sweet tongue, and good manners, (7) possessing property , (8) having children bearing capacity and affectionate nature and (9) equal respectibility."

Thus for a valid muslim marriage both the spouses have to be muslim. In the present writ petition this condition is not satisfied as the writ petition lacks credible and accountable material in this respect on which reliance can be placed. "

13. Since for a valid Muslim marriage both the spouses have to be Muslim as per verses of Holy Quran as noted in the judgment in the case of Dilawar Habib Siddiqui (supra) and since undisputedaly the petitioner no. 1 is a Hindu girl and has not embraced Islam and as such it cannot be said that there was any valid marriage.

14. Besides above both the petitioners have stated that they and their parents reside in Mumbai and petitioner no. 2 is working in Mumbai and as such even no cause of action has arisen within the territorial limits of this Court.

15. In view of the above discussion this Court finds no good reason to grant any relief in this writ petition.

16. In result writ petition fails and is hereby dismissed.
