APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.06.2014

BEFORE
THE HON'BLE SHASHI KANT, J.

Criminal Appeal No. 71 of 2013

Jan Mohammad. ..Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri J.K. Gupta, Sri Irshad Ali, Sri P.K. Maurya

Counsel for the Respondents:
Govt. Advocate

Bail Application- Appeal pending-Second bail Application-grounds of second bail are almost same-conviction for a very serious and heinous offence-of minor rape-detention in jail may be factor for consideration but can not be ground for bail-rejected-hearing expedited.

Held: Para-7
Considering the above arguments raised by the learned counsel for the parties and material available on record, I am of the view that except to enhancement of some more period of sentence as undergone, there is no any new ground in this second bail application. The decision of the above referred case of Kamal Vs. State of Haryana is distinguishable and not applicable to the facts of this case looking to the nature of the crime committed by the appellant. As such, I find no merit in this bail application. It is liable to be rejected and is accordingly rejected.

Case Law discussed:
2004 13 Supreme Court Cases

(Delivered by Hon'ble Shashi Kant, J.)

1. This second bail application is moved on behalf of the accused applicant. The first bail application was rejected on merits by Hon'ble Zaki Ullah Khan, J. on 13.5.2013.

2. I have heard learned counsel for the appellant/applicant, learned A.G.A. for the State of U.P. and learned perused the material available on record.

3. This second bail application has been filed on behalf of the applicant in S.T No. 258/2010, arising out of Case Crime No. 406 of 2010, under Section 376/506 I.P.C., P.S. Kumarganj, District Faizabad, whereby, the applicant has been convicted under Section 376/506 (2) I.P.C. and sentenced to undergo rigorous imprisonment for a period of seven years and three years imprisonment for section 506 (2) and to pay of find of Rs. 25,000/- and in default of payment of fine, the appellant to further undergo for the period of six months additional imprisonment.

4. Learned Counsel for the appellant submits that as per the prosecution story itself the alleged occurrence took place on 26.06.2010 at about 10 a.m while F.I.R. for the same had been lodged after on extra ordinary delay of 20 days which created serious doubt to the prosecution story even then the learned trial court has convicted the appellant/applicant without proper appreciation of evidence and facts on record. The learned trial court has not properly appreciated the evidence on record and particularly this vital fact that prosecutrix had not disclosed to her mother on the same day that she was subjected to rape which was very unnatural. The learned trial court has failed to appreciate the medical evidence with regard to the age of the prosecutix

which, according to Modi, come to 17-18 years. The learned trial court has also failed to appreciate the medical report of the prosecution which clearly reveals that hymen was torned, two finger easily inserted and there was no opinion regarding rape. The learned trial court has also failed to appreciate that the sole basis of the alleged prosecution story was extra judicial confession allegedly made by the appellant under influence of liquor which is very weak in nature and unbelievable.

5. In support of his case, learned counsel for the appellant has placed reliance on the decision reported in 2004 13 Supreme Court Cases 526 in the case of Kamal vs. State of Haryana in which it has been held that " the appellant of that case has been convicted under Section 304-B I.P.C. and sentenced to imprisonment for seven years. It appears that so far the appellant has undergone imprisonment for about two years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that bail be granted to the appellant on such conditions as may be imposed by the District and Sessions Judge, Faridabad.

6. Controverting the above arguments raised on behalf of the appellant, the learned A.G.A. has submitted that the appellant has been convicted for a very serious and heinous offence of rape with a minor girl. His first bail application was rejected on 13.05.2014 after elaborate discussions made by Hon'ble Zaki Ullah Khan, J. Most of the arguments raised on behalf of the appellant belongs to the facts of the case, which were available to him at the time of making the first bail application. As far period of detention is concerned, that may be a factor for consideration to grant of bail but that cannot be a sole ground for granting bail to the appellant. Case law relied upon by the learned counsel for the appellant is not applicable to the facts of this case and second bail application of the accused appellant is liable to be rejected.

7. Considering the above arguments raised by the learned counsel for the parties and material available on record, I am of the view that except to enhancement of some more period of sentence as undergone, there is no any new ground in this second bail application. The decision of the above referred case of Kamal Vs. State of Haryana is distinguishable and not applicable to the facts of this case looking to the nature of the crime committed by the appellant. As such, I find no merit in this bail application. It is liable to be rejected and is accordingly rejected.

8. However, looking to the facts and circumstances of the case and keeping in view of the fact that the appellant is in jail since 20.7.2010 and he will be completing four years of imprisonment in July, 2014 against total sentence of sevens years imprisonment which has been granted to him. Therefore, I am of the view that hearing of this appeal must be expedited and this appeal may be disposed of at the earliest in the interest of the justice.

9. List this appeal as peremptorily on 3rd July, 2014 among top of the 5 cases.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2014

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

First Appeal From Order No. 539 of 2011

Hansnath Yadav & Ors. ...Appellants
Versus
U.P.S.R.T.C.. ...Respondent

Counsel for the Appellants:
Sri A.K. Jauhari

Counsel for the Respondent:
Sri Prabhakar Tewari

Motor Vehicle Act, 1988-Section 173- Appeal For enhancement of compensation towards less of consortium by a house hold women-in absence of direct evidence-income can not be assessed less than 5000/-per month-accordingly applying 11 multiplier-held proper-appeal allowed-compensation enhanced from Rs. 2,29,500 to 6,30,000 with 9% interest.

Held: Para-15, 17

15. Hon'ble Supreme Court while dealing with the determination of income of a skilled worker, in the context of current scenario has determined minimum income of a skilled worker as Rs.5000 to 6000/- per month.

17. In the present case, the deceased Smt. Rajmati Yadav was aged about 54 years and was performing the functions of skilled worker/self-employed, in addition to her contribution to the family as wife or mother, who died in the accident occurred in the year 2002. Her income in such circumstances could not be assessed at less than Rs.5,000/- per month.

Case Law discussed:
(2010) 3 TAC 769; (2013) 10 SCC 695; 2013 ACJ 2594; (2013) 9 SCC 54; Civil Appeal No. 10918 of 2013.

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

1. The present appeal has been preferred by the husband and his four sons, challenging the award of Motor Accident Claims Tribunal dated 17.2.2011 passed in M.A.C.P. No. 533 OF 2003, awarding Rs.2,29,500/- as compensation, on account of death of Smt. Rajmati Yadav on 27.10.2002 and have sought enhancement of compensation. The award of the tribunal has been accepted by the respondent- UPSRTC and no appeal has been preferred by it.

2. On 27.10.2002 at about 4.15 PM, when the appellant no.1 along with his wife Smt. Rajmati Yadav who was a pillion rider on a scooter bearing registration no. UGD-1598 was coming from Chinhat Bazar towards his house, the driver of the roadways bus bearing registration no. UP-32 0077 dashed the scooter from behind due to rash and negligent driving. On account of that accident, the appellant no.1 and deceased Smt. Rajmati Yadav sustained serious injuries. When deceased was taken to the medical college, she was declared to be dead. Son of the appellant no.1, namely Devendra Kumar Yadav, who was coming behind the scooter, was present on the spot and has seen the incident. He admitted his father-mother in the hospital and on 28.10.2002 he informed in writing to the police station Chinhat, upon which a first information report was lodged. Claim under section 166 of the Motor Vehicles Act was

raised by the husband and his four sons against the respondent- UPSRTC with the allegation that the deceased was a hale and hearty lady, and was operating a PCO, by which she earned Rs.2,500 per month. Under different heads amount of compensation of Rs.9,02,000/- was claimed.

3. The respondent- UPSRTC has contested the claim and by filing written objection it is stated that the accident in question was not caused by its bus and the claim has been raised only on the fake and frivolous facts in order to obtain compensation and, therefore, the claim is liable to be rejected.

4. The tribunal on the basis of respective pleadings of the parties framed four issues.

5. Issue no.1 was regarding the question as to whether on 27.10.2002 at about 4.15 PM at Saket Filling Centre in front of Faizabad Road Lucknow, the driver of roadways bus bearing registration no. UP-32 0077 dashed the scooter from behind due to rash and negligent driving, and on account of which Smt. Rajmati Yadav, who was sitting on the scooter, died due to injuries sustained in the accident and Hansnath Yadav sustained injuries. This issue was decided by the tribunal and a finding was returned that the death of the deceased Smt. Rajmati Yadav was caused due to rash and negligent driving of the roadways bus bearing registration no.UP-32 0077 in the manner, as claimed.

6. Issue no.3 was to the effect that whether the claim petition is barred by the provisions of rule 3(1) of the Motor Accident Claims Tribunal, 1967. This issue was considered and decided by the tribunal in favour of the claimants-appellants. Issue no.2 & 4, regarding entitlement of compensation of the claimants, were answered by the tribunal in favour of the claimants-appellants.

7. Claimants-appellants have not produced any certificate regarding income of the deceased at Rs.2,500/-. Tribunal after assuming the income of the deceased as being not less than Rs.100/- per day, accepted the income of the deceased as Rs.2500 per month. After appropriating 1/3rd towards her personal and living expenses, the loss of dependency has been determined as Rs.20,000/- per annum. Since no evidence has been led or filed regarding age of the deceased, tribunal relying upon the postmortem report in which age of the deceased was held to be 54 years, applied multiplier of 11. Loss of dependency was fixed at Rs.2,20,000/-. Further sum of Rs.5,000/- towards loss of consortium, Rs.2,500 towards funeral expenses and Rs.2,500/- towards loss of estate, quantifying the total compensation at Rs.2,29,500/-.

8. In the instant case, the deceased was the wife of claimant-appellant no.1 and mother of four sons aged about 33, 30, 27 and 20 years respectively. The question up for consideration is, as to how the loss suffered due to death of deceased who was epicenter of the entire family has to be determined?

9. The tribunal has returned a finding that the claimants-appellants

could not produce the income certificate as claimed of Rs.2500/- per month. Even the tribunal after assuming her income as being not less than Rs.100 per day, accepted her income of Rs.2500/- per month.

10. In order to determine the claim of compensation at the instance of husband due to death of her wife, different heads have been recognized by law which includes loss of wife, contribution to household from her earnings and other expenses likely to be incurred for having the household run by housekeeper or servant apart from gratuitous services rendered to the house. This issue has been dealt with extensively by Hon'ble Supreme Court in its judgment delivered in Arun Kumar Agrawal and another v. National Insurance Company and others reported in (2010) 3 TAC 769. While dealing with this issue, following observations were made in para 19, 23, 24, 27, 31, 32, 33 and 35, which are reproduced:-

"19. We may now deal with the question formulated in the opening paragraph of this judgment. In Kemp and Kemp on Quantum of Damages, (Special Edition - 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a house-keeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife, and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.

23. In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

24. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term "services' is required to be given a broad meaning and must be

construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

27. In A. Rajam v. M. Manikya Reddy 1989 ACJ 542 (Andhra Pradesh HC), M. Jagannadha Rao, J. (as he then was) advocated giving of a wider meaning to the word "services' in cases relating to award of compensation to the dependents of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

"The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From this total must be deducted the expense the family would have otherwise been spending for the deceased housewife. While estimating the "services' of the housewife, a narrow meaning should not be given to the meaning of the word "services' but it should be construed broadly and one has to take into account the loss of "personal care and attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services."

31. In Amar Singh Thukral v. Sandeep Chhatwal (supra), the learned Single Judge of Delhi High Court adopted the yardstick of minimum rates of wages for the purpose of award of compensation in the case of death of a housewife and then proceeded to observe "since there is no scientific method of assessing the contribution of a housewife to her household, in cases such as the present, resort should be had to the wages of a skilled worker as per the minimum rates of wages in Delhi. Although, this may sound uncharitable, if not demeaning to a housewife, there is hardly any option available in the absence of statutory guidelines'.

32. In our view, it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the legislature had, as early as in 1994, fixed the notional income of a

non-earning person at Rs.15,000/- per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation. Though, Section 163A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in clause (6) of the Second Schedule and then apply appropriate multiplier keeping in view the judgments of this Court in General Manager Kerala State Road Transport Corporation v. Susamma Thomas (Mrs.) and others (supra), U.P. S.R.T.C. v. Trilok Chandra (supra), Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another (supra) and also take guidance from the judgment in Lata Wadhwa's case. The approach adopted by different Benches of Delhi High Court to compute the compensation by relying upon the minimum wages payable to a skilled worker does not commend our approval because it is most unrealistic to compare the gratuitous services of the housewife/mother with work of a skilled worker.

33. Reverting to the facts of this case, we find that while in his deposition, appellant No.1 had categorically stated that the deceased was earning Rs.50,000/- per annum by paintings and handicrafts, the respondents did not lead any evidence to controvert the same. Notwithstanding this, the Tribunal and the High Court altogether ignored the income of the deceased. The Tribunal did advert to the Second Schedule of the Act and observed that the income of the deceased could be assessed at Rs.5,000/- per month (Rs.60,000/- per annum) because the income of her spouse was Rs.15,416/- per month and then held that after making deduction, the total loss of dependency could be Rs.6 lacs. However without any tangible reason, the Tribunal decided to reduce the amount of compensation by observing that the deceased was actually non-earning member and the amount of compensation would be too much. The High Court went a step further and dismissed the appeal by erroneously presuming that neither of the claimants was dependent upon the deceased and the services rendered by her could be estimated as Rs.1250/- per month.

35. In the result, the appeal is allowed. The impugned judgment as also the award of the Tribunal are set aside and it is held that the appellants are entitled to compensation of Rs.6 lacs. Respondent No.1 is directed to pay the said amount of compensation along with interest at the rate of 6% per annum from the date of filing application under Section 166 of the Act till the date of payment. The needful shall be done within the period of 3 months from the date of receipt/production of copy of this order. The appellant shall get cost of Rs.50,000/- ."

11. One of the Hon'ble Judges, while agreeing with the aforesaid gave separate reasons, in para 23 and 28, which are reproduced:-

"23. Admittedly, it has to be recognized that the services produced in

the home by the women for other members of the household are an important and valuable form of production. It is possible to put monetary value to these services as for instance, the monetary value of cooking for family members could be assessed in terms of what it would cost to hire a cook or to purchase ready cooked food or by assessing how much money could be earned if the food cooked for the family were to be sold in the locality.

28. For the reasons aforesaid, while agreeing with the views of brother Singhvi, J., I would humbly add, that time has come for the Parliament to have a rethinking for properly assessing the value of homemakers and householders work and suitably amending the provisions of Motor Vehicles Act and other related laws for giving compensation when the victim is a woman and a homemaker. Amendments in matrimonial laws may also be made in order to give effect to the mandate of Article 15(1) in the Constitution. "

12. The contribution of deceased, who was mother and wife of the claimants-appellants can hardly be overemphasized. The vacuum created in the household due to death of the deceased can hardly be compensated in terms of the money. While assessing her contribution to the family, it would be callous on part of a court of law to treat her contribution as equivalent to the notional income of Rs.15,000/- per annum, as suggested by the respondent-UPSRTC. The argument regarding notional income of Rs.15,000/- to be relied as per IInd Schedule in the absence of proof of income is noticed only to be rejected. The IInd Schedule, which is referable to section 163A of the Act, provide for compensation on structured formula basis. Section 163-A has been introduced by the legislature vide Act No.54 of 1994 with effect to 14.11.1994. The object of the amending Act was to provide for speedy compensation even where allegation of wrongful neglect or default of the owner, was not pleaded or established. The provisions of section 163-A introducing the IInd Schedule are not to be scrupulously followed in a claim under section 166 of Act. In Puttama & others v. K.L. Narayana Reddy and another in Civil Appeal No.10918 of 2013 decided on 9.12.2013, Hon'ble Supreme Court held as under in para 28 and 29 of the said judgment:-

"28. In Sarla Verma(Smt.) and others vs. Delhi Transport Corporation and another, 2009(6) SCC121this Court compared Section 163A with Section 166 of the Act, 1988 and reiterated that the principles relating to determination of liability and quantum of compensation were different for the claims under Section 163A and claims made under Section 166.

29. Thus it will be evident from the provisions of the Act that the structured formula as prescribed under Second Schedule and the multiplier mentioned therein is not binding for claims under Section 166 of the Act, 1988."

13. Hon'ble Supreme court in Puttama (supra) also took note of the fact that determination of notional income of

Rs.15,000/- p.a. was introduced by the Parliament in the year 1994 and on account of fall in the value of rupee the notional income was required to be revised upwardly. It was also noticed that amendment to the Act has already been proposed and after it was passed by Rajya Sabha on 8.5.2012, the bill is pending in Lok Sabha. Following observations were made in para 53 and 56 of the said judgment:-

"53. In view of finding recorded above, we hold that Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable, due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy.

56. The Central Government was bestowed with duties to amend the Second Schedule in view of Section 163-A(3), but it failed to do so for 19 years in spite of repeated observations of this Court. For the reasons recorded above, we deem it proper to issue specific direction to the Central Government through the Secretary, Ministry of Road Transport & Highways to make the proper amendments to the Second Schedule table keeping in view the present cost of living, subject to amendment of Second Schedule as proposed or may be made by the Parliament. Accordingly, we direct the Central Government to do so immediately. Till such amendment is made by the Central Government in exercise of power vested under sub-section (3) of Section 163A of Act, 1988 or amendment is made by the Parliament, we hold and direct that for children upto the age of 5 years shall be entitled for fixed compensation of Rs.1,00,000/- (rupees one lakh) and persons more than 5 years of age shall be entitled for fixed compensation of Rs.1,50,000/- (rupees one lakh and fifty thousand) or the amount may be determined in terms of Second Schedule whichever is higher. Such amount is to be paid if any application is filed under Section 163A of the Act, 1988."

14. In the present case, evidence has been led on behalf of the claimants to the effect that the deceased was engaged in operating a PCO and she was earning Rs.2500/- per month. This court while deciding the claim under section 166 of the Act is not to be guided by the amount claimed, rather, the determination will have to be made, of just compensation, and if in enquiry under section 168 (2) of the Act the court determines higher compensation than what was claimed, as being just compensation, it would be the duty of the court to award such higher compensation. It is true that no proof of income was placed on record, but the evidence supporting her skills have not been controverted by leading contra evidence by the respondent- UPSRTC. The services rendered by her to the family as wife and mother are also undisputed. The services provided by the deceased to her minor daughters and husband need not be further elaborated in view of the observations made in Arun Kumar Agarwal (supra). Even though the gratuitous services rendered to the husband and children at home cannot be compensated in terms of the money but judicial notice can always be taken of the skills possessed and employed by her in extending the services to the family and loss suffered due to her death. The claimants are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by

the deceased. Although proof of income is not substantiated on record, yet deceased's income in light of the aforesaid discussions and the evidence brought on record cannot be counted as less than the income of a person who was engaged in performing the skilled activities. The least, which a court of law can thus do is to assess her income as not being less than the income of a skilled person.

15. Hon'ble Supreme Court while dealing with the determination of income of a skilled worker, in the context of current scenario has determined minimum income of a skilled worker as Rs.5000 to 6000/- per month.

16. In Minu Rout v. Satya Pradyumna Mohapatra (2013) 10 SCC 695, Hon'ble Supreme court was dealing with a claim under section 166 of the Act of a driver, where Rs.5,000/- per month was claimed. Hon'ble Supreme Court took judicial note of the fact that the post of a driver is skilled one and his salary ought to have been assessed at Rs.6,000/- per month and, therefore, we assess the income of the deceased at Rs.6,000/- per month for the purposes of determining the loss of dependency. In Kishan Gopal and another v. Lala and others: 2013 ACJ 2594, the income of a 10 years old boy assisting his father in agricultural work was assessed at Rs.5,000/- per month. Even in Arun Kumar Agarwal (supra) the income of the deceased lady was assessed at Rs.5,000/- per month.

17. In the present case, the deceased Smt. Rajmati Yadav was aged about 54 years and was performing the functions of skilled worker/self-employed, in addition to her contribution to the family as wife or mother, who died in the accident occurred in the year 2002. Her income in such circumstances could not be assessed at less than Rs.5,000/- per month.

18. In the instant case, the tribunal has applied the multiplier of 11 as the age of the deceased was between 50 to 55 years. We also hold it, accordingly.

19. The tribunal has deducted 1/3rd towards personal and living expenses. In the present case, deceased was married. The issue of deduction for personal and living expenses has been considered in respect of a married person in para 30 of Sarla Verma (supra), which is referred hereinafter:-

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-forth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

As such, the principle laid down in para 30 aforesaid would be more

appropriate to be applied in the present case. 1/4th of the aforesaid amount, therefore, would be appropriated towards personal and living expenses of the deceased.

20. The tribunal has further awarded a sum of Rs.2,000/- towards funeral expenses and Rs.5,000/- towards loss of consortium. This issue has been dealt with by Hon'ble Supreme Court in (2013) 9 SCC 54 Rajesh and others vs. Rajbir Singh and others in para 16 to 18 of the judgment, which is reproduced:-

"16. In a report on accident, there is no question of any reference to any claim for damages, different heads of damages or such other details. It is the duty of the tribunal to build on that report and award just, equitable, fair and reasonable compensation with reference to the settled principles on assessment of damages. Thus, on that ground also we hold that the tribunal/court has a duty, irrespective of the claims made in the application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim ade in the application for compensation.

17. The ratio of a decision of this court, on a legal issue is a precedent. But an observation made by this court, mainly to achieve uniformity and consistency on a socio-econmic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in Santosh Devi. We may, therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs.25000 to Rs.10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In Sarla Verma case, it was held that compensation for loss of consortium should be in the range of Rs.5000 to Rs.10000. In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc. the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Austraila, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.

18. We may also take judicial notice of the fact that the tribunals have been quite frugal with regard to award of

compensation under the head "funeral expenses". The "price index", it is a fact has gone up in that regard also. The head "funeral expenses" does not mean the fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is a follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of "funeral expenses", in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/-"

21. In view of the above, we hold that the claimants are entitled to loss of consortium amount of Rs.1,00,000/- and Rs.25,000/- for funeral expenses.

22. The tribunal has awarded payment of Rs.2,500/- towards loss of estate in the present case. The deceased was married aged about 54 years, therefore, it would be appropriate to award a sum of Rs.10,000/- for loss of estate.

23. In such circumstances, the claimants would be entitled to compensation following heads:-

Sl. No.	Heads	Calculations
(i)	Income	Rs. 5,000/-
(ii)	1/4th of (i) to be deducted as personal expenses of the deceased.	Rs.3,750/- (Rs.5000-1250)
(ii)	Compensation (for loss of dependency) after multiplier of 11 is applied.	Rs.4,95,000/- (Rs.3750x12x11)
(iv)	Funeral expenses	Rs.25,000/- (Rs.25,000 + 4,95,000 =Rs.5,20,000/-)
(v)	Consortium	Rs.1,00,000/- (Rs.1,00,000+5,20,000 =Rs.6,20,000/-)
(vi)	Loss of estate	Rs.10,000/- (Rs.10000+6,20,000 =Rs.6,30,000/-
Total compensation awarded		**Rs.6,30,000/-**

24. The tribunal has allowed interest at the rate of 6% p.a. from the date of filing of the claim petition. This court in F.A.F.O. No. 236 of 2010 considering Puttama & others v. K.L. Narayana Reddy and another in Civil Appeal No.10918 of 2013 decided on 9.12.2013, awarded interest at the rate of 9% p.a. Accordingly, the claimants are entitled to payment of interest in this case also at the rate of 9% p.a. from the date of filing of claim petition till the date of payment.

25. In view of our aforesaid findings, we modify the award dated 17.2.2011 passed by Motor Accident Claims Tribunal, Lucknow in M.A.C.P. No. 533 of 2003 and allow the claim for payment of compensation amounting to Rs.6,30,000/-, as calculated above, along with interest at the rate of 9% p.a. from the date of filing of the claim petition till the date of payment. The respondent - UPSRTC is directed to pay enhanced/additional compensation to the claimants within a period of three months by getting a demand draft prepared in their names in proportion to the amount awarded by the tribunal.

26. Accordingly, the present appeal is allowed in terms of the aforesaid directions. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2014

BEFORE
THE HON'BLE ANIL KUMAR SHARMA, J.

Criminal Appeal No. 921 of 2010

Ajay Kumar Shukla alias Chhottan Shukla .Appellant

Versus

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

Counsel for the Appellant:
Sri Shyam Sunder Mishra, Sri Mata Prasad Sri S.S. Chauhan

Counsel for the Respondent:
A.G.A.

Criminal Appeal-against conviction 8 years rigorous imprisonment with fine of Rs. 5000/-appeal against-confining prayer to reduce punishment to already undergone-held-while considering appropriate punishment court not to keep in view the rights of criminal but also careful about rights of victim and the society at large-conviction 8 years reduced to 5 years-without charge in fine.

Held: Para-12
In the case of Dhananjoy Chatterjee Vs. State of W. B. [1994] 2 SCC 220, this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. Similar view has also been expressed in Ravji v. State of Rajasthan, [1996] 2 SCC 175. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

Case Law discussed:
AIR 1991 SC 1463; [1994] 2 SCC 220; [1996] 2 SCC 175; AIR 2002 SC 760.

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

1. Challenge in this appeal is to the judgment and order dated 30.1.2010 passed by Sri M. S. Verma, the then Addl. Sessions Judge, Court no. 9, Fatehpur in S.T. no. 557 of 2005 (State Vs. Ajay Kumar Shukla) arising out of Case crime no. 140 of 2005 u/s 304 IPC, whereby the appellant had been convicted for the offence punishable u/s 304-II IPC and sentenced to undergo 8-years' rigorous imprisonment and fine of Rs. 5,000/- with default stipulation.

2. Shorn of details, the prosecution story was that on 4.7.2005 at 2:15 a.m. a

written report was lodged by complainant Triloki Nath alleging that on 3.7.2005 at about 8:00 p.m. while he was at home, Rajjan Nai came to take medicines from his brother Dhirendra Kumar Shukla and as them came out of the room, accused Chhottan Shukla armed with lathi came there and started assaulting his brother saying that why is he helping his father? His shrieks attracted nephew Sudhir (s/o Dhirendra) and Prem Dutt Shukla. This incident was seen in the lantern light and Rajjan Nai had a torch and all of them saved the injured. After about 1½ hour, the injured stopped speaking. After arranging vehicle the injured was taken to the police station and thereafter, he was sent for medical examination. On the basis of written report case at crime no. 140/05 u/s 308, 504, 506 IPC was registered against the accused-appellant, investigation whereof was taken up by S.O. Purshottam Yadav. Dr. Surendra Pratap conducted medical examination of Dhirendra Kumar Shukla on 4.7.2005 at 4.40 A. M. and he found following injuries on his person:

1.Abrasion 2 cm x 1 cm on the front of the head;

2.Contusion 11 cm x 2 cm on the left scapula;

3.Contusion with swelling 6 cm x 4 cm on the 2 cm below the right knee joint;

4.Abrasion 2 cm x 1 cm at the upper part of right tibia situated 5 cm below the right knew joint;

5.Lacerated wound 2.5 cm x 0.5 cm x deep to skin and deep muscle on the 8 cm above the left ankle joint;

6.Contusion 7 cm x 4 cm on the 11 cm below the left knee joint.

The doctor kept injuries no. 1 and 6 under observation and x-ray was advised. Rest injuries were simple, caused by blunt object and duration was about 24-hours. At about 11.45 a.m. on 4.7.2005 information regarding death of injured was received and then the case was converted into section 304 IPC. The autopsy on the cadaver of the deceased was conducted on 4.7.2005 at 3.00 p.m. The doctor has noted that the deceased has suffered death at 8.20 A.M. on the same day in the hospital due to coma as a result of ante-mortem head injury. The investigation ended into charge-sheet against the accused.

3. After committal of the case to the Court of Session charge u/s 304 IPC was framed against the appellant, who abjured the guilt and claimed trial.

4. In support of the charge the prosecution had examined complainant Triloki Nath Shukla PW-1, Prem Dutt PW-2, Jagdish Prasad Tripathi PW-3, SI Purshottam Singh Yadav PW-4, SI Rajendra Prasad PW-5, Dr. N. K. Saxena PW-6, SI Shri Prakash Singh PW-7 and Dr. Surendra Pratap PW-8.

5. The accused in his statement u/s 313 Cr. P. C. had again denied the entire prosecution story and claimed false implication on the ground that the deceased was a drunkard, he used to eve tease the ladies of the village and was beaten by the people. The complainant wanted to have his land very cheap, which he declined so he falsely implicated him. However, he has not produced any evidence in defence.

6. The learned trial Court after hearing the parties' counsel, has convicted and sentenced the accused-appellant as indicated in para-1 of the judgment above.

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

8. During the course of hearing, learned counsel for the appellant has not pressed the appeal with regard to the conviction of the appellant for the offence punishable u/s 304-II IPC. However, he has vehemently argued that custodial sentence of 8-years', is quite harsh and excessive, because the accused neither had any intention to kill the deceased or knowledge that he would be killed. His further submission is that during trial the accused had been in jail for about seven months and now he is in prison since 30.1.2010 i. e. from the date of his conviction by the learned trial Court. Thus, the accused has suffered imprisonment for about 4 years and 10 months, has argued the learned counsel. It is lastly submitted that the accused appellant be sentenced to imprisonment for the period already undergone by him. The learned AGA has however, opposed the prayer made by the counsel for the appellant.

9. Initially, the case was registered u/s 308, 504 and 506 IPC, however, after the death of Dhirendra Kumar Shukla, it was converted into section 304 IPC and the learned trial Court has found him guilty u/s 304 Part-II IPC. The State has not filed any appeal for conversion of the conviction of the appellant into Part-I section 304 IPC or for enhancement of the sentence. Not pressing a criminal appeal after the conviction of the accused by the Court below, is like the confession of the offence by the accused. The Courts generally take lenient view in the matter of awarding sentence to an accused in criminal trial where he voluntarily confesses his guilt, unless the facts of the case warrants severe sentence.

10. In the case of Sevaka Perumal etc. Vs. State of Tamil Nadu AIR 1991 SC 1463, the Apex Court in the matter of awarding proper sentence to the accused in a criminal trial has cautioned the Courts as under:

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

11. In the case of State of M. P. Vs. Ghanshyam Singh (2003) 8 SCC 13 : 2003 Crl. LJ 4339 a division bench of the M. P. High Court converted the conviction of Ghanshyam Singh from 302 IPC to 304, Part-I IPC and awarded custodial sentence of 2 years. It was observed by the Apex Court that lesser sentence should not be imposed merely on the ground of long pendency of matter. In that case, it was further observed that two years' custodial sentence for the offence under Section 304, Part-I, IPC was not proper and the sentence was enhanced to six years.

12. In the case of Dhananjoy Chatterjee Vs. State of W. B. [1994] 2 SCC 220, this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. Similar view has also been expressed in Ravji v. State of Rajasthan, [1996] 2 SCC 175. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

13. In a case of assault between two groups in regard to the right to bid for certain shamlat land, consequent to which two persons died due to the injuries suffered in the attack, the trial Court held that sentence of 8 years with a fine of Rs. 1,000 each would serve the ends of justice. This sentence was reduced by the High Court to a period of 5 years. The Supreme Court held that the setence awarded by the High Court was reasonable. [Vide - Tarsem Singh Vs. State AIR 2002 SC 760]

14. Thus considering the law laid down by the Apex Court in the above mentioned cases, in the facts and circumstances of the case, in my opinion, the ends of justice would be met if the custodial sentence of 8 years is reduced to 5-years' rigorous imprisonment without reducing the amount of fine imposed by the trial Court against the accused-appellant.

15. In view of the afore stated reasons, the appeal is partly allowed. The conviction of the appellant u/s 304 Part-II IPC is confirmed and rigorous imprisonment of 8-years is reduced to 5-years and sentence of fine of Rs. 5,000/- with default stipulation as awarded by the trial Court is maintained. The appellant is in jail and would serve out the remainder of his sentence if not already completed.

16. Let certified copy of the judgment be sent to the concerned Court immediately for sending modified conviction warrant of the accused-appellant to the concerned prison.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.05.2014

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

First Appeal From Order No. 1369 of 2009

Ram Gopal ...Appellant
Versus
Sahib Singh. & Anr. ...Respondents

Counsel for the Appellant:
Sri Balendu Shekhar

Counsel for the Respondents:
Sri G.S. Gandhi, Sri Rajesh Nath

Motor Vehicle Act, 1988- Section 173-appeal for enhancement of compensation-descend aged about 14 years and the age of parent 30-35-Tribunal awarded only Rs. 1,54,500/-applying principle of Kishan Gopal's case-Notional income per annum fixed 30,000/-applying 15 multiplier-would be Rs. 4,50,000/-apart from Rs. 50,000/-for love and affection award stand modified accordingly.

Held: Para-7
Their Lordships' of Hon'ble Supreme Court awarded an amount of Rs.5,00,000/- as compensation. The compensation awarded by Hon'ble Supreme Court in the case of Kishan Gopal (supra) seems to be squarely covered the present case. The age of the deceased (supra) was 10 years and parents' age was 36 years, their Lordships' held that the amount of Rs.4,50,000/- by applying multiplier of 15 should be awarded, in case where the age of the deceased children is between 10-15 years. Accordingly, the present case is squarely covered by the aforesaid judgment. In the present case, we also assess the notional income at Rs.30,000/- per annum and by applying multiplier of 15, award compensation of Rs.4,50,000/- for loss of life.

Case Law discussed:
2013 ACJ 2594.

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

1. Heard learned counsel for the appellant and learned counsel for the respondent-insurance company. This is an appeal under section 173 of the Motor Vehicle Act, against the impugned award dated 28.8.2009, passed by the Motor Accident Claims Tribunal/Additional District and Sessions Judge, Court No.4, Lucknow in Motor Accident Claim Petition No.372 of 2007.

2. The controversy relates to an accident occurred on 2.8.2007 at about 3.30 PM, in which son of the appellant, namely Rama Shanker @ Renu succumbed to injuries on account of accident caused by a truck bearing registration no. UP 78 AT 7325 due to rash and negligent driving, when he was on his way to home on bicycle. The deceased Rama Shanker @ Renu was the sole legal heir and survival of the parents assisting in agriculture work also. Father of the deceased, namely Ram Gopal is aged about 36 years, whereas the deceased was aged about 14 years. The tribunal has recorded the finding that the accident occurred on account of rash and negligent driving of the truck and awarded compensation to the tune of Rs.1,54,500/- assessing the notional income at the rate of Rs.15,000/- per annum.

3. The respondent-insurance company has not filed any appeal against the finding recorded by the tribunal, hence it seems to attain finality to the

extent that the factum of accident is concerned. The present appeal has been preferred for enhancement of compensation on the ground that compensation to the tune of Rs.,154,500/- is not just and proper as required under section 166/168 of the Motor Vehicle Act. Learned counsel for the appellant has invited attention to a case reported in 2013 ACJ 2594: Kishan Gopal and another v. Lala and others. On behalf of the respondent- insurance company, Sri Rajesh Nath submits that the deceased was aged about 14 years and being a non-earning member, the tribunal has awarded required compensation, hence the impugned award does not call any interference.

4. It is well settled proposition of law that IInd Schedule of the Motor Vehicle Act has outlived its utility and courts/tribunal may award just and fair compensation in pursuance to power conferred by section 166/168 of the Motor Vehicle Act.

5. Learned counsel for the appellant further invited attention to the statement given by P.W.2 Ram Gopal, father of the deceased, who stated on oath that the deceased was aged about 14 years and after college hours he used to assist him in the agriculture work. The assistance provided by deceased/son was valuable one. Apart from the fact that the deceased was sole legal heir and successor of the family, it is not disputed that the work of agriculture requires certain skill and knowledge. Accordingly, the assistance provided by the deceased/son seems to be valuable one for the family.

6. In case of Kishan Gopal (supra), a boy aged about 10 years, assisting his father and mother aged about 36 years in their agriculture work, was found to be valuable for the family. Hon'ble Supreme Court has assessed notional income of the deceased minor son of agriculturist at Rs.30,000/- per annum and by applying multiplier of 15, allowed a sum of Rs.4,50,000/- as compensation and Rs.50,000/- under conventional heads for loss of love and affection, funeral expenses, last rites etc. The observation made by Hon'ble Supreme Court in the case of Kishan Gopal (supra) is reproduced as under:-

"Since we have set aside the findings and reasons recorded by both the Tribunal and the High Court on the contentious issue Nos.1 & 2 by recording our reasons in the preceding paragraphs of this judgment and we have answered the point in favour of the appellants and also examined the claim of the appellants to award just and reasonable compensation in favour of the appellants as they have lost their affectionate 10 year old son. For this purpose, it would be necessary for us to refer to Second Schedule under Section 163-A of the M.V. Act, at clause No.6 which refers to notional income for compensation to those persons who had no income prior to accident. The relevant portion of clause No.6 states as under:

"6. Notional income for compensation to those who had no income prior to accident:

.....

(a) Non-earning persons - Rs.15,000/- p.a."

The aforesaid clause of the Second Schedule to Section 163-A of the M.V.

Act, is considered by this Court in the case of Lata Wadhwa & Ors. v. State of Bihar & Ors., while examining the tortuous liability of the tort-feasor has examined the criteria for awarding compensation for death of children in accident between age group of 10 to 15 years and held in the above case that the compensation shall be awarded taking the contribution of the children to the family at Rs.12,000/- p.a. and multiplier 11 has been applied taking the age of the father and then under the conventional heads the compensation of Rs.25,000/- was awarded. Thus, a total sum of Rs.1,57,000/- was awarded in that case. After noting the submission made on behalf of TISCO in the said case that the compensation determined for the children of all age groups could be double as in its view the determination made was grossly inadequate and the observation was further made that loss of children is irrecoupable and no amount of money could compensate the parents. Having regard to the environment from which the children referred to in that case were brought up, their parents being reasonably well-placed officials of TISCO, it was directed that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs.1.5 lakhs to which under the conventional heads a sum of Rs.50,000/- should be added and thus total amount in each case would be Rs.2 lakhs. Further, in the case referred to supra it has observed that in so far as the children of age group between 10 to 15 years are concerned, they are all students of Class VI to Class X and are children of employees of TISCO and one of the children was employed in the Company in the said case having regard to the fact the contribution of the deceased child was taken Rs.12,000/- p.a. appears to be on the lower side and held that the contribution of such children should be Rs.24,000/- p.a. In our considered view, the aforesaid legal principle laid down in Lata Wadhwa's case with all fours is applicable to the facts and circumstances of the case in hand having regard to the fact that the deceased was 10 years' old, who was assisting the appellants in their agricultural occupation which is an undisputed fact. We have also considered the fact that the rupee value has come down drastically from the year 1994, when the notional income of the non-earning member prior to the date of accident was fixed at Rs.15,000/-. Further, the deceased boy, had he been alive would have certainly contributed substantially to the family of the appellants by working hard. In view of the aforesaid reasons, it would be just and reasonable for us to take his notional income at Rs.30,000/- and further taking the young age of the parents, namely the mother who was about 36 years old, at the time of accident, by applying the legal principles laid down in the case of Sarla Verma v. Delhi Transport Corporation, the multiplier of 15 can be applied to the multiplicand. Thus, 30,000 x 15 = 4,50,000 and 50,000/- under conventional heads towards loss of love and affection, funeral expenses, last rites as held in Kerala SRTC v. Susamma Thomas, which is referred to in Lata Wadhwa's case and the said amount under the conventional heads is awarded even in relation to the death of children between 10 to 15 years old. In this case also we award Rs.50,000/- under conventional heads. In our view, for the aforesaid reasons the said amount would be fair, just and reasonable compensation to be awarded in favour of the appellants. The said amount

will carry interest at the rate of 9% p.a. by applying the law laid down in the case of Municipal Council of Delhi v. Association of Victims of Uphaar Tragedy5, for the reason that the Insurance Company has been contesting the claim of the appellants from 1992-2013 without settling their legitimate claim for nearly about 21 years, if the Insurance Company had awarded and paid just and reasonable compensation to the appellants the same could have been either invested or kept in the fixed deposit, then the amount could have earned five times more than what is awarded today in this appeal. Therefore, awarding 9% interest on the compensation awarded in favour of the appellants is legally justified."

7. Their Lordships' of Hon'ble Supreme Court awarded an amount of Rs.5,00,000/- as compensation. The compensation awarded by Hon'ble Supreme Court in the case of Kishan Gopal (supra) seems to be squarely covered the present case. The age of the deceased (supra) was 10 years and parents' age was 36 years, their Lordships' held that the amount of Rs.4,50,000/- by applying multiplier of 15 should be awarded, in case where the age of the deceased children is between 10-15 years. Accordingly, the present case is squarely covered by the aforesaid judgment. In the present case, we also assess the notional income at Rs.30,000/- per annum and by applying multiplier of 15, award compensation of Rs.4,50,000/- for loss of life.

Apart from Rs.4,50,000/-, under conventional heads for loss of love and affection, funeral expenses, last rites etc. an amount of Rs.50,000/- is also awarded, making total entitlement of the claimant to the tune of Rs.5,00,000/-.

8. Accordingly, we allow the present appeal and modify the impugned award to the extent that the claimant shall be entitled for the amount of Rs.5,00,000/- along with 9% interest from the date of filing of claim petition till the date of payment. In terms of the judgment in the case of Kishan Gopal (supra) we direct the respondent- insurance company to issue the demand draft drawn on any nationalized bank along with interest in pursuance to modify award, in favour of the claimant and send it to the tribunal within a period of two months and tribunal shall hand over the demand draft to the claimant expeditiously, say within a period of one month.

Let the learned counsel for the respondent-insurance company shall inform about the present order immediately to the insurer.

Accordingly, the present appeal is allowed and the impugned award stands modified.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.06.2014

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

Criminal Revision No. 1713 of 2014.

Siyaram & Anr. ...Applicants
Versus
State of U.P. ...Opp. Party

Counsel for the Petitioner:
Sri Akanksha Yadav

Counsel for the Respondents:
A.G.A.

Criminal Revision-against summoning order-passed under section 319 on application of prosecution-on ground in view of provisions para 7.22(3) of Chapter II of U.P. L.R. Manual-D.G.C.(Crl.) can not move application without instruction of state government-held-misconceived-rejected.

Held: Para-15
I have gone through these provisions. There is no such provision in it providing for that the District Government Counsel (Criminal) cannot appear or move an application without having specific written permission in a particular case by the State Government. Once the District Government Counsel is appointed by the State Government to conduct the legal proceedings on behalf of the State Government either generally or specially by the Government, he is free to move any application necessary in the interest of justice and expeditious disposal of the case in discharge of his duty. Nowhere it is provided in Legal Remembrancer's Manual that the District Government Counsel is required to seek permission from the State government separately every time to move any application.

Case Law discussed:
(2007) 14 SC 544; [2014(1)JIC 539 (SC)]; 2001(2) JIC 757 (SC):AIR 2001 SC 2521; 2007 (2) JIC 490(SC).

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

1. Heard learned counsel for the revisionists and learned AGA for the State on the point of admission and perused the record.

2. This criminal revision has been filed against the order dated 05.05.2014 passed by learned Additional Session Judge, (Special Judge, E.C. Act), Rampur in S.T. No. 509 of 2012, under sections 307 read with 149 IPC, arising out of case Crime No. 1583 of 2009, P.S. Shahabad, District Rampur, State vs. Virendra Fauji and others, whereby the learned Additional Sessions Judge has allowed the application filed by Additional District Government Counsel (Criminal) under section 319 Cr.P.C. and has summoned the revisionists to face the trial.

3. Learned counsel for the revisionists has argued that the Additional District Government Counsel (Criminal) has no locus standi to move any such application under section 319 Cr.P.C. against any person, who has not been charge-sheeted by the police or by the investigating agency. The locus standi to move such an application is with the person aggrieved and not with the ADGC(Crl.) who can not be termed as aggrieved party.

4. Learned counsel for the revisionists has filed the copy of provisions contained in paragraph 7.22 (3) of Chpater VII the U.P. Legal Remembrancer's Mannual which provide that the District Government Counsel (Crl.) shall inform the development of the case arising in any sessions trial and seek guidance of U.P. Legal Remembrancer's for the prosecution of the case. Learned counsel for the revisionists has argued that in view of the aforesaid provisions, the District Government Counsel (Criminal) is dis-entitled to file an application under section 319 Cr.P.C. for impleading a person as an accused without having been instructed by the

State Government to do so or without having sought instructions from the District Magistrate to file such application, as provided in paragraph 7.20 (7) of Chapter VII U.P. Legal Remembrancer's Manual.

5. It has been further argued that the impugned order has been passed by the learned lower court without recording the categorical finding that the evidence available on record is sufficient to convict the revisionists in the aforesaid session trial.

6. One more ground, questioning the legality of the order is that on earlier occasion, the District Government Counsel (Crl.), Rampur has admitted the fact that the revisionists have been falsely implicated in this case, which is evident from perusal of the order dated 28.04.2011 passed by the District Magistrate Rampur, under section 17 of Arms Act, which is annexed as Annexure-1 to the revision. Hence it has been argued that the District Government Counsel (Crl.) is not entitled to blow hot and cold at the same time regarding the same case and he is barred by the principle of estoppal.

7. On the aforesaid grounds, it has been prayed that the impugned order passed by the learned lower court without application of mind and without keeping in view the legal position be set aside.

8. In support of his arguments, learned counsel for the revisionists has placed reliance on the case of Mohd. Shafi vs. Mohd. Rafiq and another (2007) 14 SCC 544 in which the Hon'ble Apex Court has held that before exercising its jurisdiction under Section 319 Cr.P.C., a Court must arrive at the satisfaction that there exists a possibility that the accused so summoned, is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness or if the court concerned may also like to consider other evidence available before it.

9. Per contra learned AGA has opposed the prayer of the revisionists by submitting that after the decision, rendered by Constitution Bench of Hon'ble Apex Court in Hardeep Singh's case, the aforesaid case of Mohd. Shafi is no longer a good law. The revision is without any force and is liable to be dismissed at the admission stage itself.

10. After hearing learned counsel for the revisionists and learned AGA, I am of the considered view that the instant revision is liable to be dismissed at the admission stage itself for the following reasons:-

11. A Constitutional Bench consisting of Five Judges of Hon'ble Supreme Court in the case of Hardeep Singh vs. State of Punjab and others [2014 (1)JIC 539 (S C)] has set at rest the entire controversy with regard to the scope and extent of Section 319 Cr.P.C. which had arisen due to variety of views having been expressed by several High Courts and also by the Supreme Court. Noticing the conflicting views between the two judgements of the Hon'ble Supreme

Court in the case of Rakesh vs. State of Haryana, 2001 (2) JIC 757 (SC) : AIR 2001 SC 2521; and Mohd. Shafi vs. Mohd. Rafiq & another, 2007 (2) JIC 490 (SC), a doubt was expressed about the correctness of Mohd. Shafi's case (supra) which led to the framing of following five questions by Constitutional Bench in Hardeep Singh case:-

1.What is the stage at which power under Section 319 Cr.P.C. can be exercised?

2.Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the Court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

3.Whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

4.What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the Court is satisfied that the accused summoned will in all likelihood convicted?

5.Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

Question No. 2 and 4 are relevant for the present case.

12. Answering the aforesaid questions, the Hon'ble Constitutional Bench of Supreme Court expressed the clear view that neither cross-examination of witness is required before summoning an additional accused under section 319 Cr.P.C., nor any categorical finding to the affect that in all likelihood the person summoned may be convicted is necessary before exercising such power. According to Hon'ble Apex Court:-

"What is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub section (4) of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses. Therefore, even on the basis of Examination-in-chief, the court can proceed against a person as long as the court is satisfied that the evidence appearing against such person prima facie necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by cross-examination, undoubtedly in itself, is an evidence.

In view of the above, we hold that power under Section 319 Cr.P.C. can be

exercised at the stage of completion of examination-in-chief and Court does not need to wait till the said evidence is tested on cross-examination.....There is no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.....

Though under Section 319 (4) (b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge."

13. In wake of the above cited case law of five Judges Constitutional Bench of Hon'ble Apex Court, there appears no substance in the arguments advanced by learned counsel for the revisionists that the revisionists have been summoned without cross-examination of witness and without any express view of the court below that there is likelihood of their conviction.

14. The second ground challenging the validity of impugned order also appears baseless. Learned counsel for the revisionists has filed a copy of Legal Remembrancer's Manual, which is annexed as annexure-3 to the revision.

15. I have gone through these provisions. There is no such provision in it providing for that the District Government Counsel (Criminal) cannot appear or move an application without having specific written permission in a particular case by the State Government. Once the District Government Counsel is appointed by the State Government to conduct the legal proceedings on behalf of the State Government either generally or specially by the Government, he is free to move any application necessary in the interest of justice and expeditious disposal of the case in discharge of his duty. Nowhere it is provided in Legal Remembrancer's Manual that the District Government Counsel is required to seek permission from the State government separately every time to move any application.

16. Considering the aforesaid facts and circumstances of the case and the latest legal position, the revision is dismissed at the admission stage itself.

17. A copy of this order be sent to registry forthwith for onward communication to the court concerned.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.06.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

U/S 482/378/407 No. 2433 of 2014

Vidya Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sanjay Kumar Pandey

Counsel for the Respondents:
Govt. Advocate

Cr.P.C.-Section 482- on application under section 156(3)-treating complaint-by placing reliance upon smt. Sukhwasi and Chandrika case-held not proper-without considering Gulab Chand Upadhyay case magistrate committed great error-order not sustainable-set-a-side.

Held: Para-16 & 17

16. For the aforesaid reasons, the order passed by the learned revisional court is also not sustainable as it has affirmed the order of the learned Magistrate with reference to the two judgments in Sukhwasi case and Chandrika Singh case without considering the matter in the light of the judgment in Gulab Chand Upadhyaya case (supra), which has already been referred above.

17. Learned courts below have failed to appreciate that while power and discretion was vested in the Magistrate, the exercise of such powers was to be guided by the decision in Gulab Chand Case (Supra). Both the courts below have ignored this aspect of the matter.

Case Law discussed:

2007(59) ACC 739; 2000(68) ACC 777; 2002 Cri. L.J.;

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

1. Heard learned counsel for the applicant and learned Additional Government Advocate for the State.

2. This is an application under section 482 Cr.P.C. challenging the order dated 12.5.2014 passed by the Additional Chief Judicial Magistrate IV, Court No.28, Lucknow, whereby the learned Magistrate has treated the application of the applicant under section 156(3) Cr.P.C. as a complaint under section 190 (9) Cr.P.C. and has fixed the date for recording of statement of the complainant under section 200 Cr.P.C. The applicant has also challenged the revisional order passed by the District & Sessions Judge, whereby the revision filed by the applicant has been rejected.

3. The contention of the learned counsel for the applicant is that the applicant is an old lady aged about 65 years. She had purchased House No.SS 83, Sector D near Akilapur, Secretariat Colony, Jankipuram, Lucknow from the respondent no.2 way back in the year 1998. As the value of the house increased manifold with the passage of time, the respondent no.2 wanted to take back the possession of the house and to grab the same. The incident is said to have occurred on 30.3.2014 wherein the respondent no.2, his son along with other criminal associates are alleged to have visited the house of the applicant and tried to oust her. Another incident is said to have taken place on 13.4.2014 involving the respondent no.2 and certain criminal elements wherein they are said to have unauthorisedly entered into her premises and after breaking open the lock had taken away household goods, ornaments and cash etc. The police reached the place of incident on the call of the applicant to the police control room, whereupon the miscreants ran away along with aforesaid valuables.

4. Based on the aforesaid incident, she tried to lodge a first information report which was not registered by the concerned police. Her complaint to the Senior Superintendent of Police on 30.3.2014 was also not taken cognizance of.

5. Being aggrieved, the applicant filed an application under section 156(3) Cr.P.C. on 2.5.2014 before the learned

Magistrate, whereupon, the learned Magistrate has passed the impugned order on 12.5.2014 treating it as a complaint and proceeded with the same accordingly.

6. Being aggrieved, the applicant filed a revision before the learned District & Sessions Judge, Lucknow, which has been rejected by the order dated 14.5.2014.

7. The contention of the learned counsel for the applicant is that in view of the allegations made by the applicant regarding the household goods and other valuable ornaments and cash having been taken away by the respondent no.2 and his criminal associates, an investigation by the police is a must, especially for the recovery of said valuables, therefore, the learned Magistrate has erred in treating the aforesaid application under section 156(3) Cr.P.C. as a complaint.

8. Learned A.G.A. appearing for the State did make an effort to defend the order passed by the courts below, but ultimately he very fairly stated that an investigation by the police would have been the proper course of action.

9. On a perusal of the summoning order dated 12.5.2014 passed by the learned Magistrate, it is revealed that the learned Magistrate has taken note of the allegations contained in the application, wherein it has been specifically mentioned that the respondent no.2 and his criminal associates had taken away her valuables from her house in a tempo and they ran away on seeing the police.

10. Learned Magistrate has treated the application under section 156(3) as a complaint on the ground that as the applicant is aware of all the facts, she can prove the incident on her own and no investigation is required in this regard.

11. Learned Magistrate has relied upon the judgments of this Court in the case of Sukhwasi vs. State, 2007(59) ACC 739 and in the case of Chandrika Singh 2000(68) ACC 777.

12. Having heard the learned counsel for the applicant and having perused the record, I am of the view that the learned Magistrate has erred in law in passing the impugned order dated 12.5.2014. In view of the pronouncement of the Court in Sukhwasi case (supra), there can be no dispute about the legal position that the learned Magistrate has the power to treat the application under section 156(3) Cr.P.C. as a complaint and to this extent the learned Magistrate cannot be faulted. However, the relevant question in this case is as to whether the learned Magistrate has exercised the said powers and the discretion bestowed on him judiciously or not.

13. This Court in the case of Gulab Chand Upadhyaya vs. State of U.P. and others, 2002 Cri.L.J. 2907 has already observed that the powers and the discretion available to a Magistrate to treat an application under section 156(3) Cr.P.C. as a complaint and to proceed under Chapter XV of Code of Criminal Procedure cannot be unguided or arbitrary. This Court laid down the guidelines for exercise of such power and

discretion in the said case which are extracted as under:

"21. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156(3) to register and investigate an alleged cognizable offence, why should he-

(A) grant the relief of registration of a case and its investigation by the police under Section 156(3) Cr.P.C, and when should he

(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.

22. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

23. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202(1) Cr.P.C. order investigation, even though of a limited nature {see para 7 of JT (2001)2 (SC) 81:(AIR 2001 SC 571)"

14. It is pertinent to mention that the aforesaid judgment in Gulab Chand Upadhyaya case (supra) has been noticed by the Division Bench in Sukhwasi case in paragraph 19 while quoting the relevant extract of the judgment in Chandrika Singh case, which has been relied upon by the learned Magistrate.

15. Tested on the anvil of the aforesaid guidelines, the conclusion is irresistible that as recovery of stolen property is required to be made and unknown criminal associates of Respondent no.2 are required to be traced by conducting raids or searches at suspected places or persons and evidence is required to be collected for the purpose of launching a successful prosecution of the accused, the appropriate course to be adopted in this regard was to order an investigation by the police in exercise of power under section 156(3) Cr.P.C. The learned Magistrate has erred in treating the application as a complaint case under misconception that the applicant was already aware of all the facts ignoring her specific allegations about the valuables stolen and taken away by the suspected persons including some criminal associates of respondent no.2. The learned Magistrate has erred in not considering the judgment in Gulab Chand Upadhyaya case (supra), which has been taken note of in Chandrika Singh case referred by the learned counsel for the applicant and also in Sukhwasi case (supra).

16. For the aforesaid reasons, the order passed by the learned revisional court is also not sustainable as it has affirmed the order of the learned Magistrate with reference to the two judgments in Sukhwasi case and Chandrika Singh case without considering the matter in the light of the judgment in Gulab Chand Upadhyaya case (supra), which has already been referred above.

17. Learned courts below have failed to appreciate that while power and discretion was vested in the Magistrate, the exercise of such powers was to be guided by the decision in Gulab Chand Case (Supra). Both the courts below have ignored this aspect of the matter.

18. As the matter is at a pre-investigation stage, the respondent no.2 is at best a proforma party, accordingly, no notice is being issued to him.

19. In view of the above discussion and considering the facts and circumstances of the case and the law, as referred above, the impugned order dated 12.5.2014 passed by the learned Magistrate is set aside. Learned Magistrate is directed to reconsider the matter in the light of the observations made above and pass a fresh order on the application of the applicant under section 156(3) Cr.P.C.

20. The application is, accordingly, allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.06.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIJAY LAKSHMI, J.

Civil Misc. Writ Petition No.10332 of 2014

Ram Kumar Maurya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dr. S.B. Singh

Counsel for the Respondents:
A.G.A.

Constitution of India, Art.-226-quashing FIR/stay of arrest offence under section

363/366 IPC-cognizable offence made out-factum of marriage certificate under Arya Samaj validation Act 1937-can not be examined-being realm of evidence-petitioner to show before I.O. Or get statement recorded before magistrate-considering detail guide lines for a arrest has been given by the Apex Court any violation of same-shall be at risk of personal risk of officer-petition dismissed.

Held: Para-3 & 9

3. At this stage we cannot examine correctness of the factum of alleged marriage particularly when these facts are in the realm of evidence. It is open to the petitioner to bring all these facts before Investigating Officer or he himself can appear before Magistrate to get his statement recorded therein whereupon the Magistrate shall pass appropriate order accordingly. So far as the report is concerned, a bare reading of it discloses commission of a cognizable offence and rest are the things subject to investigation and to be looked into by court below whenever this matter is brought before it, in accordance with law.

9. So far as police is concerned, suffice it to mention that arrest is a mode and manner for aid and assistance of investigating agency after a report has been received regarding an offence, whether cognizable or non cognizable. In every case, the arrest is not must. It is the statutory discretion of investigating officer which has to be exercised fairly and objectively. Use of power of arrest is not an arbitrary statutory discretion of investigating officer or the police but must be founded on valid considerations. Some guidelines in this regard have been established by Apex Court in Joginder Kumar Vs. State of U.P. 1994(4) SCC 260, D.K. Basu Versus State of West Bengal; 1997 (1) SCC 416, K.K. Jerath Vs. Union Territory, Chandigarh and others, JT 1998(2) SC 658 and Lal Kamlendra Pratap Singh Vs. State of U.P.; 2009(3) ADJ 322 etc. Any arbitrary and indiscreet act of arrest, without any proper reason, would be at the personal risk of the officer concerned, for which, he may have to account for. The act of arrest during investigation must precede with the endeavour of officer concerned for making proper investigation and not just to penalise an accused or any other person.

Case Law discussed:

1994(4) SCC 260; 1997(1) SCC 416; JT 1998(2) SC 658; 2009(3) ADJ 322.

(Delivered by Hon'ble Sudhir Agarwal, J)

1. This writ petition has been filed under Article 226 of Constitution of India with the prayer for issuance of writ, order or direction in the nature of certiorari quashing the F.I.R. dated 2.6.2014 registered as Case Crime No. 159 of 2014, under Section 363 and 366 I.P.C., Police Station Aurai, District Sant Ravidas Nagar (Bhadohi) and also for issuance of a writ, order or direction in the nature of mandamus directing the respondents for not taking any coercive action against the petitioner pursuant to the aforesaid report.

2. After some arguments, learned counsel for the petitioner could not dispute that the allegations contained in the report, if taken to be correct on the fact of it, at this stage do disclose commission of cognizable offence but it is contended that the girl Pooja has already solemnized marriage with Amit Verma at Arya Samaj, Krishna Nagar, Prayag. To verify solemnization of marriage, photo copy of certificate issued by the aforesaid Arya Samaj, Krishna Nagar, Prayag under Arya Marriage Validation Act, 1937 read with Hindu Marriage Act, 1955 has been filed. Thus, it is contended that as a matter of fact, no offence has been committed under Section 363 and 366 I.P.C. and the petitioner, in any

case, has no role in the matter. Therefore, the aforesaid report is nothing but a sheer harassment for something which is factually not correct. It is further contended that the petitioner has nothing to do in the matter in as much as he is only Manager in an educational institution namely Learner's Academy School, Khamahriya, Sant Ravidas Nagar where both, Pooja Jaiswal and Amit Verma, were working as teachers and having developed intimacy amongst them, they solemnized marriage without consent of the informant, for this reason alone, the report has been lodged naming the petitioner therein. When it was pointed out to the learned counsel for petitioner that, whatever he has argued, if is correct, it is always open to the girl and Amit Verma to appear before the Magistrate concerned and get their statements recorded so that appropriate order may be passed by the court, the learned counsel has said that he has no information regarding whereabouts of two persons namely Pooja Jaiswal and Amit Verma, hence cannot ensure their presence for recording their statements before Magistrate.

3. At this stage we cannot examine correctness of the factum of alleged marriage particularly when these facts are in the realm of evidence. It is open to the petitioner to bring all these facts before Investigating Officer or he himself can appear before Magistrate to get his statement recorded therein whereupon the Magistrate shall pass appropriate order accordingly. So far as the report is concerned, a bare reading of it discloses commission of a cognizable offence and rest are the things subject to investigation and to be looked into by court below whenever this matter is brought before it, in accordance with law.

4. Learned counsel for the petitioner then contended that this Court should consider and pass an order protecting petitioner from arrest by police in view of the amendment made in Section 41(2) of the Criminal Procedure Code by Act No. 5 of 2009 which has come into force on 1.11.2010.

5. We have gone through the aforesaid provision very carefully and find no application thereof to the case in hand. Section 41(2) Cr.P.C. as it was before amendment reads as under :

"Section 41(2) : Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110."

6. After amendment sub-section 2 has been substituted. The substituted provision reads as under :

"41(2) - Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned shall be arrested except under a warrant or order of a Magistrate."

7. In fact amendment has also been made by substitution of Clauses (a) and (b) of Section 41(1) by Act No. 5 of 2009 but it is not necessary to refer the same in detail at this stage. Suffice it to mention that Section 41 lays down guidance to a police officer when he may arrest a person without warrant. Sub-section 2 is applicable to a

situation when the offence is non-cognizable. It has no application in the case in hand.

8. Even otherwise, at this stage, this Court is not examining legality or otherwise of arrest made by police, since neither any one has been arrested nor this writ petition as such has been filed with a complaint that police or investigating officer has committed violation of any provision pertaining to arrest of any person or the petitioner himself. The main relief in the writ petition is for quashing of first information report which, admittedly having disclosed commission of cognizable offence is not liable to be interfered with at this stage.

9. So far as police is concerned, suffice it to mention that arrest is a mode and manner for aid and assistance of investigating agency after a report has been received regarding an offence, whether cognizable or non cognizable. In every case, the arrest is not must. It is the statutory discretion of investigating officer which has to be exercised fairly and objectively. Use of power of arrest is not an arbitrary statutory discretion of investigating officer or the police but must be founded on valid considerations. Some guidelines in this regard have been established by Apex Court in Joginder Kumar Vs. State of U.P. 1994(4) SCC 260, D.K. Basu Versus State of West Bengal; 1997 (1) SCC 416, K.K. Jerath Vs. Union Territory, Chandigarh and others, JT 1998(2) SC 658 and Lal Kamlendra Pratap Singh Vs. State of U.P.; 2009(3) ADJ 322 etc. Any arbitrary and indiscreet act of arrest, without any proper reason, would be at the personal risk of the officer concerned, for which, he may have to account for. The act of arrest during investigation must precede with the endeavour of officer concerned for making proper investigation and not just to penalise an accused or any other person.

10. If on account of caprices of the officer concerned, any such matter is brought to this Court, showing an arbitrary exercise of power of arrest on the part of officer concerned, such matter may be dealt with by this Court with iron hands but mere possibility or apprehension of arrest would not justify a blanket order from this Court, restraining police from exercising its statutory discretionary power which has been conferred on it by the statute in aid and assistance for investigation etc. Reliance has also been placed at the bar on a Constitution Bench decision in Lalita Kumari Vs. Government of Uttar Pradesh and others; (2014) 2 SCC 1. To our view, this decision lends no support to the petitioner in the case in hand for the question raised herein.

11. No interference is called for.

12. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.06.2014

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

Criminal Misc. Writ Petition No.10426 of 2014

Jaiveer Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar Gaur

Counsel for the Respondents:
A.G.A., Sri Baleshwar Chaturvedi,
Sri Kamal Kesarwani

Constitution of India, Art.-226-Criminal Writ petition-quashing FIR-cognizable offence discloses-can not be quashed-if final relief not available-interim relief arrest can not be stayed-even on deposit of compounding charges.

Held: Para-9
In view thereof, we have no hesitation in observing that the prayer for quashing the F.I.R. if is declined on the ground that allegations contained therein discloses cognizable offence, therefore, no interference is called for at this stage, this Court would not be justified in granting any relief as an interim order by staying arrest since it will amount to grant a relief to the petitioner without deciding his right in any manner and this would be against the exposition of law settled by Apex Court in the aforesaid decisions.

Case Law discussed:
W.P. No. 10095 of 2014; AIR 1952 SC 12; AIR 1962 SC 1305; AIR 1983 SC 1272; (2014) 4 SCC 453.

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

1. Heard Sri A.K. Gaur, learned counsel for petitioner; learned A.G.A. and Sri Kamal Kesarwani, Advocate, holding brief of Sri Baleshwar Chauturvedi, appearing for respondents; and, perused the record.

2. This writ petition under Article 226 of Constitution of India has been filed seeking writ of certiorari for quashing First Information Report dated 12.6.2014 registered as Case Crime No. 143 of 2014, under Sections 135, 136 of Electricity Act, Police Station Barnahal, District Mainpuri.

3. From a perusal of averments made in F.I.R., it cannot be said that cognizable offence is not made out. Whether these allegations are correct, cannot be examined at this stage.

4. In a matter praying for quashing of F.I.R., without there being anything otherwise on record, the only scope of judicial review under Article 226 of the Constitution is from a perusal of F.I.R. and considering the averments made therein on their face value to be correct, if can be said that a cognizable offence is made out, the Court would not interfere.

5. Learned counsel for petitioner, however, contended that petitioner is ready to pay compounding charges and, therefore, this Court must follow the order dated 12.6.2014 passed by this Court in Criminal Misc. Writ Petition No. 10095 of 2014 (Lajjaram Vs. State of U.P. and others):

"Heard learned counsel for the petitioner and learned Additional Government Advocate.

Petitioner seeks quashing of the First Information Report dated 7.6.2014 being Case Crime No. 136 of 2014, under Section 135 Electricity Act, Police Station-Barnahal, District-Mainpuri.

We have examined the First Information Report. It does disclose a cognizable offence. No case for quashing of the First Information Report is made out.

However, it is provided that if the petitioner deposits the compounding fee

and assessed amount in respect of the alleged theft of electricity within 30 days from today, he may not be arrested till submission of the police report.

In case of non-compliance of any of the conditions mentioned herein above, he shall not be entitled to the benefits of this order.

Writ petition is disposed of."

6. Having gone through the same, we do not find that any principle of law has been laid down so as to bind this Court on an exposition of law.

7. So far as the grant of interim relief of staying arrest is concerned, we find that Apex Court has deprecated such practice and has held, if final relief has been declined, no interim relief/interim order should be granted to petitioners. The first such case is State of Orissa Vs. Madan Gopal Rungta AIR 1952 SC 12. Therein High Court declined to grant final relief on the ground that there was an alternative remedy available to petitioner and, therefore, dismissed the writ petition relegating petitioner to avail alternative remedy, but then observing that before filing suit, 60 days' notice under Section 80 C.P.C. will have to be given, which will take some time, an interim relief was granted. Deprecating this, Apex Court said that grant of relief under Article 226 is founded only on its decision that a right of the aggrieved party has been infringed. Therefore, existence of right is foundation of exercise of jurisdiction under Article 226. When the Court has decided nothing at all in respect to rights of parties, it would not be justified to grant any relief, final or interim, as the case may be, since Article 226 does not confer such jurisdiction. In para 6 of the judgment, the Court said:

"In our opinion, article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of section 80 of the Civil Procedure Code, and in our opinion that is not within the scope of article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under article 226 of the Constitution. In our opinion, the language of article 226 does not permit such an action. On that short ground the judgment of the Orissa High Court under appeal cannot be upheld."

8. The aforesaid dictum has been followed in Amarsarjit Singh Vs. State of Punjab AIR 1962 SC 1305 (para 22), Cotton Corporation of India Limited Vs. United Industrial Bank Limited and others AIR 1983 SC 1272 (para 10) and recently in Km. Hema Mishra Vs. State of U.P. and others (2014) 4 SCC 453 (para 22).

9. In view thereof, we have no hesitation in observing that the prayer for quashing the F.I.R. if is declined on the ground that allegations contained therein discloses cognizable offence, therefore, no interference is called for at this stage, this Court would not be justified in granting any relief as an interim order by staying arrest since it will amount to grant a relief to the petitioner without deciding his right in any manner and this would be against the exposition of law settled by Apex Court in the aforesaid decisions.

10. Even otherwise, at this stage, this Court is not examining legality or otherwise of arrest made by police, since neither any one has been arrested nor this writ petition as such has been filed with a complaint that police or investigating officer has committed violation of any provision pertaining to arrest of any person or the petitioner himself. The main relief in the writ petition is for quashing of first information report which, admittedly having disclosed commission of cognizable offence is not liable to be interfered with at this stage.

11. So far as police is concerned, suffice it to mention that arrest is a mode and manner for aid and assistance of investigating agency after a report has been received regarding an offence, whether cognizable or non cognizable. In every case, the arrest is not must. It is the statutory discretion of investigating officer which has to be exercised fairly and objectively. Use of power of arrest is not an arbitrary statutory discretion of investigating officer or the police but must be founded on valid considerations. Some guidelines in this regard have been laid down in Joginder Kumar Vs. State of U.P. 1994(4) SCC 260, D.K. Basu Versus State of West Bengal; 1997 (1) SCC 416, K.K. Jerath Vs. Union Territory, Chandigarh and others, JT 1998(2) SC 658 and Lal Kamlendra Pratap Singh Vs. State of U.P.; 2009(3) ADJ 322 etc. Any arbitrary and indiscreet act of arrest, without any proper reason, would be at the personal risk of the officer concerned, for which, he may have to account for. The act of arrest during investigation must precede with the endeavour of officer concerned for making proper investigation and not just to penalize an accused or any other person.

12. If on account of caprices of the officer concerned, any such matter is brought to this Court, showing an arbitrary exercise of power of arrest on the part of officer concerned, such matter may be dealt with by this Court with iron hands but mere possibility or apprehension of arrest would not justify a blanket order from this Court, restraining police from exercising its statutory discretionary power which has been conferred on it by the statute in aid and assistance for investigation etc.

13. In view of above, no interference is called for.

14. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 17036 of 2008

Bhagwat Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Khare, Sri Awadh Narain Rai

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Arrears of salary-denied on ground of "no work no pay" petitioner was transferred to the place where no vacancy-inspite of direction of Court no proper posting given-w.e.f. July 2004 to January 2006-held-respondent can not be allowed to take benefit of their own illegal act-entitled for salary with cost of Rs. 10,000/-.

Held: Para-55
In view thereof, it cannot be said that petitioner on is own denied to discharge duties. Instead it is the respondents own illegal act by transferring and posting petitioner at a place where there was no vacancy so as to deny him any occasion to render any service. For that purpose, the loss, if any, must be suffered by State, may be recovered from officer(s) concerned but petitioner cannot be made to suffer by denying him salary for no fault on his part.

Case Law discussed:
AIR 1984 SC 1291; 1989(2) SCC 541; AIR 1991 SC 958; AIR 1991 SC 2010; 1993 (Suppl.) (2) SCC 324;AIR 1995 SC 1053; 1996 (1) SCC 63; 1996(7) SCC 533=AIR 1996 SC 2936; 1989(9) SCC 559; AIR 1995 SC 319; AIR 2001 SC 1748; AIR 2002 SC 808; 2003(7) SCC 238= AIR 2003 SC 3137; AIR 2004 SC 3988; AIR 2005 SC 3966; 2005(104) FLR 863=2005(2) SCC 363; (2005) 8 SCC 314; 2002(3) SCC 437; AIR 2006 SC 531; AIR 2006 SC 586; AIR 2003 SC 1115; 2005 (2) ESC 1215; 2006(1) UPLBEC 20(SC)2007(1) ESC 40(SC); JT 2009(5) SC 487; AIR 1970 SC 156; 2009(15)SCC 335; 2011(11) SCC 626; JT 2011(4) SC 252; AIR 2006 SCC 3018; (2007) 9 SCC 564; (2009) 2 SCC 288; 2007(4) AWC 3382; 2007(3)ADJ 1.

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

1. Heard Sri A.N.Rai, learned counsel for the petitioner, learned Standing Counsel for the respondents and perused the record.

2. In this writ petition, petitioner was transferred vide order dated 11.6.2004 but he was not allowed to join at the transferred place on the ground that there was no vacancy. In this view of the matter, petitioner was not allowed to work from July, 2004 to 29.01.2006. Now, when he claimed salary for the said period, it has been rejected on the ground, since he did not work, therefore, is not entitled for salary.

3. It is contended that petitioner was not allowed to join as there was no vacancy on which he was transferred and there was no fault on his part, yet he has been denied salary, which is patently illegal.

4. It is said that on the one hand, respondents themselves passed an illegal order of transfer on 11.6.2004 without caring whether on the place of transfer, there was vacancy or not in which petitioner could have been transferred and

when Officer In-charge at transferred place did not allow petitioner to join on the ground that there was no vacancy, for non functioning of this period, petitioner cannot be blamed or made responsible. A subsequent modified order was passed but not communicated to the petitioner for a long period, again for the fault of respondents and still petitioner is sought to be blamed. In fact, respondent authorities are trying to take advantage of their own wrong and instead of holding officer concerned responsible, who passed a mindless order of transfer of petitioner to place where there was no vacancy, petitioner is being sought to be paralysed by denying him salary for the period he could not function not on account of his own volition but on account of denial of respondents authorities.

5. Per contra, learned Standing Counsel submitted that though initial order of transfer dated 11.6.2004 was not correct since there was no vacancy at Rajkiya Audyogik Prashikshan Sansthan (I.T.I.), Banda where petitioner was transferred and for that purpose, non functioning of petitioner during some period may not be the fault on his part. Another order was issued on 9.7.2004 posting him at Government I.T.I., Mahoba but despite thereof, petitioner did not join at Mahoba and hence for period subsequent thereto, he is responsible and is not entitled for salary.

6. The petitioner, a Senior Assistant, was working in District Employment Office, District Banda. Vide order dated 11.6.2004, passed by Director, Directorate of Training and Employment, U.P. Lucknow, he was transferred to Rajkiya Audyogik Prashkshan Sansthan (I.T.I.), Banda, on administrative ground. Pursuant thereto, District Employment Officer, Banda, relieved petitioner on 23.6.2004 and directed him to ensure his joining at State Industrial Training Institute, Banda. Pursuant thereto, petitioner submitted joining before Principal, I.T.I., Banda on 24.6.2004.

7. The Principal, however, declined to accept joining and wrote a letter dated 30.6.2004 stating that there was no vacancy of Senior Assistant at I.T.I., Banda, hence he cannot be allowed to join and in this regard a letter has also been sent to Directorate stating that further action would be taken after receiving instructions from Director.

8. Thereafter, petitioner sent a letter dated 2.7.2004 to the Director, Training and Employment, U.P. Lucknow informing the above situation and sought instructions either to permit his rejoining at District Employment Exchange Office, Banda or to direct Principal, I.T.I. Banda to accept petitioner's joining subject to further orders. It appears that matter remained pending and nothing was done for almost more than a year whereupon petitioner sent a reminder dated 12.9.2005 to the Director. Still, having no response, he approached this Court in Writ Petition No.21258 of 2005 with the grievance that neither his joining has been accepted nor he is being paid salary for no fault on his part and this action of respondents is patently illegal. The writ petition was disposed of vide order dated 21.11.2005. This Court said that the situation created in the matter should be examined as to who is the officer responsible so as to fix

his accountability and respondent no.2 was directed to consider the matter with a clear instructions that interest of petitioner should not be jeopardized because of negligence of some other official.

9. It is in these circumstances, Director passed order on 9.01.2006 stating that petitioner, when was not allowed to join at I.T.I., Banda, vide Directorate's letter dated 09.7.2004, he was posted at Government I.T.I., Mahoba and the said letter was sent to the petitioner by speed post at his permanent residence but returned back. Thereafter, Principal, I.T.I. also got the information published on 7.8.2004 in a daily newspaper "Dainik Jagran", still petitioner did not join at Mahoba. Since order of his posting has already been passed, no further direction was required and his application stands disposed of.

10. After receiving this letter, petitioner appears to have sent a letter dated 19.01.2006 stating that he has never been communicated any such letter dated 02.7.2004 posting him at Mahoba, and he therefore, required Principal, I.T.I., Banda to make him available letter dated 2.7.2004 and also copy of daily newspaper "Dainik Jagran" dated 07.08.2004.

11. Simultaneously, he also submitted joining on 19.1.2006 at Mahoba but there also Principal declined to accept his joining observing that one Deo Prasad, Senior Assistant, has already been posted by Directorate's letter dated 18.1.2005, who has joined on 20.6.2005 and there being only one post of Senior Assistant, already occupied, no vacancy existed whereagainst petitioner could be allowed to join. Thereupon, Director, Training and Employment, U.P. Lucknow passed another order dated 19.1.2006 stating that Principal, I.T.I., Mahoba shall accept petitioner's joining thereat and Sri Deo Prasad shall now join at District Employment Office, Mahoba. It is pursuant to this letter, Principal, I.T.I., Mahoba accepted petitioner's joining w.e.f. 30.1.2006 (forenoon) vide letter dated 4.2.2006.

12. Thereafter, petitioner submitted his representation claiming salary from July, 2004 to January 2006 by his letter dated 30.11.2006. Since it remained unheeded, petitioner again came to this Court in Writ Petition No.9402 of 2007, which was disposed of on 26.7.2007 with the direction to Director, Training and Employment to decide petitioner's representation with regard to salary within eight weeks. It is pursuant to this order, impugned order has been passed by Director stating that petitioner himself being guilty of non joining at Mahoba, is not entitled for salary from July, 2004 to January, 2006.

13. The respondents have filed counter affidavit wherein a copy of order dated 09.7.2004 issued by Additional Director, (Employment) has been appended as Annexure CA 1. A perusal thereof shows that copy of the letter was sent by Additional Director to Principal, I.T.I. Banda and District Employment Officer, Banda. There is nothing to show that aforesaid letter was ever addressed or sent to petitioner by respondent no.2. Respondents have also placed on record a

photocopy of a press communication said to be published in "Dainik Jagran" dated 7.8.2004 stating that petitioner has been posted at Mahoba and this information was sent by speed post but has received back. The alleged letter dated 14.7.2004, in reference whereto it has been said that same has been sent by speed post, has been received back is neither on record nor details thereof has been given in the entire counter affidavit. Moreover, photocopy of the order dated 9.7.2004 shows that it was received in the office of respondent no.3 on 14.7.2004 and therefore also it is difficult to believe that on the same day a letter could have been sent to the petitioner. The contention that information regarding change of place of posting was communicated to the petitioner by post (speed post) is very difficult to accept in absence of any such letter placed on record, as also a copy of the speed post receipt not filed though it has specifically been challenged by petitioner and he has also demanded copy thereof, which has not been supplied.

14. Before coming to the question as to whether principle of "No work, no pay" has rightly been applied in the case in hand, it has to be seen whether it is the petitioner who has to be blamed for non working for certain period or respondents authorities.

15. So far as order dated 11.6.2004, whereby petitioner was transferred by Director to Banda, it is admitted by the parties that at Rajkiya Audyogik Prashikshan Sansthan (I.T.I.), Banda, there was no post or vacancy in which petitioner could have been allowed to join and that is how, Principal of said institution declined to accept joining report from petitioner. There can be no manner no doubt that here, it is Director, who was straightway responsible for passing a mindless order and has to be held responsible for whatever consequences are.

16. Then comes the order dated 9.7.2004 issued by Director, whereby place of transfer of petitioner was changed and he was posted at I.T.I. Mahoba. Here it is said that this letter was sent to the petitioner at his permanent residence but it was received back. Thereafter, Principal, I.T.I., Banda got it published in daily newspaper Dainik Jagran on 7.8.2004 but the petitioner did not join. The question therefore, whether this order dated 9.7.2004 was reasonably communicated to the petitioner or not.

17. Here the record shows that order dated 9.7.2004 issued by Director nowhere contains any endorsement for sending copy thereof to the petitioner. About the communication of this order by Principal, I.T.I., Banda, nothing has been placed on record to show that it was actually forwarded at a known address to the petitioner for its communication and intimation. As already noticed, Principal I.T.I. Banda's letter dated 14.7.2004 has not been shown as to how it was remitted to the petitioner, as no material has been placed on record to fortify the above assertion. The Director's letter dated 9.7.2004 was received in the office of Principal I.T.I on 14.7.2004 and it is claimed that on the same date the Principal I.T.I. Banda sent a letter to the petitioner but to fortify it, no material has been placed on record. Thereafter,

Director himself passed another order dated 18.1.2005 posting another person Deo Prasad, Senior Assistant at I.T.I. Mahoba, who joined on 20.6.2005 and when petitioner after communication of order dated 9.7.2004 sought to submit his joining on 19.1.2006, the same was also declined by Principal on the ground that another person has joined and there was no vacancy at all. Thereafter a third order was passed by Director on 19.1.2006 itself directing that Principal, I.T.I., Mahoba shall allow petitioner to join thereat and Deo Prasad shall be shifted to another place and only thereafter petitioner's joining was accepted at I.T.I. Mahoba on 30.1.2006.

18. In these circumstances, it is difficult to hold that petitioner was guilty of non joining at Mahoba hence disentitled for salary for the aforesaid period. The principle of 'no work no pay', as such has no application in the government service unless it is shown that officer concerned has absented himself illegally from rendering any service and that being a misconduct, the period of absence can be treated to be unauthorized absence which may result in non payment of salary, if it is so permissible under the Rules. In some authorities, when a promotion etc. has been granted notionally, question has arisen about application of principle of "no work no pay" in government service and in one of the judgment of this Court, it has been examined at length.

19. The issue pertaining to arrears of salary in the case of a government employee, who has not rendered any duty during certain period on account of any act, omission or order of employer has been the subject matter of frequent litigation for quite sometime and a retrospect of various authorities of the Apex Court and this Court shows a revolutionary change in the approach dealing with the said issue. A government servant unlike private employment once appointed is governed by statute, rules and regulations governing his conditions of service. Though government service start with a contract but once appointed, it is a matter of "status". Various rules and regulations have been framed under Article 309 (proviso) of Constitution of India dealing with terms and conditions of government employees. It is not disputed that petitioner's salary is paid from State Exchequer. In the matter of private employment an employee earns wages by rendering service to employer and in case of no work, he is not entitled for any wages unless specifically provided under contract or any law governing such contract. It is open to such an employer to enter into a contract carving out certain exceptions where employee may be entitled for wages even for certain period where no duty is discharged. In the cases where employee is governed by various labour welfare legislations, payment of wages in certain contingencies, where employee may not work but still may be entitled for wages, are governed by said labour welfare legislations and there the employer is liable to act according thereto. In the matter of Government employees and others who are governed by the rules framed under Article 309 (proviso) of Constitution, the position is different. Fundamental Rule 17 (hereinafter referred to as 'FR 17') provides as to when a Government servant shall begin to draw pay and allowance etc. and when he would cease to do so, and reads as under:

"17. (1) Subject to any exception specifically made in these rules, and to the

provisions of Sub-rule (2) a Government servant shall begin to draw (he pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the general or special orders of the authority by whom he is appointed."

20. The exceptions referred to in FR 17 are eventualities like leave, joining time allowed to Government servant on transfer, suspension etc. In case of dismissal or removal, FR 52 provides that pay and allowances of Government servant shall cease from the date of dismissal or removal, and in case of suspension, FR 53 provides that though he would not be discharging any duty but subject to furnishing a certificate that he has not been engaged in any other business, profession or vocation, he would be entitled for subsistence allowance which may be 50% or 75% of leave salary, which he would have been drawing had he been on leave. The cases in which payment of salary is governed expressly by the rules, they do not create much difficulty but litigation pertaining to service matters had brought a number of circumstances before the Court where employees are denied benefit of salary or higher salary for one or other reasons beyond their control or for which they are not responsible or nothing can be attributed to them and such situations not answered by any rule or executive order having force of law necessitating judicial pronouncements time and again for such entitlement.

21. Initially, the courts were of the view that once it is found that employee was wrongly denied such salary, he is entitled for entire arrears irrespective of the fact whether he actually discharged duties of the post or not. There was a dichotomy of judicial pronouncements in the matters dealing with labour cases and those dealing with government service, inasmuch as, in labour matters since power of discretionary relief was conferred upon adjudicatory forum under the labour laws, the issue was decided in the light of such provisions and the facts and circumstance of concerned case but in the matter of government servants, initially the courts allowed arrears of salary virtually as a matter of course once it is found that such denial was inconsistent to law, but, subsequently it was noticed that failure on the part of authorities in observance of or strict compliance of statute was more frequent then desired and consequence of allowing arrears as a matter of course was so drastic that huge public money used to be siphoned off to such employees who have rendered no public duty or have not actually shouldered any responsibility of higher post and therefore, necessity arose to have a balance in two situations so as not to waste public money for the follies of authorities ,who were under the obligations to observe certain procedure, norms and failure whereof may not enrich certain employees being against the interest of public exchequer but simultaneously interest of employees, who were not at fault, was also to be observed. This gave occasion to consider

the question of arrears of salary not as a matter of right, but in each case depending upon multifarious reasons and factors which, this Court will be discussing later on.

22. Here, at this stage, this Court propose to refer some of the judgments throwing light on the discussion made hearinabove.

23. In P.S. Mahal Vs. Union of India, AIR 1984 SC 1291, while deciding the dispute pertaining to seniority, Apex Court directed the employees to be treated as deemed promoted from retrospective date and also directed for payment of salary of higher post for the past period. However, in Paluru Ramkrishnajah and others Vs. Union of India & another, 1989 (2) SCC 541, despite allowing promotion with back date, the back wages were denied for the reason that earlier in other matters, certain writ petitions were allowed by the Hon'ble Madhya Pradesh High Court on 4.4.1983 following the Apex Court judgment dated 2.2.1981 in Civil Appeal No. 441 of 1981 wherein back wages were denied despite retrospective promotion and a Special Leave Petition Civil No. 5987-92 of 1986 filed by the Government of India against the judgment of Hon'ble Madhya Pradesh High Court was dismissed on 28.7.1986 therefore the Court took the view that same relief should be granted to the appellant in Paluru Ramkrishnajah (Supra) also.

24. Subsequently relying on P.S. Mahal (supra), arrears of salary on account of back dated promotions was claimed but the aforesaid dictum was not followed in Virender Kumar Vs. Avinash Chadha and Ors., AIR 1991 SC 958 and for denying arrears of salary to the employees, who were allowed promotion from earlier date, Apex Court gave following reasons:- "I. Deemed appointments have to be given to the concerned employees even from the dates when they were not in service and probably when they were still in their schools and colleges. 2. Neither equity nor justice is in favour of the respondents to award them emoluments of higher posts with retrospective effect and the decision in P.S. Mahal (Supra) was distinguishable. 3. The matter was agitated in 1972 but remained pending for more than one and half decade for no fault of the employer. 4. The higher posts were not vacant during the entire period and were manned by others. The employer had paid the incumbents who were working on the higher post, emoluments of the said posts 5. The employees have not actually worked in the higher post and on the principle of "no work, no pay", were not entitled for higher salary." In the aforesaid case, therefore, on the facts and circumstances of the case, as referred above, the employees were denied arrears of salary despite allowing promotion from an earlier date.

25. In Union of India Vs. K.V. Jankiraman, AIR 1991 SC 2010, validity of a Government Order came up for consideration, which provided that during pendency of disciplinary or criminal proceedings, when an employee is to be considered for promotion, his matter shall be kept in sealed cover and he shall not be allowed actual promotion even if selected, till disciplinary/criminal proceeding is

finalized and only after conclusion of such proceeding, sealed cover shall be opened and if he is to be promoted, no arrears of salary shall be paid. The validity of this Government Order to the extent it denied arrears of salary to employee against whom, as a result of departmental inquiry or criminal proceedings, nothing ultimately was proved and who was exonerated and found entitled for promotion from due date yet arrears denied, came up for consideration and it was contended that this gives a leverage to the employer to take advantage of his own wrong and despite the fact that employee is not at fault and has done everything possible and permissible, yet he cannot get arrears of salary for an act for which employer is solely responsible and therefore, such provision is arbitrary. A Full Bench of Central Administrative Tribunal declared aforesaid part of Government Order violative of Articles 14 and 16 of Constitution. The matter came up in appeal before a three Judges Bench of Apex Court, which held that FR 17 would not be applicable to a case where employee though is willing to work is kept away by authorities for no fault of his. The court held:

"We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work, no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17 (1) will also be inapplicable to such cases"

26. The Apex Court, expressed its agreement with finding of Tribunal that when an employee is completely exonerated, meaning thereby that he is not found blameworthy in the least and is not visited with penalty even of censure, he has to be given benefit of salary of higher post alongwith other benefits from the date on which he would have been normally promoted but for disciplinary/criminal proceedings. However, Apex Court further held that in such matters, a discretion must be left to employer to decide whether entire salary is to be paid or not, for the reason that there may be cases where proceedings, whether disciplinary or criminal, were delayed at the instance of employee or clearance in disciplinary proceeding or acquittal in criminal proceeding is with benefit of doubt or on account of non availability of evidence due to the acts attributable to employee etc. The concerned authority therefore, must be vested with power to decide whether employee at all deserves any salary for intervening period and if he does, the extent to which he deserves it. The Apex Court further held that it is not possible to anticipate and enumerate exhaustively all circumstances under which such consideration may become necessary but to ignore such circumstances when they exist, however, and lay down an inflexible rule of payment of arrears once an employee is exonerated would undermine discipline in the administration and jeopardize public interests. Thus, legal exposition as laid down in K.V. Jankiraman (Supra) is where an employee is not guilty of being away from work but is prevented from doing so by authorities, normal rules of "no work, no pay" is not applicable but in such cases considering various complexities of life and history of

proceedings etc., departmental authority must decide entitlement of Government servant about arrears and quantum thereof.

27. In Vasant Rao Roman Vs. Union of India & others, 1993 (Suppl.) (2) SCC 324 arrears of salary was denied to employee though it was held that denial of promotion on higher post on account of wrong fixation of seniority was illegal. The Apex court held that principle of "no work, no pay" would have no application to the said case since employee was neither under suspension nor any disciplinary proceeding was pending against him and on the contrary he was made to suffer on account of administrative reason for which he was not responsible. There was shortage of literate Shunters at Gwalior during 1960 and the employee being literate was deputed for table work and therefore, for administrative reason, he could not complete requisite number of firing kilometers. The juniors were promoted as Shunters and Drivers and his claim was ignored on account of lack of requisite number of firing kilometers. Thus, on the one hand, the employee was utilized by department to benefit itself with qualification of employee since literate Shunters to discharge table work were not readily available and on the other hand, for the same qualification, he was denied promotion on the ground that he has not completed requisite number of firing kilometers. Hence, Apex Court held that there was no justification in denying him arrears of emoluments from the date he was allowed promotion to the post of Shunter Grade 'B' and Driver Grade 'C'.

28. In Surjit Ghosh Vs. Chairman & Managing Director, United Commercial Bank and Ors. AIR 1995 SC 1053, as a result of disciplinary proceedings, the employee was punished but the said order of punishment was passed by an authority to whom an appeal otherwise would lie under the rules and thereby the employee was denied right of appeal though conferred under the rules. The Apex Court held such exercise of power by higher authority illegal but while considering question as to what consequential orders should be passed, in the facts of the case, noticed that proceedings against employee were pending since 1982 and almost for 13 years the employee was out of employment. He also at one stage was inclined to forego all the arrears of salary provided he is reinstated in service on the post to which he was entitled with the benefit of continuity in service to which the Bank did not agree. The court thereafter noticed that his allegations that charges were trumpeted against him cannot be said to be without any substance, the inquiry was also defective, he was an ex-army officer and therefore, instead of remanding the matter, a lump sum compensation would be just and reasonable. The arrears of salary and future salary would have come to about 20 lacs and noticing the fact that the Bank being nationalized, the money belongs to public and such a huge amount should not be allowed to be paid to someone who has not worked for a long time at all just for the reason that Bank feels that it has lost confidence in the employee, the Court directed for payment of a lump sum compensation of Rs. 50,000/- in lieu of arrears of salary and reinstatement in service with continuity of service without any loss of seniority.

29. In Smt. Sudha Srivastava Vs. Comptroller and auditor General of India, 1996 (1) SCC 63 following K.V.

Jankiraman (supra), Apex Court allowed arrears of salary to the legal heirs of deceased employee on the ground that he was denied promotion on account of criminal proceedings wherein he was honourably acquitted.

30. In State of Haryana and Ors. Vs. O.P. Gupta and others, 1996 (7) SCC 533 = AIR 1996 SC 2936 as a result of redetermination of seniority, pursuant to direction of Apex Court, promotions were allowed retrospectively but arrears denied. The Apex Court noted that incumbents, who approached the Court claiming arrears of salary though contended that they were ready but were not allowed to work on higher post on account of wrong determination of seniority but their contention could not withstand judicial scrutiny for the reason that they were not the persons who agitated the issue of seniority earlier. Some other persons disputed seniority list which was ultimately decided by Apex Court directing for redetermination of seniority and therefore, contention of employees that they were ready to work was contrary to record. It was also held where a seniority list has to be redrawn and promotions have to be made and until that exercise is undertaken, it was not open to employees concerned to claim that they were ready to work on higher post and thus question of entitlement of arrears on promotional post would not arise. The law laid down in K.V. Jankiraman (Supra) was distinguished on the ground that it was a case of sealed cover procedure but would have no application to the case of promotion as a result of redetermination of seniority.

31. In J.N. Srivastava Vs. Union of India and another, 1998 (9) SCC 559, the employee served a notice of voluntary retirement but before communication of its acceptance withdrew the same. However the employer forced voluntary retirement upon him whereagainst he approached Tribunal, which held that voluntary retirement having been given effect to and employee also having handed over charge, no relief can be granted to him. The Apex Court reversed judgment of Tribunal and held that before communication of acceptance of letter of voluntary retirement, it was open to the employee to withdraw the same. Further observing that employee was denied work though he was ready, it was held that he is also entitled for benefit of salary for the period he was denied work by employer and principle of "no work, no pay" would not apply.

32. A Constitution Bench considered application of "no work, no pay" in the matter of employees of Bank going on strike in Syndicate Bank Vs. K. Umesh Nayak AIR 1995 SC 319 and observed that whoever voluntarily refrains from doing work when it is offered to him is not entitled for payment for the work not done. In other words that is the dictum of "no work, no pay". However, it was also held where issue pertaining to strike is dealt with by statute or contract between employer and employee recognizing right of employees to go on strike, in such case in order to get entitlement for wages for the period of strike, it has to be both legal and justified.

33. In State Bank of India Vs. Anjan Sanyal AIR 2001 SC 1748 an employee was transferred but he did not comply the same and made representations for its

cancellation. He was relieved in absentia and reminded by the Bank to join at the place of transfer but he did not obey, whereafter another order was passed transferring him to another place but that too was not obeyed and instead the employee filed a writ petition wherein an interim order was passed directing employee to obey the later order of transfer which was not complied by him again and instead he preferred an intra Court appeal wherein he was allowed some more time to join at the later place of transfer. The employee filed a special leave petition which was dismissed. However, the employee did not join at the place of transfer. The writ petition was ultimately allowed by Hon'ble Single Judge setting aside order of transfer with all consequential benefits and salary for the period he was not in the office. The Apex Court, in the appeal of the Bank, observed that in such a case where an employee, who has not discharged any duty by disobeying order of transfer, if is allowed salary for the period he was absent, it would amount to granting a premium to an errant officer. Accordingly, setting aside judgment of High Court, Apex Court left it open to the Bank to deal with the period of absence in accordance with rules of Bank.

34. In Food Corporation of India Vs. S.N. Nagarkar AIR 2002 SC 808, notional promotion without arrears was allowed by employer relying on judgment of Apex Court in O.P. Gupta (Supra) and Paluru Ramkrishnajah (Supra). The Apex Court found that notional promotion was allowed pursuant to order dated 6.5.1994 passed by High Court in Writ Petition No. 4983 of 1993 wherein a direction was also issued for payment of arrears of pay. The said judgment having attained finality it was not open to deny arrears of salary while implementing said judgment and to defend such denial in execution proceedings. Moreover, it was held that entitlement of employee for arrears of pay and allowances is within the domain of court and if it is satisfied that employee was not considered for promotion to the promotional post for no fault of him but on account of fault of authorities concerned, it can always allow arrears of pay and allowances, since it is settled law that in exercise of writ jurisdiction the Court can mould relief having reference to the facts of the case and interest of justice.

35. In A.K. Soumini v. State Bank of Travancore and Anr. 2003(7) SCC 238= AIR 2003 SC 3137, the Court upheld denial of arrears on the ground that as a matter of fact, employee was disentitled for promotion under the promotion policy but taking into account pendency of appeal before the Court for a considerable time on account whereof employee could not appear in subsequent tests, benefit of promotion was allowed, which was more in the nature of gesture of gratis and not by way of any right to which she was entitled. Therefore, notional promotion allowed by the Bank with revision of pay scale was found to be more than what ought to have been allowed to her, be it either in law or equity, and her further claim for payment of arrears was found to be highly far-fetched, without any basis and unjust. This is apparent from para 9 of the judgment, which is reproduced as under:

"So far as the case on hand is concerned, the appellant was denied

promotion in terms of the promotion policy under which it was necessary for a candidate to secure at least a minimum eligibility mark of 6 1/2 at the interview and the learned single Judge, allowed the claim only on the ground that such prescription of a minimum mark was not valid. Though the Division Bench also affirmed the same, this Court overruled the said decision, and upheld such prescription. But taking into account the pendency of the appeal in this Court for considerable time, and on account of which the appellant also did not appear in the subsequent tests, benefit to promote her was not denied. The fact that her non promotion was legal and there has been no unlawful interference with her right to promotion or to serve in the promoted category was obvious and could not be minced over or completely ignored in the light of the judgment of this Court, allowing the appeal by the Bank. While that be the position, the grant of relief to her, keeping in view the delay merely due to pendency of proceedings before Court, was more in the nature of a gesture of gratis and not by way of any right, to which she was found to be entitled to. Consequently, the notional promotion given to her by the Bank with suitable revision of her pay scales itself is more than sufficient to meet the requirements, be it either in law or in equity. The further claim for payment of arrears as well, is farfetched and can have no basis, in law. The Division Bench, in our view properly approached the question in the light of the relevant guiding principles and the same could not be said to be either arbitrary, unreasonable or unsound in law to warrant of our interference."

36. In Punjab National Bank v. Virender Kumar Goel, AIR 2004 SC 3988, the employees were denied work despite withdrawal of their options seeking voluntary retirement. It was held to be illegal on the ground that before acceptance, it is always open to the employee to withdraw such option and therefore, for the period the employees could not work, arrears was allowed. The Apex Court held that principle of "no work, no pay" would not apply in such a case since employees were out of their job for no fault of their. It also held that a party, who is in breach of contract, can hardly seek for any equitable relief. Since the Bank did not permit employees to work and breached contract, it did not lie in its mouth to deny arrears of salary to the employees.

37. In General Manager, Haryana Roadways Vs. Rudhan Singh, AIR 2005 SC 3966, the employee was engaged for a short period i.e. 16.3.1988 to 28.2.1989 with some breaks and thereafter was not given any appointment. He raised an industrial dispute regarding validity of his termination wherein, it was held that having completed 240 days of service in a calendar year, his termination was in violation of Section 25F of the Industrial Disputes Act, 1947. Declaring his termination illegal, he was held to be entitled for reinstatement, continuity of service and 50% of back wages. Upholding the award of Industrial Tribunal-cum-Labour Court holding termination of employee as illegal, the Court and noticed that in the matter of award of back wages, there is no rule of thumb that in every case whenever termination is found to be illegal, full or some back wages have to be allowed to the workman. A lot of factors have to be taken into consideration which include how quick the employee was in taking

legal action regarding his grievance against action of employer, delay if any in litigation and whether employee or any other person is responsible therefor. Moreover, factors like manner and method of selection and appointment, namely proper advertisement, inviting applications from Employment Exchange; nature of appointment whether ad-hoc, short term, daily wage, temporary or permanent in character; any special qualification required for the job etc. are of relevance to weigh balance of decision regarding wages. Moreover, length of service rendered by employee, age and qualification showing that he may not be in a position to get any other employment, a regular service of permanent character if terminated illegally would attract different consideration than a short term or interrupted daily wage employment though has completed 240 days in a calendar year. The Court also held that a person appointed on daily wage basis gets wages for the days only he has performed work and when work not done, remuneration is not to be paid and this is also a relevant factor. Whether employee was gainfully employed during the period of unemployment was also held to be a relevant factor.

38. In Kendriya Vidyalaya Sangthan Vs. S.C.Sharma, 2005 (104) FLR 863 (SC)=2005(2) SCC 363 relied upon by learned Additional Chief Standing Counsel, Apex Court noticed that while setting aside an order of dismissal or termination, full back wages is not natural consequence and when question of back wages is to be determined, employee has to show that he was not gainfully employed and initial burden lay on him. However, since the employer was given a liberty to proceed afresh against employee, Apex Court did not express any final opinion on the entitlement of service benefits to the employee concerned and held that final decision would be taken by competent authority in the departmental proceedings.

39. In Srikantha S.M. Vs. Bharath Earth Movers Ltd. (2005) 8 SCC 314, the Court allowed arrears of salary in the case where employee was denied work by not permitting him to withdraw his resignation, which was held to be illegal and following J.N. Srivastava (Supra) and Shambhu Murari Sinha Vs. Project and Development India Ltd., 2002(3) SCC 437, the Court held that the employee is entitled for full salary for the said period and observed as under:

"We must frankly admit that we are unable to uphold the contention of the respondent Company. A similar situation had arisen in J.N. Sirvastava and a similar argument was advanced by the employer, the Court, however, negatived the argument observing that when the workman was willing to work but the employer did not allow him to work, it would not be open to the employer to deny monetary benefits to the workman who was not permitted to discharge his duties. Accordingly, the benefits were granted to him. In Shambhu Murari Sinha II also, this Court held that since the relationship of employer and employee continued till the employee attained the age of superannuation he would be entitled to "full salary and allowances" of the entire period he was kept out of service. In Balram Gupta in spite of specific provision precluding the

government servant from withdrawing notice of retirement, this Court granted all consequential benefits to him. The appellant is, therefore, entitled to salary and other benefits."

40. In Baldev Singh v. Union of India and Ors., AIR 2006 SC 531, the employee was convicted in a criminal case whereupon he was dismissed from service w.e.f. 18.7.1990. However, in appeal he was acquitted vide High Court judgment dated 26.3.1992 and was released from jail on 4.4.1992 whereupon he claimed that he reported for duty on 5.4.1992 but the said fact was denied by Union of India and it was pointed out that after acquittal, order for his reinstatement was passed and he was repeatedly required to join his parent unit but he did not respond whereupon High Court held that he was not entitled for salary for the period he was not in service. Upholding the judgment, Apex Court held that employee was not in actual service for the period he was in custody and since he was terminated on the ground of his conviction, acquittal will not automatically give benefit of continuous service and in any case, since he has not rendered any service, is not entitled for arrears of salary.

41. The question of arrears of salary has been dealt with in detail recently in U.P. State Brassware Corporation Ltd. and Anr. v. Udai Narain Pandey, AIR 2006 SC 586 and Apex Court has observed that earlier direction to pay full back wages on a declaration that order of termination was invalid used to be usual result but now, with passage of time, a pragmatic view of the matter is being taken by Court realizing that an industry may not be compelled to pay to workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively, as a result whereof, employer would be compelled to go back to a situation which prevailed many years ago when employee was retrenched/terminated. It was held that no precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed, but held that it depends upon the facts and circumstances of each case. It cannot be automatic and should not be granted mechanically only because on technical ground or otherwise, order of termination has been found defective or illegal. It was also observed that payment of back wages involves a discretionary element in it and has to be dealt in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. Noticing the change in the approach of the Courts in dealing with such matters, in paras 44, 45 and 46 of the judgment it was held:

"44. Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person

what is due to him and not what can be given to him in law.

45. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the Junctions of an industrial court shall lose much of its significance.

46. The changes brought about by the subsequent decisions of this Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident."

42. I may also add one more aspect. Many a times, when employee approaches Court challenging an order of retirement, dismissal or removal etc. in writ jurisdiction and prays for an interim relief, while entertaining writ petition, the Court normally does not grant any interim relief for the reason that it is treated like granting a final relief to the employee at the stage of admission and also against well established principle, applicable for grant of interim injunction that not only a prima facie case must be shown but petitioner has to show balance of convenience and irreparable loss, lying in his favour. In the aforesaid kind of cases, since employee can always be compensated while granting final relief by allowing wages for the period, he is out of employment, interim relief is normally denied. Therefore, it is a relevant factor as to when the employee has approached the Court. Pendency of writ petition and non grant of interim order in view of the aforesaid legal principle should not normally result in denial of the ultimate relief of salary to the employee, when impugned order is found to be illegal, unless there are certain other factors, a few whereof have already been enumerated hereinabove, justifying denial of full salary or arrears, otherwise it would amount to denial of an effective relief to a litigant for which he is not at fault and also confer premium upon other side for passing an illegal order and, thereby, depriving the employee from discharging any duty. We cannot forget that an employee has no right to work but only a right to get salary and it is always open to the employer to take work from the employee or not but he has to pay salary so long as employment is not terminated in accordance with law or in accordance with terms of his contract.

43. In Public Service Tribunal Bar Association v. State of U.P. and Anr. AIR 2003 SC 1115, the Court while justifying non grant of interim orders in the case of suspension, dismissal, removal etc. has observed that in such cases the employee can be suitably compensated when the said order is not found in order but in case the interim order is granted, it would amount to allowing wrong usurpation of the office by the employee during operation of interim order and this act may be irreversible. The Court observed as under:

"Dismissal, removal, termination and compulsory retirement puts an end to the relationship of employer and employee. In case of suspension, reduction in rank or reversion the relationship of employer and employee continues. Interference at the interim stage with an order of dismissal,

removal, termination and compulsory retirement would be giving the final relief to an employee at an interim stage which he would have giving the final relief to an employee at an interim stage which he would have got in case the order of dismissal, removal, termination and compulsory retirement is found not to be justified. If the order of dismissal, removal, termination and compulsory retirement is set aside then an employee can be compensated by moulding the relief appropriately in terms of arrears of salary, promotions which may have become due or otherwise compensating him in some other way. But in case the order of dismissal, removal, termination and compulsory retirement is found to be justified then holding of the office during the operation of the interim order would amount to usurpation of an office which employee was not entitled to hold. The action becomes irreversible as the salary paid to the employee cannot be taken away as he has worked during that period and the orders passed by him during the period he holds office (because of the interim order) cannot also be put at naught." (Para 40)

"Orders of suspension, dismissal, removal, reduction in rank, termination, compulsory retirement or reversion of a public servant normally should not be interfered with at an interim stage as the employee can be suitably compensated in case the order of suspension, dismissal, removal, etc. is found not to be in order. The cases in which the operation of orders of dismissal, removal, termination etc. is stayed by way of interim order is later on upheld at the final stage then it results in wrong usurpation of the office by the employee during the operation of the interim order. This act becomes irreversible and the employer cannot be suitably compensated by moulding the relief at the final stage." (Para-42)

44. In Ram Swarup Srivastava Vs. Allahabad District Cooperative Bank Allahabad & Ors., 2005 (2) ESC 1215 a Division Bench of this Court while considering entitlement of arrears of salary to an employee, who was wrongfully retired before attaining age of superannuation, held that he is entitled to salary of the said period for which he was not allowed to work and was wrongly retired. It was noticed that employee approached the Court before his retirement immediately after premature retirement, forced upon him by the employer but since no interim order was granted, he could not render any service and therefore, he is entitled to salary of the said period.

45. Thus in the matter of retirement wrongfully forced upon an employee consistently, the view has been to allow arrears of salary for the period the employee could not render any duty due to wrongful retirement and this has been followed recently in Harwindra Kumar Vs. Chief Engineer, Karmik and others, 2006 (1) UPLBEC 20 (SC) where the Court observed as under:

"It is directed that in case the employees have been allowed to continue up to the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by

virtue of erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period up to the age of 60 years which must be paid to them within a period of three months from the date of receipt of copy of this order by the Nigam."

46. It is important to notice at this stage that conduct of the employee in order to show his readiness by taking such steps, as permissible in law, to compel employer to permit him to work is of utmost importance and this includes whether employee took steps for preventing employer from retiring him premature wrongfully well in time. Where an employee has failed to approach the Court well in time, such relief has been denied on the ground of delay, laches and acquiescence. In Chairman, U.P. Jal Nigam and Anr. v. Jaswant Singh and Anr., 2007 (1) ESC 40 (SC) following judgment of Apex Court in Harwindra Kumar (supra), a number of employees of U.P. Jal Nigam, who were retired at the age of 58 years, approached the High Court, claiming that they are also entitled to continue till 60 years of age and High Court allowed the writ petition with benefit of arrears of salary etc. The judgment of Hon'ble Single Judge was confirmed in special appeal whereagainst U.P. Jal Nigam approached Apex Court and reversing judgment of High Court, it was held that employees accepted retirement and did not challenge the same in time and thus guilty of acquiescence. If they would have been vigilant enough, could have filed writ petition, as others did, immediately when they were sought to be retired at the age of 58 years, but they chose to abstain and did not rise to the occasion. The Court, therefore, should be very slow in granting relief to such litigants. It was also noticed that if the said employees would have challenged the retirement being violative of provisions of Act well in time, the employer could have taken appropriate steps to raise funds to meet liability in case he looses the matter in the Court or could have taken such other remedial measures, as necessary, but since employees did not come to the Court in time, the Court should not come to rescue such persons, who are guilty of waiver and acquiescence. Therefore, delay and laches is also a relevant factor in granting relief in such matters including arrears of salary.

47. In Sharda Singh Vs. State of U.P. and Ors., JT 2009 (5) SC 487, referring to an earlier decision in State of West Bengal Vs. Bata Krishna Burman, AIR 1970 SC 156, the Court observed:

"..a Government servant exonerated of the charges framed against him cannot be deprived of any portion of his pay for the period of suspension. Then again there could be a rule or regulation which may provide, that, during the period of suspension, an employee would be entitled only for suspension allowance, dehors the ultimate result of the enquiry proceedings."

48. In Gujarat Agricultural University Vs. All Gujarat Kamdar Karmachari Union, 2009 (15) SCC 335, doctrine of "no work, no pay" has been discussed in a bit detail. The Court said :

"One of the principles well known in the matters of service is that if a person

has worked, he must be paid and if he has not worked, he should not be paid. This is expressed in doctrine, `no work, no pay'. Another oft-repeated principle in service jurisprudence is that if an employer has wrongly denied an employee his due then in that case he should be given full monetary benefits."

49. The Court then said that none of these principles is absolute nor can these principles be applied as a rule of thumb.

50. In Shiv Nandan Mahto Vs. State of Bihar & Ors. 2011(11)SCC 626, the Court, set aside decision of High Court denying of salary, on account of suspension, by observing :

"The conclusion is, therefore, obvious that the Appellant could not have been denied the benefit of backwages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the Appellant was entitled to be paid full backwages for the period he was kept out of service."

51. In respect of principle of grant of backwages, in Chairman-Cum-M.D., Coal India Ltd. and Ors. Vs. Ananta Saha and Ors., JT 2011 (4) SC 252 the Court said:

"....even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic.

52. In making the above observation, the Court relied on its earlier decision in U.P.S.R.T.C. Vs. Mitthu Singh AIR 2006 SCC 3018; Secretary, Akola Taluka Education Society and Anr. Vs. Shivaji and Ors., (2007) 9 SCC 564; and Managing Director, Balasaheb Desai Sahakari S.K. Limited Vs. Kashinath Ganapati Kambale (2009) 2 SCC 288).

53. Thus, while considering the question of arrears of salary, where the employee could not work for an act of employer, which is found to be illegal or unauthorized, direction for payment of full salary or arrears of salary is not automatic or mechanical but has to be considered in the light of the numerous attending circumstances and the facts of the case.

54. I have examined the matter in the light of the aforesaid exposition of law. This Court finds that firstly the competent authority transferred and posted the petitioner at a place where there was no vacancy at all. Nothing has

been placed on record to show that any effective steps were taken by authority concerned to ensure that petitioner is posted in a place where he may join and work. Instead respondents have sought to rely on a letter to which it has not been shown, when the same was served upon the petitioner, as already discussed above.

55. In view thereof, it cannot be said that petitioner on is own denied to discharge duties. Instead it is the respondents own illegal act by transferring and posting petitioner at a place where there was no vacancy so as to deny him any occasion to render any service. For that purpose, the loss, if any, must be suffered by State, may be recovered from officer(s) concerned but petitioner cannot be made to suffer by denying him salary for no fault on his part.

56. In taking the above view, I find myself supported by two Division Bench judgment of this Court in Ram Narain Singh Vs. State of U.P. & Ors, 2007 (4) AWC 3382 (All) and Brijendra Pakash Kulshrestha Vs. Director of Education, 2007(3) ADJ 1 (in which I was also a member).

57. In the result, the writ petition is allowed. The impugned order dated 10.10.2007 (Annexure 18 to the writ petition) passed by respondent no.2 is hereby quashed. The respondents are directed to pay entire salary to petitioner for the period, denied to him, for no fault on his part i.e. from July, 2004 to 29.01.2006. However, it shall be open to respondent no.1 to recover the aforesaid amount from officer(s) concerned, who made a mechanical transfer and posting of petitioner at a place where there was no vacancy, on account whereof, he was not allowed to function, after making such enquiry as permissible in law.

58. The petitioner shall also be entitled to cost, which I quantify to Rs.10,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2014

BEFORE
THE HON'BLE AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 18653 of 2012

Gulam & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Santosh Kumar Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-pension and compassionate appointment-claim rejected-on ground as service were dismissed-neither pension nor compassionate appointment payable-held-enquiry report submitted on 03.07.2011-employee died on 15.07.2011-in absence of relationship of employer and employee-dismissal could be inflicted on 21.11.11-order quashed-entitled for pension as well as compassionate appointment.

Held: Para-10
There is another aspect of the matter. In the present case Abdul Kareem expired on 15.7.2011, i.e. before the disciplinary authority could pass any order on the enquiry report dated 3.7.2011. In the circumstances therefore, the master and

servant relationship between Late Abdul Kareem and the respondents also came to an end with his death and therefore, the impugned order dated 21.11.2011 could not have been passed after the death of Abdul Kareem.

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

1. The petitioner in this writ petition is aggrieved by the order dated 21.11.2011 whereby the retiral and other dues of late Abdul Kareem, father of petitioner no. 1 have been with held and the order dated 1.3.2012 whereby the claim for compassionate appointment made by the petitioner no. 1 has been rejected.

2. The case of the respondents is that late Abdul Kareem obtained appointment in the Revenue Department as Lekhpal and he was sent for training of Lekhpal but thereafter it was alleged that the petitioner alongwith some other persons had obtained the appointment by concealment of facts and practicing fraud, therefore their services were terminated under the U.P. Temporary Government Service (Termination of Service) Rules, 1975. This order was challenged by the petitioner alongwith others in Writ Petition No. 1131 (S/S) of 1994 in which late Abdul Kareem was petitioner no. 4 and the writ petition was allowed on the ground that the services of the petitioner could be terminated after giving notice and after following the principles of natural justice. Against the judgment of the High Court dated 16.2.2000 a Special Appeal was filed which was dismissed on 8.10.2003. Thereafter a charge sheet was issued to the petitioner on 20.5.2010 and departmental proceedings held against him. The enquiry officer submitted his report on 30.6.2011 which was received in the office of Deputy District Magistrate, Deoria on 3.7.2011 but on 15.7.2011 Abdul Kareem died. In this view of the matter, no departmental action against late Abdul Kareem could be concluded.

3. Nevertheless, the disciplinary authority has proceeded to pass the impugned order dated 21.11.2011 holding that since the charges against late Abdul Kareem had already been proved in the enquiry proceedings and it had been established that late Abdul Kareem had obtained the appointment by fraudulent means, therefore, he would not be entitled to any retiral benefits. This order has been challenged in the present writ petition. Subsequently, the claim for compassionate appointment of the petitioner no. 1 as son of late Abdul Kareem has also been rejected by the second impugned order dated 1.3.2012.

4. I have heard Shri Ashok Khare, learned senior counsel assisted by Shri Santosh Kumar Yadav for the petitioner and the learned standing counsel for the respondents.

5. Shri Ashok Khare submits that once the father of the petitioner no. 1 Abdul Kareem expired, the entire departmental proceedings abated and even if the enquiry officer had given his findings against late Abdul Kareem, the same could not be acted upon by the disciplinary authority. Shri Khare further submits that once Abdul Kareem had expired no punitive order could have been passed against him withholding his retiral benefits or any other benefits as it was always open for the disciplinary authority to disagree with the findings of the enquiry officer or to agree with the

findings of the enquiry officer but due to the death of late Abdul Kareem nothing of this kind has happened, therefore, the disciplinary authority could not have passed the impugned order with holding the retiral dues of late Abdul Kareem, to be paid to his family members after his death. He further submits that since Abdul Kareem had expired before any penalty order could be passed against him he would be treated to be in service and for that matter in honorable service till his death without any stigma being attached to his appointment and on that ground the claim of the petitioner no. 1 for compassionate appointment could not have been rejected.

6. Learned standing counsel on the other hand submits that the charges against the petitioner had already been proved in the enquiry proceedings and his guilt having been established, there was nothing further left for the disciplinary authority except to accept the same, since it had been found in the enquiry that late Abdul Kareem had obtained appointment by producing fraudulent documents, therefore, he could not be rewarded with retiral benefits etc. after his death nor could the petitioner no. 1 be rewarded with appointment on compassionate ground.

7. It is not in dispute between the parties that departmental proceedings were initiated against late Abdul Kareem and the enquiry report was submitted on 3.7.2011 and that Abdul Kareem died on 15.7.2011. It is nobody's case that late Abdul Kareem was given any opportunity to submit his reply to the enquiry report. In these circumstances once Abdul Kareem had expired the entire departmental proceedings against him abated as no order has been passed by the disciplinary authority accepting or rejecting the findings of guilt recorded by the enquiry officer against late Abdul Kareem. The findings recorded by the enquiry officer would not be sufficient to deny the heirs of late Abdul Kareem his retiral dues and other benefits, merely because the charges had been proved in the enquiry proceedings. Ultimately it was for the disciplinary authority to take a decision as to whether the charges against late Abdul Kareem stood established or not irrespective of whatever be the findings of the enquiry officer and the Rules contemplate passing of penalty order against a government servant.

8. Disciplinary proceedings are said to conclude when the disciplinary authority passes an order on the report of the Enquiry Officer. On receipt of the enquiry report the disciplinary authority may adopt any of the following three courses:

(a) He may accept the findings of guilt recorded by the enquiry officer and after supplying copy of the enquiry report to the delinquent employee, proceed to pass the penalty order.

(b) He may disagree with the findings of the enquiry officer and remit the matter for further enquiry.

(c) He may disagree with the findings of the enquiry officer exonerating the employee and himself after giving show cause notice to the employee, proceed to pass orders imposing penalty on the delinquent employee.

9. Thus disciplinary proceedings do not conclude merely with the recording of findings by the enquiry officer when he submits the enquiry report.

10. There is another aspect of the matter. In the present case Abdul Kareem expired on 15.7.2011, i.e. before the disciplinary authority could pass any order on the enquiry report dated 3.7.2011. In the circumstances therefore, the master and servant relationship between Late Abdul Kareem and the respondents also came to an end with his death and therefore, the impugned order dated 21.11.2011 could not have been passed after the death of Abdul Kareem.

11. In my opinion therefore the disciplinary authority could not have passed the order dated 21.11.2011 withholding the retiral dues and other benefits of late Abdul Kareem. When Abdul Kareem died on 15.7.2011 he could not have been said to be a government servant thereafter and therefore the order dated 21.11.2011 on the face of it is a wholly illegal and arbitrary order and has no basis in law and cannot survive.

12. So far as the matter of compassionate appointment of the petitioner no. 1 is concerned, for the same reasons that since the disciplinary authority has not taken any decision regarding the finding of guilt against late Abdul Kareem prior to his death, it could not be said that the charge had been established against late Abdul Kareem as disciplinary proceedings are concluded only with the passing of the order of disciplinary authority and not when the enquiry officer submits his report.

13. In this view of the matter, the writ petition is allowed and both the impugned orders dated 21.11.2011 and 1.3.2012 are quashed. The respondents are directed to take steps for payment of all retiral benefits to the legal heirs of late Abdul Kareem. So far as the order dated 1.3.2012 regarding rejection of the claim of petitioner no .1 for compassionate appointment is concerned, a direction is issued to the District Magistrate, Deoria-respondent no. 3 to take a decision afresh in this regard having regard to the educational qualification of the petitioner no. 1 and availability of vacancy within a period of two months from the date a certified copy of this order is received in his office.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ [PIL] Petition No. 20773 of 2014

Sumit Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi

Counsel for the Respondents:
C.S.C., Dr. H.N. Tripathi, Sri V.S. Chauhan,Sri S.K. Srivastava, Mrs. Alka Srivastava

Constitution of India, Art.-226- PIL-conditions for running brick kiln guidelines given to administration as well as to pollution board.

Held: Para-10
As it has come to the notice of the Court that some brick kilns have been conducting their business even without grant of No Objection Certificates or consent of the Board, it has become necessary to issue the following directions :-

i) We direct that the Board shall make a detailed survey of all the brick kilns operating in the districts of Meerut and Baghpat and ensure that any brick kiln found to be operating without the consent or permission of the Board and in breach of the 2012 Rules, is dealt with in accordance with law;

ii) We also find no reason or justification as to why the instructions/directions given above should not be applied across the State. We, therefore, direct that a survey should be carried out by the Board in respect of all the districts of the State. The survey shall be completed within a period of two months from the receipt of a certified copy of this order;

iii) Where the Board finds that the operation of any brick kiln is being carried out without the No Objection Certificate of the Board or in breach of the 2012 Rules, immediate steps shall be taken in accordance with law with due notice to the brick kiln owners. These enquiries shall be taken to their logical conclusion and shall be completed no later than within a period of three months thereafter;

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice)

1. The petition, which has been filed in the public interest, makes a grievance in regard to the establishment and operation of brick kilns in violation of the provisions of the Uttar Pradesh Brick Kilns (Site Criteria for Establishment) Rules, 2012 in the districts of Baghpat and Meerut.

2. These rules have been framed under sections 54(2)(z) and 21(2) of the Air (Prevention and Control of Pollution) Act, 1981 to regulate the criteria for the establishment of brick kilns in the State. Rule 2 defines, inter alia, the prohibited distance within which a brick kiln cannot be established from a residential area or, as the case may be, hospitals, schools, public buildings and religious places. Rule 3 provides that no licence in respect of the firing of a brick kiln or for mining lease shall be granted by the Zila Panchayat/District Administration concerned until and unless a valid previous consent has been obtained by the owner of the brick kiln from the State Pollution Control Board. Rule 7 provides for the manner in which the application has to be submitted to the State Pollution Control Board for granting permission for operation of the brick kiln.

3. According to the petitioner, a report was submitted on 31 October 2013 by a committee of the State Pollution Control Board that several brick kilns were continuing with the work of construction though the proposals for grant of No Objection Certificates had been rejected by the Board. The report also mentions that in many cases, brick kilns had even commenced operation though their proposals for grant of No Objection Certificates had been rejected by the Board. Since no action was being taken by the authorities including the District Administration, the present writ petition has been filed in the public interest.

4. A short counter affidavit has been filed on behalf of the newly impleaded respondent nos.6, 7, 8 and 9 stating that three members of the family of the petitioner namely, his mother, step mother and elder brother are operating brick kilns where there are large stocks of unsold

bricks and hence the petition has been filed, it is urged, to prevent the stocks of the surrounding brick kilns from coming into the market. Moreover, it has been stated that an earlier petition which had been filed by the petitioner (Writ-C No.168 of 2013) was dismissed as not pressed by a Division Bench of this Court on 29 January 2013.

5. On the other hand, it has been submitted by the petitioner that the mere fact that members of his family conduct brick kilns is no ground for rejection of the petition since it is submitted that the petitioner has separated from his family. Moreover, it has been submitted that the petitioner has filed several other petitions in the public interest which have been entertained by the Court.

6. A counter affidavit has also been filed on behalf of the Pollution Control Board. It has been stated that there are fifteen brick kilns in the district Baghpat which are mentioned in Annexure-2 to the writ petition. The Pollution Control Board has granted its No Objection Certificate to nine brick kilns whose names are set out in Annexure-1 to the counter affidavit. The application for grant of a No Objection Certificate to five brick kilns, whose names are also set out in Annexure-2 to the counter affidavit, was rejected. On 12 April 2014, the Regional Office of the Pollution Control Board issued notices to these five brick kiln owners calling upon them not to run their brick kilns without a No Objection Certificate or consent of the Board as required under the Air (Prevention and Control of Pollution) Act, 1981. Insofar as the Meerut district is concerned, it has been stated that the Regional Office of the Pollution Control Board had granted consent on 17 December 2013 to one brick kiln and on verification, it has been found that the other two brick kilns, which have been referred to by the petitioner, are not in existence.

7. In our view, for the purpose of these proceedings, even if the Court was to come to the conclusion that there is some doubt about the bonafides of the petitioner, that should not, in a matter as the present, result in rejection of the petition once facts which have a bearing on the public interest have been brought to the notice of the Court through an affidavit of the Pollution Control Board. Where a petition is filed for extraneous or oblique motives, the Court in the exercise of its judicial discretion may decline to interfere. However, this is undoubtedly a matter of judicial discretion because in a particular case, material may be brought to the attention of the Court independently by a statutory authority which may require judicial intervention. However, the Court has to be careful and circumspect because, where the locus of the petitioner or his motivation are in doubt, it may be necessary to structure the relief sought so as to ensure that the petition is not used as an instrument for suppressing a business rival. This note of circumspection has to be kept in mind in the present case.

8. The Pollution Control Board has now stated before the Court that in Baghpat district, No Objection Certificates were granted to nine brick kilns whereas in the case of five brick kilns, the proposals for the grant of No

Objection Certificates were rejected. The notices which have been issued by the Pollution Control Board on 12 April 2014 (Annexure-3 to the counter affidavit) would indicate that despite the refusal of the No Objection Certificates, the brick kilns are being conducted. In our view, there is absolutely no reason or justification for the Board in failing to discharge its statutory obligation. It is only when this petition came up before the Court on 10 April 2014 that the Pollution Control Board seems to have been galvanized into action. Obviously, if the Board was active in the enforcement of law and in the discharge of its statutory obligation, it would not have waited for the intervention of the Court before taking such action. Hence, we must express our serious concern about the manifest failure on the part of the Board in not taking remedial measures. The Regional Officers of the Pollution Control Board must be held accountable for failure to carry out the statutory obligations which they have to perform.

9. We, therefore, direct that the Pollution Control Board shall take all due and necessary steps to ensure that the work of the Regional Officers is closely monitored so as to ensure that the statutory duties and obligations which are cast upon them are duly performed. Now, when the Board has issued notices on 12 April 2014 to the brick kiln owners who have been operating their brick kilns without permission or consent of the Board, we direct that the Board shall make all endeavour to take the matter to its logical conclusion. The District Administration shall also co-operate with the Board to ensure compliance of law.

10. As it has come to the notice of the Court that some brick kilns have been conducting their business even without grant of No Objection Certificates or consent of the Board, it has become necessary to issue the following directions :-

i) We direct that the Board shall make a detailed survey of all the brick kilns operating in the districts of Meerut and Baghpat and ensure that any brick kiln found to be operating without the consent or permission of the Board and in breach of the 2012 Rules, is dealt with in accordance with law;

ii) We also find no reason or justification as to why the instructions/directions given above should not be applied across the State. We, therefore, direct that a survey should be carried out by the Board in respect of all the districts of the State. The survey shall be completed within a period of two months from the receipt of a certified copy of this order;

iii) Where the Board finds that the operation of any brick kiln is being carried out without the No Objection Certificate of the Board or in breach of the 2012 Rules, immediate steps shall be taken in accordance with law with due notice to the brick kiln owners. These enquiries shall be taken to their logical conclusion and shall be completed no later than within a period of three months thereafter;

iv) In order to maintain transparency in the working of the Board and its Regional Offices, details of the notices issued and the action taken should be

periodically uploaded on the website of the State Pollution Control Board;

v) The Board shall also upload the names of all the brick kilns which have submitted applications for granting the No Objection Certificates as also the names of brick kilns which have been granted such certificates so as to facilitate a verification of whether any brick kiln in the State is being operated without the grant of the requisite permission or a No Objection Certificate of the Board. Likewise, the refusal to grant a No Objection Certificate should also be periodically uploaded on the website of the Board. The exercise of uploading the No Objection Certificates which have already been granted shall be completed within a period of two months;

vi) The due exercise of statutory powers by the Pollution Control Board also requires the co-operation of the District Administration and the law enforcement machinery. The District Administration and the law enforcement machinery of the districts shall, therefore, take all necessary steps to ensure due compliance with the lawful instructions and directives issued by the Board.

11. The writ petition is, accordingly, disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.06.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Application No. 21567 of 2014
(U/s 482 Cr.P.C.)

Rahees alias Baura & Ors. ...Applicants
Versus
The State of Uttar Pradesh .Opp. Parties

Counsel for the Applicants:
Md. Abrar Khan, Sri Irfan U Huda

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

Cr. P.C.-Section-482-Practice of seeking direction for disposal of bail application on same day-inspite of clear authority of full Bench consisting Seven Judges as well as of the Apex Court-amounts to grass abuse process of law and frivolous litigation- in absence of pleadings to attract the power of Section 482-exemplary cost-held must.

Held: Para-23
In view of the above and considering the fact that despite the law laid down by a Larger Bench of this Court in Smt.Amarawati and Anr. (supra), which has been approved by Apex Court also in Lal Kamlendra Pratap Singh (supra) and has considered again in a recent decision in Trilok Chand (supra), still applications under Section 482 Cr.P.C., like present one, are continuously being filed with a sole request that bail application, which is yet to be filed, should be directed to be decided on the same day. In my view, it is nothing but a gross abuse of process of law and frivolous litigation, therefore, should attract exemplary cost.

Case Law discussed:
2004(57) ALR 390; 2009(3) ADJ 322; 1992 Supp. (1) SCC 335; (2006) 7 SCC 296; (2008) 1 SCC 474; (2008)1 SCC 474; (2008) 8 SCC 781; (2009) 9 SCC 682; JT 2010 (6) SC 588; 2011(1) SCC 74; 2012 (2) SC 237; AIR 2007 SC 137; 1976 (1) SCC 671; 1994 Cri.L.J. 1981=1994(4) SCC 260; 2009(4)SCC 437; 2005(1) AWC 416; 2010 (4) SCC 358; Crl. M.P. No. 25683 of 2013; 1986 Supp. SCC 719; (2011) 8 SCC 249; AIR 2012 SC 2881; JT 2005(6) SC 486.

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

1. This application under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") has been preferred with a sole prayer that Courts below be directed to consider bail application of applicants, on the same day, pursuant to first information report dated 28.4.2014 (Case Crime No.408 of 2014) under Section 147, 307, 120-B I.P.C.) registered at P.S. Chakeri, District Kanpur Nagar, in the light of decision of this Court in Smt.Amarawati and Anr. Vs. State of U.P., 2004 (57) ALR 390 as approved by Apex Court in Lal Kamlendra Pratap Singh Vs. State of U.P., 2009 (3) ADJ 322.

2. I am required to consider whether such an application under Section 482 Cr.P.C. with the prayer, as aforesaid, is entertainable. The scope of Section 482 Cr.P.C., as is evident from a bare reading of aforesaid provision, can be culled out from the provision itself, which reads as under:

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

3. The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Supreme Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive on the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.

4. In Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or

otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

5. In the present case, fortunately and interestingly it is not the allegation of applicants that there is any non-compliance of order passed by Court under Cr.P.C. or that there is any abuse of process on the part of Court or that there is any failure or travesty of justice on the part of Court below. In fact, applicants though have stated in para 11 of application that they are ready to surrender and apply for bail but it is admitted by learned counsel for the applicants that till date no such application has seen the light of the day. This Court does not know whether such an application would actually be filed or not. But what applicants require from this Court, to do, is that an application, which has yet to see the light of the day, should be directed to be decided by Court below and that too, on the "same day" so as to command the Court below to dispose of an application on the day it is presented before it, without exercising its discretion, which has been permitted by law by conferring a discretion upon it, looking to the facts and circumstances of the particular case.

6. The seven Judges decision of this Court in Smt.Amarawati and Anr. (supra) while answering the question referred to it, in para 47 of the judgment itself has said:

"The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that would be interfering with the judicial discretion of the Court hearing the bail application." (emphasis added)

7. Having answered this very question, as above, this Court has further explained the distinction in the matter of procedure while considering bail application under Section 437 and 439 Cr.P.C. and made certain observations in respect thereto, but the fact remains that a direction by this Court in routine manner for considering bail application on the same day has not been found to be consistent with the scheme of the statute. This decision having been rendered by seven Judges Bench of this Court is binding upon this Court and I find no reason not to follow the aforesaid dictum.

8. It is true that this Court has used the word "ordinarily" but then in order to exclude this dictum and to make a case exceptional, background facts have to be pleaded, in the application. Without being guilty of reading a judgment as statute,

still this Court cannot read the dictum laid down by Larger Bench in Smt. Amarawati and Anr. (supra) in a manner so as to render the dictum laid down therein frustrated or become meaningless for all practical purposes. The expression "ordinarily" may mean "normally". The expression must be understood in the context in which it has been used. When in a common parlance, expression "ordinarily" is used, there may be an option. There may be cases where an exception can be made out. (see State of Andhra Pradesh Vs. V.Saram Rao & Ors., AIR 2007 SC 137)

9. In Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed and Ors., 1976 (1) SCC 671, the Court said :

"The expression "ordinarily" indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority..."

10. Having gone through the entire application, and, as also admitted by learned counsel for the applicants, there is not even a whisper in the entire application so as to claim that any extra or exceptional circumstances exist so as to take out the present application from the law "ordinarily" applicable in such matter, as held in Smt.Amarawati and Anr. (supra). In paras 2, 3 and 4, general description about relief, for which application is being filed and the factum about registration of FIR are mentioned. Then paras 5 to 10 contain reasons stated by applicants, on their own, for justifying grant of bail and those reasons are:

(i) The applicants are innocent and law abiding persons falsely implicated due to enmity;

(ii) No weapon used is mentioned in FIR;

(iii) Due to enmity, Section 307 has been included in FIR though no case thereunder is made out;

(iv) Medical examination has been got conducted in a private hospital and injury report is manipulated;

(v) There is no serious injury; and

(vi) The applicants are not previously convicted.

11. These are the averments, which normally have to be considered by concerned Court while deliberating upon application of an accused to consider whether he should be granted bail or not.

12. Besides above, there is no averment/pleading so as to attract Section 482 Cr.P.C. in the case in hand.

13. Then learned counsel for the applicants stated that everyday, hundreds of cases are being filed under Section 482 Cr.P.C. with the sole relief that bail application should be considered on the same day and orders are being passed by this Court, therefore, the same order should be passed in this Court also. Some of such orders have been placed before this Court. However, I do not find consideration of any principle of law so as to pass an order, which apparently does not come within the precinct of Section 482 Cr.P.C. and that too after a categorical declaration of law by seven Judge Bench of this Court in Smt.Amarawati and Anr. (supra), as approved by Apex Court in Lal Kamlendra Pratap Singh (supra).

14. Even otherwise, I find that this aspect has been considered by this Court in Application under Section 482

No.19926 of 2013 (Trilok Chand Vs. State of U.P. & Anr.) decided on 19.6.2013. I find it useful to reproduce substantial part of the judgment on this aspect from paras 5 to 23, which read as under:

"5. The learned counsel for applicant then submitted that applicant may be allowed some time to surrender and a direction be issued to court concerned to consider his bail application on the same day and also to follow the law laid down in Joginder Kumar Vs. State of U.P. 1994Cri.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. He also requested that till then arrest of applicant be stayed and placed certain orders of this Court wherein such directions have been issued. He pointed out that hundreds and thousands such orders have been passed by this Court and, therefore, following the principle of parity similar direction must be issued in this case also.

6. 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 have 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.

7. 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.

8. 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.

9. I may illustrate on this aspect by looking into the aforesaid decisions in

detail, which the learned counsel or applicant 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-applicant when he would be presenting his case before court below.

10. 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.

11. 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.

12. 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 petitioner 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.

13. 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.

14. 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.

15. 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.

16. 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, petitioners 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. It is true, that, several orders placed before this court, show that directions as requested by accused applicant 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 placed before 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. These orders, therefore, do not constitute a precedent so as to have a binding effect under the law of precedent.

22. Lastly it is contended that atleast the court below be directed to consider the bail application of accused applicant 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 his part.

23. 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 datas from concerned district judgeship(s).

15. Learned counsel for the applicants, despite repeated query, could not address this Court to substantiate upon any aspect of the matter so as to persuade this Court to take a different view or to distinguish the aforesaid judgment, for the purpose of present case. I, therefore, find no reason but to follow the aforesaid dictum in the case in hand also.

16. It is really surprising that an application under Section 482 Cr.P.C. is being filed though there is no infringement of any right or procedural protection available to the accused, in any manner, so as to justify exercise of power

under Section 482 Cr.P.C., yet precious time of this Court is sought to be consumed for obtaining an order directing the Court below to consider bail application, which is yet to be filed, on the "same day", despite law otherwise declared by this Court in Smt.Amarawati and Anr. (supra) holding that High Court should not "ordinarily" direct any subordinate Court to decide bail application on the same day as that would be interfering with judicial discretion of this Court hearing bail application.

17. This law was laid down as back as in 2004 and since applicants themselves have required the Court below to consider the law laid down therein, it is evident that applicants are well aware of aforesaid decision, yet have not cared to avoid frivolous case before this Court seeking a relief, which has been held inapplicable in the aforesaid decision. There is no factual averment and foundation laid down in the entire application to attract any part of Section 482 Cr.P.C. in the case in hand. In my view, such an application should be treated a mere judicial adventure on the part of applicants to obtain an order, which according to applicants, is an innocuous order though not; or it should be taken as a gross abuse of process of law. I am inclined to follow the later view.

18. This Court cannot be oblivious of the fact that it is already reeling under extreme pressure of extra ordinary pendency of cases, for one or the other reasons, causing huge delay in disposal of cases. Everyday, on various platforms, people cry of denial of justice. They are frequently reminding us that "justice delayed is justice denied" but on account of massive litigation exodus, Courts are under mounting pressure of huge number of cases, pending. Lack of infrastructure and other supporting establishment, is another hurdle in speedy disposal of cases. It is virtually a day dream to think of an early disposal of a case yet a few litigants, assisted by officers of this Court, do not hesitate in filing frivolous cases adding to mounting arrears. This is high time when such frivolous and uncalled for litigation must be endeavoured to be curtailed by taking hard steps. This Court should not show its misplaced sympathy to such persons, who indulge in filing frivolous cases before this Court so as to consume a sufficient time in those matters, depriving Court's precious time to be utilized in other substantial issues. It is not that the state of law was/is not clear, inasmuch as, Smt.Amarawati's judgment came in 2004, approved by Apex Court in 2009, is further reiterated in Trilok Chand (supra), still practice of filing cases with the only prayer that bail application, which is yet to be filed, should be directed to be decided by Courts below on the same day, is continuing. Here, it is a fit case, which warrants not only rejection of this application but with exemplary cost.

19. Stressing upon the ways to discourage filing of vexatious and frivolous cases against all kinds of orders or at every stage of proceedings, irrespective of the fact whether application like the present one would be permissible in law or not, Apex Court in the context of practice of filing SLPs against all kinds of orders of High Court or other authorities, came heavily in Mathai @ Joby vs. George and Anr, 2010 (4) SCC 358 and said that if all such sundry kinds of cases are allowed, the Court will soon be flooded with a huge

amount of backlog and it will not be able to deal with important questions relating to the Constitution or the law or where grave injustice has been done. The Court has limited time at its disposal and the Judges are struggling with unbearable burden with zeal to dispense justice to whom it is highly needed yet being obstructed by such frivolous and vexatious matters, a trend is developing to bring all kinds of trivial and flimsy matters to Court causing wastage of not only public money, but also precious time of the Court, which can be used for other substantial matters.

20. The Apex Court in Crl. M.P. No.25683 of 2013 in Special Leave Petition (Crl.) No. 2448 of 2014 (Phool Chandra & Anr. Vs. State of U.P.), decided on 10.3.2014, observed:

"..the time of the Court which is becoming acutely precious because of the piling arrears has to be wasted on hearing such matters. There is an urgent need to put a check on such frivolous litigation. Perhaps many such cases can be avoided if learned Counsel who are officers of the court and who are expected to assist the court tender proper advice to their clients. The Bar has to realise that the great burden upon the Bench of dispensing justice imposes a simultaneous duty upon them to share this burden and it is their duty to see that the burden should not needlessly be made unbearable. The Judges of this Nation are struggling bravely against the odds to tackle the problem of dispensing quick justice. But, without the cooperation of the gentlemen of the Bar, nothing can be done."

21. The Court in Phool Chandra & Anr. (supra) referring to earlier decisions in Varinderpal Singh Vs. Hon'ble Justice M.R. Sharma and Ors., 1986 Supp SCC 719; Ramrameshwari Devi and Ors. Vs. Nirmala Devi and Ors., (2011) 8 SCC 249; and Gurgaon Gramin Bank Vs. Khazani and Anr., AIR 2012 SC 2881 has said:

"It is high time that the Courts should come down heavily upon such frivolous litigation and unless we ensure that the wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigation. In order to curb such kind of litigation, the courts have to ensure that there is no incentive or motive which can be ensured by imposing exemplary costs upon the parties as well as on learned Counsel who act in an irresponsible manner."

22. I may also repeat hereat observation made by the Court in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, JT 2005 (6) SC 486 stating that award of costs must be treated generally as mandatory. It is the liberal attitude of the Courts in not awarding costs which has led to frivolous points or litigation before the Courts. Costs should invariably follow the event and reasons must be assigned for not awarding costs.

23. In view of the above and considering the fact that despite the law laid down by a Larger Bench of this Court in Smt.Amarawati and Anr. (supra), which has been approved by Apex Court also in Lal Kamlendra Pratap Singh (supra) and has considered again in a recent decision in Trilok Chand (supra), still applications under Section 482 Cr.P.C., like present one, are continuously being filed with a sole request that bail application, which is yet to be filed,

should be directed to be decided on the same day. In my view, it is nothing but a gross abuse of process of law and frivolous litigation, therefore, should attract exemplary cost.

24. Learned A.G.A. informs this Court that everyday, dozens of such applications with similar request are being filed consuming huge time of this Court in disposal of such applications, which orders in fact are nothing but create an undue pressure upon subordinate judiciary also so as to protect itself from a situation of likely disobedience of this Court's orders though, as a matter of fact, neither such direction in view of Larger Bench judgment is permissible nor there is any occasion for such issuance.

25. This Court cannot make any comment on such statement of learned AGA but only takes notice of the fact that a large number of cases with similar request are being filed everyday consuming enough time of this Court in disposal of such applications. This is high time now that legal aspect of the matter should be reiterated again with a hope that such applications in future would be discouraged to be filed unless and until a case on the basis of pleadings, facts and material is made out.

26. Looking to the discussion, made above, the application has to be dismissed with cost.

27. The application is accordingly dismissed with cost of Rs.25,000/-, which shall be paid by applicants in Government Treasury within a month from today, failing which, it would be open to the State to realize the same as arrears of land revenue.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.06.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Application No. 21577 of 2014
(U/s 482 Cr.P.C.)

Ravi Kumar Agarwal & Anr. ...Applicants
Versus
State of U.P. & Anr.. ...Opp. Parties

Counsel for the Petitioners:
Sri K.K. Dwivedi

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 482-Applicant seeking direction for expeditious disposal of bail application-shocking state of affairs on part of Court below-inspite of direction of full Bench as well as Hon'ble Supreme Court-without assigning any reason-adjournment granted either on Advocate strike or at request of prosecution-presiding judge-failed to discharge its duty-direction issued to decide bail application on merit on next date fixed-application allowed with cost of Rs. 10,000/-.

Held: Para-14
It was a simple matter and should not have come to this Court but due to unfortunate inaction and lethargy on the part of the court below, the applicants have been compelled and forced to seek remedy before this Court having no other alternative. The State investigating agency and the prosecution are equally responsible since they have also not shown attitude of cooperation for expeditious disposal of bail application. In view thereof, I am clearly of the opinion that it is a fit case where the applicants must be compensated for avoidable expenses it has met in litigation before this Court.

Case Law discussed:
[2004(57) ALR 290]; [2009(4)SCC 437]; Application u/s Cr.P.C. No. 19926 of 2013.

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

1. Heard Sri K.K. Dwivedi, learned counsel for applicants, learned Standing Counsel for State and perused the record.

2. It is really surprising that Bail Application No. 1122 of 2014 - Ravi Kumar Agarwal and Another Vs. State of U.P., filed on behalf of applicants is not being attended and disposed of by I/C District and Sessions Judge, Agra, as is evident from orders dated 31.5.2014 and 05.06.2014, whereby the same has been adjourned only on the ground that Advocates are on strike and request of prosecution for adjournment is accepted without assigning any reason. On 12.6.2014 the application has been adjourned only on the ground of strike of Advocates.

3. This approach on the part of Sessions Judge concerned is apparently illegal, inasmuch as in my view, he has failed to discharge his duties in the manner as laid down by a Seven Judges' decision of this Court in Amaravati and another Vs. State of U.P. [2004 (57) ALR 290] and approved in Lal Kamlendra Pratap Singh Vs. State of U.P. [2009 (4) SCC 437].

4. Both the above authorities have also dealt with the tendency of Courts in not passing orders on bail applications expeditiously, by applying mind, and instead simply deferring proceedings. It has been considered by this Court also in Trilok Chand Vs. State of U.P. and Anr. (Application U/S 482 Cr.P.C. No. 19926 of 2013, decided on 19.06.2013), and deprecating above tendency, in paragraph nos. 22 and 23, this Court has said :-

"22. Lastly it is contended that at least the courts below be directed to consider the bail application of accused applicant 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 his part.

23. What is said, if correct, is admittedly something serious and puts a lot 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 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 datas from concerned district judgeship(s)."

5. If bail application has been filed on behalf of accused through an Advocate and Counsel does not appear on the ground that there is call of strike or on any other pretext, the Court concerned must allow the accused, in case he is present, to address the Court on bail application. It is only if the accused makes a statement that application should be deferred to some other date till his counsel is available, and he is ready to continue in jail, the Court may defer hearing on bail application. Otherwise, bail application should be heard and ought not be deferred only on the ground that Advocates are on strike or not present/ready to address the Court on bail application. If the accused(s)' counsel is present, but counsel appearing for the prosecution/complainant is not present, or seeks adjournment, that by itself would not confer a ground to the Court concerned to defer hearing of bail application, for the reason that a person cannot be allowed to be detained or continue to languish in jail merely for the reason that other side is not ready to address the Court on bail application, on merits. Reason(s) must have to be assigned by the Court concerned and there must be some special and genuine reason for such deferment, which are beyond the control of learned counsel appearing for the prosecution or the complainant, as the case may be.

6. In several matters, it has come to the notice of this Court, that mostly, bail applications are adjourned on the request of prosecution, stating that case diary has not been received or investigating officer/pairokar from the concerned Police Station has not come with record or likewise similar other excuses. These excuses on the part of prosecution are needed to be dealt with seriously and sternly. As a matter of right, Investigating Officer or Prosecution cannot delay disposal of bail application or trial, as the case may be, by simply not cooperating with the Court. It is their prime duty to attend the court at first call and produce the record called for, and assist the Court by providing required information and record to the prosecuting agency/counsel. Any defiance, negligence or carelessness in this respect, not only requires serious action on the part of Court concerned but such attitude on the part of concerned official(s) also amounts to obstruction in administration of justice for which the Court concerned can also make reference to this Court for initiating contempt proceeding against such Official/Government Official(s), and for punishing him/them suitably, for creating

obstruction in administration of justice under the provisions of Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act, 1971') District level officers of prosecution as also Secretary level officers in the State Government should also be apprised of such facts so as to enable them to take appropriate action on departmental side. In case of inaction on their part also, their tacit approval for defiance of Courts' order or obstruction in the administration of justice would be inferred, justifying appropriate action under the Act, 1971, against them also.

7. It is pertinent to notice here that it is a common feature of present day that considerable number of cases are pending in lower Courts owing to either non appearance of prosecution witnesses, or, production of record, specially concerned with Government agencies etc. or absence of Investigating Officer, or non production/non-appearance of formal witnesses by prosecution etc. The trial also suffers for similar reason.

8. Maintenance of Court's authority rests heavily upon Court itself. A Court of law has authority to get its order(s) executed or complied. It is for the Court to ensure that law and its rule is respected without exception. The circumstances under which Court chooses to allow adjournment or simply proceeds with the case to the detriment of the side that has failed to produce witnesses, have to be scrutinized by the Court before granting adjournment or proceeding with the case. The Court should strictly apply its authority in each and every case so as to have disposal of the matter with reasonable expeditiousness, whether bail applications or the trial itself. Duty and responsibility to ensure that State Agencies/prosecution agencies, promptly and diligently assist the Court and comply with orders thereof. Thus, obligation ultimately rests with the State itself. The State must be held responsible for lapses, if any, in this regard. It must ensure that breaches/lapses, if any, in observing obligation as above, are prevented in future. The Court must take necessary steps to assert its authority with vigour and determination so as not to allow adornments on shallow and bogus grounds. Sometimes on account of artificial, flimsy and wholly unreasonable excuses, the matters are adjourned and sometimes due to frivolous litigation a considerable time of Court is wasted which otherwise could have been utilised for some substantial issue. It prevents effective discharge of duty of Courts towards dispensation of justice to the needy.

9. Time has come when this Court has to evolve a method so that dispensation of justice expeditiously and within reasonable time becomes a reality. Today, a person facing a litigation whether civil or criminal, treats it as nightmare, not for any other reason but for the fear of prolonged litigious torture i.e. for extraordinary and indefinite period which is bound to affect, not only his pocket, but resources and life in general. The way in which the judicial system in India is seen by people can be visualised from a well known idiom "mukadme ke liye jeb me sone ki dali or pair me lohe ka joota hona chahiye." (for pursuing a litigation in court one should have a piece of gold in his pocket and shoes made of iron in feet). Literal meaning of the above idiom in its true spirit is that the money one would be required to face a litigation is so exorbitant that it may render him

virtually penniless at the end and simultaneously, he will have to visit the Court for innumerable times. This assumption in general public/society has to be removed, not by simply giving lectures on various platforms or in meetings and eatings but by effective and actual work in the field. Time has come when Court should show a determination of speedy disposal of cases so as to generate confidence in litigants that a date if has been given in his case, it will cause a result on that date and not a simple adjournment i.e. another date. The tendency of date after date has to be broken.

10. In the present case, I find a serious breach on the part of I/C Sessions Judge, in simply deferring consideration of bail application of applicant, repeatedly on three dates, without there being any fault on the part of accused applicants and that is how they have continued in jail. Continuing a person in jail by keeping his bail application pending without any just and lawful reason and without any application of mind on the part of the Court, in my view, prima facie infringes his right of freedom of personal liberty. It also violates constitutional and fundamental right of the applicants under Article 21 of the Constitution of India. The applicants who are confined in jail due to deferment of their bail applications, suffer violation of their fundamental rights, thereon, for which the attitude of Court below deserves serious deprecation.

11. Learned A.G.A. At this stage submitted that due to strike of lawyers disposal of bail applications have become very difficult. If an accused is in jail, every time he is not brought to the Court. Many a times, the accused remains in jail, therefore, in absence of his counsel, courts below find it difficult as to how bail applications should be heard and decided and that is a general practical dilemma before Courts below. He required that this Court may make some clarification on this aspect for the benefit and guidance of courts below to deal with such situation and like others.

12. Looking to the above aspect, in my view, whenever bail application is filed before the Magistrate/Court, as the case may be, whether under Section 437 or under Section 439 Cr.P.C. etc., the same shall be dealt with immediately and all out attempts shall be made to pass a reasoned order by application of mind thereon on that day, unless, of course, there is requirement of prior notice to other side and such notice has not been given or the other side did not find sufficient time to collect relevant information from the Police etc. for assisting the Court. On all these aspects the matter has been clarified by larger Bench of this Court in Smt. Amrawati and Another (supra) and a Single Judge judgment in Trilok Chand (supra) which must be looked into and followed. However, in Courts where Advocates are observing strike or otherwise, abstaining from Court, bail applications shall not be adjourned for this reason alone and the same shall be dealt with on merits, as far as practicable. Some directions/guidelines in this regard are stated hereunder:

I.If in a particular Court, Strike in general continues, Magistrate/Court shall ensure hearing of bail applications in Court/Jail, as the case may be.

II.If the accused is present in Court, the Court shall permit him/her to address

it and after hearing him/her and perusal of record it shall pass appropriate order on the bail application.

III.Deferment of bail application should be only if the accused makes a statement, which shall be recorded in writing by the Court concerned that bail application should be deferred till his/her counsel is available and he/she is ready to continue in detention.

IV.If the accused is not present in court having not been brought from jail, the Court shall ensure its sitting in jail itself for disposal of bail application on that very date, and with the consent of accused in jail, his/her bail application be disposed of. There also deferment shall only be on statement made by the accused which shall be recorded by the Court concerned.

V.If the Court finds that some relevant information is required from prosecution, and for valid reasons it is not available on the same day, the application may be taken up on the next day but there should not be a general long adjournment as a matter of course.

VI.Personal liberty of individuals must be given due credit, respect and honour.

13. The Court below is, therefore, directed to dispose of Bail Application No. 1122 of 2014 on the next date fixed, and the case shall not be adjourned only on the ground that Advocates are on strike or that prosecution is seeking adjournment as a matter of course.

14. It was a simple matter and should not have come to this Court but due to unfortunate inaction and lethargy on the part of the court below, the applicants have been compelled and forced to seek remedy before this Court having no other alternative. The State investigating agency and the prosecution are equally responsible since they have also not shown attitude of cooperation for expeditious disposal of bail application. In view thereof, I am clearly of the opinion that it is a fit case where the applicants must be compensated for avoidable expenses it has met in litigation before this Court.

15. The application is accordingly allowed with the aforesaid directions. The applicants shall also be entitled to cost which I quantify to Rs.Ten Thousand, which shall be paid by respondent no. 1 to the applicants within a month.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.06.2014

BEFORE
THE HON'BLE MANOJ MISRA, J.

Criminal Misc. Application No. 21608 of 2014
(U/s 482 of Cr.P.C.)

Nishant Tiwari @ Sonu & Ors. .Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Ram Surat Patel

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 482- Quashing of criminal proceeding-offence under section 498-A, 323, 506 IPC-on ground process issued under Section 202(i)-without-enquiry-vitiated-held-when the Magistrate after recording statement under section 200 and 202 Cr.P.C-being satisfied regarding existence of prima facie case against applicants amended provisions of 202 (i)Cr.P.C.-stand fully

complied with no interference called for-however direction for consideration of bail in Amrawati Case as well as Lal Kamlendra Pratap Singh case must be fully complied with.

Held: Para-8

As in the instant case, the process has been issued after recording the statement of the complainant as well as the witnesses as also after recording satisfaction with regards to existence of a prima facie case against the accused, upon consideration of the statements so recorded as also the material brought on record, it cannot be said that there was no compliance of the amended provisions of sub section (1) of Section 202 of the Code of Criminal Procedure.

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

1. Heard learned counsel for the applicants and the learned A.G.A. for the State.

2. By the present application, the applicants, who are husband, father in law and mother in law of the complainant (opposite party no.2), have sought quashing of the proceedings of Complaint Case No.48 of 2013 pending in the Court of Judicial Magistrate, Orai, District Jalaun, under Section 498-A, 323, 506 I.P.C. and Section ¾ of D.P. Act, P.S. Kotra, District Jalaun.

3. A perusal of the complaint, and paragraph 4 in particular, disclose the involvement of the applicants in commission of the offences for which they have been summoned. There is an injury report also to support the allegations. The learned Magistrate after taking cognizance on the complaint proceeded to hold an inquiry by recording statement of the complainant under section 200 and of the witnesses under section 202 Cr.P.C. to ascertain whether or not there is sufficient ground to proceed against the accused. After considering the allegations, the injury report and the statements recorded under sections 200 and 202 CrPC, the learned magistrate recorded satisfaction with regards to existence of a prima facie case to proceed against the applicants and, accordingly, summoned the applicants for offences punishable under Sections 498-A, 323, 506 I.P.C. and Section ¾ of D.P. Act.

4. Challenging the proceedings, the learned counsel for the applicants submitted that as the applicants, who are the accused, reside outside the jurisdiction of the Court, where cognizance has been taken, therefore, before issuing process the learned Magistrate ought to have himself inquired or to have directed an investigation for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. It has been submitted that by virtue of amendment of sub section (1) of section 202, by Act No.25 of 2005, with effect from 23.06.2006, in the Code of Criminal Procedure, such an inquiry is mandatory and in absence thereof, the order issuing process stands vitiated. In support of the said submission, reliance has been placed on decisions of the apex court in the case of National Bank of Oman V. Barakara Abdul Aziz: (2013) 2 SCC 488 and K.T. Joseph v. State of Kerala: (2009) 15 SCC 199. The second submission of the learned counsel for the appellant is that in absence of clear and specific allegation against the father in law and the mother in law they ought not to have been summoned by the learned magistrate in view of the decision of the apex court in the case of Geeta Mehrotra & another

versus State of UP & another: (2012) 10 SCC 741.

5. I have considered the submissions of the learned counsel for the applicants and perused the record.

6. The first submission of the learned counsel for the applicants is completely misconceived, inasmuch as, the learned magistrate has himself held an inquiry by recording statement on oath of the complainant and her witnesses Vinay Mishra and Gaya Prasad, under sections 200 and 202 CrPC respectively, which are on record as Annexure Nos.3, 4 and 5. It is only after recording the statements, and consideration of the same along with injury report, the learned magistrate drew satisfaction with regards to existence of a prima facie case for proceeding against the applicants and has summoned them accordingly.

7. The term inquiry as contemplated by sub section (1) of Section 202 is a pre-trial inquiry, as would be clear from Section 2 (g) of the Code of Criminal Procedure, which defines inquiry as every inquiry, other than trial, conducted under the Code by a Magistrate or Court. In Hardeep Singh v. State of Punjab: (2014) 3 SCC 92, in para 117.2 of the report, the Constitutional Bench of the Apex Court observed that inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. It was observed that materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet. In Vasanti Dubey v. State of M.P.: (2012) 2 SCC 731, the apex court, in paragraph 29 of the report, observed that while in a case based on police report, the court while taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the FIR, whereas a complaint case requires an enquiry by the Magistrate under Section 200 CrPC if he takes cognizance of the complaint. In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under Section 200 CrPC. From above, it is clear that recording of statement under Section 200 CrPC or under Section 202 CrPC, is nothing but a part of the pre-trial inquiry. Accordingly, where the magistrate records the statement of the complainant under section 200 CrPC and, if required, of the witnesses under section 202 CrPC and proceeds to consider them, along with other material, if produced, for ascertaining whether a prima facie case is made out to proceed against the accused, and records a satisfaction to that effect, there is sufficient compliance of the amended provisions of sub section (1) of Section 202 of the Code. Process issued to an accused residing out of the territorial jurisdiction of the Magistrate, after following the aforesaid procedure is not vitiated in any manner.

8. As in the instant case, the process has been issued after recording the statement of the complainant as well as the witnesses as also after recording

satisfaction with regards to existence of a prima facie case against the accused, upon consideration of the statements so recorded as also the material brought on record, it cannot be said that there was no compliance of the amended provisions of sub section (1) of Section 202 of the Code of Criminal Procedure.

9. So far as the second submission of the learned counsel for the applicants is concerned, the same cannot be accepted as there are allegations against all the accused who are husband, father in law and mother in law of the complainant. As the complaint allegations and the statements made in support thereof as also the injury report do make out a prima facie case to proceed against the applicants neither the summoning order nor the consequential proceedings can be quashed. The prayer of the applicant to that extent is therefore rejected.

10. At this stage, the learned counsel for the applicants submitted that a simple matrimonial discord between husband and wife has been given color of a dowry case. It has been submitted that subsequent to filing of the complaint, the husband (the applicant no.1) filed a petition for restitution of conjugal rights, which was decreed ex parte, thereby disclosing that the complainant had no justifiable cause to live separate. It has been submitted that the complaint allegations are nothing but false.

11. Be that as it may, the veracity of the allegations cannot be tested at this stage, inasmuch as, at this stage, the allegations are to be taken at their given face value. And since from the complaint allegations and the material in support thereof a prima facie case to proceed against the applicants is made out the proceedings cannot be quashed at the threshold. However, considering the facts and circumstances of the case, it is hereby provided that if the applicants appear /surrender before the court concerned and apply for bail, within a period of four weeks from today, their bail application shall be considered in accordance with law laid down in the case of Amrawati and another Vs. State of U.P.: 2004 (57) ALR 290, decided by a Full Bench of this Court, which has been approved by the Apex Court in the case of Lal Kamlendra Pratap Singh Vs. State of U.P.: 2009(3) ADJ 322 (SC).

12. With the aforesaid observations /directions, the application stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition (PIL) No. 26711 of 2014

Krishna Kant Mishra ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Nandan

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-read with Registration Act 1908-Section 17(i)(b)-with power of attorney Act 1982, Section-2-PIL-Seekind direction to furnish information with regards to Registration of power of attorney-reliance placed upon

Registration(Amendment) Bill, 2013, circular 03.07.2013 held-such amendment being contrary to Section 17 of the Act-Court declined to exercise power of extraordinary jurisdiction-petition dismissed.

Held: Para-26 & 27

26. As the law stands today in the country, and for the reasons which we have indicated above, it is evident that the circular that was issued by the Inspector General of Registration on 3 July 2013 requiring that powers of attorney be maintained in Book 1 was contrary to the specific provisions of the Registration Act and was correctly rectified by the subsequent circular dated 12 February 2014 of the Inspector General of Registration.

27. For these reasons, we are unable to interfere in the exercise of writ jurisdiction under Article 226 of the Constitution but while concluding, would express our appreciation of the able assistance which has been rendered to the Court both by the learned counsel appearing on behalf of the petitioner and by the learned Standing Counsel.

Case Law discussed:

(2005) 12 SCC 77; (2012) 1 SCC 656; (2009) 14 SCC 728.

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

1. The petitioner states in his petition under Article 226 of the Constitution that he is a prospective purchaser of a plot at George Town, Amar Nath Jha Marg, Allahabad. The owner of the plot is stated to have executed a power of attorney to sell the property. The petitioner has stated that he approached the authorities to verify the authenticity of the power of attorney by an application dated 2 May 2014. In response to the application, the petitioner was informed that powers of attorney are placed in Book-IV and do not constitute public documents available for inspection in view of the provisions of Regulation 254 of the Registration Manual. A circular dated 3 July 2013 was issued to the effect that powers of attorney which relate to immovable property would, in accordance with the provisions of section 51(2) of the Registration Act 1908, be placed in Book-I. Subsequently, on 12 February 2014, the Principal Secretary (Stamp & Registration) issued a communication to the Inspector General of Registration to the effect that the earlier circular dated 3 July 2013 was not in accordance with the legal position in view of the advice which was tendered by the Law Department. The petition has been filed in order to challenge the communication of the Principal Secretary dated 12 February 2014 and for a mandamus to the respondents to provide details of the power of attorney in relation to the plot in question in respect of which the petitioner claims, as a prospective purchaser, to be interested in negotiating a transaction.

2. Before we appreciate the contentions of the petitioner, at the outset, it would be necessary to advert to some of the provisions of the Registration Act, 1908 which have a bearing on the issues which are raised in these proceedings.

3. Section 17 deals with documents of which registration is compulsory. Section 18 provides for documents of which registration is optional. Section 17(1), which is material to the present discussion, provides that a document shall be registered, if the property to which it relates is situate in a district in which, and if they have been executed on or after the date on which Act No.XVI of 1864, or the Registration Acts of 1866, 1871 or 1877,

or the present Act of 1908 came into force if the document meets one of the descriptions set out therein which includes the following:-

"17(1)(b). Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property."

4. Clause (b) of section 17(1) refers to non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest, whether vested or contingent, to or in immovable property. This may be in present or in future and the right, title or interest may be vested or contingent.

5. Section 18 which provides for documents of which registration is optional refers in clause (f) to "all other documents not required by Section 17 to be registered."

6. A power of attorney is defined in section 1(a) of the Powers of Attorney Act, 1882 to include any instrument empowering a specified person to act for and in the name of the person executing it. Black's Law Dictionary defines the term "power of attorney" as follows:-

"An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. Complaint of Bankers Trust Co., C.A.Pa., 752 F.2d 874m 885. An instrument authorising another to act as one's agent or attorney. The agent is attorney in fact and his power is revoked on the death of the principal by operation of law. Such power may be either general (full) or special (limited)"1

7. A power of attorney is thus a written instrument by which one person who is described as a principal appoints another as an agent and confers authority on him to perform certain specified acts on his behalf. The acts of the agent or donee bind the person who confers the authority.

8. Section 2 of the Powers of Attorney Act, 1882 provides as follows:-

"2. The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force."

9. A power of attorney does not within the meaning of section 17(1)(b) purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property. Where the donor of the power of attorney authorises an agent to execute an instrument, acting on his behalf, which will have the effect of a transaction in respect of an immovable property, the power of attorney does not by itself constitute a creation, declaration,

assignment, limitation or extinguishment of a right, title or interest to or in any immovable property.

10. These principles are indeed well settled and it would be material to refer to some of the leading judgments of the Supreme Court on the subject. In State of Rajasthan & Ors. Vs. Basant Nahata2, the Supreme Court clarified the nature of a power of attorney in the following observations:-

"13. A grant of power of attorney is essentially governed by Chapter X of the Indian Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well-known, a document of convenience.

14. .....

Execution of a deed of power of attorney, therefore, is valid in law and subject to the provisions of the Act is not compulsorily registerable."

11. The same principle was laid down in Suraj Lamp and Industries Private Limited Vs. State of Haryana & Anr.3. The relevant observations are:

"A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee."

12. Having regard to this position in law, the Supreme Court held in paragraph 24 of the aforesaid judgment that the Courts will not treat transactions of the nature of general power of attorney sales as completed or concluded transfers or as conveyances "as they neither convey title nor create any interest in an immovable property".

13. Following these decisions of the Supreme Court, it is clear that a power of attorney does not require compulsory registration under section 17(1)(b) for the simple reason that the donor by the execution of the document only authorises the donee to act on his behalf and the instrument itself does not create, declare, assign, limit or extinguish any right, title or interest to or in immovable property.

14. Section 51 of the Registration Act, 1908 provides as follows:-

"51. Register-books to be kept in the several offices.-(1) The following books shall be kept in the several offices hereinafter named, namely:--

A. In all registration offices-

Book 1. Register of non-testamentary documents relating to immovable property;

Book 2. 'Record of reasons for refusal to register';

Book 3. 'Register of wills and authorities to adopt', and

Book 4. 'Miscellaneous Register'.

B. In the offices of Registrars--

Book 5. 'Register of deposits of wills'.

(2) In Book 1 shall be filed true copies of all documents or memoranda registered under Sections 17, 18 and 89 which relate to immovable property, and are not wills:

Provided that where Book is in electronic form, all documents, other than wills, registered under aforesaid sections or true copies thereof, as the case may be, or memoranda shall be scanned in it and a printout, thereof shall be kept permanently in Book 1.

(3) In Book 4 shall be filed true copies of all documents registered under Clauses (d) and (f) of Section 18 which do not relate to immovable property:

Provided that where Book is in electronic form, all documents registered under the aforesaid clauses or their true copies, as the case may be, shall be scanned in it and a printout thereof shall be kept permanently in Book 4.

(4) Nothing in this section shall be deemed to require more than one set of books, where the office of the Registrar has been amalgamated with the office of a sub-Registrar.

(5) Where due to fire, tempest, flood, excessive rainfall, violence of any army or mob, or other irresistible force, any or all of the books specified in sub-section (1) are destroyed, or become illegible, either wholly or partially, and the State Government is of the opinion that it is necessary, or expedient so to do so, it may, by order, direct such book or such portion thereof, as it thinks fit, to be recopied, authenticated, or reconstructed in such manner as may be prescribed, and the copy so prepared, authenticated or reconstructed, shall for the purpose of this Act, and of the Indian Evidence Act, 1872, be deemed to have taken the place of, and to be the original book or portion."

15. Insofar as the present case is concerned, the two books which are of relevance, are Book 1 and Book 4. Book 1 is a register of non-testamentary documents relating to immovable property. Book 4 is a miscellaneous register. Sub-section (2) of section 51 provides that in Book 1 shall be entered or filed all documents or memoranda which are registered under sections 17, 18 and 89, which relate to immovable property and are not Wills. Sub-section (3) of section 51 specifies that Book 4 shall comprise all documents which are registered under clause (d) and (f) of section 18 which do not relate to immovable property. Clause (d) of section 18 deals with instruments which create, declare, assign, limit or extinguish any right, title or interest to or in movable property. Clause (f), as we have also noted, deals with all other documents not required by section 17 to be registered. A power of attorney is not entered in Book 1 which is maintained under section 51 but under Book 4 inasmuch as it is optionally

registerable under section 18(f) and does not relate to immovable property.

16. Section 32 of the Registration Act, 1908 provides as follows:-

"32. Persons to present documents for registration :- Except in the cases mentioned in Sections 31, 88 and 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration-office :-

(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assign of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

17. Section 32 provides for the manner in which a document shall be presented for registration at the registration office, where registration is compulsory or optional. A document has to be presented for registration by (i) the person executing or claiming under the document; or (ii) a representative or assign of the executant; or (iii) the agent of the executant, representative or assign, duly authorised by a power of attorney of the assignee executed and authenticated in the manner thereinafter mentioned. Consequently, insofar as a power of attorney is concerned, clause (c) of section 32 stipulates that when a document is presented for registration by the agent of the executant or by a representative or assign, such power of attorney has to be executed and authenticated in the manner which is mentioned thereafter. Section 32A provides for the affixation of a photograph and fingerprint to the document.

18. Section 33 provides as follows:-

"33. Power-of-attorney recognizable for purposes of section 32. - (1) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely: -

(a) if the principal at the time of executing the power-of-attorney resides in any part of India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid resides in any part of India in which this Act is not in force, a power-of-attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in India, a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government:

Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely:--

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in court.

Explanation.--In this sub-section "India" means India, as defined in clause (28) of section 3 of the General Clauses Act, 1897 (10 of 1897).

(2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf."

19. Section 33 stipulates a situation under which alone, powers of attorney would be recognised for the purpose of section 32. Under clause (a) where a principal resides in India, the power of attorney has to be executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides. Clause (c) deals with a situation where the principal does not reside in India with which we are not concerned in these proceedings. Under sub-section (2) of section 33, the Registrar or Sub-Registrar in the case of every such person, if satisfied, that the power of attorney has been voluntarily executed by the person purporting to be the principal may attest it without requiring his personal attendance at the office or the Court aforesaid.

20. In Rajni Tandon Vs. Dulal Ranjan Ghosh Dastida & Anr.4, the Supreme Court has held that it is only in a case where the person who has signed the document cannot present it before the registering officer and furnishes a power of attorney to another to present the document that section 33 comes into operation. It is only in such a case that the power of attorney has to be executed or authenticated in the manner which is provided in section 33(1)(a). Section 32, when read together with section 33 would thus make it abundantly clear that where a person who has executed the instrument is unable to remain present before the registering officer for the purpose of presenting the document for registration and the document is presented by the holder of a power of attorney, the power of attorney has to be executed and authenticated in the manner which is provided for in section 33(1)(a).

21. The situation which has arisen as a result of these provisions of the Registration Act, 1908 has caused a serious lacuna in the law since, as a result of the provisions as they now stand, a power of attorney is not compulsorily registerable under section 17(1)(b). Moreover, since the power is not compulsorily registerable under section 17, it is not required to be placed in Book

1. Even a power of attorney which has been registered optionally under section 18 is not entered in Book 1 since Book 1 requires only those documents or memoranda registered under sections 17, 18 and 89 which relate to immovable property and are not wills to be entered therein. This imposes a serious hurdle in the way of a prospective buyer in carrying out due diligence in respect of a transaction which is proposed to be entered into on the strength of a power of attorney. A power of attorney is placed in Book 4 if it is registered under clause (f) of section 18. If the power of attorney is not registered at all, it is impossible for the prospective buyer to conduct a proper due diligence in respect of a property with which the buyer intends to deal. Even if the power of attorney is registered under section 18(f), it is maintained in Book 4 of which inspection is not contemplated by the Registration Manual and by section 57 of the Registration Act, 1908. Section 57 provides as follows:-

"57. Registering officers to allow inspection of certain books and indexes, and to give certified copies of entries. - (1) Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the Indexes relating to Book No. 1 shall be at all time open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies or entries in such books shall be given to all persons applying for such copies.

(2) Subject to the same provisions, copies of entries in Book No. 3 and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents, and after the death of the executants (but not before) to any person applying for such copies.

(3) Subject to the same provisions, copies of entries in Book No. 4 and in the Index relating thereto shall be given to any person executing or claiming under the documents to which such entries respectively refer, or to his agent or representative.

(4) The requisite search, under this section for entries in Book Nos. 3. and 4 shall be made only by the registering officer.

(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents."

22. Under sub-section (1) of section 57, inspection is contemplated in respect of Books 1 and 2 by any person applying for inspection. Copies of entries in Book 4 can be given to any person executing or claiming under the document to which the entries refer or to his agent or representative. There has been a recognition of the serious hurdle which we shall shortly note. In the State of Uttar Pradesh, Regulation 254 stipulates that Book 4 is a miscellaneous register in which are to be copied all documents registered under clauses (d) and (f) of section 18 which do not relate to immovable property. Regulation 254 specifies that Book 4 is not open to public inspection, nor are its indices; and copies of entries are provided only to parties executing or claiming under the document to which such entries relate or to their agents or representatives. Regulation 258 deals with Book 6 which is the register for

recording brief abstracts of those powers of attorney which are authenticated under section 33(a). Regulation 258 clarifies that when a power of attorney is registered, it has to be copied in full in the register like any other document.

23. The Registration (Amendment) Bill, 20135 was introduced in the Rajya Sabha to amend the provisions of the Registration Act, 1908. The Bill contemplates inter alia the insertion of a specific provision in section 17 of the Registration Act, 1908 to the following effect:

"(i) power of attorny authorising transfer of immovable property with or without consideration."

24. The statement of objects and reasons accompanying the introduction of the Bill in fact highlights the reason why it has been considered necessary to propose the amendment to section 17 by providing compulsory registration of powers of attorney :

"At present the Power of Attorney is optionally registrable. Many unscrupulous elements have found an ingenious way to avoid the registration and transfer the immovable properties through this Power of Attorney. The Act does not contain the provision for recovery of deficit registration fees or refund of the excess registration fees collected by the Registering Officer."

25. The Bill is pending consideration. The Bill, when passed into law would answer the pressing need to ensure the due protection of prospective buyers across the country while entering into transactions for the sale and purchase of immovable property when they deal with a person who holds a power of attorney. The proposed amendment is, if we may say so, a step in the right direction and commends itself as a measure which would obviate a serious loophole that has been exploited by unscrupulous persons at the cost of unaware purchasers.

26. As the law stands today in the country, and for the reasons which we have indicated above, it is evident that the circular that was issued by the Inspector General of Registration on 3 July 2013 requiring that powers of attorney be maintained in Book 1 was contrary to the specific provisions of the Registration Act and was correctly rectified by the subsequent circular dated 12 February 2014 of the Inspector General of Registration.

27. For these reasons, we are unable to interfere in the exercise of writ jurisdiction under Article 226 of the Constitution but while concluding, would express our appreciation of the able assistance which has been rendered to the Court both by the learned counsel appearing on behalf of the petitioner and by the learned Standing Counsel.

28. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2014

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

Civil Misc. Writ Petition No. 29757 of 2013

Ravindra Pratap Singh ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Khare

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-300-A- Petitioner's land 1989 sq. meter utilized for widening road-without resorting acquisition proceeding-despite of repeated direction correct area not disclosed-from report 1989 sq. meter found further utilized-in view of law developed by Apex Court-land can not be released-compensation at commercial rate fixed-with interest of 12% interest till actual payment within 3 month-in default interest @ 18% shall be payable with cost of Rs. 50,000/-.

Held: Para-13
In view of the aforesaid, when from the original record also, which is available with the learned Standing Counsel, nothing could be shown to the Court to prove that the width of the road, as it existed in 1955, remained the same even after upgradation and widening, and it is well established from the record that 1989 sq. meters of the land had been utilized in the year 2003 for widening of the road, we are of the opinion that the petitioner would be entitled for being paid compensation, at least at the rate at which the value of said land has been assessed by the report dated 31.10.2008.

Case Law discussed:
2013(2) AWC 1795

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

1. The case of the petitioner is that he, along with his brothers, is the owner of Khata no. 542 situated in village Koda, Jahanabad, Tehsil Bindki, District Fatehpur. It is not disputed that a road, maintained by the U.P.Public Works Department, passes through the plot of the petitioner which was constructed sometime in the year 1955. According to the petitioner, only 400 meters of land from plot no. 542, was utilized for construction of the said road which would be clear from the records of the revenue department and there is no grievance regarding the same.

2. The grievance of the petitioner is that in the year 2003, when the project for widening of the said road was carried out under a scheme of the World Bank, a further area of 1989 sq. meters of land of plot no. 542 was utilized for such widening, without resorting to the procedure for acquisition under the Land Acquisition Act or following any procedure prescribed by law, or on payment of any compensation to the petitioner and his brothers. It is contended that eversince the taking over of the land of the petitioner, he has been running from pillar to post but no compensation has been paid. He has thus filed this writ petition with the prayer for a direction in the nature of Mandamus commanding the respondents to pay the compensation for the land of Khata no. 542 situated in village Koda, Jahanabad, District Fatehpur which has been taken by the respondents for widening of the road and also pay 18% interest thereon.

3. We have heard Sri Manu Khare, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the record. Pleadings between the parties have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

4. On 24.5.2013 a Division Bench of this Court had passed the following order:-

"On hearing the parties, we adjourn this matter for six weeks. In the meantime, learned counsel for the State shall seek instructions from the Secretary, Public Works Department representing respondent no.1-State of U.P. and from respondent nos. 8 and 9 Superintending Engineer and Executive Engineer concerned.

We direct respondent nos. 8 and 9 to get the public road, which has been allegedly repaired or renovated, measured scientifically to find out whether the land of the petitioner has been utilised for the purpose of said road or not. If the petitioner's land in Gata No.542 has been utilised, then the extent to which such land was utilised for the purpose of road should be measured and shown in a scientifically prepared map and value of such land should be calculated as per Government policy. In case, the land of the petitioner has not been utilised for the road, then respondent nos.8 and 9 shall mention this fact clearly in their report. Such report should be made available to learned counsel for the State by the next date.

List the matter after six weeks in the cause list."

5. Respondents no. 8 and 9 in this writ petition are Superintending Engineer, World Bank Project P.W.D. Kanpur Nagar and Executive Engineer, Nirman Khand-IV Kanpur Nagar respectively. In compliance thereof, after nearly one year an affidavit has been filed today, which is sworn by Sri Gopal Raj Swaroop, Assistant Engineer, World Bank Division, Public Works Department, Lucknow. The same shall be dealt with at the relevant stage.

6. Besides the fact that in the revenue records only 400 sq. meters land of plot no. 542 has been shown as having been utilized for construction of road, which fact is not disputed by the respondents, learned counsel for the petitioner has placed reliance on the following communications/reports:-

(1) Communication dated 26.7.2008 (Annexure-4 to the writ petition) of the Executive Engineer to the petitioner, stating that they have written to the Sub Divisional Magistrate, Bindki to submit his report with regard to the utilization of the land belonging to the petitioner for widening of road and construction of the culvert and that only after receipt of such report, the matter relating to payment of compensation to the petitioner would be considered.

(2) The report of the Revenue Inspector dated 31.10.2008 (Annexure-5 to the writ petition and Annexure-2 to the Rejoinder affidavit) wherein it has been categorically stated that beyond the area of 400 sq. maters of Khata no. 542 which has been shown in the records for the purpose of road, an additional area of 1989 sq. meters of the said plot has been utilized for widening of road, for which compensation is to be paid to the petitioner. In the said report it is also mentioned that the circle rate for residential plots of the area is Rs. 1500/- per sq. meter, according to which the compensation would come to Rs. 29,83,500/-; whereas the commercial rate is Rs. 1900/- per sq. meter according to

which the compensation would come to Rs. 37,79,100/-. The said report has been duly forwarded by the Sub Divisional Magistrate to the Executive Engineer on 14.11.2008.

(3) Communication dated 2.5.2009 (Anneuxre-6 to the writ petition) by Sugam International Sansthan (which is the body responsible for supervising the work of widening/up-gradation of road being carried out under the scheme of the World Bank) which acknowledges the taking over of 1989 sq. meters of land of the petitioner for widening of the road, and mentions that it has been duly certified by the Sub Divisional Magistrate also, for which the compensation has yet not been paid to the petitioner.

(4) Communication dated 7.9.2012 (Annexure-13 to the writ petition) from the District Magistrate to the Additional District Magistrate requiring the latter to initiate proceedings for payment of compensation in accordance with the rules and the law. Acknowledgement of communication of Sugam International Sansthan and of the Executive Engineer, with regard to taking over 1989 sq. meters land of the petitioner has been done in this letter.

(5) Communication dated 8.9.2012 of the Additional District Magistrate, Kanpur to the Superintending Engineer, World Bank Scheme, respondent no.8, for taking necessary action with regard to payment of compensation.

7. In the light of the above, it is submitted by the learned counsel for the petitioner that the matter relating to payment of compensation, though acknowledged by the relevant authorities, is moving from one desk of the government and semi-government organizations to another, without the petitioner getting any relief, despite more than a decade having passed. It is contended that from the record it is absolutely clear that additional 1989 sq. meters of the land of the petitioner has been taken away for widening of the road without any consent of the petitioner or without resorting to the procedure for acquiring the land, and as such the petitioner ought to be paid compensation for the land taken, along with interest and damages.

8. This Court had earlier directed the learned Standing Counsel to produce the original record relating to the case, which has been made available. From the record, learned Standing Counsel does not dispute the issuance of the communications which have been relied upon by the learned counsel for the petitioner, mention of which has been made hereinabove. It is also not disputed that revenue record shows only 400 sq. meters of plot no. 542 to have been utilized for construction of road. All that he states is that the length of the road passing through the plot of the petitioner is 159.1 meters and if only 400 sq. meters is the area utlised for the road, the width of the road would be only about 2.5 meter, which is not possible. He thus submits that since the road was wide enough for being a highway since 1955, it has wrongly been recorded in the revenue records that only 400 sq. meter is the area used for the road which passes through the plot of the petitioner. The affidavit of compliance which has been filed today is not in terms of the order dated 24.5.2013 passed by this Court. No scientifically carried out measurement of land which

has been taken or utilized from the plot of the petitioner for the purpose of road construction has been given and all that has been stated is that no land from the plot of the petitioner has been utilized for the up-gradation of road, as the road was always as wide as it now is.

9. Learned Standing Counsel has, however, not been able to explain that if it is taken to be correct that there has been no widening of the road, then how and why the reports of various authorities with regard to utilization of additional 1989 sq. meters of land of the petitioner for the purposes of the widening of road have been submitted.

10. Land can be taken over by the State only in accordance with law. The same may be either by resorting to the process of the Land Acquisition Act or through a sale deed executed by the land owner. Proper compensation ought to be paid to the land owner before he is deprived of or made to part with his land. The might of the State should not be used for grabbing land from land owners and thereby refuse to pay compensation, even when the record show that additional land has been taken from the land owner. All citizens, and more particularly the State authorities, are expected to follow the law. The law is clear that no person can be deprived of his property without following the due process of law.

11. In the present case, what appears to have been done is that for the purposes of widening of road the land of the petitioner has been utilized. Later on, even when the authorities realised that additional 1989 sq. meters of land of the petitioner had been taken for such purpose, regarding which reports of the officials exist on record, they tried to justify that the total land had already been taken from the petitioner initially when the road was constructed in the year 1955. Howsoever laudable or important the purpose of acquisition of land may be, the process of law cannot be given a go bye. The respondents in this case clearly appear to have used their authority against a simple land owner to take his land and thereafter not even bother to compensate him.

12. From the record it is established that additional 1989 sq. meters land of the petitioner was utilized in the year 2003 for widening of the road. Learned Standing Counsel does not dispute the fact that the location of the land in question, falls in commercial area. In the counter affidavit, nothing has been stated with regard to the value of the land, which would be Rs. 37,79,100/- (as per the circle rate of Rs. 1900/- per sq. meter) as per the report dated 31.10.2008 of the Revenue Inspector, which has been duly forwarded by the Sub Divisional Magistrate.

13. In view of the aforesaid, when from the original record also, which is available with the learned Standing Counsel, nothing could be shown to the Court to prove that the width of the road, as it existed in 1955, remained the same even after upgradation and widening, and it is well established from the record that 1989 sq. meters of the land had been utilized in the year 2003 for widening of the road, we are of the opinion that the petitioner would be entitled for being paid compensation, at least at the rate at which the value of said land has been assessed by the report dated 31.10.2008.

14. The Apex Court in the case of Bhimandas Ambwani vs. Delhi Power Co.

Ltd. 2013(2) AWC 1795, has, while considering a case where the facts were such that the landowner was dispossessed without resorting to any law of Land Acquisition Act, held that such person would not be entitled to restoration of possession as full-fledged residential colony had been constructed on the land in question but directed the respondents to make an award under the provisions of the Land Acquisition Act treating section 4 notification to have been issued as on the date of the judgment of the Supreme Court which was 12.2.2013. In the present case, if the land is treated to have been acquired as on date for the purposes of valuation for payment of compensation, it would have to be assessed under the provisions of the Right to Fair Compensation And Transparency In Land Acquisition, Rehabilitation and Resettlement Act, 2013. However, keeping in view that the valuation of 1989 sq. meters of land of the petitioner has been assessed at Rs. 37,79,100/- by the report dated 31.8.2008 prepared by the respondent-authorities and the petitioner does not object to such valuation, we would not be inclined to remit the matter for further valuation of the property as more than ten years have already lapsed since the petitioner has been deprived of his property without being paid any compensation and directing for further proceeding for valuation, in the aforesaid facts, would be further delaying the determination and payment of compensation.

15. Accordingly, we direct the respondents to pay compensation of Rs. 37,79,100/- to the petitioner along with 12% interest from 31.10.2008 till the date of payment, if the payment is made within three months from today, and if not, then the respondents shall be liable to pay interest at the rate of 18% per annum from 31.10.2008 till the date of actual payment. In the facts of this case, since the petitioner has been running from pillar to post for payment of compensation of his land which has been taken over and utilized by the respondents more than a decade ago, and that too without following any procedure of law, we are of the opinion that the petitioner would also be entitled for payment of cost, which this Court assesses at Rs. 50,000/-. The said amount shall also be paid to the petitioner within the aforesaid period of three months.

16. The writ petition stands allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.06.2014

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

Civil Misc. Writ Petition No. 31868 of 2014 along with W.P. No. 32259 of 2014, W.P. No. 32264 of 2014, and W.P. No. 32292 of 2014

Ajay Pratap Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dr. D.K. Tiwari, Sri Shashi Kant Kushwaha

Counsel for the Respondents:
C.S.C., Sri Nisheeth Yadav, Sri Ajay Kumar

Constitution of India, Art.-226- Eligibility-information given by candidates-online as well off line application form-Combined State Upper Subordinate Services(Regular Recruitment) Examination 2013-column 13 provides-special qualification-petitioner given post graduate-while for Designated officer minimum cut off of general

candidate if 222 and petitioner get 272 marks-column 20 being confusive-ractified in subsequent advertisement 2014-held-petitioner entitled to participate in main examination for post of Designated officer-consequential direction issued.

Held: Para-15 & 16

15. We find that column no.20 does not mention about specific posts. From a physical demonstration given by the Commission for filling up an application form online before the Court we find that when a candidate clicks 'Yes' in column no.20, a window opens wherein other essential qualification such as Law graduate, Commerce graduate or post graduate in Chemistry etc. is asked for. These qualifications are nothing else but repetition of the information sought for in column no.19. The Court further, noticed that while clicking 'Yes' in column no.20 the window which opens does not mention the specific posts for which specified qualifications were asked for. We are of the opinion that the column no.20 has no relation with the specified post, for which specified qualification was prescribed in Sl. No. 13 of the advertisement. The Court also notices that this ambiguity was rectified by the Commission while issuing the advertisement in the year 2014, wherein column no. 20 indicates "specified post details with other essential qualification".

16. In the light of this ambiguity contained in column no. 20 of the application form, the Court is of the opinion that the benefit of this ambiguity is required to be given to the petitioners. Since the petitioners are eligible for the post Designated Officer and they have obtained more marks than the cut-off marks depicted by the Commission, the Court is of the opinion that the candidates being eligible should be permitted to appear in the Mains Examination, which is going to be held on 01.07.2014. The Court has been informed that the last date for deposit of the fee for the Main Examination is 14.06.2014 and the last date for submission of the form is 23.06.2014.

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

1. The Uttar Pradesh Public Service Commission, Allahabad issued an advertisement dated 23.03.2013 inviting applications for various posts for Combined State/Upper Subordinate Services (Gen.Rectt.) Examination-2013 and Combined State/Upper Subordinate Services (Physically Handicapped Special Rectt.)Examination-2013.

2. In this advertisement, applications were invited for several posts such as Dy. Collector, Naib Tehsildar, Treasury Officer/Accounts Officer etc. There were some specific posts for which specific qualifications were prescribed. The minimum qualification for various posts was that the candidate should a graduate but for some specific posts specific qualifications were prescribed. For example, for the post of "Sub Registrar and Asstt. P.O. (Transport)", the essential qualification was Law graduate. Similarly, for the post of "Designated Officer" the essential qualification was Post Graduate Degree in Chemistry as one of the subjects. The petitioners contends that they are eligible to apply for the Executive posts as well as for the post of Designated Officer.

3. The controversy in the present writ petition relates to the post of Designated Officer, which is a special post for which special qualification was prescribed under Sl. No. 13 of the advertisement. For facility, relevant portion of Sl. No. 13 is extracted hereunder:

"13. Educational Qualification : The candidate must possess Bachelors Degree of any recognised University or equivalent qualification upto the last date for receipt of application. This should be mentioned by the candidate in the relevant column of their

application form but for some posts specific qualifications have been prescribed of which the details are given below.

Designated Officer (1) Post Graduate Degree in Chemistry as one of the subjects from a University established by law in India or a qualification recognised by the Government as equivalent thereto."

4. The procedure pursuant to the said advertisement is that there is a preliminary examination followed by a written examination and then an interview. The advertisement indicated that the candidates could apply through online mode or through offline mode. The petitioners in writ petition nos. 31868 of 2014, 32259 of 2014 and 32264 of 2014 have applied by using the online mode. Under column no. 19 in the on line mode, the application form states "Are You Post Graduate?" for which the petitioners said 'Yes' and when clicked on the 'Yes' option, a window opened asking the candidate to fill the relevant subject. The petitioners, being a Post Graduate in Chemistry, accordingly filled up that column indicating that they are Post Graduate in Chemistry. Serial No. 20 of the application form is headed by the words "Other Essential Qualification". Most of the petitioners pressed the option 'No', meaning thereby that they had no other essential qualification except one of the petitioners who indicated that the said petitioner was a Law graduate.

5. The examinations were held on 26.06.2013 and the results were declared on 23.05.2014. The cut-off marks declared was as under:

6. For the General Category, cut-off marks was 265, for the Scheduled Caste, cut-off marks was 251, for the Scheduled Tribe cut-off marks was 222 and for Other Backward Classes the cut-off marks was 261.

7. For the post of Designated Officer the cut-off marks for the General Category was 222, for the Scheduled Caste cut-off marks was 198, for the Other Backward Classes cut-off marks was 222 and the Female Category cut-off marks was 209.

8. The petitioner no.1 in Writ Petition No. 31868 of 2014 obtained 272 marks and petitioner no.2 of this writ petition obtained 219 marks. Petitioner in Writ Petition No. 32259 of 2014 obtained 264 marks. Petitioner in Writ Petition No. 32264 of 2014 obtained 252 marks. Petitioner in Writ Petition No. 32292 of 2014 obtained 258 marks.

9. According to the petitioner no.1 in Writ Petition No. 31868 of 2014, he obtained more than the cut-off marks for the Executive Posts but has not been called to appear in the examination for the post of Designated Officer. The second petitioner in the same writ petition having qualifications for the post of the Designated Officer and eligible to appear in the mains examination for the post of Designated Officer has not been called to appear in the final examination and, being aggrieved, has filed the present writ petition. Similar relief has been claimed by other petitioners.

10. The contention of the petitioners is that for certain specific post such as Designated Officer qualifications were prescribed, which the petitioner indicated in column no.19 and that column no.20, which relates to other essential qualification did not relate specifically for these specified posts and, accordingly, the

petitioner indicated 'Nil' option while filling that column.

11. On the other hand, the stand of the Commission is, that column no.20 relates to specific posts, which requires specific qualifications and since the petitioners did not fill up the relevant column they are not entitled to be considered for the post of Designated Officer.

12. The petitioner in Writ Petition No. 32292 of 2014 had applied through off line mode and, in that form also, column no.20 relates to "other essential qualifications". The Court finds that the application form indicated 04 options, which the said petitioner had filled but could not fill the qualification of having Post Graduate Degree in Chemistry on account of fact that no further columns were made available in the application form to fill the extra qualification which he possessed in addition to the qualifications which he had filled up.

13. In the light of the assertions and contentions of the parties, we have heard Dr. D.K.Tiwari, Sri R.N.Tiwari, Sri Santosh Kumar Pandey and Sri Akhilesh Kumar Singh for the petitioners and Sri C.B. Yadav, the learned Additional Advocate General along with Sri Ajay Kumar for the Uttar Pradesh Public Service Commission.

14. Serial No. 13 of the advertisement indicates that for some specific posts, specific qualifications have been prescribed. For example, for the post of Sub Registrar, the specific qualification is that the candidate should be a Law graduate. Similarly, for the post of Designated Officer, the specific qualification is Post Graduate Degree in Chemistry. The petitioners have indicated this qualification of having a Post Graduate Degree in Chemistry while filling up column no.19. The contention of the respondents that the column no.20 relates to these specific posts cannot be accepted. Heading of column no.20 is "Other Essential Qualification". The heading does not indicate that it is related to specified posts having specified qualifications and consequently, the Court finds that there is an ambiguity in column no.20, which has confused the candidates. If the Commission was asking the candidate to specify specific qualifications for specific posts, then a dedicated column should have been made for that purpose. For example, column no.20 should have been headed as "Specific Post details with specific qualification".

15. We find that column no.20 does not mention about specific posts. From a physical demonstration given by the Commission for filling up an application form online before the Court we find that when a candidate clicks 'Yes' in column no.20, a window opens wherein other essential qualification such as Law graduate, Commerce graduate or post graduate in Chemistry etc. is asked for. These qualifications are nothing else but repetition of the information sought for in column no.19. The Court further, noticed that while clicking 'Yes' in column no.20 the window which opens does not mention the specific posts for which specified qualifications were asked for. We are of the opinion that the column no.20 has no relation with the specified post, for which specified qualification was prescribed in Sl. No. 13 of the advertisement. The Court also notices that this ambiguity was rectified by

the Commission while issuing the advertisement in the year 2014, wherein column no. 20 indicates "specified post details with other essential qualification".

16. In the light of this ambiguity contained in column no. 20 of the application form, the Court is of the opinion that the benefit of this ambiguity is required to be given to the petitioners. Since the petitioners are eligible for the post Designated Officer and they have obtained more marks than the cut-off marks depicted by the Commission, the Court is of the opinion that the candidates being eligible should be permitted to appear in the Mains Examination, which is going to be held on 01.07.2014. The Court has been informed that the last date for deposit of the fee for the Main Examination is 14.06.2014 and the last date for submission of the form is 23.06.2014.

17. In the light of the aforesaid, we allow the writ petitions.

18. A writ of mandamus is issued to the Uttar Pradesh Public Service Commission, Allahabad directing them to include the name of the petitioners in the list for the post of Designated Officer. The Commission is further directed to accept their fee and forms for the Main Examination. Since the last date of deposit of fee is 14.06.2014 and time is short, we, accordingly, direct the Commission to extend the date for deposit of fee by 21.06.2014. The forms can be accepted by 23.06.2014.

19. In the circumstances of the case parties shall bear their own cost.

20. A certified copy of this order be made available to the learned counsel for the parties by Monday 16.06.2014 on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2014

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

Civil Misc. Writ Petition No. 35775 of 2013

Swaroop Chand Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Mehta, Sri Saurabh Kumar, Sri P.S. Gupta
Sri Ravi Kant, Sri Ram Raj Prajapati, Sri Rakesh Kumar Gupta

Counsel for the Respondents:
Sri Ramesh Upadhyay, C.S.C.
Sri Vivek Shandilya (Addl. C.S.C.)

Constitution Of India, Art.-341(1)&(2)- Whether 'Kasera' is sub caste of Shilpkar in category of scheduled case? held-'No'- Law laid down by Division Bench in Vijay Shankar case is not correct law.

Held: Para-26&30

26. On the aforesaid findings, we decide the Question No.1 to the effect that 'Kasera' is not a sub caste of 'Shilpkar'. The persons belonging to 'Kasera' or any other sub caste, which were included in Note 4 of Appendix-A of Part-VIII of the list of the Constitution (Scheduled Castes) Order 1950 are not entitled to get certificates to belong to the Scheduled Caste.

30. On the aforesaid discussion, we also answer the question No.2 in negative, and hold that the judgment dated 23.12.2011, rendered by the Lucknow

Bench of the Court in State of Vs. Vijay Shankar and another - Writ Petition (Service Bench) No. 2080 of 2011, is not correct in law.

Case Law discussed:
[2001 (1) SCC 4]; [2004 (2) SCC 105]; [2007(14) SCC 481]; [2005 (7) SCC 690]; [2008(4) SCC 612]; [2005(2) AWC 1848]; [AIR 1965 SC 1557]; [(1996) 3 SCC 585]; [(1996) 3 SCC 100]; [(1996) 4 SCC 431]; [(1996) 8 SCC 264]; [(1997) 3 SCC 406]; [(2007) 5 SCC 360].

(Delivered by Hon'ble Sunil Ambwani, J)

1. We have heard Sri Ravi Kant, Senior Advocate, assisted by Sri Ram Raj Prajapati and Sri Ashok Mehta, Senior Advocate assisted by Sri Saurabh Kumar, for the petitioner. Sri Rakesh Kumar Gupta appears for Sri Hari Sharan Gautam (Intervenor). Sri Ramesh Upadhyay, learned Chief Standing Counsel assisted by Sri Vivek Shandilya, Additional Chief Standing Counsel appear for State respondents.

2. This reference arises out of a difference of opinion expressed by a Division Bench presided by one of us (Hon'ble Sunil Ambwani, J) with the Division Bench judgement of Lucknow Bench of the Court in Service Bench No.2080 of 2011 (State of UP Vs. Vijay Shankar & another) decided on 23.12.2011. The questions, which have been referred to be considered by this larger Bench, are as follows:-

"(1) Whether 'Kasera' is a sub-caste of 'Shilpkar' which is notified in the category of Scheduled Caste under Article 341 (1) and (2) of the Constitution of India?

(2) Whether the judgment dated 23.12.2011 in Service Bench No.2080 of 2011 (State of UP and another Vs. Vijay Shanker and another) is correct in law?"

3. The facts giving rise to the Writ petition No. 35775 of 2013 are that Sri Swaroop Chand Singh son of Srichandra - the petitioner claims that he belongs to 'Kasera' caste, which according to him is a sub-caste of 'Shilpkar', and falls within the category of Scheduled Caste, as notified under Article 341 of the Constitution of India. The petitioner applied to the District Magistrate, Mirzapur to issue a caste certificate for his minor son Tarang Singh, to verify that he belongs to Scheduled Caste for claiming admission to any College. In the writ petition, the petitioner has prayed for a writ, order or direction in the nature of mandamus directing respondent No.2 - the District Magistrate, district Mrizapur to issue a Scheduled Caste Certificate in the name of petitioner's son namely Tarang Singh in the light of judgement and order dated 23.12.2011 passed in Writ Petition No. 2080 of 2011 (State of U.P. And others Vs. Vijay Shankar and another), within a period specified by the Court.

4. The petitioner has relied on the judgment dated 23.12.2011 of Lucknow Bench of the Court in Writ Petition No. 2080 of 2011 - State of U.P. and others Vs. Vijay Shankar and another (Supra), in which a Division Bench, sitting at Lucknow Bench, considered the challenge of the State of U.P to the judgment of the U.P. State Public Services Tribunal by which the Tribunal granted the relief to Sri Vijay Shanker, who was appointed as Assistant Prosecution Officer on the recommendation of the U.P. Public Service Commission by virtue of a Scheduled Caste Certificate issued by the Tehsildar, Mirzapur dated 02.02.1987.

The said certificate verified that he belongs to 'Shilpkar' caste. Later on, a complaint was made against Sri Vijay Shankar on the ground that he has obtained the appointment by submitting forged Scheduled Caste Certificate; actually, the caste of Sri Vijay Shankar was recorded as 'Kasera' in School Certificate. On this ground, he was dismissed from service vide order dated 21.05.2007. The U.P. Public Services Tribunal granted the relief to him by setting aside the punishment order and reinstated him with all consequential service benefits and continuity in service. The Division Bench in its judgment dated 23.12.2011, dismissed the writ petition filed by the State of U.P holding that on a perusal of records, it appears that the Collector has written a letter on 14.12.2005, wherein he has mentioned that no certificate was issued during the year 1983-85, pertaining to the 'Kasera' caste being a Scheduled Caste. For this purpose, an enquiry was made by the Collector from all the Tehsils, but the fact remains that no specific query was made from the Tehsildar, Mirzapur, who had issued the said certificate. Moreover, it was not mandatory to make an entry for issuing every certificate. The Division Bench further observed that the Tribunal examined the National Citizen Register wherein it was shown that opposite party's parents names were mentioned as Sri Laxmi Narain Son of Mata Prasad and mother Smt. Suraj Mani wife of Laxmi Narain and they were categorized as 'Shilpkar', which admittedly belongs to Scheduled Caste. The Tribunal also observed that 'Kasera' is a sub caste of 'Shilpkar' as per Government Order dated 12.12.1950, and that there are 26 sub castes of 'Shilpkar', and 'Kasera' is one of them. Thus, 'Kasera' being a sub caste of 'Shilpkar' comes under the category of Scheduled Caste. When it is so, then it was found that there was no reason to interfere with the impugned order passed by the Tribunal.

5. Sri Ravi Kant, Senior Advocate, assisted by Sri Ram Raj Prajapati appearing for the petitioner submits that 'Shilpkar' has been notified by the President of India as Scheduled Caste in the Constitution (Scheduled Castes) Order 1950 in Part VIII Uttar Pradesh at Sl. No.62. 'Shilpkar' is a generic name of community who have been socially, economically and educationally deprived of their rights. Prior to Independence of India, in the census report of 1931 by J.S. Hutton, the petitioner's community was shown in the category of 'depressed class', and on the basis of the said report, the community after Independence was shown in the category of Scheduled Caste being 'Shilpkar' and 'Kumhar', after following the terms and conditions as provided under law. The State Government after the directions of the Government of India, directed the Anusuchit Jati Evem Anusuchit Janjati Shodh Evem Prashikshan Sansthan, to submit an ethnographic report about the status of the community of Prajapati/Kumhar. On the basis of the report, the State Government found that the status of the community is lower in status than other communities, and the State Government thus sent its report with a proposal for providing benefit for including it in the category of Scheduled Caste. The State Government subsequently on the basis of Government Order dated 12.09.1950, and the decision taken in Writ Petition No. 2080 of 2011, provided an interim benefit, as given to the community of the Scheduled Caste.

The community in the category of 'Shilpkar' is thus entitled to all benefits as provided in the State list to the community of Scheduled Caste.

6. Sri Ravi Kant further submits that this Court has permitted Uttar Pradeshiya Prajapati Mahasabha (Registered) through its Pramukh Mahasachiv Sri Heera Lal Son of Late Budhai R/o Moahalla Near Bari Vihari, Ram Rai Patti, Post Shiva Park, Line Bazar, Jaunpur to be heard in the proceeding. He submits that admittedly 'Shilpkar' is a notified Scheduled Caste and that there are 26 sub castes of 'Shilpkar', which were so notified in the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956 (Act No. 63 of 1956) by putting a note under Part-VIII-Uttar Pradesh. All these sub castes were classified as 'depressed classes' as per census report of 1931, and thus they cannot be denied the benefit of castes certificate, issued to these sub castes including 'Kasera' as a sub caste of 'Shilpkar' caste, notified as Scheduled Caste.

7. Sri Ashok Mehta submits that Note (4) to Appendix A to the Government Order dated 12.09.1950, provided 26 sub castes within the caste of 'Shilkpar' notified as Scheduled Caste in the State of U.P. at Sl. No. 62 of the Government Order dated 12.09.1950. Note 4 reads as follows:-

"Within Shilpkar - Atpahariya, Auji, Barhai, Beda, Bhat, Kumbar, Koli, Lohar, Rudia, Sunar, Pahri, Jogi, Dhunar, Chhipli, Dhoni, Kolai, Jhumariya, Tamta, Kasera, Dhaloti, Vakhariya, Kolta, Halia, Hurakya, Bhul and Chunariya.".

8. Sri Ashok Mehta further submits that if any enquiry is to be made whether 'Kasera' is a sub caste of 'Shilpkar', the State is competent to refer the matter first at the District Level Scrutiny Committee and thereafter to the State Level Scrutiny Committee which have been constituted in the State of U.P. He has relied on the judgment of the Supreme Court in Kavita Solunke Vs. State of Maharashtra and others in Civil Appeal no. 5821 of 2012 decided on 9.8.2012, in which following the judgment in State of Maharashtra Vs. Milind [2001 (1) SCC 4], as explained in R. Vishwanatha Pillai Vs. State of Kerala [2004 (2) SCC 105; State of Maharashtra Vs. Sanjay K. Nimje [2007 (14) SCC 481; Bank of India Vs. Avinash D. Mandivikar [2005 (7) SCC 690] and Union of India Vs. Dattatray [2008 (4) SCC 612], it was held that if a person has secured appointment or admission on the basis of false caste certificate, he cannot retain the said certificate obtained by him, and the Courts will refuse to exercise its discretionary jurisdiction depending upon the facts and circumstances of each case. Relying on Nimje's case, it was held that since there was no allegation against the appellant that she had fabricated or falsified the particulars of being a Scheduled Tribe only with a view to obtain an undeserved benefit in the matter of appointment as a teacher, there is no reason why the benefit of protection against ouster should not be extended to her, subject to the usual condition that the appellant shall not be ousted from service and shall be reinstated if already ousted, but she would not be entitled to any further benefit on the basis of certificate, which she has obtained, and which was 10 years after its issue cancelled by the Scrutiny Committee.

9. Sri Rakesh Kumar Gupta appearing for Sri Hari Sharan Gautam who claims to be President of Dr. B.R.

Ambedkar Granthalaya Evam Jan Kalyan Samiti, Gorakhpur and was allowed to intervene submits that previously in the year 2005, the Government of U.P illegally included 16 OBC castes in the list of Scheduled Caste. A Public Interest Litigation No. 76922 of 2005 (Dr. B.R. Ambedkar Granthalaya Evam Jan Kalyan Samiti Vs. State of U.P. And others) was filed wherein a Division Bench of the Court granted stay order against that notification of the State Government. He submits that benefit of reservation for Scheduled Caste cannot be given, except in accordance with notification by the President under Article 341 (1) or the notification under Article 341 (2) of the Constitution of India, and in any case the State Government does not have authority to include any caste or sub caste in the list of Scheduled Caste, notified under Article 341 (1) or (2) of the Constitution of India.

10. The Uttar Pradesh Public services (Reservation) for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994, lays down the percentage of reservation in public services and posts at 21 % for Scheduled Castes; 2 % for Scheduled Tribes and 27 % for Other Backward Classes of citizens. The term 'other backward classes of citizens' has been defined in Section 2 (b) of the Act as 'backward classes of citizens specified in Schedule-I'. The Schedule-I of the Act notified 66 other backward classes of citizens, which include 'Kasera, Thathera, Tarakhar' at Sl. No. 59.

11. The notification including the 26 sub castes of 'Shilpkar', alleged to be included in the Appendix-A of the Constitution (Scheduled Castes) Order 1950 was amended by Scheduled castes and Scheduled Tribes Orders (Amendment) Act 1956, and thereafter by Scheduled Castes and Scheduled Tribes Lists (Modification) Order 1956, by which entire Appendix-A to Part-VIII was omitted.

12. It is submitted by Sri Rakesh Kumar Gupta that 'Kasera' is not a caste, which is a sub caste of 'Shilpkar' which has its own identity. He submits that considering the background of castes in the State of U.P., 'Kasera' and other sub castes are included in the notified list of Other Backward Classes.

13. Sri Ramesh Upadhyay, learned Chief Standing Counsel appearing for the State has filed an affidavit of Sri Ram Gopal, Special Secretary, Department of Social Welfare Government of U.P Lucknow, in which it is stated as follows:-

3. That, in exercise of powers conferred by clause (1) of Article 341 of the Constitution of India, the President made the Constitution (Scheduled Castes) Order, 1950, by which in State of Uttar Pradesh 63 castes were declared to be Scheduled Castes and in Bundelkhand Division and the portion of Mirzapur District south of Kaimur Range the 'Gond' caste was also declared to be deemed to be Scheduled Caste. True copy of the Constitution (Scheduled Castes) Order, 1950, is being annexed herewith and marked as ANNEXURE NO. 1 to this affidavit.

4. That, thereafter, the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1956 was enacted and in the Scheduled I the list of Scheduled Castes has been provided, in which 64 castes are shown to be Scheduled Caste and throughout the State excluding Agra,

Meerut and Rohilkhand Division 'Kori' and in Bundelkhand Division and the portion of Mirzapur District sought of Kaimur Range 'Gond' caste has been declared as Scheduled Caste. True copy of the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956, is being annexed herewith and marked as ANNEXURE NO. 2 to this affidavit.

5. That, thereafter, the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956 was made by the President in pursuance of Section 41 of the State Reorganization Act, 1956 (37 of 1956), and Section 14 of the Bihar and West Bengal (Transfer of Territories) Act, 1956 (40 of 1956), by which the Constitution (Scheduled Castes) Order, 1950 has been modified in the manner and to the extent specified in Schedule I. True copy of the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956, is been annexed herewith and marked as ANNEXURE NO. 3 to this affidavit.

6. That, copies of the Government Orders, which provide the procedure for issuing caste certificate prior to issuance of Government Order dated 27.11.2010, are being collectively annexed herewith and marked as ANNEXURE NO. 4 to this affidavit.

7. That, from the perusal of the Circular dated 22.05.1957 it is clear that the List of Scheduled Castes and circulated alongwith the government Order dated 12.09.1950 and reproduced as Appendix 'A' to the Circular dated 22.05.1957, is now no more in force. As such, the argument of the counsel for the petitioner that there are 26 sub-castes of caste 'Shilpkar', has no force. The clear and legible copy of the Circular dated 22.05.1957 is being annexed herewith and marked as ANNEXURE NO. 5 to this affidavit.

8. That, the Lucknow Bench of this Hon'ble Court in the case of Ghanshyam Das Vs. Union of India and others held that at no point of time the 'Kasera' community was included in the list of Scheduled Castes of U.P. True copy of the order dated 09.12.2004 of the Lucknow Bench of this Hon'ble Court in the case of Ghanshyam Das Vs. Union of India and others, is being annexed herewith and marked as ANNEXURE NO. 6 to this affidavit.

9. That, in view of the facts and circumstances stated herein above, it is respectfully submitted that the present affidavit may kindly be taken on record."

14. Sri Ramesh Upadhyay submits that in the Constitution (Scheduled Caste) Order 1950, 63 Castes were declared as Scheduled Caste in the State of U.P., and in Bundelkhand Division, and the portion of Mirzapur district south of Kaimur Range 'Gond' was also declared to be Scheduled Caste in the State of U.P. Thereafter Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956 (Act No. 63 of 1956) was enacted . In schedule-I, Part-VIII, a list of Scheduled Castes was notified, and in which 64 castes were shown. The 'Kori' caste was also declared Scheduled Caste through out the State excluding Agra, Meerut and Bundelkhand divisions and 'Gond' caste was declared as Scheduled Caste in Bundelkhand division and the portion of Mirzapur district south of Kaimur Range. Thereafter, Scheduled Castes and Scheduled Tribes Lists

(Modification) Order 1956, was made by the President under Article 341 (1) of the Constitution of India in pursuance of Section 41 of the States Reorganization Act 1956, and Section 14 of the Bihar and West Bengal (Transfer of Territories) Act 1956 by which Constitution (Scheduled Caste) Order 1950 was modified and to the extent specified in Schedule-I. He submits that in the circular dated 22.05.1957, issued in pursuance to Modification Order 1956, it is clear that Appendix-A to the circular, which was included and circulated along with Government Order dated 12.09.1950, is no more in force. Thus, the 26 sub casts of 'Shilpkar' are no more notified as sub caste to be included as Scheduled Caste since 22.05.1957.

15. Sri Ramesh Upadhyay further submits that the question whether 'Kasera' caste is to be included within the caste of 'Shilpkar' was decided by a Division Bench of the Court at Lucknow Bench in Ghanshyam Das vs. Union of India and others decided on 9.12.2004 [2005 (2) AWC 1848]. In this case a claim was made that 'Kasera' is a sub caste of 'Shilpkar. A caste certificate, showing the petitioner as 'Kasera' caste and belonging to Scheduled Caste was issued to him on 6.12.1996. A complaint was made against the said certificate. The Tehsildar after making enquiries, cancelled the caste certificate vide order dated 31.3.1999. The writ petition filed against the cancellation order was dismissed by the Lucknow Bench of the Court relying on paragraph 7 and 9 of the counter affidavit. Paras 8 and 9 of the judgment of the Lucknow Bench in Ghanshyam Das case (Supra) is quoted as under:-

"8. In paragraphs 7 and 9 of the counter-affidavit filed by the Union of India is as under :

(7) "That in reply to the contents of paras 8 to 10 of the writ petition, it may be pointed out that the list of Scheduled Castes of Uttar Pradesh is contained in Part XVIII of the Schedule to the Constitution (Scheduled Castes) Order, 1950, as amended up to date. The community "Shilpkar" has been specified as Scheduled Castes at serial No. 65 in relation to the State of Uttar Pradesh. That the Kasera Community does not find place in the said order. It may be stated that Article 341 of the Constitution prescribes procedure for specification of community as Scheduled Castes. Clause (1) envisage that first specification of Scheduled Castes in relation to a particular State is by a notified Order of the President, after consultation with the State Government concerned. Under Clause (2) the notification once issued in exercise of powers contained in Clause (1) can be modified subsequently only through an Act of Parliament. At no point of time the Kasera Community was scheduled as S. C. in relation to the State of Uttar Pradesh. Thus, Annexure-5 stated to have been issued by the Government of Uttar Pradesh is not legally tenable. The State Government may merely recommend and it cannot include in or exclude from the list of Scheduled Castes any community.

(9) That the contents of paras 18 and 19 of the writ petition are not admitted as framed. It may be pointed out that the State Government of Uttar Pradesh have no power to amend the S. C. list of that State contained in Part XVIII of the Schedule to the Constitution (Scheduled Castes) Order, 1950. It is also submitted that at no point of time the community Kasera was included in the S. C. list of Uttar Pradesh. The order stated to have

been issued by the Government of Uttar Pradesh in the year 1957 is not legally tenable. The Government of U. P. vide U. P. Act No. 4 of 1994 has neither added nor excluded from the lists of Scheduled Castes any community. The Government of Uttar Pradesh is within its power to notify any community other than S.Cs. and S.Ts. as other Backward Class."

9. From the record, it reveals that at no point of time the Kasera community was included in the list of Scheduled Castes of U. P. The petitioner who belongs to Kasera community cannot be said to be Scheduled Castes. There is no illegality in the impugned order. The writ petition is devoid of merits. It is accordingly dismissed."

16. Sri Ramesh Upadhyay submits that Vijay Shankar's case (Supra), the attention of the Division Bench was not drawn to the earlier Division Bench judgment of the Court dated 9.12.2004, in Ghanshyam Das case (Supra). The conclusion drawn in Vijay Shankar's case is contrary to the judgment of the same Court in Ghanshyam Das case (Supra).

17. The Constitutional scheme specifies the castes, races or tribes or parts of or groups within castes races or tribe which shall for the purpose thereof be deemed to be Scheduled Castes. Article 341 of the Constitution provides as follows:-

"Art. 341 (1). The President may with respect to any State or with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes races or tribe which shall for the purpose thereof be deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be.

(2). Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

18. The object of Article 341 is to provide additional protection to the members of the Scheduled castes having regard to the social and educational backwardness from which they have been suffering since a considerable length of time and to keep away disputes touching whether a caste is a Scheduled Caste or not for the purpose of the Constitution.

19. In State of Maharashtra Vs. Milind (Supra), it was held that the object of Articles 341, 342, 15 (4) and 16 (4-A) is to provide preferential treatment for the Scheduled Castes and Schedule Tribes having regard to the economic and educational backwardness and other disabilities wherefrom they suffer.

20. A list of Scheduled Caste was initially notified in the Constitution (Scheduled Castes) Order 1950, which was amended by Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956, as a result of State Reorganization Act 1956. No one can claim that his caste should be included as Scheduled Caste unless the claim is examined and with the recommendation of the Governor of the State, such caste is included in the list by an order made by President and after he has made an order by a Parliamentary enactment. In

including any caste in Presidential Order, the President is authorised to limit the notification to parts or groups within the caste depending on the educational and social backwardness.

21. In Bhaiyalal Vs. Harkishan Singh [AIR 1965 SC 1557] a constitution bench of the Supreme court held that the object of clause (1) of Article 341 is to avoid all disputes as to whether a caste is a scheduled Caste or not, for the purposes of the Constitution. The Scheduled Castes Order 1950 has been promulgated by the President under Article 341. In order to determine whether a particular caste is a Scheduled Caste within the meaning of Article 341, one has to look into the terms of the Order. Hon'ble P.B. Gajendra Gadkar, Chief Justice of India, speaking for the bench, held in paras 9 and 10 as follows:-

"9. Whilst we are referring to this aspect of the matter, we may point out that the Order has taken good care to specify different castes under the same heading where enquiry showed that the same caste bore different names, or it had sub- castes which were entitled to be treated as scheduled castes for the purposes of the Order. In the district of Datia, for instance, entry 3 refers to Chamar, Ahirwar, Chamar Mangan, Mochi or Raidas. Similarly, in respect of Maharashtra, Item 1, entries 3 and 4 refer to the same castes by different names which shows either that the said castes are known differently or consist of different sub- castes. Likewise, item 2, entry 4 in the said list refers to Chamar, Chamari, Mochi, Nona, Rohidas, Ramnami, Satnami, Surjyabanshi or Surjyaramnami. It is also remarkable that in Maharashtra in certain districts Chambhar and Dhor are included in the list separately. Therefore, we do not think that Mr. Chatterjee can seriously quarrel with the conclusion of the High Court that the appellant has not shown that he belongs to the Chamar caste which has been shown in the Order as a scheduled caste in respect of the Constituency in question.

10. Mr. Chattejee attempted to argue that it was not competent to the President to specify the lists of Scheduled Castes by reference to different districts or sub-areas of the States. His argument was that what the President can do under Art. 341(1) is to specify the castes, races or tribes or parts thereof, but that must be done in relation to the entire State or the Union territory, as the case may be. In other words, says Mr. Chatterjee, the President cannot divide the State into different districts or subareas and specify the castes, races or tribes for the purpose of Art. 341(1). In our opinion, there is no substance in this argument. The object of Art. 341(1) plainly is to provide additional protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer. It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe but parts of or groups within them should be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social

and education are backwardness of the race, caste or tribe justifies such specification. In fact, it is well-known that before a notification is issued under Art. 341(1), an elaborate enquiry is made and it is as a result of this enquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and that may justify the division of the State into convenient and suitable areas for the purpose of issuing the public notification in question. Therefore, Mr. Chatterjee is in error when he contends that the notification issued by the President by reference to the different areas is outside his authority under Art. 341 (1)."

22. In A. Chinnappa Vs. V. Venkatamuni [(1996) 3 SCC 585], it was held by the Supreme Court that once the Parliament by law includes in or excludes from any race, caste, tribe, parts of or groups within any caste, race or tribe, the President thereafter shall have no power to vary it by any subsequent notification. In Nityanand Sharma Vs. State of Bihar [1996 (3) SCC 585]; S. Swvigaradoss Vs. Zonal Manager [(1996) 3 SCC 100]; Prabhudev Mallkarjunaiah Vs. Ramchandra Veerappa [(1996) 4 SCC 431]; Pankaj Kumar Saha Vs. Sub-Divisional Officer, Islampur [(1996) 8 SCC 264]; Vinay Prakash Vs. State of Bihar [(1997) 3 SCC 406] and State of Maharashtra Vs. Milind (Supra), the Supreme Court held that the Court is also devoid of power to include in, or exclude, or substitute, or declare synonyms to be of a scheduled caste or scheduled tribe or parts thereof or group of such caste or tribe. The Courts have no power to go behind the order, or to hold any inquiry or to let in any evidence to determine whether or not any particular community falls within the Order or not. The States have no power to amend Presidential Orders. In Shree Surat Valsad Jilla K.M.G. Parishad Vs. Union of India [(2007) 5 SCC 360], the Supreme Court held that the list prepared by the President under Article 341 (1) forms one class of homogeneous group. Only one list is to be prepared by the President and, if any amendment thereto is to be made, the same is to be done by Parliament. Even the State does not have any legislative competence to alter the same.

23. It is not open to anybody to seek any modification of the Order by producing any evidence to show that though caste A is mentioned in the Order, caste B was also a part of Caste A, and as such was deemed to be a Scheduled Caste. In State of Maharashtra Vs. Milind (Supra), it was held that the Presidential Order made under Article 341 (1) can be amended only by the legislation by Parliament, and not even by subsequent notification by the President. Such amendment cannot be made by the court even indirectly.

24. The aforesaid discussion, clearly establishes that the sub castes of 'Shilpkar', as notified in Note 4 in Annexure-A to the Constitution (Scheduled Castes) Order 1950, was replaced by Scheduled Castes and Scheduled Tribes Orders (Amendment)

Act 1956, consequent upon States Reorganization Act 1956, thereafter by Scheduled Castes and thereafter by Scheduled Tribes Lists (Modification) Order 1956, and accordingly the list of Scheduled Castes circulated in Government Order dated 12.09.1950, and reproduced as Appendix-A to the Government Order dated 22.05.1957, is now no more in force. The petitioner cannot rely upon Note appended to Annexure-A to the Government Order dated 12.09.1950, to submit that 26 sub castes are included with the caste of 'Shilpkar', and can claim the benefit of Scheduled Case for any purpose including contesting in election, admission in educational institution, for appointment on any posts etc.

25. In view of the aforesaid discussions, we do not find any force in the argument of Sri Ravi Kant that 'Shilpkar' is a generic name of community, and that 26 sub castes, which are universally known as depressed class in the census report of 1931, are to be included in the caste of 'Shilpkar'. It is not open for the Court to take any evidentiary value on the report, and to hold that the 'Kasera' is a sub caste of 'Shilpkar', which was so notified for the State in the Presidential Order, or subsequently by a Parliamentary enactment, or by Scheduled Tribes Lists (Modification) Order 1956.

26. On the aforesaid findings, we decide the Question No.1 to the effect that 'Kasera' is not a sub caste of 'Shilpkar'. The persons belonging to 'Kasera' or any other sub caste, which were included in Note 4 of Appendix-A of Part-VIII of the list of the Constitution (Scheduled Castes) Order 1950 are not entitled to get certificates to belong to the Scheduled Caste.

27. So far as question No. 2 is concerned, in State Vs. Vijay Shankar and another (Supra) [Writ Petition No. 2080 of 2011 decided on 23.12.2011], a Division Bench of the Court sitting at Lucknow Bench held that no specific query was made from the Tehsildar, Mirzapur, who has issued the caste certificate, and that it was not mandatory to make an entry for issuing every certificate. The Tribunal has examined the National Citizen Register, wherein it was shown that opposite party's parents were categorized as 'Shilpkar', which admittedly belongs to scheduled caste; the Tribunal also observed that 'Kasera' is a sub caste of 'Shilpkar' as per Government Order dated 12.12.1950, and that Kasera being a sub caste of 'Shilpkar, comes under the category of scheduled caste.

28. We may observe here that the Collector, vide letter dated 14.12.2005, after making enquiries, informed that no certificate was issued during the year 1983-85 pertaining to the 'Kasera' caste being a scheduled caste. The scheduled caste certificate was issued to Vijay Shankar, to belong to the caste of 'Shilpkar' by the Tehsildar on 2.2.1987, whereas he was recorded as 'Kasera' in the school certificate. The Division Bench further observed that no specific query was made from the Tehsildar, Mirzapur, who has issued the said certificate to Sri Vijay Shankar. Since we have held after tracing the legislative background under Article 341 (1) and (2) of the Constitution of India that 'Kasera' is not a sub caste of Shilpkar, we need not go into the question nor any further discussion is required.

29. The observation of the Division Bench that it was not mandatory for the

Tehsildar to make an entry for issuing every certificate is not borne out from the procedure prescribed for issuing such certificate. Sri Ramesh Upadhyay submits that there was no need to issue any specific Government Order, providing that record should be kept for issuing certificate inasmuch as "System of Record, Files and Registers Relating to Correspondence" in the U.P. Revenue Manual provides for maintenance of records for every document issued by Revenue Officer in the State of U.P. As the Tehsildar has been authorised to issue caste certificate, he is required to maintain the records of every file in accordance with Rules 54 to 59 of Chapter III of U.P. Revenue Manual. All enquiries with regard to issuance of caste certificate can be made from the records maintained by the concerned Tehsildar. He further submits that the Government is now trying to simplify the procedure of issuing caste certificate, income certificate and residence certificate through e-legalix system from the Common Service Centre (Jan Sevak Kendra). The applicants under the Government Order dated 27.11.2010, are to be provided a prescribed format at the Common Service Centre. The Centre operator will fill up the details in the e-form. A print out of entries made in the e-form will be given to the applicant, on which the applicant may sign which will be scanned and a print out of the same with unique number will be given to him as acknowledgement receipt. The Tehsildar will examine the e-form, and will make necessary enquiries through concerned Lekhpal and Revenue Inspector with regard to his/her caste, by making physical inspection of which reports will be prepared and sent to the Tehsildar within one week. After the Tehsildar is satisfied with the enquiry, with regard to caste of the person, the authorized representative or CCS will issue the caste certificate to the concerned person. It can also be examined at any time from the data stored in the computer. Sri Upadhyay submits that now a fair, transparent and simplified procedure has been evolved, which will not cast any doubt, and will be open to any enquiry in future for its verification.

30. On the aforesaid discussion, we also answer the question No.2 in negative, and hold that the judgment dated 23.12.2011, rendered by the Lucknow Bench of the Court in State of Vs. Vijay Shankar and another - Writ Petition (Service Bench) No. 2080 of 2011, is not correct in law.

31. In view of the aforesaid findings and answers given to the questions referred to us, we do not propose to send the matter back to the Division Bench, as we do not find that any relief can be granted to the petitioner for issuing caste certificate to his son, to belong to Scheduled Caste on the basis of judgment in State of U.P. Vs. Vijay Shankar and another (Supra).

32. The writ petition stands dismissed with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 42101 of 2011 alongwith 30278 of 2004

Dileep Kumar Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhoopendra Nath Singh

Counsel for the Respondents:
S.S.C., Sri Ajay Singh, Sri K.C. Sinha
Sri Rakesh Sinha.

Persons with Disabilities(Equal opportunity protection of Right of full participation)-Act 1995-Section-47(1) and (2)-Boarding out from service-in garb of notification-providing exemption from applicability-held-illegal- denial of rights-not only unjust and unfair but graver problems to society-notification is to be read in lights of statutory provisions of Section 47(1) and (2) of Act-consequential direction given.

Held: Para-33
In view of the aforesaid, we held that the boarding out of the petitioner under the order impugned with invalidation pension cannot be sustained, it is therefore quashed. The respondent establishment is directed to treat the petitioner in the service and to adjust him against any suitable post or against a supernumerary post, until a suitable post is available or till he attains the age of superannuation, whichever is earlier.

Case Law discussed:
2004(6) SCC Page 4; AIR 2010 (SC) Page 1253; 2008(1) SC Page 75; AIR (SC) 1975 page 1758; 2004(6) SCC page 708; 2013 (6) ADJ page 276; 2010(8) ADJ page 280; 2011(1) UPLBEC page 774.

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

1. Heard learned counsel for the parties.

2. Petitioner Sri Dilleep Kumar Singh was employed as Assistant Commandant in Central Reserve Police Force. The petitioner sustained injuries in his spinal cord and major fracture in both foot due to fall from roof top of Quarter Guarding during checking night guard.

3. He has been confined to wheelchair for last several years. Under an interim order passed in the connected Writ Petition No. 30278 of 2004 filed against the proposal to board out from service, he was allowed to serve upto 24.05.2011, i.e, when the interim order was vacated permitting the respondent Central Reserve Police Force to take appropriate final decision in the matter. The Deputy Inspector General of Police (Personnel) by an order in the name of President of India has taken a decision qua the petitioner with reference to the Notification dated 10.9.2002 issued under Section 33/47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the 'Act-1995') to board out the petitioner on invalidation pension.

4. This order of Deputy Inspector General of Police (Personnel) is under challenged in the connected second writ petition No. 42011 of 2011.

5. The short controversy involved in the petitions is confined to the interpretation of the Proviso to Section 47 of the Act, 1995 and the scope of Notification dated 10.9.2002.

6. We may record that the injury had been suffered by the petitioner rendering him invalid on 11.10.2001. On the relevant date no Notification under Section 33/47 had been issued qua Central Reserve Police Force. However, the invalidation medical certificate was issued in favour of the petitioner only on 13.09.2002 The petitioner had suffered 100% disability. On the date the invalidation certificate was issued the Notification dated 10.9.2002 under Section 33/47 had seen light of the day.

7. For the controversy involved it would be appropriate to refer to Section

33 as well as Section 47 of the Act, 1995 which read as follows :

"**33. Reservation of posts.**- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

"47. Non- discrimination in Government employment. (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall he denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may he specified in such notification, exempt any establishment from the provisions of this section."

8. The Apex Court in the case of Union of India Versus Devendra Kumar Pant & Others, reported in AIR 2010(SC) page 1253 para 14 has explained, that Section 33 of Act 1995 deals with reservation of posts for persons with disability. Sections 32 and 33 of Act, 1995 therefore apply to pre- employment situation, that is where persons with disability are yet to secure employment. While Section 47 applies to an employee who is already in employment and who acquires a disability during his service. Sub-section (1) of Section 47 provides for protection to the employees in government service who acquire a disability during service in following manner (a) their service shall not be dispensed with nor he shall be reduced in rank on the ground that he acquired a disability during service; and (b) if an employee who acquires a disability during service is not suitable for the post he was holding, he has to be shifted to some other post with same pay scale and service benefits, and (c) if it is not possible to adjust the employee against any such post, the employee has to be kept on a

supernumerary post until a suitable post is available or until he attains the age of superannuation whichever is earlier.

9. Section 47(2) of Act, 1995 take care of promotion of such invalidated employee and provides that he shall not be denied promotion merely on the ground that he suffers from the disability. Proviso to Section 47(2) of the Act, 1995 confers a power upon the Central Government having regard to the type of work carried to exempt an establishment from the applicability of the said Section. With reference to this Proviso to Section 47(2) of the Act, 1995 that the Central Govt. vide Notification dated 10.9.2002 excepted all categories of posts of "combatant personnel" only, of the Central Para Military Forces (CPMFs), namely, Central Reserve Police Force (CRPF), Border Security Force (BSF). Into Tibetan Border Police (ITBP) Central Industrial Security Force (CISF) and Assam Rifles from the provisions of the said section.

10. The Apex Court in the case of Union Of India vs Sanjay Kumar Jain , 2004 (6) SCC Page 4 has held that the power under Proviso to sub-section 2 of Section 47 of the Act, 1995 does not give unbriddled power to exclude any establishment from the purview of Section 47 of the Act, 1995, the exclusion can be only done under certain specified circumstances. A Notification can be issued only when the appropriate Government, having regard to the type of work carried on in any establishment thinks it appropriate to exempt such establishment from the provisions of section 47 of Act, 1995

11. It is with reference to this Notification dated 10.9.2002 that the order impugned has been issued boarding out the petitioner on invalidation pension.

12. Sri B.N. Singh, counsel for the petitioners submitted before us that the Proviso to Sub-clause 2 Section 47 authorize the Central government to exclude a particular establishment only in the matter of promotion because of the invalidation, the scope of this proviso cannot be extended so as to suggest that the establishment stands excluded from the applicability of entire Section 47 including the restriction which is provided for under Section 47(1) in the matter of disengagement of an employee who surfers disability during employment.

13. In support of his submission Sri B.N. Singh has drawn the attention of the Court to Section 73 (3) and 73(4) of the Act, 1995. He submits that Act 1995 is a social beneficial enactment dealing with disabled persons and intended to give them equal opportunities, protection of rights and full participation. The view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act.

14. Sri B.N. Singh relies upon the judgment of the Supreme Court in the case of Union of India Vs. Devendra Kumar Pant & Others reported in AIR 2010 (SC) Page 1253, Kunal Singh Vs. Union of India & another, Bhagwan Dass & Another Vs. Punjab State Electricity Board, reported in 2008(1)SC page 75.

15. Sri Ashok Singh, counsel for the respondents in reply submits that on simple reading of the Proviso to Section 47 Act 1995 makes it clear that the Central Government has been granted a power to exclude an establish from the scope of Section 47 of Act 1995 as a whole. The word "from the provisions of

this Section of the proviso on simple reading would mean from the provisions of entire Section 47 which would include sub-section (1) as well as sub-Section (2) of Section 47".

16. He explains that the Central Government having regard to the nature of work claimed on by Central Reserve Police Force in exercise of powers under Section 47, Proviso has decided to exclude the establishment from the provision of Section 47 in its entirety. Therefore, the order of the competent authority boarding out the petitioner on invalidation pension does not violate any of the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

17. Sri Ashok Singh, advocate has placed reliance upon the judgments reported in AIR (SC) 1975 page 1758 (Dwarka Prasad Vs. Dwarka Das Saraf), 2004(6) SCC page 708 (Union of India Vs. Sanjay Kumar Jain), 2013 (6) ADJ page 276 (Union of India and others Vs. Mohd. Yasin Ansari), 2010 (8) ADJ page 280 (Union of India and others Vs. State of U.P. & another), 2011(1) UPLBEC page 774 (Dhruv Singh Yadav Vs. Director General Central Industrial Secruity Force and others) and Sandeep Singh Vs. Union of India decided on 22.2.2011.

18. We have heard learned counsel for the parties and have examined the records of the present writ petitions.

19. Sub-Section (1) of Section 47 in clear terms provides that there cannot be any discrimination in government employments qua persons who suffer disability denying service. It mandates that no establishment shall dispense with or reduce in rank an employee because of the disability suffered by him during service. To the said sub-section (1) there are two Proviso added, the Ist Proviso provides that, if an employee, after acquiring disability is not suitable for the post he was holding he could be shifted to some other post with the same pay scale and service benefits. While IInd Proviso to the same sub-section (1) provides that if it is not possible to adjust the employee against any suitable post, he may be kept on a supernumerary post until a suitable post is available or till he attains the age of superannuation, whichever is earlier.

20. Sub-section (2) to Section 47 prohibits denial of promotion only because of disability suffered by an employee during service. The issue up for consideration is as to whether the proviso added after sub-section(2) of Section 47 is in the nature of exception from the sub-section (2) only or it is in the nature of an exception to the Section 47 itself.

21. In a meeting of launch of the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region held at Beijing on 1st to 5th December, 1992, a proclamation was adopted on the full participation and equality of people with disabilities in the Asia and the Pacific region. Our country is a signatory to the said proclamation. To give full effect to the proclamation it was felt necessary to enact a legislation Act, 1995 is the manifestation of the said proclamation. The Act 1995 has to be read in that background.

22. The disabled too are equal citizens of the country and have as much

share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country.

23. We are of the opinion that if the purpose of the Act 1995 is to be given effect to in the widest possible amplitude being a social beneficial legislation then every attempt must be made to read its provision in a manner which may protect the employment of the disabled. Effort has to be made to see that an employee who suffers disability during employment is not denied his his bread and butter. Not only the employee so disabled would suffer by his disengagement his entire family which is dependent upon him would have to bear the brunt.

24. The proviso after Section 47(2) if read as an exception to Section 47(2) only and not as an exception to Section 47 as a whole would definitely be in tune with fundamental purpose for which the Act 1995 has been enacted.

25. The purpose of placing the proviso after Section 47(2) by the legislature when ascertained with reference to proclamation of full participation and quality of people with disability wold be more than obvious to exclude the rights of consideration for promotion of a disabled employee qua certain establishments rather than out boarding the employee from the employment itself.

26. It may be noticed that under Section 47(1) of Act, 1995 even where a disabled employee cannot be adjusted against any post in the establishment because of disability, a supernumerary post is required to be created for the period till he can be adjusted or he attains the age of superannuation which ever is earlier.

27. The judgments relied upon by the counsel for the employees deal with applicability of proviso added after Section 47(2) in the matter of promotion of a disabled employee and are therefore distinguishable.

28. We are supported in our reasoning by the language of Section 73 sub-clause (3) and sub-clause (4) which read as follows : -

" *(3) Every notification made by the Central Government under the proviso to section 33, proviso to sub-section (2) of section 47, every scheme framed by it under section 27, section 30, sub-section (1) of section 38, section 42, section 43, section 67, section 68 and every rule made by it under sub-section (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, notification or scheme, both Houses agree that the rule, notification or scheme should not be made, the rule, notification or scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to*

the validity of anything previously done under that rule, notification or scheme, as the case may be.

4. Every notification made by the State Government under the proviso to section 33, proviso to sub-section (2) of section 47, every scheme made by it under section 27, section 30, sub-section (1) of section 38, section 42, section 43, section 67, section 68 and every rule made by it under sub-section (1), shall be laid, as soon as may be after it is made, before each House of State Legislature, where it consists of two Houses or where such legislature consists of one House before that House."

29. From the simple reading of the aforesaid, it is clear that legislature itself has contemplated that Notification of excaption has to be issued with reference to the Proviso to sub-section(2) of Section 47 only. Therefore Notification for excaption of the establishment has to be with regard to what is covered by sub-section (2) of Section 47 and not the entire Section 47.

30. It may also be seen that while Section 73(3) and Section 73(4) of the Act, 1995 talk of Notification to be issued under Proviso to Section 33 they refers to a Notification to be issued under Proviso to sub-section (2) of Section 47 only.

31. For the reasons recorded by us herein above, we record that the Notification dated 10.9.2002 issued under Section 73(2) by the Central Government is necessarily to be read with reference to the field occupied by sub-section(2) of Section 47 only. Therefore the Notification dated 10.9.2002 as exempts the CRPF from the restriction imposed in the matter of denial of promotion to disabled employees only.

32. With the help of such Notification the respondent establishment could not have boarded out the petitioner with disability pension.

33. In view of the aforesaid, we held that the boarding out of the petitioner under the order impugned with invalidation pension cannot be sustained, it is therefore quashed. The respondent establishment is directed to treat the petitioner in the service and to adjust him against any suitable post or against a supernumerary post, until a suitable post is available or till he attains the age of superannuation, whichever is earlier.

34. It is needless to the record that the petitioner shall be entitled for full salary and consequential benefit of service.

35. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 43886 of 2004

Udai Pratap Singh @ Sukhdeo Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri N.K. Saxena, Sri Deepak Saxena
Sri Ram Kishor Gupta

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-311(2)- Dismissal from Service-on ground of

conviction of life imprisonment-without holding disciplinary proceeding-without considering the conduct lead to conviction-after fair acquittal in criminal appeal-filed departmental appeal also dismissed-held-dismissal as well as order by Appellate authority not sustainable quashed-in view of 'No work no pay'-not entitled for back wages-but entitled for post retiral benefits with continuity of service.

Held: Para-15 & 16

15. The impugned order is also not sustainable as it has been passed in violation of principle of natural justice without giving any opportunity to the petitioner. The petitioner has now been retired. He can only be reinstated notionally and entitled for other post retiral benefits.

16. On the facts and circumstances, I am of the view that on the principle of "No work no pay", the petitioner is not entitled for the salary for the period during which he has not worked. However, the period of termination be treated as the period of service and the petitioner would be entitled for other post retiral benefits from the date when he attained the age of superannuation.

Case Law discussed:

2013 (11) ADJ 352; 2013(3) LBESR 438; AWC-2007-7-7002; 2010 SCC (15) 305; AIR 1985 (SC) 1416; (1988) 6 LCD 530; 1993 LCD 70; 2006 SCC (L&S) 35.

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

1. Heard Sri Ram Kishor Gupta, learned counsel for the petitioner and Sri Raj Kumar Pandey, learned Standing Counsel.

2. By means of the present writ petition, the petitioner is seeking the following relief:

"5. Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to pay pensionary benefit to the petitioner from the date of his superannuation from service;

VI. Issue a writ order or direction in the nature of certiorari quashing the order dated 02.09.2013 passed by respondent no.3 rejecting the representation dated 26.04.2004 submitted by the petitioner."

3. The petitioner was a regular employee with the respondent no.3 and was working on the post of Ward Boy at Rajkiya Ayurvedic & Unani Chikitsalya, Dhagwa, district Hamirpur. In the year 1978 a first information report was lodged against the petitioner and the petitioner has been sent to jail. The petitioner has been suspended vide order dated 08.09.1978. The petitioner has been sentenced to life imprisonment vide judgment and order dated 05.05.1981 passed by IIIrd Additional Sessions Judge, Hamirpur in Session Trial No.257/78, under sections 302, 34 I.P.C. In pursuance thereof, the services of the petitioner has been terminated vide order dated 19.10.1981, w.e.f. 05.05.1981, the date on which the petitioner has been convicted by the Sessions Court. Against the conviction order, the petitioner filed Criminal Appeal No.1017 of 1981, which has been allowed by this Court vide order dated 05.03.2004 and the petitioner has been acquitted. After the acquittal, the petitioner filed the present writ petition challenging the termination order dated 19.10.1981. The petitioner filed amendment application claiming post retiral benefits from the date of his superannuation and further prayed for quashing of the order dated 02.09.2013 rejecting the representation of the petitioner dated 25.06.2004.

4. Learned counsel for the petitioner submitted that the services of the petitioner appears to have been terminated under the Proviso of Article 311 (2) of the Constitution of India after the petitioner being convicted by the Sessions Court vide order dated 05.05.1981 without making any enquiry. No departmental enquiry proceeded and has not been culminated into any punishment. The termination of the petitioner is mechanical without application of mind. Now the petitioner has been acquitted on merit by this Court honourably, therefore, the petitioner is entitled to be reinstated with all benefits. However, since the petitioner has attained the age of superannuation, the petitioner's service can only be notionally reinstated and the petitioner may be allowed to be reinstated with full salary and further the pensionary benefits from the date of superannuation.

5. In support of the contention, reliance is placed on the decision of learned Single Judge in the case of Ratan Singh Vs. State of U.P. and others, reported in 2013 (11) ADJ, 352, in the case of Constable 491, Civil Police, Gabbar Singh Vs. State of U.P. & Ors., reported in 2013 (3) LBESR, 438 (All), in the case of Prem Pal Singh Vs. State of U.P., reported in AWC-2007-7-7002 and the decision of the Apex Court in the case of State of Uttar Pradesh Vs. Ram Vinai Sinha, reported in 2010 SCC (15), 305.

6. Learned Standing Counsel submitted that it was open to the petitioner to challenge the termination order in the year 1981. He further submitted that the petitioner has been given benefit of doubt by this Court while acquitting from the criminal charges. He submitted that the petitioner has not made any pleading that he was unemployed during the period of termination and, therefore, in any view of the matter, he is not entitled for any salary for the period after termination.

7. I have considered the rival submissions and perused the record.

8. Present writ petition has been filed in the year 2004 challenging the termination order dated 19.10.1981 when the petitioner was acquitted in Criminal Appeal No.1017 of 1981 in respect of the criminal charges. The writ petition was entertained without raising any objection in respect of the laches. In the facts and circumstances, the laches have also been explained. Therefore, the objection of learned Standing Counsel that the petitioner should have challenged the termination order in the year 1981 and since, it has been challenged in the year 2004, the petitioner is not entitled for any relief, can not be accepted.

9. Now coming to the merit of the case. The perusal of the termination order reveals that the services of the petitioner have been terminated merely because the petitioner has been acquitted by the Sessions Court. mechanically without application of mind whether the conduct of the petitioner was such that he was liable to be terminated.

10. In the case of Union of India Vs. Tulsi Ram Patel, reported in AIR 1985 (SC), 1416, the Apex Court while considering the pare materia provision under Article 311 of the Constitution of India, held as under :

"The second proviso will apply only where the conduct of a Government

servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all because Article 311 (2) is itself confined only to these three penalties. Therefore, before denying a Government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned, Government servant is such as justified the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the Government servant is not entitled to an enquiry." (Emphasis added).

11. A similar question came up for consideration before a Division Bench of this Court in the case of Shyam Narain shukla Vs. State of U.P., reported in (1988) 6 LCD, 530 and this Court held as under:

"In view of the above decision of the Supreme Court, it has to be held that whenever a Government servant is convicted of an offence, he cannot be dismissed from service merely on the ground of conviction but the appropriate authority has to consider the conduct of such employee leading to his conviction and then to decide what punishment is to be inflicted upon him. In the matter of consideration of conduct as also the quantum of punishment the employee has not to be taken by the appropriate authority independently of the employee who, as laid down by the Supreme Court, is not to be given an opportunity of hearing at that stage. "

12. Similarly another Division Bench of this Court in the case of Sadanand Mishra Vs. State of U.P., reported in 1993 LCD, 70, held that on the conviction of an employee of a criminal charge, the order of punishment cannot be passed unless the conduct which has led to his conviction is also considered. Further, it is held that the scrutiny of conduct of an employee leading to his conviction is to be done ex parte and an opportunity of hearing is not to be provided for this purpose to the employee concerned.

13. In view of the above law laid down by the Apex Court and by this Court before passing the dismissal order the competent authority ought to have considered "Conduct led to conviction" and should not pass the order mechanically on the basis of mere conviction.

14. In the present case, no such exercise has been done. The conduct of the petitioner, which led to conviction has not been examined and the petitioner has been dismissed mechanically only on the ground that he has been convicted by the criminal court. Perusal of the order of this Court passed in Criminal Appeal No.1017 of 1981, by which the petitioner has been acquitted reveals that the petitioner has been acquitted on merit on consideration of the evidences on record. Admittedly, no departmental enquiry has been made and no reason has been given for not conducting the disciplinary proceeding. In this view of the matter, the termination order is not sustainable.

15. The impugned order is also not sustainable as it has been passed in violation of principle of natural justice without giving any opportunity to the petitioner. The

petitioner has now been retired. He can only be reinstated notionally and entitled for other post retiral benefits.

16. On the facts and circumstances, I am of the view that on the principle of "No work no pay", the petitioner is not entitled for the salary for the period during which he has not worked. However, the period of termination be treated as the period of service and the petitioner would be entitled for other post retiral benefits from the date when he attained the age of superannuation.

17. In the case of Baldev Singh Vs. Union of India and others, reported in 2006 SCC (L&S), 35, Apex Court held that where the service of the employee is terminated on the ground that he was convicted in criminal case and on his acquittal his service is reinstated, the employee is not entitled for salary for the period during which he has worked on the principle of "no work no pay".

18. In the result, the writ petition is allowed in part. The impugned termination order dated 19.10.1981 as well as order dated 02.09.2013 passed by the respondent no.3, Regional Ayurvedic/Unani Chikitsadhikari are set aside. However, the petitioner is not entitled for back salary for the period when he has not worked on the principle of "no work no pay" and would entitled for the post retiral benefits, namely, pension etc. from the date when he attained the age of superannuation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 46172 of 2003

Subas Yadav ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.C. Singh, Sri A.K. Mishra, Sri Ashwani Kr. Misra, Sri Sunil Kumar Singh, Sri Rajes Kumar Singh

Counsel for the Respondents:
C.S.C., Sri A.K. Tripathi

U.P. Intermediate Education Act 1921-Chapter III Regulation 101-Appointment of Asst. clerk-without prior approval-ab intio illegal-after appointment-no requirement of approval-DIOS rightly refused to approve.

Held: Para-9
I do not find any error in the impugned order passed by District Inspector of Schools, Deoria. The appointment has been made by the Principal of the college, appointing the petitioner without prior approval, therefore the appointment was ex-facie illegal being contrary to Regulation 101 and, therefore, the District Inspector of Schools, Deoria has rightly refused to grant the approval. The decision of the Division Bench of this Court in the case of Jagdish Singh, etc. Vs. State of U.P. and others (Supra) is of no help to the petitioner.

Case Law discussed:
2006(4) ADJ 162.

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

1. Heard Sri Rajesh Kumar Singh, Advocate, holding brief of Sri Sunil Kumar Singh, learned counsel appearing on behalf of the petitioner and Ms. Suman Sirohi, learned Standing Counsel.

2. By means of the present writ petition, the petitioner is challenging the order dated 02.09.2003 passed by District

Inspector of Schools, Deoria, by which the approval of the appointment of the petitioner on the post of Assistant Clerk made by the Principal of the college in pursuance of the selection made by the selection committee and appointed by the Committee of Management, has been declined.

3. Brief facts of the case are that it appears that the petitioner has applied for the post of Assistant Clerk in Sarojani Kanya Uchhatar Madhyamik Vidyalay, Barhaj, Deoria in pursuance of the advertisement. It appears that the petitioner has been selected by the selection committee, constituted by the committee of management vide resolution dated 02.09.2001 and has been appointed on the same day by the committee of management and in pursuance thereof, Principal of the college issued appointment letter to the petitioner for the post of Assistant Clerk. Subsequently, on 06.01.2001, the papers have been sent to District Inspector of Schools, Deoria for approval of the appointment of the petitioner, which has been declined by the impugned order on the ground that prior approval as contemplated under Regulation 101 of Chapter III of U.P. Intermediate Education Act, 1921 has not been taken.

4. Learned counsel for the petitioner submitted that no prior approval is required before the selection under Regulation 101 as held by the Division Bench of this Court in the case of Jagdish Singh, etc. Vs. State of U.P. and others, reported in 2006 (4) ADJ, 162 (All)(DB). He further submitted that prior approval is only required before the appointment, therefore, the selection of the petitioner can not be held illegal. While considering the approval of the appointment of the petitioner, the District Inspector of Schools, Deoria should not have disputed the selection of the petitioner.

5. Ms. Suman Sirohi, learned Standing Counsel submitted that the District Inspector of Schools, Deoria has only disapproved the appointment of the petitioner, inasmuch as the appointment has admittedly been made on 02.01.2001 and the relevant papers have been sent to District Inspector of Schools, Deoria on 06.01.2001 after the appointment and, therefore, the District Inspector of Schools, Deoria has rightly refused to grant the approval as it was contrary to the Regulation 101. She further submitted that the question for consideration before the District Inspector of Schools, Deoria was approval of the appointment. There was no question before the District Inspector of Schools, Deoria whether the selection was valid or not and, therefore, there was no occasion to make any comment in respect of the selection of the petitioner. The impugned order is wholly justified.

6. I have considered the rival submissions and perused the record.

7. Regulation 101 reads as follows:

"Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution:

Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector. "

8. Division Bench of this Court in the case of Jagdish Singh, etc. Vs. State of

U.P. and others (Supra) has held that approval by the District Inspector of Schools is not required before the selection and it is only required before making the appointment. In the present case, the appointment of the petitioner has been made on 02.01.2001 by the Principal of the college after the resolution of the committee of management dated 02.01.2001, without taking prior approval from the District Inspector of Schools, Deoria contrary to the procedure provided under Regulation 101. After making the appointment on 02.01.2001 the necessary papers have been sent on 06.01.2001 to the District Inspector of Schools, Deoria for approval of the appointment of the petitioner. The District Inspector of Schools, Deoria was only concerned with the appointment made on 02.01.2001. Since the approval has been sought after making the appointment, the District Inspector of Schools, Deoria has declined to grant the approval as the appointment was contrary to the procedure provided under Regulation 101.

9. I do not find any error in the impugned order passed by District Inspector of Schools, Deoria. The appointment has been made by the Principal of the college, appointing the petitioner without prior approval, therefore the appointment was ex-facie illegal being contrary to Regulation 101 and, therefore, the District Inspector of Schools, Deoria has rightly refused to grant the approval. The decision of the Division Bench of this Court in the case of Jagdish Singh, etc. Vs. State of U.P. and others (Supra) is of no help to the petitioner.

10. In view of the above, the writ petition fails and, is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 49764 of 2013

Dr. Fazal Ur.-Rehman ...Petitioner
Versus
Vice Chancellor, A.M.U., Aligarh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohd Saeed Siddiqui, Sri Irshad Ali

Counsel for the Respondents:
Sri Shashank Shekhar Singh, Sri M.F. Ansari

Constitution of India, Art.-14, 16-Reduction of minimum eligibility qualification-vacancy of Associate Professor advertised on 06.02.2013-with requirement of 5 year teaching experience after last date of submission of application-on shortlisting-petitioner not called for interview-on 25.03.2012 the V.C. Exercising emergency power u/s 19(3) of A.M.U. Act reduced teaching experience with 4 years-which resulted selected of Respondent 6 and other desiring candidate-held-such action violate of Art. 14 and 16 of the constitution-depriving other similarly situated candidate to participate in selection-entire selection proceeding quashed.

Held: Para-12
We further find that if a candidate like respondent no.6, who had less then five years teaching experience and did not satisfy the requirements mentioned in the advertisement had to consider than last expected from Aligarh Muslim University to have published a corrigendum or a fresh advertisement so that all other candidates with four years teaching experience like respondent no.6

may submit their application. It is not open to the Aligarh Muslim University to have reduce the requirements of five years teaching experience contrary to the terms of the advertisement only in respect of respondent no.6 and Tanvir Ahmad.

Case Law discussed:
(1994) 2 SCC 723

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

1. We have heard Sri Irshad Ali, learned counsel for the petitioner, Sri Shashank Shekhar Singh, learned counsel on behalf of respondent Nos.1 to 5 and Sri M.F. Ansari, learned counsel on behalf of respondent No. 6.

2. Aligarh Muslim University published advertisement No.1 of 2013, dated 6.2.3013 for the post of Associate Professor in subject of Anatomy. The petitioner as well as the respondent no.6 applied in pursuance to the advertisement. It was specifically mentioned in the advertisement that Assistant Professor/Lecturer having teaching experience of five years, would be eligible to apply. The last date for the submission of the application was 5.3.2013. The cut off date for determination of the eligibility condition was provided as the last date of submission of the application form. The applications received were scrutinized and only three candidates namely, the petitioner, Dr. Farhan Kirmani and Dr. Nema Usman were found eligible for being called for interview and they alone fulfilled the minimum teaching experience of five years in terms of the advertisement.

3. From the record it appears that the respondent no.6, who was not short listed for want of requisite five years teaching experience submitted an application before the Vice Chancellor. In the application it was stated that the petitioner may be provided relaxation from five years teaching experience. He also filed another application wherein it was stated that under the amended M.C.I. guidelines only four years teaching experience is required. The Vice Chancellor asked for the legal opinion and is exercising the emergency powers under Section 19 (3) of Aligarh Muslim University Act, 1920 vide order dated 25.3.2012 adapted the amendment notification issued by Medical Council of India, whereby the minimum teaching experience for the post of Associate Professor stood reduced from five years to four years.

4. With the adaptation of the amendment in the teaching experience the selection committee proceeded to include the name of respondent no.6 and one Tanvir Ahmad for the purposes of interview. After interview the respondent no.6 along with Tanvir Ahmad, who was also had teaching experience of four years has been selected for appointment on the post of Assistant Professor. The selection has been notified on 27.6. 2013 (Annexure-11 to the writ petition). It is against this selection that the present writ petition has been filed.

5. On behalf of the petitioner it is contended that from the records it is admitted that on the date of advertisement published i.e., 6.2.2013 as well as on the last date of the submission of the application i.e., 5.3.2013, admittedly, the relevant Ordinances of the Aligarh Muslim University provided that the minimum teaching experience required for the post of Associate Professor, would

five years as Lecturer/Associate Professor. It is with reference to these statutory provision that on the selection for the said post had to be completed. Even if the Vice Chancellor exercised his emergency power under section 19(3) of the Aligarh Muslim University Act, 1920 for the purposes of adapting the amended notification of Medical Council of India to be precise on 25.2.2013 the same would be perspective in nature and shall not effect the proceedings of selection under the advertisement in question. It is further stated that if by adaptaion of the amended provisions of the Medical Council of India the requirement of teaching experience stood reduced to 4 years and the University decided to consider the candidates with four years teaching experience as qualified for the post of Lecturer/Associate Professor than the minimum required was to publish a corrigendum disclosing the minimum teaching experience as four years, so that inasmuch as all such candidates, who could apply may have an opportunity to participate in the selection from Back door of respondent no.6 and Tanvir Ahmad by adaptation of the amended Medical Science of India Regulation under notification dated 25.3.2013.

6. Learned counsel for the University could not refer to any statutory provisions contrary to the minimum experience, which was notified in the advertisement applicable on the relevant date. He could not dispute the fact that if persons with four years teaching experience were to be treated as eligible then besides respondent no.6 and Tanvir Ahmad, there may be other similarly situate persons duly qualified for being considered for the post of Associate Professor who did not apply because of minimum five years teaching experience being required as essential conditions in the advertisement.

7. So far as Dr. Farha Ghaus, respondent no.6 is concerned, she submits that once the petitioner has been considered in the process of selection and has not been selected in preference to the respondent no.6, his writ petition may not be entertained.

8. We have heard the learned counsel for the parites and examined the records.

9. It is not in dispute that in the advertisement for the post of Associate Professor, the Aligarh Muslim University has specifically provided that the candidate must have five years teaching experience as a Lecturer/Associate Professor. It is also not in dispute that the petitioner satisfies the said requirement. It is also not in dispute that the petitioner was sort listed for interview being possessed the prescribed qualifications as per advertisement along with two others, while the respondent no.6 was not sort listed as he was not possessed of the prescribed minimum qualification.

10. It is only after the Vice Chancellor of the Aligarh Muslim University decided to exercise with emergency process under section 19(3) of the Aligarh Muslim University Act, 1920 for adapting the amended notification of the Medical Council of India on 25.3.2013 for the essential teaching experience required for the post of Associate Professor, being reduced from five to four years that respondent no.6 has been short listed. Such emergency power by the Vice Chancellor and adaptation of

the amended notification by the Aligarh Muslim University for the purposes of reducing the teaching experience from five years to four years would be perspective in nature and will not adversely affect the selection proceedings which had been initiated under advertisement No.1 of 2013.

11. The last date for making of the application was 5.3.2013. The eligibility of the candidates has to be seen with reference to the provisions as applicable and with reference to the condition mentioned in the advertisement, on the last date of making of the application as has been laid down by the Apex Court in the case of U.P. Public Service Commission,U.P., Allahabad and another Vs. Alpana (1994) 2 SCC-723.

12. We further find that if a candidate like respondent no.6, who had less then five years teaching experience and did not satisfy the requirements mentioned in the advertisement had to consider than last expected from Aligarh Muslim University to have published a corrigendum or a fresh advertisement so that all other candidates with four years teaching experience like respondent no.6 may submit their application. It is not open to the Aligarh Muslim University to have reduce the requirements of five years teaching experience contrary to the terms of the advertisement only in respect of respondent no.6 and Tanvir Ahmad.

13. Such experience undertaken by the Aligarh Muslim University runs contrary to Article 14 and 16 of the Constitution of India, inasmuch as similarly situate persons like respondent no.6 have been denied the opportunity to participate in the process of selection because of the condition mentioned in the advertisement published qua five years teaching experience as Lecturer/Associate Professor being mandatory for making of the application for the post of Associate Professor.

14. We may clarify that the qualifications provided under the guidelines of the Medical Council of India only lay down minimum standards for the post of Lecturer/Associate Professor and it is always open to a University to prescribe higher qualification and if any advertisement in this regard is published, it cannot be said to be in violation of the guidelines of the Medical Council of India.

15. So far as the objection raised on behalf of the respondent no.6 qua petitioner being not entitled to challenge the selection process having participated in the same does not appeal to us in the facts of this case. The consideration of the case of respondent no.6 after reduction of the required experience is found to be in violation of Article 14 and 16 of the Constitution.

16. We quash the selection proceedings including the select panel dated 27.6.2013. The Aligarh Muslim University may proceed with selections in accordance with law. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2014

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

Civil Misc. Writ Petition No. 50601 of 2007

M/S Deepak Kumar Agarwal ...Petitioner
Versus
Nagar Palika Parishad & Anr. Respondents

Counsel for the Petitioner:
Sri Ravi Agarwal

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

Constitution of India, Art.-226- Black listing-petitioner are register government contractor-who completed the work within prescribed period payment also made-after some time by notice required to submit explanation-thereafter by impugned order black listed-upon direction of court representation required to be decided by passing speaking order-in para 9 of representation petitioner mentioned relevant facts-totally untouched by the authority-held-rejection order wholly unjustified and arbitrary impugned black listing order quashed.

Held: Para-10
In the instant case, the Court finds gross violation of the principles of natural justice and non-consideration of the relevant aspects of the matter before blacklisting the petitioner, therefore, the impugned orders are wholly unjustified and arbitrary.

Case Law discussed:
[(1975) 1 SCC 70]; [(1977) 3 SCC 457]; [(1978) 1 SCC 248]; [(1981) 1 SCC 722]; [(1979) 3 SCC 489]; [(1989) 3 SCC 751]; [(1990) 3 SCC 752]; [(1977) 3 SCR 249].

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

1. List has been revised. No one appears to oppose this petition.

2. Heard learned counsel for the petitioner and perused the record.

3. By means of this writ petition, the petitioner has challenged the orders dated 9th January, 2006 and 3rd July, 2006, whereby he has been blacklisted, his security forfeited and the remaining dues declined.

4. According to the petitioner, he is a registered contractor and had submitted a tender for construction/painting of a road, namely 'Majnuwala Road' from G.T.road to Raillway Crossing, on 1st July, 2003, which was accepted and an agreement was entered into between the parties on 29.07.2003.

5. Assertion of the petitioner is that he completed the work by 31.03.2004, where after the due payment was also made. Thereafter, he received a notice with regard to the work being not satisfactory and ultimately an order of blacklisting was passed on 09.01.2006, against which, the petitioner filed Writ Petition No. 8670 of 2006, which was disposed of with a direction to the petitioner to submit a representation before the authority concerned, which was to be decided within a stipulated period and till then the order of blacklisting dated 09.01.2006, was kept in abeyance. The representation made accordingly, by the petitioner has been rejected by the exparte order dated 03.07.2006.

6. Upon hearing learned counsel for the petitioner and perusal of the record, it transpires that no notice was issued to the petitioner before passing the initial order of blacklisting nor after the order of this Court, any notice or opportunity of hearing was given to the petitioner and the order impugned herein has been passed exparte. The Court finds merit in the contention of the learned counsel for the petitioner that the authority has failed to consider the specific pleadings made by him in paragraphs 3 and 9 of his representation, which are quoted hereto below:

3– यह कि सडक निर्माण में मात्र पेंटिंग कार्य की निविदा आमंत्रित की गयी थी चूँकि बाद को प्रिमिक्सिंग ;लेपन कार्यद्ध पेंटिंग पर अलग से होना था जो कि तकनीकी रूप से आवश्यक है जिसके लिये निविदाएं किन्हीं अपरिहार्य कारणों से आमंत्रित नहीं की गयी।

9– यह कि प्रार्थी के सडक निर्माण पेंटिंग कार्य के बाद सडक पर प्रिमिक्सिंग ;लेपन कार्यद्ध होना चाहिये था जो नगरपालिका परिषद द्वारा नहीं कराया गया चूंकि पेंटिंग कार्य सडक निर्माण का 1/2 ;आधाद्ध कार्य है इस कारण सडक पर जब तक प्रिमिक्सिंग कार्य नहीं होगा तो सडक का ज्यादा समय तक टिके रहना तकनीकी रूप से संभव नहीं है। नगरपालिका परिषद देवबंद ने पेंटिंग वर्क पर प्रिमिक्सिंग न कराकर नगरपालिका परिषद देवबन्द स्वयं सडक क्षतिग्रस्त होने के लिये जिम्मेदार है तथा अपनी कमी प्रार्थी पर थोंपना चाहती है जो सरासर गलत है।

7. A perusal of the orders impugned indicates that the assertion made in paragraph 3 of the representation, according to the authority, do not require any examination and there is not even a whisper therein about the assertion made in paragraph 9 of the representation. In the opinion of the Court, the assertions made in paragraphs 3 and 9 of the representation were very relevant because according to the petitioner, he was assigned only the painting work whereas the laying and surfacing of the road by tarcol mix with stone ballast was to be done by the Nagar Palika Parishad, the respondent no. 1, which was not done and due to which, the irregularity occurred and for that, the petitioner could not be held responsible. Non-consideration of the aforesaid specific pleas raised by the petitioner in his representation renderes the impugned order arbitrary.

8. Reference may be made in this regard to the pronouncement of the Supreme Court in the case of Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr. Reported in [(1975)1 SCC 70] wherein their Lordships' have held as under:

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

9. The decisions of the Supreme Court in Radha krishna Agarwal and Ors. v. State of Bihar & Ors. [(1977) 3 SCC 457]; E.P.Royappa v. State of Tamil Nadu and Anr. [(1974) 4 SCC 3]; Maneka Gandhi v. Union of India and Anr. [(1978) 1 SCC 248]; Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., [(1981) 1 SCC 722]; R.D. Shetty v. International Airport Authority of India and Ors., [(1979) 3 SCC 489]and Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 751] have also ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a Writ Court exercising powers under Article 226 or Article 32 of the Constitution. A reference to the following passage from the decision of the Supreme Court in M/s Mahabir Auto Stores & Ors.v. Indian Oil Corporation Ltd.,[(1990) 3 SCC 752] should, in our view, suffice:

"11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by

reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Miss Radha Krishna Agarwal and Ors. v. State of Bihar and Ors., [(1977) 3 SCR 249]..... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable.. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

10. In the instant case, the Court finds gross violation of the principles of natural justice and non-consideration of the relevant aspects of the matter before blacklisting the petitioner, therefore, the impugned orders are wholly unjustified and arbitrary.

11. In view of above, the impugned orders being unsustainable are quashed. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2014

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 51697 of 2006

Dhirendra Nath Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Bajpai

Counsel for the Respondents:
Sri J.P. Pandey, Sri R.D. Khare
Sri S.K. Srivastava, Ms. Suman Sirohi
Sri Ayank Mishra, C.S.C.

Constitution of India, Art.-226- Compassionate appointment-petitioner being second son-of deceased employee applied for compassionate appointment-of death of first son-in the year 1998-by order dated 23.12.2014 claim rejected on ground-the amended provision of dying in Harness Rules 1974-adopted by Corporation by order dated 24.10.02-by which brother of deceased employee-also included in definition of family-held-relevant provisions prevailing at the time of application-applicable and not on date of consideration-in the year 1998 after death of brother-all family member were dependent of deceased father-no

question of consideration of brother-arose-order quashed-direction for fresh consideration issued.

Held: Para-10

Lastly, Sri Mishra submits that the compassionate appointment cannot be granted after a lapse of a reasonable period, which must be specified in the rules. I do not find any force in this submission in view of the facts of the present case. The compassionate appointment has been declined to the petitioner merely on the ground that the amendment provisions of 2002 shall not apply when application for compassionate appointment was being considered in the year 2004 rather the unamended provision shall apply. In the facts and circumstances of the case since, it was not the ground for rejection of application of compassionate appointment of the peitioner and as such new ground cannot be permitted to be raised.

Case Law discussed:

JT 2007(7) SC 336; [(1997) 7 SCC 314]; JT 2003(10) SC 555; (2010) 11 SCC 661 para 14 to 16; (2003) 7 SCC 270; (2006) 5 SCC 702; (1981) 2 SCC 205.

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

1. Heard Sri Anil Kumar Bajpai, learned counsel for the petitioner, Ms. Suman Sirohi, learned Standing Counsel for respondent no.2 and Sri Ayank Mishra, learned counsel for respondents no. 2 to 5.

2. Briefly stated the facts of the present case are that the father of the petitioner late Sri Shivnath Yadav was employed as Noter and Drafter. He died on 1.4.1994 during the period of his service. His son Sri Upendra Nath Yadav was appointed on compassionate ground on the request of the wife of late Sri Shivnath Yadav on 2nd July, 1994 as Clerk in Electricity Distribution Division, Gorakhpur who also died on 3.12.1998. After his death, the mother of the petitioner Smt. Gulabi Devi, wife of late Sri Shivnath Yadav moved an application dated 21.12.1998 requesting for compassionate appointment of his second son Sri Dhirendra Nath Yadav as there is no earning member in the family. Her application dated 21.9.1998 was forwarded with recommendation by the Superintendent Engineer to the Chief Engineer (Distribution) to appoint Sri Dhirendra Nath Yadav on compassionate ground. However, no decision was taken with regard to the compassionate appointment of the petitioner. In these circumstances, the mother of the petitioner again made a representation dated 21.8.2004 before the Superintendent Engineer, Electricity Distribution Division-I, Gorakhpur referring to the initial application of September, 1998. In the meantime, The Uttar Pradesh Recruitment of government servant Dying-in-harness Rules, 1974 was amended and in the definition of the word "family" the dependent of deceased's unmarried brother was also included. This amendment was adopted by the respondent - corporation vide order dated 24.10.2002 filed as Annexure 9 to the writ petition. By a letter dated 23.12.2004, the Superintendent Engineer communicated the mother of the petitioner that the approval for compassionate appointment has been declined by the Corporation vide letter no. 5818 dated 22.12.2004. The letter no. 5818 of the Corporation has been filed as Annexure-1, which says that no relaxation can be allowed in the interest of the Corporation.

3. Sri Anil Kumar Bajpayee submits that the father of the petitioner died in the year, 1994 leaving behind him, his wife Smt. Gulabi Devi and three sons namely, Sri Upendra Nath Yadav, Sri Ambujeshwar Nath Yadav and Sri Dhirendra Nath Yadav who were dependents of the deceased employee. To support the dependents of the deceased

employee, the mother of the petitioner requested for appointment of her son Upendra Nath Yadav on compassionate ground, which was given by the respondents. Sri Upendra Nath Yadav was unmarried son and he died on 3.9.1998. In these circumstances, the remaining dependents of the deceased employee Sri Shivnath Yadav became entitled for compassionate appointment. In these circumstances, the mother of the petitioner requested for compassionate appointment of the petitioner but the request was declined by the respondents on the ground that on the date the application was moved, the definition of the word "family" did not include the dependent unmarried brother. He submits that the reason given was an incorrect interpretation of law inasmuch as, the amendment provisions as available on the date of taking the decision on the application would be applicable. In support of his submission, he relied upon the Full Bench judgment of this Court in Writ-C No. 41958 of 2008, dated 13.2.2014 Anand Kumar Sharma Vs. State of U.P. and others, wherein it has been held that the government policy as existed on the date of application shall not apply rather the government policy, which existed on the date of taking decision on the application shall be applicable.

4. Sri Ayank Mishra submits that when the application for compassionate appointment was moved, 'unmarried brother' was not included in the definition of the word 'family' under the Rules. The amendment came in the year 2002, which shall not be applicable on the petitioner so as to entitle him to fall within the definition of the word "family" of the deceased unmarried brother. In support of his submission he relied upon a Single Bench judgment of this Court in the case of Seema Srivastava Vs. U.P. Power Corporation passed in Writ-A No. 14571 of 2004 decided on 16.9.2013.

5. I have carefully considered the submissions of learned counsel for the parties. The only ground stated before me by the respondents for declining the appointment of the petitioner on compassionate ground is that he did not fall within the definition of the word "family" under the Rules 1974 when the application was moved in the year 1998. The stand of the respondent is that the amended provision shall not apply rather unamended provision shall apply inasmuch as, when the application for compassionate appointment was moved, the unamended provision was in force. The submissions so made appears to be not correct. In the case of Anand Kumar Sharma (supra) a Full Bench of this Court held as under :

"In view of the foregoing discussion, we are of the opinion that the petitioner did not acquire any vested right on making the application on 25/7/2005 to get his application considered on the basis of the policy as existing on the date of making the application. The Government order dated 04/8/2006 was fully applicable w.e.f. 04/8/2006 and no error was committed by the Collector taking into consideration the policy dated 04/8/2006 when the application was rejected on 18/12/2006. The Division Bench judgment in Dr. O.P Gupta's case (supra) to the extent that it lays down that an application for grant of free hold right is to be considered in accordance with the government's policy as was existing on the date of application does not lay down the correct law."

6. An application has to be decided in accordance with law applicable on the date, on whichwhich the authority applies its mind to the prayer made in the application. In the case of Commissioner of Municipal Corporation, Shimla V. Prem Lata Sood and

others, JT 2007(7) SC 336, Hon'ble Supreme Court has held in para 41, 42 as under :

"41. The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others, wherein this Court categorically held :

The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to ownership or possession of any property for which the expression vest is generally used. What we can understand from the claim of a vested right set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a legitimate or settled expectation to obtain the sanction. In our considered opinion, such settled expectation, if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such settled expectation has been rendered impossible of fulfilment due to change in law. The claim based on the alleged vested right or settled expectation cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such vested right or settled expectation is being sought to be enforced. The vested right or settled expectation has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a settled expectation or the so-called vested right cannot be countenanced against public interest and

convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon.

42. In Union of India and Others v. Indian Charge Chrome and Another [(1999) 7 SCC 314], yet again this Court emphasized : "The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration."

7. Hon'ble Supreme Court in the case of The State of U.P. V. Dy. Director of Consolidation & Ors. , JT 1996(6) S.C. 306 and State of Punjab and Anr. Vs. M/s Devans Modern Brewaries Ltd. & Anr., JT 2003 (10) SC 555 with regard to compassionate appointment, held that if the scheme of compassionate appointment is changed or amended then the pending applications under the abolished scheme will seize to exit unless saved. Reference in this regard may also be had to the judgment of Hon'ble Supreme Court in the case of State Bank of India and another Vs. Raj Kumar, (2010) 11 SCC 661, para 14 to 16 as under :

"14. In this context we may usefully refer to the decision of this Court in Union of India vs. R. Padmanabhan wherein this Court observed(SCC pp. 278-79, para 8) :

8...That apart, being ex gratia, no right accrues to any sum as such till it is determined and awarded and, in such cases, normally it should not only be in terms of the Guidelines and Policy, in force, as on the date of consideration and actual grant but

has to be necessarily with reference to any indications contained in this regard in the Scheme itself. The line of decisions relation to vested rights accrued being protected from any subsequent amendments may not be relevant for such a situation and it would be apposite to advert to the decision of this Court reported in State of Tamil Nadu vs. Hind Stone and Ors. - 1981 (2) SCC

205. That was a case wherein this Court had to consider the claims of lessees for renewal of their leases or for grant of fresh leases under the Tamil Nadu Minor Mineral Concession Rules, 1959. The High Court was of the view that it was not open to the State Government to keep the applications filed for lease or renewal for a long time and then dispose them of on the basis of a rule which had come into force later. This Court, while reversing such view taken by the High Court, held that in the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application, despite the delay, if any, involved although it is desirable to dispose of the applications, expeditiously.

15. We may also refer to the decision of this Court in Kuldeep 8 Singh v. Govt. of NCT of Delhi [2006 (5) SCC 702] which considered the question of grant of liquor vend licences. This Court held that where applications required processing and verification the policy which should be applicable is the one which is prevalent on the date of grant and not the one which was prevalent when the application was filed. This Court clarified that the exception to the said rule is where a right had already accrued or vested in the applicant, before the change of policy.

16. In this case the employee died in October, 2004, the application was made only in June, 2005. The application was not even by the respondent, but by his mother. Therefore, it was necessary to ascertain whether respondent really wanted the appointment, whether he possessed the eligibility, and whether any post was available. Within two months of the application, the new scheme came into force and the old scheme was abolished. The new scheme specifically provided that all pending applications will be considered under the new scheme. Therefore it has to be held that the new scheme which came into force on 4.8.2005 alone will apply even in respect of pending applications."

8. Similar view has been taken by Hon'ble Supreme Court in the cases of Union of India Vs. R. Padmnabhan, (2003) 7 SCC 270, Kuldeep Singh Vs. Government of Delhi (2006) 5 SCC 702 and Stae of Tamilnadu Vs. Hind Stone (1981) 2 SCC 205.

9. From the perusal of the law laid down by Hon'ble Supreme Court in the afore noted judgments, it follows that the provisions as on the date when the application for compassionate appointment is being considered shall be applicable and not the unamended provision, which existed on the date of application. The judgment in the case of Seema Srivastava (supra) relied by Sri Ayank Mishra is distinguishable on facts, inasmuch as, the application for the appointment of Seema Srivastava was rejected by the competent authority in the year 2000 for reason that "sister" dos not fall within the definition of the word "family" and thus, she cannot be considered for appointment under the dying-in-harness rules. Thus, from the facts of the case of Seema Srivastava(supra) it is clear that the application for compassionate appointment was rejected prior to coming into force of the amendment in the dying-in-harness rules 2004. In the present set of facts , the application for appointment on compassionate ground was moved on 21.4.1998 and the

recommendation for giving compassionate appointment was made by the Superintendent Engineer on 25.9.1998. The application was rejected in the year 2004 and the ground as elaborated before this court is that the amended provisions shall not apply to old applications. The application of the petitioner was not rejected on any other ground. In view of these facts, the judgment in the case of Seema Srivastava is distinguishable.

10. Lastly, Sri Mishra submits that the compassionate appointment cannot be granted after a lapse of a reasonable period, which must be specified in the rules. I do not find any force in this submission in view of the facts of the present case. The compassionate appointment has been declined to the petitioner merely on the ground that the amendment provisions of 2002 shall not apply when application for compassionate appointment was being considered in the year 2004 rather the unamended provision shall apply. In the facts and circumstances of the case since, it was not the ground for rejection of application of compassionate appointment of the peitioner and as such new ground cannot be permitted to be raised.

11. In view of the foregoing discussion, I find that the impugned order dated 23.12.2004 read with the letter of the U.P. Power Corporation No. 5818 are hereby set aside. The respondent no.5 shall pass appropriate order in accordance with law in the matter of compassionate appointment of the petitioner within a period of three months from the date of a certified copy of this order is filed.

12. The writ petition is allowed with the aforesaid directions.

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 27.05.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MOHD. TAHIR, J.

Civil Misc. Writ Petition No. 54794 of 2011

Lal Naresh Bahadur Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amrendra Pratap Singh, Sri Triloki Singh

Counsel for the Respondents:
S.C.

Constitution of India-Art-300-A- Construction of link road-Bhumidhari Land of petitioner utilized without acquisition-without compensation-even the compensation offered during pendency of writ petition-amount-land garbing by mighty state-direction issued to take recourse of procedure contained in land acquisition Act-with liberty to file reference-petition allowed with cost of Rs. 25000/- payable within two month.

Held: Para-7
Though the Land Acquisition Act, 1894 has been repealed after coming into force of Act of 2013, with effect from 1.1.2014, yet considering the facts and circumstances of this case and keeping in view that the land of the petitioner was taken in the year 2009, when the Land Acquisition Act, 1894 was in force, we direct that proceedings for awarding compensation be taken, treating section 4 notification under the Land Acquisition Act, 1894 to have been issued as on this date i.e. 27.5.2014 and to make the award under the provisions of the Act of 1894, after hearing the parties and in accordance with law, within a period of six months from today. The petitioner shall also have the liberty to file a Reference under section 18 of the Act and pursue the remedies available to him under the said Act of 1894. Needless to say that the

petitioner shall be entitled to all other statutory benefits also.

Case Law discussed:
2013 (2) AWC 1795.

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

1. The land of the petitioner has been taken over by the respondents for construction of road without resorting to any procedure under the law. Being aggrieved by such action of the respondents, the petitioner has filed this writ petition with the prayer for issuing a writ in the nature of mandamus commanding the respondents not to dispossess the petitioner from his "bhumidhari" land and in the alternative, to award compensation along with interest as per the present value of the land.

2. We have heard Sri Amrendra Pratap Singh along with Sri Triloki Singh, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents. Pleadings between the parties have been exchanged and with their consent, this writ petition is being disposed of at this stage.

3. The case of the petitioner has by and large been admitted by the respondents in their counter affidavit wherein, in paragraph 4, it has been stated that for construction of approach road connecting the bridge made over river "Tons", the land of various tenure holders was taken and in 20% of the cases, with consent of the tenure holders. What is surprising is that in the said paragraph the respondents state that "the tenure holders including the petitioner were informed on 13.9.2010 that compensation at market circle rate would be paid to them. Out of plot nos. 23 (273) and 276 of the petitioner 0.068 + 0.023 = 0-091 hectare land has been taken by consent of the petitioner and a cheque of Rs. 40,950/- at the present circle rate was offered to the petitioner which he refused to accept." Photocopy of the cheque dated 15.3.2012, said to have been tendered to the petitioner, has been filed as Annexure-C.A.1; a list of tenure holders who have accepted the compensation at the circle rate has been filed as Annexure-C.A. 2; and some sale deeds executed by the tenure holders in favour of the State-respondents have been filed as Annexures-C.A. 3, 4, 5 and 6.

4. Interestingly, neither any consent of the petitioner nor agreement with the petitioner has been filed nor any sale deed is said to have been executed by the petitioner in favour of the respondents. What is also interesting to note is that in the said paragraph the respondents state that the petitioner was informed on 13.9.2010 that compensation would be paid at the market circle rate. The respondents thus admit that no process under the Land Acquisition Act or any other law for acquiring such land had been initiated. By giving information regarding compensation, in the manner as is said to have been given to the petitioner appears to be a command or direction to the tenure holders that they shall be paid compensation at the 'market circle rate' which the respondents have themselves determined. It is noteworthy that for more than a year after the decision is said to have been taken on 13.9.2010, no compensation as suggested also was paid. In September 2011 this petition was filed and the offer to pay has also been given during the pendency of this petition and just before the filing of the counter affidavit by the respondents.

5. A land-owner cannot be deprived of his land, except in accordance with law. The high-handed attitude adopted by the respondents in first taking over the land of the petitioner and thereafter commanding the petitioner to accept the alleged "market circle

rate" as determined by the respondents themselves, is highly unreasonable. If the land is needed for any purpose of the State Government, it could have acquired the same under the provisions of the Land Acquisition Act, 1894 and now under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the "Act of 2013"). If the action of the respondents, which they have themselves admitted, is condoned and the respondents are permitted to take the land of any land-owner and thereafter offer the price of the "market circle rate", it would amount to land grabbing at the hands of the "mighty" State. Such action of the respondents taking over the land of private land owners cannot be permitted by courts of law, as the rule of law has to be maintained by all persons, and more so by the State authorities.

6. In similar facts, the Apex Court in the case of Bhimandas Ambwani vs. Delhi Power Co. Ltd. 2013 (2) AWC 1795, wherein land owner was dispossessed without resorting to any valid law for acquisition of land and thereafter a residential colony was constructed on the said land, has, after finding that it was difficult to restore back the possession to the land owner, held that the respondents would make an award treating section 4 notification under the Land Acquisition Act, 1894 as on the date of the judgment, which in that case was 12.2.2013. We are of the view that the petitioner herein would also be entitled to similar relief.

7. Though the Land Acquisition Act, 1894 has been repealed after coming into force of Act of 2013, with effect from 1.1.2014, yet considering the facts and circumstances of this case and keeping in view that the land of the petitioner was taken in the year 2009, when the Land Acquisition Act, 1894 was in force, we direct that proceedings for awarding compensation be taken, treating section 4 notification under the Land Acquisition Act, 1894 to have been issued as on this date i.e. 27.5.2014 and to make the award under the provisions of the Act of 1894, after hearing the parties and in accordance with law, within a period of six months from today. The petitioner shall also have the liberty to file a Reference under section 18 of the Act and pursue the remedies available to him under the said Act of 1894. Needless to say that the petitioner shall be entitled to all other statutory benefits also.

8. This writ petition stands allowed to the extent indicated above.

9. In the peculiar facts of this case where the land of the petitioner is said to have been taken from him in the year 2009 without following the process of law and as per the counter affidavit itself, the petitioner was informed on 13.9.2010 that compensation at the market circle rate would be paid to him whereas the cheque is said to be offered after nearly two years on 15.3.2012, which all go to show that the respondents had not even proceeded efficiently even after depriving the petitioner of his land, we are of the view that the petitioner would be entitled to payment of cost, which we assess at Rs. 25,000/-. The respondent no.2-District Magistrate, Allahabad shall ensure that the said cost is paid to the petitioner within two months from today, failing which the petitioner shall be entitled to file an application before this Court for issuance of further directions.
