ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Transfer Application No. 343670 of 2014
In Arbitration Application No. 35 of 2009

Satya Prakash Singh Applicant
Versus
Dinesh Prakash Singh & Ors. Opp. Parties

Counsel for the Applicant:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Amit Kumar Singh

Counsel for the Opp. Parties:
Sri Gautam Baghel, Sri Pawan Shukla, Sri Vivek Kumar Singh, Sri M.D. Singh Shekhar, Sri Udai Chandani

Arbitration and Conciliation Act 1996-Section-11(6)-Application for appointment of Arbitral Tribunal-once by exercising power the Chief Justice appointed the Arbitral Tribunal and became final under section 25 of the Act-except the contingencies given in section 14-Chief Justice or the Judge nominated ceased with any jurisdiction-application wholly misconceived-not maintainable.

Held: Para-39
Having considered the law and provisions of the Act, in the facts of the present case where the subject matter of the dispute was referred to arbitration and the arbitration proceedings have been closed. Similar application for referring the very same claim under Section 11, in my opinion, once the power was exercised under Section 11 and an arbitrator was appointed, the proceedings have been closed under Section 25, there is no further power, considering the nature of power under Section 11 read with the Scheme, to once again refer the same disputes to arbitration, under Section 11. Therefore, in my opinion, the second application is not maintainable and is consequently dismissed. Interim order is vacated.

Case Law discussed:
(2009) 4 SCC 523; (2005) 8 SCC 618; 2012 (6) ADJ 214; (2009) 8 SCC 520; 2013 (5)

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

(In Re: Civil Misc. Transfer Application No. 343670 of 2014)

1. The applicant had earlier filed an application no. 35 of 2009 under Section 11(6) for appointment of an Arbitral Tribunal for settlement of dispute between the applicant and the opposite parties, with regard to a partnership deed. Hon'ble Chief Justice in exercise of his powers under Section 11(6) appointed Justice D.P.S. Chauhan, a retired Judge of this Court as sole Arbitrator to decide the claims arising between the parties.

2. The parties put in appearance before the Arbitral Tribunal and during the pendency of the arbitration proceedings, the Arbitral Tribunal by order dated 5.10.2014, in Arbitration Case No. 35-09 of 2012 (Staya Prakash vs. Dinesh Prakash Singh and others) District Mirzapur, closed the case, under Section 25 of the Arbitration and Conciliation Act, 19961 and posted the case for award on 9.11.2014 at 2:00 PM.

3. The applicant has again approached the Court on 17.10.2011 by filing the present Civil Misc. Transfer Application, under Paragraph 8 of the Scheme of Appointment of Arbitrators by Hon'ble the Chief Justice of Allahabad High Court, 19962, seeking the following prayer:-

"It is therefore, most respectfully prayed that this Hon'ble Court may

graciously be pleased to withdraw the authority given to the learned Arbitrator in Arbitration Case No. 35/2009 of 2012 (Satya Prakash Singh vs. Dinesh Singh & others) and/or designate any other Arbitrator for the settlement of Claim Petition between between the claimant and opposite party no. 1, and/or pass any other and further order which may meet at the end of justice, otherwise the applicant/opposite party no. 1 shall suffer an irreparable loss and injury."

4. I have heard Sri M.D. Singh Shekhar, learned Senior Advocate assisted by Sri Udai Chandani, learned counsel appearing for the applicant and Sri Ajai Kumar Singh, learned counsel for the contesting opposite parties.

5. A preliminary objection has been raised by Sri Ajai Kumar Singh that the application is not maintainable, the applicant has challenged the appointment of the arbitrator on the grounds mentioned under section 12 sub-section (3) questioning the independence or impartiality of the arbitrator and under section 14 for terminating the mandate of the arbitrator, for undue delay. The Chief Justice or his designate shall have no jurisdiction under Section 11(6) or the Scheme framed by Hon'ble the Chief Justice under sub-section (10) of Section 11 to go into the question of Section 12 or Section 14 of Act, to remove the arbitrator.

6. The learned Senior Advocate would submit that the application is maintainable and the grounds stated in Section 12(3) and 14(1) are evident from the record of the arbitration case, the applicant has lost faith in the Arbitral Tribunal as the arbitrator is not independent or impartial, further, there has been undue delay in concluding the arbitration proceedings, more than three years has lapsed. The learned Senior Advocate to substantiate his argument relied upon the following judgments:- Union of India vs. Singh Builders3, SBP & Co. vs. Patel Engineering Ltd. and another4, Rungta Projects Ltd. vs. Government of Uttar Pradesh and anothers5, Indian Oil Corporation Ltd. and others vs. Raja Transport (P) Ltd. 6

7. Sri Ajai Kumar Singh contends that once an order has been passed under Section 11(6) for appointment of an Arbitrator by the Chief Justice or his designate, the Chief Justice or his designate becomes functus officio. The Arbitrator for want of independence or impartiality under Section 12(3) can be removed by following the procedure prescribed under section 13 of the Act, which in the present case was not followed, admittedly, no written statement was filed before the Arbitrator. To terminate the mandate of the Arbitrator, for undue delay, under section 14, the remedy is to approach the original Civil Court having jurisdiction and not the Chief Justice or his designate under Section 11 of the Act. The present application has been filed with mala fide intention, to restrain the Arbitrator from rendering the award on 9.11.2014. Sri Singh in support of his submissions has relied upon following judgments:- Suresh Chandra Agarwal vs. Mahesh Chandra Agarwal7, M/s S.K. & Associates vs. Indian Farmer & Fertilizers8, Rakesh Jain vs. M/s Willowon Builders (India) Pvt. Ltd.9, Ghaziabad Development Authority vs. Subodh Builders Pvt. Ltd.10, Ahluwalia Contractors (India) Ltd. vs. Housing and Urban Development

Corporation & others11, Chintakayala Siva Rama Krishna vs. Nadimpalli Venkata Rama Raju AIR12, M/s SBP & Co vs. M/s Patel Engineering Ltd. and others13.

8. Rival submissions fall for consideration.

9. The question for determination is as to whether this application filed under the Scheme of 1996, read with Section 11 of the Act is maintainable or whether, the Chief Justice or his designate has jurisdiction to terminate the mandate of the Arbitrator, already appointed under Section 11, and to appoint substitute Arbitrator.

10. Section 12 of the Act provides the grounds for challenge, whereas, Section 13 prescribes the procedure to be followed for such a challenge. Section 14 of the Act permits the termination of the mandate of an arbitrator, for the reasons stated therein and Section 15 of the Act provides for appointment of substitute arbitrator, in case, the mandate of the arbitrator, already appointed, is terminated. Since these are the relevant provisions of the Act and have a bearing on the facts and circumstances of the present case, which are as follows:-

"12. Grounds for challenge.

(1)When a person is approached in connection with his appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2)An arbitrator from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in Sub-section(1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) circumstances exit that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made"

13. Challenge procedure.

(1) Subject to Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2)Failing any agreement referred to in Sub-section (1), a party who intends to challenge an arbitrator shall,within fifteen days after becoming aware of the constitution of the arbitral Tribunal of after becoming aware of any circumstances referred to in Sub-section(3) of Section 12, send a written statement of the reasons for the challenge to the arbitral Tribunal.

(3) Unless the arbitrator challenged under Sub-section(2) withdraws from his office or the other party agrees to the challenge, the arbitral Tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under Sub-section (4), the party

challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under Subsection (5), the Court may decide as to whether the arbitrator who is challenged is entitles to any fees.

"14 Failure or impossibility to act.

(1)The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause,

(a) of Sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this Section or Sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or Sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral Tribunal."

11. The applicant in the present case has prayed for termination of the mandate of the arbitrator (though worded as to withdraw the authority and designate any other arbitrator for settlement) because the applicant apprehends bias on the part of the arbitrator, thus, doubting his independence or impartiality. The Senior Advocate has taken the Court through the record to demonstrate the lack of independence or impartiality of the arbitrator. The details need not be gone into as it is not relevant to the question sought to be answered.

12. The grounds for challenge to the mandate of the arbitrator falls under Section 12 sub-section (3)(a) of the Act. Section 13(3) of the Act makes it clear that unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge, the arbitral Tribunal shall decide on the challenge,

admittedly, this procedure was not followed by the applicant. The applicant had not challenged the arbitrator by following the procedure of challenge prescribed under sub-clause (2) of Section 13. The applicant within 15 days after becoming aware of any circumstances referred to in sub-section (3) of Section 12 must, send a written statement of the reasons for the challenge to the arbitral Tribunal under Section 13(3).

13. The arbitral Tribunal shall decide on the challenge on merits except-

a). if the arbitrator whose appointment is challenged withdraws from his office on his own, or

b). the other party agrees to thechallenge.

14. By virtue of Section 13(4) of the Act, if a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) fails, the arbitral Tribunal has to continue the arbitral proceedings and make an arbitral award. Sub-section (5) of Section 13 of the Act empowers a party challenging the arbitrator to make an application for setting aside such arbitral award made under sub-section (4) in accordance with Section 34 of the Act.

15. Under Section 14(2) of the Act, the court has the power to decide on the termination of the mandate on any of the grounds referred to in Clause (a) of sub-section (1) and also in the circumstances enumerated in Section 15 of the Act and appoint an arbitrator. Under Section 14 of the Act the mandate of an arbitrator stands terminated if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without unnecessary delay or he withdraws from his office or the party agreed to the termination of his mandate. As per Section 14(1)(b) the mandate of an arbitrator shall terminate if he withdraws from his office or the parties agree to the termination of his mandate.

16. Section 15 provides for a procedure which has to be followed when mandate of the arbitrator is terminated and substitution of the arbitrator in the circumstances set out under Sub-section (1) including those referred under Section 13 and 14 of the Act is required. As per Section 15 sub-section (2) of the Act where the mandate of an arbitrator terminates, a substitute arbitrator has to be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

17. In the present case the applicant instead of pursuing the remedy available for challenging the arbitrator as laid down in Section 13 or Section 14 has sought appointment of a substitute Arbitrator on the ground that the Arbitrator is not independent or impartial, under Section 11 read with the Scheme.

18. The Chief Justice or his designate in exercise of power under Section 11(4) or sub-clause (6) cannot terminate the mandate of the arbitrator on challenge by a party on grounds mentioned in Section 12 or 13 of the Act, therefore, this court has no jurisdiction under Section 11 to substitute an arbitrator so appointed in terms of the arbitration agreement. The meaningful interpretation of these sections, if read together, is that challenge to the appointment of the arbitrator has to be raised by the applicant before the arbitral

Tribunal itself. If he succeeds in the challenge, the applicant has no cause or grievance left but if he fails then he has to participate in the arbitral proceedings and if aggrieved by the award, to challenge the same in accordance with provisions of the Section 34 of the Act including the mandate of the Arbitrator.

19. Once the matter reaches the arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

20. The seven judge Constitution Bench of the Supreme Court in S.B.P. And Company vs. Patel Engineering Ltd.14 has observed that the High Court should refrain from interfering against any order passed by the Arbitral Tribunal during arbitration proceedings under Article 226 or 227 of the Constitution. The aggrieved party has a remedy under Section 34 or Section 37 by filing an appeal, if available.

21. This Court in Rakesh Jain vs. M/s Willowon Builders (India) Pvt. Ltd.15, where the question before the Court was as to whether, "is it open to the Chief Justice, exercising jurisdiction under Section 11(4) of the Arbitration Act, to remove an appointed Arbitrator and appoint another Arbitrator in his place?" The Court held that once an Arbitrator has been appointed, before the application is filed, it would not be open to Hon'ble the Chief Justice or his designate to remove the said Arbitrator and appoint another Arbitrator in his place.

22. It is to be noted that the Act is enacted mainly in the pattern of the Modern Law adopted by the United Nations Commission on International Trade law. The object and the reasons of the Act clearly indicate that the intention of the Act is to lay emphasis on speedy disposal of arbitration proceedings. The Act also seeks to minimize judicial intervention in the progress and completion of arbitration proceedings, which is crystal clear from a bare reading of Section 5 of the Act which provides that no judicial authority would intervene except where so provided in the Act. Consequently, the bar on Court interference on challenging the arbitral Tribunal during the pendency of the arbitration proceeding was meant to minimize judicial intervention at that stage, as any interference at that stage would be against the spirit with which the Act was enacted. Sub-section (5) of Section 13 of the Act lays down that challenging an arbitral award is permitted even on the grounds taken by the aggrieved party on which the challenge to the arbitral Tribunal was made. There is no provision in the Act which would enable the Court to remove an Arbitrator during the arbitration proceedings. But, at the same time the party having grievance against an Arbitrator cannot be said to be without a remedy and the said remedy becomes available as soon as the arbitral award is made by the arbitrator or the arbitral Tribunal.

23. Thus clear mandate is to bar judicial interference except in the manner provided in the Act. Conversely if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere.

24. Comparing this legislation with the earlier legislation on the subject-

namely the Arbitration Act, 1940, the message is loud and clear. The legislature found mischief in various provisions contained in the Arbitration Act, 1940 which would enable a party to approach the Court time and again during the pendency of arbitration proceedings resulting into delays in the proceedings. Law makers wanted to do away with such provisions.

25. The new Act deals with the situation even when there is challenge to the constitution of the arbitral Tribunal. It is left to the arbitrator to decide the same in the first instance. If a challenge before the arbitrator is not successful, the arbitral Tribunal is permitted to continue the arbitral proceedings and make an arbitral award. Such a challenge to the constitution of the arbitral Tribunal before the Court is then deferred and it could be only after the arbitral award is made that the party challenging the arbitrator may make an application for setting aside an arbitral award and it can take the ground regarding the constitution of arbitral Tribunal while challenging such an award.

26. Thus course of action to be chartered in such contingency is spelt out in the Act itself. Court interference on basis of petitions challenging arbitral Tribunal during the pendency of the arbitration proceedings would be clearly against the very spirit with which the Act has been enacted. The mischief which existed in the earlier enactment and is sought to be removed by the present enactment cannot be allowed to be introduced by entertaining petitions in the absence of any provision in the new Act in this respect.

27. Now coming to Section 14 of the Act, so far as the provisions of the Arbitration Act, 1940 are concerned, Section 14(1)(a) and sub-section (2) of the present Act substantially correspond to Section 8(1)(b) and Section 11(1) of the Arbitration Act, 1940. A bare perusal of Section 14 would show that the mandate (authority) of an arbitrator shall terminate on two conditions being satisfied:-

1.) The arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and.

2.) The arbitrator withdraws from his office or the parties agreed to the termination of his mandate.

28. It will thus, be seen that it is not open to a party to unilaterally terminate the mandate of an arbitrator on the ground that the arbitrator de jure or de facto unable to perform his functions or for other reasons failed to act without undue delay.

29. In such situation, where one of the parties wants the mandate of the arbitrator be terminated on the above grounds, it will have to take the controversy to the Court under sub-section (2) and the Court will then decide on the termination of the mandate. Compared to the old law when the Court had power to give leave to revoke the authority of an arbitrator under Section 5 or to remove an arbitrator under circumstances detailed in Section 11 of the Arbitration Act 1940. The Court has now no such power, except when it is asked to decide a controversy brought before it by any party as to whether an arbitrator has become de jure or de facto unable to perform his functions or for any other reason failed to act without undue delay. Even here a party may not

approach the Court for this purpose, if it is so agreed by the parties, it is clear from the use of words "unless otherwise agreed by the parties" used in sub-section (2). No appeal lies from an order of the Court on the controversy, which is clear from perusal of Section 37.

30. A conjoint petition under Section 11(6) and Section 14 does not lie, since under Section 11(6) the petition has to be heard and decided by the Chief Justice or his designate, while a petition under Section 14 lies to the "Court". Since fora are different, conjoint petition does not lie. (Grid Corporation of Orissa Ltd. vs. AES Corporation16.

31. An application under Section 14(2) of the Act for decision on termination of the mandate of an arbitrator lies only before the "Court" as defined in Section 2(1)(e) of the Act.

32. In a case, where, the Supreme Court had appointed the arbitrator in question, on an application made to it under Section 11(5) and (6) of the Act, held that application under Section 14(2) of the Act for terminating the mandate of the arbitrator was not maintainable before the Supreme Court. The jurisdiction which the Chief Justice or his designate exercises under Section 11(6) of the Act is limited jurisdiction. The Supreme Court becomes functus officio after exercising jurisdiction under Section 11(6) of the Act. (Nimet Resources Inc. vs. Essar Steels Ltd.17).

33. There is no automatic termination of the mandate of an arbitrator on the alleged ground of his failure to act without undue delay. It is only the Court which will have to resolve the dispute whether the arbitrator had failed to act without any undue delay. But if the arbitrator fails to conclude arbitration proceedings within the time agreed to between the parties and parties do not extend the mandate of the arbitrator any further, the mandate of the arbitrator automatically terminates. (N.B.C.C. Ltd. vs. J.G. Engineering Pvt. Ltd.18).

34. Termination of arbitral proceedings is different from termination of the mandate of the arbitrator. Termination of arbitral proceedings is governed by Section 32 of the Act. The arbitral proceedings can come to an end on the events mentioned in Section 32 had occurred. Thus, mandate (authority) of an arbitrator can be terminated but that would not mean that the arbitral proceedings have also terminated.

35. If an arbitrator refuses to act as an arbitrator, a substitute arbitrator would be appointed in his place under sub-section (2) or Section 15, except where the intention of the parties was to refer the disputes to arbitration by a particular person only.

36. "Rules" referred to in Section 15(2) would refer not only to any statutory rules or rules framed under the Act or under the Scheme, but also mean that substitute arbitrator must be appointed according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. (Yashwitha Construction (P) Ltd. vs. Simplex Concrete Piles India Ltd.19).

37. In National Highways Authority of India vs. Bumihiway D.D.B. Ltd.20 Supreme Court held that provisions of

Section 15(2) states that a substitute arbitrator shall be appointed according to the rules applicable to the appointment of arbitrator being replaced. Appointment of retired Chief Justice by the High Court under Section 11(6) was set aside and directions was given that India Road Congress be approached as per the agreed procedure to appoint the arbitrator.

38. The application is misconceived and is not maintainable under paragraph 8 of the Scheme, paragraph 8 refers to withdrawal of authority by the Chief Justice on receipt of a complaint from either party to the arbitration agreement or otherwise is of opinion that the person or institution designated by him under paragraph 3 has neglected or refused to act or is incapable of acting he may withdraw the authority given by him to such person or institution and dealing with the request himself or designate another person or institution for that purpose. Paragraph 3 provides that upon receipt of a request under paragraph 2, the Chief Justice may either deal with the matter entrusted to him or designate any other person or institution for that purpose; and paragraph 2 provides where a request to the Chief Justice under sub-section 4 or sub-section 5 or sub-section 6 of Section 11 shall be made in writing and accompanied by the documents mentioned therein. Thus reading of paragraph 2, 3 and 8 would clearly demonstrate that the powers conferred under paragraph 8 has nothing to do with the removal of an arbitrator or appointment of a substitute arbitrator. Paragraph 8 only confers power upon the Chief Justice to withdraw the authority given by him to the designate person or institution for that purpose.

39. Having considered the law and provisions of the Act, in the facts of the present case where the subject matter of the dispute was referred to arbitration and the arbitration proceedings have been closed. Similar application for referring the very same claim under Section 11, in my opinion, once the power was exercised under Section 11 and an arbitrator was appointed, the proceedings have been closed under Section 25, there is no further power, considering the nature of power under Section 11 read with the Scheme, to once again refer the same disputes to arbitration, under Section 11. Therefore, in my opinion, the second application is not maintainable and is consequently dismissed. Interim order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Arbitration Petition No. 57 of 2007

M/s Banaras Auto Traders & Anr.
Petitioners
Versus
M/s Reliance Web Stores Ltd. & Ors.
...Respondents

Counsel for the Petitioner:
Sri Udai Chandani

Counsel for the Respondents:
Sri R.D. Khare, Sri Siddharth, Sri Siddharth Khare, Siddharth Singh

Arbitration & Conciliation Act 1996-Section 11(5)-Territorial jurisdiction-both parties residing at Mumbai-as per section 16 of franchisee agreement only Civil Court at Mumbai-entrusted with jurisdiction-mere filing application before Civil Court Varanasi-not confer jurisdiction of Allahabad High Court-application rejected.

Held: Para-13
A perusal of the demand made by the notice dated 20.6.2007 send by applicants to the defendants is a useful material for coming to the conclusion that the dispute, as per the demand of the applicants, relate to damages and claims and not to immovable property. In such a situation, under law, the suit could have been filed at Mumbai where the defendants resides, or where some cause of action arose, i.e. in the State of Uttar Pradesh. Hence, the relevant clause in the agreement conferring jurisdiction in the matter solely upon the Courts at Mumbai cannot be said to be illegal in view of the Supreme court judgments noticed herein above.

Case Law discussed:
(2007) 7 SCC 125; (2006) 11 SCC 521; (2007) 1 SCC 467; (2000) 8 SCC 151; (2010) 1 SCC 673.

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

1. Heard Sri Udai Chandani, learned counsel for the applicant and Sri Siddharth Singh, learned counsel appearing for the opposite parties.

2. The application has been filed under Section 11(5) of the Arbitration and Conciliation Act. 1996 for settlement of dispute as per the arbitration clause contained in Section 16 of the Franchise Agreement dated 8.10.2004. The application is being opposed by the opposite parties that in view of Section 16 of the agreement the Courts of Mumbai will have exclusive jurisdiction in respect of this agreement, thus, this Court shall have no jurisdiction to entertain the application.

3. Learned counsel for the applicant submits that he has already filed Arbitration Case No. 50 of 2007, (M/s Banaras Auto Traders and others vs. M/s Reliance Web Stores Ltd. and others) before the Court of District Judge, Varanasi for injunction to restrain the opposite parties from terminating the Franchise Agreement dated 8.10.2004 further restraining the opposite parties from interfering in the functioning the petitioner as Franchise under the said agreement. The opposite parties have appeared in the arbitration case before the District Judge, Varanasi and raised objection regarding jurisdiction of the Court as the parties had agreed that the Courts of Mumbai shall have exclusive jurisdiction in the matter. Learned counsel for the parties submit that the arbitration case is still pending before the Varanasi Court.

4. The submission of learned counsel for the applicant is that section 42 of the Act inter alia provides that when an application has been made in the Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the subsequent proceedings shall be made in that Court and in no other Court.

5. In support of his submission, the learned counsel for the applicant has placed reliance upon:- Adhunik Steels Ltd. vs. Orrisa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125, Jindal Vijaynagar Steel vs. Jindal Praxair Oxygen Co. Ltd. (2006) 11 SCC 521, Pandey & Co. Builders (P) Ltd. vs. State of Bihar and another (2007) 1 SCC 467, Datar Switchgears Ltd. vs. Tara Finance Ltd. and another (2000) 8 SCC 151, Bharat Sanchar Nigam Ltd. and another vs. Dhanurdhar Champatiray (2010) 1 SCC 673.

6. In rebuttal, learned counsel for the opposite parties would submit that this Court will not have jurisdiction, as no

property is involved, further, the contract itself provides that the Courts at Mumbai shall have jurisdiction, which is permissible as per section 20 of the Act. Learned counsel for the opposite parties, in support of his submission has placed reliance upon Balaji Coke Industries Pvt. Ltd. Ms. Maa Bhagwati Coke Guj Pvt. Ltd., 2009 (9) SCC 403 and order passed in Arbitration and Conciliation Application No. 20 of 2008 (M/s Ujhani Fuel Point and others vs. M.S. Reliance Industries Limited) and NKC Projects Pvt. Ltd. and another vs. Utility Energytech & Engineering Pvt. Ltd. and another 2009 (4) ALJ 18 (DB).

7. Rival submissions fall for consideration.

8. The "Court" is defined under section 2(e), means principal Civil Court of original jurisdiction in the District, and includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit.

9. Section 19 of the contract reads as follows:-

Section 19: Dispute Resolution and Jurisdiction

"If any dispute arises in respect of this Agreement, the parties shall endeavor to settle the dispute by direct negotiations in good faith. If such negotiations do not settle the dispute, the parties agree to submit the matter to settlement proceedings under the rules of the Arbitration and Conciliation Act, 1996, (the 'Act') as applicable for the time being in force. The place of the Arbitration will be Mumbai and the language of the proceedings will be English. The arbitral award shall be in writing and shall be final and binding on the parties. Judgement upon the award may be entered in any Court having jurisdiction thereof; provided, however, that this clause shall not be construed to limit Reliance from brining any action in any Court of competent jurisdiction for injunctive or other provisional relief as Reliance deems to be necessary or appropriate to protect its System, Proprietary Rights, trade marks, trade names, service marks, logotypes, insignia, trade dress and designs, or to enjoin or restrain Franchisee from otherwise causing immediate and irreparable harm to Reliance.

Subject to the above, the Courts of Mumbai shall have exclusive jurisdiction in respect of this Agreement."

10. It is evident from the arbitration clause that the Courts of Mumbai have exclusive jurisdiction. Mere filing of an application under section 9 of the Act before the Court at Varanasi would not confer jurisdiction upon this Court to entertain the application under Section 11(5) for appointment of an Arbitrator.

11. The Supreme Court in Jindal Vijaynagar Steel (JSW Steel Ltd) vs. Jindal Praxair Oxygen Co. Ltd. (2006) 11 SCC 521 held that once the parties have chosen a particular place to be the place for arbitration and proceedings connected thereto for resolve of dispute, the said place alone shall have jurisdiction.

12. The Supreme Court in the case of Balaji Coke Industry Pvt. Ltd. Vs. Ms

Maa Bhagwati Coke Guj Pvt. Ltd., 2009 (9) SCC 403, where Clause 14 of the agreement, which was a High Seas Sale Agreement, provided that the sale contract would be subject to Kolkata jurisdiction. The venue of the arbitration was also agreed to be Kolkata, West Bengal. After discussing several earlier judgments on the issue, the Apex Court held that the parties had knowingly and voluntarily agreed for Kolkata jurisdiction and even if the Courts in Gujarat also had jurisdiction, the agreement to have the disputes decided in Kolkata by an Arbitrator was valid and the respondent-Company had wrongly chosen to file an application under Section 9 of the Act before a Court in Gujrat and the same was in violation of the agreement. The Apex Court relied upon an earlier judgement in the case of A.B.C. Laminart (P) Ltd. Vs. A.P. Agencies, 1989 (2) SCC 173 to approve a legal proposition that so long as the parties to a contract do not oust the jurisdiction of all the Courts, which would otherwise have jurisdiction to decide the cause of action under the law, it could not be said that the parties had by their contract ousted the jurisdiction of the Court. To similar effect is a judgment of this Court rendered by a Division Bench in the case of NKC Projects Pvt. Ltd. and Anr. Vs. Utility Energytech & Engineers Pvt. Ltd. & Anr., 2009 (4) ALJ 18 (DB).

13. A perusal of the demand made by the notice dated 20.6.2007 send by applicants to the defendants is a useful material for coming to the conclusion that the dispute, as per the demand of the applicants, relate to damages and claims and not to immovable property. In such a situation, under law, the suit could have been filed at Mumbai where the defendants resides, or where some cause of action arose, i.e. in the State of Uttar Pradesh. Hence, the relevant clause in the agreement conferring jurisdiction in the matter solely upon the Courts at Mumbai cannot be said to be illegal in view of the Supreme court judgments noticed herein above.

14. In view of the aforesaid discussions, it is held that this application under Section 11 of the Act has been wrongly filed before this Court at Allahabad. The proper Court for filing such application would be at Mumbai. In that view of the matter, this application is dismissed, but with liberty to the applicants that they may prefer similar application before the competent Court at Mumbai.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2014

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

Civil Revision No. 143 of 2013

Awadh Bihari Tripathi ...Revisionist
Versus
Smt. Shanti Devi Shukla ...Respondent

Counsel for the Revisionist:
Sri Radha Kant Ojha, Sri Satyendra Chandra Tripathi

Counsel for the Respondents:
Sri B.K. Srivastava, Sri C. K. Singh, Sri Dhiraj Srivastava

(A) Provincial Small Causes Court Act-1887-Section 25-jurisdiction of Revisional Court-held-very limited-no illegality or perversity committed by Court below-no interference required-revision dismissed.

Held: Para-18
The revisional jurisdiction of this Court under Section 25 of the Provincial Small

Cause Courts Act, 1887 is limited. The Court can interfere under this section only when the finding recorded by the Court below is totally perverse and is based on no evidence. Learned counsel for the revisionist-tenant has failed to point out any perversity in the order of the Court below, as discussed above. The findings of the Court below on various points are based on documentary as well as oral evidence. It has not been pointed out that the Court below has ignored any important documentary evidence filed by the tenant-revisionist or it has taken into consider any fact, which was not on the record.

(B) C.P.C. Order XV Rule V-first date of hearing-whether the date of filling written statement or the day on which issue framed? Held-in view of law laid down by Apex Court in case of Chotti case-first date of hearing would be 15.06.10 when written statement filed-while rent deposited on 15.07.10 not entitled to a claim benefit of statutory protection.

Held: Para-16

This Court after considering the judgment of the Supreme Court in respect of the Small Cause Courts Act held that the first date of hearing shall be the date for appearance as well as final hearing. Applying the said principle in the present case, the tenant had filed his written statement on 15th June, 2010 and submitted his tender on 15th July, 2010, therefore, I do not find any error in the finding of the Court below that the tenant has deposited the arrears of rent after the first date of hearing. Thus, he was not entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972.

Case Law discussed:

2002 (1) ARC 370; AIR 1993 SC 2525; 1995 (1) ARC 563; 1999 (4) AWC 3484 (SC); 2002 (2) ARC 160; 2006 (2) ARC 208; 2011 (5) AWC 4405; 2012 (4) AWC 3374; 2013 (1) ARC 335; 2013 (2) AWC 1509; 2014 (1) ARC 692; 1999 (2) ARC 71.

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

1. This is a revision preferred by a tenant under Section 25 of the Provincial Small Cause Courts Act, 1887 against the judgment and order dated 01st March, 2013 and decree dated 07th March, 2013 passed by the Judge, Small Cause Court/Additional District Judge, Court No. 7, Kanpur Nagar, whereby Small Cause Suit No. 160 of 2009 (Smt. Shanti Devi Shukla v. Sri Awadh Bihari Tripathi) filed by the landlady-respondent has been decreed by directing the tenant-revisionist to vacate the suit premises within thirty days and to pay the arrears of rent of Rs.70,066/- and damages at the rate of Rs.2,000/- per month since 28th September, 2009 till the actual physical possession is handed over to the landlady.

2. The essential facts are that the respondent is landlady/owner of Premises No. 133/16, Transport Nagar, Kanpur Nagar. The revisionist is tenant in a shop situated in the said premises at the rate of Rs.2,000/- per month excluding the tax. Said shop was let out in the year 1986 vide a lease agreement dated 16th December, 1986 for a period of 11 months. The tenancy started from 15th December, 1986 and came to an end on 14th November, 1987. However, in spite of expiry of said period of agreement, the tenant did not vacate the suit premises. Thereafter at the instance of the landlady the rent was enhanced from Rs.1,000/- to Rs.2,000/- per month in terms of Clause-14 of the agreement. It is stated that the tenant has deposited the rent from 16th November, 1987 to 31st December, 1990 at the rate of Rs.2,000/- per month, which comes to a total sum of Rs.75,000/-, and the landlady issued a receipt of the said

amount on 04th December, 1990. It is further stated that when the landlady asked the tenant to pay 18% tax in addition to the rent in terms of the agreement since January, 2001, the tenant refused to pay the said tax and also stopped paying rent since January, 2001. When after several requests the tenant did not pay the rent and the tax, the landlady on 24th August, 2009 sent a notice to the tenant determining his tenancy and made a demand of arrears of rent. Vide said notice the tenant was asked to vacate the premises in terms of the notice. The said notice was served on the tenant on 28th August, 2009 but neither he did pay arrears of rent, as demanded in the notice, nor did he vacate the premises. The tenant had sent a reply to the said notice on 19th September, 2009, wherein he disputed the rate of rent. According to the tenant, agreed rent was Rs.1,000/- per month and not Rs.2,000/- per month, as claimed by the landlady in her notice.

3. Against this background, the landlady-respondent instituted a suit for eviction and arrears of rent in the Court of Judge, Small Cause, Kanpur Nagar which was registered as Small Cause Suit No. 160 of 2009 (Smt. Shanti Devi v. Sri Awadh Bihari Tripathi). The revisionist-tenant contested the suit and filed his written statement and denied the claim made by the landlady.

4. The Court below framed six issues for determination which are as under:

(i) Whether rate of rent is Rs.2000/- per month excluding the taxes as claimed by the plaintiff-landlady or is Rs.1000/- including taxes per month as claimed by the defendant-tenant?

(ii) Whether defendant is entitled to get the benefits of the provisions of Section 20(4) of U.P. Act No. 13 of 1972?

(iii) Whether the defence of the defendant is liable to be struck off for non-compliance of Order XV Rule 5(2) of the Code of Civil Procedure?

(iv) Whether the defendant has committed default in payment of rent from 1.1.2001 and he is in arrears of rent for more than 4 months?

(v) Whether the suit filed by the plaintiff without consent of the co-owner is not maintainable?

(vi) Whether any other relief can be granted to the plaintiff?

5. The Issue No. 1 was decided in favour of the landlady and it was found that the rate of rent was Rs.2000/- per month and not Rs.1000/- per month, as claimed by the tenant. As regards Issue No. 2, the Court below recorded a finding that the tenant has not deposited the entire rent and cost of the suit in terms of Section 20(4) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972). The tenant is not entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972, as the tenant-revisionist has failed to deposit the entire arrears of rent on the first date of hearing of the suit. In addition to above, he has not deposited the entire arrears of the rent and the expenses. Issue No. 3, which deals with striking off the defence of the tenant, was decided in favour of the tenant and the Court below refused to strike off the defence of the landlady on the ground that the tenant has made substantial compliance of the deposits of the rent. With regard to Issue No. 4 the Court below was satisfied that the tenant has made default and in spite of notice

demanding the arrears of rent, it was not paid for more than four months. Thus, the said issue was decided against the tenant. Issue No. 5 was in respect of maintainability of the suit. It was alleged by the tenant that all the landlords have not joined the suit but the Court below has decided the said issue in favour of the landlady. Accordingly, the Court below vide impugned judgment and decree decreed the suit of the landlady-respondent.

6. I have heard Sri Radha Kant Ojha, learned Senior Advocate, assisted by Sri Satyendra Chandra Tripathi, learned Counsel for the tenant-revisionist, and Sri B.K. Srivastava, learned Senior Advocate, assisted by Sri C.K. Singh and Sri Dhiraj Srivastava, learned Counsel for the landlady-respondent.

7. Sri Radha Kant Ojha, learned Senior Counsel appearing for the tenant-revisionist, submits that the tenant has deposited the entire rent on the first date of hearing. In this case, since the issues have been framed, there cannot be the first date of hearing before framing of the issues. He submits that the Court below has illegally accepted that the first date of hearing is 15th June, 2010 when the revisionist had filed his written statement. The Court below has failed to understand that it is well settled that the first date of hearing will be the date when the Court applies its mind and it would not be prior to the date of filing of the written statement, where the issues were not framed. If the issues are framed, then that will be the date of first hearing. He further submits that in the present case written statement was filed on 15th June, 2010 and thereafter the next date fixed was 15th July, 2010. On that date, the Court below has granted permission to the revisionist-tenant to deposit the arrears of rent under Section 20(4) of the U.P. Act No. 13 of 1972. Thus, prior to 15th July, 2010 the Court below had not applied its mind, therefore, the revisionist-tenant was entitled to get benefit of Section 20(4) of the U.P. Act No. 13 of 1972. He has placed reliance on a judgment of the Supreme Court in the case of Mam Chand Pal v. Smt. Shanti Agarwal, 2002 (1) ARC 370.

8. Sri Ojha further contended that the agreement dated 16th December, 1986 was an unregistered document, therefore, the Court below has illegally placed reliance on the said agreement. He has further urged that the landlady has filed a suit under Section 21 of the U.P. Act No. 13 of 1972, therefore, it is evident that the provisions of the U.P. Act No. 13 of 1972 are applicable to the suit premises. Sri Ojha has also contended that the finding of the Court below refusing to give benefit of Section 20(4) of the U.P. Act No. 13 of 1972 on the ground that the tenant has failed to deposit the entire rent and the expenses, is erroneous and against the evidence on record.

9. Sri B.K. Srivastava, learned Senior Counsel appearing for the landlady-respondent, has submitted that the provisions of the U.P. Act No. 13 of 1972 are not applicable to the premises in dispute. The tenancy has rightly been determined by the landlady-respondent. He further submitted that in the present case the suit was filed on 27th October, 2009 and in the summons 02nd December, 2009 was fixed for written statement/hearing. The tenant had refused to accept the summons. Thus, the publication was made on 03rd February,

2010. In pursuance thereof, the tenant appeared for the first time before the Court below on 24th February, 2010 and moved an application for getting copy of the plaint and other papers. He sought adjournments on 19th March, 2010, 02nd April, 2010, 31st May, 2010 and 11th June, 2010 and he filed his written statement on 15th June, 2010. The tenant-revisionist moved an application on 15th July, 2010, being Paper No. 22-Ga(2), for passing tender to make deposit under Section 20(4) of the U.P. Act No. 13 of 1972 on which 16th July, 2010 was fixed. On 16th July, 2010 the matter was adjourned and on 21st July, 2010 the tenant-revisionist deposited a sum of Rs.1,90,000/-. From the aforesaid chronological dates, learned Senior Counsel appearing for the landlady-respondent sought to argue that the tenant-revisionist has failed to deposit the amount on the first date of hearing, which in the present case was on 15th June, 2010, when the Court had applied its mind. Therefore, the Court below has rightly rejected the claim of the tenant-revisionist to give benefit of Section 20(4) of the U.P. Act No. 13 of 1972.

10. Sri B.K. Srivastava has further submitted that in addition to above, the tenant-revisionist did not deposit the entire arrears of rent, tax, interest, court fee. According to him, the arrears of rent was Rs.2,28,000/-. The tenant has deposited only Rs.1,14,000/-. Thus, there was a shortfall of Rs.1,14,000/-. The tax was Rs.41,041/-, whereas the tenant deposited Rs.15,390/-. Under the head of interest Rs.58,995/- was due, out of which he has deposited only Rs.49,162.50. The court fee was Rs.10,996/-, out of which he had deposited Rs.5,196.50. Thus, the tenant ought to have deposited a total sum of Rs.3,39,031/- but he deposited only Rs.1,90,000/-. Therefore, there was a huge shortfall of Rs.1,55,282/-. For this reason also, he was not entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972. He further submitted that under Section 25 of the Provincial Small Cause Courts Act this Court has limited jurisdiction and if the finding is not perverse, this Court should not interfere under the revisional jurisdiction under Section 25.

11. In support of his submissions, Sri Srivastava has relied upon several decisions of the Supreme Court in Siraj Ahmad Siddiqui v. Shri Prem Nath Kapoor, AIR 1993 SC 2525; Advaita Nand v. Judge, Small Causes Court, Meerut and others, 1995 (1) ARC 563; Smt. Sudershan Devi and another v. Smt. Sushila Devi and another, 1999 (4) AWC 3484 (SC); and, Ashok Kumar and others v. Rishi Ram and others, 2002 (2) ARC 160, and of this Court in Saadat Ali v. J.S.C.C., Moradabad and others, 2006 (2) ARC 208; Commercial Auto Sales (P) Ltd. v. Auto Sales (Properties), 2011 (5) AWC 4405; Rashid v. Kailash Chand, 2012 (4) AWC 3374; Om Prakash v. Sri Anil Kumar, 2013 (1) ARC 335; Mahesh Chandra and others v. Ashwani Kumar, 2013 (2) AWC 1509; and Mela Ram (since deceased and substituted by legal heirs) v. Arun Kumar Agrawal, 2014 (1) ARC 692.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties and perused the records.

13. Before adverting to the issue whether the revisionist-tenant is entitled to the benefit of Section 20 (4) of the U.P. Act No. 13 of 1972 or not, it is necessary to examine whether the rent of the

tenanted premises was Rs.2,000/- per month, as claimed by the landlady, or Rs.1,000/-, as claimed by the tenant-revisionist. The landlady has relied upon an agreement dated 16th December, 1986, whereby the shop was let out to the revisionist-tenant at the rate of Rs.1,000/- per month. Clause-14 of the said agreement provides that in case after expiry of the eleven months the tenant does not vacate the premises and he continues in possession, in that event the rent shall be Rs.2,000/- per month. The revisionist-tenant has denied this agreement. A copy of the said agreement is on the record. The Court below has recorded a finding that this agreement bears the signature of the tenant and he did not file Handwriting Expert opinion denying his signature. Thus, I do not find any error in the finding of the Court below that there is existence of an agreement between the parties.

14. The landlady has also filed counter-foil of the rent, which has been duly proved by her witness. From the same counter-foil it was noticed by the Court below that the receipt of previous tenants and other tenants have also been issued. On the basis of the documentary evidence as well as statement of P.W.-1 Sri Rajesh Kumar Shukla, it has been established by the landlady that the rate of rent was Rs.2,000/- per month. The Court below has elaborately analysed the evidence while recording its finding on this point i.e. Issue No.1. Learned Senior Counsel appearing for the revisionist-tenant Sri Ojha has failed to point out any error in the finding of fact recorded by the Court, therefore, I find that the finding recorded by the Court below that the rent was Rs.2,000/- per month does not suffer from any illegality.

15. It is submitted by Sri Ojha that the first date of hearing in the present case shall be the date when the Court below has framed the issues. In the cases of the small cause suits, the issue about the first date of hearing is no more res integra.

16. The Supreme Court in the case of Siraj Ahmad Siddiqui (supra) has held that the first date of hearing is the date on which the Court proposes to apply its mind to determine the point in controversy between the parties to the suit and to frame the issues, if necessary. The Court held that "when time is fixed by the court for the filing of the written statement and the hearing, these dates bind the defendant, regardless of the service of the summons, and compliance with the provisions of Section 20(4) of the said Act must be judged upon the basis of the dates so fixed". In respect of Section 20 (4) of the U.P. Act No. 13 of 1972 the Court held that the date for filing of the written statement and hearing shall be the first date of hearing. The aforesaid ratio was explained by the Supreme Court in the case of Advaita Nand (supra). The Court held that the first date of hearing shall be the date when the time is fixed by the Court for filing the written statement and hearing. Same view has been taken by this Court also in the case of Chotti v. 13th Additional District and Sessions Judge, Agra and others, 1999 (2) ARC 71. This Court after considering the judgment of the Supreme Court in respect of the Small Cause Courts Act held that the first date of hearing shall be the date for appearance as well as final hearing. Applying the said principle in the present case, the tenant had filed his written statement on 15th June, 2010 and submitted his tender on 15th July, 2010, therefore, I do not find any error in the finding of the Court below that the tenant has deposited

the arrears of rent after the first date of hearing. Thus, he was not entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972.

17. As regards the submission of Sri Ojha that the tenant has deposited the entire rent and the finding of the Court below that there was a shortfall of amount is incorrect, this Court finds that the finding of the Court below that the rent is Rs.2,000/- per month has been found to be correct in the earlier part of this judgment. The tenant has deposited the rent at the rate of Rs.1,000/- per month. Thus, there is a shortfall of Rs.1,58,000/- and for this reason also, his claim for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972 has rightly been rejected by the Court below. The finding of the Court below that the tenant has made a default for more than four months, is a finding of fact. Learned Senior Counsel appearing for the revisionist-tenant could not satisfy the Court that the said finding is perverse. The Court below has noticed the fact that the statement of D.W.-1 Awadh Bihari that after receiving the notice he had sent the rent of the months of October & November, 2009 by money-order, was not correct as no receipt of the money-order was filed before the Court below. Therefore, said fact has been rightly ignored by the Court below. The landlady has filed a suit under Section 28(A) of the U.P. Act No. 13 of 1972. Section 20(2)(A) of the U.P. Act No. 13 of 1972 provides that if a tenant is in arrears for more than four months and he fails to deposit the rent in spite of the notice, then he shall be liable for eviction. For the reasons stated above, the finding of the Court below on Issue No. 4 also does not suffer from any error.

18. The revisional jurisdiction of this Court under Section 25 of the Provincial Small Cause Courts Act, 1887 is limited. The Court can interfere under this section only when the finding recorded by the Court below is totally perverse and is based on no evidence. Learned counsel for the revisionist-tenant has failed to point out any perversity in the order of the Court below, as discussed above. The findings of the Court below on various points are based on documentary as well as oral evidence. It has not been pointed out that the Court below has ignored any important documentary evidence filed by the tenant-revisionist or it has taken into consider any fact, which was not on the record.

19. After careful consideration of the facts and circumstances of the case, I am of the view that the revision lacks merit and is liable to be dismissed. It is, accordingly, dismissed.

20. Considering the facts and circumstances of the case, the tenant-revisionist is granted three months' time to vacate the premises in question on the following conditions:

(i) The revisionist shall file an undertaking within one month from today before the Judge, Small Cause Court, Kanpur Nagar that on or before the expiry of the three months he will handover peaceful possession to the landlady-respondent and shall not create any third party interest in any manner.

(ii) For the period of three months, which has been granted to him to vacate the premises, he shall pay damages at the rate of Rs.2,000/- per month for the use of accommodation.

(iii) In case of default in compliance of any of the conditions, the interim order shall stand vacated.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Transfer Application No. 519 of 2014
(U/s24 C.P.C.)

Amit Agarwal ...Petitioner
Versus
Atul Gupta ...Respondent

Counsel for the Petitioner:
Sri Shashi Nandan, Sri Prabhakar Dwivedi, Sri Anil Kumar

Counsel for the Respondent:
Sri K.R. Sirohi, Sri Pankaj Dubey

C.P.C.-Section 24-Transfer of Arbitration Appeal pending before D.J. Merrut to any other adjoining District-on ground by conduct of presiding judge-no hope of fair justice-bent upon to grant interim order in favor of Respondent-held the ground of transfer wholly vague unsubstantiated-no ground for interference-rejected.

Held: Para-30 & 39

30. If there is a deliberate attempt to scandalize a judicial Officer of subordinate Court, it is bound to shake confidence of the litigating public in the system and has to be tackled strictly. The damage is caused not only to the reputation of the concerned Judge, but, also to the fair name of judiciary. Veiled threats, abrasive behaviour, use of disrespectful language, and, at times, blatant condemnatory attacks, like the present one, are often designedly employed with a view to tame a Judge into submission to secure a desired order. The foundation of our system is based on the independence and impartiality of the men having responsibility to impart justice i.e. Judicial Officers. If their confidence, impartiality and reputation is shaken, it is bound to affect the very independence of judiciary. Any person, if allowed to make disparaging and derogatory remarks against a Judicial Officer, with impunity, is bound to result in breaking down the majesty of justice.

39. In the light of the above exposition of law, the pleadings in the case in hand have been examined. The grounds taken by applicant is vague and wholly unsubstantiated. The mere allegation is not sufficient to justify transfer unless it is also substantiated by relevant material, which is not the case in hand. No ground, therefore, justifying transfer is made out under Section 24 C.P.C.

Case Law discussed:

AIR 1960 Kerela 91; AIR 2003 AP 312; 1914 (27) MLJ 645; AIR 1990 MP 320; (1882) ILR 5 All 60; (1979) Cri.L.J. 459(SC); 1990 (1) SCC 4; AIR 2008 SC 1333; AIR 2009 SC 1374; AIR 2009 SC 1773; (1938) 2 MLJ 249; AIR 1933 Lahore 635; AIR 1975 Delhi 42; AIR 1953 Orissa 46; AIR 1996 Kerela 113; AIR 1976 P & H 321; 2007 (3) AWC 3119; AIR 1995 Karnataka 112; AIR 1981 Madas 54 or 24; AIR 1981 Madras 24; AIR 1988 Gujrat 63; AIR 2003 AP 448; AIR 2001 Culcutta 26; (1998) 7 SCC 248; 2013 (2) AWC 1546; AIR 2003 AP 312.

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

1. Heard Sri Shashi Nandan, Senior Advocate, assisted by Sri Prabhakar Dwivedi, learned counsel for the applicant, Sri K.R.Sirohi, Senior Advocate, assisted by Sri Pankaj Dubey, learned counsel for opposite party and perused the record.

2. This transfer application has been filed under Section 24 C.P.C., seeking transfer of non admitted Arbitration Appeal No. Nil of 2014 (Atul Gupta Vs. Amit Agarwal) pending in the Court of District Judge, Meerut to any other

District Judge of any nearby District making allegations against Sri Amar Singh Chauhan, District Judge, Meerut. Paras 23 to 26 of the affidavit, filed in support of transfer application contain allegation, which read as under:

"23. That at about 3.30 p.m. the appeal filed under section 37(2)(b) of Arbitration and Conciliation Act, 1996 by the respondent was taken up before the District Judge Meerut then the time was sought from the counsel for the applicant to file objection as in the said appeal the caveat of the applicant was already filed then in utter surprise the District Judge Meerut Sri Amar Singh Chauhan told to the counsel for the applicant to prepare the objection within 30 minutes so as to hear the matter at 4.00 p.m. and since it was not possible to prepare the objection towards the said appeal within 30 minutes and as such only after various request and persuasion, the District Judge Meerut fixed the next date as 03.11.2014. It is also stated that on 30/31.10.2014, the elections of District Bar Association was scheduled.

24. That as the earlier occasion also the present Presiding Officer/Sri Amar Singh Chauhan District Judge Meerut has completely ignored the arguments and objection filed by the petitioner and being prejudiced he has passed the order dated 20.12.2013. Further more the present District Judge Meerut is much interested to pass interim order in favour of respondent due to which earlier on 29.10.2014 when the case was taken up, the Presiding Officer earlier granted only 30 minutes time to prepare the objections to the appeal and only after great request and persuasion the next date has been fixed as 03.11.2014.

25. That is is also stated that since the aforesaid appeal dated 29.10.2014 filed by the respondent under section 37(2)(b) of Arbitration and Conciliation Act-1996 before the District Judge Meerut has yet not been admitted and as such no any number etc. has been given to the said appeal and due to said reason no any certified copy of the order sheet could be obtained by the petitioner.

26. That as a matter of fact now the applicant lost all his hope to get justice in the Arbitration Appeal No.Nil of 2014 (Atul Gupta Vs. Amit Agarwal) pending before Sri Amar Singh Chauhan District Judge Meerut in as much as the said Court is even not ready to consider the material brought on record and the argument advance before him on behalf of the applicant which is apparent from the aforesaid facts."

3. From the bare perusal thereof clearly shows that assertions are absolutely vague, unsubstantiated and lacks trustworthiness.

4. Learned counsel for opposite party opposed the application submitting that there is no ground for transfer the case.

5. The power of transfer of a case from one Court to another under Section 24 C.P.C. is very wide. However, while exercising such power, the Court itself must look into the ground taken for justifying transfer and should consider the matter within permissible limitations so as not to exercise power on mere asking by applicant.

6. The plaintiff, as obiter litis or dominus litis, has a right to chose any forum, the law allows him. It is a substantive right but of course subject to

control by statute like Sections 22 to 23 of C.P.C.

7. The mere factum of expenses or difficulties should not justify transfer of a case from one Court to another, unless Court finds that expenses and difficulties in the Court, where it is pending, is so great as to lead injustice to applicant, or, the suit has been filed in a particular Court for the purpose of working injustice. (P. Sadayandi Nadar and Ors. vs. Venugopala Chetty and Ors., AIR 1960 Kerela 91; Satyasri Fertilisers vs. E.I.D. Parry (India) Ltd., AIR 2003 AP 312; and, The Hindustan Assurance and Mutual Benefit Society Ltd. vs. Rail Mulraj and Ors., 1914 (27) MLJ 645).

8. It is always necessary to the Court to find out from the allegations made in transfer application, whether any reasonable ground is made out for transfer of the case. (Smt. Sudha Sharma vs. Ram Naresh Jaiswal, AIR 1990 MP 320)

9. Transfer of cases from one Court to another is a serious matter particularly when transfer is sought by making allegations against Presiding Officer. It sometimes indirectly cause doubt on the integrity and competence of Presiding Officer of the Court from whom the matter is transferred. In cases where ground for transfer is likelihood of bias of Presiding Officer, it is onerous duty of Court to see, whether such ground has been substantiated with reasonable certainty or not. It should not be done without a proper and sufficient cause. In Tula Ram Vs. Harjiwan Das (1882) ILR 5 All 60 it was held that the Court has to consider whether applicant has made out a case to justify it, closing doors of the Court in which suit is brought to plaintiff, and leaving him to seek his remedy in another jurisdiction.

10. In Meneka Sanjay Gandhi Vs. Rani Jekhmalani, (1979) Cri.L.J. 458 (SC) the Court said:

Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. (emphasis added)

11. Again in the context of power of Supreme Court with regard to transfer of cases under Section 25 C.P.C. in Subramaniam Swamy Vs. Ramakrishna Hegde, 1990(1) SCC 4, the Court said:

"The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice. It is true that if more than one court has jurisdiction under the Code to try the suit, the plaintiff as dominus litis has a right to choose the Court and the defendant cannot demand that the suit be tried in any particular court convenient to him. The mere convenience of the parties or any one of them may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Cases are not unknown where a party

seeking justice chooses a forum most inconvenient to the adversary with a view to depriving that party of a fair trial. The Parliament has therefore, invested this Court with the discretion to transfer the case from one Court to another if that is considered expedient to meet the ends of justice. Words of wide amplitude- for the ends of justice- have been advisedly used to leave the matter to the discretion of the apex court as it is not possible to conceive of all situations requiring or justifying the exercise of power. But the paramount consideration must be to see that justice according to law is done; if for achieving that objective the transfer of the case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner's plea for the transfer of the case must be tested on this touchstone. (emphasis supplied)

12. The age of wife and distance between place of residence and place where matrimonial proceedings were filed, as well as absence of people who would escort her, are some of the grounds considered reasonable justification, for directing transfer of case, to a place more suitable to her. In Kulwinder Kaur @ Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and Ors., AIR 2008 SC 1333 the Court said that order of transfer must reflect application of mind and the circumstances which weighed the Court in taking action or transfer of case from one Court to another.

13. In Kulwinder Kaur @ Kulwinder Gurcharan Singh (supra), the Court said:

"14. Although the discretionary power of transfer of cases cannot be imprisoned within a strait-jacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; interest of justice demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a fair trial in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

14. In the matrimonial matters the convenience of wife and in particular that she has no one in her family to escort her to undertake a long journey has been held to be good ground for transfer of case as is also evident from Apex Court's decision in Anjali Ashok Sadhwani vs. Ashok Kishinchand Sadhwani, AIR 2009 SC

1374 and Fatema vs. Jafri Syed Husain @ Syed Parvez Jafferi, AIR 2009 SC 1773.

15. One of the common ground which generally is taken is of distrust in Presiding Officer of the Court. Here the Courts have to be very careful while passing the orders for transfer of case.

16. Where two persons filed suit against each other in different Courts on the same cause of action, it was held desirable that suits should be tried by one and the same Court. (G.M. Rajulu Vs. Rao Bahadur M. Govindan Nair, (1938) 2 MLJ 249; Mt. Zabida Khatoon vs. Mohammad Hayat Khan and Ors., AIR 1933 Lahore 635; and Manjari Sen vs. Nirupam Sen, AIR 1975 Delhi 42).

17. Similarly, if two suits in different Courts are filed raising common questions of fact and law, and the decisions are independent, it is desirable that they should be tried by same judge so as to avoid multiplicity of litigation and conflict in decision. (Purna Chandra Mahanty and Ors. vs. Samanta Radhaprasana Das, AIR 1953 Orissa 46).

18. If the fact of suits sought to be tried together are intertwined with cause of action in each suit, transfer of suit may not be refused provided the parties and subject matter of suits are one and the same. (Rosamma Joseph vs. P.C. Sebastian, AIR 1996 Kerala 113)

19. An order of transfer can also be made to prevent abuse of process of Court as said in State Bank of India vs. Sakow Industries Faridabad (Pvt.) Ltd., New Delhi, AIR 1976 P & H 321.

20. In Amardeep and others Vs. District Judge, Lalitpur and others, 2007(3) AWC 3119 the applicant put forward his claim on the basis of a Will before Civil Judge (Senior Division). The respondent filed a suit before Civil Judge (Junior Division) for cancellation of Will. It was held that claims of both parties were based on execution and non-execution of alleged Will, therefore, it would be in the interest of justice that both cases must be decided in the same Court. The expression "same Court" does not mean same Judge, rather it means the same Civil Court and as such the order of transferring proceeding from the Court of Civil Judge (Junior Division) to the Court of Civil Judge (Senior Division) was held proper.

21. The mere observations of Presiding Officer of the Court while hearing a case does not mean that he has made up his mind in a particular manner so as to justify an allegation of bias against such Presiding Officer and this would not justify transfer of case from one Court to another. A Judge is not expected to remain silent during course of hearing and not to express any opinion. A sphinx like attitude is not expected from a Presiding Officer. There has to be an effective discussion and effective attempt to conciliate or to clarify the misunderstanding or to get the issues clear, so that the issues can be settled or a just and proper decision can be arrived at. If in that process the Presiding Officer would make a statement it should not be misunderstood as an expression of decision. (Smt. Sangeetha S. Chugh vs. Ram Narayan V. and others, AIR 1995 Karnataka 112 and Official Assignee, Madras vs. Inspector-General of Registration, Bangalore and Anr., AIR 1981 Madras 54 or 24)

22. In one matter certain observations were made by a Judge in an

earlier case. When a subsequent matter came up before him this was sought to be a ground for transfer but declined by the Court in G. Lakshmi Ammal vs. Elumalai Chettiar and Ors, AIR 1981 Madras 24.

23. The allegations of bias of Presiding Officer, if made the basis for transfer of case, before exercising power under Section 24 C.P.C., the Court must be satisfied that the apprehension of bias or prejudice is bona fide and reasonable. The expression of apprehension, must be proved proved/ substantiated by circumstances and material placed by such applicant before the Court. It cannot be taken as granted that mere allegation would be sufficient to justify transfer. In Smt. Sudha Sharma (supra) the Court observed that it is the duty of learned counsel to draft the application and made allegations with utmost care and caution. Hon'ble B.M. Lal, J. (as His Lordship then was), said:

"9. .....a foremost duty casts upon the counsel concerned while drafting and making allegations in the transfer petition against the Judge concerned with utmost care and caution, particularly in making wild allegations against the Presiding Judge. But, it appears that now-a-days it has become common feature to make allegations against the Court Presiding Judge. The counsel should realise that they are also officers of the Court. Introducing fanciful and imaginary allegations as grounds for transfer and harbouring apprehension such grounds that fair and impartial justice would not be done should always be deprecated.

10. Nonetheless, it is also important for all those who are engaged in the task of administering justice to remember that it is incumbent on them to create and maintain such confidence and atmosphere by giving every litigant an assurance by their judicial conduct that fair and impartial justice will be imparted. It is necessary to create such a confidence in the mind of the litigants so that their faith may not be shaken in Courts of law."

24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Culcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary

prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice.

27. The justice delivery system knows no caste, religion, creed, colour etc. It is a system following principle of black and white, i.e., truth and false. Whatever is unfair, that is identified and given its due treatment and whatever is good is retained. Whoever suffers injustice is attempted to be given justice and that is called dispensation of justice. The prevailing system of dispensation of justice in Country, presently, has different tiers. At the ground level, the Courts are commonly known as "Subordinate Judiciary" and they form basis of administration of justice. Sometimes it is said that subordinate judiciary forms very backbone of administration of justice. Though there are various other kinds of adjudicatory forums, like, Nyaya Panchayats, Village Courts and then various kinds of Tribunals etc. but firstly they are not considered to be the regular Courts for adjudication of disputes, and, secondly the kind and degree of faith, people have, in regular established Courts, is yet to be developed in other forums. In common parlance, the regular Courts, known for appropriate adjudication of disputes basically constitute subordinate judiciary, namely, the District Court; the High Courts and the Apex Court.

28. The hierarchy gives appellate and supervisory powers in various ways. The administrative control of subordinate judiciary has been conferred upon High Court, which is the highest Court at provincial level and is under constitutional obligation to see effective functioning of subordinate Courts by virtue of power conferred by Article 235 read with 227 of the Constitution. No such similar power like Article 235, in respect to High Court is exercisable by Apex Court, though it is the highest Court of land. Its judgments are binding on all. Every order and judgment of any Court or Tribunal etc., in the Country, is subject to judicial review by Apex Court. This is the power on judicial side.

29. In Ajay Kumar Pandey, Advocate, In Re:, (1998) 7 SCC 248, the Court said that superior Courts, i.e. High Court as also the Apex Court is bound to protect the Judges of subordinate Courts from being subjected to scurrilous and indecent attacks, which scandalise or have the tendency to scandalise, or lower or have the tendency to lower the authority of any court as also all such actions which interfere or tend to interfere with the due course of any judicial proceedings or obstruct or tend to obstruct the administration of justice in any other manner. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the courts to enable them to discharge their judicial functions without fear.

30. If there is a deliberate attempt to scandalize a judicial Officer of subordinate Court, it is bound to shake confidence of the litigating public in the system and has to be tackled strictly. The damage is caused not only to the reputation of the concerned Judge, but, also to the fair name of judiciary. Veiled threats, abrasive behaviour, use of

disrespectful language, and, at times, blatant condemnatory attacks, like the present one, are often designedly employed with a view to tame a Judge into submission to secure a desired order. The foundation of our system is based on the independence and impartiality of the men having responsibility to impart justice i.e. Judicial Officers. If their confidence, impartiality and reputation is shaken, it is bound to affect the very independence of judiciary. Any person, if allowed to make disparaging and derogatory remarks against a Judicial Officer, with impunity, is bound to result in breaking down the majesty of justice.

31. I cannot ignore the fact that much cherished judicial independence needs protection not only from over zealous executive or power hungry legislature but also from those who constitute, and, are integral part of the system. Here is a case where an Advocate has drafted a petition since the litigants, namely petitioners, hereat does not appear to understand the legal complexity much. The Advocate forgetting the higher status conferred upon him, making him an Officer of the Court, has chosen to malign Judicial Officer of the Subordinate Court, based on caste consideration as also the nature of his appointment over which he himself has no control. In any case, that, by itself, has no connection with his performance and function as Presiding Officer of the Court.

32. An Advocate's duty is as important as that of a Judge. He has a large responsibility towards society. He is expected to act with utmost sincerity and respect. In all professional functions, an Advocate should be diligent and his conduct should also be diligent. He should conform to the requirements of law. He plays a vital role in preservation of society and justice system. He is under an obligation to uphold the rule of law. He must ensure that the public justice system is enabled to function at its full potential. He, who practices law, is not merely a lawyer, but acts as moral agent. This character, he cannot shake off, by any other character on any professional character. He derives from the belief that he shares sentiment of all mankind. This influence of his morality is one of his possession, which, like all his possession, he is bound to use for moral ends. Members of the Bar, like Judges, are the officers of the Court. Advocacy is a respectable noble profession on the principles. An Advocate owes duty not only to his client, but to the Court, to the society and, not the least, to his profession.

33. I do not intend to lay down any code of conduct for the class of the peoples known as "Advocates", but certainly I have no hesitation in observing that no Advocate has nay business to condemn a Judge merely on the basis of his caste, creed or religion or for any other similar trait or attribute. If there is something lacking on the part of a Judicial Officer touching his integrity, Advocates, being Officers of the Court, may not remain a silent spectator, but should come forward, raising their voice in appropriate manner before the proper authority, but there cannot be a licence to any member of Bar to raise his finger over the competency and integrity etc. of a Judicial Officer casually or negligently or on other irrelevant grounds. Here the competence and capacity of the concerned Judicial Officer has been attempted to be maligned commenting upon his integrity and honesty. It deserves to be condemned in the strongest words. No one can justify it in any manner. Thinking of intrusion of such thought itself sounds alert. It is a siren of something which is not only

very serious, but imminent. A concept or an idea which should not have cropped up in anybody's mind, connected with the system of justice, if has cropped up, deserves to be nipped at earliest, else, it may spreads its tentacles to cover others and that would be a dooms day for the very institution.

34. This Court also made similar observations in Smt. Munni Devi and others Vs. State of U.P. and others, 2013(2) AWC 1546 and in para 10, said:

"10. Be that as it may, so far as the present case is concerned, suffice is to mention that the Constitution makers have imposed constitutional obligation upon the High Court to exercise control over subordinate judiciary. This control is both ways. No aberration shall be allowed to enter the Subordinate Judiciary so that its purity is maintained. Simultaneously Subordinate Judiciary can not be allowed to be attacked or threatened to work under outside pressure of anyone, whether individual or a group, so as to form a threat to objective and independent functioning of Subordinate Judiciary."

35. Sometimes transfer of suit has also been justified on the ground of convenience to the parties or witnesses etc. but in such cases the paramount factor which should be considered is the convenience of both parties. An exception, however, to some extent, has been made in matrimonial cases where convenience of wife has been given a dominating factor than husband, particularly when she has none to escort her or of quite young age or where she has financial constrained etc.

36. In Satyasri Fertilisers vs. E.I.D. Parry (India) Ltd., AIR 2003 AP 312 the transfer of case was declined which was sought only on the ground that the applicant is a diabetic patient.

37. The observations made above are only illustrative to show that Court, though has wide power of transfer under Section 24 C.P.C. but it must be exercised for valid reasons and not in whimsical and arbitrary manner.

38. Now, this has to be seen, whether any valid reason exist in the case justifying transfer.

39. In the light of the above exposition of law, the pleadings in the case in hand have been examined. The grounds taken by applicant is vague and wholly unsubstantiated. The mere allegation is not sufficient to justify transfer unless it is also substantiated by relevant material, which is not the case in hand. No ground, therefore, justifying transfer is made out under Section 24 C.P.C.

40. The transfer application, therefore, fails and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2014

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

Special Appeal Defective No. 880 of 2014

Dakshinanchal Vidyut Vitran Nigam Ltd. Agra & Ors. Appellants

Versus

Aziz Ullah Opp. Party

Counsel for the Appellants:
Sri Baleshwar Chaturvedi

Counsel for the Respondents:
Sri Shekhar Srivastava

Constitution of India, Art.-226- Termination-on ground of forged high school certificate-without holding enquiry as envisaged under Rule 7-in responce show cause notice after reply-termination order on 14.05.12 retirement on 31.07.12-when no disciplinary proceeding pending-Learned Single Judge rightly interfered-appeal dismissed.

Held: Para-12
In view of the above, learned counsel for the appellants has failed to point out any rule as to whether disciplinary proceedings could be initiated against the delinquent employee after retirement. The order of termination was passed on 14.5.2012 merely on a show cause notice and two months thereafter i.e. on 31.7.2012 he retired from the service after attaining the age of superannuation. It appears that on the date of superannuation there was no enquiry pending or contemplated against the respondent. The procedure as provided under rule 7 of the Rules, 1999 was not followed and straight way the services of the respondent were terminated. The Writ Court has rightly quashed the termination order dated 14.5.2012 directing the appellants to pay post retirement benefits to the respondents.

Case Law discussed:
AIR 2004 SC 1469.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the appellants on Civil Misc. Delay Condonation Application No. 344900 of 2014 and perused the affidavit filed in support of this application. Cause shown for delay in filing the special appeal is sufficient. Delay is condoned and the Application for Condonation of Delay is allowed.

2. Heard learned counsel for the appellants on merit of the appeal also and perused the record.

3. The appellants have filed this intra court appeal challenging the validity and correctness of the impugned judgment and order dated 24.7.2014 passed by the Writ Court in Civil Misc. Writ Petition No. 30714 of 2012, Aziz Ullah versus Dakshinanchal Vidyut Vitran Nigam Limited and others whereby the aforesaid writ petition was allowed.

4. Brief facts giving rise to the instant appeal are that the respondent was initially appointed in 1971 as Kuli on Class-IV post with Dakshinanchal Vidyut Vitaran Nigam Limited, Agra, and thereafter on qualifying examination, he was promoted on Class-III post as Technical Grade-II (TG-2). The minimum qualification for promotion is that the incumbent apart from qualifying the examination must be a High School. On 6.8.2008, appellant no.3, Executive Engineer, Electricity Distribution Division, Dakshinanchal Vidyut Vitaran Nigam Limited, District Banda issued a show cause notice directing him to produce his High School certificate. Pursuant thereto, he approached appellant no.3 along with original mark sheet as well as certificates, However, appellant no. 3 did not examine the original mark sheet and again a notice was issued on 20.10.2008 calling upon the respondent to submit his mark sheet. Similar notice was issued on 5.9.2009. In response thereto, the respondent submitted a detailed reply on 3.10.2009 and due to the pendency of the enquiry, he was not given the benefit of "Sixth Pay Commission" hence he preferred Civil Misc. Writ Petition No. 75588 of 2010 praying that the pending enquiry be concluded and finalized which was dismissed vide judgment and order dated 4.1.2011. The judgment and order dated 4.1.2011 reads thus:-

"Heard learned counsel for the parties.

It appears that some enquiry is going on against the petitioner with regard to authenticity of papers submitted by the petitioner and in pursuance thereto the petitioner has been asked to submit certain document vide orders dated 7.4.2010 and 23.9.2010.

It is stated by the petitioner that he has supplied all the documents but no decision is being taken.

If that is the case, the respondents may complete the said enquiry within six weeks from the date of submission of a certified copy of this order, provided the petitioner cooperates.

Subject to the aforesaid, this petition is dismissed. "

5. In compliance of the aforesaid judgment and order dated 4.1.2011 of the High Court, inquiry was conducted against the respondent in which it was found by the Enquiry Officer that the original documents submitted by the respondent-employee do not tally with High School Certificate of the respondent. He was found guilty in the enquiry and vide order dated 14.5.2012 his services were terminated.

6. Aggrieved by the order dated 14.5.2014 the respondent preferred Civil Misc. Writ Petition No. 30714 of 2012, Aziz Ullah versus Dakshinanchal Vidyut Vitaran Nigam Limited and others, which was allowed vide judgment and and order dated 24.7.2014, hence the instant appeal.

7. The impugned judgment and order of the Writ Court is assailed on the ground that the Writ Court has failed to consider that the respondent does not fulfill eligibility criteria for the post of T.G.-2 and has been promoted on the basis of forged certificate, hence he has caused financial loss to the Nigam; that the enquiry was held of which proper notice and opportunity was given to the respondent to put his defence and thereafter on the basis of proper scrutiny the order dated 14.5.2012 terminating his services was passed, hence in view of the law laid down by the Apex Court in the case of R. Vishwanath Pillai versus State of Kerala, AIR 2004, SC-1469, issuance of fresh notice under the rules was not necessary as the genuineness of the certificate has already been examined by the Enquiry Officer.

8. It is also submitted that the Writ Court has quashed the order dated 14.5.2012 on the ground that no disciplinary enquiry as provided under rule 7 was initiated and no charge sheet was served upon the delinquent employee, hence it has committed an error in law by not giving a liberty to the appellants to hold departmental enquiry in respect of the allegation of misconduct and take necessary action thereafter in accordance with law and as such the impugned judgment and order dated 24.7.2014 passed by the Writ Court is liable to be set aside.

9. Per contra, learned counsel for the respondent submits that only a show cause notice was issued to the respondent to which he submitted his reply and thereafter the enquiry was conducted behind his back; that opportunity was afforded to the respondent to put his defence and the authority has imposed major penalty which is not permissible under the 1999 Rules; that the Writ Court has rightly allowed the writ petition, hence no interference is required by this

Court. The Writ Court appreciated the arguments and the case laws thus:-

"Enquiry commences with the issue of charge-sheet as held in the case of Union of India vs. K.V. Jankiraman (AIR 1991 SC 2010), Union of India vs. Anil Kumar Sarkar, 2013 (4) SCC 161 and State of Andhra Pradesh vs. C.H. Gandhi, 2013 (5) SCC 111; Framing of the charge-sheet is the first step taken for holding enquiry into the allegations on the decision taken to initiate disciplinary proceedings. Service of charge-sheet on the Government servant follows decision to initiate disciplinary proceedings and it does not precede and coincide with that decision (vide Delhi Development Authority vs. H.C. Khurana 1993 (3) SCC 196). Once the enquiry was not initiated or contemplated or pending before the retirement, the same cannot be continued after retirement, unless there is a rule to that effect. The learned counsel for the respondents has failed to show any rule or circular as to whether disciplinary proceedings could be initiated after retirement and under what circumstances.

A Division Bench of this Court in Smt. Parmi Maurya vs. State of U.P. and others [(2014) 2 UPLBEC 1060] held that the provisions of Rule 7 is mandatory and it is obligatory for the employer to frame charge/conduct disciplinary enquiry by applying the principles of natural justice and prove that certificates were fabricated, without adopting such procedure order passed terminating the delinquent employee is illegal. Paragraph 7 is as follows:-

"7. On these facts, the learned Single Judge, in our view, was clearly in error in arrogating to the Court the task of determining whether the certificate and mark sheets submitted by the appellant were genuine or otherwise. This, with respect, was no part of the jurisdiction of the writ Court under Article 226 of the Constitution. When a substantive charge of misconduct is levied against an employee of the State, the misconduct has to be proved in the course of a disciplinary inquiry. This is not one of those cases where a departmental inquiry was dispensed with or that the ground for dispensing with such an inquiry was made out. The U.P. Government Servants (Discipline and Appeal) Rules, 1999 lays down a detailed procedure in Rule 7 for imposing a major penalty. Admittedly, no procedure of that kind was followed since no disciplinary inquiry was convened or held."

In Smt. Munni Devi vs. State of U.P. and others [(2014) 2 UPLBEC 974] it was held that once an enquiry is initiated under Rule 7 it is mandated that the enquiry officer would conduct oral enquiry. It was held that oral enquiry would be mandatory before imposing major punishment. Paragraph 9 is as follows:-

"9. The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008(3) ESC 1667 and the Court clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment. This Court has said in paras 10 and 11 of the judgement as under:

"10. ---------- Non holding of oral inquiry in such a case is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing

Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subhash Chandra Sharma Vs. U.P. Cooperative Spinning Mills & others, 2001 (2) UPLBEC 1475 and Laturi Singh Vs. U.P. Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

The Supreme Court in Dev Prakash Tewari vs. U.P. Cooperative Institutional Service Board [LAWS (SC)-2014-6-14] was considering the case that as to whether disciplinary proceedings after retirement of an employee could be continued in absence of any rule to that effect. In paragraph 6 and 7 held as follows:-

"6. While dealing with the above case, the earlier decision in Bhagirathi Jena's case (supra) was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

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

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

The Full Bench judgment in case of State of U.P. v. Jai Singh Dixit and others, 1974 A.L.J. 862, the words 'inquiry' and 'contemplated' was considered.

"34. A formal departmental inquiry is invariably preceded by an informal preliminary inquiry which itself can be in two phases. There can be a summary investigation to find out if the allegations made against the Government servant have any substance. Such investigation or inquiry is followed by a detailed preliminary or fact finding inquiry whereafter final decision is taken whether to initiate disciplinary proceeding. The first preliminary inquiry may be in the shape of secret inquiry and the other, of an open inquiry. In the alternative, when complaints containing serious allegations against a Government servant are received, the authority may peruse the records to satisfy itself if a more detailed preliminary inquiry be made.

37. Departmental inquiry is contemplated when on objective consideration of the material the appointing authority considers the case as one which would lead to a departmental, inquiry, irrespective of whether any preliminary inquiry, summary or detailed, has or has not been made or if made, is not complete. There can, therefore, be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding i.e., even before the framing of the charge and the communication thereof to the Government servant."

The Supreme Court in Mathura Prasad v. Union of India and others, (2007) 1 SCC (L&S) 292), held that when an employee is sought to be deprived of his livelihood for alleged misconduct, the procedure laid down under the rules are required to be strictly complied with:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub-rules are required to be strictly followed: It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in the manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact, for sufficient reasons may attract the principles of judicial review."

The Division Bench of this Court in Dr. Subhash Chandra Gupta v. State of U.P. and others, [2012(1) ESC 279 (All)(DB)] while dealing with the provision of rule 7 and 9 of the Rules, held that the procedure for imposition of major penalty is mandatory and where the statute provides to do a thing in a particular manner that thing has to be done in that manner. Paras 15 and 16 is as follows:-

"15. It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgment of the Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541.

16.A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667 (All)(DB), held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceedings including the order of punishment has observed as under:

"10.....Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P. Cooperative Spinning Mills and others, 2001(2) UPLBEC 1475 and Laturi Singh v. U.P. Public Service Trinunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

10. After hearing learned counsel for the parties and on perusal of the impugned judgment of the Writ Court and the record it appears that the respondent had been working since 1971 and had passed his high school examination in 1990. Thereafter he appeared for the written examination for promotion to the next higher post (TG-II). On the basis of some complaint that the respondent's high school certificates were forged, an enquiry was initiated. At the best

it could be said that it was a fact finding enquiry and on the basis of a fact finding enquiry the services of the respondent were terminated without following the procedure as prescribed under rule 7 of the Rules. The impugned order of termination was passed on 14.5.2012 and he had since superannuated on 31.7.2012.

11. The Writ Court after considering the following admitted facts has recorded the findings in the impugned judgment dated 24.7.2014 thus:-

"The facts are not in dispute between the parties. It is admitted that no charge-sheet was issued to the petitioner as required under rule 7 for initiating disciplinary proceedings for imposing major penalty. The enquiry had not commenced before the petitioner superannuated. The learned counsel for the respondents failed to point out any rule as to whether disciplinary proceedings could be initiated against the petitioner after retirement. Even otherwise, after retirement the petitioner cannot be imposed the penalty of termination as the employer/employee relationship no longer exists. There is no allegation of causing loss to the corporation that is to be recovered, hence no enquiry can be initiated against the petitioner after retirement. The impugned order of termination was passed on 14.5.2012 merely on a show cause notice and two months thereafter i.e. on 31.7.2012 the petitioner retired on attaining the age of superannuation thus on the date of superannuation there was no enquiry pending or contemplated, and admittedly the procedure as contemplated under rule 7 of the Rules of 1999 was not followed and straightway the petitioner's services was terminated.

For the facts and circumstances stated herein above, the impugned order dated 14.5.2012 is quashed. The petitioner shall be entitled to post retirement benefits. The writ petition is allowed with all consequential benefits. Legal expenses assessed as Rs. 15,000/-."

12. In view of the above, learned counsel for the appellants has failed to point out any rule as to whether disciplinary proceedings could be initiated against the delinquent employee after retirement. The order of termination was passed on 14.5.2012 merely on a show cause notice and two months thereafter i.e. on 31.7.2012 he retired from the service after attaining the age of superannuation. It appears that on the date of superannuation there was no enquiry pending or contemplated against the respondent. The procedure as provided under rule 7 of the Rules, 1999 was not followed and straight way the services of the respondent were terminated. The Writ Court has rightly quashed the termination order dated 14.5.2012 directing the appellants to pay post retirement benefits to the respondents.

13. For the reasons stated above, the special appeal is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.11.2014

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Alongwith
Service Single No. 3140 of 2005 along with Service Single No. 2160 of 2005, Service Single No. 597 of 2011 and Service Single No. 7995 of 2011

Devi Prasad Katiyar & Ors. ...Petitioners
Versus
U.P. Sahkari Gram Vikas Bank Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri P.K. Srivastava

Counsel for the Respondents
Sri Himanshu Shekhar Awasthi, Sri Balram Yadav, Sri N.N. Jaiswal

Constitution of India, Art.-226-Petitioner working as Assistant Accountant-claimed parity of pay scale as typist-accepted by Industrial Tribunal equated with pay scale of typist-against that special appeal as well as SLP dismissed-after successful working period of 10 years and 15 years-benefit of first promotional pay given on 01.03.95 and 01.03.2000 respectively-after 24 years super time scale on 15.05.2001 by subsequent order 16.03.2005 all previous order quashed without affording any opportunity in garb of G.O. 03.09.01-whether justified ? held-'no'-unless G.O. Provides otherwise-can not be implemented retrospectively-quashed-consequential benefit given.

Held: Para-21 & 26
21. There is also no clause in the aforesaid Government Order dated 03.09.2001 that this amendment shall apply retrospectively. If any Government Order is silent about its operation, then it has to be treated as prospective and it cannot be applied retrospectively. Admittedly, the petitioners were granted time scales prior to 03.09.2001, therefore, the said Government Order dated 30.09.2001 is not applicable to the employees who have been granted scales prior to it.

26. For the aforesaid reasons, I am of the view that the promotional pay scale granted to the petitioners cannot be termed as promotion. The Government Order dated 03.09.2001 is the amendment and not a clarification and it is to be implemented prospectively. There has been no mistake or misinterpretation of the Government Orders while granting time scale to the petitioners. As no opportunity was granted to the petitioners before passing of the order dated 16.03.2005, therefore, it is liable to be set aside.

Case Law discussed:
(2012) 8 Supreme Court Cases 417; 2014 (1) LBESR 561 (SC); 2007 (1) LBESR 19 (SC):2006 (11) SCC 492; 2003 SCC (L& S) 951; 1994 LAB I.C. 2493.

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the petitioners and learned counsel appearing for the respondents.

2. By means of these aforementioned writ petitions, the order dated 16.03.2005 has been challenged, by which the pay-scale of the petitioners has been reduced and they have been put in lower scale of pay.

3. The brief facts of the case are that petitioners were appointed on the post of Assistant Accountant in the then pay scale of Rs.100-180. Along with the petitioners, certain persons were appointed on the post of Typist in the same pay-scale of Rs.100-180 and they were also equally placed with the petitioners. The pay-scale of the Typist was revised to the pay-scale of Rs.120-220, which was subsequently revised to Rs.150-260. The Assistant Accountants raised an industrial dispute by means of Case Nos.37 of 1997 and 01 of 1987 and by means of an award dated 09.05.1978, the pay-scale of the Assistant Accountants was equated w.e.f. 01.04.1971 and the same was accepted. The said award was challenged before Hon'ble the Apex Court, but the appeal was dismissed on 18.01.1984. Another award dated 12.12.1988 was challenged, against which, the appeal was also dismissed by Hon'ble the Supreme Court of India on 24.10.1989. Although the

petitioners were designated as Accountants but their pay-scales remained the same as admissible to the Assistant Accountants and the alleged promotions, so given, became infructuous. The petitioners are subsequently placed in the higher pay-scale on completion of 10 years and 16 of service. The petitioners were given first promotional pay-scale of Rs.5000-8000 w.e.f. 01.03.1995 and the second promotional pay-scale of Rs.8000-13500 was sanctioned w.e.f. 01.03.2000. A person can be said to have been promoted when there is enhancement in the pay-scale but in the present case, there was no enhancement in the pay-scale. On 09.04.2001, the Managing Director of the Bank issued an executive order to the effect that the employees, who have rendered 24 years of service, shall be given super time scale and the authorities issued order on 15.05.2001, by which the petitioners were given the time scale of Rs.8000-275-13500 w.e.f. 01.03.2000. Subsequently the Managing Director issued order dated 23.01.2002 and cancelled the order dated 15.05.2001 and constituted the Committee. The order dated 23.01.2002 was passed without affording any opportunity of hearing to the petitioners. During this period, the Typists also continued on the pay-scale of Rs.8000-13500. By order dated 16.03.2005, the pay-scale of the petitioners was reduced and the orders dated 15.05.2001 to 15.01.2002 as well as order dated 29.01.2002 were cancelled. The reduction of pay of the petitioners has caused financial loss to them, which is arbitrary and violative of provisions of the Constitution. Therefore the said order, by which the reduction in the pay-scale has been done, is liable to be set aside.

4. In the counter affidavit, the respondents have taken plea that the order was passed in pursuance of the directions contained in the Government Order dated 03.09.2001, therefore, there is no illegality. It has also been mentioned in the counter affidavit that because the petitioners were given one promotion, therefore, they were not entitled for two time scales. All the petitioners were given promotion to the post of Branch Accountant/ Senior Clerk during the period from 1976 to 1986. Therefore, in view of the provisions contained in sub-para-2 (Ka) of the Government Order dated 03.09.2001, no other benefits were admissible to such employees.

5. Learned counsel for the petitioners has submitted that as the Government Order dated 03.09.2001 is not retrospective, therefore, it has to be interpreted as prospective. It has also been submitted that petitioners were given scale because they had completed 24 years of service. It has also been submitted that while reducing the pay-scale, no opportunity was afforded to the petitioners. It has also been submitted that grant of scale to the petitioners was not by way of mistake but it was in compliance of the Government Orders.

6. In support of his submission learned counsel for the petitioners has relied upon the case Chandi Prasad Uniyal and others vs. State of Uttarakhand and others reported in (2012) 8 Supreme Court Cases 417, in which the Hon'ble Apex Court in paras-11, 12, 13 and 14 has held as under.

"11. We may in this respect refer to the judgment of a two-Judge Bench of this Court in Col. B.J. Akkara case where this Court after referring to Shyam Babu Verma case, Sahib Ram case (supra) and few other decisions held as follows:

"Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

12. Later, a three-Judge Bench in Syed Abdul Qadir case supra) after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows:

"Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

(emphasis added)"

We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is

often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment".

7. Learned counsel for the petitioners has further relied upon the case Kusheswar Nath Pandey vs. State of Bihar & others reported in 2014 (1) LBESR 561 (SC), in which the Hon'ble Apex Court in paras-8, 9, 10, 11 and 12 has held as under:-

"8. Mr. Rai, learned Senior Counsel for the appellant points out that there was no fraud or misrepresentation on the part of the appellant. The appellant was given a time bound promotion by the concerned Department. If at all the examination was required to be passed, he has passed it subsequently in 2007 much before the cancellation orders were issued in 2009. Mr. Rai relied upon two judgments of this Court in case of Bihar State Electricity Board and Anr. vs. Bijay Bhadur and Anr. reported in (2000) 10 SCC 99 and Purushottam Lal Das & Ors. vs. State of Bihar & Ors. reported in 2007 (1) LBESR 19 (SC): (2006) 11 SCC 492 wherein it has been held that recovery can be permitted only in such cases where the employee concerned is guilty of producing forged certificate for the appointment or got the benefit due to misrepresentation.

9. The learned counsel for the State of Bhiar submitted that under the relevant rules passing of this examination was necessary. He referred us to the counter affidavit of the respondent No. 1 wherein a plea has been taken that under the particular Government Circular dated 26.12.1985 the amounts in excess are permitted to be recovered. He relied upon Clause (j) of the Government Circular dated 1st April, 1980 to the same effect.

10. Mrs. Jain, learned Additional Solicitor General appearing for the Accountant General drew out attention to another judgment of this Court in Chandi Prasad Uniyal & Ors. vs. State of Uttarakhan & Ors. reported in 2012 (3) LBESR 692 (SC): JT 2012 (7) SC 460: (2012) 8 SCC 417, and particularly paragraph 14 thereof which states that there could be situation where both the payer and the payee could be at fault and where mistake is mutual then in that case such amounts could be recovered.

11. In our view, the facts of the present case are clearly covered under the two judgments referred to and relied upon by Mr. Rai. The appellant was not at all in any way at fault. It was a time bound promotion which was given to him and

some eleven years thereafter, the Authorities of the Bihar Government woke up and according to them the time bound promotion was wrongly given and then the relevant rules are being relied upon and that too after appellant had passed the required examination.

12. In our view, this approach was totally unjustified. The Learned Single Jude was right in the order that he has passed. There was no reason for the Division Bench to interfere. The appeal is therefore allowed. The judgment of the Division Bench is set aside. The writ petition filed by the appellant will stand decreed as granted by the Learned Single Judge. The parties will bear their own costs".

8. Learned counsel for the petitioners has also relied upon the case Chandra Singh vs. State of Rajasthan reported in 2003 SCC (L & S) 951, in which the Hon'ble Apex Court has held as under:-

"..... It is fairly well settled that the legality or otherwise of an order passed by a statutory authority must be judged on the face thereof as the reasons contained therein cannot be supplemented by an affidavit (See Mohinder Singh Gill vs. Chief Election Commr.). It may be true that mentioning of a wrong provision or omission to mention the correct provision would not invalidate an order so long as the power exists under any provision of law, as was submitted by Mr. Rao. But the said principles cannot be applied in the instant case as the said provisions operate in two different fields requiring compliance with different prerequisite".

9. Learned counsel for the respondents has submitted that as per the Government Order dated 02.12.2000, only two time scales were payable if there has been no promotion. It has also been submitted that the previous Government Order was misinterpreted, therefore, the subsequent Government Order is like a clarification. It has also been submitted that because as per rules, two pay-scales could be granted if there has been no promotion, but in the present case, the petitioners have been granted promotion in view of the award.

10. Learned counsel for the respondents has further submitted that as per the existing Government Orders, which have been adopted by the respondents, the petitioners were entitled either for one promotion and one time scale or in case there has been no promotion then two time scales. He has further submitted that the time scales granted between 15.05.2001 to 15.01.2002 and 29.01.2002 were third time scale, for which, they were not entitled.

11. The whole controversy took birth by the Government Order dated 03.09.2001, by which the previous Government Orders were amended. It is not disputed that the respondents have adopted in-toto the Government Orders issued by Finance Department of Government of U.P. Para-2 (Ka) of the said Government Order dated 03.09.2001 has been relied upon by the respondents, which provides that if an employee has not got two promotions/ next pay-scale till the completion of 24 years of service on 01.03.2000, whichever is later, the second promotion/ next pay-scale could be granted. The respondents, who had adopted the Government Orders of the Finance Department, had issued the order

dated 03.10.2001 in accordance with the said Government Order dated 03.09.2001. Accordingly, following the Government Order as well as the order of the Managing Director, the order dated 16.03.2005 was passed, by which the orders issued in between 15.05.2001 to 15.01.2002 as well as order dated 29.01.2002 were set aside and it was also directed that if the employees have drawn excess salary then it should be adjusted from their dues or the future salary.

12. The main question for consideration is whether the petitioners have been promoted as claimed by the respondents or they have been deemed to have been promoted in compliance of the award dated 09.05.1978.

13. For deciding this controversy, the reference to the award of Case No.37 of 1977 dated 09.05.1978 is relevant. The Industrial Tribunal (II) U.P. has held as under:-

"The decision becomes even erroneous in its retrospective effect from 01.04.1971, as if workmen appointed as junior typists in the junior grade were automatically treated as appointed in the higher grade of senior typists. The decision becomes also suspiciously motivated in starting the chain of promotion of a group with the advancement in grade of only 13 typists without assigning reasons. There is no way of reversing what has been done, administratively the balance can be restored only by similar promotion 65 of the workmen concerned, barring Sl.No.53, who were employed with the Bank concerned prior to 14.07.1971 which is the date of appointment of the last promoted typists, to next higher grade of branch accountants/ senior clerk/ senior typists, and making it effective retrospectively from 01.04.1971, as in the case of the promoted typists.

Accordingly, my award is as follows:-

Workmen concerned from Sl.No.1 to 52 and from Sl.No.54 to 66, who were employed with the bank concerned prior to 14.07.1971 shall be placed in the next higher grade of Branch Accountants/ Senior Clerks/ Senior Typists, alternatively mentioned in Ext. E-4 as Shakha Ankik/ Lekha Lipik/ Praver Tankak with retrospective effect from 01.04.1971. The scale applicable to these workmen will, of course, be Rs.280-450 ex-post facto as given in column 4 against Sl.No.8 of the order of the Registrar, Cooperative Societies, U.P. Dated 25th March, 1974. The workmen concerned at Sl. No.53, Smt. Vijya Srivastava, having joined the Bank on 11.12.1972 will be entitled to such promotion in her turn only and is not covered by the above".

14. For the said award, the reference was to the extent that whether non revision of pay equivalent to Typists is justified or not. In that award, the question or dispute regarding promotion was not involved but the main dispute involved was that the pay-scale of Junior Clerk/ Assistant Branch Accountants was lower than the pay-scale of the Typists. Learned Tribunal after considering all aspects of the matter has restored the balance administratively and has directed that the employees, who were employed with the Bank prior to 14.07.1971 which is the date of appointment of a last promoted Typists, the Branch Accountants/ Senior Clerks shall be placed in the next higher grade with retrospective effect from 01.04.1971.

15. Admittedly, the said award was challenged before Hon'ble the Supreme Court by way of Civil Appeal No.1956 of 1981, by which the appeal has been dismissed.

16. Perusal of the aforesaid order of the Industrial Tribunal reveals that it was not a promotion given to the petitioners but their pay-scales were equated with a last promoted Typists. There is vide difference between a promotion and a promotional pay-scale. In the promotion, the scale of pay is enhanced as well as the promotee employee is also burdened with higher duties and responsibilities. But in the promotional pay-scale, the scale is revised but the duties remain the same.

17. In view of the above, I do not find any substance in the submission of learned counsel for the respondents that the petitioners shall be deemed to have been promoted inconsonence of the award dated 09.05.1978. By the award dated 09.05.1978, the petitioners have not been promoted but they have been granted promotional pay-scale equivalent to the last promoted Typist as on 14.07.1971. Therefore, it cannot be said that the said revision of pay-scale is covered by the term "promotion".

18. From the aforesaid discussion, I have come to the conclusion that the scale granted to the petitioners in compliance of the award dated 09.05.1978 does not come within the definition of promotion. Therefore, the scales granted by the order dated 15.05.2001 to 15.01.2002 and 29.01.2002 cannot be said to be the third time-scale.

19. It is also not disputed that while passing the order dated 16.03.2005, any opportunity of hearing was not granted to the petitioners. In Bhagwan Shukla vs. Union of India and others reported in 1994 LAB I. C. 2493 the Hon'ble Apex Court in paras-2 and 3 has held as under:-

"2. The controversy in this appeal lies in a very narrow compass. The appellant who had joined the Railways as a Trains Clerk w.e.f. 18.12.1955 was promoted as Guard, Grade-C w.e.f. 18.12.1970 by an order dated 27.10.1970. The basic pay of the appellant was fixed at Rs.190/- p.m. w.e.f. 18.12.1970 in a running pay-scale. By an order dated 25th July, 1991, the pay-scale of the appellant, was sought to be refixed and during the refixation his basic pay was reduced to Rs.181/- p.m. From Rs.190/- p.m. w.e.f. 18.12.1970. The appellant questioned the order reducing his basic pay with retrospective effect from 18.12.1970 before the Central Administrative Tribunal, Patna Bench. The justification furnished by the respondents for reducing the basic pay was that the same had been 'wrongly' fixed initially and that the position had continued due to "administrative lapses" for about twenty years, when it was decided to rectify the mistake. The petition filed by the appellant was dismissed by the Tribunal on 17.09.1993.

3. We have heard learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs.190/- p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs.181/- p.m. from Rs.190/- p.m. in 1991 retrospectively w.e.f. 18.12.1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice

before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play inaction warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.07.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this, appeal and set aside the order of the Central administrative Tribunal dated 17.09.1993 as well as the order (memorandum) impugned before the Tribunal dated 25.07.1991 reducing the basic pay of the appellant from Rs.190/- to Rs.181/- p.m. w.e.f. 18.12.1970".

20. In the aforesaid matter, the Hon'ble Apex Court has set aside the reduction of pay because there was flagrant violation of principles of natural justice and no opportunity of hearing was afforded. In the present case also admittedly no opportunity of hearing has been given to the petitioners while withdrawing the previous orders. Therefore, the impugned order dated 16.03.2005 suffers from illegality.

21. As pointed out earlier, the whole of the controversy arises due to the Government Order dated 03.09.2001 by the Department of Finance, Government of U.P. The perusal of the aforesaid Government Order reveals that it was an amendment regarding the previous Government Orders. In the said Government Order, it has nowhere been mentioned that if the pay scale of any of the employee has been sanctioned or revised in accordance with the previous Government Orders, then the same shall stand cancelled. There is also no clause in the aforesaid Government Order dated 03.09.2001 that this amendment shall apply retrospectively. If any Government Order is silent about its operation, then it has to be treated as prospective and it cannot be applied retrospectively. Admittedly, the petitioners were granted time scales prior to 03.09.2001, therefore, the said Government Order dated 30.09.2001 is not applicable to the employees who have been granted scales prior to it.

22. Learned counsel for the respondents has tried to convince this Court that petitioners were granted higher pay scales under mistake and misinterpretation of the Government Order, therefore, they are not entitled for the higher pay scales. The pay scales of the petitioners have been reduced by the order dated 16.03.2005 and in the order dated 16.03.2005, there is no mention to the effect that petitioners have been granted higher pay scales due to mistake or due to misinterpretation or wrong interpretation of the previous Government Orders.

23. In the present case, it has been argued that the higher pay scales were granted due to mistake but the same does not find in the order dated 16.03.2005. In view of the law laid down by the Hon'ble Apex Court in the case Chandra Singh vs.

State of Rajsthan (supra) the said mistake cannot be supplemented by an affidavit.

24. In Chandi Prasad Uniyal and others vs. State of Uttarakhand and others (supra), the Hon'ble Apex Court considering the fact that as now the appellants have either retired or are on the verge of it, therefore, the recovery of amount what has been paid an excess is not justified.

25. In the present case also the petitioners have retired and even after retirement their retiral dues with regard to the pay scales granted from 01.03.2000, have been withheld.

26. For the aforesaid reasons, I am of the view that the promotional pay scale granted to the petitioners cannot be termed as promotion. The Government Order dated 03.09.2001 is the amendment and not a clarification and it is to be implemented prospectively. There has been no mistake or misinterpretation of the Government Orders while granting time scale to the petitioners. As no opportunity was granted to the petitioners before passing of the order dated 16.03.2005, therefore, it is liable to be set aside.

27. I am also of the view that the order dated 23.01.2002 passed by the Managing Director of the respondent-bank, by which the sanction orders issued in between 15.05.2001 to 15.01.2002 have been set aside, cannot be sustained.

28. For the facts and circumstances mentioned above, all the aforementioned writ petitions are allowed with the following directions:-

(i) The orders dated 23.01.2002 and 16.03.2005, passed by the Managing Director, U.P. Cooperative Village Development Bank Ltd., are set aside.

(ii) The respondents are directed to pay the arrears of salary of the petitioners along with annual increments and arrears thereof treating the orders dated 23.01.2002 and 16.03.2005 as nonest, within six months from today.

(iii) The respondents are also directed to release the amount of gratuity and other retiral dues, within six months from today, failing which, they shall be liable for interest at the rate of 6% per annum from today to the date of actual payment, (if actual payment is made beyond six months from today).

29. Accordingly, the orders dated 30.07.2010 and 06.04.2010 and 09.11.2009 regarding the petitioner Raj Kumar Mehrotra of Writ Petition No.597 (S/S) of 2011, are also quashed.

30. It is made clear that the above directions shall be applicable in those matter of the petitioners who have been granted higher pay-scales prior to the date of issuance of Government Order dated 03.09.2001.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.11.2014

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

U/S 482/378/407 No. 4153 of 2013
along with
W.P. No. 5058 of 2013

Arjun Singh @ Natthu Singh Yadav
...Applicant
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Jai Pal Singh

Counsel for the Respondents
Govt. Advocate, Sri Srees Kumar Srivastava

Cr.P.C. Section 482-Quashing of complaint case-offence u/s 323, 452, 504, 506 IPC-on plea of alibi, malafidy-held-in absence of public document-plea of alibi can not be accepted-except on Trail-none of the contingencies contained of guidelines of Apex Court in Rajiv Thapper case-no interference called for-keeping in view of Art. 20 & 21-with certain direction-application disposed of.

Held: Para-15
So far as question of absence of petitioner Amar Singh Yadav and Shailendra Yadav is concerned, though they filed documents in respect of alibi. These documents are not public documents and do not fall within the category of step one as mentioned in Rajiv Thapar's case (Supra). Unless the plea of alibi is established by cogent evidence, no inference could be drawn on the basis of those documents to this effect that present proceedings are abuse of process of court.

Case Law discussed:
(2013) 3 SCC 330; 2009 (3) 322 (SC)

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

1. Both these petitions under section 482 Code of Criminal Procedure (for short "Cr.P.C.') have been filed for quashing the proceedings of Complaint Case No. 858 of 2013 Santosh Pandey Vs. Rajneesh Yadav and others and also the order dated 29.6.2013 passed by A.M.M.-III, Unnao, whereby petitioners Rajneesh Yadav alias Bajrangi , Sonu Yadav, Amar Singh Yadav and Arjun singh alias Natthu Singh Yadav have been summoned to face trial under sections 323, 452, 504,506 IPC

2. Since both these petitions are arising out of same proceedings, they are being disposed of by a common order.

3. Brief facts for deciding these petitions are that a criminal complaint has been filed by opposite party no. 2, Smt. Santosh Pandey against the petitioners having Case No. 858 of 2013 alleging therein that petitioner Rajneesh Yadav alias Bajrangi in (Criminal Misc. Case No. 5058 of 2013 (U/s 482 Cr.P.C.), the son of petitioner Amar Singh Yadav is Gunda. On 11.4.2013 at about 5.30 p.m., some altercation took place in between Rajneesh Yadav alias Bajrangi and Rishi Pandey, the son of opposite party no. 2. Rajneesh Yadav alias Bajrangi extended threats to life to Rishi Pandey. A complaint of it was made to the police. The police came, but Rajneesh Yadav alias Bajrnagi escaped. On 12.4.2013 at about 6.45 p.m. Rishi Pandey was standing on his door. The petitioners came alongwith sticks on their hands, abused Rishi Pandey. Rajneesh Yadav alias Bajrangi asked what you have achieved by making complaint with the police. Rishi Pandey entered into his house. All the four petitioners also entered into the house and beat Rishi Pandey with sticks. When opposite party no. 2 came to rescue her son, she was also beaten by kicks and fists and also by stick. Rishi Pandey was badly injured and became unconscious. The incident was witnessed by Pradeep Awasthi, Ashok Tiwari and several other persons, who came on spot after hearing cries. Rishi Pandey was medically examined on 15.4.2013. When police did not take action, complaint was filed.

4. In Criminal Misc. Case No. 4153 of 2013 (U/s 482 Cr.P.C.) relating to Arjun Singh alias Natthu Singh Yadav a Co-ordinate Bench of this Court vide

order dated 19.9.2013 called for report from the Circle Officer In-charge of police station Gangaghat, District Unnao with regard to presence of petitioner Arjun Singh @ Natthu Singh Yadav on the date of occurrence. The police submitted report that Arjun Singh @ Natthu Singh Yadav was on official duty at District Mahrajganj on 12.4.2013 though he was not posted there.

5. In both these cases under section 482 Cr.P.C the ground to challenge the summoning order and continuance of the proceedings is that petitioners Arjun Singh alias Natthu Singh Yadav, Amar Singh Yadav and Shailendra Yadav alias Sonu were at their work places at the time of alleged incident i.e. 12.4.2013.

6. The second ground of attack is that daughter of opposite party no. 2 was kidnapped by one Deepu Yadav, who was closely related to the petitioners' family and, therefore, the petitioners have been falsely implicated in the complaint case. The case of kidnapping the daughter of opposite party no. 2 is still pending against Deepu Yadav.

7. The petitioners have filed certain documents to demonstrate that they were on their work places at the time of alleged incident. The plea which has been taken for quashing the proceedings with regard to absence of petitioners Arjun Singh alias Natthu Singh Yadav, Amar Singh Yadav and Sonu Yadav is based on plea of alibi, which is plea of defence and ought to have been proved by the accused persons by adducing cogent evidence.

8. So far as second ground of attack is concerned which relates to kidnapping of daughter of opposite party no. 2 by Deepu Yadav is concerned, it is not in dispute.

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

10. It has been contended by the learned counsel for the petitioners that police did not found any material against accused petitioner Amar Singh Yadav and his son Sonu Yadav, who have been falsely implicated in this case and in that regard extract of police report dated 27.9.2005 has been brought on record as Annexure no. 7 to this petition.

11. After considering the aforesaid facts, it cannot be said that after lapse of more than 8 years, a false case can be cooked up against the petitioners. The facts which are based on some evidence, ought to have been appreciated by the trial court and not by this Court while exercising jurisdiction under section 482 Cr.P.C

12. The Apex Court in Rajiv Thapar Vs. Madan Lal Kapoor (2013) 3 SCC 330 had an occasion to rule what documents on material could be considered while exercising jurisdiction under section 482 Cr.P.C. to quash the proceedings after rejecting and discarding the accusations levelled by the complaint, without the necessity of recording any evidence. The Apex Court in paras 29,30 and 31 observed as follows:

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing

of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5.If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially

when it is clear that the same would not conclude in the conviction of the accused.

13. In light of the aforesaid ratio propounded and directions issued this case has to be judged on touch stone of the aforesaid guidelines issued in Rajiv Thapar's case (Supra). So far as the report submitted by the police in this court is concerned, no doubt it mentions that petitioner Arjun Singh alias Natthu Singh Yadav was present on 12.4.2013 at Mahrajganj on his official duty.

14. As report has been submitted in pursuance of the order passed by the Co-ordinate Bench of this Court, it cannot be ignored by this Court. But at the same time, the report which was submitted by the C.O., Unnao is based on statement and record which ought to have been tested with cross examination during trial.

15. So far as question of absence of petitioner Amar Singh Yadav and Shailendra Yadav is concerned, though they filed documents in respect of alibi. These documents are not public documents and do not fall within the category of step one as mentioned in Rajiv Thapar's case (Supra). Unless the plea of alibi is established by cogent evidence, no inference could be drawn on the basis of those documents to this effect that present proceedings are abuse of process of court.

16. So far as petitioner Rajneesh Yadav alias Bajrangi is concerned, he has not pleaded his absence. So far as the evidence of medical examination causing injury to Rishi Pandey is concerned, it is on record coupled with evidence of injured. Therefore, at this stage, it cannot be said that present proceedings are abuse of process of court unless plea of alibi taken by the petitioners is established by cogent evidence.

17. As Co-ordinate Bench of this Court has asked for report in respect of petitioner Arjun Singh alias Natthu Singh Yadav, this Court is of the view that in these circumstances, if this petition is finally disposed of with following directions, it would serve the ends of justice and the principle of fair trial enshrined under Articles 20 and 21 of the Constitution of India would be advised.

Directions

1.That in case the petitioners appear before trial court within four weeks from today and move application for bail, the same shall be considered and disposed of expeditiously in accordance with law and also keeping in view the directions contained in the judgment delivered by the Apex court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.). If bail application of the petitioners is not disposed of on same day by the court concerned , the petitioners shall be released on interim bail till the final order passed thereon.

18. For four weeks or till the date of surrender, whichever is earlier, no coercive steps shall be taken against the petitioners.

2.That after appearing in the trial court, the petitioners shall move appropriate application before trial court. The trial court shall proceed to decide the plea of defence in the form of alibi before further proceeding with trial. The petitioners may be allowed to adduce evidence in respect of plea taken by them

as plea of alibi and the trial court after giving opportunity to adduce evidence to the prosecution will decide the plea of alibi taken by the petitioners Arjun Singh alias Natthu Singh Yadav, Amar Singh Yadav, Shailendra Yadav and Sonu Yadav. In case the plea of alibi fails then the trial shall proceed against them in accordance with law.

3.That trial court will decide the defence plea of alibi taken by the aforesaid petitioners within four months from the date of communication of this order.

19. Interim order granted by this court in both these petitions stand vacated.

20. In view of the above, these two petition are disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.11.2014

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Service Single No. 6488 of 2014

C/M Vikas Madhyamik Vidyalay Tindola
...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri G.C. Verma, Sri Arvind Kumar Mishra

Counsel for the Respondents
C.S.C., Sri Rahul Shukla

U.P. Basic Education Act 1972-Section 3(2), 14, 15(5)-Ban imposed on appointment of class IV employee by G.O. 06.01.2011-in recognized institutions-held-arbitrary,discriminatory exploitative in nature-taking away provision of appointment contrary to statutory provisions-and engagement outsourcing nothing but a system of supply of work force through contractor-already quashed being violative of Art. 14 and 16 of Constitution-same being adopted in Basic Education also-order impugned quashed-with follow up direction.

Held: Para-8 & 13

8. Thus, considering the scheme relating to appointment on Class IV posts in a Junior High School, I am of the opinion that the reasoning given in the judgment rendered in the case of C/M Lal Babu Baijal Memorial Inter college (supra), would also apply to the institutions governed by the Uttar Pradesh Basic Education Act, 1972. The Management is under mandate of law to fill vacancies within two months of its occurrence and in accordance with the procedure prescribed under the Rules, which does not permit employing services of Class IV employees by 'outsourcing'.

13. In view of above discussion, this writ petition is allowed. The order dated 27.9.2014 passed by the District Basic Education Officer, Barabanki is quashed. The Management shall be free to advertise the vacancies. However, it is provided that the Management shall specifically mention in the advertisement that the selection would be held subject to decision of this Court in special appeal No.1023 of 2012 pending against the judgment of this Court dated 21.3.2012. The District Basic Education Officer, Barabanki is further directed to act in accordance with law and nominate a specialist in case any such request is made by the Management, after following the procedure prescribed for advertising the vacancies. These, directions are without prejudice to the power of the District Basic Education Officer to examine the validity of the selection at the stage of grant of approval under Rule 15 (5).

Case Law discussed:
W.P. No. 11760 of 2011

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. Heard counsel for the petitioner, learned Additional Chief Standing Counsel Sri Devendra Upadhyay on behalf of respondent no.1 and Sri Rahul Shukla on behalf of respondent no.2. With their consent, this writ petition is being disposed of finally, as the respondents state that they have already obtained instructions in the matter and do not wish to file formal counter affidavit.

2. The petitioner is the Committee of Management of a recognised Junior High School receiving grant-in-aid from the State Government. The provisions of the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 and the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 (hereinafter referred to as '1984 Rules') are applicable to it. The petitioner is aggrieved by order dated 27.9.2014 passed by District Basic Education Officer, Barabanki-respondent no.2, whereby, he had refused to accord permission to the Management to advertise two vacant Class IV posts. The reasoning given in the order is that under Government Order dated 6.1.2011 there is a ban on appointment against Class IV posts. These posts, according to respondent no.2, would automatically come to an end after the retirement of incumbents working against these posts.

3. Learned counsel for the petitioner contended that the Government Order dated 6.1.2011 has been struck down as illegal, arbitrary and violative of Articles 14 and 16 of the Constitution vide judgment dated 21.3.2012 rendered in a bunch of writ petitions, leading case being Writ Petition No.11760 of 2011 C/M Lal Babu Baijal Memorial Inter college and another Vs. State of U.P. and others. It is submitted that against the said judgment, the State preferred Special Appeal (Defective) No.1023 of 2012, which is still pending and no interim order has been passed therein. Thus, according to him, the judgment dated 21.3.2012 in the case of C/M Lal Babu Baijal Memorial Inter college (supra) is binding on respondent no.2. It is further contended that in fact District Basic Education Officer was not authorised to withhold approval for advertising the posts, as no such power is conferred in his favour under Rules 1984, which governs the appointment on Class IV posts.

4. On the other hand, learned Additional Chief Standing Counsel and Sri Rahul Shukla appearing on behalf of the respondents contended that judgment in the case of C/M Lal Babu Baijal Memorial Inter college (supra) is applicable only in relation to the Intermediate Colleges and would not apply to the colleges governed by the Uttar Pradesh Basic Education Act, 1972. However, it is not disputed by them that the judgment rendered therein dated 21.3.2012 has not been stayed/set aside by any court. Sri Rahul Shukla further states that, infact, no permission was required by the Management from District Basic Education Officer, Barabanki for issuing the advertisement and they were only required to intimate the vacancies.

5. I have considered the submissions made by learned counsel for the parties and perused the record.

6. The Government Order dated 6.1.2011 places prohibition on appointment against Class IV posts in various educational institutions, receiving grant-in-aid.. It is provided that such posts in future shall be filled by 'outsourcing'. The Court, in the case of C/M Lal Babu Baijal Memorial Inter college (supra), examined the provisions of the Intermediate Education Act, 1921, the Regulations framed thereunder, and thereafter, came to the conclusion that Class IV posts are integral part of any educational institution and introduction of the scheme of appointment by outsourcing, is violative of Articles 14 and 16 of the Constitution of India. Relevant findings, in this regard, in the said judgment are as under:-

"61. Moreover, in the context of what it has permitted to be done by educational institutions, there also I am of the view that this order is palpably arbitrary, discriminatory, exploitative in nature and, therefore, suffers the voice of contravening constitution provision under Article 14 and 16. It is not a case where requirement of Class-IV staffs in educational institutions has been done away. The existing sanctioned posts of Class-IV have not been abolished. It is nobody's case that henceforth educational institutions shall not require any Class-IV staffs in its functioning. What it suggests and try to endeavour is that the educational institutions shall not employ Class-IV staff directly on their own so as to function and discharge the duties of Class-IV staff under the administrative and otherwise control of institution, but, the work supposed to be performed by Class-IV staff would be required to be done through the staff made available by an outside agency and by that agency's staffs. In true sense though it is termed "outsourcing", but it does not satisfy the requirement of term "outsourcing", as discussed above.

62. The normal functions of Class-IV staff in a secondary educational institution is ringing of bell, opening of class rooms, cleaning, providing stationary etc. from office to class teachers, taking files and other documents like examination copies etc. from one place to other and similar other menial job. All this work of Class-IV has to be performed by a person present in educational institution itself. It cannot be performed sitting outside the educational institution. Therefore, what the G.O. suggests is that for performing menial job of Class-IV, the workers shall be made available by a third party, by whatever name it may be called, may be a labour supplier, may be a Service Provider or else but in effect it amounts to introduction of a "middleman" for arranging Class-IV employees to perform the job of Class-IV in educational institutions for which the institutions shall pay the service charges which would include wages/salary of such person (Class-IV) and also the service charges of third party. This is nothing but a kind of contract labour arrangement.

63. Introduction of a middlemen where the requirement is perennial, continuous and permanent has been deprecated time and again and many statutes enacted with an objective to exclude middleman have been held to be in public interest. This is really strange that herein the State Government intend to introduce a system of middleman when it is not already there. Learned Additional Advocate General also could not explain that besides wages/salary of the person who would be available to educational institution for performing the job of

Class-IV employee, the service charges to third party would also be paid and in these circumstances how it can be an arrangement for saving the cost. To this query he could not reply at all.

64. In my view, therefore, though the concept of making available the staff to perform Class-IV job by outside agency though termed "Outsourcing" but it is nothing but a system of supply of work force through a contractor or a person who satisfy the term "contractor" for all purposes though termed as "outsourcing". Hence the system as contemplated in Para 2 of impugned G.O. is evidently exploitative, arbitrary, unreasonable, irrational, illogical, hence violative of Article 14 and 16 of the Constitution.

7. Under the Rules 1984 framed under sub-section (1) of Section 19 of the Uttar Pradesh Basic Education Act, 1972, a wholesome procedure is prescribed for filling up Class IV posts. Rule 3(2) prescribes that if any vacancy occurs during an academic session, it shall be filled within two months from the date of occurrence of vacancy. Rule 13 provides that no vacancy shall be filled, except after its advertisement in at least one newspaper having adequate circulation in the locality and after intimation of such vacancy to the District Basic Education Officer. Under Rule 14, Selection Committee comprises of Manager, Headmaster of the recognised school in which the appointment is to be made and a specialist nominated by the District Basic Education Officer. The Selection Committee, after interviewing the candidates, forwards the list to the Management, who is enjoined with the duty to place the same before the District Basic Education Officer within one week. Thereafter, the District Basic Education Officer is conferred with power to accord approval to the recommendation made by the Selection Committee. Rule 15 (5) (iii) further states that in case the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee. Under Rule 16, the Management is authorised to issue appointment letter on receipt of approval or on expiry of period of one month provided under Clause (iii) of the Sub-Rule 5 of Rule 15.

8. Thus, considering the scheme relating to appointment on Class IV posts in a Junior High School, I am of the opinion that the reasoning given in the judgment rendered in the case of C/M Lal Babu Baijal Memorial Inter college (supra), would also apply to the institutions governed by the Uttar Pradesh Basic Education Act, 1972. The Management is under mandate of law to fill vacancies within two months of its occurrence and in accordance with the procedure prescribed under the Rules, which does not permit employing services of Class IV employees by 'outsourcing'.

9. As regards the contention of the respondents that special appeal is pending against the aforesaid judgment, it is admitted to both the parties that there is no stay in the special appeal and thus, the said judgment still holds the field and would be binding on the authorities. This is, however, subject to any contrary decision in special appeal, which is stated to be pending.

10. In view of the above, I am of the opinion that District Basic Education

Officer, Barabanki was not justified in restraining the Management from advertising the posts.

11. There is another aspect of the matter. Under Rule 13, the Management is only required to intimate the vacancy to District Basic Education Officer and its approval for advertising the same in the newspaper was not required. The grant of approval to the selection made on Class IV post by the Management comes at a later stage under sub rule (5) of Rule 15. In view of this, there was no justification on part of District Basic Education Officer to pass the impugned order, refusing to accord approval for advertising the post. Sri Rahul Shukla appearing on behalf of Basic Education Officer also supported the submission made by the petitioner, in this regard.

12. Learned counsel for the petitioner submitted that there is apprehension that District Basic Education Officer, who has passed the impugned order, would not nominate the specialist in the Selection Committee and would thereby, scuttle the selection process. The aforesaid apprehension of the petitioner can be taken care of by providing that District Basic Education Officer shall nominate the specialist in case request is made to him by the petitioner, after due advertisement of the vacancies. However, after the Selection Committee makes recommendation, the District Basic Education Officer shall be empowered to take decision on its own merits, regarding grant of approval to such appointment.

13. In view of above discussion, this writ petition is allowed. The order dated 27.9.2014 passed by the District Basic Education Officer, Barabanki is quashed. The Management shall be free to advertise the vacancies. However, it is provided that the Management shall specifically mention in the advertisement that the selection would be held subject to decision of this Court in special appeal No.1023 of 2012 pending against the judgment of this Court dated 21.3.2012. The District Basic Education Officer, Barabanki is further directed to act in accordance with law and nominate a specialist in case any such request is made by the Management, after following the procedure prescribed for advertising the vacancies. These, directions are without prejudice to the power of the District Basic Education Officer to examine the validity of the selection at the stage of grant of approval under Rule 15 (5).

14. Subject to aforesaid observations/directions, writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 36130 of 2014

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

Counsel for the Petitioner:
Sri A.C. Tiwari

Counsel for the Respondents
C.S.C., Sri Jagdish Pathak, Sri Anil Tiwari

(A) U.P. Municipalities Act 1916, read with U.P. Municipal Board Servants (Inquiry Punishment and Termination of

Services) Rules 1960-Rule 74-Suspension of permanent servant of non centralized services-challenged being without jurisdiction-as appointing authority is municipality and not the President-held-municipality means an institution of Self government as per provisions of Section 77-competent authority is the president and not the Board-can not be said without jurisdiction.

Held: Para-16 & 17

16. A bare perusal of the provisions of the Act and 1960 Rules, the petitioner a clerk, is permanent superior staff within the meaning of Section 74 belonging to the non-centralized service, can be appointed and dismissed by the President, Section 77 read with 1960 Rules the authority competent to pass an order of suspension is the President not the Board, Section 77-B read with rule 8(i) refers to 'competent authority' and not the Board, thus, the competent authority for punishment of superior staff is the President.

17. Thus, it is evident from the provisions of the Act and the rules, stated herein above, the competent authority to place the petitioner under suspension is the President and not the Board.

(B) U.P. Municipal Board Servants (Inquiry Punishment & Termination of Service) Rules 1960-Rule-4 (iv) and Rule 8 (1)-Suspension-whether punishment or not?-explained-when during contemplated enquiry suspension order passed is no punishment-under Rule 4(iv) suspension-held-punishment.

Held: Para-26 & 27

26. In the 1960 Rules, suspension is provided both as a punishment, as well as, pending enquiry or contemplation of enquiry (rule 4(4)(iv) and rule 8(1) of 1960 Rules). Suspension pending enquiry or contemplation of enquiry provided under rule 8(1), is not a punishment. It is not the case of the respondents that suspension by way of punishment was imposed upon the petitioner.

27. The petitioner was placed under suspension on 29.05.2014, the moment the President accepted the proposal of Executive Officer to place the petitioner under suspension pending enquiry. The order dated 02.06.2014 is merely communication of the suspension order pending euquiry, it is not an order of punishment.

Case Law discussed:

2001 (3) UPLBEC 2057; 1995 AIR 600; 1998 (1) AWC 282; [1999 (2) E.S.C. 1009 (S.C.)]; AIR (SC) 1959-0-1342; (1968) 2 SCR 577; AIR 1952 SC 362; AIR 1961 SC 276; AIR 1964 SC 787; (2006) 2 SCC 269; (1970) 1 SCC 362; AIR 1996 SC 1313; (1969) 3 SCC 28; (2006) 2 SCC 269; (1960) 1 SCR 476; AIR 1961 SC 276; AIR 1964 SC 787; (1970) 1 SCC 362; AIR 1968 SC 800.

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

1. The petitioner is class III employee working as a clerk with the Nagar Palika Parishad, Bijnor, service conditions are governed under the Uttar Pradesh Municipalities Act 1916 read with U.P. Municipal Board Servants (Inquiry, Punishment and Termination of Services) Rules, 1960 (hereinafter referred to as '1960 Rules')

2. By means of this writ petition, the petitioner has challenged the complaint dated 27.05.2014 made by the respondent no. 3/4, Executive Officer, Nagar Palika Parishad, Bijnor, approval dated 29.05.2014 granted by the President, Nagar Palika Parishad and the consequential order of suspension dated 02.06.2014 passed by respondent no. 3.

3. Submission of learned counsel for the petitioner is that the suspension order is a malafide exercise of power in order to punish the petitioner, is wholly without jurisdiction as the appointing authority of

the petitioner is the Municipality and not the President, the order is without application of mind as the President has merely countersigned the complaint lodged by the Executive Officer against the petitioner. The order nowhere states that enquiry is either pending or contemplated, and finally the allegations, if accepted as correct, are not serious to warrant the imposition of major penalty.

4. Learned counsel for the petitioner in support of his submission has relied upon the following judgments:

Smt. Meera Tiwari Versus The Chief Medical Officer and others1, Om Prakash Gupta Versus The State of U.P.2, Ram Dular Tripathi Versus State of U.P. and other3 and Capt. M. Paul Anthony Versus Bharat Gold Mines Ltd. and another4.

5. Per contra, Sri Anil Tiwari, learned counsel for the Parishad would submit that the order dated 02.06.2014 is not the order of suspension, but merely communication of the order, suspension was passed vide order dated 29.05.2014 by the President. The allegations against the petitioner, are very serious, as is reflected in the complaint made by the Executive Officer recommending the suspension and initiation of disciplinary proceedings which was duly approved and endorsed by the President on 29.05.2014.

6. It is alleged that the petitioner, being a clerk, had disobeyed the order of the Commissioner and has been indulging in illegal activities which was not in the interest of the Nagar Palika Parishad. Petitioner has removed important records from the Nagar Palika, as well as, the service book is in the custody of the petitioner, questions was raised in the Assembly regarding Nagar Palika, Bijnor, but proper reply could not be sent to the Assembly as the files and records were in the custody of the petitioner which was not handed over to the Nagar Palika, on 20.06.2014 the Executive Officer was threatened, by some persons, at the behest of the petitioner to withdraw the suspension order, respondent no. 3 lodged First Information Report on 20.06.2014, thus, the order of suspension pending enquiry is legal and lawful order.

7. Learned counsel for the respondents in support of his submission has relied upon the following judgments:

Management Hotel Imperial, New Delhi Vs Hotel Workers Union5, Balvantray Ratilal Patel Versus State of Maharash6, Shrimati Hira Devi and others Versus District Board, Shahjahanpur through the Collector7, T. Cajee Versus U. Jormanik Siem and another8, R.P. Kapur Versus Union of India and another9, L.K. Verma Vs. HMT Ltd. and another10 and V.P. Gidroniya Vs. State of Madhya Pradesh and another11.

Rival submissions fall for consideration.

8. The submission of learned counsel for the petitioner is two fold, firstly that the order of suspension is without jurisdiction as the competent authority mentioned under the 1960 Rules is the Municipality and not the President. Secondly, it is argued that the suspension order dated 02.06.2014 does not refer to any allegation nor does it state that enquiry is either contemplated or pending, by merely endorsing the complaint of the

executive officer would not mean that the order of suspension was passed by the President, finally there is allegation of malafides against the respondent no. 4, the Executive Officer.

9. It is further contended that the petitioner is a clerk, a class III employee belonging to the non centralized service of the Nagar Palika Parishad. Section 74 of the U.P. Municipalities Act 1916 (hereinafter referred to as 'Act') provides, servants on posts in non-centralised service, carrying scale of pay equal to or higher than the lowest scale of pay admissible to the clerical staff, shall be appointed and may be dismissed, removed or otherwise punished, or the services of a probationer may be terminated, by the President, subject to the right of appeal. Proviso to section 74 refers the certain posts including Tax and Sectional Head Clerks whose appointments on such posts shall be subject to the approval of the Municipality. Section 74 is as follows:-

"74. Appointment and dismissal of permanent superior staff.-Subject to the provision of Sections 57 to 73, servants on posts in the non-centralised services, carrying scale of pay equal to or higher than the lowest scale of pay admissible to the clerical staff, shall be appointed and may be dismissed, removed or otherwise punished, or the services of a probationer may be, terminated, by the President subject to the right of appeal, except in the case of the termination of the service of a probationer, to such authority within such time and in such manner as may be prescribed.

Provided that appointment on the posts of Tax Superintendent, Assistant Tax Superintendent, Inspectors, Head Clerks, Sectional Head Clerks, Sectional Accountants, Doctors, Vaids, Hakim and Municipal Fire Station Officers, shall be subject to the approval of the [Municipality].

10. Section 75 provides for appointment of permanent inferior staff and the power is vested with the Executive Officer. The servants referred to as the inferior staff would mean servants carrying scales of pay lower than the lowest scale of pay referred to in section 74, and section 76 confers power of punishment and dismissal of permanent inferior staff upon the Executive Officer and when there is no Executive Officer on the President. Section 76 and 77 are as follows:-

76. **Punishment and dismissal of permanent inferior staff**.- Except as otherwise provided, the Executive Officer, and where that is no Executive Officer, the President may dismiss, remove or otherwise punish servants of the [Municipality], or terminate the services of probationers, [referred to in Section 75], subject to their right of appeal, except in the case of termination of the service of a probationer, to such authority within such time and in such manner as may be prescribed.]

77. Limitation of powers conferred by Sections 71 to 76.-(1) the provisions of Sections 71, 73, 74, 75 and 76, shall be subject to the provisions of,-

(a).....

(b).....

(2) The provisions of Sections 74, 75 and 76 shall also be subject to the provisions of any regulation raising any maximum or minimum monthly salary prescribed in those sections with reference to the respect powers of the [Municipality], the [President] and the Executive Officer over the staff."

11. The powers conferred under Section 74, 75 and 76 is subject to the provisions of section 78 and any rule pertaining to suspension or dismissal [removal or other punishment or discharge or termination of service] of such persons so appointed. The power of suspension is covered under Section 77-B. Section 77-B, sub-clause 1 and sub-clause 5, is as follows:-

77-B. Power of suspension.-(1) The authority competent to punish an officer or servant of the [Municipality] may place him under suspension,-

(a) where a disciplinary proceedings against him is contemplated or pending; or

(b) where a criminal case against him in respect of an offence involving moral turpitude is under investigation, enquiry or trial.

(2).....

(3).....

(4).....

(5) [Municipality] shall act under this section by a special resolution supported by not less than two-thirds of the members constituting the Board.

12. Sub-clause 9 of section 2 defines "Municipality" means an institution of self-Government [referred to in clause (e) of Article 243-P] and sub-section (22) of section 2 defines "servant of the [Municipality]" means any person in the pay and service of the [Municipality].

13. Section 9 provides for the Composition of Municipality which shall consist by a President who shall be its Chairman, elected members, Ex officio members and nominated member.

14. The Service conditions of the servants belonging to the non-centralized servants is governed under 1960 Rules. "Servants" in the Rules has been defined, meaning servant of the Municipality and competent authority means the authority or Board (Municipality) competent under the law to take such action. Rule 4 provides for the penalties which can be imposed by the Board for sufficient reasons. Sub-clause of rule 4 is as follows:-

"4. Subject to the provisions of these rules and any law governing a Municipal Board, the following penalties may, for good and sufficient reasons, be imposed upon a servant by the competent authority, namely

(i) Censure,

(ii) With holding of increments, including stoppage at an efficiency bar.

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

(iv) Suspension"

15. Rule 8(i) provides for suspension of servant of Municipality during enquiry or contemplation of enquiry. Rule 8(i) is as follows:-

"8(1) Subject the provisions of any law governing the municipal board, a servant against whose conduct an inquiry is contemplated or is proceeding, may in the discretion of the competent authority be placed under suspension pending the conclusion of the enquiry."

16. A bare perusal of the provisions of the Act and 1960 Rules, the petitioner a clerk, is permanent superior staff within the meaning of Section 74 belonging to the non-centralized service, can be appointed and dismissed by the President, Section 77 read with 1960 Rules the

authority competent to pass an order of suspension is the President not the Board, Section 77-B read with rule 8(i) refers to 'competent authority' and not the Board, thus, the competent authority for punishment of superior staff is the President.

17. Thus, it is evident from the provisions of the Act and the rules, stated herein above, the competent authority to place the petitioner under suspension is the President and not the Board.

18. As regards, the second submission, as to whether the order of the Chairman dated 29.05.2014 endorsing the complaint of the Executive Officer recommending suspension pending enquiry or contemplation of enquiry is an order of suspension or not, requires close reading of the complaint. The executive officer complained on 27.05.2014 alleging that the petitioner had scanned his signature and issued contract, the petitioner did not attend the Tehsil Diwas in spite of the directions of the Commissioner, Moradabad Division, Moradabad, as such, the petitioner was removed as Lekha Lipik and was made the pairokar to pursue the cases of the Nagar Palika Parishad. The petitioner did not inform the Executive Officer of the important cases, as a result, the Nagar Palika Parishad lost certain important cases thus resulting in loss to the Nagar Palika; in spite of the directions being issued to the petitioner, appeal was not filed before the High Court, as such, the Palika lost several crores, there are allegations of the petitioner conniving with the opposite party against the interest of the Palika; keeping in custody of the service book; filing of proxy complaints, thus the Executive Officer recommended that the petitioner be placed under suspension pending enquiry, which was duly approved and endorsed by the President on 29.05.2014, the petitioner was thereafter communicated the order of suspension on 02.06.2014 by the Executive Officer.

19. The contention of learned counsel for the petitioner that endorsement of the President dated 29.05.2014 is not the suspension order, the order dated 02.06.2014 communicating that the petitioner has been placed under suspension is the order of suspension, cannot be accepted for the simple reason that the petitioner was placed under suspension on 29.05.2014 i.e. the moment President approved the proposal. It would be wrong to say that the President did not apply his mind. The complaint made by the executive officer alleges serious allegation against the petitioner, which if true, would follow imposition of major penalty, the President by merely endorsing the complaint and directing to proceed, as proposed would mean that the petitioner was placed under suspension with immediate effect pending enquiry. Merely because the communication order dated 02.06.2014, passed pursuant to the endorsement dated 29.05.2014, does not refer or mention that the petitioner was placed under suspension pending enquiry, is not correct, as the suspension and enquiry was already proposed which was approved and accepted by the President. It is settled principle of law that the suspension order comes into effect the date it is passed and not from the date of communication, unlike termination or dismissal order.

20. An order passed by a competent authority dismissing a government servant from services requires communication

thereof vide State of Punjab Versus Amar Singh Harika12, but an order placing a government servant on suspension does not require communication of that order vide State of Punjab Versus Khemi Ram13. What is, therefore, necessary to be borne in mind is the knowledge leading to the making of the order. An order of suspension ordinarily would be presumed to have been made when it is signed.

21. The contention on behalf of the petitioner is that the order is not only malafide exercise of power but the order of suspension is a punishment order under rule 4(4)(iv), hence opportunity should have been given to the petitioner before passing the order.

22. Suspension in service jurisprudence is of different kinds, viz as punishment if provided under the service rules, inherent power of the employer to suspend and thirdly, rules providing for suspension during pending enquiry or contemplation of enquiry.

23. In L.K. Verma Versus HMT Ltd. and another14, the Supreme court held as follows:-

"17. Suspension is of three kinds. An order of suspension may be passed by way of punishment in terms of the conduct rules. An order of suspension can also be passed by the employer in exercise of its inherent power in the sense that it may not take any work from the delinquent officer but in that event, the entire salary is required to be paid. On order of suspension can also be passed, if such a provision exists in the rule laying down that in place of the full salary, the delinquent officer shall be paid only the subsistence allowance specified therein."

[Refer: Management of Hotel Imperial V. Hotel Workers' Union15, T. Cajee Versus U. Jormanik Siem and another16 and R.P. Kapoor Versus Union of India and another17,]

24. In V.P. Gidroniya Versus State of Madhya Pradesh and another18, the Constitution Bench of the Supreme Court held as under:-

"8.....The general principle is that an employer can suspend an employee of his pending an enquiry into his misconduct and the only question that can arise in such a suspension will relate to the payment of his wages during the period of such suspension. It is now well settled that the power to suspend, in the sense of a right to forbid an employee to work, is not an implied terms in an ordinary contract. Between master and servant, and that such a power can only be the creature either of a statute governing the contract or of an express term in the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some statute would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well-settled that an order of interim suspension can be passed against the employee while an enquiry is

pending into his conduct even though there is no such term in the contract of employment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which, it could be withheld. The distinction between suspending the contract of a service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not to the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must today."

25. Suspension as punishment can be imposed after holding departmental enquiry. The Supreme Court in Balvantray Ratilal Patel Versus State of Maharashtra19, observed as follows:-

".....On general principles therefore the government like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. The Government may also proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty."

26. In the 1960 Rules, suspension is provided both as a punishment, as well as, pending enquiry or contemplation of enquiry (rule 4(4)(iv) and rule 8(1) of 1960 Rules). Suspension pending enquiry or contemplation of enquiry provided under rule 8(1), is not a punishment. It is not the case of the respondents that suspension by way of punishment was imposed upon the petitioner.

27. The petitioner was placed under suspension on 29.05.2014, the moment the President accepted the proposal of Executive Officer to place the petitioner under suspension pending enquiry. The order dated 02.06.2014 is merely communication of the suspension order pending euquiry, it is not an order of punishment.

28. In my opinion, there is no illegality or infirmity in the impugned orders.

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

30. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.10.2014

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 40533 of 2014

Ankit Tiwari & Ors. Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri V.D. Shukla

Counsel for the Respondents
C.S.C., Sri Neeraj Tiwari, Sri R.K. Ojha

Constitution of India, Art.-226-cancellation of entire entrance examination for joint para-medical and nursing entrance examination 2014-on certain objection at residence of Hon'ble Chief Minister-being influenced previous examination canceled-but no specific date of subsequent examination disclosed-held once examination held properly-cancellation of first examination without any valid reason-subsequent examination-immaterial-quashed-direction to hold counseling as per merit of OMR sheet of first examination.

Held: Para-37-
In view of the discussions and consideration made above, this Court finds the impugned action of the respondent institute, in cancelling the examination dated 13.7.2014 to be without any basis, lacking bona fide, and based upon non existed material, and as such, it cannot be sustained. The impugned order dated 17.7.2014, cancelling the examination held on 13.7.2014 is, therefore, quashed. A direction is further issued to the respondents to forthwith process the OMR sheets of the examination held on 13.7.2014, which are lying in the safe custody of the institute itself, and based upon the results thereof, the counselling and admission to Para Medical and Nursing course be offered, in accordance with law.

Case Law discussed:
1986(1) SCC 133; 2004 (4) SCC 666; 1991 (3) SCC 47; 1993 (1) SCC 154; 2002 (5) SCC 533; 2012 (2) ADJ 561; 2009 (9) ADJ 316.

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

1. U.P. Rural Institute of Medical Sciences and Research, Saifai, District-Etawah, is an institute of Paramedical Science established by the State Government, which is affiliated to Chhatrapati Shahu Ji Maharaj University, Kanpur. The institute was assigned the responsibility of conducting entrance examination for Joint Paramedical and Nursing Entrance Examination, 2014, and thereafter to conduct counselling. The institute published notice on 2nd May, 2014, whereunder registration for appearing in the entrance test was to commence from 5th May, 2014 with the last date for submission of online registration being 6.6.2014 and the date of examination was notified as 13th July, 2014. The petitioners, who are three in number, were desirous of appearing in the entrance examination, duly applied for appearing in the entrance test, and were issued admission ticket and they actually appeared in the entrance test held on 13th July, 2014. However, the petitioners learnt through a press release that the examination conducted on 13th July, 2014, had been cancelled allegedly for unavoidable reasons, vide order dated 17th July, 2014 and the date of next examination was to be notified through newspapers. It is this press release dated 17th July, 2014, which has been challenged by filing the present writ petition. A further prayer has been made to command the respondents to publish the result of the entrance examination conducted on 13th July, 2014 and grant admission, on the basis thereof, to the petitioners.

2. The writ petition was entertained and following orders were passed on 6.8.2014:-

"Learned Standing Counsel prays for and is allowed one week time to seek instruction as to what was the reason for cancelling the examination, which took place on 13th July, 2014.

Put up/list on 18th August, 2014."

3. Again on 19.8.2014, further time was granted to learned Standing Counsel to seek instructions and bring on record reasons for cancellation of the examination already conducted on 13th July, 2014. The order dated 19.8.2014 is reproduced:-

"The instant petition has been filed challenging the order dated 17th July, 2014 cancelling the examinations already held without assigning any reason.

On 6th August, 2014, learned Standing Counsel was granted time to seek instructions. Learned Standing Counsel prays for further time to seek instruction.

Learned counsel for the petitioners informed the Court that now, by an advertisement, 14th September, 2014 has been notified for fresh examination. It has been submitted that in absence of any valid reason for cancelling the earlier examination, the holding of subsequent examination on 14th September, 2014 does not appear to be justified.

In view of the above, let this matter be listed on 1st September, 2014. In the meantime, learned Standing Counsel shall file counter affidavit detailing the reasons for which the earlier examination was cancelled and a decision to take fresh examination was taken."

4. A counter affidavit was filed by the institute on 1st September, 2014. The matter thereafter was heard on 8.9.2014, wherein following orders were passed:-

"Sri Neeraj Tiwari, who appears on behalf of respondents 2 and 3, has sent illness slip.

Learned counsel for the petitioners submitted that in the counter affidavit filed by Sri Neeraj Tiwari on behalf of respondents 2 and 3, in paragraphs 5, 6 and 7 thereof, allegations have been made against the conduct of respondent no.4.

As per the endorsement in the writ petition, the learned Standing Counsel has accepted notice on behalf of respondents 1 to 4, but now learned Standing Counsel states that he appears only for respondent no.1 and that due to mistake the said endorsement has been made in the writ petition.

In view of the above, let notice be issued to the respondent no.4 through Registered Speed Post returnable within three weeks. Steps to serve the respondent no.4 may be taken within three days.

List this petition on 7th October, 2014 by which date the respondent no.4 may file counter affidavit."

5. Notices, accordingly, were issued to respondent no.4, who filed his counter affidavit on 7.10.2014 and the following orders were passed:-

"Rejoinder affidavit filed on behalf of the petitioners is taken on record.

A counter affidavit has been filed on behalf of respondent no.4, which is taken on record and a copy whereof is also supplied to Sri Neeraj Tiwari, learned counsel appearing for respondent no.2 and 3.

Learned counsel for the petitioners state that the counselling is to start for admission to Para Medical Nursing Course from tomorrow, which fact is not disputed by Sri Neeraj Tiwari, learned counsel for respondent no.2 and 3.

On the request made by learned counsel for the parties, let the matter once again appear tomorrow in the additional cause list, by which time, further affidavits, if any, may be exchanged."

6. The matter was heard on 8.10.2014 and while passing an interim order, case was fixed for delivery of orders on 13.10.2014. The order passed on 8.10.2014 was to the following effect:-

"Heard Sri Ashok Khare, Senior Advocate, assisted by Sri V.D. Shukla, appearing for the petitioner, learned Standing Counsel for the respondent no.1, Sri Neeraj Tiwari, learned counsel for the respondent no.2 & 3, and Sri R.K. Ojha, Senior Advocate, assisted by Sri Ashish Kumar Ojha, appearing for the respondent no.4.

Sri Ashok Khare, Senior Advocate, has challenged the decision taken by the respondent institute contained in the communication dated 17.7.2014, whereby the entrance examination conducted on 13.7.2014 for admission to Para Medical and Nursing Courses in the State of U.P. for the year 2014 has been cancelled, on account of alleged unavoidable circumstances. The submission advanced is that no reasons have been assigned in support of the decision, nor any reasons actually exist on record, and that the impugned decision is arbitrary and is unsustainable in law.

A counter affidavit has been filed by the respondent institute, wherein it has been stated that after the examination was conducted, certain complaints were received by the office of the Chief Minister and the attempt of the institute to contact the Examination Controller could not succeed. According to the respondent institute, it apprehended that the examination has not been conducted fairly, and therefore, the decision has been taken to cancel the examination. Thereafter, a show cause notice has also been issued to the respondent no.4 on 23.7.2014. Sri Neeraj Tiwari also submits that fresh examination has been conducted thereafter, although parties are at issue on it and the date of such subsequent examination is also disputed.

Sri R.K. Ojha, Senior Advocate, appearing for the respondent no.4, states that the facts stated in the counter affidavit of the respondent no.2 & 3 are absolutely incorrect, inasmuch as the institute had already taken a decision to have entrance examination conducted in the manner as has been done. The Director of the Institute had already passed an order on 18.6.2014, whereby respondent no.4 was authorized to have the possession of all examination materials and OMR sheets etc., after the examination were concluded, so that transparency in holding of the examination is maintained. The attention of the Court has also been invited to the decision of the institute, whereby the outside agency had been appointed for the purposes of evaluation of the OMR answer sheets and the rates etc. had all been settled by the Director. The argument, therefore, is that there is no infirmity in holding of the examination and it has also been contended that after the examination were conducted, the OMR sheets were retained in the custody of respondent no.4, as per the decision already taken by the Director on 18.6.2014 and respondent no.4 left for Lucknow along with OMR sheets and other relevant records for being delivered to the agency, after obtaining permission from the Director, which document has also brought on record along with counter affidavit.

Prima facie, the contention of the petitioner that cancellation of examination conducted on 13.7.2014 was not for valid reason appears to have substance. Since the hearing in the matter

has been concluded and sometime may be consumed in delivering judgment in the matter, and the counselling is to commence from today itself, therefore, as an interim measure it is provided that till delivery of judgment, the counselling, which is proposed to be undertaken by the respondent no.4 institute from today, shall remain stayed.

This order has been passed in the presence of Sri Neeraj Tiwari, learned counsel for the respondent no.2 and 3, who shall inform the authorities concerned about passing of this order for its compliance.

List this matter for delivery of judgment on 13.10.2014."

7. On 13.10.2014, the matter was again adjourned, after noticing the previous orders passed in the matter, in order to give one further opportunity to the respondents to reply to the affidavit of respondent no.4 and also produce the records, on the basis of which, the impugned action has been taken. The order dated 13.10.2014, which also records previous orders passed, is reproduced:-

"Hearing in the matter was concluded on 8.10.2014 and the matter was fixed for today i.e. 13.10.2014 for delivery of judgment. However, from the materials available on record, this Court is of the opinion that one opportunity is liable to be further granted to the respondents, before the matter is decided finally, for the reasons disclosed hereinafter.

The record of the writ petition shows that while entertaining the writ petition following orders were passed on 6.8.2014:-

"Learned Standing Counsel prays for and is allowed one week time to seek instruction as to what was the reason for cancelling the examination, which took place on 13th July, 2014. Put up/list on 18th August, 2014."

The matter was thereafter was taken up on 19.8.2014 and the following orders were passed:-

"The instant petition has been filed challenging the order dated 17th July, 2014 cancelling the examinations already held without assigning any reason.

On 6th August, 2014, learned Standing Counsel was granted time to seek instructions.

Learned Standing Counsel prays for further time to seek instruction.

Learned counsel for the petitioners informed the Court that now, by an advertisement, 14th September, 2014 has been notified for fresh examination. It has been submitted that in absence of any valid reason for cancelling the earlier examination, the holding of subsequent examination on 14th September, 2014 does not appear to be justified.

In view of the above, let this matter be listed on 1st September, 2014. In the meantime, learned Standing Counsel shall file counter affidavit detailing the reasons for which the earlier examination was cancelled and a decision to take fresh examination was taken."

A counter affidavit was filed on behalf of respondent no.2 and 3, wherein allegations were made against the conduct of Examination Controller i.e. respondent no.4. Accordingly, notices were issued to respondent no.4.

A counter affidavit has been filed by respondent no.4 in the matter on 7.10.2014, copy whereof was made available to Sri Neeraj Tiwari, learned counsel appearing for the respondent no.2

and 3. The matter was adjourned to 8.10.2014, by which time, learned counsel for the parties were granted opportunity to file further affidavits, if any. Hearing in the matter was concluded on 8.10.2014.

Learned counsel appearing for the respondent no.2 and 3, on the basis of the report of the Officiating Director dated 18.7.2014, had stated that after the Examination Controller had left, complaints regarding bungling in examination were received on 15.7.2014 from the office of the Chief Minister and the Principal Secretary, Department of Medical Education, which ultimately led to cancellation of the examination, no record in support of the report, however, has been annexed. In response to the query of the Court, learned counsel for the respondent no.2 and 3 stated that the only material available on record was the report of Officiating Director dated 18.7.2014.

In the counter affidavit filed by respondent no.4, materials have been brought on record to show that he had acted in accordance with the directions issued by the department. In such circumstances, as the reply of respondent no.4 was filed on 7.10.2014 and the hearing was concluded on 8.10.2014, as such, it would be appropriate in the interest of justice that a further opportunity be granted to respondents to file reply to the affidavit of respondent no.4. They may also bring on record materials in support of the report of the Officiating Director dated 18.7.2014, if any, which prompted them to take the impugned action or any other material existing on record. The respondents may also produce relevant records, in this regard.

Since counselling has been stayed by this Court, the matter is required to be adjudicated at the earliest. Let matter once again appear, as a case in the additional cause list, on 16.10.2014, by which time, the required affidavit be filed in the matter."

8. On 16th October, 2014, an affidavit was filed on behalf of the respondent nos.2 and 3 and, therefore, the matter was adjourned to 17th October, 2014. Following orders thereafter were passed on 17th October, 2014:-

"Heard learned counsel for the petitioners and learned Advocate General, assisted by the learned Chief Standing Counsel, who has appeared for respondent nos. 2 and 3, at some length. However, It has been stated by the Chief Standing Counsel that records relating to the matter, are not available and will have to be obtained from the office at Lucknow, therefore, the matter may be deffered.

On the request made by the learned Advocate General, the hearing of the matter is deffered to 27.10.2014, on which date relevant record shall be produced before the Court."

9. On 27th October, 2014, when the hearing in the matter was resumed, learned counsel appearing for the respondents made a statement, which was noted and the hearing commenced. The order dated 27th October, 2014 is reproduced:-

"Sri Ramesh Upadhyay, learned Chief Standing Counsel, states that he has instructions from Sri Arindam Chatterjee, Special Secretary of the State of U.P. that there exists no written complaint on record of the State Government, which led to cancellation of examination in question.

Learned Advocate General, who is present in Court, states that the Court may proceed to adjudicate the matter on merits in light of the aforesaid fact, on the basis of pleadings and material, which exist on record.

Argument of Sri Ashok Khare, learned Senior Counsel appearing for the petitioners and Sri V.B. Singh, learned Advocate General for the State, have been concluded.

Submission of Sri R.K. Ojha, learned Senior Counsel appearing for the respondent no.4 remains inconclusive.

Put up tomorrow i.e. on 28.10.2014."

10. In view of the stand so taken by the learned Advocate General, this Court proceeds to adjudicate the writ petition, on the basis of pleadings and materials available on record of the writ petition, after noticing that there exists no record of any written complaint etc. on record of the State Government, against the examination held on 13th July, 2014.

11. A counter affidavit on behalf of the respondent nos.2 and 3 was initially filed by the Director of the institute. Paragraph nos. 5, 6, 7 and 9 of the affidavit are reproduced:-

"5. That it is further stated while leaving the Institute neither he has taken any approval for arrangement of evaluation nor he has given any information to the Director of Institute. To maintain the transparency of Examination it is necessarily required to carry out OMR sheet and other documents out of institute with the permission of Director and further OMR sheet should be evaluated before a Team was constituted for that purpose and not by one individual person.

6. That in this reference complaints were filed before Principal Secretary, Medical Education as well as Chief Minister of the State and direction was issued to carry out the enquiry on 15.7.2014. Immediately thereafter Institute has tried to contact the Controller of Examination but his all known mobile numbers were found switched off. Thereafter Institute has tried to contact him by other means then at 8.45 PM he has informed that he is in seriously and unable to have any talk. At this stage at 9.45PM after having contact with him, he was directed to come back Institute without any evaluation of OMR sheet but he has informed that he is suffering with heart disease and it is not possible to him to come back. Again around 12.00 night he has informed the Director that he is admitted in ICU and he will take at least 4-5 days in coming back to Institute.

7. That on 17.7.2014 Controller of Examination again first time informed his location on telephone that he is admitted in ICU in Military Hospital, Lucknow and prior to that he has never informed about his location. Whole conduct of Controller of Examination is very objectionable and which creates serious doubt about the relativity of examinations result. Under these circumstances a meeting of officers was held on 17.7.2014 and it was decided in the meeting to cancel the earlier entrance examination held on 13.7.2014 and taken fresh examination on 14.9.2014. In this reference a detail report was also submitted vide letter dated 18.7.2014 to Principal Secretary, Medical Education, Lucknow. A photocopy of letter dated 18.7.2014 is being filed as Annexure CA-1 to this affidavit.

9. That thereafter the institute has decided to take fresh examination and it was decided to hold the same on 14.9.2014. For that purpose a press release dated 8.8.2014 was issued and new date was also uploaded on the website Institute."

12. Respondent no.4, pursuant to the notices issued by this Court, appeared in the matter and filed his counter affidavit along with annexures. The stand taken by the respondent no.4 was that the manner of holding of examination had been decided in the meeting of the institute dated 26th March, 2014, pursuant to which, the then Director passed an order on 18th June, 2014 appointing respondent no.4 as Coordinator and Examination Controller for the examination to be held on 13th July, 2014. The order dated 18.6.2014 provided as under:-

"प्रो0 के0एम0 शुक्ला को परीक्षाओं से सम्बन्धित समस्त अभिलेख, सील आदि के रखरखाव, प्रश्न–पत्र एवं उत्तर–पुस्तकाओं आदि को अपनी अभिरक्षा में रखने हेतु अधिकृत किया जाता है। डॉ0 शुक्ला परीक्षाओं के सकुशल सम्पादन के साथ परीक्षा में उपयोग में लाये जाने वाले प्रश्न–पत्र एवं अन्य अभिलेखों की गोपनीयता एवं सुरक्षा भी रखेंगे।

उक्त कार्य हेतु वह निदेशक के नियंत्रण में रहते हुए परीक्षाओं का संचालन करने एवं विभिन्न परीक्षाओं के आयोजन हेतु आवश्यक सभी प्रबन्ध सुनिश्चित करेंगे एवं परीक्षा सम्बन्धी समस्त प्रक्रियाओं के सम्यक निष्पादन हेतु उत्तरदायी होंगे।"

It was also stated that the agency for evaluating the answer sheets as well as rates payable to it, were all approved and settled by the Director himself. Respondent no.4 further brought on record a confidential letter addressed to the Director, upon which the permission was granted by the Director for petitioners to leave the institute on 15.7.2014 in connection with confidential examination work, which reads as under:-

"पैरामेडिकल एवं नर्सिग महाविद्यालय के शैक्षिक सत्र 2014 के विभिन्न पाठ्यक्रमों में प्रवेश हेतु दिनांक 13 जुलाई, 2014 को आयोजित परीक्षा से संबंधित गोपनीय/अति आवश्यक कार्यो हेतु अधोहस्ताक्षरी दिनांक 15 जुलाई, 2004 से संस्थान से बाहर प्रस्थान कर रहा है।

कृपया उक्त कार्य हेतु स्टेशन छोड़ने की अनुमति प्रदान करें। अधोहस्ताक्षरी की अनुपस्थिति में संकायाध्यक्ष के कार्यों का निर्वाह प्रो0 अभय कुमार, विभागाध्यक्ष ई0एन0टी0 द्वारा किया जाएगा।"

It is the case of respondent no.4 that pursuant to the permission granted by the Director, he proceeded to take the OMR sheets and got them delivered to the agency, selected for evaluation of OMR sheets by the Director. The Controller also stated that after he had delivered the OMR sheets to the agency, selected for the purposes, at Lucknow, he suffered serious heart ailment, and therefore, was admitted to Army Command Hospital at Lucknow, where he remained hospitalized and ultimately got discharged on 20th July, 2014. The certificates and medical prescription etc. have been brought on record as

Annexure No.6 to the affidavit.

13. Pursuant to the liberty granted by this Court, an affidavit in rebuttal to the affidavit of respondent no.4 was filed by the Registrar of the institute. Paragraph nos. 04 to 16 of the affidavit, which elaborates the stand of institute, are reproduced:-

"4. That entrance examination for Paramedical Science and Nursing Course was held on 13th July, 2014 simultaneously in 13 centres in Etawah. The examination was based on objective type of questions to be answered on OMR sheets. About ten thousand candidates had participated in the examination for

about 610 seats. The OMR sheets (Answer sheets) were kept in about 10 boxes, which itself is a bulky baggage. For the purposes of its transportation from U.P. Rural Institute of Medical Sciences and Research (U.P.R.I.M.S.) to Lucknow at S.R. Net Computer Services Pvt. Ltd., it was necessary to have additional hands/officials, security men to ensure its safety and safe transportation.

5. That from the records it transpires that respondent no.4 all alone without taking security guards or without taking any additional hands undertook the journey himself to Lucknow, S.R. Net Computers. Before leaving or before taking the permission for visiting Lucknow he did not indicate or disclose that he would be carrying OMR sheets for its evaluation to Lucknow. Entire travel and journey was kept a closely guarded secret. Before taking permission he should have requested for security guards and further would have disclosed that he would be moving with OMR sheets and specific disclosure should have been made to the Director of Institute that he was going to Lucknow for getting evaluation of OMR sheets.

6. That with a plan and design Dr. Shukla appears to have completed a formality of by obtaining a permission to leave the station (Safai) from the Director of Institute but did not disclose which place/city he was visiting or that he would be carrying valuable OMR sheets nor there is any whisper that he required security. It can be appreciated that carrying 10 or 9 boxes all alone which contain the answer sheets of near about 10,000 candidate was itself a risky affair and could not have been handled by one individual all alone. There was an inherent risk of tampering loss, manipulations etc.

7. That it is pertinent to submit that this the second year when the Institute had conducted examination in the previous year that is year 2013-14 even the then Director Dr. J. B. Singh was present in Lucknow at the time of evaluation of OMR sheet had taken place. But this time Dr. Shukla all alone by maintaining opaque secrecy took up the entire task by himself. The Institute tried to contact Dr. Shukla about his movement and whereabouts on phone but he could be contacted only at night on 15th July, 2014 at about 8.45 PM, who disclosed that he was ill. He was also instructed by the Director on phone to return back immediately with all the papers and OMR sheets but he expressed his inability and disclosed he had a heart trouble and cannot come back to Institute. Later on at about 12 in the midnight Dr. Shukla suo-moto informed that he is being admitted in ICU without disclosing the name of the hospital or the city.

8. That on 17th July, 2014 for the first time respondent no.4 Dr. Shukla informed that he has been admitted in Lucknow hospital. Only on 17th the location of the city and the hospital could be known to the Director.

9. That it is the settled practice that the movement of the answer sheets (OMR sheets) for the purpose of its safety, security, due precaution is taken and more than one individual/officials with security personnels should accompany. One official is not burdened with such serious responsibility as there may be chances of its tampering and may be injurious to ensure the fairness of examination system.

10. That the way Dr. Shukla acted in this matter coupled with many complaints received even in the government serious doubts and suspicion about the sanctity of

the examination are being raised. The Institute to maintain fairness of the competitive examination and to ensure absolute fairness in the selection process took a decision for re-examination which has already been held and counselling had also commenced. It is also significant to notice that only 3 candidates out of 10,000 candidates who had appeared in the examination have filed this writ petition out of which one petitioner namely Pooja Shukla has also appeared in the second examination. The Institute is conducting the exercise of second examination at its own expenses and has given a chance without charging fresh examination fee to all the 10,000 candidates to appear in the examination to maintain purity, fairness of examination process.

11. That the Director of Institute was in dark and was not made aware by respondent no.4 that he was carrying bulky baggage containing OMR sheets to Lucknow for the purpose of its evaluation whereas respondent no.4 being subordinate to Director and was under his control should have taken precaution of disclosing in brief details about his movement and that of the answer sheets.

12. That the complaints were flooded in the office of Principal Secretary, Medical Education as well as office of the Chief Minister, the direction was issued for holding an enquiry in the entire matter by the order dated 18th July, 2014. True copy of the letter is being filed as ANNEXURE No.1 to this affidavit.

13. That the Institute of the answering respondent starting functioning from the academic session 2012-13. In the first year admissions were held on the basis of merit determined by the marks obtained by the students in the High School and Intermediate Examination. From the academic session 2013-14 admission are being made on the basis of entrance examination conducted by the Institute itself. Last year also respondent no.4 was the controller of the examination and the entire process of examination, evaluation of answer sheets, declaration of results, and admission of students was done in the supervision and control of the Director of the Institute. This year however, respondent no.4 chose to transport the OMR sheets all by himself without informing the Director and without taking any other officer or authority of the Institute along with him. Movement of the answer sheet only in the sole custody of respondent no.4 without there being any other officer or authority of the Institute, without information to the Director in this regard and without even taking the security personnel itself casts a doubt as to whether or not any tampering may have been done in the OMR sheets. The conduct of the respondent no.4 itself reinforces the complaints made to different authorities.

14. That upto 17.7.2014 the Institute was not aware about the location of respondent no.4 as such the Director of the Institute requested the Additional Director (Administration) to carry out an enquiry and submit the report.

15. That the matter was placed before the examination committee of the Institute which came to the conclusion that the sanctity of the examination had become doubtful. Looking into the entire aspect of the matter the examination committee recommended for the cancellation of the examination and a fresh examination has already been conducted. A copy of the report of the Additional Director along with the report of the Committee is being filed herewith as ANNEXURE NO.2 to this affidavit.

16. That continuous absence of respondent no.4 and unavailability of his location for substantially long period with the answer sheets created a doubt in the mind of the examination committee and only with a view to maintain the sanctity of the examination the Institute has taken a decision for cancellation of examination in question and for re-holding the examination for the purposes of admission of students."

14. The aforesaid affidavit of the Registrar has been replied by respondent no.4 by filing a fresh affidavit, in which, following averments have been made in paragraph no.4:-

"4. That in reply to the contents of paragraph nos.4 and 5 of the counter affidavit filed on behalf of the Respondent Nos.2 and 3, it is submitted that it is the OMR Sheets which were kept in 9 boxes, having total weight of 10 Kg. and in order to avoid any doubt or dispute over the issue the deponent has taken away those boxes in a small vehicle with the permission of the Director and went Lucknow and got those documents received on 15.7.2014 itself. It is further relevant to mention that deponent has been given those responsibilities by the then Director with the direction that he will maintain all transparency and secrecy over the issue, however, the deponent has got certain direction/threat on telephone from the certain higher officials, whether said direction given from the office of the Chief Minister or not for that the deponent is not clear but the deponent has received telephone from the office of the Chief Minister directing that deponent has to be selected 3 persons namely (1) Neeraj Kumar, having Roll No. 300413, (2) Diksha, having Roll No. 110649 and (3) Priti Yadav, having Roll No. 215112. The deponent has also maintained a C.D. by dubbing voice which deponent has received on his Mobile number from the Mobile No. 9411020906. The deponent is ready to produce CD which was prepared by him, at the time of hearing, whereas, for kind perusal of this Hon'ble Court the deponent is annexing copy of the version which was made on 10.7.2014 and 13.7.2014 on the Mobile phone of the deponent by the Mobile No. 9411020906 is being filed herewith and marked as Annexure CA-1 to this affidavit. Due to the aforesaid reason and also as per direction given by the then Director the deponent has no option but to maintain necessary secrecy for the aforesaid purposes."

It has also been alleged that the examination process was conducted with due diligence and sanctity of the process was maintained by him. It has been stated that he had acted in the best interest of transparency and fairness of examination process itself and disclosure of unnecessary details had been avoided so as to ward of extraneous influences being exercised upon him. It is also stated that his movements in connection with the affairs of the examination was with due intimation and permission of the Director, and it was only on account of extraneous influence that the examination process has been scuttled, as he has refused to honour influences unauthorizedly exercised in the matter. In the affidavit, the details of the calls received by him and the contents of the talks and the messages received have been annexed. Yet another affidavit has been filed by the respondent no.4 explaining the circumstances and the manner, in which he had carried the OMR

sheets from institute at Saifai, Etawah to Lucknow. It is also stated that any association of security guards and the staff of the institute would have obstructed the secrecy of the examination process itself under the peculiar facts and circumstances of the present case. The petitioners have also filed a rejoinder affidavit.

15. I have heard Sri Ashok Khare, learned Senior Counsel assisted by Sri V.D. Shukla for the petitioners, Sri Vijay Bahadur Singh, learned Advocate General assisted by Sri Ramesh Upadhyay, learned Chief Standing Counsel on behalf of the respondent nos.1, 2 and 3 along with Sri Neeraj Tiwari, who also appeared for respondent no.2 & 3 and Sri R.K. Ojha, learned Senior Counsel assisted by Sri A.K. Ojha for the respondent no.4 and have considered the materials available on record.

16. Learned counsel for the petitioner submits that the entrance examination in question had been conducted in absolutely fair and transparent manner and there was no material to support any allegation of irregularity in the examination process, and therefore, the cancellation of entrance examination was wholly unjustified.

17. Sri R.K. Ojha, learned Senior Advocate, appearing for the respondent no.4, has submitted that holding of the examination was strictly, in accordance with the decision already taken for the purposes by the Director, and sanctity of the process had been maintained. The argument advanced is that the extraneous influence exercised to secure admission for some of the candidates since had not been honoured by him, therefore, for oblique and ulterior motive the examination itself was scuttled. It has been stated that there is absolutely no material available on record to show that any illegality or infirmity was caused in holding of the examination and the OMR sheets based on the examination of 13.7.2014 are still in the safe custody of the respondent institute itself and no discrepancy therein had been reported till now, and in such circumstances, the cancellation of the examination itself was arbitrary.

18. Learned Advocate General, on the other hand, defended the action of the respondent institute. According to him, the decision to cancel the examination was taken in order to ensure sanctity of the process of examination itself, which cannot be said to be arbitrary. He also submitted that even otherwise, merely holding of examination does not create right in favour of any one and it is always the concern of the institute to assess whether the examination has been conducted in a fair and transparent manner and if any bonafide doubt is created in the process, the decision to cancel it can always be taken. He also submitted that once the institute has exercised such a course and subsequent examinations have been conducted, in which one of the petitioner has also participated, it would not be appropriate for this Court to interfere in the matter.

19. From the materials brought on record of the writ petition, as well as the submissions advanced, the factual scenario emerges that the respondent no.3 institute was to conduct Para Medical and Nursing Entrance Examination- 2014. The institute proceeded to consider the modalities in its meeting dated 26.3.2014,

wherein respondent no.4 Dr. K.M. Shukla was appointed as examination controller. The Director by his order dated 18.6.2014 specifically appointed respondent no.4 to act as coordinator and examination controller for the examination to be held on 13.7.2014. The agency, which was to carry out evaluation of OMR sheets was also selected by the examination controller on 30.4.2014, which decision was approved by the Director on the same day and the rates were also approved for being paid to the agency on 1.5.2014 by the Director. The respondent no.4 was authorized to keep in his possession all records, seal, question paper and answer books. In his capacity, as examination controller and coordinator Dr. Shukla, was also held responsible for secrecy and confidentiality of the examination records. He was to function under the supervision of the Director and undertake all steps required for the smooth conduct of the examination itself. The entrance examination was conducted at different centres on 13.7.2014 and the OMR sheets (answer sheets) were specifically kept in the custody of respondent no.4, as per the decision already taken by the Director. It is also apparent from the record that the respondent no.4, as per the decision already taken, proceeded in connection with the confidential examination work from the institute on 15.7.2014 with the permission of the Director.

20. The first counter affidavit filed on behalf of the institute states that the complaints were filed before the Principal Secretary, Department of Medical Education, as well as the Chief Minister of the State, on the basis of which a direction was issued to conduct an enquiry on 15.7.2014. The report of the Officiating Director dated 18.7.2014 has been annexed along with first counter affidavit, which clearly refers to letter issued by the Director on 18.6.2014, according to which, the entire examination was to be conducted under the supervision of the Director by the controller Dr. Shukla, who was responsible to ensure entire process of examination. The report of the Officiating Director states that after Dr. Shukla left the institute, a communication was received from the office of the Chief Minister and from the office of Principal Secretary, Department of Medical Education, to the effect that complaints, regarding widespread irregularities have been received, and therefore, an immediate enquiry in the matter be got conducted. It is after receiving of such instructions from the office of the Chief Minister and Principal Secretary, that the Officiating Director proceeded to make telephonic contact with Dr. Shukla, but it is stated that all his known mobile numbers were found switched off. The report further states that attempts to contact him from other sources fructified only at 8.45 PM, when Dr. Shukla informed that he has fallen ill and he is not in a position to talk. The Director in his report, which is Annexure-1 to the counter affidavit dated 26.8.2014, states that when contact could be again made at 9.45 PM, Dr. Shukla was asked to immediately return, but Dr. Shukla responded by saying that he is sick and having heart trouble, and therefore, he is being hospitalized and it is not possible to immediately return. The report further states that at about 12.00 night Dr. Shukla informed that he is hospitalized in ICU and he will take 4-5 days to return. The Officiating Director in his report has stated that no permission was obtained by Dr. Shukla before proceeding from the

institute and generally OMR sheets are opened before a committee, whereafter it should get assessed by computer, but Dr. Shukla has not got any committee constituted from the Director nor any officer has gone with him, and therefore, the results of the entrance examination are entirely dependent upon Dr. Shukla and the agency. The Director, therefore, states that the results of the examination have no longer remained reliable and it is only on 17.7.2014 that Dr. Shukla has informed the Officiating Director that he is actually admitted in the Military Hospital, Cantt., Lucknow, in ICU and prior to it, he has never disclosed his location. The report also stated that Dr. Shukla has not disclosed the name of the agency with whom, the OMR sheets were kept at Lucknow, and therefore, the sanctity of the examination process itself is in doubt. Therefore, the decision has been taken to cancel the examination and to hold fresh examination.

21. Learned Advocate General has also referred to another report dated 17.7.2014, which is Annexure-2 to the counter affidavit of the Registrar of the institute, which is signed by five persons, wherein also the contents of the report of Officiating Director have been reiterated. It has been stated that after the examination process was complete, it was found that OMR sheets have been taken by Dr. K.M. Shukla to unknown location, which is indicated at some place at Delhi and as neither security personnel nor any other officer was with Dr. Shukla, therefore, the process itself, as held, lost its sanctity. Learned Advocate General, on the basis of these reports, has submitted that decision to cancel the examination was taken bonafidely, inasmuch as the attempt on part of the officials of the institute to contact respondent no.4 repeatedly failed, and therefore, the responsible officials become suspicious about the process adopted by the respondent no.4, and therefore, the decision to cancel the examination was taken and that the Court should not interfere in such circumstances.

22. It is not in dispute that sanctity of the examination process must be maintained and the decision of the institute for the purposes is entitled to great weight. It is also not disputed that a bona fide exercise of power by the institute for the purposes, if is based upon some material, is not liable to be interfered with. However, the facts, which emerges on record, are rather disturbing and the Court is not satisfied that a bona fide decision was taken to cancel the examination.

23. The order of the Director dated 18.6.2014 clearly authorized respondent no.4 to be responsible for the custody, safety and holding of fair entrance examination. It is also not disputed that the custody of OMR sheets was with respondent no.4. It is also not disputed that respondent no.4 did proceed from the institute with a specific permission obtained from the Director on 15.7.2014. The Director or for that matter any other authority of the institute found no fault in the conduct of examination or the movement of respondent no.4 from the institute itself.

24. The sudden anxiety on part of the institute to locate whereabouts of Dr. Shukla or to doubt the examination process itself was a direct consequence of the communication received from the

office of the Chief Minister and the Principal Secretary, Department of Medical Education about complaints of widespread illegalities in holding of the examination. This Court ever since entertaining of the writ petition and in almost all subsequent orders directed the State to bring on record the alleged complaints, which are said to have been received by the office of the Chief Minister or the Principal Secretary, Department of Medical Education, but not a single complaint of any kind, has been brought on record. The proceedings of the writ petition were deferred from time to time in order to enable the respondents to produce the alleged complaints which prompted the office of Chief Minister or the Principal Secretary of the Department to intervene and direct the institute to hold an enquiry or monitor the whereabouts of Dr. Shukla, but no such material has been brought before the Court. The proceedings were specifically deferred on the request of learned Advocate General assisted by Chief Standing Counsel to produce the material in this regard. However, learned Advocate General has fairly stated that there exists no complaint on record of the State, which led to cancellation of the examination itself. He also stated that no complaint of any kind exits on record. The thrust of argument of learned Advocate General is that the institute is comparatively new and it is only the second occasion when it has conducted such examination and as it found that respondent no.4 was not traceable, despite repeated attempts, therefore, suspicion got generated in the matter. He further contends that respondent no.4 had no authority to take the OMR sheets without permission of the Director and since he went all alone, without any security guard, driver or any other officer, therefore, this in itself is sufficient to indicate that the conduct of respondent no.4 was strange in the matter and the decision to cancel the examination cannot be said to be without any basis.

25. Learned counsel for the respondent no.4 submitted that respondent no.4 was being pressurized to ensure induction of certain candidates in the examination by any means.

26. The respondent no.4 in his subsequent affidavit has brought on record details of the telephone calls, which he had received allegedly at the instance of somebody from Chief Minister's residence at Saifai instructing him to ensure inclusion of certain candidates in the entrance examination. The details of the telephone number and the contents of the talks have been enclosed. This court is not going into the merits of such details offered by respondent no.4, as it can be a matter of investigation by appropriate agency, but the materials brought on record by respondent no.4, particularly in para 4 therein does constitute sufficient material for any prudent person to be apprehensive of extraneous interference being exercised in the matter of holding of examination, and therefore, maintaining of complete secrecy by the officer concerned cannot be said to be wholly unjustified. This opinion of the Court gets support from the fact that while the office of Chief Minister had intervened in the matter, on the pretext of receiving of complaints, whereas it is admitted before this Court that no such complaint actually exists on record.

27. It is not in dispute that OMR sheets were required to be in the safe

custody of the respondent no.4. It is also not in dispute that no order had been passed by the Director which authorized other persons to have custody of the OMR sheets and the record of the respondents itself proves that it was only on 7.8.2014 that a committee for the purpose was constituted. The records of the respondents also clearly shows that the OMR sheets of the examination conducted on 13.7.2014 had been received by the institute from respondent no.4, pursuant to order of the Director on 19.7.2014. Learned Advocate General has fairly stated that all such OMR sheets are lying in the safe custody of the institute itself.

28. The Director of the institute had already granted permission to respondent no.4 to proceed from the institute on 15.7.2014 in connection with the confidential examination work. The permission, however, does not specifically refer to taking of OMR sheets by respondent no.4 along with him and this issue has been highlighted by learned Advocate General. In the opinion of the Court, once the permission had been granted to respondent no.4 to proceed from the institute in connection with the confidential examination work, it was not essential for him to have mentioned the taking of OMR sheets with him. The Court finds substance in the submission of Sri R.K. Ojha, Senior Advocate that the applications seeking permission to leave for examination work are typed by the subordinate staff and considering the fact that holding of examination was a confidential matter, requiring utmost secrecy, it was a bonafide exercise of restraint on his part in not mentioning the taking of OMR sheets, particularly in light of the bona fide apprehension of alleged interference at the instance of somebody claiming from the residence of Chief Minister itself. Even otherwise once the Director was granting permission to respondent no.4 to proceed with confidential work of examination, it can be safely assumed that the purposes of such movement was within the knowledge of the Director and no exception can be taken to non mentioning of OMR sheets in the letter of respondent no.4 seeking permission to leave from the institute. This Court also finds that Director at his level had no doubts about the purpose of movement of respondent no.4 and the situation changed only on account of the intervention by the office of Chief Minister.

29. The Director had authorized the examination controller and holding of the examination was specifically as per his instructions. The movement of the examination controller on 15.7.2014 was with his permission for the confidential examination purpose. If the Director sensed any irregularity, he could have verified the matter or taken any action in the matter. The Director, however, found no infirmity in the conduct of entrance examination or movement of controller with the OMR sheets and even otherwise no tempering or manipulation of any kind in the OMR sheets has been reported even after the records containing OMR sheets were received by the institute. It is only the alleged complaint received in the office of the Chief Minister regarding widespread illegality in the examination that the entire process was initiated to locate the whereabouts of respondent no.4. No such complaint or material suggesting any irregularity in the examination till date has been brought on record despite repeated opportunity

granted to the State, in such circumstances the alleged suspicion which is cause of cancellation of examination is without any material or basis. If the very initiation of the action is not in good faith and is based on no material the exercise of power itself is vitiated. The observations made by the Apex Court in its judgment in 1986 (1) SCC 133: Express Newspapers Pvt. Ltd. & others vs. Unino of India & others as contained in para 119 to 121, are clearly relevant for the present purposes and are therefore reproduced:-

"119. Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in S. Pratap Singh v. State of Punjab. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an "alien" purpose other than the one for which the power is conferred is mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in General Assembly of Free Church of Scotland v. Overtown "that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred". It was said by Warrington, C.J. in Short v. Poole Corpn. that:

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

In Lazarus Estates Ltd. v. Beasley Lord Denning, L.J. said:

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

See also, in Lazarus case at p. 722 per Lord Parker, C.J.:

"Fraud' vitiates all transactions known to the law of however high a degree of solemnity."

All these three English decisions have been cited with approval by this Court in Pratap Singh case.

120. In Ram Manohar Lohia v. State of Bihar it was laid down that the courts had always acted to restrain a misuse of statutory power and more readily when improper motives underlie it. Exercise of power for collateral purpose has similarly been held to be a sufficient reason to strike down the action. In State of Punjab v. Ramjilal it was held that it was not necessary that any named officer was responsible for the act where the validity of action taken by a Government was challenged as mala fide as it may not be known to a private person as to what matters were considered and placed before the final authority and who had acted on behalf of the Government in

passing the order. This does not mean that vague allegations of mala fide are enough to dislodge the burden resting on the person who makes the same though what is required in this connection is not a proof to the hilt, as held in Barium Chemicals Ltd. v. Company Law Board the abuse of authority must appear to be reasonably probable.

121. In the present case, the petitioners have alleged several facts imputing improper motives which have not been specifically denied and there is only a bare denial with the assertion that the facts are not relevant. Mere denial of allegations does not debar the courts from inquiring into the allegations. In answer to the rule nisi, the respondents here and in particular Respondent 1, the Union of India, Ministry of Works & Housing disdained from filing a counter-affidavit and left it to Respondent 2, Lt. Governor of Delhi to controvert as best as he could the specific allegations made by the petitioners that the impugned action was wholly mala fide and politically motivated i.e. that there was malice in fact as well as malice in law which actuated the authorities in issuing the impugned notices. Respondent 2 did not controvert these allegations but asserted that the allegations were "wholly irrelevant" to the matter in issue. He disclaimed all responsibility for the issue of the impugned notices and instead tried to justify all his actions throughout the affair as the Lt. Governor. As the hearing progressed, on being put wise on the legal issues, Respondent 2 filed an additional affidavit trying to refute the allegations of personal bias and animosity on his part. As already stated, Respondent 1 put in a supplementary affidavit of M.K. Mukherjee, Secretary, Ministry of Works & Housing which instead of meeting the specific allegations made by the petitioners, avers that they were "wholly irrelevant" and that the Union of India adopts the counter-affidavit filed by Respondent 2. The submissions advanced at the Bar by learned counsel appearing for the Union of India were wholly inconsistent with the stand taken by the respondents in their counter-affidavits. The learned counsel made no attempt to refute the charge that the impugned notices were wholly mala fide and politically motivated."

30. The aforesaid observation has been reiterated in 2004 (4) SCC 666: Vijay Shekhar & another vs. Union of India & others.

31. In the absence of any complaint or material to suggest irregularity in holding of the examination or violation of any instructions issued in connection with holding of the examination no fault can be found with the process of examination itself. Serious doubts arise upon the bona fide of the decision itself, when no material or complaint is actually available on record of the State indicating even allegation of alleged widespread illegality. In the backdrop of the stand taken by the respondent no.4 that he had received direction allegedly by someone from the residence of the Chief Minister to ensure induction of certain candidates, the holding of enquiry on account of receiving of such non existed complaint raises serious doubts on the entire action of the respondent itself.

32. Learned Advocate General has also relied upon the judgment of the Apex Court in Shankarasan Dash v. Union of India: 1991 (3) SCC 47, which has been followed in Union Territory of

Chandigarh vs. Dilbagh Singh and others: 1993 (1) SCC 154 and in the judgment in B. Ramanjini and others vs. State of A.P. and others: 2002 (5) SCC 533 to contend that mere selection in examination does not constitute any indefeasible right to claim appointment and the scope of judicial review in cancellation of examination by government is extremely limited. The proposition laid down by the aforesaid judgments are the law of the land but have no application to the facts of the present case, inasmuch as the judgment in Shankarasan Dash (supra) also holds the action of the State to be valid when taken for bona fide and valid reasons and is not taken arbitrarily. In the present case, since the entire action is wholly without any material, and has been taken on the basis of non existence material, such exercise of power apparently lacks bona fide and even the limited extent of judicial review does permit the Court to interfere with the action, as it is based on no material and lacks bona fide.

33. Sri Ashok Khare, learned Senior Advocate, appearing for the petitioner has referred to a division bench judgment of this Court in Ram Babu Sahu vs. State of U.P. & others: 2012 (2) ADJ 561 which in turn relied upon a decision rendered in Writ Petition No.11394 of 2008 dated 2nd March, 2009, Ram Prakash Singh vs. State of U.P. reported in 2009 (9) ADJ 316 wherein the judgment in Shankarasan Dash (supra) has also been considered. Para 15, 16, 17, 22 & 23 of the judgment in Ram Prakash Singh (supra) are reproduced:-

"15. Having heard learned Counsel for the parties and perusing the records, I find that any of the seven reasons or all of them taken together could not be the basis of the decision to cancel the entire election. There are no allegations on record that the selections for backlog vacancies were not widely advertised or that the selected persons did not belong to the categories for which the vacancies were existing. Further, there is no complaint that merit list in the descending order of the 1600 candidates was not prepared strictly in accordance with the marks awarded to them in their educational qualifications. The members of the selection committee observed that wherever the marks were found to be erroneously entered in the list the mistakes were immediately corrected. They did not report, that they did not have opportunity or did not award marks for interviews or that the marks awarded by them were not properly shown in the list. The Government order dated 20.7.2002 for award of marks for achievements on sports was superseded by the U.P. Procedure for Director Recruitment for Group-C posts (Outside the Purview of the U.P. Public Service Commission) Rules, 2002, which clearly provided in Rule 5 (3)(c) the number of marks to be awarded for achievement in sports. The members of the Committee did not agree on any common method of awarding marks in the interviews. They did not decide to award any minimum or maximum marks to the candidates and thus it was open to each of the members to award marks on their own assessments. The enquiry committee has found the variance of marks only in case of two candidates namely Kamal Pati and Sweta Kumari. In fact there are no allegations of mala fides or any undue favours raised against the District Panchayat Raj Officer, except in stating that he had awarded lesser marks to two candidates

in interviews and had not corrected the marks for achievements in sports. Further, it is stated that he had maintained undue secrecy in preparing the final results by typing out the appointment letters and their dispatch.

16. No exception could be taken nor there were any directions given to the District Panchayat Raj Officer for keeping the records of selection only in his office. His concern in keeping the records of selections at safer place, could not be a ground to cancel the selection. Further, there is no allegation that the appointment letters were typed out at a private place. The District Panchayat Raj Adhikari used the computer of Deputy Director of his department for typing the appointment letters and thereafter deleting the entires on the computer to maintain secrecy. Thereafter he ensured that the establishment clerk of his office was engaged in dispatching the appointment letters. Purchase of stamps and the posting of the appointment letters by Railway Mail Service cannot be said to be an illegality. If the appointment letters were posted by a clerk other than the clerk, who was routinely doing dispatches, on the dates, when she did not affect the validity of the selections.

17. The Court finds that the District Panchayat Raj Officer took all reasonable care to avoid unfairness in selections. He was unnecessarily victimized by suspending him and thereafter in lodging an F.I.R. against him and clerks of his office. The Court prima facie finds that the entire action taken against the District Panchayat Raj officer and the clerks in his office, at the instance of some persons in the State Government, who have not been named, appear to be taken on their frustration in failing to break the secrecy. The members of the Selection Committee and the Enquiry Committee have not found any such illegality, which vitiates the selection or the selection of any candidate. They have failed to point out any violation of the Rules of 2002, which may have affected the final result. It is thus apparent that the District Magistrate was acting either at the behest of the Minister of the Direct Panchayati Raj, who did not succeed in getting their candidates appointed.

22. In Inder Preet Singh Kahloon v. State of Punjab, 2006 2 SCC 356, the Supreme Court held that sufficient materials should be collected to be gathered through investigation in fair and transparent manner, and that the illegalities must go to the root of the matter vitiating the entire selection process, and the appointees in majority must be found to be part of the fraudulent purpose or may themselves must be found to be corrupt, to cancel the selections. The Supreme Court observed that High Court should also consider the consequence of en masse cancellation of selection. It carries a big stigma particularly, when the cancellation of selection is directed on the serious charges of corruption. For the misdeeds of some candidates, honest and good candidates should not suffer in en masse cancellation. In the interest of all concerned and particularly in the interest of honest candidates the State should have undertaken the taks of finding out the illegalities in respect of each selections. The unscrupulous candidates should not be allowed to damage the entire system in such a manner, where innocent people also suffer great ignominy and stigma. The State also must not leave any stone unturned to bring the guilty to book. If there is any stigma, no officer howsoever high should be spared.

23.In the same report the Supreme Court observed in paras 71 to 73 that a decision to cancel the selection en masse should not be taken in undue haste. It was found that a note containing 90 pages was sent to the Chief Secretary of Punjab on 22.5.2002 and that service of all the officers were terminated on the next day. The undue haste was beyond anticipated apprehension. It was necessary for the State to show as to how records moved so as to satisfy the conscience of the Court that there had been proper and due application of mind on the part of authorities concerned. An action taken in undue haste may be held to be mala fide vide Bahadur Singh Lakhubhai Gohil v. Jagdish Bhai M. Kamalia 2004 2 SCC 65. The basic principle underlying the rule is that justice not only be done but must also appear to be done. This rule is not confined to the cases, where judicial power is exercised. It is appropriately extended to all the cases, where an independent mind has to be applied to arrive at a just and fair decision between rival claims of the parties vide Ashok Kmar Yadav v. State of Haryana 1985 4 SCC 417. It was held in this case, that justice i3 not function of the Courts alone; it is also the duty of all those; who are expected to decide fairly between contending party. The strict standards applied to authorities exercising judicial powers are being increasingly applied to administrative bodies, and it is vital to maintain rule of law in welfare of the State, where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentality of the State should discharge their functions in a fair and just manner."

34. The division bench also observed as under in para 18, 19 & 20 in Ram Babu Sahu (supra):-

"18. We have considered the submissions, and perused the documents annexed to the writ petition. We find considerable substance in the argument advanced by Shri Ashok Khare, that the findings of misconduct in the irregularities in selection process were subject matter of adjudication by the High Court. This Court had recorded specific findings that the irregularities alleged in the selection could not be a ground to cancel the entire selection. There were no allegation that the selections of backlog vacancies were not advertised or that the selected persons did not belong to the categories in which the vacancies were existing. Further, there was no complaint, that the merit list in the descending order of the 1600 candidates was not prepared strictly in accordance with the marks awarded to them in their educational qualifications, which was the only criteria to award marks and in which there was no discretion given to the Selection Committee. Their discretion was only available in the marks awarded for interviews. The members of the Selection Committee had observed that wherever the marks were found to be erroneously entered in the list, the marks were immediately corrected. None of the members of the Selection Committee had complained that they did not have opportunity to interview the candidates or that the marks awarded by them were not properly shown in the list. The Government Order dated 20.7.2002 for award of marks for achievements on sports was superseded by the UP Procedure for Direct Recruitment for Group 'C' Posts (Outside the Purview of UP Public Service Commission) Rules, 2002, which clearly provided in Rule 5 (3) (c) the number of marks to be awarded in achievement in sports. The members of

the Committee did not agree on any common method of awarding marks for the interview. They did not decide to award any minimum or maximum marks to the candidates in interviews and thus it was open to each of the members to award marks on their own assessment. The enquiry committee found variation of marks only in case of two candidates namely Kamlapati and Swata Tiwari. There were no allegations of malafides and any undue favours against District Panchayat Raj Officer except in stating that he had awarded lesser marks to the two candidates in the interviews, and had not corrected the marks for achievements and sports.

19. The Court had also found that the anxiety to maintain secrecy in preparing the final result and by typing them out with the help of two clerks in the department, and its despatches by a person other than the despatch clerks could not by itself be treated to be an irregularity, which vitiated the selections.

20. The Court had also recorded findings that no exception could be taken nor there were any directions given to the District Panchayat Raj Officer, to keep the records of the selection only in his office. His concern for safety of the records could not be a ground to cancel the selections. There was no allegation, that the appointment letters were typed out at a private place. The District Panchayat Raj Officer used the computer of the Deputy Director in his office for typing out the appointment letters and thereafter deleted the entries to maintain the secrecy. The deployment of the establishment clerk in preparing the select list and in despatching the appointment letters after purchasing the stamps and posting by Railway Mail Service cannot be said to be an illegality, which vitiated the selections. If the appointment letters were typed and posted by a clerk other than the clerk, who was routinely doing such despatches, the selection cannot be held to be bad in law. The Court also recorded specific findings that the District Magistrate, either at the behest of the Minister, or Director, Panchayati Raj was making an attempt to break the secrecy, and since he did not succeed in getting their candidates appointed, he prepared a report, which in any case could not dispute the validity of the selection. There was no complaint by any person or any candidate that the select list was not drawn in accordance with the categories, or that any person could not secure appointment or suffered on account of failure to prepare the list category-wise. "

35. Reliance placed on the judgment of the Supreme Court in 1970 (1) SCC 648 : The Bihar School Examination Board vs. Subhas Chandra Sinha and others, dealt with a different factual scenario where mass copying has been resorted to, and therefore, it was held that principles of natural justice would not apply. No such allegation with regard to conduct of examination has been pointed out nor does it exit on record, and therefore, the principle laid down in the said decision does not help the cause of respondents.

36. It is also submitted that in the subsequent examination one of the petitioners has participated, and therefore, on this ground also the petition is not liable to be entertained. It is not in dispute that the writ petition had been entertained by this Court and the examination process itself was undertaken during the pendency of the writ petition and 2 out of 3

petitioners have not taken part in it. In counter affidavit filed by the respondent State, it has been stated that fresh examination was to be held on 14.9.2014 but during the course of submissions it has been pointed out that the examination was actually not conducted on that day but was conducted on 18th September or some date thereafter. The respondents have not brought on record any material to show exact date of holding of second examination and whether the date was intimated to all. The advertisement for holding of fresh examination mentions the date as 14.9.2014 but the holding of examination on some subsequent date after 14.9.2014 has been claimed, which also creates doubt as to whether the subsequent date was intimated to all the candidates. Nevertheless once this Court finds that the cancellation of first examination conducted on 13.7.2014 itself was without any basis and arbitrary, the holding of any subsequent examination will not be material. Even otherwise all the students in both the examinations are same and once they have appeared in the examination on 13.7.2014 and the examination process was fair and transparent, no prejudice would be caused if their OMR sheets are assessed.

37. In view of the discussions and consideration made above, this Court finds the impugned action of the respondent institute, in cancelling the examination dated 13.7.2014 to be without any basis, lacking bona fide, and based upon non existed material, and as such, it cannot be sustained. The impugned order dated 17.7.2014, cancelling the examination held on 13.7.2014 is, therefore, quashed. A direction is further issued to the respondents to forthwith process the OMR sheets of the examination held on 13.7.2014, which are lying in the safe custody of the institute itself, and based upon the results thereof, the counselling and admission to Para Medical and Nursing course be offered, in accordance with law.

38. Accordingly, the writ petition is allowed. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2014

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

Civil Misc. Writ Petition [PIL] No. 42084 of 2014

Dr. Ravindra Shukla & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sushil Jaiswal, Sri Rakesh Chandra Tiwari

Counsel for the Respondents:
C.S.C.

Wild Life Protection Act-Section 34(3)-Grant of fire arm license without approval of Chief Wild Life Warden-applicants residing withing 10 km area of sanctuary-such practice highly deappriciated-state government to issue necessary direction to all the District Magistrate for strict compliance of direction of NOC from CWLW before grant of fire arm license.

Held: Para-8
We also issue a general direction to the effect that hereafter, no licence under the Arms Act, 1959 shall be granted in

the State of U.P. without the NOC of the Chief Wild Life Warden in those areas which fall within the purview of Section 34 of the Act of 1972. The State Government shall take necessary steps to issue directions to all the District Magistrates concerned to take steps with reference to those arms licences which have been granted without complying with the provisions of Section 34 (3) in respect of those areas which fall within a radius of ten kilometers of a sanctuary.

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

1. In a petition which has been filed in the public interest, the petitioners have highlighted a serious issue relating to the issuance of arms licences without the prior concurrence of the Chief Wild Life Warden, in violation of the provisions of Section 34 (3) of the Wild Life (Protection) Act, 19721.

2. A wild life sanctuary by the name of Hastinapur sanctuary, spread over an area of 2073 sq km, is situated in the districts of Meerut, Ghaziabad, Bijnore and Jyotiba Phule Nagar. The population of the sanctuary includes various species of antelope, sambhar, cheetal, blue bull, leopard, hyena, wild cat and different types of birds. It also has alligators.

3. The grievance of the petitioners is that the District Magistrate, Jyotiba Phule Nagar (Amroha) has issued arms licences without observing the requirement of the prior concurrence of the Chief Wild Life Warden.

4. Section 34 of the Act of 1972 provides as follows:

"34. Registration of certain persons in possession of arms.- (1) Within three months from the declaration of any area as a sanctuary, every person residing in or within ten kilometers of any such sanctuary and holding a licence granted under the Arms Act, 1959 (54 of 1959), for the possession of arms or exempted from the provisions of that Act and possessing arms, shall apply in such form, on payment of such fee and within such time as may be prescribed, to the Chief Wild Life Warden or the authorised officer, for the registration of his name.

(2) On receipt of an application under sub-section (1), the Chief Wild Life Warden or the authorised officer shall register the name of the applicant in such manner as may be prescribed.

(3) No new licences under the Arms Act, 1959 (54 of 1959) shall be granted within a radius of ten kilometers of a sanctuary without the prior concurrence of the Chief Wild Life Warden."

5. Under sub-section (1) of Section 34, on the declaration of an area as a sanctuary, every person residing within a radius of ten kilometers and holding a licnece under the Arms Act, 1959, and even a person exempted from the provisions of the that Act and possessing arms, has to apply to the Chief Wild Life Warden for the registration of his name. Under sub-section (3), no new licences can be granted within a radius of ten kilometers of a sanctuary without the prior concurrence of the Chief Wild Life Warden.

6. The counter affidavit which has been filed by the present District Magistrate, who has taken charge on 8 June 2014, states that as many as 166 arms licences were granted in 2005-06, 2006-07 and 2007-08 without a No Objection

Certificate2 from the Chief Wild Life Warden. Notices have been issued on 31 May 2014 to all such arms licence holders, numbering 166. In the case of 33 arms lience holders, the Chief Wild Life Warden found that NOC had been issued. In respect of the balance 133 arms licence holders, neither has any reply to the show cause notices been received nor have any NOCs granted by the Chief Wild Life Warden been submitted. Consequently, fresh notices have been issued by the Chief Wild Life Warden on 29 August 2014 to 133 arms licence holders for cancellation of licences as they do not have the NOC of the Chief Wild Life Warden, and hearing is to take place on 20 September 2014.

7. We, accordingly, direct that the competent authority shall take necessary steps in accordance with law in pursuance of notices to show cause which have been issued on 29 August 2014 and even earlier, in respect of those arms licence holders who do not have the NOC of the Chief Wild Life Warden under Section 34 (3) of the Act of 1972.

8. We also issue a general direction to the effect that hereafter, no licence under the Arms Act, 1959 shall be granted in the State of U.P. without the NOC of the Chief Wild Life Warden in those areas which fall within the purview of Section 34 of the Act of 1972. The State Government shall take necessary steps to issue directions to all the District Magistrates concerned to take steps with reference to those arms licences which have been granted without complying with the provisions of Section 34 (3) in respect of those areas which fall within a radius of ten kilometers of a sanctuary.

9. We also clarify that since the State Government has referred to the position of the arms licences which were granted between 2005 to 2008, in the event that arms licences were granted thereafter without complying with the provisions of Section 34 (3) of the Act of 1972, necessary action shall be taken in accordance with law.

10. The learned Standing Counsel shall take steps to transmit a copy of this order to the Principal Secretary (Home) who shall take necessary steps for compliance of this order by issuing instructions to all the concerned District Magistrates.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2014

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

Civil Misc. Writ Petition No. 47953 of 2014

Swami Brhamanand Saraswati Charitable Trust & Anr. . .Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sri Tarun Agarwal

Counsel for the Respondent:
C.S.C.

U.P. Zamindari Abolution & Land Reforms Act, 1950-Section-154(2) and (3)-Petitioner a charitable society-sought permission from state government to purchase more than 12.50 acre land-for residence of student

and ancillary purposes-earlier while quashing the impugned order-considering willingness to pay the fines petition disposed again without considering the direction-without any finding of charitable-general public interest-rejection on ground more than 12.50 acre land purchased-held can not be said-no specific purpose/project behind acquisition-order quashed with direction to take fresh decision-if required take additional evidence-after affording full opportunity to petitioner.

Held: Para-11

In the present case, prima facie, it cannot be held that the petitioners have no specific project or purpose behind the acquisition of the land. The petitioners have submitted a detailed project report to the State Government. The proposal was recommended both by the District Magistrate as well as by the Commissioner to the State Government. Having regard to this factual background, it was necessary for the State Government to take those recommendations of responsible officers of the State into consideration. In the present case, having considered all materials on record, we have come to the conclusion that the impugned order does not take into account relevant and germane circumstances and has been passed without a due and proper application of mind.

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

1. The first petitioner is a public charitable trust and the second petitioner is its authorized representative. The trust was set up with the object to revive and resuscitate Vedic Science and promote its study as a primary source of knowledge, establish the correlation of Vedic Science and other branches of knowledge and with the discipline of life and to disseminate the same amongst people. Clause 3 of the Deed of Trust contains an exhaustive enumeration of the objects of the trust.

2. The first petitioner applied on 10 June 2000 for the grant of permission for the purchase of land in excess of 12.50 acres, in public interest for the accomplishment of a proposed project which envisaged setting up educational institutions for the dissemination of Vedic knowledge, construction of residences for students and for ancillary purposes. The permission was sought in order to enable the trust to purchase land in excess of 12.50 acres, as mandated by Section 154 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19501. When no action was taken, the petitioners again applied to the Commissioner, Kanpur Division, Kanpur on 21 August 2000 for the grant of permission under Section 154 (2) for the purchase of 725.50 acres of land spread over 21 villages on the banks of river Ganges of Kanpur Nagar. On 21 October 2000, the Commissioner recommended to the State Government for the grant of permission as sought by the first petitioner. Thereafter, there was an exchange of correspondence regarding certain queries being raised with the petitioners.

3. On 14 December 2006, the State Government passed an order to the effect that since the petitioners had purchased land admeasuring 544 acres in excess of the prescribed limit under Section 154 (1) without the permission of the State Government, the land stood vested in the State under Section 167 of the Act. The order was challenged in Writ - C No. 2982 of 2007 which was disposed of by a Division Bench of this Court on 11 March 2010. The Division Bench recorded the statement of the petitioners that an

application would be filed under Section 154 (3) before the State Government which was directed to pass an appropriate order in accordance with law, after furnishing to the petitioners an opportunity of being heard.

4. The petitioners, thereupon, made a representation on 23 August 2010 to the Commissioner, Kanpur Division which was forwarded to the State Government on 1 September 2010. The petitioners have stated that the District Magistrate had also duly recommended to the State Government the grant of an exemption under Section 154 (2), and that the Tehsildar, in the course of an enquiry in April 2011, had opined that the activities proposed by the first petitioner were in the interest of the general public. A separate recommendation was made by the District Magistrate on 2 September 2011. The State Government, however, rejected the application on 25 June 2012 on the ground that the purpose for which the land was purchased, did not qualify as a public purpose.

5. The order of the State Government was challenged by the petitioners in Writ-C No. 45114 of 2012. During the pendency of the petition, the petitioners made an unconditional statement of their readiness and willingness to deposit an amount of fine as required by the first proviso to Section 154 (3). On 17 April 2013, the Court was apprised on behalf of the State that in view of the readiness expressed by the petitioners, a decision was expected shortly by the State Government under Section 154 (3). On 31 May 2013, the application submitted by the petitioners was once again rejected, following which the earlier writ petition was disposed of as infructuous with liberty to file a fresh writ petition. Thereupon, the petitioners filed a fresh writ petition, being Civil Misc Writ Petition No 67058 of 2013 for challenging the order dated 31 May 2013. The Division Bench allowed the petition on 9 December 2013 with the following observations:

"Once land in question belonged to private land holders and petitioners have proceeded to purchase the same for charitable purpose, and educational purpose and provision for post facto ratification of the said transaction, on fulfillment of terms and conditions as contained in the first proviso to sub-section 3 of Section 154 of U.P. Zamindari Abolition and Land Reforms Act, 1950, then request made by petitioner ought to have been considered by reasoned order as to why petitioners' request cannot be accepted. Merely because mutation has been made in favour of the State Government, same cannot be made foundation and basis for not considering the request of the petitioners. Mutations are made for a specific purpose, and are always subject to transactions and proceedings that take place. Once there is a provision, then the claim of petitioners should have been considered on merit, instead of proceeding to non suit the claim of petitioners, merely on the premises that mutation has taken place.

6. Consequently, in view of the fact stated above, order dated 31.5.2013 passed by the State Government is hereby quashed and set aside and the State Government is directed to take a fresh decision in the matter in accordance with law, preferably within period of next four months from the date of production of certified copy of this order.

With these observations, writ petition is allowed."

Following the order of remand, a fresh order has been passed by the Principal Secretary (Revenue) to the State Government on 14 August 2014 rejecting the representation. The Principal Secretary has held that the petitioners had acquired land in excess of the prescribed limit under Section 154 (1) without the approval of the State Government and without any precise policy or project and, hence, it was not appropriate to grant permission.

Section 154 of the Act provides as follows:

"154. Restriction on transfer by a bhumidhar.-(1) Save as provided in sub-section (2), no bhumidhar shall have the right to transfer by sale or gift, any land other than tea garden to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh.

Explanation.- For the removal of doubt it is hereby declared that in this sub-section the expression "person" shall include and be deemed to have included on June 15, 1976 a "Co-operative Society":

Provided that where the transferee is a Co-operative Society, the land held by it having been pooled by its members under Clause (a) of sub-section (1) of Section 77 of the Uttar Pradesh Co-operative Societies Act, 1965 shall not be taken into account in computing the 5.0586 hectares (12.50 acres) land held by it.

(2) Subject to the provisions of any other law relating to the land tenures for the time being in force, the State Government may, by general or special order, authorise transfer in excess of the limit prescribed in sub-section (1) if it is of the opinion that such transfer is in favour of a registered co-operative society or an institution established for a charitable purpose, which does not have land sufficient for its need or that the transfer is in the interest of general public.

Explanation.- For the purposes of this section, the expression 'family' shall mean the transferee, his or her wife or husband (as the case may be) and minor children and where the transferee is a minor also his or her parents.

(3) For every transfer of land in excess of the limit prescribed under sub-section (1) prior approval of the State Government shall be necessary:

Provided that where the prior approval of the State Government is not obtained under this sub-section, the State Government may on an application give its approval afterward in such manner and on payment in such manner of an amount, as fine, equal to twenty five per cent of the cost of the land as may be prescribed. The cost of the land shall be such as determined by the Collector for stamp duty.

Provided further that where the State Government is satisfied that any transfer has been made in public interest, it may exempt any such transferee from the payment of fine under this sub-section."

7. Sub-section (1) of Section 154 imposes a limit of 12.50 acres beyond

which, save as provided in sub-section (2), no bhumidhar shall have the right to transfer, by way of sale or gift, any land to any person where the transferee shall, by virtue of the sale or gift, be entitled to land which together with land, if any, held by his family, in the aggregate, exceeds 12.50 acres. However, the limit under sub-section (1) of Section 154 is expressly subject to sub-section (2), as the opening words of sub-section (1) would indicate. Sub-section (2) empowers the State Government, either by a general or special order, to authorise a transfer in excess of the prescribed limit in sub-section (1) if the State Government is of the opinion that such a transfer is in favour of a registered co-operative society or an institution established for a charitable purpose, which does not have land sufficient for its need or where the transfer of the land is in the interest of the general public. Under sub-section (3), for every transfer in excess of the prescribed limit under sub-section (1), prior approval of the State Government is necessary. However, under the first proviso to sub-section (3), the State Government is empowered to grant its approval post facto, subject to the payment of an amount equal to 25 percent of the cost of the land as prescribed. The second proviso to sub-section (3) further empowers the State Government to exempt from the payment of fine, where it is satisfied that any transfer has been made in public interest.

8. In the present case, it is apparent that the State Government has repeatedly disabled itself from applying its mind to the considerations relevant to the exercise of the power under sub-section (2) or, as the case may be, sub-section (3) of Section 154 of the Act. As the record before the Court would indicate, the orders passed by the State Government have been interfered with in the exercise of the writ jurisdiction under Article 226 of the Constitution by directing the Government to apply its mind to the requirements which are contained in sub-section (2) and the provisos to sub-section (3) of Section 154 at various stages. The State Government, in the present case, has declined to exercise the discretion which has been conferred upon it under sub-section (3) of Section 154 on the ground that the petitioners have acquired land in excess of the prescribed limit and, hence, there was no reason or justification to grant approval. The second reason which has weighed for the rejection is that the petitioners have proceeded to purchase the land without any specific purpose or project in mind.

9. We find merit in the contention of the learned counsel appearing on behalf of the petitioners, that the State Government has, once again, rejected the application without considering the circumstances which are relevant and germane to the exercise of the power. The fact that the holding of the petitioners would exceed the limit prescribed under sub-section (1) cannot be a reason, in itself, to reject the application. As a matter of fact, sub-section (1) of Section 154 begins with an expression that save as provided in sub-section (2), no bhumidhar shall have the right to transfer land in excess of the limit as prescribed, where the transferee shall, as a result of the sale or gift, become entitled to land which together with his existing holding exceeds 12.50 acres. The provisions of sub-section (2) indicate that the State Government is duly empowered, by general or special order, to authorise a transfer in excess of the limit prescribed,

where it is satisfied that (i) the transfer is in favour of a registered cooperative society; or (ii) the transfer is in favour of an institution established for a charitable purpose which does not have land sufficient for its need; or (iii) that the transfer is in the interest of the general public. Obviously, if the limit of 12.50 acres is to be an inflexible norm which does not admit of any exception, there was no occasion for the legislature to make a provision under sub-section (2) for transfer in excess of the limit prescribed under sub-section (1). Sub-section (3) of Section 154 mandates the prior approval of the State Government. The first proviso to sub-section (3) also contemplates a situation in which a post facto permission can be granted, the discretion being vested in the State Government to do so, subject to the payment of a fine. The second proviso to sub-section (3) further authorises the State Government to dispense with the payment of fine, where it is satisfied that the transfer has been made in public interest.

10. In the present case, a statement was made on behalf of the petitioners in earlier writ proceedings that they were ready and willing to deposit the fine as required by the first proviso to sub-section (3) of Section 154. Hence, there would be no occasion to dispense with the condition of a fine, as is contemplated in the second proviso, where the State Government is satisfied that the transfer is in public interest. But more importantly, the State Government has to exercise its discretion on objective considerations and the statute itself provides the guidelines and circumstances in which the discretion can be exercised. Sub-section (2) of Section 154 provides the circumstances in which the State Government may authorise a transfer in excess of the limit prescribed under sub-section (1). There is absolutely no reference in the impugned order to whether the petitioners satisfy any of the guiding factors which are stipulated in the statutory provision. There has been no application of mind to whether the institution is established for a charitable purpose; whether it does not have land sufficient for its need; or whether the transfer is in the interest of the general public. Merely holding that the petitioners had acquired land in excess of the prescribed limit under sub-section (1) does not, by itself, disable the State Government from exercising the powers vested in it by sub-section (2) and by the first proviso to sub-section (3) of Section 154. The infirmity in the impugned order lies in the fact that the State Government has abdicated its discretion and has rejected the application without considering circumstances relevant and germane to the exercise of discretion under the statute. Where an application is made to the State Government for the exercise of its discretion under sub-section (2) or the first proviso to sub-section (3) of Section 154, the burden lies on the institution to establish the element of public interest or, as provided in sub-section (2), to demonstrate that the institution is established for a charitable purpose. Where an institution has purchased a tract of land in excess of the prescribed limit without the approval of the State Government, this judgment should not be construed to mean that the State Government is bound to grant its permission without application of mind to whether the institution has a concrete proposal or project which would sub-serve its charitable purpose or which has an element of public interest. The petitioners would have to duly establish

the purpose that is involved and the public interest that would be subserved by the project. The prescribed limit of 12.50 acres has been introduced as a part of the legislation which subserves the wider social policy of the State, made in pursuance of the Directive Principles of State Policy in the Constitution. Consequently, any dispensation from the prescribed limit of 12.50 acres will have to meet the conditions of exemption which have been stipulated in the statute and it is only subject to compliance with those conditions that a dispensation can be granted in the exercise of discretion by the State.

11. In the present case, prima facie, it cannot be held that the petitioners have no specific project or purpose behind the acquisition of the land. The petitioners have submitted a detailed project report to the State Government. The proposal was recommended both by the District Magistrate as well as by the Commissioner to the State Government. Having regard to this factual background, it was necessary for the State Government to take those recommendations of responsible officers of the State into consideration. In the present case, having considered all materials on record, we have come to the conclusion that the impugned order does not take into account relevant and germane circumstances and has been passed without a due and proper application of mind.

12. In view of the above, the petition deserves to be allowed and is, accordingly, allowed. The order dated 14 August 2014 passed by the Principal Secretary (Revenue) is set aside. The matter is remanded to the State Government for a decision afresh, which shall be made after furnishing to the petitioners a reasonable opportunity of being heard.

13. We grant liberty to the petitioners to produce any additional material upon which they seek to place reliance before the State Government. We also leave it open to the State Government to direct the petitioners to produce further information and material, as may be required by the State Government to arrive at a proper conclusion for the exercise of its discretion, in accordance with the provisions of Section 154 (3) of the Act.

14. The petition is accordingly disposed of. In the circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2014

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

Civil Misc. Writ Petition No. 49075 of 2014

M/S Jupiter Information Tech. Pvt. Ltd., Delhi ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri V.K. Jaiswal, Sri H.R. Mishra

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav

Constitution of India, Art.-226- Restoration of allotment of plot -on certain default-considering huge investment-as per clause 'L' of the policies & Procedures for industrial

property management-subject to fulfillment of the conditions-authority to consider and take appropriate decision-petition disposed of.

Held: Para-8
Having considered the submissions raised, we dispose of the writ petition with a direction to the respondent no. 2, to consider the aforesaid claim of the petitioner and pass appropriate orders within two months from the date of production of a certified copy of this order provided there is no legal impediment or any other policy of Government Order contrary to the above.

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

1. Heard Sri H.R. Mishra, learned senior counsel for the petitioner and Sri Shivam Yadav, learned counsel for the respondents no. 2, 3 and 4.

2. The petitioner had been allotted a commercial plot.

3. The contention of the respondents appears to be that the petitioner has defaulted and, therefore, the plot has been cancelled as per the conditions applicable.

4. The petitioner contends that he has made huge deposits and, therefore, the prayer is that the plot may be allowed to be retained by the petitioner on the terms and conditions that may be applicable for the said purpose.

5. This matter had been adjourned to enable the learned counsel for the respondent authority to inform the Court whether such a course is permissible or not.

6. Sri Shivam Yadav has presented before the Court a document titled as "The Policies and Procedures for Industrial Property Management" of October, 2012.

7. Sri Shivam Yadav has invited the attention of the Court to Clause L of the said policy, which is extracted herein under:

Restoration of Industrial Plot/Shed

The Authority can exercise cancellation of industrial plot/shed for breach of terms and conditions of allotment/lease deed/Transfer deed. However, the Chief Executive Officer/or any other officer authorised by him can restore the plot. the restoration will be subject to the following conditions:-

1. The allottee would pay restoration charges @ 10% of the prevailing rate/reserve price. .

2. The allottee has to produce NOC of accounts department.

3. The allottee has to pay time extension, charges as per terms of allotment/lease.

4. The allottee will submit project implementation schedule in the shape of affidavit. The maximum time allowed is one year for plot size upto 4000 sq. mtrs. And two years for plot size above 4000 sq. mtrs.

5. The allottee has to submit performance guarantee valid for more than three months period of Pis given by him and value of performance guarantee will be 10% of the prevailing price of the plot.

6. Transfer and/or Change In Constitution of the unit would not be allowed outside the blood relation, till the

unit is declared functional by the NOIDA through a written communication.

7. If there is any court case pending before any court, it has to be withdrawn by the allottee. All legal expenses would be borne by the allottee.

8. In case allotment has been cancelled due to commercial activities the restoration of the plot shall only be considered on submission of affidavit for not carrying out the commercial activities in future and on inspection of the site about closing the commercial activities.

9. In case of restoration in prepossession cases, the allottee shall be required to get the unit functional as per terms of the Lease Deed. In such cases they will have to comply with the clauses 1,2,5,6 & 7, as stated above.

8. Having considered the submissions raised, we dispose of the writ petition with a direction to the respondent no. 2, to consider the aforesaid claim of the petitioner and pass appropriate orders within two months from the date of production of a certified copy of this order provided there is no legal impediment or any other policy of Government Order contrary to the above.

9. With the above directions, the writ petition is disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2014

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

Civil Misc. Writ Petition No. 49946 of 2014

Nagar Palika Parishad, Mawana, Merrut
...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Nipun Singh

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

U.P. Palika (Centralized) Service Rules 1966-Rule-31-Additional or temporary charge of executive officer-by G.O. Dated 24.01.2014-proposal for appointment be send to state government-District Magistrate-no authority to give additional/temporary charge-quashed.

Held: Para-7
A perusal thereof leaves no room for doubt that any ad hoc or temporary officiating appointment is within the jurisdiction of the State Government and which stands fortified by the judgment in paragraph 29 aforesaid. The Government Order dated 24.1.2014 is also to the same effect.

Case Law discussed:
2014 (1) A.D.J. Page 368.paragraph 29.

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

1. Heard Sri Nipun Singh learned counsel for the petitioner, Sri Rajiv Singh learned Standing Counsel for the respondent nos. 1 to 3 and Sri Anand Kumar for the respondent no. 4.

2. The Office of the Executive Officer of the Nagar Palika, Mawana, was lying vacant and one Mr. Manoj Kumar Rastogi was transferred for taking over charge as such by the State Government. However, Mr. Rastogi has not taken over charge as yet.

3. The District Magistrate, Meerut as an interim measure, pending taking over charge by a regular appointee, has passed the impugned order whereby he has directed the respondent no. 4 Shailendra Kumar Singh, who is the Executive Officer, Hastinapur to also additionally take charge of Nagar Palika Parishad, Mawana.

4. The petitioner is the Chairman of the Nagar Palika Parishad, Mawana and it is alleged that this order of the District Magistrate is without jurisdiction keeping in view the ratio of the decision in the case of Girdhari Lal Swarnkar Vs. State of U.P. and others reported in 2014 (1) A.D.J. page 368. Paragraph 29 of the said judgment is extracted hereinunder:-

"29- The U.P. Palika (Centralized) Service Rules, 1966, do not contemplate any delegation of powers by the State Government in the matter of appointment upon the District Magistrate or any other authority. Therefore, the Government Order impugned also suffers from the vice of excessive delegation."

5. This matter was taken up and we had called upon the learned Standing Counsel to obtain instructions about the exercise of powers by the District Magistrate in such a contingency keeping in view the aforesaid decision of the Court.

6. Learned Standing Counsel has invited the attention of the Court to the Government Order dated 24.1.2014 to urge that the State Government has already issued instructions as per the judgment in the case of Girdhari Lal Swarnkar (Supra) and any such proposal for additional or temporary charge as provided under Rule 31 of the U.P. Palika (Centralized) Service Rules, 1966 has to be sent to the State Government for orders. The said rule is extracted hereinunder:-

"31- Temporary Arrangments- Ad hoc and temporary officiating appointments- Notwithstanding anything contained in Rule 21 the State Government may also make ad hoc appointments or temporary officiating arrangements for the posts falling vacant Substantively or temporarily."

7. A perusal thereof leaves no room for doubt that any ad hoc or temporary officiating appointment is within the jurisdiction of the State Government and which stands fortified by the judgment in paragraph 29 aforesaid. The Government Order dated 24.1.2014 is also to the same effect.

8. There is no ambiguity in the source of the power available with the State Government in this regard. The petitioner therefore is correct in her submission that the District Magistrate did not have any jurisdiction to pass any order with regard to such arrangment as per Rule 31 aforesaid.

9. The writ petition therefore deserves to be allowed. The impugned order dated 12.8.2014 Annexure 1 to the writ petition is quashed leaving it open to the State Government-respondent no. 1 to pass an appropriate order with regard to proposal of appointment of the Executive Officer of the Nagar Palika Parishad concerned in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 31.10.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 52637 of 2014

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

Counsel for the Petitioners:
Sri Shashi Nandan, Sri Santosh Kumar Srivastava, Smt. Alka Srivastava

Counsel for the Respondents
C.S.C., Sri Manish Goyal, Sri G.K. Singh
Sri Samir Sharma

Constitution of India, Art.-226- Regularization-employees working in fast tract Court-after regularization-the reconsidered as per circular issued by High Court-following dictum of 'Uma Devi' case-neither State Government nor High Court ever given direction for regularization-revocation although not faulty-but High Court not considered the case law of Apex Court of Brij Mohan Lal-where direct or Adhoc judges of Fast track Court were directed to regularized-both judges and employees of fast track court-being part of same scheme-should not be treated differently-direction for fresh consideration of their regularization given.

Held: Para-42
Having said so, I am also of the view that the High Court does not appear to have considered the judgment of the Supreme Court in Brij Mohan Lal's Case (supra), specially Paragraph 207.9 thereof, whereby direct recruit ad hoc judges of Fast Track Courts were ordered to be considered for regular appointment/regularisation subject to the terms and conditions mentioned therein. As both judges and employees of Fast Track Courts were part of the same Scheme, in my view, there is no reason as to why they should be treated differently, therefore, I am of the view that the respondents may consider the case of the petitioners for grant of such benefits as has been extended by the Supreme Court in Brij Mohan Lal's Case (supra) to the Fast Track Courts' Judges vide paragraph 207.9 thereof, subject to such variations as may be necessary, unless there are exceptional and compelling reasons for not extending such benefit to them.

Case Law discussed:
2006 (4) SCC 1; 2014 (7) SCC 233; 2010 (9) SCC 247; 2014 (7) SCC 2; 2012 (6) SCC 502; 2012 (11) SCC 656.

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

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Santosh Kumar Srivastava for the petitioners, Sri G.K. Singh, learned Senior Counsel assisted by Shri Samir Sharma for the respondents No. 2, 3 and 4 and the learned Standing Counsel for the respondent No. 1.

2. The issue involved herein is the entitlement of the petitioners to regularization of their ad hoc services against sanctioned posts in the regular cadre of service in the District Courts and the validity of the orders passed by the concerned District Judge and the High Court, on the Administrative Side, in this regard.

3. The scheme of Fast Track Courts was introduced by the Union of India and funds were allocated for the said purpose by the 11th Finance Commission. The said Courts were created for short duration, which were extended from time to time. Ultimately, the aforesaid arrangement came to an end on 31.3.2011 when the Union of India refused to extend

further financial assistance for the said Courts. Thereafter, in some States, the Fast Track Courts have continued and the expenses have been borne by the concerned State Government, whereas in other States, the employees engaged for running of the said Courts have been absorbed in the regular Courts on such terms and conditions as has been deemed fit.

4. An advertisement was issued by the District Judge, Baghpat on 27.5.2003 inviting applications for selection and appointment of Stenographers/Clerks/Typists and Class-IV employees for the Fast Track Courts referred above and in pursuance thereof a selection was held wherein the petitioners participated and on being found fit for the post in question, were selected and appointed on ad hoc basis with a clear stipulation that the post in question were purely temporary and likely to continue for short duration unless abolished earlier and that no lien etc. will be claimed for further appointment on these posts.

5. The Fast Track Courts Scheme continued till 2005 when the same was withdrawn, however, on revival of the said scheme in the same year, the ex-ad hoc employees, such as the petitioners, who were earlier working, were allowed to continue on the same terms and conditions but with the condition that the salary shall be payable only from the date of fresh joining. The earlier period was to be counted for other purposes, except salary. This was provided by the Circular of the High Court dated 24.5.2005. The employees of the Fast Track Courts who were declared surplus on account of shifting of such Courts from one judiciary to another, were to be considered for absorption as per the Circular dated 27.7.1994.

6. On 28.8.2010, a Government Order was sent by the State Government to the Registrar General of the Allahabad High Court communicating extension of the Fast Track Courts w.e.f. 1.6.2010 to 28.2.2011 subject to the terms and conditions mentioned therein. The said Government Order also mentioned that Union of India vide its letter dated 9.8.2010 had informed that the financial assistance provided by it for the Fast Track Courts for the period up to 31.3.2011, was limited to 480 lacs per year and any expenditure beyond it will have to be borne by the State Government, therefore, the High Court should consider keeping the post of Presiding Officer vacant as and when the incumbent relinquishes the post on account of promotion or other such reason and not to fill up the same and also to absorb the supporting staff elsewhere.

7. On 18.3.2011, a Circular was issued by the Registrar General, High Court, Allahabad to all the District Judges in the State to the effect that if they wanted to make appointments in the regular establishment of Class III and IV of their judgeship, they will leave vacant or keep reserved posts for the purpose of adjustment of the employees of the Fast Track Courts working in their judgeship.

8. On 31.3.2011, presumably, consequent to the refusal of the Union of India to extend further financial assistance for such Courts, a Government Order was sent by the State Government to the Registrar General, Allahabad High Court regarding creation of 780 ex-cadre posts for speedy disposal of cases for the period

1.4.2011 to 29.3.2012 unless abolished earlier. These posts were created subject to the condition that as and when the regular posts in the regular cadre fall vacant, the aforesaid ex-cadre posts shall be adjusted/absorbed against said posts and thereafter, the vacancy shall be filled up in accordance with the procedure prescribed in the Rules. On 1.4.2011, the Registrar General communicated the Government Order dated 31.3.2011 to all the District and Sessions Judges in the State of U.P. For necessary action. The Adhoc employees of the Fast Track Courts were continued against these ex-cadre post, albeit on Adhoc basis.

9. The records reveal that in view of the letter of the Registrar General dated 1.4.2011 and the G.O. Dated 31.3.2011 referred therein, a representation was submitted by the petitioners and others for their absorption/regularization, whereupon a Screening Committee was constituted by District Judge vide order dated 12.2.2013, which recommended their absorption/regularization vide undated report, a copy of which is annexed as Annexure 12 to the writ petition.

10. Consequent to the report submitted by the Screening/Grievance Committee, the District Judge, Baghpat issued an order dated 23.5.2013 regularising the services of the petitioners herein allegedly against vacant posts in the regular cadre of the judgeship.

11. Thereafter, on 26.11.2013, the Grievance Committee submitted another report recommending confirmation of the petitioners on the respective posts in the service, which was approved by the District Judge on the same date.

12. Based on another report of the Grievance Committee dated 2.2.2014, the petitioners were granted the first financial upgradation from respective dates on completion of 10 years satisfactory service, including the ad hoc services rendered by them and the same was approved by the District Judge on 2.7.2014.

13. On 30.8.2014, the Joint Registrar (Judicial) (Inspection), Allahabad High Court issued a letter to the District Judge, Baghpat communicating him the decision of the High Court to the District Judges asking them to re-visit the order of regularization/absorption and to bring the same in conformity with the law laid down by the Apex Court in the case of Secretary, State of Karnatka Vs. Uma Devi reported in 2006 (4) SCC 1 and to issue a show-cause-notice to the employees concerned to explain as to why orders of regularization/absorption may not be withdrawn and after considering their reply suitable orders may be passed. It was made clear that these employees of Fast Track Courts, shall not go out of employment because of withdrawal of order of regularization/absorption. They were to be continued till regular appointments are made against the posts, on same terms and conditions as they were working prior to the issuance of the orders of regularization/absorption.

14. In pursuance to the aforesaid, the District Judge, Baghpat issued notices to the petitioners who submitted their replies. It appears that a report was sought from the Administrative Committee of the judgeship, which was submitted on 8.9.2014, based thereon, the impugned order dated 9.9.2014 was passed restoring their status and service, as it was, prior to

the passing of orders of regularization/absorption on 23.5.2013 and 30.8.2013 and continuing them as such on ad hoc basis. Thus, the order regularising their services and those granting consequential benefits have been rendered inoperative.

15. Being aggrieved by this order dated 9.9.2014, the petitioners have approached this Court.

16. The contention of Sri Shashi Nandan, learned Senior Counsel is that the appointments of the petitioners was made after due advertisement and selection based on open competition, albeit, on ad hoc basis, therefore, it can neither be termed as illegal nor irregular appointment. It can also not be termed as back door entry. He further contended that the genesis of the dictum of the Supreme Court in Uma Devi's case was appointments made without any advertisement and selection i.e. through back door and the observations contained therein have to be understood in this background. As, by no stretch of imagination, the entry of the petitioners in the service of the Fast Track Courts can be termed as back door entry, therefore, the observations contained in Uma Devi's case regarding dis-entitlement of such appointees to regularization are not attracted to their case. The petitioners possessed the requisite qualification for the respective posts and went through a process of selection, which was in consonance with the requirements of Article 14 and 16 of the Constitution of India, therefore, the District Judge, rightly regularized their services and absorbed them in terms of the letter of the High Court dated 1.4.2011 and the Government Order dated 31.3.2011, which, according to him contained a decision for absorption/regularization of such employees in the regular cadre of the District Courts. Learned counsel also placed reliance upon Paragraph 53 of the judgement in Uma Devi's Case as elucidated further in the case State of Jharkhand Vs. Mamal Prasad reported in 2014 (7) SCC 223, in support of his contention that the petitioners having completed more than 10 years of service and their initial appointments neither being illegal nor through back door, their services were rightly regularized.

17. Learned counsel contended that the direction of the High Court vide letter dated 30.8.2014 to the District Judge to re-visit the order of regularization and issue show-cause-notice to the concerned employees etc. amounted to an encroachment upon the authority of the District Judge to take an independent decision in the matter thereby reducing the entire exercise to a mechanical formality indicative of pre-determination, on the part of the respondents, of the issue. The High Court did not give any reason as to how there was a violation of Uma Devi's case. The consequential order of cancellation of regularization passed by the District Judge on 9.9.2014 is also not sustainable as he has merely mechanically followed the dictates of the High Court without considering the reply submitted by the petitioners to show-cause-notice and without considering and mentioning as to how the dictum in Uma Devi's case has been violated in the matter of the petitioners. The learned counsel contended that the petitioners have not only been regularized in service but also confirmed and granted the first promotional pay scale, therefore, the impugned action is unjustified, unreasonable and illegal.

18. The learned Senior Counsel invited the attention of the Court to the Government Order dated 31.3.2011 and the Circular of the High Court dated 1.4.2011 as also the letter of the High Court dated 18.3.2011 by which the District Judges were directed to keep the posts in the regular cadre reserved for adjustment of the employees of the Fast Track Courts working in the judgeship, as well as various other documents which have already been referred to hereinabove.

19. Sri G.K. Singh, learned Senior Counsel appearing for the Respondent nos. 2 to 4 submitted that the petitioners were never appointed substantively against any sanctioned post in the regular cadre of the District Courts. He referred to the advertisement annexed with the writ petition to show that the selection on the basis of which the petitioners were appointed, was for Fast Track Courts, that too, on ad hoc basis, wherein, even retired employees could participate. The Fast Track Courts were created for short duration. He referred to the Government Order dated 31.3.2011, to show that the same only spoke of absorption of ex-cadre posts against the regular vacancies in the regular cadre of the District Courts but it does not speak of absorption of incumbents thereof. The petitioners were made to work against ex cadre posts only on ad hoc basis and not on regular basis. No such decision was taken by the State Government or by the High Court to confer status of regular or permanent employee upon the petitioners. The Circular dated 1.4.2011 of the High Court and the G.O. dated 31.3.2011 were misconstrued and misread by the District Judge, Baghpat resulting in an illegal exercise of regularization of services of the petitioners, an error which has now been rectified. There was no provision of law under which the District Judge could have passed the order of regularization of services of the petitioners. There was no policy decision of the Competent Authority for regularization of employees such as the petitioners. The District Judge clearly exceeded his power.

20. He further contended that the reliance placed by the petitioners on Paragraph 53 of the judgement of the Supreme Court in Uma Devi's case is misplaced as the said paragraph has been considered and explained by it in a subsequent judgement in M.L. Kesri's case reported in (2010) 9 SCC 247, wherein, it has been held that period of 10 years of service should have been completed, on the date of decision in the Uma Devi's case i.e. 10.4.2006. As the petitioners herein had not completed 10 years of service on the said date they were not entitled to be regularized even as per the exception carved out in Para 53 of the dictum of the Supreme Court in Uma Devi's case. The reliance placed by the petitioners upon the judgement reported in 2014 (7) SCC 2 is also misplaced as it only follows M.L. Kesri's case and does not overrule it. Both the judgements have to be read and understood in harmony. The employees in the latter case had completed 10 years of service prior to the decision in Uma Devi's case. In nut shell, the submission was that the orders of regularization were contrary to the dictum of the Supreme Court in Uma Devi's Case, therefore, remedial measures have been taken which do not suffer from any error.

21. No doubt the petitioners were appointed after Advertisement and after

going through a process of selection but indisputably, the petitioners were not appointed against regular posts in the regular cadre of the Judgeship of District, Baghpat. A perusal of the advertisement and other documents relating to their selection and appointment leaves no doubt that their appointment was for working in the Fast Track Courts, which had been created for short duration, that too, purely on ad hoc basis without any right to claim any further appointment on regular basis. The appointment was not a regular appointment nor against a regular sanctioned post in the regular Class III and IV cadre in the judgeship of District Baghpat. The petitioners from the very date of their entry in the service of the Fast Track Courts knew the nature of their appointment, the duration of the Scheme of Fast Track Courts and also the limitations of the terms and conditions of service of such appointments, yet they chose to accept the same.

22. In this context reference may be made to Paragraph 45 of the judgement in Uma Devi's Case, which reads as under:

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

when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

23. Paragraph 19 of the aforesaid judgement is also relevant, which reads as under:

"One aspect arises. Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality of the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and the economic aspects. Can the court impose on the State a financial burden of this nature by insisting on regularisation or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the court ought not to impose a financial burden on the State by such directions, as such directions may turn counterproductive."

24. In paragraph 43, the Constitution Bench held as under:

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

regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgement, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

25. Paragraph 47 of the said judgement reads as under:

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

26. The Constitution Bench held that such employees do not have any enforceable right of regularization of their services nor of being declared permanent.

27. Having said so, the Supreme Court carved out an exception in Para 53 thereby permitting, as a one time measure, the regularization of such employees irregularly appointed (not illegally appointed) who have completed 10 years or more of service without intervention of the order of the Courts/Tribunal and were duly qualified persons appointed against duly sanctioned vacant posts.

28. The Purport of Paragraph 53 has been clarified by the Supreme Court in a subsequent judgement in M.L. Kesri's case (supra) wherein Their Lordships have held that the period of 10 years of continuous service referred in para 53 of Uma Devi's case should be before the date of decision in Uma Devi i.e. 10.4.2006. The said Paragraph 53 has also been considered in the subsequent judgement in State of Jharkhand Vs. Kamal Prasad reported in 2014 (7) SCC 223 relied upon by the petitioners and on a perusal of the same, I find that the dictum of M.L. Kesri's case, has not been deviated from,

in any manner. Thus, on a conjoint reading of both the judgements, the requirements of 10 or more years of service before the date of decision in Uma Devi's Case still holds good.

29. It is not out of place to mention that the Supreme Court had the opportunity to consider the issue of regularization of ad hoc judges appointed in the Fast Track Courts in the case of Brij Mohan Lal Vs. Union of India and Others reported in 2012 (6) SCC 502, wherein their Lordships after considering the dictum in Uma Devi's Case (supra), held that such appointees of the Fast Track Courts did not have any enforceable right of regularization of their services, however, in Para 207.9, in exercise of their powers under Article 142 of the Constitution of India, they gave an opportunity to such appointees for regular appointment in the regular cadre, subject to the terms and conditions mentioned therein.

30. Reference may be made in this regard to Paras 76, 172, 173, 174, 181 and 207 of the said judgement, which read as under:

"76. Upon an analysis of the abovestated Rules relating to the different States, the appointment letters issued to the appointees and the methodology that was adopted for appointment of the FTC Judges, it becomes clear that the appointees cannot be said to have any legal, much less an indefeasible right to the posts in question. Firstly, the posts themselves were temporary, as they were created under and within the ambit and scope of the FTC Scheme sponsored by the Union of India, which was initially made only for a limited period of five years. Now, financing of the FTC Scheme has already been stopped by the Central Government with effect from 31.3.2011. No permanent posts were ever created. In other words, their appointments were temporary appointments against temporary posts.

172. The prayer for regularisation of service and absorption of the petitioner appointees against the vacancies appearing in the regular cadre has been made not only in cases involving the case of the State of Orissa, but even in other States. Absorption in service is not a right. Regularisation also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularisation shall depend upon the facts and circumstances of a given case as well as the relevant rules applicable to such class of persons.

173. As already noticed, on earlier occasions also, this Court has declined the relief of regularisation of the persons and workmen who had been appointed against a particular scheme or project. A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularisation or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be dehors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the posts concerned. [Refer to Umadevi (3)]

174. It is not not necessary for us to deliberate on this issue all over again in view of the above discussion. Suffice it to notice that the petitioner appointees have

no right to the posts in question as the posts themselves were temporary and were bound to come to an end by efflux of time. With reference to the letters of their appointment and the Rules under which the same were issued, it is clear that these petitioners cannot claim any indefeasible right either to regularisation or absorption. It may also be noticed that under the Orissa Superior Judicial Service and Judicial Service Rules, 2007, there is no provision for absorption or regularisation of ad hoc Judges.

181. The issues arising for the consideration of this Court under this head, though ancillary, are of significant importance. Having held that the petitioner appointees to FTCs do not have any right to the post and such appointments were temporary, ad hoc and on urgent basis for a limited period, we have yet to examine whether these petitioners would at all be entitled to some relief within the framework of law, with particular reference to certain constitutional provisions.

207. Without any intent to interfere with the policy decision taken by the Government, but unmistakably, to protect the guarantees of Article 21 of the Constitution, to improve the justice delivery system and fortify the independence of judiciary, while ensuring the attainment of constitutional goals as well as to do complete justice to the lis before us, in terms of Article 142 of the Constitution, we pass the following orders and directions:

207.1. Being a policy decision which has already taken effect, we decline to strike down the policy decision of the Union of India vide Letter dated 14.9.2010 not to finance the FTC Scheme beyond 31.3.2011.

207.2. All the States which have taken a policy decision to continue the FTC Scheme beyond 31.3.2011 shall adhere to the respective dates as announced, for example in the cases of States of Orissa (March 2013), Haryana (March 2016), Andhra Pradesh (March 2012) and Rajasthan (February 2013).

207.3. The States which are in the process of taking a policy decision on whether or not to continue the FTC Scheme as a permanent feature of administration of justice in the respective States are free to take such a decision.

207.4. It is directed that all the States, henceforth, shall not take a decision to continue the FTC Scheme on ad hoc and temporary basis. The States are at liberty to decide but only with regard either to bring the FTC Scheme to an end or to continue the same as a permanent feature in the State.

207.5. The Union of India and the State Government shall reallocate and utilise the funds apportioned by the 13th Finance Commission and/or make provisions for such additional funds to ensure regularisation of the FTC Judges in the manner indicated and/or for creation of additional courts as directed in this judgement.

207.6. All the decisions taken and recommendations made at the Chief Justices and Chief Ministers' Conference shall be placed before the Cabinet of the Centre or the State, as the case may be, which alone shall have the authority to finally accept, modify or decline the implementation of such decisions and, that too, upon objective consideration and for valid reasons. Let the minutes of the Conference of 2009, at least now, be placed before the Cabinet within three months from the date of pronouncement of

this judgement for its information and appropriate action.

207.7. No decision, recommendation or proposal made by the Chief Justices and Chief Minsters' Conference shall be rejected or declined or varied at any bureaucratic level, in the hierarchy of the Governments, whether in the State or the Centre.

207.8. We hereby direct that it shall be for the Central Government to provide funds for carrying out the directions contained in this judgement and, if necessary, by re-allocation of funds already allocated under the 13th Finance Commission for Judiciary. We further direct that for creation of additional 10 per cent posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments and funds be provided without any undue delay so that the courts can be established as per the schedule directed in this judgement

207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over the FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective State only in the following manner :

(a) The direct recruits to the FTCs who opt for regularization shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.

(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four senior-most Judges of that High Court.

(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40 per cent aggregate for general candidates and 35 per cent for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering Justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as afore-indicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the

applicant being in excess of the prescribed age.

207.10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, shall not be eligible to the benefits stated in clause 5 of the judgement.

207.11. Keeping in view the need of the hour and the Constitutional mandate to provide fair and expeditious trial to all litigants and the citizens of the country, we direct the respective States and the Central Government to create 10 per cent of the total regular cadre of the State as additional posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State, immediately thereafter.

207.12. These directions, of course, are in addition to and not in derogation of the recommendations that may be made by the Law Commission of India and any other order which may be passed by the Courts of competent jurisdiction, in other such matters.

207.13. The candidates from any State, who were promoted as FTC Judges from the post of Civil Judge, Senior Division having requisite experience in service, shall be entitled to be absorbed and remain promoted to the Higher Judicial Services of that State subject to :

(a) Such promotion, when effected against the 25 per cent quota for out-of-turn promotion on merit, in accordance with the judgement of this Court in the case of All India Judges' Association (2002) (supra), by taking and being selected through the requisite examination, as contemplated for out-of-turn promotion.

(b) If the appointee has the requisite seniority and is entitled to promotion against 25 per cent quota for promotion by seniority- -cum-merit, he shall be promoted on his own turn to the Higher Judicial Services without any written examination.

(c) While considering candidates either under category (a) or (b) above, due weightage shall be given to the fact that they have already put in a number of years in service in the Higher Judicial Services and, of course, with reference to their performance.

(d) All other appointees in this category, in the event of discontinuation of the FTC Scheme, would revert to their respective posts in the appropriate cadre."

31. The aforesaid judgement has been followed in the case of Mahesh Chandra Varma Vs. State of Jharkhand, 2012 (11) SCC 656, wherein a similar issue regarding regularization of ad hoc judges of Fast Track Courts in the regular cadre of the Higher Judiciary was under consideration.

32. The terms and conditions of Class III employees in the District Courts in the State of U.P. are governed by Rules known as The Subordinate Courts Ministerial Establishment Rule, 1947, and those of Class IV employees are governed by the Rules known as The U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955. The aforesaid rules do not contain any provision for regularisation nor is it mentioned as a mode of recruitment therein.

33. It is not out of context to refer to the U.P. Regularization of Ad hoc Appointments (on posts outside the purview of Public Service Commission) Rules, 1979 as amended from time to time, which contains a provision for regularization of ad hoc appointments and Rule 4 thereof provides a cut off date i.e. 30.6.1998, thus, only those who are directly appointed on ad hoc basis on or after the said date were eligible for consideration for regularization subject to other conditions mentioned therein. Indisputably, the petitioners herein have been appointed subsequent to 30.6.1998, that too, not against a post in the regular cadre, therefore, they are not covered by the aforesaid regularization Rule, 1979.

34. The validity of the impugned orders is to be considered against the aforesaid factual and legal background.

35. The petitioners have not been able to place before the Court any decision of the State Government or the High Court whereby such ad hoc employees of Fast Track Courts were ordered to be absorbed on regular basis against regularly sanctioned posts in regular cadres of the judgeship or for regularisation of their services.

36. The District Judge passed the order dated 23.5.2013 regularising the services of the petitioners only on the basis of G.O. Dated 31.3.2011 and Letter of High Court dated 1.4.2011.

37. I have care fully perused the G.O. dated 31.3.11, the Circular of the High Court dated 1.4.2011 and 18.3.2011. None of the said orders provide for absorption/regularization of the petitioners in the regular cadre. In fact G.O. dated 31.3.2011 speaks of adjustments of the ex-cadre posts against regular vacancies in the regular cadre and the need to fill up the same as per the prescribed procedure (not regularization/absorption of ad hoc employees of Fast Track Courts). None of the said orders justify the regularization of the services of the petitioners in the regular cadre of the judgeship. The District Judge clearly misconstrued the said orders and treated them to be orders for regularization/absorption of such employees in the regular cadre and erroneously proceeded to regularize the services of the petitioners, therefore, the orders of regularization of service of the petitioners issued by the District Judge on 23.5.2013 were bereft of any sustainable factual and legal basis, therefore illegal.

38. There was no provision under which their services could have been regularized as was done by the District Judge.

39. The petitioners herein were ad hoc employees engaged for short duration in a Scheme of Fast Track Courts which itself was temporary, therefore, in view of the dictum of the Supreme Court in Uma Devi's case and Brij Mohan Lal's Case, as quoted hereinabove, they did not have any enforceable right for regularization/absorption of their services. They had not completed 10 years of service on the date of decision in Uma Devi's case i.e. 10.4.2006, therefore, in view of the pronouncement in M.L. Kesri's case they were also not covered by the exception carved out in Paragraph 53 thereof.

40. Thus, even if, the letter of the High Court dated 30.8.2014 does not spell out in clear terms the violation of the dictum

in Uma Devi's case and the decision of the District Judge dated 9.9.2014 also does not do so, but, in view of the apparent factual and legal position and the discussion made hereinabove, as, the only possible conclusion is that the regularization of the services of the petitioners was not permissible and it was in violation of the dictum of the Supreme Court in Uma Devi's case, I do not find any valid ground for interfering with the impugned orders. Reference may be made in this regard to the dictum of the Supreme Court : M.C. Mehta Versus Union of India (1999) 6 SCC 237, wherein their Lordships have observed as under:

" .....If the High Court had quashed the said order, it would have restored an illegal order - it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi.....

The above case is a clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of the principles of natural justice or is otherwise not in accordance with law."

41. In the aforesaid background, the High Court cannot be faulted for having issued the letter dated 30.8.2014 to the District Judge, Baghpat for taking remedial measures in conformity with the dictum of the Supreme Court. The District Judge can also not be faulted for having acted in conformity thereof nor for cancelling orders of regularization after issuing show-cause-notice to them.

42. Having said so, I am also of the view that the High Court does not appear to have considered the judgment of the Supreme Court in Brij Mohan Lal's Case (supra), specially Paragraph 207.9 thereof, whereby direct recruit ad hoc judges of Fast Track Courts were ordered to be considered for regular appointment/regularisation subject to the terms and conditions mentioned therein. As both judges and employees of Fast Track Courts were part of the same Scheme, in my view, there is no reason as to why they should be treated differently, therefore, I am of the view that the respondents may consider the case of the petitioners for grant of such benefits as has been extended by the Supreme Court in Brij Mohan Lal's Case (supra) to the Fast Track Courts' Judges vide paragraph 207.9 thereof, subject to such variations as may be necessary, unless there are exceptional and compelling reasons for not extending such benefit to them.

43. Subject to the above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2014

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

Civil Misc. Writ Petition No. 53361 of 2014

Laxman Prasad alias Nand Lal .Petitioner
Versus
Uttar Pradesh Power Corporation Lko & Ors. ...Respondents

Counsel for the Petitioner:
Deepali Srivastava, Sri Amit Kumar Sinha

Counsel for the Respondents
C.S.C., Sri Mahboob Ahmad

Police Liability Insurance Act, 1991-Section 6(2), 3 (c)-compensation-death caused due to electrician deceased 24 years young boy-snapped of high tension electric cable-claimed 5 lac compensation along with 12% interest-District Magistrate under no fault liability awarded 1 lac after adjusting amount already paid-held-as per Section 2(e) of Environment (Protection) Act 1896-electricity would fall within expression 'hazardous substance'-nature of accident-undisputed-District Magistrate to pass fresh order within period of 3 month-petition disposed of.

Held: Para-10
The provisions of Section 7(1) of the Act empower the Collector to determine the amount of relief which appears to him to be just. Under sub-section (4) of Section 7 of the Act the Collector is empowered to follow such summary procedure as he thinks fit, subject to any rule made in that behalf. Under sub-section (5) the Collector has been vested with the powers of a Civil Court for certain specific purposes. The award of compensation under Section 6 is not in the nature of an ex gratia. The Act recognises a statutory entitlement and imposes a corresponding statutory obligation. An Undertaking, which engages itself in the supply and distribution of electricity, cannot be unmindful of the serious hazard to life and property that may result as a consequence of its activities. The award of compensation under the Act has, therefore, to be construed to be in recognition of the right to life under Article 21 of the Constitution. The Collector ought to have furnished a reasoned justification in quantifying the award of compensation following the well settled principles in that regard.

Case Law discussed:

AIR 2010 Allahabad 117; AIR 1998 Allahabad 1: 1998 All LJ 1.

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

1. In these proceedings the petitioner has called into question the legality of an order dated 2 January 2014 passed by the Collector and District Magistrate, Allahabad on an application which was moved under Section 6 of the Public Liability Insurance Act, 19911. The Collector has, taking due note of the fact that an amount of Rs. 20,000/- was paid over to the petitioner on account of an accidental death of his son caused due to electrocution, directed the payment of a further sum of Rs.80,000/-. The petitioner seeks to challenge the order and claims an enhancement of the compensation to an amount of Rs. 5 lacs, on which interest has been claimed at the rate of 12% per annum.

2. The residential house of the petitioner is situated in Mohalla Ramkiyan Gandhi Nagar, Nagar Panchayat Sirsa, Allahabad. A high tension electric overhead cable passes in close proximity. On 8 August 2004, the high tension electric cable snapped, as a result of which the petitioner's son Raj Kumar, who was about 24 years of age, came into contact with the wire and sustained grievous injury. The petitioner's son succumbed to the injuries. A report of the incident was lodged by the petitioner at Police Station Meja, District Allahabad on 9 August 2004. The police prepared an inquest report and sent the dead body for post-mortem. The cause of the death was ascertained in the post-mortem report to be due to shock as a result of passage of electricity in the body. The petitioner's

son was, at the material time, a student of IInd year of the B.A. Degree course. The petitioner moved the U.P. Power Corporation for the grant of compensation. A detailed enquiry was conducted by the Joint Director. Since no further steps were taken for the disbursal of the compensation, the petitioner moved proceedings2 before this Court. In the said proceedings, an order was passed on 29 October 2010 by a Division Bench of this Court by which a direction was issued to the effect that if the petitioner furnished all the relevant documentary material to the Executive Engineer, his claim for the grant of compensation shall be decided in accordance with law. In compliance with the order, the petitioner submitted a copy of the first information report, post-mortem report and succession certificate to the Executive Engineer in the Electricity Distribution Division of the first respondent. Since no action was initiated, the petitioner filed an application before the District Magistrate, Allahabad under Section 6 of the Act. At that stage, on 11 September 2013, the first respondent awarded an amount of Rs.20,000/- to the petitioner by way of compensation. The District Magistrate by an order dated 2 January 2014 partly allowed the claim and directed the payment of compensation quantified as Rs.1 lac after giving due credit for the amount of Rs.20,000/-, which has already been paid. The petitioner is aggrieved by the quantum of compensation that has been awarded.

3. The Public Liability Insurance Act, 1991 was enacted by Parliament to provide for public liability insurance for the purpose of providing immediate relief to persons affected by accidents occurring while handling any hazardous substance. Section 2(a) of the Act defines the expression 'accident', as follows:

"(a) "accident" means an accident involving a fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to, any person or damage to any property but does not include an accident by reason only of war or radio-activity;"

4. The expression 'handling' is defined in Section 2(c), thus:

"(c) "handling", in relation to any hazardous substance, means the manufacture, processing, treatment, package, storage, transportation by vehicle, use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance;"

5. Section 3 of the Act provides for the payment of no fault compensation in the following terms:

"3. Liability to give relief in certain cases on principle of no fault

(1) Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage.

(2) In any claim for relief under sub-section (1) (hereinafter referred to in this Act as claim for relief), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

Explanation: For the purpose of this section--

(i) "workman" has the meaning assigned to it in the Workmen's Compensation Act, 1923 (8 of 1923);

(ii) "injury" includes permanent total or permanent partial disability or sickness resulting out of an accident."

6. Section 6 of the Act provides for the making of an application for a claim for relief. Section 6 is in the following terms:

"6. Application for claim for relief

(1) An application for claim for relief may for made--

(a) by the person who has sustained the injury;

(b) by the owner of the property to which the damage has been caused;

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by such person or owner of such property or all or any of the legal representatives of the deceased, as the case may be:

PROVIDED that where all the legal representatives of the deceased have not joined in any such application for relief, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made to the Collector and shall be in such form, contain such particulars and shall be accompanied by such documents as may be prescribed.

(3) No application for relief shall be entertained unless it is made within five years of the occurrence of the accident."

7. Under Section 7(1) of the Act, on the receipt of an application under Section 6(1), the Collector is empowered to hold an enquiry consistent with the principles of natural justice, into the claim and to make an award determining the amount of relief which appears to him to be just and specifying the person or persons to whom such amount of relief shall be paid. Under sub-section (4) of Section 7 of the Act, the Collector is empowered to follow such summary procedure as he thinks fit for holding the enquiry. Under sub-section (5) of Section 7, the Collector has all the powers of a Civil Court inter alia for taking the evidence on oath and for enforcing the attendance of witnesses and for compelling the discovery and production of documents and material objects as well as for such other purposes, as may be prescribed. Section 8(1) of the Act makes it clear that the right to claim relief under sub-section (1) of Section 3 in respect of death or injury to any person or damage to any property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.

8. Under Section 3(1) of the Act the compensation is based on the no fault liability principle where death or injury has been caused to any person, other than a workman, or damage to any property has resulted from an accident. The expression 'accident' is defined to mean an accident involving a fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death, among other

things. The expression 'handling' in Section 2(c) of the Act in relation to a hazardous substance includes use, transfer or the like of such hazardous substance. 'Hazardous substance' is defined under Section 2(d) of the Act to have the same meaning as under the Environment (Protection) Act, 1896. Section 2(e) of the Environment (Protection) Act, 1986 defines the expression 'hazardous substance' as follows:

"(e) "hazardous substance" means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment;"

9. Electricity is clearly a hazardous substance covered by the definition contained in Section 2(e) of the Environment (Protection) Act, 1986. A learned Single Judge of this Court in Uttar Pradesh Power Corporation Ltd. and anr. v. Kaleemullah and ors.3, following an earlier decision in U.P. Electricity Board and another v. District Magistrate, Dehradun and others4, held that the electricity would fall within the expression 'hazardous substance'.

10. In the present case, an application was moved by the petitioner to the Collector and District Magistrate under the provisions of Section 6 of the Act. The facts, which have been pleaded by the petitioner, are not in dispute. There is no challenge on the part of the first respondent to the legality of the order passed by the Collector awarding compensation under the Act and, as we have noted, the challenge of the petitioner is to the quantum of compensation. In this regard, the order which has been passed by the Collector is completely bereft of any reason or justification for the award of compensation in the amount which the Collector found to be just and proper. The provisions of Section 7(1) of the Act empower the Collector to determine the amount of relief which appears to him to be just. Under sub-section (4) of Section 7 of the Act the Collector is empowered to follow such summary procedure as he thinks fit, subject to any rule made in that behalf. Under sub-section (5) the Collector has been vested with the powers of a Civil Court for certain specific purposes. The award of compensation under Section 6 is not in the nature of an ex gratia. The Act recognises a statutory entitlement and imposes a corresponding statutory obligation. An Undertaking, which engages itself in the supply and distribution of electricity, cannot be unmindful of the serious hazard to life and property that may result as a consequence of its activities. The award of compensation under the Act has, therefore, to be construed to be in recognition of the right to life under Article 21 of the Constitution. The Collector ought to have furnished a reasoned justification in quantifying the award of compensation following the well settled principles in that regard.

11. In this view of the matter, we are inclined to allow the petition and to remit the proceedings back to the Collector for a fresh assessment of the quantum of compensation payable under the provisions of Section 6(1) of the Act. We clarify that we have not set aside the findings of fact which are contained in the order of the Collector in regard to the nature of the incident and in regard to the liability to pay the compensation since

there is no challenge before the Court to be considered at the behest of the first respondent. On remand, the Collector shall duly hear both the petitioner and the first respondent and pass an appropriate order in accordance with law quantifying the amount of compensation. This exercise shall be completed within a period of three months of the receipt of a certified copy of this order. In the meantime, we direct that any payment which has been made in compliance with the impugned order of the Collector, shall necessarily abide by the final result of the proceedings.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 53815 of 2014

Smt. Sudha & Anr. ...Petitioners
Versus
Motor Accident Claims Tribunal/D.J. Etah & Ors. ...Respondents

Counsel for the Petitioner:
Sri Upendra Upadhyay

Counsel for the Respondents
C.S.C.

Constitution of India, Art.-226-Release claimed amount-deposited by Insurance company towards accident compensation-claimant being poor illiterate widow of deceased-application to release Rs. 2 lacs for repairing of dilapidated house-rejection by Tribunal-misinterpreting the guidelines of Apex Court-held-not proper-quashed-direction for immediate release with interest given.

Held: Para-8
Learned counsel for the petitioners submits that in the instant case, in view of the above, this Court finds that the Tribunal has taken a very rigid stand and had mechanically passed the order without understanding and without appreciating the distinction drawn by the Supreme Court. The guidelines, which have now been incorporated in the Rules was only to safeguard the interest of the claimants particularly the minors and the illiterates. In the instant case the Court finds that the application was meant for the release of the money so that the petitioner's can get her house repair by making boundary wall and plaster, but the Tribunal has failed to understand the need and urgency in the matter and has mechanically passed the order while rejecting the application.

Case Law discussed:
2014 (1) T.A.C. 630 (All.).

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the respondents.

2. By means of present writ petition, the petitioners has challenged the impugned order dated 24.03.2014 passed by the the Motor Accident Claims Tribunal / District Judge, Etah.in Misc. Case No. 18 of 2014 in M.A.C.P. No. 14 of 2012 (Smt. Sudha and another Vs. Kamrujjama and others).

3. Learned counsel for the petitioners submits that petitioners has filed the Motor Accident Claims Petition No. 14 of 2012 (Smt. Sudha and another's Vs. Kamrujjama and others) for

compensation of the death of her husband Subodh Kumar who died on account of injuries sustained in the accident, which was occurred on 13.12.2011.

4. The award was passed on 17.10.2013 and compensation of Rs. 3,99,000/- alongwith 7% per annum interest was awarded by the Motor Accident Claims Tribunal, Etah.

5. Learned counsel for the petitioners submits that it is admitted position that entire amount of the award was deposited by the Insurance Company. As per the directions given in the award, Rs. 50,000/- was deposited in fixed deposit scheme in the name of petitioner no.2, Rishav Kumar Minor son of late Subodh Kumar and Rs. 2,00,000/- was deposited in fixed deposit in the name of petitioner no.1, Smt. Sudha wife of late Subodh Kumar and remaining amount of the award of Rs. 1,49,000/- was released in favour of petitioner no.1.

6. Learned counsel for the petitioners submits that at present petitioners is suffering great hardship due to dilapidated position of her house. She had moved Misc. Application No. 18 of 2014 before the respondent no.1 to release of Rs. 2,00,000/- which was kept in fixed deposit scheme, so that she may construct boundary wall and plastered of her house, but said application has been rejected by the respondent no.1 and same was assailed by means of present writ petition.

7. Learned counsel for the petitioners has relied the judgment passed in Civil Misc. Writ Petition No. 36701 of 2013 (Smt. Farmoodi Vs. Additional District Judge, Court No.9, Muzaffarnagar and Others), reported in 2014 (1) T.A.C. 630 (All.). The relevant portion of the said judgment is reproduced herein below:-

"5. The purpose of keeping the amount in a fixed deposit is for a specific purpose. The Supreme Court in the case of General Manager, Kerala State Road Transport Corporation Vs. Sushamma Thomas & Others, 1994 (1) TAC 323 issued certain guidelines to the Claims Tribunal while awarding compensation. The said guidelines are extracted below:-

"(i).The claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposited at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however, be allowed to be withdrawn.

(ii). In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as agricultural implements, rickshaw, etc. to earn a living the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money.

(iii). In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expending any existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv). In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above subject to the realization set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order.

(v). In the case of widows the claims Tribunal should invariably follow the procedure set out in (i) above.

(vi). In personal injury cases, if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii). In all cases in which investment in long term fixed deposits is made it should be an condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency if the amount awarded is substantial the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such F.D.R. can be liquidated."

6. These guidelines have now been incorporated by the legislature and Rule 220-B of the U.P. Motor Vehicle Rules, 1998 have been inserted in the Rules.

9. The Supreme Court held that these guidelines were issued to keep the amount in a fixed deposit for a period of time was mandatory only in the case of minors, illiterate claimants and widows."

8. Learned counsel for the petitioners submits that in the instant case, in view of the above, this Court finds that the Tribunal has taken a very rigid stand and had mechanically passed the order without understanding and without appreciating the distinction drawn by the Supreme Court. The guidelines, which have now been incorporated in the Rules was only to safeguard the interest of the claimants particularly the minors and the illiterates. In the instant case the Court finds that the application was meant for the release of the money so that the petitioner's can get her house repair by making boundary wall and plaster, but the Tribunal has failed to understand the need and urgency in the matter and has mechanically passed the order while rejecting the application.

9. Learned counsel for the petitioners submits that petitioner no.1 is a literate widow. On the other hand, a genuine reason has been given for the release of the balance amount.

10. Consequently, without further adverting on this issue, the Court is of the opinion that the impugned order cannot be sustained and is quashed.

11. The writ petition is allowed.

12. The petitioner is entitled for the release of the amount as prayed by her. The Tribunal is directed to release the amount along with the interest so accrued

immediately upon the receipt of the certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2014

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

Civil Misc. Writ Petition No. 54866 of 2014

Rajendri Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gopal Srivastava

Counsel for the Respondents
C.S.C., Suresh Singh

Constitution of India, Art.-226-Release of land-acquired under Land Acquisition Act-without disclosing particular of date of notification u/s 4 and 6 of Act-without disclosing the date on which compensation received-claim based upon letter dated 24.04.2014 by Principle Secretary Industrial development-held-can not be ground of release under section 48 without denotification of government-where no possession taken-where compensation given and possession taken-can not be released pursuant to letter referred above-petition dismissed.

Held: Para-6 & 7

6. We are of the considered opinion that such Government Orders/Letters of the Principal Secretary cannot be made a tool to reopen the settled acquisition proceedings specifically where the land holder has accepted the compensation without protest.

7. The State Government has to keep in mind the provisions of Section 48 of the Land Acquisition Act which confers a right upon the State Government to withdraw from the acquisition any land, possession whereof has not been taken, meaning thereby that where the possession of the acquired land has been taken, there cannot be a withdrawal of any land from the acquisition proceedings covered by Sections 4 and 6 of the Land Acquisition Act.

Case Law discussed:
2008 (1) AWC 399

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

1. Heard learned counsel for the petitioner, learned counsel for respondent no.4 and learned Standing Counsel for the State-respondents.

2. It is admitted on record that the land of the petitioners was acquired under the provisions of Land Acquisition Act, 1894. It is also admitted on record that the petitioners have taken compensation for the land, which had been so acquired.

3. What is missing from the writ petition is as to on what date the notifications under Sections 4 and 6 of the Land Acquisition Act, 1894 were made and on what date petitioners had actually received the entire compensation.

4. Learned counsel for the petitioners refers to the letter of the Principal Secretary, Industrial Development Department, Government of U.P. at Lucknow dated 24th April, 2010 enclosed as Annexure-2 to the writ petition for the reliefs prayed for in the present writ petition i.e. for the acquired land being leased in his favour.

5. We have gone through the letter of the Principal Secretary dated 24th April, 2014 and we find that in the letter it

has been recorded that in exceptional circumstances i.e. where there is a dispute with regard to the acquired land being Abadi, where there is public agitation against acquisition or law and order situation has arisen, the Noida, Greater Noida and Yamuna Express-way Industrial Development Authorities, while recommending de-notification of the acquisition, may examine the leasing out of property in favour of the person whose land has been so acquired.

6. We are of the considered opinion that such Government Orders/Letters of the Principal Secretary cannot be made a tool to reopen the settled acquisition proceedings specifically where the land holder has accepted the compensation without protest.

7. The State Government has to keep in mind the provisions of Section 48 of the Land Acquisition Act which confers a right upon the State Government to withdraw from the acquisition any land, possession whereof has not been taken, meaning thereby that where the possession of the acquired land has been taken, there cannot be a withdrawal of any land from the acquisition proceedings covered by Sections 4 and 6 of the Land Acquisition Act.

8. We may record that a Division Bench of this Court in the case of Abdul Salam alias Babu versus State of U.P. & Others, reported in 2008 (1) AWC 399, has specifically held that once the land has been acquired under the provisions of the Land Acquisition Act and possession has been taken, no application for release of the acquired land from the acquisition proceedings can be made before the State Government.

9. What logically follows is that the letter of the Principal Secretary dated 24th April, 2010 can be read to mean that power to de-notify the land would be available to the State Government only where the possession of the land has not been taken under the Land Acquisition Act. Where the possession has been taken, the letter of the Principal Secretary dated 24th April, 2010 will have no application.

10. Therefore, there cannot be any mandamus as prayed for in the facts of the case.

11. In view of the aforesaid, the present writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 55500 of 2013

Dharmendra Singh Rathor ..Petitioner
Versus
Hon'ble Chief Justice Hon. High Court Judicature at Alld. & Ors.
...Respondents

Counsel for the Petitioner:
Sri Anil Tiwari

Counsel for the Respondents
Sri Samir Sharma, Sri Ashish Mishra
Sri Manish Goyal, S.C.

Constitution of India, Art.-226-Petitioner seeking benefit Division Bench judgment -denied-while all other 7 persons appointed as Routine Grade Clerk-along with petitioner-got extended same benefits-held-once it is found that post of RGC abolished and merged to ARO-petitioner and 7 others representationst

being appointed by the Chief Justice-can not be termed illegal one-petitioner entitled for every consequential benefit of judgment in special appeal-even may not be party-committee earred treating differently having no rational basis-impugned order quashed-consequential directions given.

Held: Para-34

On a perusal of the decision dated 31.05.2012 taken by the High Court on the administrative side pursuant to the judgment dated 20.09.2011 reveals that the High Court did not at all consider and failed to appreciate that the remaining seven persons including the petitioner were similarly situated to the seven 'representationists', referred therein, nor did it draw any distinction on the ground that the remaining seven were not entitled to the benefit of the judgment as they were not parties to the said proceedings. The Committee simply treated these seven persons differently without considering as to whether they were similarly situated and entitled to same benefit. I am of the view that it erred in doing so.

Case Law discussed:

2006 (4) SCC 1; 1978 (1) SCC 405; 1983 (1) LCD 201.

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

1. Heard Sri Anil Tiwari, learned counsel for the petitioner and Sri Samir Sharma, learned counsel for the respondents.

2. The petitioner herein was appointed as routine grade clerk in the High Court along with 13 other persons vide orders of the Registrar General dated 01.09.2004 on the same terms and conditions. The appointment was on ad hoc basis with the condition that he was permitted to appear in the examination/ test to be held for direct recruitment of routine grade clerks and his appointment would be regularised and confirmed only if he was selected in that examination/ test. This condition existed in the appointment orders of all the 14 persons. Six other persons were appointed on various dates, whose appointment order did not mention the word 'Ad Hoc'.

3. Prior to such appointment, an advertisement was issued for selection on the same post in March, 2004.

4. One Devendra Kumar Pandey, who claimed to be eligible for consideration as per the aforesaid advertisement filed a writ petition before this court being Civil Misc. Writ Petition No.45922 of 2004 praying for a writ of certiorari for quashing the appointments of respondents No.3 to 14 therein, vide orders dated 26.07.2004, 01.09.2004 and 02.09.2004 (Annexures No.2, 3, 4, 5 & 6 to the writ petition) and other similarly situated employees, if any. His claim was that the respondents should hold the recruitment as per the advertisement issued in March, 2004.

5. The memo of the said writ petition is annexed with the writ petition, which shows that the respondents No.3 to 14 were those who were appointed along with the petitioner on 01.09.2004 and four others, whose order of appointment did not mention the word ad hoc.

6. The petitioner was not impleaded as respondent, but the fact is that in the relief clause, relief had been sought for quashing the appointment of 'other similarly situated employees, if any'.

7. Ultimately, the advertisement referred above was cancelled.

8. The aforesaid writ petition came up for hearing and the same was decided vide judgment dated 27.07.2007. This court observed that once the advertisement had been cancelled and the writ petition had not been amended, the cause of action in favour of the petitioner therein did not survive any further. The court also took note of the fact that a fresh advertisement had been issued on 31.07.2006, but the petitioner therein had not applied pursuant thereto. The service Rules had also undergone a change, according to which, the requisite qualifications had also undergone a change. In fact, the cadre of routine grade clerk was declared as a dead cadre and its employees were merged in the new cadre of Assistant Review Officer, for which new Rules prescribing new qualifications had been prescribed. For the aforesaid reasons, this court held that the petitioner therein was not entitled to any relief, however, referring to the Constitution Bench judgment of the Supreme Court reported in Secretary, State of Karnatka and others Vs. Uma Devi (3) and others, 2006 (4) SCC 1 held that appointments made by Hon'ble Chief Justice in exercise of his powers under Rules 41 & 45 of the Allahabad High Court Officers and Staff (Condition of Service and Conduct) Rules, 1976, i.e. the respondents before the court, will be subject to regular selection by direct recruitment in accordance with Rule 8 of the Service Rules and these appointees will not be confirmed and regularised.

9. Being aggrieved the respondents therein, who were similarly situated to the petitioner herein filed special appeal before a Division Bench of this court challenging the aforesaid judgment dated 27.07.2007. The High Court on the administrative side also felt aggrieved and also filed a special appeal against the said judgment. Both the aforesaid appeals were clubbed together and allowed vide judgment dated 20.09.2011.

10. A Division Bench of this court held that the appointments in question were validly made, therefore, the observations in Uma Devi's case were not attracted. It also held that once the cadre of routine grade clerks had been declared a dead cadre and a new cadre had been created, for which new Rules had been framed, the conditions mentioned in the appointment order of the appointees dated 01.09.2004 etc. became redundant. The Division Bench was of the view that once the learned Single Judge had held that the petitioner therein was not entitled to any relief in view of the change in circumstances and his failure to amend the writ petition, the same should have been dismissed, and that, it erred in proceeding to make the observations in the operative portion of the judgment based upon the Constitution Bench Judgment in Uma Devi's case.

11. The Division Bench considered the scope of the powers of Hon'ble the Chief Justice under Rules 41 & 45 of the Rules of 1976 in the light of various decisions and held that the Chief Justice was empowered to make such appointments and as the same had been made as per the relevant Rules, therefore, they were not illegal nor irregular. Accordingly, the directions given by the learned Single Judge in para-21 of the impugned judgment dated 27.07.2007 following the observations of the Supreme Court in Uma Devi's case were set aside. The writ petition was treated to be dismissed on the basis of the

observations of the learned Single Judge himself in the earlier paragraphs of the impugned judgment. Registrar General of this court was directed to take appropriate steps with regard to confirmation/ regularisation and consequential relief to the employees.

12. A review petition was filed by the High Court, which was dismissed on 08.11.2012, inter alia, with the observation that the judgment in question had already been given effect to and all the concerned employees had been confirmed/ regularised and given consequential reliefs by way of promotion etc. vide various orders.

13. Pursuant to the judgment of the Division Bench dated 20.09.2011, a meeting of the concerned Committee of the High Court on the administrative side was held on 31.05.2012, wherein, out of the 14 persons referred hereinabove, seven who were respondents before the writ court and appellants in appeal were given benefit of regularisation/ confirmation etc., whereas, the remaining seven persons were treated differently. In respect to them, it was stated that as no rule had been framed by the High Court for regularisation of ad hoc employees, therefore, as per sub-clause (2) of Rule 40 of the High Court Rules, the Regularisation Rules applicable to the State Government employees were applicable and, as, the High Court had not issued any order of modification, variation and exception, therefore, the same were applicable without any modification and since the said seven persons including the petitioner did not fall within the date mentioned therein, i.e. 30.06.1998, therefore, they cannot be given benefit of regularisation. The four respondents before the writ court who were not even appellants in the appeal as referred hereinabove were also treated similarly to the seven appellants referred to hereinabove.

14. The petitioner herein submitted a representation to the High Court on the administrative side dated 19.09.2012 seeking confirmation on the post of routine grade clerk with all consequential benefits including promotion from the date of promotion of his juniors as has been done in the case of similarly situated persons. In the representation, the petitioner referred to the benefit given to the seven other persons, who were similarly appointed vide order dated 01.09.2004 and were respondents in the writ petition filed by Devendra Kumar Pandey and were appellants before the Division Bench, as already referred hereinabove. The representation also referred to the similar treatment having been given to six other persons, who were appointed without there being any stipulation in their appointment about their appointment being ad hoc. He referred to the judgments of the learned Single Judge dated 27.07.2007 and the judgment of the Division Bench dated 20.09.2011 and sought similar reliefs.

15. On receipt of the decision of the Committee dated 31.05.2012, the Hon'ble Chief Justice passed an order on 01.06.2012 referring the matter of all such employees, who could not get benefit of the said judgment dated 20.09.2013, including that of the petitioner to the Rules Revision Committee which, on 27.05.2013, took a decision as quoted in paragraph-12 of the counter affidavit of the respondents and pursuant thereto, the impugned order was passed indicating the

last three lines thereof, which stated that 'Committee recommends that those have become over-age be given relaxation in age in the next examination provided they possess minimum qualification for appointment'. The relevant extract of the decision of the Committee dated 27.05.2013 as quoted in paragraph-12 shows that the Committee had taken into consideration the conditions mentioned in the appointment order regarding appearance in examination and also the fact that the Regularisation Rules for class-III employees provided for a cut off date, i.e. 20.12.2001, but the petitioner and others, who had represented likewise did not fall within the said cut off date.

16. Being aggrieved, the petitioner has filed this writ petition.

17. The court was informed during the course of argument that six other persons, who had also represented and whose representations had been rejected likewise had approached this High Court sitting at Lucknow and their writ petitions are still pending. Learned counsel for the petitioner also informed the court that, as, fresh advertisement was issued by the respondents on 19.07.2014 for filling up the vacant posts in question, therefore, a writ petition being W.P. No.5288 (S/S) of 2013 was filed at Lucknow, wherein, an interim order had been passed on 25.08.2014 to the effect that though the selection for the post of routine grade clerk, pursuant to the advertisement dated 19.07.2014, may go on, but, the result of the same shall not be declared. A copy of the said order was placed before the court.

18. The contention of Sri Tiwari, learned counsel for the petitioner is that the petitioners were similarly situated to the seven persons who have been given the benefit of confirmation and further promotion in pursuance to the judgment of the Division Bench dated 20.09.2011, therefore, there is no reason as to why the petitioner should be treated differently. Learned counsel invited the attention of the court to one of the appointment orders of the other persons, which is annexed as part of Annexure-3 and the appointment order of the petitioner, which is also annexed with the writ petition, to show that except for the difference in the name, all the orders were verbatim similar, with the same terms and conditions.

19. He invited the attention of the court to the decision of the Committee pursuant to the judgment of the Division dated 20.09.2011 to impress upon that the committee decided to treat the seven 'representationists', who were respondents in the writ petition and appellants in the special appeal, referred above, as, on probation for one year from the date of their initial appointment and as confirmed on the expiry of the said period, the six persons, whose appointment orders did not contain words 'ad hoc' and who did not prefer any appeal against the judgment of the learned Single Judge dated 27.07.2007 were given similar benefits. However, the remaining seven persons including the petitioner were dealt with differently.

20. The contention is that the High Court completely failed to appreciate that the seven persons including the petitioner, who were not parties in the writ petition and were not appellants in the special appeal were similarly situated to those who were parties therein and once the Division Bench upheld the appointment of others as being legal entitling them to

confirmation/ regularisation, then the same benefit was required to be extended to these persons also, and there was no rational distinction for treating them differently as has been done by the Committee, vide decision dated 31.05.2012.

21. Learned counsel further submitted that out of the six persons, who were not similarly situated to the 14 persons, referred to hereinabove, only four were respondents in the writ petition and none of them filed special appeal against the judgment dated 27.07.2007, yet, all the six of them were extended the same benefits by treating them as on probation for a period of one year from the date of their initial appointment and as confirmed on completion of the aforesaid probation, under Rule 33. The contention is that the petitioner was entitled to similar treatment under Rule 33.

22. On the other hand, Sri Samir Sharma, learned counsel for the High Court submits that a perusal of the Division Bench judgment dated 20.09.2011 will show that the same was applicable only to the employees who were parties thereto, as is evident from the use of the word 'employees hereunder' in the last line of the said judgment. In this context, he also invited the attention of the court to the judgment dated 08.11.2012 passed in the review petition filed by the High Court, wherein, this court had taken notice of the fact that the judgment had been given effect to and all the concerned employees had been confirmed/ regularised. Based thereon it was contended that this court clearly meant that the said judgment dated 20.09.2011 was only confined to the parties therein and not others.

23. The learned counsel invited the attention of the court to paragraphs-8, 9, 10, 11 & 12 of the counter affidavit filed by the respondents in support of his contentions. The contention of the learned counsel is that as the petitioner did not file any special appeal against the judgment of the Single Judge dated 27.07.2007, therefore, the benefits under the judgment passed in special appeal were not liable to be extended to him and the decisions of the respective committees in this regard did not suffer from any error. Consequently, the impugned order passed pursuant to the same does not warrant any interference.

24. In rejoinder, Sri Tiwari submitted that the reliance being placed by the learned counsel for the respondent upon the words 'employees hereunder' mentioned in the judgment of the appellate court, as also mentioned in the counter affidavit, does not find any mention in the earlier decision of the Committee dated 31.05.2012 nor in the subsequent decision dated 27.05.2013, therefore, the same is by way of an afterthought, as such impermissible. He further submitted that even out of the six persons, whose appointment order did not mention the words 'ad hoc', only four were respondents in the writ petition and none filed special appeal against the judgment dated 27.07.2007, yet, the respondents have extended the benefit of the said judgment to all the six persons. The petitioner herein was similarly situated to the seven representationists referred in the decision of the Committee of the High Court dated 31.05.2012 and there was no reason for treating him differently.

25. He further submitted that as the High Court had also filed a special appeal

against the judgment dated 27.07.2007, therefore, there was no need for the petitioner to file such an appeal as his interest was being looked after and protected by the High Court itself, therefore, the contention to the contrary on behalf of the respondents is not acceptable. He contended that the seven 'representationists' have not only been confirmed but have been promoted to the next higher post of Review Officer and the petitioner is also entitled to the same benefit.

26. There is no doubt about the fact that the petitioner herein and the seven representationists, as referred in the decision dated 31.05.2012, who were respondents in the writ petition filed by Devendra Kumar Pandey, were similarly appointed by verbatim similar orders of the same date, on the same terms and conditions. Except for the difference in the name, the appointment orders did not differ in any manner. It is also not in dispute that when Devendra Kumar Pandey filed the Writ Petition No.45922 of 2004, he sought the quashing of appointment orders of respondents No.3 to 14 dated 01.09.2004, 02.09.2004 and 26.07.2004 and 'other similarly situated employees, if any'. For the reasons best known to him, he impleaded only some of the appointees excluding the petitioner herein but claimed relief against all of them.

27. In any case, the subject matter in issue in the writ petition was the validity of the appointments made by the respondents and if the court had held that they were illegal, then obviously the petitioner's (herein) appointment would also have been rendered illegal as it was also on the same terms. After the passing of the judgment dated 27.07.2007, the aggrieved respondents (therein) filed special appeal. The High Court on the administrative side also filed special appeal. In special appeal, the Division Bench categorically held such appointments to be legal and valid having been made as per Rules and also that the Chief Justice was empowered to do so. The relevant observations of the Division Bench are as under:

"In the instant case, High Court, which is the employer, and the employees, who have been appointed by the then Hon'ble the Chief Justice and whose appointments were challenged in the writ petition, both are aggrieved by the same order of the learned Single Judge and have preferred these appeals independently from the same order, therefore, it can be safely construed that there is no conflict of interest between the High Court as an employer and its employees. Against this background, we have to see whether passing of such order at the instance of the respondent/writ petitioner, who had no locus, was justified or not. At least the ratio propounded in 2001 (10) SCC 447 (Mohd. Shafi Pandow Vs. State of J&K and others), 2003 (8) SCC 567 (Chairman & MD, BPL Ltd. Vs. S.P. Gururaja and others), 2006 (3) SCC 758 (Gurpreet Singh Bhullar and another Vs. Union of India and others), 2008 (3) SCC 512 (K. Manjusree Vs. State of Andhra Pradesh and another) and 2009 (1) SCC 386 (Mukul Saikia and others Vs. State of Assam and others) does not say so.

Admittedly, appointment of the appointees, who are either appellants or respondents in these appeals, were made on adhoc basis by the then Hon'ble the Chief Justice in the year 2004 under

Rules 41 and 45 of the Rules, 1976. Rules 41 and 45 of the Rules, 1976, which are relevant for the purpose, are as follows:

"41. Residuary powers.-- Nothing in these rules shall be deemed to affect the power of the Chief Justice to make such orders, from time to time, as he may deem fit in regard to all matters, incidental or ancillary to these rules, not specifically provided for herein or in regard to matters as have not been sufficiently provided for:

Provided that if any such order relates to salaries, allowances, leave or pension, the same shall be made with the approval of the Governor of U.P."

"45. Notwithstanding anything contained in these rules, the Chief Justice shall have the power to make such orders, as he may consider fit, in respect of recruitment, promotion, confirmation or any other matter."

The preamble of the Rules, 1976 speaks that in exercise of the powers conferred by Clause (2) of Article 229 of the Constitution of India, the Chief Justice of the High Court of Judicature at Allahabad makes the following rules with respect to the conditions of service of persons serving on the staff attached to the High Court of Judicature at Allahabad. The appointments under challenge made on adhoc basis appear to be on the post of Routine Grade Clerk. Source of recruitment on Class-III posts as per Rule 8(a)(i), substituted by notification dated 27th October, 1989, is that direct recruitment will be made through competitive examination conducted by the Appointing Authority or in any manner so directed by the Chief Justice. Therefore, the appointments of such employees are as per the respective rules.

So far as Constitution Bench judgement of the Supreme Court in Uma Devi (supra) is concerned, it criticised passing of orders by the Courts regularising the services through back door process making burden on the Union of India or the State only out of sympathy for the continuance of service ignoring the process of appointment. In this case employer and employees are not in dispute. Even the Supreme Court in Uma Devi (supra) has eliminated irregular appointments under certain circumstances from illegal appointments with the intervention of orders of the Courts or of tribunals.

Moreover, by an order of the then Chief Justice dated 19th October, 2005 the cadre of Routine Grade Clerk was declared as dead cadre as per Rule 40 (3) of the Rules, 1976 and merged with the cadre of Assistant Review Officer (Lower Division Assistant in the pattern of civil secretariat). As a result whereof, the condition stipulated in the appointment letters of all the incumbents working as Routine Grade Clerk looses force. A deponent on the part of the Registry of the High Court has stated that by virtue of merger of the posts of Routine Grade Clerk with the Assistant Review Officer and the advertisement as made on 17th April, 2004 for 79 posts of Routine Grade Clerks having been cancelled, no recruitment can be made to such posts and accordingly, holding of any regular selection by direct recruitment to the post of Routine Grade Clerk does not arise. It has been contended by the appellants that the adhoc appointments as made in the case herein are neither temporary nor contractual nor casual, as was in the case of Uma Devi (supra). Moreover, such appointments are neither illegal nor irregular but in accordance with the

relevant Rules and powers of the Chief Justice of a High Court. Such power is sovereign and plenary in nature, which can not be questioned with the reference of Uma Devi (supra). Learned Counsel appearing for the respondent-writ petitioner has only contended that he has nothing to say with regard to availability of power of the Chief Justice but with regard to use of such power of the Chief Justice.

Upon hearing the parties, it can be construed that when the Chief Justice is empowered to appoint a person under the Rules framed in exercise of powers conferred under Article 229 (2) of the Constitution of India, the appointment of the person can not be said to be illegal or irregular. .....

Thus, in totality, both the appeals succeed and are allowed. The direction given by the learned Single Judge in Paragraph-21 of the impugned judgement dated 27th July, 2007 following the observations of the Supreme Court judgement in Uma Devi (supra) stands set aside. The writ petition is treated to be dismissed on the basis of the observations of the learned Single Judge himself in the earlier paragraphs of the impugned judgement. Registrar General of this Court is hereby directed to take appropriate steps with regard to confirmation/ regularisation and consequential relief of the employees hereunder.

However, no order is passed as to costs."

28. This court is not in any doubt that the observations of the Division Bench, referred hereinabove, regarding the validity of the appointments and the entitlement of such appointees to confirmation/ regularisation is applicable to all such appointees, and there is no rational basis for making any distinction in this regard.

29. So far as the use of the words 'employees hereunder' in the last line of the said judgment is concerned, I have perused the decision of the Committee dated 31.05.2012 taken pursuant to the aforesaid judgment dated 20.09.2011 and I do not find any distinction having been drawn by the Committee based on the aforesaid ground. Thus, it is clearly an afterthought, a post facto attempt to justify a prior action, which is impermissible. The validity of an action impugned is to be judged on the basis of the reasons mentioned in the impugned order/ decision, which cannot be allowed to be supplemented by means of a counter affidavit, therefore, this plea is not open to the respondents. Reference may be made in this regard to the judgment of the Supreme Court in the case of Mohinder Singh Gill Vs. The Chief Election Commissioner, 1978 (1) SCC 405, para-8 of which is quoted hereinbelow:

"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (1) "Public orders, publicly made, in exercise of a statutory

authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older: "

30. Mere use of the words 'employees hereunder' does not mean others similarly situated are to be deprived of similar benefits.

31. It is trite that judgments of the court are not to be read as statutes. Before the Division Bench, it was not an issue as to whether the benefit of regularisation/ confirmation etc. is to be confined to only those who were parties in the writ petition and the appeal or it was to be extended to others also, therefore, the said judgment can not be read or understood to mean that the benefits therein were to be confined to the parties therein. It is the ratio of the judgment, which is to be read and understood. The issue before the Division Bench was the validity of the appointments, which was upheld. It is also trite that once the legal position has been settled by the High Court in a writ petition at the behest of some persons, then other similarly situated should be extended the same benefit instead of being compelled to approach the court for the same relief. Reference may be made in this regard to a Divison Bench judgment of this court reported in R.N. Dixit Vs. State of U.P., 1983 (1) LCD 201, in para-3 of which it has been held as under:

"3. A qualifying examination for promotion of Junior Engineers, to the post of Assistant Engineers was held in 1970. The Government took a decision to allow grace marks upto 9 in respect of candidates of irrigation department and not to P.W.D., whereupon five persons filed two writ petitions nos.690 of '78 and 1523 of '78 complaining of discrimination. These writ petitions were allowed on 08.04.1982 by this court and the government was directed to consider the case of the petitioners who belonged to the P.W.D., by allowing grace marks, such as was done in respect of officers of the irrigation department. The state government has, accordingly, declared those petitioners passed after allowing their 9 grace marks. This order dated 3.2.83 is Annexure 4 to this writ petition. Petitioner is one of the remaining officers of the P.W.D. who could have succeeded if 9 grace marks were allowed. The state government has, however, given the benefit only to the persons who had earlier approached this court and not to persons who were similarly situated and had failed to approach this court. We find no justification for the government decision to deny the benefit of the decision in 'Madan Gopal Popli Vs. State' (Writ Petition No.1523 of 1978) to persons who were similarly situated with the petitioners of that case. Once the legal position is declared by this court and the same is not challenged before the Hon'ble Supreme Court, it is obligatory on the State Government to given effect to the law so declared. We, therefore, allow the Writ Petition and direct that the case of the petitioner and also of other persons similarly situated be dealt with after allowing them the benefit of 9 grace marks in respect of 1970 qualifying examination and to declare the result

accordingly, at an early date, being, within a month from today."

32. The petitioner was not made a party in the writ petition filed by Sri Devendra Kumar Pandey, though he claimed relief against similarly situated persons. Whether petitioner herein can be faulted or made to suffer on account of the above. The answer is in the negative. The High Court having already challenged the order of the Single Judge dated 27.07.2007, obviously the rights and interests of the petitioner herein were being looked after and were protected in its special appeal.

33. It is also important to note that out of the six persons whose appointment order did not mention the words 'ad hoc', only four were respondents in the writ petition and none of them filed special appeal against the judgment dated 27.07.2007, yet, the Committee extended the benefit of the Division Bench judgment dated 20.09.2011 to all the six persons.

34. On a perusal of the decision dated 31.05.2012 taken by the High Court on the administrative side pursuant to the judgment dated 20.09.2011 reveals that the High Court did not at all consider and failed to appreciate that the remaining seven persons including the petitioner were similarly situated to the seven 'representationists', referred therein, nor did it draw any distinction on the ground that the remaining seven were not entitled to the benefit of the judgment as they were not parties to the said proceedings. The Committee simply treated these seven persons differently without considering as to whether they were similarly situated and entitled to same benefit. I am of the view that it erred in doing so.

35. The decision of the High Court on the administrative side dated 27.05.2013 also does not consider the issue of these persons being similarly situated to the seven 'representationists', instead, it refers to the conditions of appointment mentioned in their appointment order, ignoring that the Division Bench, vide its judgment dated 20.09.2011, had already held that those conditions have lost force and these observations of the Division Bench are applicable as much to the appointment letter of the petitioner as to that of others who were before it. The said observations have become final. The review petition had been dismissed. This court has been informed that no special leave petition was preferred.

36. In my view, what has been held by the Division Bench in respect of the seven 'representationists', is applicable to the petitioner herein also and there is no rational basis for treating him differently. The respondents have erred in treating him so.

37. In view of the above discussion, the impugned order cannot be sustained. The same is accordingly quashed. The respondents are directed to extend the same benefits as has been extended to the seven 'representationists' as referred by the High Court in its decision dated 31.05.2012 pursuant to the judgment dated 27.07.2007 and the judgment dated 20.09.2011. The petitioner shall also be entitled to consequential benefits as has been granted to the said persons. This exercise shall be done within a period of two months from the date a certified copy of this order is produced before the competent authority. The writ petition is allowed in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2014

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

Civil Misc. Writ Petition No. 64061 of 2013

Panna Lal & Ors. ...Petitioners
Versus
The Collector, Allahabad & Ors.
...Respondents

Counsel for the Petitioner:
Sri Harish K. Yadav.

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

Urban Land (Ceiling & Regulation) Act 1976-Section 10 (b), 19 (5)-petitioner seeking direction to delete the State from revenue record-claimimg in actual physical possession-no specific denial-mere taking possession on paper without following procedure under Section 19 (5)-no possession in eye of law-direction to struck of the name of state as well as ADA given-petition allowed.

Held: Para-4
From the impugned order, it is apparently clear that no proceeding was initiated under section 10(6) of the Act and consequently, the alleged possession taken on paper and thereafter transferring the same to Allahabad Development Authority appears to be wholly illegal and without any justification.

Case Law discussed:
2013 (4) SCC 280; 2014 (4) ADJ 305

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

1. Baladeen was the original tenure holder of Gata No. 139 having an area 4872.94 sq. meter situate in village Dadanpur, Tehsil Chail District Allahabad. Under the Urban Land (Ceiling and Regulation) Act, 1976, the competent authority declared 3372.94 sq. meter as surplus land. The petitioners are the children and grand children of late Baladeen who have filed the present writ petition alleging that they are still in possession of the land in question and that the order of the District Magistrate dated 22.5.2013 rejecting their application should be set aside and the name of State of U.P. should be deleted from the revenue records and their names should be incorporated in view of the fact that all the proceedings under the Urban Land (Ceiling and Regulation) Act, stood repealed by virtue of the Urban Land (Ceiling and Regulation) Repeal Act,1999. This court under the earlier ground of litigation had directed the petitioner to make a representation which has been rejected by an order dated 15.5.2013.

2. The petitioner in paragraph 10 of the writ petition has made a categorical statement that they are in actual and physical possession. This fact has not been denied by the respondents in paragraph 6 of the counter affidavit.

3. From a perusal of the order of the District Magistrate,the court finds that the possession was alleged to have been taken by the delegate of the District Magistrate on 18.9.1984 pursuant to the order dated 18th September, 1984 declaring the land as surplus. The order of District Magistrate aforesaid further indicates that the land was transferred to Allahabad Development Authority on 10.1.1990 and possession of such transfer was recorded in the notice under section 10(5) of the Act. Nothing has been indicated in the

impugned order that voluntary possession was given by the original tenure holder or children or by the grand children under section 10(5) of the Act nor anything has been indicated that upon failure to give voluntary possession under section 10(5) by the original tenure holder or by his heirs, actual and physical possession was taken pursuant to the proceedings initiated under section 10(6) of the Act.

4. From the impugned order, it is apparently clear that no proceeding was initiated under section 10(6) of the Act and consequently, the alleged possession taken on paper and thereafter transferring the same to Allahabad Development Authority appears to be wholly illegal and without any justification.

5. In State of U.P. Versus Hari Singh 2013 (4) SCC 280 the Supreme Court has held that actual physical possession is required to be taken by the State under section 19(5) and 10(6) of the Act otherwise the benefit of the Repeal Act would have to be given to the tenure holder. Similar view was held by this Court in the case of Yasin and others Versus State of U.P. and others 2014 (4) ADJ 305.

6. We also find that inspite of time being granted no counter affidavit has been filed by the Allahabad Development Authority nor the counsel is present before the Court In the light of the aforesaid the impugned order of the District Magistrate cannot be sustained and is quashed. Writ petition is allowed. A writ of mandamus is issued directing the respondents not to interfere in the possession of the petitioners over the land in dispute. Further a writ of mandamus is issued commanding the State of U.P. to remove the name of the State of U.P. and/or remove the name of the Allahabad Development Authority from the revenue record and record the names of the petitioners on the land in question.
