ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHASHI KANT, J.

Criminal Contempt Application No. 15 of 2012

In Re. ...Applicant
Versus
K.P. Seth & Ors. ...Contemnors

Counsel for the Applicant:
A.G.A., Sri Sudhir Mehrotra

Counsel for the Respondents:
Sri Arvind Kumar Tripathi, Sri K.K. Arora, Sri Rahul Sripat

Contempt of Court Act, 1971-Criminal Contempt-office bearer of Bar Association-disturbing court functioning-use of defamatory language addressing cost-held-ex-facie illegal amount to criminal contempt-exercising power under chapter 24 Rule 11 (3) of High Court Rule 1952 and Section 34 of Advocate Act 1961-restrained from practicing for 30 days with fine of Rs. 2000/--in case of default shall undergo 15 days simple imprisonment-apology not bonafied

Held: Para-20
Besides, in exercise of our powers under Chapter 24 Rule 11(3) of The Allahabad High Court Rules, 1952, framed under Section 34(1) of Advocates Act, 1961, we restrain two contemnors from practising in Civil Court/District Judgeship, Rampur for a period of thirty days. They shall not enter premises of Civil Court/District Judgeship, Rampur for a period of thirty days', which shall commence from 23rd April, 2015.

Case Law discussed:
[2009 (4) ALJ 434]

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

1. Sri Kamla Pati Seth, Advocate (K.P. Seth) S/o Late Jagdish Narain and Mohd. Qurban, Advocate on behalf of Bar Association, Rampur, identified by their respective counsel Sri Rahul Sripat and Sri K.K. Arora are present in the Court.

2. This criminal contempt has been initiated against two contemnors, Sri Kamla Pati Seth and Mohd. Qurban, Advocates, and registered on a reference made by Sri S.P. Singh, District Judge, Rampur vide letter dated 4th July, 2012. It is stated therein that two contemnors alongwith large number of other Advocates entered Court rooms, raised slogans, took out Advocates who were present and working in the Court, forcibly, and disrupted Court proceedings on 06.06.2012, between 12.15 P.M. and 1.15 P.M. Report of disruption of Court functioning, slogans etc. was made by the other presiding officers of Rampur Judgship namely, Sri Shyam Lal Kori, Chief Judicial Magistrate; Sri Navneet Kumar Giri, Additional Civil Judge (Senior Division)/Additional Chief Judicial Magistrate; Sri Mumtaz Ali, Additional Chief Judicial Magistrate, Court No. 2; Sri Gyanendra Singh Yadav, Additional Chief Judicial Magistrate, Court no. 3; Sri Sita Ram, Civil Judge (Junior Division)/Judicial Magistrate; Sri Sanjay Kumar Singh, Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 2 and Sri Yajuvendra Vikram Singh, Additional Civil Judge (Junior Division)/Judicial Magistrate etc. Again on 7th June, 2012, such a report was given by Smt. Alka Bharti, Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 1, Rampur to the effect that at about 1.00P.M., when she was busy in Court, Sri K.P. Seth and Sri Qurban Ali, Advocates

who were also office bearers of Bar Association as President and Secretary respectively approached the gate of Court room, prevented litigants and Advocates from entering the Court room, forcibly, and raised slogans. After lunch, aforesaid Advocates again disrupted Court proceedings and functioning.

3. Complaint letters were also made part of the reference letter of District Judge, Rampur. Relevant extract of complaint of Smt. Alka Bharti dated 06.06.2012, reads as under :

"पुनः अपरान्ह करीब 1.00 बजे जब दैनिक पेशी के समय अधिवक्तागण व वादकारी न्यायालय में उपस्थित थे तथा मैं न्यायिक कार्य सम्पादित कर रही थी, तभी बार के अध्यक्ष श्री के0पी0सेठ, बाद वाहासचिव कुर्बान अली व श्री जुनैद खान कुछ अधिवक्ताओं के साथ न्यायालय में आये और नारेबाजी करने लगे तथा जातिसूचक शब्दों का प्रयोग करते हुए अभद्र भाषा का प्रयोग किया तथा अधिवक्तागण व वादकारियों को जबरदस्ती न्यायालय कक्ष से बाहर ले गये तथा पुनः न्यायिक कार्य करने में व्यवधान उत्पन्न किया गया। बार अध्यक्ष ने यह भी कहा कि यदि मेरे पक्ष में मन–माफिक आदेश नहीं होगा, तो न्यायालय में कार्य नहीं करने दिया जायेगा।"

English Translation by the Court :

"Again at 1 p.m., while dainik peshi being underway, the counsels and litigants were present in the court and I was discharging my judicial functions; at that very time Bar president Sri K.P. Seth, general secretary Sri Kurban Ali and Sri Junaid Khan, alongwith some other counsels, came over to the court; resorted to sloganeering, used indecent language laced with casteist words, forced the counsels and litigants out of the court room and again obstructed judicial proceedings. The Bar president also threatened that if a favourable order is not passed, the court shall not be allowed to run."

4. Taking cognizance of aforesaid contempt reference, this Court issued notice to Sri K.P. Seth, Mohd. Qurban and Sri Junaid Khan, Advocates vide order dated 26.07.2012, to show cause, why they should not be punished for above act of contempt.

5. On behalf of Mohd. Qurban and Sri Junaid Khan, Advocates affidavits were filed tendering unconditional apology, but having gone through, the Court rejected the same vide order dated 27.09.2012. Sri K.P. Seth, Advocate did not filed any reply but sought time, which was granted.

6. Thereafter, Court formulated charges against three Advocates vide order dated 10.10.2012, as under :-

"Sri K.P. Seth, President District Bar Association, Rampur

Sri Qurban Ali, Advocate, Secretary, District Bar Association,

Sri Junaid Khan, Advocate.

(i) That you on 06.06.2012 at 10.30 a.m. alongwith some other Advocates entered into the court room of Smt. Alka Bharti, Additional Civil Judge (J.D.), Court No. 1, Rampr and shouted slogan by using indecent language and thereby disrupted the court proceedings.

(ii) That you on the same day at 01.00 p.m. again indulged in slogan shouting, using unparliamentary and abusive language against the Presing Judge coerced and also coercing litigants and advocates to leave the court room and thereby stalled and threatened to stall the functioning of the court only because you, K.P. Seth, solicited favour from the

above noted Additional Civil Judge in different judicial proceedings.

(iii) That you all on 06.06.2012 along with other members of the Bar Association resolved to boycott the court of Smt. Alka Bharti and transmitted the resolution to the District Judge, Rampur and again withdrew it without any reason, which was also an act of contempt, due to being instance of acts done by you for gaining undue favour from a Judge in a judicial proceedings, which was being handled by the above noted Smt. Alka Bharti by bullying her down by the above acts and threat to boycott her court

The above charges was explained to the contemnors to which they pleaded not guilty and claimed to be tried."

7. Sri Rahul Sripat, Advocate has put in appearance on behalf of Sri K.P. Seth, while Sri K.K. Arora, Advocate has put in appearance on behalf of Mohd. Qurban. In respect to Sri Junaid Khan it is informed that during pendency of these proceedings he is no more.

8. These proceedings are now confined to two contemnors, Sri K.P. Seth and Mohd. Qurban, Advocates.

9. Though, aforesaid contemnors have taken defence in respect to the charges by filing replies, but, when today matter was taken up, Learned counsels appearing for the two contemnors, at the outset stated that they are not contesting the matter, but admitting the guilt and therefore, Court may not look into the defence they have taken in their replies. Both contemnors, also stated that being office bearers of Bar Association when resolution was passed, they got indulged in the aforesaid activities, for which they have no excuse at all but they are now not putting any defence before the Court, but admit their guilt and pray for mercy and benevolence. They further requested to accept their unconditional apology.

10. On behalf of contemnor no. 2, i.e. Mohd. Qurban, an affidavit sworn on 7th April, 2015 was also filed, stating therein that he is not entering into merits of the pleadings and defence and submits unconditional apology.

11. Sri Rahul Sripat, and Sri K.K. Arora, Advocates appearing on behalf of two contemnors stated at the Bar that Court may ignore their defence taken in their replies in respect to the charges and instead, showing magnanimity and benevolence, pardon them and they assure that in future no such conduct shall be shown. Both contemnors support what their counsels, stated and pleaded for leniency in the matter, requesting the Court to pardon them.

12. So far as question of acceptance of apology is concerned, it is already on record that before formulation of charges, when contemnors tendered apology, looking to their replies and other circumstances, Court rejected the same.

13. Today, situation is that contemnors, almost have come to the corner and apology, apparently, means to avoid severe punishment. The guilt has been admitted by them, hence, charges stand proved. That being so, question of apology, apparently, is with intention to avoid serious punishment of imprisonment or fine or both, as the case may be.

14. The question as to when an apology can be said to be bonafide and

unconditional has been examined in detail by a larger Bench of five Judges of this Court in Suo Motu Action taken by the Court Vs. Smt. Sadhna Upadhyaya, Advocate [2009 (4) ALJ 434] and some of the relevant observations made by the Court are reproduced as under :-

"66. The ordinary dictionary meaning of apology is a speech in defence; a regretful acknowledge or excuse for failure. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given; or a frank acknowledgement of the offence with expression of regret for it, by way of reparation. (Refer to Murray's Dictionary). In short an apology is something written or said in defence of what appears to other people to be wrong and is an expression of regret.

67. To apologize, is to speak in justification, explanation or palliation of a fault. It is to serve as a satisfaction for any failure that may have caused dissatisfaction. It carves out an excuse or defensive argument acknowledging and expressing regrets for a fault without setting up any defence. The fault committed, cannot be reversed but it can be repented for. An apology is a substitute which is peculiar in nature and such character is very subtly reflected in the speech of Benjamin Disraeli the former British Prime Minister who said it in the following words in his speech in the House of Commons on 28.7.1871:

"Apologies only account for the evil which they cannot alter."

69. To our mind if an unconditional apology is tendered, then it should be tempered with a sense of genuine remorse and unflinching repentance. No justifications for the cause are to be pleaded and insisted inasmuch as, once such an apology is tendered, then in that event the guilt is almost unhesitatingly admitted and an expression of contrition exhibiting a real mood not to commit any such mistake in future is indicated. It is in such circumstances that the court starts contemplating as to whether the trust that the court desires and legitimately expects can be reposed or not.

70. An honest unconditional apology is normally received by the court with implicit faith. The faith is diminished if it is tainted with consequences. However, unconditional apology, even if tendered voluntarily and not strategically to avoid punishment, is no absolute assurance of discharge. The court has to weigh the circumstances keeping in view the object for which such powers are preserved especially in superior courts.

73. ..... An apology is not a palliative medicine to mesmerise a court for sometime. It has to generate a sort of a permanent belief that the tender of apology is genuine and is likely to have a baneful effect. Not a casual or formal passing of affairs to avoid punishment. Such an apology with defence raises a presumption of predominant whim of contradictions and lacks in sincerity.

74. A suspicious and defensive approach by the contemnor herself cannot invoke sympathies or any other equitable considerations. There appears to be a barrier of confusion in her about her own fate which might have impelled her not to give up her defence. There is no open commitment to an unqualified apology and is hedged by desperate attempts to justify her stand. Inspite of the long opportunity available to the contemnor we are surprised at her stolidity for a remorseful apology. The apology is

superficial and is only an upholstery with no sense of depth in it.

76. The elements of remorse, repentance and contrition are what can be described as the life and blood of a bonafide expression of apology. To detest the existence of such virtues for judging an act of contempt, is to deprive the law of its morality which it deserves and which is also necessary to preserve the same. It is like asking to live comfortably in a room with all its air having been pumped out.

78. Remorse is deep regret experiencing the pain of a guilty conscience. It is self-condemnation. Once the guilt is realised, then the natural feelings of humanity that assert themselves, is known as remorse. Shakespeare with his undoubted mastery of thought and language has depicted this at several places in the character of Macbeth and lady Macbeth, when they talk of the merciless killings of innocent persons at the behest of Macbeth. To quote one such line:-

"I am afraid to think what I have done;

look on it again I dare not."

15. Looking to the circumstances in which alleged apology has come forth at this stage, it cannot be said to be bonafide, sincere and unconditional. In our view, contemnors deserve appropriate punishment, though, considering the fact that contemnors have accepted guilt and have tendered apology to the Court, we would be justified in giving due weightage to this conduct while determining as to what appropriate punishment would be, in this case.

16. Before coming to punishment part, we find it necessary to observe that of late it has become a regular feature in the subordinate courts where judicial proceedings are being disrupted by Advocates collectively or in the group of individuals and otherwise by raising slogans, using abusive language and many a times creating other kind of disruptions like breaking window panes, striking on the doors of court rooms heavily and preventing litigants and others to enter Court rooms etc. Virtually, in the State of Uttar Pradesh substantial period of functioning in subordinate courts is getting waste due to such disruption and obstruction by Advocates.

17. It is true, that two contemnors were office bearers of Advocates Bare Association i.e. they were holding office of President and Secretary, but, nevertheless both were Advocates first, and had serious responsibility towards maintaining decorum and allowing smooth functioning of Courts. If collectively, Association of Advocates took a decision to do some thing which was not just, legal or valid, it was expected from them not to become a part of such proceedings and instead they could have taken appropriate steps for keeping themselves away, instead of becoming part of such illegal and contemptuous activities of their colleagues. Unfortunately they failed in showing respect to the Court and maintaining its majesty. They took active participation in doing some thing which was ex-facie illegal and amounts to criminal contempt, by lowering down the authority and dignity of officers of Court in particular and Court of law as an institution in general.

18. People have lot of faith and confidence in the system of administration of justice with hope and trust that institution of justice shall come forward to do away injustice, caused to

them, and would impart complete justice to them. Where process of administration of justice is interfered with in such a manner, the faith and confidence of public is bound to fade away.

19. Considering the entire facts and circumstances and conduct shown by two contemnors before this Court, we award punishment of simple imprisonment for a day i.e. till raising of the Court and fine of Rs.2,000/- each, failing which, they shall undergo simple imprisonment for a further period of fifteen days'.

20. Besides, in exercise of our powers under Chapter 24 Rule 11(3) of The Allahabad High Court Rules, 1952, framed under Section 34(1) of Advocates Act, 1961, we restrain two contemnors from practising in Civil Court/District Judgeship, Rampur for a period of thirty days. They shall not enter premises of Civil Court/District Judgeship, Rampur for a period of thirty days', which shall commence from 23rd April, 2015.

21. Conduct of both contemnors shall also remain under constant observation of the District Judge, Rampur for a period of two years' and in case, they are found indulged in any otherwise activity causing disruption etc. in the court, matter shall be reported to this Court forthwith. Copy of this order shall be communicated to District Judge, Rampur forthwith, for compliance of aforesaid directions.

22. The two contemnors present in the Court, at this stage, stated that they are surrendering before this Court to serve the sentence and may be taken in custody. They also prayed, that they be permitted to deposit fine within such time as the Court may direct.

23. In view of above, contemnors are taken in custody to serve sentence of one day simple imprisonment and shall be released on rising of the Court. Fine of Rs.2,000/- each may be deposited by the two contemnors within a week.

24. Criminal contempt application is accordingly disposed of with the directions as above.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2015

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

Civil Revision No. 16 of 2010

Ram Lakhan Gupta ...Revisionist
Versus
M/S Taksal Theatre Pvt. Ltd. ..Opp. Party

Counsel for the Revisionist:
H.K. Srivastava, C.K. Parikh

Counsel for the Opp. Party:
Shailendra, A.K. Gupta, Chandan Sharma, U.N. Sharma

Provincial Small Causes Court Act-Section 25-Scope of Revision-concurrent finding of fact-default in rent-recorded by Court below-word 'rent'-as per Section 7 of Act no. 13 of 1972-includes the maintenance and service charges also-held-justified-no interference call for.

Held: Para-26
After careful consideration of the matter I am of the view that Court below has correctly appreciated the evidence on record and its findings on the issue of default do not warrant any interference by the Court in its revisional jurisdiction under section 25 of the Act.

Case Law discussed:
(1990) 2 SCC 651; AIR 2000 Delhi 69; 1997 (1) AWC 378; AIR 1957 SC 309; (1990) 2 SCC 651; AIR 1976 Allahabad 362; 2000 (2) JCLR 375 (All) (FB); 1997 (1) AWC 378; AIR 2000 Delhi 378; AIR 2000 Delhi 69; (2014) 9 SCC 78.

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

1. This civil revision under section 25 of Provincial Small Causes Court, 18871 has been preferred by a tenant/revisionist against the judgment and decree dated 25.11.2009 passed by the Additional District Judge, Varanasi for the arrears of rent and his ejectment in SCC suit.

2. Briefly stated the facts are that Ms Taksal Theaters Private Limited is a Company registered under the Indian Companies Act, 1956. The Taksal Theater building situate at Nadesar in Varanasi. The tenant-revisionist is a tenant of 3rd floor in the said building. The accommodation in question is 25' x9" x 9' x 2" x 18' 6" total area is 380.80 square feet. The said portion was let out to the tenant-revisionist in February, 1988. According to the landlord the present rent of the building is Rs.2687/- per month including the service charges. The landlord claims that the provisions of the U.P. Act No. 13 of 1972 are not applicable to the said building as the rent is above Rs.2000/- per month.

3. The landlord on 28.4.2007 issued a composite notice of demand terminating the tenancy and called upon the tenant to vacate the premises after the thirty days time from the date of receipt of the notice. The said notice was served on 30.4.2007, but the tenant did not vacate the premises within stipulated period and submitted a reply on 10.5.2007. The landlord instituted a suit in small cause court, Varanasi being Suit No. 16 of 2007 for the eviction of the tenant-revisionist and for the recovery of arrears of rent amounting to Rs. 9516/- and the damages.

4. It was averred that on 1.2.1988 the demised premises was let out to the tenant for eleven months. At present the rent is Rs.2,687/- per month including the service charges. The provisions of Rent Control Act are not applicable. It is further stated that as the tenancy was only for eleven months and after the expiry of the said period the landlord does not want to let out the premises in question to the tenant, therefore vide notice dated 28.4.2007 the tenancy has been terminated after giving notice of thirty days.

5. In the plaint it was stated that the landlord is a Private Limited Company registered under the Indian Companies Act, 1956 and Sri Gopi Dargan is its Director who was authorized to institute the suit no. 16 of 2007 (M/s Taksal Theatres Private Limited v. Ram Lakhan Gupta). The tenant-revisionist filed a written statement and contested the suit. It was admitted by the tenant that a portion of Taksal Theater building was let out to him. Further it was claimed that the said tenancy was created under a memorandum dated 16.2.1988 which was executed between landlord and tenant. The original agreement was taken and retained by the landlord.

6. In the additional plea the tenant took the stand that initially monthly rent was only Rs.500/- for total covered area of 3rd floor. Beside the rent it was agreed between the parties that the tenant shall pay service charge of Rs.300/- per month.

According to tenant-revisionist the deed of memorandum contains a renewal clause subject to enhancement of the rent @ 20% after expiry of every three years. The landlord has been pressurizing the tenant-revisionist to increase the rent and service charges every time and the tenant had no option but to yield to the illegal demand of the landlord. It is further stated that tenant-revisionist in order to avoid litigation and harassment agreed to the condition of increasing the rent and service charges @ 20% on expiry of every three years.

7. The landlord examined Gopi Dargan as PW 1 and Ram Lakhan Gupta the tenant-revisionist was examined as DW-1.. While deciding the issue no.1 the trial court held that Gopi Dargan was authorized to file the suit. The issue no.2 was decided by the trial court also in favour of the landlord that the provisions of Act No. 13 of 1972 are not applicable on the premises on the ground that the rent was above Rs.2000/- per months. The trial court rejected the plea of the tenant-revisionist that the rent was only Rs.1640/- and the service charge Rs.1045/- cannot be included in the rent. The court found that the service charge was included in rent therefore, the provisions of Act, No.13 of 1972 was not applicable. The third issue regarding the notice the trial court found that the notice was valid and the illegality pointed out by the tenant-revisionist was not sustainable. On the above finding the suit of the landlord was decreed.

8. I have learned counsel for the tenant-revisionist Mr.C.K.Parikh and Sri U.N.Sharma, learned Senior Advocate assisted by Sri Chandan Sharma, learned counsel for the landlord respondent.

9. Learned counsel for the tenant-revisionist submitted that on 16.2.2008 two separate memorandum were executed between the parties. The first one was in respect of rent which was Rs.500/- per month and on the same day a separate and independent agreement was also entered into between the parties in respect of service charge as service agreement for separate amount of Rs.300/- as service charge and it cannot be treated as rent. Under section 2(1)(g) of the U.P.Act No. 13 of 1972 a building is exempted from its operation, if the rent is above Rs.2,000/- per month. He submitted that service charge cannot be treated as a part of rent therefore, the finding recorded by the court below on issue no.2 that the service charge was included in the rent and for the said reason the total amount of rent was Rs.2687/- therefore the provisions of Act No. 13 of 1972 would not be applicable.

10. Learned counsel for the tenant-revisionist failed to cite any authority that service charge cannot be included in the rent.

11. Learned counsel for the landlord submitted that Section 3 (1) of the Act No. 13 of 1972 defines the building. Section 7 of the Act provides that the tenant shall be liable to pay the landlord in addition to and as part of the rent, the certain taxes or proportionate part thereof, if any, payable in respect of the building or part under this tenancy. It was further submitted that the term building means a residential or non residential building roofed structure and includes any land including any garden, garages and out houses, appurtenant to such building; any furniture supplied by the landlord for use in such building ; any fittings and fixtures

affixed to such building for the more beneficial enjoyment thereof.

12. Learned counsel for the landlord has placed reliance on a judgment of the Supreme Court in the case of Pushpa Sen Gupta v. Susma Ghose (1990) 2 SCC 651, Sewa International Fashions v. Smt. Suman Kathpalia and others, AIR 2000 Delhi 69. and Manager, Punjab National Bank, Shamshabad Agra and others v. District Judge, Agra and others, 1997 (1) AWC 378. in support of his submission he submitted that the word 'rent 'includes not only which is strictly under the rent but also demand in respect of amenities or services provided by landlord under the terms of tenancy.

13. He lastly urged that Section 105 of the Transfer of Property Act, 1882 defines 'leases' which states that a lease of immovable property is a transfer or a right to enjoy such property made available for certain time, express or implied, or of money.

14. I have considered the rival submissions and perused the record. It is a common ground that at present the rent of the premises is Rs.2,687/- per month. The principal question that arises for consideration is whether the service charge can be included in the rent or not. If the service charge is not a part of the rent then the provisions of the Rent Control Act, 1972 would be attracted because the rent would fall below Rs.2000/- per month. The issue whether the service charge or other amenities can be part of th rent has been decided in a series of decisions by the Supreme Court and this Court also. It is noteworthy that word 'rent' has not been defined under the U.P .Act No. 13 of 1972.

15. The Supreme Court in the case of Karnani Properties Ltd. v. Miss Augustine (AIR 1957 SC 309) considered the term 'rent'. The Court was considering a case arising out from the West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950). In the said case the word 'rent' was not defined. The Supreme Court relying on a judgment of Property Holding Company Ltd. v. Clark, (1948-1 KB 630) held that the term 'rent' is comprehensive and it includes all payment by the tenant to be paid to his landlord for the use and occupation of the building. It also includes the furnishing, electric installations and other amenities agreed between the parties. The relevant part of the judgment reads as under :-

“The term 'rent' has not been defined in the Act. Hence it must be taken to have been used in its ordinary dictionary meaning. The term 'rent' is comprehensive enough, to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord. Therefore all that is included in the term 'rent' is within the purview of the Act."

(emphasis supplied by me)

16. The judgment of Karnani Properties Ltd.(supra) was relied by the Supreme Court in Pushpa Sen Gupta v. Susma Ghose (1990) 2 SCC 651. This Court also in the case of P.L.Kureel Talib Mankab, Bidhan Parishad v. Beni Prasad and another, (AIR 1976 Allahabad 362) considered the service charges which the landlord had been realizing from the

tenant every month. In the said case the services included maintenance and operation of lift, electricity, furnishing and cleaning water pump, salary of the watchman etc. The Court was of the view that the service charges were part of the 'rent'. The Court has relied the judgment of the Supreme Court in Karnani Properties Ltd. (supra). Same view has been taken by the Full Bench of this Court in the case of Gokaran Singh v. Ist Additional District and Sessions Judge, Hardoi and others, 2000 (2) JCLR 375 (All) (FB). The full Bench held that word 'rent' in absence of any definition must be held to have been used in its ordinary dictionary meaning and the term 'rent' is comprehensive and it includes all payments agreed by the tenant to be paid to his landlord. Paragraph 13 of the judgment held thus :-

"Before proceeding further, we will have to see as to what is meant by term 'arrears of rent' as used in clause (a) of Sub-section (2) of Section 20 of the Act. Under the Act or the Rules framed thereunder, term 'rent' has not been defined. Therefore, it must be held to have been used in its ordinary dictionary meaning. Term' rent' is comprehensive enough, to include all payments agreed by the tenant to be paid to his landlord for the used and occupation not only of the building and its appurtenances but also of furnishes, electricity installation and other amenities agreed between the parties to be provided by and at the cost of the landlord, as held by the Apex Court while dealing with a case under West Bengal Premises (Rent Control) Temporary Provision Act, 1950, the provisions of which are analogous to the provisions of the Act , In Karanani Properties Ltd., AIR 1957 SC 309. The rent may be agreed rent or standard rent in view of provisions of Section 4 (2) of the Act."

17. A similar view has been taken by this Court in the case of Manager, Punjab National Bank, Shamshabad, Agra and others v. District Judge, Agra and others , 1997 (1) AWC. 378.

18. In the Sewa International Fashions v. Smt. Suman Kathpalia and others, AIR 2000 Delhi 69, the Delhi High Court took the view that apart from the money which is paid as rent if any service is rendered and if any payment is made in respect of the same it shall also be included within the definition of rent. In the said case also the issue was whether the maintenance charges paid by the tenant shall be included in the rent. It was urged before the Delhi High Court that the maintenance charges cannot be computed as rent and therefore the payment made towards maintenance charges cannot be said to be payment towards rent. The Delhi High Court relying on the judgment in the case of Karnani Properties Ltd. (supra) and following the judgment of the High Court, Allahabad in the case of P.L.Kureel Talib Mankab, Bidhan Parishad v. Beni Prasad and another (supra) held that maintenance charges could be included within the ambit of expression rent. The relevant part of the judgment reads as under :-

" It is an established proposition of law that rent includes not only what is originally described as rent in agreement between a landlord and tenant but also those payment which is made for the amenities provided by the landlord under the agreement between him and the tenant. The payment made towards the maintenance charges of the premises rented out and also for providing amenities to the tenant would also come within the expression 'rent' as rent

includes all payments agreed to be paid by the tenant to his landlord for the use and occupation not only of the building but also of furnishing, electric installations and other amenities."

19. From the aforesaid judgments it emerges that the word 'rent is a comprehensive and it includes the maintenance charges/service charges.

20. Now coming to the facts of this case, the Landlord has filed the memo of rent agreement dated 16.2.1988 regarding service charges and rent agreement for the tenancy for 11 months as paper No. 19 GA/32 to 35 and paper No. 19 Ga/36 to 38. Those documents are on record of the case also as Annexure- 1 , 2 and 3 to the Stay Application of Civil Revision.

21. The relevant part of the agreement dated 16.2.1988 regarding service charge reads as under :-

"That the company shall be responsible for the maintenance of common roads, common passage, common lights and other services provided in the tenancy agreement and the tenant shall pay Rs.300/- (Rupees three hundred only) per month to the Company against the said services."

22. From perusal of the agreement it is clear that tenant had agreed to pay the service charges to the landlord. The agreement also provides for enhancement of service charge. Indisputably the agreement has been acted upon as the tenant has been paying agreed amount.

23. It is noteworthy that tenant in his deposition has stated that he has the original receipt of the landlord but he has not filed it. The landlord has established from the documentary evidence as well as from the oral statement that service charges were part of rent. Learned counsel for the revisionist could not satisfy the Court that the finding of facts recorded by the court below suffers from any perversity.

24. This Court has taken consistent view that the revisional court while exercising its power under section 25 of the Act, ordinarily will not set aside the finding of facts and substitute its own finding after re appreciation of evidence. The Court interfere only in those cases where it finds the finding is based on no evidence or suffers from vice of perversity. Reference may be made to the judgment in Laxmi Kishore v. Har Prasad Kishore v. Har Prasad Shukla- 1979 All CJ 473; Om Prakash Gupta v. Additional District Judge, Aligarh 1996 All. RC (2) 532; Man Mohan Dixit v. Additional District Judge, 1996 All. RC (2) 561:(1997 AIHC 740); Anwaruddin v. Additional District Judge, Aligarh 1999 All. CJ 54: (AIR 1999 All 218), Rajendra Nath Tripathi v. Jagdish Nath Gupta 1999 All. CJ 431: (1999 All. LJ 1429) and Har Swarup Nigam v. District Judge 1999 All. CJ 990.

25. The Supreme Court has recently in the case of Hindustan Petroleum Corporation Limited v. Dilbahar Singh, (2014) 9 SCC 78, has held that ordinarily appellate jurisdiction involves a rehearing but in the revisional jurisdiction Court cannot act as Second Court of first appeal. Paragraph 31 of the judgment reads as under:-

"31. We are in full agreement with the view expressed in Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259 that where both

expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a rehearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an "appeal" and so also of a "revision". If that were so, the revisional power would become coextensive with that of the trial Court or the subordinate tribunal which is never the case. The classic statement in Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246 that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three Rent Control Statutes, the High Court is not conferred a status of second court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent."

26. After careful consideration of the matter I am of the view that Court below has correctly appreciated the evidence on record and its findings on the issue of default do not warrant any interference by the Court in its revisional jurisdiction under section 25 of the Act.

27. For the reasons recorded herein above, revision lacks merit and it accordingly dismissed.

28. The tenant -revisionist is granted three months time to vacate the premises subject to the following conditions:-

(I)the tenant shall submit an undertaking in the court below that he will handover the vacant and peaceful possession to the landlord on or before 15th July,2015.

(II)he will continue to pay the rent on each succeeding month till vacation of the accommodation on 7th day of each month.

(III)He will not create any third party interest in the disputed premises.

29. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2015

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Rent Control No. 73 of 2011

Krishna Mohan Mahrotra ...Petitioner
Versus
A.D.J. Lakhimpur Kheri & Ors.
...Respondents

Counsel for the Petitioner:
Mohd. Aslam Khan

Counsel for the Respondents:
Nirankar Nath Jaiswal

U.P. Urban Building (Regulation of letting Rent & Eviction) Rules 1972-Rule 34 (i)(g) and Rule 22(f)-issue of commission-can not be as matter of right-sole prerogative of Court.

Held: Para-26 & 27

26. Further to go for local inspection or issue of commission for the proper

disposal of the controversy pending is a sole prerogative of the Court to decide whether to move the same or not.

27. Accordingly, it is a sole domain of the Court to issue a commission or not and the local inspection or commission can not be claimed as a matter of right by a party, so arguments as advanced by the learned counsel for petitioner for issuing commission having no force and is liable to be rejected.

Case Law discussed:
1988 (2) ARC 348; 1999 (2) ARC 289; 2005 (1) ARC 555; 2006 (60) ALR 359; (2002) 9 SCC 375; 2005 (23) LCD 336; 2007 (1) AWC 961; 2010 (1) AWC 371; 2014 (32) LCD 262; 1997 (2) JCLR 860; [2010 (2) A.D.J. 758] 1992 2 ARC 596; 1992 (1) ARC page 423; 2010 (2) ARC 84; 2010 (2) ARC 23; 2010 (2) ARC 95; (2015) 0 Supreme (SC) 158.

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

1. Heard Mohd. Arif Khan, Senior Counsel assisted by Mohd. Aslam Khan learned counsel for the petitioner; Sri Nirankar Nath Jaiswal learned counsel for the respondents no. 3 and 4 and perused the pleadings of writ petition.

2. This writ petition has been filed with a prayer to issue writ of certiorari quashing the order dated 17.05.2011 passed by the Additional District Judge, Court no. 3 Lakhimpur Kheri whereby the judgement dated 21.11.2009 passed by the Additional Chief Judicial Magistrate, Court no.2, Lakhimpur Kheri has been upheld.

3. The brief facts of the case are that the respondents had filed an application under Section 21(1)(a) of the Act No. 13 of 1972 stating that he is the owner of the building and the petitioner is the tenant @ Rs.200/- per month in his shop. There are two major sons of the landlord and the said shop is required for his sons as he has no alternate shop. The landlord had requested the tenant to vacate the shop but the said shop has not been vacated.

4. The tenant had contested the case and admitted that he is the tenant @ Rs.200/- per month. The previous owner of the shop was Bankey Lal Gupta who had given it on rent to Raman Lal Mehrotra in the year 1962 at about 35 years ago. The half of the shop was got vacated and after the death of Bankey Lal Gupta, the said shop was sold to the present landlord, who started his business in the said shop. The landlord is engaged in the business of preparation of 'Samosa' and 'Namkeen' at a large level and both his sons also remained busy in the said business. The tenant is running the shop of D.C.M. Cloths and he has a goodwill, therefore, it is not possible to vacate the said shop.

5. Both the parties had adduced their evidence before the court below and the court below after appreciating the evidence on record had allowed the application on the ground that the landlord has the bonafide need. The said judgement was challenged by way of Rent Control Appeal No.5 of 2009 before the Additional District Judge, Lakhimpur Kheri, which was dismissed by the judgement and order dated 17.05.2011.

6. Learned counsel for the petitioner has submitted that the opposite parties no. 3 and 4 have no bonafide or genuine need because they are carrying on the business of selling 'Samosa' and 'Namkeen' at a large scale with the help of their son. The opposite parties no. 3 and 4 are also carrying on their business on the

accommodation available at the first floor and during the pendency of the case before the opposite party no.2, the opposite party no.3 had filed his affidavit specifically stating therein that he is ready to provide the accommodation on the first floor, which is in the shape of a room to the petitioner but that point has not been considered by the court below. It has also been submitted that the Rule 16(D) has also not been dealt with in accordance with law and the application of the petitioner for issuance of commission was also rejected wrongly. It has also been submitted that in paragraph 17 of the grounds, the order-sheet has been mentioned in which the learned Additional District Judge has directed that there is no need to issue commission so far as the application for providing alternative accommodation is concerned and it will be appropriate to dispose of the application at the time of final hearing of the appeal and the point regarding hardship can be inferred thereon but while deciding the appeal, this point has not been considered. Therefore, the said judgement is perverse and is liable to be set aside.

7. In support of his arguments, learned counsel for the petitioner has relied upon 1988 (2) ARC 348 (M/s Jawahar Lal Ratan Chand Nagar and another vs. VIIth Additional District Judge, Varanasi and others, wherein the Hon'ble Single Judge of this court relying upon the case of Jivram Ranchhod Das Thakkar and another vs. Tulshiram Ratanchand Mantri and others reported in AIR 1977 SC 1357 has held that

"adopting the same principle it appears to be just and proper to partition this shop in dispute also half and half between the landlord and the tenant. The parties through their counsel have given their consent that in the circumstances of the case they are agreeable to the partition of the disputed shop half and half between them so that both parties may be able to carry on their business in the half portion falling on their shape."

8. Learned counsel for petitioner has further relied upon 1999 (2) ARC 289 (Anil Kumar and others vs. IXth Additional District Judge, Kanpur Nagar and another, in which the Hon'ble Single Judge of this Court has held as under:

"In the result, the writ petition is partly allowed. The tenant shall vacate the disputed accommodation provided the petitioner given vacant possession of the first floor accommodation marked by me by letters EFGH MNOP and IJKL. Respondent No. 2 shall give a notice to him. On giving such a notice, the tenant shall vacate the disputed accommodation within one month and will handover the disputed accommodation to the landlord-respondent. If there is any dispute in regard to the exchange of the accommodation, an application can be filed before the Prescribed Authority, who will execute the order in accordance with the observations and directions given by me. Considering the facts and circumstances of the case, the parties shall bear their own costs the rent of the accommodation will be same which is being paid by the tenant at present."

9. He has further relied upon 2005 (1) ARC 555 (Pratap Narain Tandon vs. Abdul Mukadadir wherein it has been held as under :

"A perusal of the orders of Prescribed Authority as well as the

Appellant Authority demonstrates that neither the Prescribed Authority nor the Appellate Authority considered the question of part release of the accommodation. Therefore, in the interest of justice, without entering into the merits of the rival contentions, I remand back the matter to the Appellate Authority to be decided the matter after consideration of question of part release also in accordance with law."

10. Learned counsel has further relied upon 2006 (60) ALR 359 (Swaraj Kumar vs. Arvind Kumar) in which the Hon'ble Single Judge of this Court has considered the aspect of the release of the part of the accommodation for the purpose of landlord and tenant both and remanded the matter back to consider the question of part release.

11. Learned counsel for the opposite parties no.3 and 4 has submitted that during the pendency of the case, they were ready to provide the alternate accommodation but the petitioner has refused to accept the said alternate accommodation. Therefore, now he can not take the benefit of that offer. It has also been submitted that there is no perversity or illegality in the judgement of the court below and there are concurrent findings of fact by the courts below, which cannot be inferred by this Hon'ble Court in exercise of writ jurisdiction under Article 226 of the Constitution of India. It has also been submitted that Article 226 do not permit re-appreciating the evidence on record.

12. In support of his arguments, learned counsel for the respondents no. 3 and 4 has relied upon (2002) 9 SCC 375 (Mohd. Shahnawaz Akhtar and another vs. Ist Additional District Judge Varanasi and others in which the Hon'ble Apex Court has held as under :

"We have carefully perused the judgement of the trial court and the orders of learned Additional District Judge as also of the High Court. The High Court, we are constrained to observe, has acted like an appellate court and re-appreciated the evidence and thereby exercised a jurisdiction which it did not have. The High Court has nowhere arrived at a finding that there was any error of jurisdiction committed by any of the courts below or the finding of the fact impugned before it suffered from perversity. In our opinion, in exercise of writ jurisdiction, the High Court ought not to have entered into reappreciation of evidence and dislodged the finding of fact recorded by the trial court and maintained in revision by the learned Additional District Judge. To satisfy our own conscience,we have gone through the record. In our opinion, the findings arrived at by the trial court are such as could have been reasonably arrived at and are well-reasoned and therefore, they are not open to interference. The learned Additional District Judge rightly affirmed those findings. In as much as the order of the courts below were not liable to be interfered with in exercise of the writ jurisdiction by the High Court, the impugned order of the High Court dated 30-04-1997 cannot be sustained and is set aside. The order of the trial court, as upheld by the learned District Judge, is restored. No order as to the costs."

13. Learned counsel has further relied upon 2005 (23) LCD 336 (Prakash Chandra Gupta vs. District Judge, Unnao and others) in which the Hon'ble Single Judge of this Court has held as under:

"so for as issue of commission is concerned, the same, as argued by the learned counsel for the tenant, was sought for finding out feasibility whether the landlord could satisfy his need by getting a shop constructed for himself on the upper floor with a stair case adjacent to the shop in question. Learned counsel for the landlord rightly placed reliance on the judgement of this Court in Sarla Ahuja vs. United India Insurance Co. Ltd. AIR 1999 SCC 100, wherein it has been observed that tenant has not to suggest terms to the landlord as to how he can adjust himself without possession of tenanted premises. Thus, the said question is totally out of contest and in case need of the landlord is genuine and comparative hardship lies in his favour then tenant has not to suggest that landlord should get his need fulfilled by getting another accommodation constructed."

14. Further in the case of Janki Prasad vs. Kashi Nath Mishra reported in 2007 (1) AWC 961, the Hon'ble Single Judge of this Court has held as under:

"It is evident that both the courts below, after appraisal of evidence of both the parties, have given concurrent finding of fact that the need of the landlord is greater than the tenant and that the tenant has got another shop adjacent to shop in dispute where he may shift his business.

In Harbans Lal v. Jasmohan Saran 1986 ALJ 84, it has been held that a writ in the nature of certiorari may be Issued only if the order of the Inferior court suffers from the error of jurisdiction or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach finding of fact contrary to those rendered by an inferior court. When High Court proceeds to do so, it acts plainly in excess of its powers.

In the instant case, counsel for the petitioner could not establish that the orders of the courts below suffer from the error of jurisdiction or from a breach of the principles of natural justice or vitiated by a manifest or apparent error of law. Thus, it would be inappropriate in the circumstances for High Court to reappraise the evidence without sufficient reason in law and reach finding of fact contrary to those rendered by the courts below."

15. Learned counsel has further relied upon 2010 (1) AWC 371 (Ram Narayan Singh vs. Additional District Judge/Special Judge E.C. Act, Etawah and others in which the Hon'ble Single Judge of this court has held as under:

"The Apex Court has ruled on the question of comparative hardship in the case of Badri Narayan Chuni Lal Bhutada Vs. Govindram Ram Gopal Mundada, A.I.R. 2003 S.C., 2713. Failure of the tenant to search an alternative accommodation after institution of the release application is good enough reason to decide the question of hardship against the tenant and refuse comparison of likely hardship on this ground alone. Similar view was adopted in the case of Azamuddin Vs. Malika Bano Smt.), 2008(3) A.R.C., 570. In the case of Siddalingamma and another Vs. Mamtha Shenoy, A.I.R. 2001 S.C. 2896, the Apex Court was of the view that since the Rent Control Act is basically meant for the benefit of the tenants and provisions of the release on the ground of bonafide need is the only provision which treats the

landlord with some sympathy and, therefore, if the tenant is satisfied that the accommodation in which he is living since very long time thus it should not be released on the asking of the landlord. This leniency cannot be allowed. The Courts, if during the proceedings come to a conclusion that comparison of relative hardship caused to the landlord and tenant is a step-in-aid and beneficial to the tenant, therefore, comparison of hardship is necessary. However, if the tenant fails to establish its bonafide that during continuation of the proceedings the tenant did make an effort to search for an alternative accommodation but failed to do so only then a view in favour of the tenant is possible in such an event. If the tenant fails to establish this, the courts are well within their rights to refuse comparison of hardship."

16. Lastly learned counsel for the opposite parties no. 3 and 4 has relied on 2014 (32) LCD 262 (Keshar Bai vs. Chhunulal), wherein the Hon'ble Supreme Court has held as under:

"It is well settled by a long line of judgements of this Court that the High Court should not interfere with a concurrent finding of fact unless it is perverse. (See: Deep Chandra Juneja, Yash Pal & Firojuddin). In this case, for the reasons which we shall soon record, we are unable to find any such perversity in the concurrent finding of fact returned by the courts below warranting the High Court's interference."

17. From the perusal of the aforesaid judgements, the legal position is crystal clear that if the order of the court below suffers from error of jurisdiction or breach of the principles of natural justice or is vitiated by a manifest or apparent error of law, it may be set aside. It is also settled position that High Court cannot reappraise the evidence without sufficient reasons and reach finding of fact contrary to those rendered by the court below. The Hon'ble Apex Court has held that where there are concurrent findings of fact, the High Court should not interfere unless the findings are perverse.

18. Learned counsel for the petitioner has mainly emphasised that the provisions of Rule 16(1)(d) of U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Rules 1972 have not been considered by the court below because the respondents no. 3 and 4 had specifically mentioned in their affidavit that they are ready to provide alternate accommodation to the petitioner. Therefore, the findings of the learned court below are perverse.

19. I do not find any substance in the submissions of the learned counsel for the petitioner because the trial court while deciding the issue no.2 has specifically dealt with the said affidavit in which the offer was given for alternate accommodation. The learned court below has come to the conclusion that the petitioner himself has neither accepted the said offer of the landlord nor has shown any willingness to accept the said offer and he has not come forward that he is ready to take the alternative accommodation. On the contrary, the tenant has given suggestion to the landlord that the said portion may be utilized by his sons.

20. It is settled preposition of law that the landlord is the best judge of his needs and it cannot be decided by the tenant that where the landlord or his

family members will reside or carry on their business. Accordingly, the provisions of Rule 16(1)(d) of the Rules have been dealt with specifically. Therefore, the law cited by the learned counsel for the petitioner has no relevance.

21. It has also been submitted that the application for commission was rejected by the trial court without any sufficient grounds. Therefore, the learned court below has committed jurisdictional error because under the provisions of Section 34, the prescribed authority has the powers of Civil Court. The application for commission was moved on 25.07.2009, a copy of which has been filed as annexure 4, in which it was requested that Amin Commissioner be directed to inspect the shop of the landlord and the portion of the first floor. In the main suit, the shop of the landlord or the portion of the first floor of the building was not in dispute. The trail court has rejected the said application by order dated 03.08.2009 holding that there was no dispute regarding the location of the shop in question and the landlord has himself stated in the application that he is doing the business of 'Samosa' and 'Namkeen' and the portion of the first floor has also been described.

22. As far as the provision of Section 34(1)(g) and the Rule 22 (f) are concerned, the commission may be issued by the court, if it is not able to arrive at a just conclusion or where the court feels that there is some ambiguity in the evidence of the parties, which can be clarified by making local inspection or inspection through commission.

23. Local inspection or issue a commission by the court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence. (See:- Randhir Singh Sheoran Vs. 6th Additional District Judge, 1997(2) JCLR 860, Radhey Shyam Vs. A.D.J., Court no. 13, Lucknow and others, [2010(2) A.D.J., 758] and Sonpal Vs. 4th Additional District Judge, Aligarh and others, 1992 2 ARC, 596).

24. In the case of Smt. Shamshun Nisha Vs. Ist Additional District Judge, Lucknow and others 1992, (1) ARC page 423, it is held as under :

"By means of the present writ petition, the petitioner challenges the order, dated 13.05.1991, passed by Ist Additional District Judge, Lucknow, contained in Annexure No. 6 by which the petitioner's request for local inspection was rejected by the appellate Court. The appellate Court pointed out that the petitioner had been given sufficient opportunity to rebut the evidence of the expert. However, the fact is not disputed that the appeal is still pending and in appeal only an application for local inspection of the site by the Advocate Commissioner has been rejected. Therefore, in my opinion, the said order cannot be challenged in the writ petition."

25. The aforesaid view was further reiterated by this Court in the case following cases:-

(i) Avinash Chandra Tewari Vs. A.D.J. Court No. 3, Unnao & others, 2010 (2) ARC 84

(ii) Radha Rani Mehrotra (Smt. And 5 others Vs. Learned prescribed Authority/Civil Judge, S.D. and 2 others, 2010 (2) ARC 23

(iii) Radhey Shayam and others Vs. Additional District Judge, Lucknow and others 2010 (2) ARC 95

26. Further to go for local inspection or issue of commission for the proper disposal of the controversy pending is a sole prerogative of the Court to decide whether to move the same or not.

27. Accordingly, it is a sole domain of the Court to issue a commission or not and the local inspection or commission can not be claimed as a matter of right by a party, so arguments as advanced by the learned counsel for petitioner for issuing commission having no force and is liable to be rejected.

28. As the situation and location of the shop in dispute was not in controversy and the landlord has also specified his shop as well as the portion of the first floor, therefore, in the facts and circumstances of the case, there was no ambiguity regarding the location and situation of the shop in question. Thus, the application for commission has also been rightly rejected.

29. Learned counsel for the petitioner has further emphasised that in the order dated 08.06.2010, the learned Additional District Judge, Kheri has observed that there is no need to issue commission. So far as the application for providing alternate accommodation is concerned, it will be appropriate to dispose of this application at the time of hearing of the appeal and the point regarding the hardship can be inferred thereon, but the learned Additional District Judge Kheri has not dealt with this point while deciding the Rent Control Appeal. I do not find any substance in the submission of the learned counsel for the appellant because the said point has been discussed at length at page 11 and 12 of the judgement of the appellate court dated 17.05.2011 wherein the court has come to the conclusion that the landlord cannot be compelled to make available the rooms at the first floor.

30. Both the learned courts below have considered the bonafide need and the comparative hardship of the parties and have come to the conclusion that the landlord has the bonafide need and the comparative hardships is also in favour of the landlord because the shop in question is required for his sons who have now become major. The findings of both the courts below are concurrent and I do not find any good ground to interfere with the findings. I do not find any error of jurisdiction or perversity in the impugned judgement.

31. This writ petition has been filed under Article 226 of the Constitution with a prayer to issue a writ of certiorari. The judicial order of the courts below have been challenged.

32. Hon'ble Apex Court in a recent judgement reported in (2015) 0 Supreme (SC) 158 [Radhey Shyam vs. Chhabi Nath] has held that a writ of certiorari is not available against the judicial order of a competent court because the court could not violate the fundamental rights. It has further been held that even incidental violation cannot be held to be violative of fundamental rights. It has further been held that an order of civil court could be challenged under Article 227 and not under Article 226.

33. Present writ petition has been filed under Article 226 of the Constitution

of India with a prayer to quash the order dated 17.05.2011 passed by the Additional District Judge, Court no. 3 Lakhimpur Kheri. Thus, the writ petition is also not maintainable to this aspect of the matter.

34. Accordingly the writ petition is dismissed. The interim order dated 31.05.2011 stands vacated. The petitioner is directed to vacate the premises in question within a period of two months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.04.2015

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Habeas Corpus No. 78 of 2015

Km. Ankita ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
K.K. Tewari

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-226-Habeas Corpus petition-rejection-for release of custody to her parent-on ground of impediment of review under Section 362 Cr.P.C.-held-earlier she confinement in nari niketan-on refusal to join the company of her parent-now being pregnant getting majority desirous to go with her father-held curtailment of her liberty not permissible-approach of Judge wholly insensitive and injudicious being irresponsible-order quashed-direction to release the detainee to custody of her father given.

Held: Para-11 & 14

11. In the case in hand, the detenue filed an application for being released in custody of her own parents. We fail to understand as to under what circumstance, law or procedure, the application of the detenue could have been dismissed. The detenue is a victim, and not the accused. The relevant considerations have not been kept in mind by the court while deciding the application.

14. Considering the stand of the detenue, the court should have immediately passed orders for her release in the custody of the parents. The parents are not aliens for their daughter, who is pregnant. The order denying the detenue to live with her parents is not only wholly on account of insensitive approach, but is also injudicious, and irresponsible.

(Delivered by Hon'ble Ajai Lamba, J.)

1. The petition has been filed through Ramesh Kumar with the allegation that his daughter Ankita, the detenue has been kept in illegal detention in the Women Protection Home, Lucknow.

2. It has been pointed out that on 19.7.2014, one Chhanga Raidas abducted the detenue with the help of other accused. In that regard, Crime No.1205 of 2014 under Sections 363, 366 I.P.C., Police Station Asiwan, District Unnao was registered. During investigation, Section 376(2) (D) alongwith Section 3/4 of Prevention of Children from Sexual Offences Act(for short 'POCSO Act') were also added.

3. The prosecutrix was recovered on 1.11.2014 and was medically examined. Medical age of the detenue/prosecutrix was found to be 19 years. Statement of

the detenue/prosecutrix was recorded. Mother of the detenue moved an application for custody of the detenue but the court refused to give custody to the mother and the detenue has been sent to Women Protection Home, Lucknow on the ground that she is a minor and she had refused to go with her parents, vide order Annexure No.1 dated 9.1.2015.

4. On 14.1.2015, the detenue gave an application to the Superintendent, Women Protection Home, Lucknow stating that she is pregnant and does not want to live in protection home and wants to live with her parents.

5. Order Annexure No.2 dated 12.2.2015 has been passed on the premise that vide earlier order Annexure No.1 dated 9.1.2015, the detenue had been confined to Women Protection Home, Lucknow because she had refused to go with her parents. The court concerned viz. Shri Jai Singh Pundeer, Additional Sessions Judge, Court No.1, Special Judge, POCSO Act, Unnao has stated that it would tentamount to review earlier of order Annexure No.1 dated 9.1.2015.

6. We have considered the contention of learned counsel.

7. We have also questioned the detenue Ankita. Ankita has stated in court that she had given an application dated 14.1.2015 showing her desire to go with her parents.

8. We find the approach of the Additional Sessions Judge to be wholly inappropriate. The impediment of review under Section 362 Cr.P.C. cannot be strictly invoked in such proceedings. Annexure No.1 is not an order passed during the course of a trial or other proceedings in appeal or revision. Such orders of detention of girls are passed only as stop gap arrangement.

9. At times, it is desirable, in the interest and welfare of a young girl that she be allowed to give a thought in regard to her future before deciding whether she wants to go with an accused or her parents. At times, the girl is a minor and therefore is not allowed to live in the company of the accused. The girl in such circumstances, can be confined to Women Protection Home/Nari Niketan only if she refuses to go with her parents.

10. In our considered opinion, the duration of stay of detenue, such as the petitioner, should be permitted for the shortest period of time. By such detention, liberty of girls is curtailed, which ordinarily is not permissible in law. A constitutional right vested in a person, particularly liberty cannot be curtailed for convenience of a court or for other such reasons.

11. In the case in hand, the detenue filed an application for being released in custody of her own parents. We fail to understand as to under what circumstance, law or procedure, the application of the detenue could have been dismissed. The detenue is a victim, and not the accused. The relevant considerations have not been kept in mind by the court while deciding the application.

12. The reality of the conditions prevailing in Nari Niketan/Protection Homes also cannot be ignored. Such protection homes are not being maintained under ideal conditions, under ideal staff. There is every likelihood of abuse of girls in

such homes. Long confinement in such circumstances, is likely to torment the inmates mentally and emotionally. This is not permissible in law.

13. Considering the totality of the facts and circumstances of the case, we also record our anguish at the conduct of the court in entertaining application dated 14.1.2015 and forwarded to the court on 15.1.2015, on 12.2.2015, approximately after one month. Such application should be taken up and dealt with immediately, and not beyond a period of one week.

14. Considering the stand of the detenue, the court should have immediately passed orders for her release in the custody of the parents. The parents are not aliens for their daughter, who is pregnant. The order denying the detenue to live with her parents is not only wholly on account of insensitive approach, but is also injudicious, and irresponsible.

15. Considering the totality of the facts and circumstances of the case, the petition is allowed. Annexure No2 dated 12.2.2015 is hereby quashed. Detenue Ankita is hereby directed to be released in the custody of her father Ramesh Kumar.

16. Let a copy of this order be released under the signature of Bench Secretary of this Court.

17. Let a copy of the order be also forwarded to District & Sessions Judge, Unnao.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2015

BEFORE

THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Special Appeal No. 256 of 2015

Manmohan Mishra ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Kundan Rai, P.K. Jain, Vishal Kashyap

Counsel for the Respondents:
C.S.C., A.K. Yadav

U.P. Secondary Education Service Selection Board Rules 1998-Rule-9-Bar to appoint male teacher in girls institution-whether can be termed unreasonable? held-'No'-various reasons discussed.

Held: Para-19
In view of this legal position, we would have to hold, though for the reasons which we have indicated, that there is no merit in the challenge to the view which has been taken by the learned Single Judge. The rule-making authority in framing Rule 9 has not taken over an essential legislative function. The rule-making authority has not transgressed the limitations on its statutory power under Section 35 of the Act of 1982. Rule 9 is perfectly in conformity with the provisions of the Act of 1982 and cannot be regarded as being unreasonable.

Case Law discussed:
AIR 1981 SC 1829; AIR 1954 SC 321; (1979) 4 SCC 260; 2008 (3) ESC 409 (SC)

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

1. The appellant having unsuccessfully pursued a writ proceeding under Article 226 of the Constitution, is in appeal against a judgment and order of the learned Single Judge dated 15 April 2015.

2. The appellant was appointed as a Lecturer in Physics on 21 January 1980 in the D.P. Girls Inter College, Allahabad, an institution which is recognised under the Uttar Pradesh Intermediate Education Act, 19211. An advertisement was published by the Uttar Pradesh Secondary Education Services Selection Board2 for appointment of the Principal of the institution in 2011. On 12 March 2015, the Board invited two senior most teachers of the college for an interview for the post which was scheduled to be held on 16 April 2015. The second senior most teacher in the seniority list is stated to have attained the age of superannuation on 24 December 2014 and was continuing in service until the end of the academic session. The appellant applied for his name being forwarded for interview under Rule 12(6) of the U.P. Secondary Education Services Selection Board Rules, 19983. The Committee of Management submitted the records pertaining to the appellant and the senior most teacher. The Board rejected the candidature of the appellant on the ground that he was not eligible for appointment on the post of Principal being a male candidate (as a result of the bar created by Rule 9 of the Rules of 1998) and the institution was directed to send the name of the next senior most woman teacher. Aggrieved, the appellant filed a writ petition seeking, inter alia, to challenge the order dated 9 April 2015, rejecting his candidature and seeking a mandamus to the Board to allow the appellant to appear in the interview scheduled to be held on 16 April 2015. The learned Single Judge dismissed the writ petition holding that Rule 9 of the Rules of 1998 prohibits the appointment of a male candidate in a girls institution as Headmaster or Principal. The learned Single Judge held that the restriction was not in conflict with either the Act of 1921 or the U.P. Secondary Education Services Selection Board Act, 19824 nor was it unreasonable. The petition was accordingly dismissed.

3. The Uttar Pradesh Intermediate Education Act, 1921 was enacted to establish a Board of High School and Intermediate Education. Section 16-E envisages that the head of the institution and teachers shall be appointed by the Committee of Management in the manner which is thereinafter provided. The Act of 1982 established the Board for the selection of teachers in institutions recognised under the Act of 1921. The Statement of Objects and Reasons accompanying the introduction of the Bill in the state legislature furnish the following rationale for the enactment of the Act:

"The appointment of teachers in secondary institutions recognised by the Board of High School and Intermediate Education was governed by the Intermediate Education Act, 1921 and regulations made thereunder. It was felt that the selection of teachers under the provisions of the said Act and the regulations was some times not free and fair. Besides, the field of selection was also very much restricted. This adversely affected the availability of suitable teachers and the standard of education. It was therefore, considered necessary to constitute Secondary Education Service Commission at the State level, to select Principals, Lecturers, Headmasters and L.T. Grade teachers, and Secondary Education Selection Boards at the regional level, to select and make available suitable candidates for comparatively lower posts in C.T./J.T.C./B.T.C. Grade for such institutions."

4. The object of enacting Act 5 of 1982 was to obviate the allegations that the selection of teachers under the provisions of the Act of 1921 had not been free and fair. The object was to ensure that selection of teachers including Principals and Headmasters would be made on an objective and fair basis. Section 9 (a) of the Act of 1982 empowers the Board to prepare guidelines on matters relating to the method of recruitment and promotion of teachers. Under Section 9(i) of the Act of 1982, the Board is to perform such other duties and exercise such other powers as may be prescribed or as may be incidental or conducive to the discharge of its functions under the Act or the Rules or Regulations made under it. Section 10 of the Act of 1982 lays down the procedure for selection by direct recruitment under which the Management has to determine the number of vacancies existing or likely to fall vacant during the year of recruitment and to notify the vacancies to the Board in such manner as may prescribed. Section 10(2) of the Act of 1982 provides that the procedure for selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed. The expression 'Teacher' is defined in Section 2(k) of the Act of 1982 to mean a person employed for imparting instruction in an institution and to include a Principal or a Headmaster. Under Section 11, upon the notification of the vacancy, the Board has to prepare a panel of persons found most suitable for appointment which is to be intimated to the Management of the institution. The Management is required to issue an appointment to the selected candidate. Section 16 of the Act of 1982 provides that notwithstanding anything to the contrary contained in the Act of 1921 or the Regulations framed under it, every appointment of a teacher shall be made by the Management only on the recommendation of the Board. Section 32 of the Act of 1982 deals with the applicability of the Act of 1921 and provides as follows:

"32. Applicability of U.P. Act No.II of 1921. - The provisions of the Intermediate Education Act, 1921 and the Regulation made thereunder in so far as they are not inconsistent with the provisions of this Act or the rules or regulations made thereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher."

5. A rule making power is conferred upon the State Government by Section 35 of the Act of 1982 under which rules are to be framed for carrying out the purposes of the Act. In exercise of the rule making power, the State Government initially framed the Uttar Pradesh Secondary Education Services Commission Rules, 19835. These were followed by the Uttar Pradesh Secondary Education Services Commission Rules, 19956 and ultimately by the Rules of 1998. Under Rule 10 of the Rules of 1998, recruitment to the post of Principal of an Intermediate College is to be by direct recruitment. Under Rule 11(2)(b) of the Rules of 1998, it has been provided that with regard to the post of Principal or Headmaster, the Management has to forward names of two senior most teachers together with their service records to the Board.

6. Rule 5 of the Rules of 1998 deals with academic qualifications for appointment to the post of teacher and is in the following terms:-

"5. Academic qualifications. - A candidate for appointment to a post of teacher must possess qualifications specified in Regulation 1 of Chapter II of the Regulations made under the Intermediate Education Act, 1921."

7. Consequently, the qualifications which have been specified in Regulation 1 of Chapter II of the Regulations made under the Act of 1921 have been incorporated by Rule 5 of the Rules of 1998. Rule 9 of the Rules of 1998, upon which the controversy in the present case turns, provides as follows:

"9. Bar to appoint a male candidate in a girls' institution - No male candidate shall be eligible for appointment to the post a in a girls' institution:

Provided that nothing contained in this rule shall apply to -

(a) a candidate already working as a confirmed teacher in a girls' institution for appointment by promotion to a higher post of teacher, other than the post of head of institution in the same institution; or

(b) a blind candidate for appointment as a teacher for the subject of Music :

Provided further that when a suitable lady candidate is not available for appointment to the post of a teacher other than the post of head of institution, or for any other sufficient reason the Board is satisfied that it is expedient in the interest of the students so to do, it may select a male candidate for such post :

Provided also that before selecting a male candidate in accordance with the preceding proviso, the Board may obtain and consider the views of the Management of the institution concerned and the Joint Director."

8. In its substantive part, Rule 9 provides that a male candidate shall not be eligible for appointment to the post of a teacher in a girls institution. However, clause (a) of the first proviso to Rule 9 protects the services of candidates who are already working as confirmed teachers in a girls institution by securing their right to appointment by promotion to a higher post of teacher other than a post of the head of the institution. The second proviso, however, stipulates that when a suitable lady candidate is not available for appointment as a teacher other than the post of a head of the institution or for any sufficient reason, deemed expedient in the interest of students, the Board may select a male candidate for the post. The prohibition contained in Rule 9 of the Rules of 1998 is similar to a corresponding provision in Rule 3 (2) of the Rules of 1983 and almost identical to Rule 9 of the Rules of 1995.

9. Now, it is in this background that it would be necessary to appreciate the submissions which have been urged on behalf of the appellant by learned counsel. The submissions are as follows:

(i) The duty and function of the Board under the Act of 1982 is to provide the procedure for selection of candidates as is evident from Section 10(2) of the Act of 1982. The Board does not have the statutory power to frame qualifications for appointments of teachers and, in fact, Rule 5 of the Rules of 1998 incorporates the qualifications prescribed in Regulation 1 of Chapter II of the Regulations framed under the Intermediate Education Act, 1921;

(ii) The right of a qualified teacher under the Act of 1921 cannot be taken away by the rule making power conferred

on the State by Section 35 of the Act of 1982. Rights which have been conferred under the Act of 1921 cannot be taken away by subordinate legislation framed under the Act of 1982;

(iii) Rule 9 of the Rules of 1998 is ultra vires the provisions of Section 35 of the Act of 1982. The Act of 1982 does not empower the Board to frame qualifications for appointment as a teacher;

(iv) The framing of qualifications constitutes an essential legislative function which cannot be delegated to subordinate legislation; and

(v) The restriction which is imposed by Rule 9 of the Rules of 1998 is unreasonable.

10. The Secondary Education Services Selection Board was constituted by Act 5 of the Act of 1982; the object of the state legislature being to establish a Board which would bring objectivity and fairness in the appointment of teachers in institutions which are governed by the Intermediate Education Act, 1921. As we have noticed earlier, the Board has wide ranging powers and duties under Section 9 of the Act of 1982, including the preparation of guidelines on matters relating to the method of recruitment and promotion of teachers and the performance of duties and exercise of powers, as may be incidental or conducive, to the discharge of its functions under the Act. Section 10(2) of the Act of 1982 envisages that the procedure for selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed. Under Section 32 of the Act of 1982, the provisions of the Act of 1921 as well as the Regulations which were framed under it, were to continue to remain in force for the purpose of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of teachers insofar as they are not inconsistent with the provisions of the Act. This provision, to our mind, is a clear recognition by the state legislature of two things. Firstly, the statutory provisions contained in the Act of 1921, as well as its Regulations, would continue to hold the field, inter alia, in matters of selection, appointment and promotion of teachers insofar as they were not inconsistent with the provisions contained in the Act of 1982 as well as in the Rules and Regulations made under the Act. Secondly, the language of Section 32 indicates that under the Act of 1982 as well as the Rules or Regulations which could be framed under it, provisions could be made in the matter of selection, appointment and promotion of teachers among other things. These could even be at variance with those under the Act of 1921 and the rules and regulations under it. For, unless such a power to make provisions in the Rules and Regulations framed under the Act of 1982 in regard to selection, appointment and promotion of teachers among other things, was comprehended, there would be no possibility of any inconsistency. The fact that the legislature did envisage an inconsistency conceivably as arising and gave an overriding effect, to the extent of the inconsistency, to the Act of 1982 and to the Rules and Regulations made under it, indicate both the sweep and ambit of the regulatory power under the Act of 1982 as well as the overriding force which would operate in respect of the statutory provisions contained in the Act as well as in the Rules and the Regulations. In fact, it must also be emphasised that in Section 32 of the Act

of 1982, the legislature contemplated an inconsistency not merely with the provisions of the subsequent Act but also with its Rules and Regulations. In either event, it is the Act of 1982 as well as the Rules and Regulations framed thereunder which would prevail to the extent of inconsistency. Rule 5 of the Rules of 1998 incorporates the qualifications which are specified in Regulation 1 of Chapter II of the Regulations made under the Act of 1921.

11. Rule 9 of the Rules of 1998 essentially ensures that for appointment to the post of a teacher in a girls institution a candidate should not be a male. However, clause (a) to the first proviso to Rule 9 stipulates that if a candidate was already working as a confirmed teacher in a girls institution, such a candidate could secure appointment by promotion to a higher post of teacher other than the head of the institution. Moreover, under clause (b) to the first proviso, the Board is empowered to select even a male candidate for appointment to the post of a teacher other than the head of an institution when a suitable woman candidate is not available or where the Board is satisfied for any other sufficient reason that it is expedient in the interest of the students to do so. These provisions in Rule 9 are based on an expert assessment by the delegate of the legislature that such a provision was necessary in the State of Uttar Pradesh to protect the interest and welfare of students in an institution exclusively meant for girls. The rule-making authority is entitled to form an opinion that in order to encourage girls' education in the State, a conducive atmosphere should be created. As part of a measure for creating a conducive environment for imparting education and to encourage the formation of public confidence in a girls' institution, it is open to the delegate to form an assessment that in such an institution, male candidates should not be appointed as teachers, save and except in certain exceptional situations. Those exceptional situations have also been categorized in Rule 9. However, in the case of a head of an institution, a male candidate has been regarded as not being eligible. There is a distinction between the duties and functions which are discharged by the head of the institution and by a mere teacher. The head of an institution has an important role to play in inculcating discipline among the teaching and non-teaching staff as well as among the students. The head of the institution has duties and functions which a teacher does not possess. The distinction is based on a reasonable classification.

12. The Supreme Court in the celebrated judgment in the case of Air India Versus Nergesh Meerza7 ruled that 'what Articles 15 (1) and 16 (2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations'. .

13. For arriving at such a conclusion their Lordships of the Supreme Court placed reliance on a previous judgment in the case of Yusuf Abdul Aziz Versus State of Bombay8 wherein, it was held that sex is a permissible classification. Therein, the Court observed as under: -

"Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on

that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code."

14. In a later decision in Miss C.B. Muthamma Versus Union of India9, Hon'ble Mr. Justice Krishna Iyer, speaking for the Supreme Court made the following observations: -

"We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the the differentiation is demonstrable, the rule of equality must govern." (emphasis supplied)

15. The legislature or its delegate can legitimately be of the view that in order to encourage greater access to education to girl students in intermediate education, the post of head of the institution should be filled in only on the basis that the candidate, who is chosen, should not be a male candidate. This cannot be regarded as being unreasonable or as violative of Article 14 of the Constitution. This does not indicate a legislative opinion formed either by the state legislature or by its delegate as to the unsuitability of male candidates in general, but an assessment by the rule-making authority that the interest of women's education can be sub-served best by the creation of a conducive environment in which a greater degree of confidence is generated by the appointment of women as teachers or as heads of institutions. It is trite law that it is open to the legislature or to its delegate to take into account the prevailing social circumstances in the area within its regulatory power and social realities which have a bearing on such policy decisions. Aspects such as the safety of girl students, the possibility of abuse and the need to protect girl students of a particular age group are considerations which cannot be regarded as being alien or extraneous to the exercise of regulatory powers. In this view of the matter, the impugned Rule cannot be faulted as being unreasonable or as violative of Article 14. As time goes by, a regulation which is conceived in the best interest of young women students at a particular point of time, may need to be modulated based upon experience gained, the development of education and the awareness of women's rights in society. When the time is right to do so is a matter for legislative judgment on which the Court cannot express any opinion. Significantly, the provision in the present case does not exclude women. A provision which restricts, curtails or circumscribes the rights of women - in the workplace, in educational institutions or elsewhere - would have to meet a heavy burden. It would be a discrimination against women on grounds of gender which is constitutionally impermissible. But the provision before us is not a provision that excludes women.

16. There is no merit in the submission that the right which has been conferred by the Act of 1921 has been taken away by subordinate legislation which has been framed under the Act of 1982. As a first principle of law, there can

be no dispute about the proposition that subordinate legislation is subservient to an enactment of the state legislature. But, in the present case, the scheme of the two state enactments has to be understood in its correct perspective. The object of setting up the Secondary Education Services Selection Board under the Act of 1982, was to substitute the method of selection which prevailed under the Act of 1921 in the field of intermediate education and to confer the power on the Board to regulate appointments in intermediate institutions governed by the Act of 1921. The powers which have been vested in the Board, more particularly, by Section 9, Section 10 and Section 35 are wide enough to extend to the framing of rules to define the qualifications of teachers. This, as we have noted earlier, is evident from Section 32 which confers a paramount effect upon the statutory provisions of the Act of 1982 and the Rules and Regulations framed thereunder over the statutory provisions contained in the Act of 1921 and its Rules and Regulations in the event of inconsistency. In fact, while framing Rule 5, the delegate of the legislature incorporated the qualifications contained in Regulation 1 of Chapter II of the Regulations made under the Act of 1921. Insofar as the power is concerned, it would have been open to the subordinate legislation to frame its own qualifications. However, while framing Rule 5, the delegate of the legislature has adopted the convenient legislative device of incorporating the qualifications which were already prescribed under the Act of 1921 while making Rule 5. These are legislative modalities which are well accepted. The Act of 1982, in fact, does contemplate that the statutory provisions contained in the Act of 1921 as well as its rules and regulations must give way in the event of inconsistency with the Act of 1982 or the Rules and Regulations framed under it.

17. Insofar as the issue before this Court is concerned, a considerable degree of guidance can be obtained from the judgment of a Supreme Court in Balbir Kaur and another Vs. U.P. Secondary Education Services Selection Board, Allahabad and others10. In that case, an advertisement was issued under the Act of 1982 for filling up vacancies of principals in institutions region-wise. The names of two senior most teachers were to be forwarded by the Management in accordance with Rule 11 (2) (b) of the Rules of 1998. The challenge in that case was that candidates who were eligible for selection under Regulation 1 of Chapter II of the Regulations framed under the Act of 1921 had been excluded. The contention was that Regulation 1 of Chapter II provided only for a stipulated experience of Class IX to XII and not teaching experience as a lecturer, as was prescribed in the advertisements. In that context, the Supreme Court held as follows:

"Having come to the said conclusion, the issue which still survives for consideration is whether for appointment to the post of Principal, the qualifying experience as stipulated in the said `Note' would apply or the one prescribed in the Appendix-A to Regulation I of Chapter II of the Regulations made under the Intermediate Act. In our view, answer to the question can be found in Section 32 of the Principal Act, which provides that the provision of the Intermediate Act and Regulations made thereunder will continue to be in force in case they are not inconsistent with the Principal Act

and the Rules made thereunder. As noted hereinbefore `Note' to sub rule (5) of Rule 12 of 1998 Rules prescribes the requirement of experience for the post, which is different from what is prescribed in the said Appendix A and, therefore, there being a conflict between the two provisions, in the teeth of Section 32, the said `Note' shall have an overriding effect over Appendix A insofar as the question of experience is concerned."

18. The judgment of the Supreme Court, therefore, is a clear answer to submission which has been urged on behalf of the appellant. The Supreme Court observed that the Note to sub-rule 5 of Rule 12 of the Rules of 1998 prescribed the requirement of experience for the post which was different from what was prescribed in the Regulations framed under the Act of 1921. Consequently, the Note would have an overriding effect insofar as the question of experience was concerned. .

19. In view of this legal position, we would have to hold, though for the reasons which we have indicated, that there is no merit in the challenge to the view which has been taken by the learned Single Judge. The rule-making authority in framing Rule 9 has not taken over an essential legislative function. The rule-making authority has not transgressed the limitations on its statutory power under Section 35 of the Act of 1982. Rule 9 is perfectly in conformity with the provisions of the Act of 1982 and cannot be regarded as being unreasonable.

20. For these reasons, we hold that the learned Single Judge was not in error in dismissing the writ petition and upholding the rejection of the candidature of the appellant based on the provisions of Rule 9 of the Act of 1982.

21. The special appeal accordingly stand dismissed. There shall be no order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2015

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

Civil Revision No. 404 of 2011

Raghunath Goel ...Revisionist
Versus
Yogendra Singh Nehru ...Opposite Party

Counsel for the Revisionist:
Anurag Khanna, Mohit Kumar Singh, Tarun Agarwal

Counsel for the Opp. Party:
Vijaya Prakash

Small Causes Court Act 1887-Section-25-Revision-against order passed by Small Causes Court-suit for arrears of rent and eviction decreed-rate of rent and executing of rent deed-admitted-whether entire Chaudhary Bhawan or its part-was under tenantry-being question of fact-can not be adjudicated in revision finding based on evidence available on record-no interference called for.

Held: Para-29
In view of the above the next question arises that whether this Court should exercise its jurisdiction under Section 25 to set aside finding of facts recorded by the court below. For the reasons recorded above, I find that the court below has recorded finding of facts against the tenant which are based on relevant evidence on record. The learned counsel for the revisionist failed to point

out that the findings are not based on evidence of record. The scope of interference under revisional jurisdiction under Section 25 came to be considered in long line of decisions of the Supreme Court and this Court.

Case Law discussed:
(2008) 8 SCC 564; (2012) 8 SCC 516; (2000) 6 SCC 394; 1981 ARC 545; 1996 (2) ARC 532; 1996 (2) ARC 561; 1999 (1) ACJ 54; 1999 (1) ACJ 431; 1999 (2) ACJ 990; AIR 1969 SC 1344; AIR 1987 SC 1782; (2002) 3 SCC 626; (2014) 9 SCC 78; (1980) 4 SCC 259.

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

1. The tenant/ defendant has preferred this Civil Revision under Section 25 of the Provincial Small Cause Courts Act, 18871 against the order dated 16 August 2011 passed by Judge Small Causes Court, whereby the suit for the eviction of tenant has been decreed.

2. The essential facts are; the plaintiff/respondent is the owner and landlord of the premises Chaudhary Bhawan situated at Niwari Road, Modi Nagar, District Ghaziabad. The landlord instituted a suit no. 72 of 2006 in the Court of Judge, Small Causes Court, Ghaziabad for the eviction of the tenant/ revisionist and for the recovery of Rs. 3,18,600/- as arrears of rent together with pendente lite and further interest. The landlord has further claimed damages at the rate of Rs. 25,000/- per month for the use and occupation of the premises from 16 July 2005 till the premises is actually vacated by the defendant and the possession is handed over to the landlord. He further claimed a sum of Rs. 2 lacs as damages for the expenses incurred by him in making modification of the premises. The landlord's case was that he let out a portion of the house, Chaudhary Bhawan consisting three halls, three rooms, two verandas and two galleries at the rate of Rs. 18,000/- per month w.e.f. 27.1.2004. The landlord and the tenant entered into an agreement dated 27.1.2004 in the said premises for a period of three years. The tenant had taken the premises on rent for running a Coaching Institute / Educational Institution. On the request of the tenant the landlord had made suitable alterations in his premises as per the need of the tenant. Accordingly, he has incurred a sum of approximately Rs.2 lacs for the modifications. As the tenant wanted to run the educational institution, the existing kitchens were altered to make the room for the said purposes.

3. It is stated that after the alteration of the building the tenant took the possession of the premises on 27.1.2004. But the tenant did not make the payment of rent in terms of the agreement. It is averred in the plaint that for the reasons best known to the tenant he has not used the building. The furniture is lying in the building and his associates/ employees come to the premises and sit there for the whole day and leave it after locking the same. The landlord repeatedly made requests for the payment of arrears of the rent but the tenant was not serious about the payment of the rent. When the tenant did not pay any heed to the repeated requests of the landlord for the payment of his arrears of rent and the current rent the land lord had no option but to send a notice dated 17 June 2005 under Section 106 of the Transfer of Property Act, 18822 for terminating his tenancy and demanding arrears of rent and for vacation of the premises. It is stated that the said notice was duly served upon the defendant/ tenant but neither he made the payment of rent nor vacated the premises.

4. The tenant contested the suit. In its written statement the tenant admitted the fact that the tenancy commenced on 27.1.2004 in terms of the agreement at the rate of Rs. 18,000/- per month but the landlord had given possession of only one hall, one room and in the rest of the premises the landlord has been keeping his goods and living in the same premises. The landlord had assured the tenant that within 8-10 days he would vacate the remaining part of the tenanted premises and will handover the possession of the rest of the building in terms of the agreement. The tenant also admitted that an agreement was entered into between the landlord and the tenant on 27.1.2004 but the landlord did not handover the possession of entire premises as per the agreement, for the said reason there was no relationship of landlord and tenant between the parties. It has also been stated that the landlord has refused to accept the rent.

5. It was further averred that after sometime the tenant wanted to vacate the premises by removing his effects from the premises but the landlord did not permit him. It is also stated that in February 2004 the landlord has taken back the possession of one room and has let out to some other persons and his goods lying in the premises, has also been given to the new tenant for their use.

6. The landlord has examined himself as P.W.-1 and Naupal Singh as P.W.-2 and also filed some documentary evidence; copy of the notice dated 17.6.2005, agreement which was exhibited, reply submitted by the tenant to the notice, the report of the amin in another suit no. 1449 of 1996 "Yogendra Singh vs. Nagar Palika and others" etc. The tenant has examined himself and has filed the affidavit of one Karamveer, who was also examined as DW-2. The tenant did not file any documentary evidence. The Trial Court has framed two issues; (i) whether on 27.1.2004 the part of the Chaudhary Bhwan consisting of three halls, three rooms, two varandas and two galleries have been let out to the defendant or entire building Chaudhary Bhawan was let out, and (ii) Whether the defendant is entitled for any other relief.

7. In respect of the issue no. 1, the Trial Court found that the landlord let out three halls, three rooms, two verandas and two galleries to the tenant. The Trial Court has recorded a finding that it was an admitted case of the tenant that an agreement was entered into on 27.1.2004 in respect of three halls, three rooms, two verandas and two galleries at the rate of Rs. 18,000/- per month. The court has also relied upon the report of the amin dated 20.4.2006 against which no objection was filed by the tenant. The Court has also referred the report of the amin in another Suit No. 1449/1996 "Yogenera Singh Vs. Nagar Palika and others". The court has referred some other admissions like a paper no. 32Ga dated 2 December 2004, a communication sent by the tenant to the landlord regarding furniture etc.. The court has disbelieved the case of the tenant that since the possession of the entire accommodation was not handed over to him, therefore, he could not use the premises for the purpose to run the coaching classes. In this regard the court has referred the statement of the tenant that when he could not get the possession of the entire accommodation then he sent a notice to the landlord to give the possession of the premises as per the agreement, however the tenant did not

file the said notice as evidence on the record. There is no explanation of the tenant on record that why he has not filed said evidence.

8. In view of the aforesaid findings the Trial Court has decreed the suit for the eviction and arrears of rent.

9. I have heard Sri Ravi Kant, learned Senior Advocate assisted by Sri Tarun Agrawal, learned counsel for the revisionist, and Sri Vijay Prakash, learned Counsel for the respondent-landlord.

10. The learned Senior Advocate submitted that from the perusal of the agreement dated 27.1.2004 it is evident that the entire premises was given on rent for three years to the tenant. Since the rent agreement does not contain any further detail of the tenanted property then it is explicit under the agreement that entire Chaudhary Bhawan premises was given on the rent. It was further submitted that the premises was let out for a period of three years, therefore, it was required to be compulsorily registered as per Section 107 of the Act No. 4 of 1882. He further urged that the rent agreement was executed on a stamp-paper of Rs. 100/-, thus having regard to Section 49 of the Registration Act, the rent deed was clearly inadmissible in the evidence, therefore, Trial Court grievously erred in placing reliance on the said document. For the above reasons, none of the clauses of the rent agreement including the clause relating to fixation of rent of Rs. 18,000/- per month could have been received in evidence. The reliance has been placed on a judgement of the Supreme Court in the case of K.B. Saha and Sons Private Limited v. Development Consultant Limited3.

11. It was also submitted that since the attesting witnesses were not examined, hence it could not have been relied upon by the Trial Court. Lastly it was urged that the Trial Court has wrongly placed the burden of proof on the defendant.

12. The learned counsel for the revisionist Sri Vijay Prakash submitted that the defendant/ revisionist was a tenant of a portion of the above premises, Chaudhary Bhawan, consisting of three halls, three rooms, two verandas and two galleries on monthly rent of Rs. 18,000/- w.e.f. 27.1.2004. The defendant/ revisionist did not pay rent from 27.1.2004 to 16.7.2005 in spite of repeated demand, thus a notice was sent on 17 June 2005 terminating the tenancy of the defendant and in spite of the said notice he did not make the payment. It is further submitted that the amin made a spot inspection of the tenanted accommodation on 20.4.2006 in the presence of both the parties and defendant/ revisionist did not file any objection to the report submitted by the amin. The Trial Court has rightly relied on the said report, other evidence and has recorded a finding of fact which should not be disturbed under the revisional jurisdiction under Section 25 of the Act No. 9 of 1887.

13. Lastly, it was urged that the Trial Court has decreed the suit on the basis of the admission of the defendant/ revisionist on the point of rate of rent and the existence of the tenant and landlord relationship between him and the plaintiff. The revisionist has failed to point out any jurisdictional error in the judgement passed by the learned court below. Lastly, it was urged that the findings recorded by the Trial Court on the issue of existence of tenancy and rate of rent are the findings of facts which do not require any

interference by this Court under Section 25 of the Provincial Small Cause Courts Act.

14. I have heard learned counsel for the parties, considered their submissions and perused the record.

15. The parties are not in conflict on the fact that they entered into an agreement dated 27.1.2004 for creating a tenancy of the premises and according to the tenant he got the possession of one hall, one room. From the evidence on the record it is evident that the Chaudhary Bhawan is a huge building, in which some tenants like Pragyan Classes, IIT, Medical Entrance etc. were running their coaching classes/ institutions at the time of institution of the suit.

16. In the written statement the tenant has admitted about the agreement dated 27.1.2004 and the rate of rent also at the rate of Rs. 18,000 per month. It is apposite to extract paragraph-2 of the written statement, thus:

''2. यह कि वादपत्र की धारा 2 जिस प्रकार वर्णित है, गलत है, स्वीकार नहीं है । सही तथ्य यह है कि प्रतिवादी ने वादी से प्रश्नगत सम्पत्ति को किराए पर लिया था और किराएदारी 27.1.2004 से शुरू होनी थी तथा पूरे भवन का किराया 18000/–रूपये प्रतिमाह तय हुआ था । वादी द्वारा प्रतिवादी को सम्पूर्ण भवन मय समस्त निर्माण के किराए पर देना तय हुआ था परन्तु जिस समय किराएदारी शुरू हुई थी, उस समय भवन का एक हाल एवं एक कमरा खाली था और शेष भवन में वादी का सामान रखा था, जिसमें वादी रह रहा था । वादी द्वारा प्रतिवादी से यह कहा गया था कि वह आठ–दस दिन में अपने सामान को कहीं और शिफ्ट कर देगा और पूरे भवन का कब्जा वादी को दे देगा । कथन इसके विपरीत वादी गलत है, स्वीकार नहीं है ।''

17. The only dispute raised by the tenant was that the landlord had agreed to let out the entire premises and not only a part of the premises. In the written statement the tenant has averred that in the said premises three other educational institutions were running. Thus the case of the tenant that the entire premises was let out to him, has been rightly disbelieved by the Trial Court. The Trial Court has recorded a finding of fact with regard to a part of the tenancy on the basis of two Amin reports.

18. It is noteworthy that the tenant has not filed any objection against the amin's report of this case. It is also not disputed that the tenant has not filed any documentary evidence in support of his case. The tenant has examined one Karamveer as DW-2, who has admitted that he had not seen the house, and is also not aware of the fact that the entire house is consisting of 100 rooms, which has been let out to the tenant.

19. The oral statement of the tenant also failed to inspire the confidence of the court. He has also admitted that he had sent a notice to the landlord when he could not get the possession of the entire premises but the Trial Court has rightly recorded that he has not filed the notice as an evidence.

20. Now I may deal with the submissions of the learned Senior advocate.

21. It was contended on behalf of the revisionist that the premises was let out for a period of three years, therefore, the rent agreement dated 27.1.2004 was required to be compulsorily registered as per Section 107 of the Act No. 4 of 1882. It is further urged that the court below has erred by placing reliance on such an unregistered document. He has placed

reliance on a judgement of the Supreme Court in K.B. Saha and Sons Private Limited (supra). In the said case a residential flat was let out to M/s Development Consultant Limited by the landlord by a memorandum dated 30 March 1976. The flat was let out for a particular officer, Keshab Das and members of his family, and for not other purposes. One of the terms of the memorandum was that if the tenant intended to use the flat in question for any purpose other than providing residential accommodation to its employee Keshab Das, the tenant would seek written consent from the landlord.

22. The Company informed the landlord that its employee Mr. Keshab Das had vacated the flat and the Company wanted to repair it and to allot it to some other employee. The landlord refused to give his consent for the same and he protested that the Company has no right to allot the premises to another employee, therefore, it must surrender the same once vacated by Mr. Keshab Das. The landlord instituted Title Suit No. 19 of 1992 for declaration and permanent injunction that as per terms of memorandum dated 30.3.1976 the Company had no right to allot the said premises to any other employee after its employee Mr. Keshab Das had vacated the premises. The Trial Court granted an interim injunction. Later on, the landlord issued a notice under Section 13(6) of the West Bengal Premises Tenancy Act, 1956 calling upon the Company to vacate the suit premises. In response to the said notice when the Company refused to vacate the premises, he filed another suit being Title Suit No. 39 of 1995 praying for ejectment of the respondents from the suit premises. The Company filed a written statement and one of the plea taken on it was that they have paid the rent to the appellant and as such the tenancy was protected by the provisions of the West Bengal Premises Tenancy Act, 1956. A further plea was taken by it was that the tenancy agreement entered into by the parties, was illegal and invalid and as such the agreement was against the Statute. Therefore, no injunction could be granted against them.

23. The Trial Court recorded a finding inter alia that the respondent had deposited the rent in the office of the Rent Controller, Calcutta, therefore, he was not a defaulter and was not liable to be evicted on the ground of default. The tenant could be directed to vacate the suit premises only on proof of grounds mentioned in Section 13(1) of the Act. The agreement was not registered which was required to be registered under Section 49 of the Registration Act, therefore, the agreement was not admissible in evidence. The trial court dismissed both the suits. Against the order of the trial court two first appeals were filed. The High Court affirmed the judgement and decree passed by the Assistant District Judge whereby both the suits were dismissed.

24. The matter was carried to the Supreme Court by the landlord. The Supreme Court, after considering large number of the judgements on the point of requirement of registration, held as under:

"34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3.A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4.A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5.If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

25. From a perusal of the law laid down by the Supreme Court it is evident that an unregistered document can be used as the evidence of collateral purpose as provided under the proviso to Section 49 of the Registration Act. In the said case, the landlord had relied on clause-9 of the lease agreement for the purpose that the tenant was liable to be evicted because of violation of clause-9 of the lease agreement. The court found that since the suit was filed only on the ground of clause-9 of the unregistered document, therefore, it was not for a collateral purpose.

26. In the present case the tenant has admitted the terms of the agreement with regard to the rate of rent and the possession, therefore, the case relied by the learned Senior Advocate stands on completely different footing.

27. In the case of Ahmedsaheb (Dead) By Lrs. and others v. Sayed Imail4 the landlord filed a civil suit for the recovery of arrears of rent. The tenant admitted the fact that the premises was let out to him at the rate of Rs. 800/- per year. It was also admitted that the rent was due from him. The High Court observed that it is needless to emphasize that an admission of a party in the proceedings, either in the pleading or oral, is the best evidence and the same does not need any further corroboration. The Court observed as under:

"12.... In our considered opinion, that vital aspect in the case viz. the admission of the respondent in the written statement about the rate of rent and the further admission about its non-payment for the entire period for which the claim was made in the three suits was sufficient to support the suit claim. The High Court failed to note the said factor while deciding the second appeal which led to the dismissal of the appeals. Even while eschewing Exhibit 69 from consideration, the High Court should have noted that the relationship of landlord and tenant as between the plaintiffs and defendants was an established factor and the rate of rent was admitted as Rs. 800 per year."

28. In the same judgement the Supreme Court has referred and relied its earlier judgement in the case of Anthony v. K.C. Ittoop & Sons5. Following discussion and conclusion are apt and relevant for the purpose of the case:

"14.When it is admitted by both sides that the appellant was inducted into the possession of the building by the owner thereof and that the appellant was paying monthly rent or had agreed to pay rent in

respect of the building, the legal character of the appellant's possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second paragraph of Section 107 of the TP Act extracted above. From the pleadings of the parties there is no possibility for holding that the nature of possession of the appellant in respect of the building is anything other than as a lessee."

29. In view of the above the next question arises that whether this Court should exercise its jurisdiction under Section 25 to set aside finding of facts recorded by the court below. For the reasons recorded above, I find that the court below has recorded finding of facts against the tenant which are based on relevant evidence on record. The learned counsel for the revisionist failed to point out that the findings are not based on evidence of record. The scope of interference under revisional jurisdiction under Section 25 came to be considered in long line of decisions of the Supreme Court and this Court.

30. A Division Bench of this Court in the case of Laxmi Kishore and another v. Har Prasad Shukla6, has elaborately considered the scope of interference under Section 25 of the Small Cause Courts Act and held as under:

"3. This provision confers a supervisory and not a appellate power. The record can be called for seeing that the decree is according to law. If it is not, the revisional court can pass such order with respect thereto as it may think fit. This power is conditional on the revisional court finding that the decree or order sought to be revised was not according to law. The phrase 'pass such orders with respect thereto as it thinks fit' has come up for consideration before the Supreme Court in several decisions..."

31. Similar view has been consistently taken by this Court in a long line of decisions. Reference may be made to the judgements in the cases of Om Prakash Gupta v. Vth Additional District & Sessions Judge, Aligarh and others7; Man Mohan Dixit v. Additional District Judge/ Special Judge (E.C. Act), Jalaun at Orai and others8; Anwar Uddin v. Ist Additional District Judge, Aligarh and others9; Rajendra Nath Tripathi and another v. Jagdish Dutt Gupta and another10; and Har Swarup Nigam v. District Judge, Allahabad and others11.

32. The Supreme Court in the case of Malini Ayyappa Naicker v. Seth Manghraj Udhavdas Firm & others12,held as under:

"9. It may be remembered that Shah, J. was also a party to the decision in Hari Shankar's case, 1962 Supp 1 SCR 933 = (AIR 1963 SC 698) (supra). We see no conflict between the two decisions. The former decision enumerates some of the circumstances under which the High Court can interfere while considering whether the decision under review was made according to law. All that it laid down in Abdul Shakur's case is that the High Court is not competent to disturb a finding of fact reached by the District Court even if in reaching that finding it was required to take into consideration a statutory presumption."

33. The Supreme Court in the case of Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri13,held thus:

"16...We must, however, guard ourselves against permitting in the guise of revision substitution of one view where two views are possible and the Court of Small Causes has taken a particular view. If a possible view has been taken, the High Court would be exceeding its jurisdiction to substitute its own view with that of the courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant. Judged by the standard, we are of the opinion that the High Court in this case had exceeded its jurisdiction."

34. The Supreme Court in the case of Harsavardhan Chokkani v. Bhupendra N. Patel and others14, held as under:

"7... Nonetheless, the High Court is exercising the revisional power which in its very nature is a truncated power. The width of the powers of the revisional court cannot be equated with the powers of the appellate court. In examining the legality and the propriety of the order under challenge, what is required to be seen by the High Court is whether it is in violation of any statutory provision or a binding precedent or suffers from misreading of the evidence or omission to consider relevant clinching evidence or where the inference drawn from the facts proved is such that no reasonable person could arrive at or the like. It is only in such situations that interference by the High Court in revision in a finding of fact will be justified. Mere possibility of a different view is no ground to interfere in exercise of revisional power..."

35. The Supreme Court in Hindustan Petroleum Corporation Limited v. Dilbahar Singh15, has elaborately considered the scope of the revision in the following words:

"31. We are in full agreement with the view expressed in Sri Raja Lakshmi Dyeing Works16 that where both expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a rehearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an "appeal" and so also of a "revision". If that were so, the revisional power would become coextensive with that of the trial Court or the subordinate tribunal which is never the case. The classic statement in Dattonpant17 that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three Rent Control Statutes, the High Court is not conferred a status of second court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent."

36. In the present case the tenant has admitted that he got the possession on 27.1.2004. He has also not disputed the rate of the rent at the rate of Rs. 18000/- per month, thus in my view a jural relationship between the parties came into existence. The

parties are on conflict with regard to the fact whether the landlord had given the possession of entire premises or not. As noted above, the said disputed question of fact cannot be adjudicated in revisional jurisdiction under Section 25 of the Small Cause Courts Act. The court below has recorded a finding of fact on the basis of the unrebutted report of the Amin and the other evidence on the record.

37. In view of the above, the revision lacks merit and it is accordingly dismissed.

38. The tenant-revisionist is granted three months' time to vacate the premises subject to the following conditions;

(i) the tenant shall submit an undertaking in the court below that he will handover the vacant and peaceful possession to the landlord on or before 3 July 2015;

(ii) he will continue to pay the rent on each succeeding month till vacation of the accommodation on 07th day of each month.

(iii) he will not create any third party interest in the disputed premises.

39. No order as to costs

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2015

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

Civil Revision No. 412 of 2013

Smt. Richa Khare & Ors. ...Revisionist
Versus
Ankit Gupta & Ors. ...Opp. Parties

Counsel for the Revisionist:
Amit Kumar Shukla

Counsel for the Opp. Parties:
Arun Kumar Shukla

C.P.C.-Section 115-Civil Revision - against rejection-application to amend heading in provision-instead of 163 A-should be Section 166-held-Tribunal taken hyper technical view-in both sections-the vehicle owner or insurance company-on fault of injured or deceased-can be defeat claim-no prejudice caused.

Held: Para-12
Significantly, in the amendment application no amendment of the pleading or the relief has been sought by the claimants. Thus, there is no question of change of nature of the case. Moreover, if the amendment is allowed, no prejudice will be caused either to the owner or to the insurance company as under both the provisions i.e. Sections 163A and 166, the owner and the insurance company can defeat the claim of the claimants on the ground of fault on the part of the claimants or injured.

Case Law discussed:
AIR 2004 SC 2107:(2004) 5 SCC 385; 2007 ACJ 2067 Gujrat (DB); 2008 ACJ 909 Rajasthan (FB); 2012 Law Suit (SC) 200: (2012) 5 SCC 337; 2012 Law Suit (SC) 642:(2012) 11 SC 341; 1998 Law Suit (AP 243:AIR 1998 AP 337; 2007 Law Suit (KAR) 439; Laws (APH)-2006-9-10; (2012) 2 SCC 356; (2012) 2 SCC 300; (2005) 7 SCC 534; (2006) 12 SCC 1; (2008) 5 SCC 117; (2008) 14 SCC 364; (2009) 2 SCC 409:(2009) 1 SCC (Civ) 562; (2010) 10 SCC 512:(2010) 4 SCC (Civ) 239; (2011) 12 SCC 268; (2009) 10 SCC 626:(2009) 4 SCC (Civ) 294.(2006) 4 SCC 385; (2009) 10 SCC 84.

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

1. This civil revision under Section 115 of the Code of Civil Procedure,

19081 arises out of an order dated 22nd August, 2013 passed by the Additional District Judge/Special Judge (EC Act)/Motor Accidents Claims Tribunal, Shahjahanpur2 in Motor Accident Claim Petition No. 297 of 2010 (Smt. Richa Khare v. Ankit Gupta and others) whereby the Tribunal has rejected the amendment application of the claimants-revisionists under Order VI Rule 17 CPC.

2. The essential facts are that late Sanjay Khare, husband of the revisionist no. 1 and father of the revisionist nos. 2 and 3, was a Government employee working on the post of Assistant Nazir (I) at District Court, Shahjahanpur. He met an accident on 25th September, 2008 with a truck bearing Registration No. U.P.27C-5624. He succumbed to his injuries on 30th September, 2008. The revisionists moved a claim petition before the Tribunal under Section 163A of the Motor Vehicles Act, 19883 which was registered as Motor Accident Claim Petition No. 297 of 2010 (Smt. Richa Khare v. Ankit Gupta and others). The case of the claimants-revisionists was that on the fateful day the driver of the offending vehicle, which is owned by the respondent no. 1 and insured by the respondent no. 2, was driving the vehicle rashly and negligently and he hit the husband of the revisionist no. 1 who was returning to his home. In the claim petition, a claim of Rs.50,45,400/- was raised. The claim petition was contested by the defendants-respondents.

3. In the claim petition the claimants-revisionists moved an application for amendment under Order VI Rule 17 CPC on 07th August, 2013 on the ground that due to clerical mistake, the claim petition was filed under Section 163A of the Act instead of Section 166. Thus, the claimants sought the only relief for amendment of section of the claim petition. The said amendment was opposed by the respondents on the ground that it had been filed at a belated stage. The amendment application has been rejected by the Tribunal by the impugned order dated 22nd August, 2013 on the ground that there was an option to the claimants to move the claim petition either under Section 163A or under Section 166 of the Act. The Tribunal further took the view that the proceeding under Section 163A of the Act is of final nature which cannot be converted, and in this regard the Tribunal has placed reliance on the judgements in Deepal Girishbhai Soni and others v. United India Insurance Co. Ltd., Baroda4, New India Assurance Company Limited v. V.B.N. Panchan Bhai Patel5, and United India Insurance Company Limited v. Satya Narayan Sharma6. The Tribunal has further held that the amendment application has been filed after a considerable delay.

4. I have heard learned counsel appearing for the parties.

5. Learned counsel for the revisionists submitted that the claimants-revisionists did not seek any amendment in the pleading or the relief of the claim petition but they only wanted to amend the section, under which the claim petition was filed. The amendment was not going to change the basic nature of the claim petition. In fact, the amendment was a bona fide and legitimate. However, the Tribunal has taken a hypertechnical approach in rejecting the amendment. Lastly, he urged that under Section 163A of the Act a person whose annual income

is Rs.40,000/- or less is covered, which is evident from the Second Schedule of the Act. Under Section 163A of the Act, being a social security provision providing for a distinct scheme, only those persons whose annual income is upto Rs.40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act. He has placed reliance on several judgements of the Supreme Court and other High Courts in Rameshkumar Agarwal v. Rajmala Exports Private Limited and others7, Abdul Rehman and another v. Mohd. Ruldu and others8, Smt. Pochamma and others v. Mirza Dawood Bagi and another9, Bangalore Metro Transport Corporation v. Lakshmamma10, Deekonda Suresh Dharmoji and others v. New India Assurance Company Limited and others11.

6. Learned counsel for the respondents has supported the findings of the Tribunal. No other submission has been made.

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

8. Section 163A of the Act was inserted in Chapter XI of the Act by Act No. 54 of 1994 with effect from 14th November, 1994. It provides the special provisions for payment of compensation on structured formula basis which is indicated in the Second Schedule of the Act. Under Chapter X of the Act, Section 140 provides liability to pay compensation in certain cases on the principle of 'no fault'. Chapter XII of the Act deals with the Claims Tribunals. Section 166 provides that an application for compensation arising out of an accident may be made, amongst others, by the person who has sustained the injury, or, where death has resulted from the accident, by all or any of the legal representatives of the deceased.

9. The distinction among Sections 140, 163A and 166 of the Act has been elaborately considered by the Supreme Court in the case of Deepal Girishbhai Soni (supra). In the said case, the Supreme Court has held that Section 140 of the Act provides for the claim for compensation under no fault liability and by the reason of the said provision, a fixed sum is to be paid. The Supreme Court has further held that Section 140 of the Act deals with the interim compensation but Section 163A was inserted in the Act to avoid the long drawn trial or proof of negligence in the cause of accident. The said section was inserted for grant of immediate relief to a section of people whose annual income is not more than Rs.40,000/-, whereas Section 166 under Chapter XII of the Act does not have any such ceiling.

10. The Supreme Court in the case of National Insurance Company Limited v. Sinitha and others12 has considered the distinction between Sections 140 and 163A of the Act. The Court held that the claim of compensation under Section 140 of the Act cannot be defeated because of any of the fault grounds i.e. "wrongful act", "neglect" or "default". Thus, in the case of Section 140, the owner or insurer cannot take a plea that there was fault on the part of the claimant or the deceased. Therefore, the claim made under Section 140 is based on "no-fault liability" principle. However, under Section 163A

of the Act it is not essential for the claimants to plead or establish that the accident suffers from "wrongful act" or "neglect" or "default" of the offending vehicle, but the owner or the insurance company can plead that there was "wrongful act", "neglect" or "default" on the part of the deceased/ injured. In case the owner or the insurance company established that the accident took place due to fault of the deceased/injured then the claim petition can be defeated. The Court while drawing distinction between no fault theory held as under:

"27. Thus, in our view, it is open to a party concerned (the owner or the insurer) to defeat a claim raised under Section 163-A of the Act by pleading and establishing any one of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason we find no plausible logic in the wisdom of the legislature for providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act and in avoiding to include a similar negative bar in Section 163-A of the Act. The object for incorporating sub-section (2) in Section 163-A of the Act is that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163-A of the Act is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" on to the shoulders of the defence (the owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude that Section 163-A of the Act is founded on the "fault" liability principle."

11. In the present case, a copy of the claim petition is on the record. From a perusal of pleadings of the claim petition it is evident that all the necessary pleadings required under Section 166 of the Act have been made in the claim petition and a claim of Rs.50,45,400/-has been made. It is also pleaded by the claimants in the claim petition that the accident had taken place due to rash and negligent driving of the truck driver. Thus, all the necessary ingredients for an application under Section 166 of the Act are present in the claim petition.

12. Significantly, in the amendment application no amendment of the pleading or the relief has been sought by the claimants. Thus, there is no question of change of nature of the case. Moreover, if the amendment is allowed, no prejudice will be caused either to the owner or to the insurance company as under both the provisions i.e. Sections 163A and 166, the owner and the insurance company can defeat the claim of the claimants on the ground of fault on the part of the claimants or injured.

13. Insofar as the finding of the Tribunal that the amendment application has been moved at a belated stage is concerned, the law in respect of such amendment has been considered by the Supreme Court in the case of J. Samuel and others v. Gattu Mahesh and others13, in the following terms:

"23. Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of

those cases have been decided prior to the insertion of Order 6 Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order 6 Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Vide Aniglase Yohannan v. Ramlatha14, Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N.15, Chander Kanta Bansal v. Rajinder Singh Anand16, Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd.17, Vidyabai v. Padmalatha18 and Man Kaur v. Hartar Singh Sangha19.]"

(Emphasis supplied by me)

14. In the case of State of Madhya Pradesh v. Union of India and another20 the Supreme Court has held that in case the amendment is moved at a belated stage, the Court has wide and unfettered discretion to allow the amendment of the pleadings on such terms as it appears to the Court proper and just. The amendment cannot be refused if it is found that for deciding the real controversy between the parties it can be allowed on payment of cost. The relevant part of the judgement reads as under:

"10. This Court, while considering Order 6 Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh21, at para 5: (SCC p. 627)

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

(ii) **** **** ****

(iii) **** **** ****

(iv) Rajesh Kumar Aggarwal v. K.K. Modi22, at paras 15 & 16: (SCC pp. 392-93)

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading.

The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

15. The Supreme Court in Revajeetu Builders and Developers v. Narayanaswamy and Sons and others23 has culled out certain factors to be taken into consideration while dealing with the application for amendment:

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

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

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

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

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

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

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

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

16. Applying the aforesaid parameters to the present case, it is evident that the Tribunal has taken a hypertechnical view and has rejected the amendment application on wrong premise.

17. In view of the above, the impugned order dated 22nd August, 2013 passed by the Tribunal is set aside. The matter is remitted to the Tribunal to decide the amendment application afresh within three months from the date of communication of this order.

18. The revision is, accordingly, allowed. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2015

BEFORE
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No. 497 of 2006

Abhay Kumar Dubey ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Arvind Kumar Tewari

Counsel for the Respondents:
Govt. Advocate

Criminal Revision-Against order by Magistrate-treating complaint case-instead directing the police to registered the case-on application under Section 156 (3) Cr.P.C.-held-finding by Magistrate-controversy being civil in nature-rightly treated it the complaint case-no illegality committed-revision rejected.

Held: Para-9
In present matter all evidence required to be proved in the case is within knowledge of revisionist. Learned Court

below had rightly mentioned in impugned order that matter relating to application u/s 156(3) Cr.P.C. may be a matter relating to exclusive dispute of civil nature. Therefore no impropriety or irregularity appears to have been committed by the Court below by not ordering the investigation by the police and directing the case to be registered as complaint case. Therefore impugned order should not be interfered with in revision. Revision, accordingly, is dismissed.

Case Law discussed:
2001 (2) C.Cr.J. 644(All.); 2005 (51)ACC 901; 2007 (59) ACC 739.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This revision has been filed against the order dated 12.01.2006 passed by Chief Judicial Magistrate, Etawah in Criminal Misc. Case No. 133/2005, Abhay Kumar Dubey Vs. Netram & others by which application under section 156(3) Cr.P.C. was registered as complaint case.

2. Present revisionist had moved an application dated 09-12-2005 in Court below u/s 156 (3) Cr.P.C. After hearing the counsel for applicant/revisionist the Court below had passed its impugned order 12-01-2006 by which application u/s 156 (3) Cr.P.C of applicant was registered as complaint case. Aggrieved by this order present revision had been preferred.

3. None appeared on behalf of revisionist. Heard learned AGA and perused memo of revision.

4. Code of Criminal Procedure had given different type of powers to deal with such matters relating to commission of cognizable offences when brought before it. Code and various case laws had set guidelines for Courts to deals with such matters. In ruling 2001 (2) C.Cr.J. 644 (All); Ram Babu Gupta vs. State of U.P. & others full bench of this Court held that:

"On receiving of such complaint, different courses are open to the Magistrate he may with the aid of power conferred by Section 156 (3) direct the police to register a case and investigate in the matter as provided in Chapter XII or he may treat the same as complaint and proceed in the manner as provided in Chapter XV of the Code. While resorting to the first mode in as much as directing the police for investigation he should not pass order in a routine manner. He should apply his judicial mind and on glimpse of the complaint, if he is prima facie of the view that the allegations made therein constituted commission of a cognizable offence requiring thorough investigation, he may direct the police to perform their statutory duties as envisaged in law. " - - - - - - - - "Where the Magistrate receives a complaint or an application which otherwise fulfills the requirement of a complaint envisaged by section 2 (d) of Cr.P.C. and the facts alleged therein disclose commission of an offence, he is not always bound to take cognizance. This is clear from the use of the words "may take cognizance" which in the context in which they occur in section 190 of the Code cannot be equated with 'must take cognizance '. The word 'may' gives discretion to the Magistrate in the matter. Two courses are open to him. He may either take cognizance under section 190 or may forward the complaint to police under section 156 (3) Cr. P.C. for investigation."

5. In ruling 2005 (51) ACC 901, Dharmendra @ Pappu vs. State of U.P. & others this Court held that:

"From the perusal of the allegations made in the application under section 156(3) Cr.P.C. it appears that on the basis of the allegations made therein a prima facie cognizable offence is made out against the accused and the allegations are of such nature which require investigation by the police. In such circumstances the Magistrate was under obligation to direct the S.O. of police station concerned to register the case and investigate them."

6. Section 156(3) CrPC reads "Any Magistrate empowered under section 190 may order such an investigation as above-mentioned." It is noteworthy that there is word "may" and not "shall" in this provision. From the perusal of the allegations made in the application under section 156(3) Cr.P.C. it appears that on the basis of the allegations made therein a prima facie cognizable offence is made out against the accused and the allegations are of such nature which requires investigation by the police, in such circumstances the Magistrate may direct the S.O. of police station concerned to register the case and investigate them.

7. The jurisdiction of a Magistrate to dispose of application u/s 156 (3) Cr.P.C. cannot be exercised arbitrarily, but there are certain specific norms for it. For ordering the investigation on application u/s 156(3) Cr.P.C. there must be prima facie commission of cognizable offence and must be the allegations are of such nature which require investigation by the police. Even if there appears commission of cognizable offence in application containing complaint, Magistrate is not always obliged to order the police for investigation, if there is actually nothing to be investigated. In such case applicant can take recourse of procedure of complaint case. Order for investigation is to be made only when allegations are of such nature that actually requires investigation.

8. In ruling 2007 (59) ACC 739; Sukhwasi vs. State of U.P. division bench of this Court had held as under:

"Applications under section 156(3) Cr.P.C. are coming in torrents. Provisions under section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of section 156(3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has discretion to treat an application section 156(3) Cr.P.C. as a complaint."

9. In present matter all evidence required to be proved in the case is within knowledge of revisionist. Learned Court below had rightly mentioned in impugned

order that matter relating to application u/s 156(3) Cr.P.C. may be a matter relating to exclusive dispute of civil nature. Therefore no impropriety or irregularity appears to have been committed by the Court below by not ordering the investigation by the police and directing the case to be registered as complaint case. Therefore impugned order should not be interfered with in revision. Revision, accordingly, is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.04.2015

BEFORE
THE HON'BLE SATYENDRA SINGH CHAUHAN, J.

Misc. Single No. 1138 of 2015

Neeraj Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sushil Kumar, Akshat Srivastava

Counsel for the Respondents:
C.S.C., Yogendra Nath Yadav

Constitution of India, Art.-226-Locus standie-petitioner being member of Gaon Sabha-challenging order by which notice under Rule 49-A-withdrawn-against private respondent-unless resolution passed by Gaon Sabha-empowering to file writ petition-individual capacity-petition - held-not maintainable.

Held: Para-6
Be that as it may, the question before this Court is as to whether the petitioner, in individual capacity, being a member of the Gram Panchayat can challenge the order passed by the Collector. There is no resolution passed by the Gaon Sabha, authorizing the petitioner to challenge the order passed by the Collector.

Case Law discussed:

1982 ALJ 76

(Delivered by Hon'ble Satyendra Singh Chauhan, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel as well as learned counsel for the Gaon Sabha.

2. The order in this case was reserved on 17.3.2015. Learned counsel for the petitioner wanted to place certain case laws for perusal of the Court, but no case law has been filed by the counsel for the petitioner, which may lend support to the argument advanced on behalf of the petitioner.

3. The petitioner, who happens to be a member of the Gaon Sabha, has come forward to challenge the order dated 30.9.1993 passed by the Tehsildar (Nyayik), the order dated 16.7.2010 passed by the Tehsildar Sadar and the order dated 03.9.2014 passed by the Collector, Raebareli as contained in Annexure Nos.1, 2 and 3 respectively to the writ petition..

4. The earlier proceedings were initiated against the petitioner on the report submitted by the Lekhpal in 1983 under Rule 115(C) of U.P. Z.A. and L.R. Rules. The Nayab Tehsildar submitted a report on 24.3.1990 and after considering that report, notice issued under Rule 49-A of the U.P. Z.A. And L.R. Rules was taken back.

5. The present report, which has been filed against the petitioner, has been filed at the instance of village rivalry and that the private respondent has established in the earlier round of litigation that patta was executed in his favour and he is in possession since long.

6. Be that as it may, the question before this Court is as to whether the petitioner, in individual capacity, being a member of the Gram Panchayat can challenge the order passed by the Collector. There is no resolution passed by the Gaon Sabha, authorizing the petitioner to challenge the order passed by the Collector.

7. The law contemplates that if somebody wants to challenge the action of the revenue authorities on behalf of the Gaon Sabha, then there has to be a resolution on behalf of the Gaon Sabha to challenge the same.

8. In the case of Sita Ram vs. Deputy Director of Consolidation and others 1982 ALJ 76, the Court in Para-22, held as under:

"22. Thus, in view of the above I am of the opinion that the objection filed by the opposite party No.3 Sheo Prasad cannot be treated to be a valid objection on behalf of the Gaon Sabha under Section 9A(2) of the U.P. Consolidation of Holdings Act, on the ground that he was himself an interested person under Section 9A(2) of the Act, as admittedly the Land Management Committee of the Gaon Sabha had not passed any resolution taking decision to file objection, appeal and revision nor opposite party no.3 was authorised to file those on behalf of the Gaon Sabha. It is also not disputed that the action of the opposite party no.3, in filing objections, appeal, and revision on behalf of the Gaon Sabha, was not ratified by the Land Management Committee in its meetings. Thus, the objections, appeal and revision filed by opposite party no.3 Sheo Prasad on behalf of the Gaon Sabha were wholly incompetent and opposite party nos.1 and 2 acted illegally and without jurisdiction in passing the impugned orders."

9. I, therefore, find that the writ petition on behalf of the petitioner in individual capacity is not maintainable. It is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2015

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRATYUSH KUMAR, J.

First Appeal From Order No. 1240 of 2000

The Oriental Insurance Co. Ltd. Allahabad ...Appellant
Versus
Manoj Kumar & Ors. ...Respondents

Counsel for the Appellant:
Sri S.C. Srivastava

Counsel for the Respondents:
Sri Siddharth Srivastava, Sri S.D. Ojha

Motor Vehicle Act, 1988-Section 173-Appeal by Insurance Company-award fixing liability upon appellant-admittedly accident took place on 03.09.97-license of driving renewed only on 08.10.1997-stood expired on 09.09.96-more than one year-held-benefit of Section 15 of Act-not available-appellant not liable to pay-if any amount paid in compliance of award-liberty to realize from the claimants-appeal allowed.

Held: Para-11 & 17

11. The accident, in this case, admittedly took place on 03.09.1997. Although, there is nothing on record to indicate as to when the renewal was applied, but this much is clear that the licence was renewed after more than a year from its expiry and, thus, on the

date of accident, the driver did not have a valid driving licence.

17. The offending vehicle was clearly being driven in breach of Section 149 (2) (a) (ii) of the Act and, thus, the insurance company cannot be held liable to pay the compensation. The insurance company has already been directed to make payment of the amount to the claimant-respondents. The insurance company shall be liable to recover the same from the owner of the offending vehicle, namely, respondent no. 4.

Case Law discussed:
2007 (2) TAC 393 (SC); (2003) 3 SCC 338.

(Delivered by Hon'ble Krishna Murari, J.)

1. Heard Shri S.C. Srivastava, learned counsel for the appellant, Shri Siddharth Srivastava, learned counsel for the claimant-respondent nos. 1 to 3 and Shri S.D. Ojha for respondent no. 4.

2. This appeal under Section 173 of the Motor Vehicles Act (for short the Act) has been filed by Insurance company challenging the judgment and award dated 31.05.2000 passed by Additional District Judge/Motor Accident Claims Tribunal, Meerut awarding a sum of Rs.5,85,500/- as compensation to the claimant-respondent nos. 1 to 3.

3. Facts, in short, giving rise to the dispute are as under.

4. A claim petition claiming compensation to the tune of Rs.20 lacs was preferred by the claimant-respondents on the allegation that on 03.09.1997 when deceased Sobha Ram was going on his moped no. U.P. 15D 1960 to his office at about 10 am, when he reached telephone exchange, then near SSD Crossing, Bus No. UHN 1152, which was being driven in rash and negligent manner, hit the moped, which caused grievous injuries and resulted into death of Sobha Ram. It was further pleaded that the deceased was aged 55 years and was working in CDA Pension office and his total income including that of from agriculture was Rs.12,559/- per month. The proceedings were contested by the appellant-insurance company denying the allegations. It was pleaded in the additional pleas that the accident was caused due to own negligence of the deceased and the driver of the bus was not having a valid driving licence. The Tribunal, on the basis of the pleadings of the parties, framed two issues.

(1) Whether the accident was caused due to rash and negligent driving of the offending vehicle UHN 1152.

(2) Whether the claimants were entitled for any compensation and if yes, then how much and from whom.

5. After analysing the oral and documentary evidence brought on record, the Tribunal returned a finding that the accident was caused due to rash and negligent driving of the driver of the offending vehicle no. UHN 1152, which resulted in the death of Sobha Ram.

6. On the question of quantum of compensation, on the basis of the documentary evidence brought on record in the form of salary slip, the Tribunal returned a finding that the monthly income of the deceased was Rs.10,252/- and after deducting 1/3rd towards personal expenses, determined his annual income to be Rs.72,000/-. Treating the age of the deceased to be 55 years, the Tribunal in accordance with the Schedule II applied a multiplier of 8 and in this manner, determined the total compensation to be Rs.5,85,500/-.

7. Learned counsel for the appellants vehemently contended that since the driver of the offending vehicle was not having a valid driving licence, which fact was established before the Tribunal by cogent evidence, hence, the Tribunal committed a manifest error of law in not allowing the right to the appellant to recover the amount of compensation from the owner. It is further submitted that since the vehicle was being driven in violation of the insurance policy as the driver did not have a valid driving licence, as such, it was the insurer, who was liable to pay the compensation and the liability has wrongly been fastened upon the appellant.

8. A perusal of the award goes to show that it was pleaded and established before the Tribunal that the driving licence of the driver of the offending vehicle expired on 09.09.1996 and admittedly it was renewed from 08.10.1997. The accident, admittedly, took place on 03.09.1997. Thus, what is to be seen is whether the renewal made on 08.10.1997 would relate back to the date of its expiry.

9. Section 15 of the Act relate to the renewal of the driving licence. The relevant part of Section 15 for the purposes of the case reads as under.

"15. Renewal of driving licences.- (1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry:

Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal."

10. A perusal of the aforesaid provision makes it clear that, in case, the renewal is applied, where the application for renewal is made within 30 days from the date of expiry, the renewal shall relate back to the date of expire, otherwise if the application is made beyond 30 days, it would be effected from the date of its renewal. Proviso to Section 15 (1) makes it clear that the original licence granted despite expiry only remain operative only for a period of 30 days from the date of expiry and, in case, if an application is made within this period, it would relate back to the said date, otherwise it would be deemed to be renewed from the date of its renewal.

11. The accident, in this case, admittedly took place on 03.09.1997. Although, there is nothing on record to indicate as to when the renewal was applied, but this much is clear that the licence was renewed after more than a year from its expiry and, thus, on the date of accident, the driver did not have a valid driving licence.

12. This view came up for consideration before the Hon'ble Apex Court in the case of Ishwar Chandra & Ors. Vs. Oriental Insurance Co. Ltd. & Ors., 2007 (2) TAC 393 (SC). After considering the provisions of the Act, the Hon'ble Apex Court has observed as under.

"From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from

the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place on 28.04.1995. As on the said date, the renewal application had not been filed, the driver, did not have a valid licence on the date when the vehicle met with the accident."

13. Learned counsel for the respondent no. 4, owner relying upon the judgment of the Hon'ble Apex Court in the case of United India Insurance Co. Ltd. Vs. Lehru & Ors., (2003) 3 SCC 338, contended that once the driver had a valid driving licence and he was driving competently, it cannot be said that there was a breach of Section 149 (2) (a) (ii) of the Act and the insurer would not be absolved from liability and the Tribunal rightly fastened the liability of paying the compensation on the insurance company.

14. The case before the Hon'ble Apex Court was one where the driving licence of the driver of the offending vehicle was found to be fake. Keeping that factor in consideration, the Hon'ble Apex Court in paragraph 20 observed as under.

"When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured."

15. We see no reason as to how the said judgment is of any help to the respondent no. 4 or comes to his rescue. It was a case where the licence was fake and, thus, the Hon'ble Apex Court held that the owner of the vehicle is not expected to verify the driving licence, which on the face of it, looks to be genuine. However, in the case in hand, the owner is supposed to be aware that the driving licence of the driver is to expire and it was his duty to have ensured that the driver gets the licence renewed within the time.

16. Thus, the reliance placed by respondent no. 4 in the case of Lehru (supra) is misplaced and, as such, the judgment is of no avail to him. Since the driver of the offending vehicle was not having a valid driving licence on the date of accident, the vehicle was being driven in a breach of the condition of the policy requiring the vehicle to be driven by a person, who is duly licenced.

17. The offending vehicle was clearly being driven in breach of Section 149 (2) (a) (ii) of the Act and, thus, the insurance company cannot be held liable to pay the compensation. The insurance company has already been directed to make payment of the amount to the claimant-respondents. The insurance company shall be liable to recover the same from the owner of the offending vehicle, namely, respondent no. 4.

18. The appeal stands allowed to the extent directed above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2015

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 1495 of 2015

Smt. Neha Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shivam Sharma

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Scope of Judicial Review-essential qualification-for TGT(English)-3 years Bachelor's degree with English subject-petitioner being M.A. (English) with 2 year English course in graduation-claims appointment-held-with limited scope of judicial review-neither mandamus can be issued to bring withing eligibility zone-nor can interfere-petition dismissed.

Held: Para-17
Thus, in view of the aforesaid pronouncements of Hon'ble Supreme Court it can safely be summed up that the grounds of judicial review by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India in a case where challenge is made to the prescription of essential educational qualification for a teaching post, is very limited.

Case Law discussed:
Civil Appeal No. 1010 of 2000; AIR 1965 SC 491; [(1997) 1 SCC 253]; [(2007) 5 SCC 519]; [(1990) 1 SCC 288; [(2008) 10 SCC 1].

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri Ratnesh Chandra, learned counsel appearing for the petitioner and learned Standing Counsel appearing for the respondents.

2. These proceedings under Article 226 of the Constitution of India have been instituted by the petitioner challenging the advertisement dated 17.03.2015, in so far as it restricts selection to the post of Trained Graduate Teacher (English) only to the candidates, who have graduated with English in all the three years of their Graduation Course, to the exclusion of candidates credited with a degree of Post Graduation in English.

3. In effect, the petitioner challenges the educational qualification prescribed by the respondent no.2 for selection/appointment as Trained Graduate Teacher (English), according to which, only those Graduates in English will be eligible, who have studied English as a subject in all the three years of their Graduation Course.

4. The State Government has taken a decision to establish Model Schools in the State of Uttar Pradesh and for the said

purpose Rajya Model School Organization, Uttar Pradesh, has been established as a Society. The purpose of establishing Rajya Model School Organization, it appears, is to establish Model Schools on the pattern of Kendriya Vidyalayas established throughout the country by Kendriya Vidyalaya Sangathan. The Rajya Model School Organization, Uttar Pradesh has advertised various teaching posts to be filled in these Model Schools, which are to be established and affiliated with the Central Board of Secondary Education, New Delhi.

5. As per the annexure no.3 annexed with this petition, the essential qualification prescribed for the post of Trained Graduate Teacher in English is that the candidate should possess Graduation Degree in English with 50% minimum marks along with the degree of B.Ed./L.T. from a University established under law or from any other Institution.

6. The petitioner is a Post Graduate in English from University of Lucknow. She is also possessed of a B.Ed. Degree from Indra Gandhi National Open University. Further, the petitioner has also qualified the Central Teacher Eligibility Test (CTET) conducted by the Central Board of Secondary Education, New Delhi. The petitioner also possesses a Graduation Degree from Lucknow University. She studied Geography and Psychology as two subjects in the third and last year of her B.A. Course. In the first and second year of B.A. Course, the petitioner had studied English as one of the subjects.

7. Submission of learned counsel for the petitioner is that the petitioner possesses a qualification higher than the educational qualification prescribed by the Rajya Model School Organization, and hence, she is better equipped to teach the students, who are to be imparted education in class VI to X. It has further been argued by the learned counsel for the petitioner that if a candidate possesses higher qualification than the essential qualification prescribed, the same cannot be permitted to come as a hurdle in his/her way to seek public employment.

8. It has also been stated by the learned counsel for the petitioner that the Model Schools being established by the State of Uttar Pradesh, are going to be affiliated with Central Board of Secondary Education for the purposes of admitting the students to participate in the examination conducted by the said Board and Central Board of Secondary Education has framed bye laws for the purposes of regulating various aspects of the institutions, which are affiliated with it. He has further stated that the Central Board of Secondary Education affiliation bye laws prescribe qualification for appointment as Trained Graduate Teacher (English) as Graduation in/with the subject, recognized Degree/Diploma in Education and B.A.B.Ed. with English of the Regional College of Education. He has further submitted that since the Model Schools are going to be affiliated with Central Board of Secondary Education, hence, it was incumbent upon the Rajya Model School Organization to have borrowed the qualification prescribed by the Central Board of Secondary Education in its affiliation bye laws.

9. Learned counsel for the petitioner in support of his submission that higher qualification should not come to the disadvantage of a candidate seeking

employment, has relied upon a judgment of Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and ors. vs. District and Sessions Judge, Nagpur and others, (Civil Appeal No.1010 of 2000), rendered on 11.02.2000.

10. Per contra, Shri Pratyush Tripathi and Shri Ajay Kumar, learned Standing Counsels, have submitted that the qualification prescribed by the Rajya Model School Organization for the post of Trained Graduate Teacher in English, have been borrowed from the prescriptions made for the said purpose by the Kendriya Vidyalaya Sangathan. It has also been stated by the learned Standing Counsels that it is not only that the qualification for the post in question only has been borrowed from the prescriptions made by the Kendriya Vidyalaya Sangathan, but it has been borrowed for all the teaching posts.

11. The question, thus, which calls for determination by the Court is as to whether a candidate, possessing a Master's Degree in English having studied English only in two years of his/her Graduation Course, instead of studying English in all the three years of the course, can be said to have been wrongly excluded by the respondents from the zone of eligibility.

12. Before dealing with the submission advanced by the learned counsel for the petitioner in support of his case, it would be apt to state that this is not the province of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India to go into and prescribe the essential qualification for selection/appointment on a post. In the case of University of Mysore and Another vs. C.D. Govinda Rao & another, reported in AIR 1965 SC 491,it has been observed by Hon'ble Supreme Court that normally it is wise and safe for the courts to leave the decision of academic matters to experts, who are more familiar with the problems they face than the courts generally can be.

13. It is equally well settled principle of law that it is the policy of the Government or the employer to create a post or to prescribe the qualification for the post. The Court or any Tribunal is devoid of any power to give any such direction. The judgment of Hon'ble Supreme Court in the case of the Commissioner, Corporation of Madras vs. Madras Corporation Teachers' Mandram and others, reported in [(1997) 1 SCC 253] can be referred to in this regard. Yet another judgment of Hon'ble Supreme Court in the case of Bihar Public Service Commission and others vs. Kamini and others, reported in [(2007) 5 SCC 519, can be mentioned to reiterate the aforesaid principle, wherein Hon'ble Supreme Court has held that it is well settled that in the field of education, a Court of Law cannot act as an expert.

14. In the case of J. Ranga Swamy vs. Government of Andhra Pradesh and others, reported in [(1990) 1 SCC 288, it has been held by the Supreme Court that it is not for the Court to consider the relevance of qualifications prescribed for various posts.

15. Reference may also be had to another judgment of Hon'ble Supreme Court in the case of Official Liquidator vs. Dayanand and others, reported in [(2008) 10 SCC 1], wherein it has been laid down by Hon'ble Supreme Court that

though the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification, etc. is not immune from judicial review. However, the Court will always be extremely cautious and circumspect in interfering in such matters.

16. Para 59 of the aforesaid judgment in the case of Official Liquidator (supra) is relevant which is quoted hereinbelow:

"The creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification etc. is not immune from judicial review, the Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by mala fides."

17. Thus, in view of the aforesaid pronouncements of Hon'ble Supreme Court it can safely be summed up that the grounds of judicial review by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India in a case where challenge is made to the prescription of essential educational qualification for a teaching post, is very limited.

18. It has been stated by the learned Standing Counsel, which fact is not disputed, that essential educational qualification for all the posts in Model Schools to be established by the State of Uttar Pradesh including the post of Trained Graduate Teacher (English) has been borrowed from the prescription made for the said purpose by the Kendriya Vidyalaya Sangathan.

19. One of the purposes, as observed above, for establishing the Model Schools in the State of U.P. is to establish these institutions on the pattern on which Kendriya Vidyalayas in the entire country have been established by Kendriya Vidyalaya Sangathan, which functions under the aegis of Central Government. Thus, it cannot be said that educational qualification prescribed for the post in question by the Rajya Model School Organization, U.P. is without any basis.

20. As already observed above, the qualification which has been prescribed for the post in question has been borrowed from the prescription made in that regard by Kendriya Vidyalaya, hence, the ground being urged by the learned counsel for the petitioner that the qualification is unreasonable and without any basis, in so far as it excludes the Post Graduates in English from the zone of eligibility is not tenable.

21. So far as the submission made by the learned counsel for the petitioner that since the institutions, which are going

to be set up by Rajya Model School Organization, are to be affiliated with the Central Board of Secondary Education, as such the qualification prescribed in the affiliation bye laws framed by the said Board are binding and appointment of teachers in these institutions should also be made in accordance with the prescriptions made in the affiliation bye laws is concerned, It may only be indicated that the said bye laws do not appear to be binding for the reason that Kendriya Vidyalaya established by Kendriya Vidyalaya Sangathan, have also been affiliated with the Central Board of Secondary Education and Kendriya Vidyalayas' prescription for appointment to the post of TGT (English), is Graduation in English with the condition that the candidate should have studied English in all the thee years of his Bachelor's Course.

22. The last submission made by the learned counsel for the petitioner on the basis of judgment rendered by Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and ors. (supra) that a criteria which denies a candidate his right to be considered for appointment against a post on the ground that he is having higher qualification than the qualification prescribed cannot be reasonable also does not have any bearing on the fate of this writ petition.

23. In the case of Mohd. Riazul Usman Gani and ors. (supra), the matter which caught attention of Hon'ble Supreme Court was in relation to appointment of peons in the subordinate judiciary of the Bombay High Court. The qualification prescribed for the post of peon in the said case was "not lower than a pass in the Examination of Standard IV in the Regional Language." Certain candidates desirous of appointment to the said post of peon were having higher qualification and at the time of short listing, the candidates having higher qualification than a pass in Examination of Standard IV, were excluded from the zone of consideration. Hon'ble Supreme Court while examining the rules relating to various posts, including the posts where recruitment was made by way of making promotion from amongst the peons and qualification for such higher posts was higher than the qualification prescribed for the post of peon, has considered that in case a peon having higher qualification is excluded from the zone of consideration for appointment on the said post, then promotion to the posts from amongst the peons, who did not fulfill the requirement of higher qualification, could not be made. Further, Hon'ble Supreme Court has decided the said case of Mohd. Riazul Usman Gani and ors. (supra) in the facts of the said case, relevant observations made by Hon'ble Supreme Court in the said case is as follows:

"A criterion which has the effect of denying a candidate his right to be considered for the post on the principle that he is having higher qualification, than prescribed cannot be rational. We have not been able to appreciate as to why those candidates who possessed qualifications equivalent to SSC examination could also not be considered. We are saying this on the facts of the case in hand and should not be understood as laying down a rule of universal application."

(Emphasis supplied by the Court)

24. From a perusal of the aforequoted observations made by Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and ors.

(supra) makes it clear that the proposition that a candidate cannot be denied his participation for selection for appointment on a post on the basis that he is having higher qualification, thus, cannot be applied universally. The application of the said principle of law would depend on the facts and circumstances of the case.

25. In the instant case, it is not known as to whether the incumbent, who would be appointed on the post of TGT (English) teacher, would have any avenues of promotion. Even if the promotional avenues are made available to such TGT (English) teacher, what would be the eligibility criteria for promotion to the higher post is also not known. Thus, looking to the facts of this case, the judgment rendered by Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and ors. (supra) does not come to the rescue of the petitioner.

26. At the cost of reiteration, it may be stated that the fact that the respondents have borrowed the qualification for appointment to the post in question on the prescriptions made in that regard by Kendriya Vidyalaya Sangathan, itself is sufficient to sustain the qualification prescribed by the respondents which has been challenged in this writ petition.

27. It may further be observed that in exercise of its jurisdiction under Article 226 of the Constitution of India, neither the prescription made by the respondents for appointment to the post in question can be set aside nor any Mandamus can be issued to include the candidates having Post Graduate qualification in English within the eligibility zone. Such matters, as observed above, are in the exclusive domain of the employer or the Government being a policy matter.

28. For the reasons given and discussions made above in the preceding paragraphs, I do not find any illegality in the impugned qualification prescribed by the respondents for the post in question.

29. Accordingly, the writ petition is dismissed.

30. Before parting the case, I may, however, observe that for consideration of candidates having Post Graduate qualification in English for consideration of appointment on the post of TGT (English), since such authority lies with the employer, it would be open to the petitioner to take up her cause before the authority concerned by way of making a representation. If the petitioner in this regard makes a representation to the authority concerned raising all the pleas, which may be available to her, the same shall be considered and decided by the authority concerned without being influenced by any of the observations made hereinabove.

31. There will be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.04.2015

BEFORE
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No. 2120 of 2007

Satyendra @ Maggan & Ors. Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Hira Lal

Counsel for the Opp. Parties:
Govt. Advocate

Criminal Revision-Summoning order-complaint case-offence under section 452, 504, 506, 379 IPC-summoning order-without application of judicial mind-without going through statements recorded under section 202 Cr.P.C-not a proper order under prescribed procedure of law-quashed.

Held: Para-8
In light of this legal position I have gone through the impugned order. A perusal of this order indicates that learned Magistrate had written nothing concerning facts of the case in hand. Neither any discussion of evidence was made, nor was it considered as to which accused had allegedly committed what overt act. The accused person of complaint were summoned for offences mentioned in that application. I doubt whether the learned Magistrate had actually read statements u/ss 200, 202 CrPC or the documents of the original file or not. No reason was mentioned in the impugned order as to what those documents contain, and how they help the prosecution case. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law.

Case Law discussed:
1998 UPCrR 118; 2002 Cri.L.J. 996; 2003 (47) ACC 1017.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This revision has been filed against the order dated 18-05-2007 passed by Judicial Magistrate- Chakia, Chandauli in criminal complaint case no. 777 / 2006 Mewa Prasad vs. Satyendra & Others, p.s. Baburi, Chandauli.

2. In complaint case before it, after receiving evidences under section 200 and 202 CrPC from the complainant/ O.P. No.-2, the Court below had passed summoning order dated 18-05-2007 by which accused were summoned for offences u/ss 452, 504, 56, 379 IPC. Aggrieved by this impugned order one summoned accused persons had preferred present revision with prayer to quash the summoning order.

3. In ruling "M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UPCrR 118" Hon'ble Supreme Court held :-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

4. In ruling "Paul George vs. State, 2002 Cri.L.J. 996" Hon'ble Supreme Court held :-

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - - -

5. It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

6. In ruling "Chhaya William (Smt.) & others vs. State of U.P. & another, 2003 (47) ACC 1017" this Court held :-

"I have carefully gone through the law laid down by Hon'ble Apex Court. No doubt on one hand the enquiry conducted under section 202 Cr.P.C. does not need to be detailed enquiry or scrutiny of evidence to that extent which is required for the purposes of the trial or conviction, but at the same time, the Court has not to sit as a silent spectator. It must apply its mind while passing order for the issue of summonses under section 204(1) of the Code of Criminal Procedure."

7. As held by superior Courts the passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind.

8. In light of this legal position I have gone through the impugned order. A perusal of this order indicates that learned Magistrate had written nothing concerning facts of the case in hand. Neither any discussion of evidence was made, nor was it considered as to which accused had allegedly committed what overt act. The accused person of complaint were summoned for offences mentioned in that application. I doubt whether the learned Magistrate had actually read statements u/ss 200, 202 CrPC or the documents of the original file or not. No reason was mentioned in the impugned order as to what those documents contain, and how they help the prosecution case. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law.

9. Therefore impugned order is quashed. Revision, accordingly, succeeds.

The case is remanded back to trial Court with direction to afford complainant the opportunity of hearing and pass afresh the speaking order on point of summoning in light of points discussed in the body of judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2015

BEFORE
THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Service Single No. 2532 of 2014

Virendra Kumar Srivastava & Anr. Petitioners

Versus

The Hon'ble High Court of Judicature at Allahabad ...Respondent

Counsel for the Petitioner:
Noorul Hasnain Khan, Mohan Singh

Counsel for the Respondent:
Manish Kumar, Gaurav Mehrotra, Surendra Kumar Shukla

Provident Fund (U.P.) Rules, 1985, Rule-5 read with U.P. Retirement Benefit Rules 1961-Rule 5(2)-Right and obligation of nominee-deceased employee ignoring his wife and daughter-in service record-shown 'niece' as nominee-contrary to provisions of Rules 5(2)-nominee not entitled for any benefit.

Held: Para-19
As far as the appointment under Dying in Harness Rules is concerned, it is established from the documents brought on record by the official respondents that Smt. Vinita Srivastava and Km. Shilpi Srivastava are the wife and daughter of the deceased. Furthermore, the petitioner do not fall within the definition of "family" under the 1974 Rules. Therefore, the action of the official respondents cannot be said to be unreasonable or legally unjustified.

Case Law discussed:
2004 Vol. 106 (4) Bombay; 2011 (2) AWC 1576 (SC)

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

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

2. By means of present writ petition, petitioners have inter-alia prayed for a writ in the nature of mandamus commanding the respondents to make payment of the post death benefits of Late Arvind Nath Srivastava together with 12% interest and to consider the petitioner no. 1 for appointment under Dying in Harness Rules, 1974.

3. Submission of learned counsel for the petitioners is that Late Arvind Nath Srivastava was a peon in High Court, Lucknow Bench, Lucknow who died on 26.5.2013 during service tenure. It has been averred in the writ petition that since the relations between Late Arvind Nath Srivastava and opposite parties no. 3 & 4 (wife and daughter of deceased) were strained and litigation were also going on between them, the deceased had deprived them from being nominee in the service record and he was looked after by petitioner no. 1. As the petitioner no. 1, Virendra Kumar Srivastava was male nominee in service record by the deceased he made an application to the Senior Registrar (opposite party no. 2) for payment of post death benefits of Late Arvind Nath Srivastava in their favour. On this application, the Joint Registrar (Accounts) of the Court vide letter dated

18.11.2013 asked for the Succession Certificate issued by the competent authority for payment of amount under Group Insurance Scheme.

4. According to petitioner, later on it came to their knowledge that opposite parties no. 3 & 4 (the wife and daughter) have also moved application before the concerned authority for making payment of post death benefits of Late Arvind Nath Srivastava. Km. Shilpi Srivastava d/o late Arvind Nath Srivastava (opposite Party no. 4) also moved an application on 29.11.2013 for appointment on compassionate ground under Dying in Harness Rules.

5. According to petitioners late Arvind Nath Srivastava was fully neglected by his wife and daughter and in that situation petitioners looked after their real uncle late Arvind Nath Srivastava, who under the love and affection on his own sweet free will made the petitioner nominee in his service record.

6. It has been contended that since petitioner has been made nominee, he is entitled to receive the post death benefits of the deceased.

7. Refuting the allegations of the petitioners, learned Counsel appearing for the official respondents no. 1 and 2 (High Court etc.) submitted that petitioner no. 1 is the nephew and petitioner no. 2 is niece of the deceased employee Late Arvind Nath Srivastava and as per Rules, they do not fall within the definition of "Family' for the purpose of payment of post death dues of the deceased. So far as filling of Nomination Form by the deceased is concerned, Late Arvind Nath Srivastava had shown petitioner no. 2 as daughter in the column of relation, as would be evident from Annexure No. 3 enclosed with the petition. In order to ascertain correct facts a legal heir verification report was sought from the office of the District Magistrate, Lucknow, as well as from the office of District Magistrate, Rae Bareli who in their reports have indicated that Smt. Vineeta Srivastava and Km. Shilpi Srivastava as wife and daughter of the deceased respectively. So far as claim of petitioner no. 1 is concerned, the same has been rejected vide order dated 12.7.2013, but quashing of this order has not been sought and as such, the said order is intact till today.

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

9. Before dealing with the issue regarding release of post death dues in favour of the petitioners, who are said to be the nephew and niece of the deceased, it is imperative to refer the definition of nomination and family as laid down in the General Provident fund (Uttar Pradesh) Rules, 1985. Rule 5 deals with nomination and reads as under:

"Nomination.--(1) A subscriber shall at the time of joining the Fund submit to the Head of Department/Head of Office a nomination conferring on one or more persons the right to receive the amount that may stand to his credit in the Fund in the event of his death, before that amount has become payable or, having become payable, has not been paid:

Provided that a subscriber who has a family at the time of making the nominations shall make such nomination only in favour of a member or members of his family:

Provided further that the nomination made by the subscriber in respect of any other provident fund to which he was subscribing before joining the fund shall, if the amount to his credit in such other fund has been transferred to his credit in the fund, be deemed to be a nomination duly made under this rule until he makes a nomination in accordance with the rule.

10. At this juncture, it would also be useful to reproduce the definition of nomination and Family pension as laid down in the U.P. Retirement Benefit Rules, 1961.

11. Part II of the U.P. Retirement Benefit Rules, 1961 deals with the Death-cum-retirement Gratuity. Rule 5(2), which is relevant for the present purpose, is reproduced herein-below;

Death-cum-retirement Gratuity :(1) .....

(2) if an officer dies while in service a gratuity, the amount of which shall, subject to a minimum of 12 times and a maximum of 16½ times the emoluments, be an amount equal to one-fourth of the emoluments of the officer multiplied by the total number of six monthly periods of qualifying service, shall be paid to the person or persons on whom the right to receive the gratuity is conferred under sub-rules (1) to (8) of Rule 6 and if there is no such person, it shall be paid in the manner indicated in sub-Rule (9) of that rule.

Rule 6(1) deals with the nomination and reads as under;

Nomination-(1). A Government servant shall, as soon as he acquires or if he already holds a lien on a permanent pensionable post, make a nomination conferring on one or more persons the right to receive any gratuity that may be sanctioned under sub-rule (2) or sub-rule (3) of the rule 5 and gratuity which after becoming admissible to him under sub-rule (1) of that rule is not paid to him before death.

Provided that if at the time of making the Notification the officer has a family the nomination shall not be in favour of any person other than one or more of the members of his family.

12. Rule-7 deals with the Family Pension, which reads as under;

Family Pension -(1). The family pension not exceeding the amount specified in sub-Rule (2) below may be granted for a period of ten years to the family of an officer who dies, whether after retirement or while still in service after completion of not less than 20 years qualifying service.

Provided that the period of payment of family pension shall in no case extend beyond a period of five years from the date on which the deceased officer reached or would have reached the age of compulsory retirement.

13. The word "family has also been defined in U.P. Government Servants Dying in Harness Rules, 1974, which is being reproduced herein-under:-.

"2(c)'family' shall include the following relations of the deceased Government servant:

(i) wife or husband;

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus, ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried grand daughters of the deceased Government servant dependent on him."

5. Recruitment of a member of the family of the deceased-(1) In case of Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a state Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfills the educational qualifications prescribed for the post,

(ii) is otherwise qualified for the Government service, and

(iii) makes the application for employment within five years the date of the death of Government servant:-

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, if may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

14. As averred above Rule 6 of the Uttar Pradesh Retirement Benefit Rules, 1961 provides that at the time of making nomination, if the officer has a family, the nomination shall not be in favour of any person other than one or more of the members of his family. From the perusal of the nomination form available on record, it is evident that late Arvind Nath Srivastava nominated Ms. Ranjana Srivastava his niece mentioning her as his daughter, despite the fact that his own family member i.e. daughter and wife were present and as such the nomination made by late Arvind Srivastava is in total breach contravention of U.P. Retirement Benefit Rules, 1961 Rules. As far as the assertion of the petitioner that as to whether the deceased was informed about the nomination being made by him is not admissible in law, has no relevancy as late Arvind Nath Srivastava has shown Km. Ranjana Srivastava as daughter in the column of relations, and there was no occasion for the department to disbelief the statement of fact given by the deceased. The doubt arose when more than one person came forward to claim post-death service benefits.

15. In the case of (Gangubai Bhagwan Salawade & others vs. Smt. Chimanabai Suryabhan Salawade & others) reported in 2004 Vol. 106(4) Bombay, it has been held that at the time of making nomination, it must be made in favour of one of the members of his family. Relevant paragraph 5 of the judgment reads as under:-

"It is no doubt true that once there is a nomination, the amounts must be paid over to the nominee under the Payment of Gratuity Act. A nominee can be any person who belongs to the family of the deceased. Section 6 of the Act makes it clear that if the employee has a family at the time of making nomination, the nomination must be made in favour of one of the members of his family. Any nomination made by the employee in favour of a person who is not a member of his family is void. If the employee at the time of making a nomination has no family but subsequently acquires a family, the nomination made earlier becomes invalid and a fresh nomination must be made by the employee in favour of the members of his family. "Family" has been defined under section 2(h) of the Act. In relation to a male employee the word includes his wife, his children whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son."

16. In Ram Chander Talwar and another vs. Devender umar Talwar and others; 2011 (2) AWC 1576 (SC), the Apex Court, while dealing with Section 45 ZA of the Banking Regulation Act, has held that nominee of depositor has right to receive money lying in account of depositor after his death but he is not owner of money, so received. In this context paragraph 5 of the aforesaid judgment is being reproduced as under:-

" Section 45 ZA (2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45 ZA (2) would, therefore, form part of the estate of the deceased depsoitor and devolve according to the rule of succession to which the depositor may be governed.

17. Thus, it is evident that by nomination a person is authorized to receive the benefits from such membership in the event of death of the person, who had nominated him. It does not amount to a bequest in favour of the nominee; nor does it create any right in the nominee except to collect it. Putting it differently, a nomination made by a person in favour of another does not create a title in the property. It is only meant to provide for the interregnum between the death and the full administration of the estate and does not confer any permanent right to the property forming part of estate of the deceased. .

18. It would be pertinent to mention here that the claim of the petitioner no.1 has been rejected by the official

respondents vide order dated 12.7.2013 which was communicated vide order dated 15.7.2013 but surprisingly, neither any disclosure about the aforesaid order of rejection has been made in the writ petition nor the quashing of the said order has been sought in the writ petition.

19. As far as the appointment under Dying in Harness Rules is concerned, it is established from the documents brought on record by the official respondents that Smt. Vinita Srivastava and Km. Shilpi Srivastava are the wife and daughter of the deceased. Furthermore, the petitioner do not fall within the definition of "family" under the 1974 Rules. Therefore, the action of the official respondents cannot be said to be unreasonable or legally unjustified.

20. It may be added that during the course of arguments, it has been brought to the notice of the court that the petitioners have entered into a compromise with the wife of deceased Arvind Nath Srivastava, who is private respondent in the present proceedings. As per compromise, all post death beneifits of Late Arvind Nath Srivastava shall be paid in equal share to the petitioners. The wife-respondent shall receive family pension and the petitioners and other private respondents would have no objection with regard to compassionate appointment to Km.Shilpi Sriavasta.

21. Having examined the matter in the light of the relevant Rules, referred to above, the compromise said to have been entered into between the parties, cannot be said to be a valid document in the eyes of law, as the same is against the provisions of law because in presence of real daughter and wife of the petitioner, the court cannot direct the official respondents to make payment of post death benefits in favour of the petitioners. Needless to say, that the court cannot go contrary to rule to recognize the compromise. In other words, by consent or agreement, parties cannot achieve what is contrary to law and the court is not bound to accept the compromise entered into between the parties to the legal proceedings.

22. In view of the aforesaid detail discussions, the petitioner is not entitled for any relief and the writ petition is hereby dismissed. The official respondents shall make the payment of post death benefits, family pension and dealt the matter of compassionate appointment strictly in accordance with relevant rules.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ-A No. 42556 of 2013

Hansaram Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Dismissal from service-without opportunity of personal hearing-without supply of enquiry report-without opportunity to cross-examine the witness-held-Principle of Natural Justice violated-quashed on ground of disproportionate punishment also.

Held: Para-9 & 22

9. Learned counsel for the petitioner submits that the impugned order dated 15.07.2013 passed by respondent No. 3 and order dated 01.08.1994 passed by the respondent No. 1 cannot be sustained on the ground that the disciplinary proceedings were vitiated in law and as such no opportunity of personal hearing had ever been afforded to the petitioner nor even the inquiry report had been supplied to him and further submits that even he had not been permitted to cross-examine the witnesses, therefore, the complete inquiry was against the principles of natural justice.

22. Considering the facts and circumstances of the case, the punishment awarded to the petitioner of dismissal from service is too harsh and totally disproportionate to the charges, for which he had been found guilty. The punishment of dismissal from service are resorted only if there is very grave misconduct. The punishment from dismissal from service imposed on the petitioner is too harsh and is liable to be set-aside.

Case Law discussed:

AIR 1998 SC 3038; AIR 2000 SC 277; 2003 (1) AWC 84 (SC); 2002(3) UPLBEC 2799; AIR 1987 SC 2386; AIR 1994 SC 215; 2001 (4) AWC 2630, 2002 Lab IC 259.

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

1. Heard Sri Ram Krishna and Sri Anil Kumar, learned counsels for the petitioner and Sri Pankaj Rai, learned Additional Chief Standing Counsel for the respondents.

2. By means of the present writ petition, the petitioner has prayed for quashing the impugned order dated 15.07.2013 passed by respondent No. 3 and order dated 01.08.1994 passed by the respondent No. 1.

3. After exchange of affidavits, the writ petition is disposed of finally.

4. Brief facts giving rise to the present writ petition are that the petitioner was appointed as regular Sahkari Kurk Amin on commission basis in the year 1978 in Kishan Sewa Sahkari Samiti Pakariya Hakim Puwayan, Sahjahanpur in the pay scale of Rs. 354-350. The appointment letter has been brought on record as Annexure No. 1 to the writ petition.

5. It has been averred in the writ petition that the petitioner had lodged an F.I.R., against one Sri Satnam Singh, against whom an allegation had been levelled that he had kidnapped the petitioner and the petitioner was rescued by the people of the locality and on the same day one F.I.R. had also been lodged by Sri Bhupendra Tripathi, Planning Director of Zila Gram Vikas Adhikaran, Shahjahanpur against the petitioner regarding the alleged demand of Rs. 500/- as bribe from Sri Satnam Singh and in this regard an F.I.R., had been lodged under Sections 395, 224, 225, 333, 427, 161 and 323 IPC and Section 5 (2) of Prevention of Anti Corruption Act. The same was registered as Case Crime No. 10 of 1993. The petitioner against the said F.I.R. had filed criminal case and this Court vide order dated 17.02.1993 had passed interim order in favour of the petitioner with following observations:-

"Standing Counsel desires and is granted one month's time to file counter affidavit. The rejoinder affidavit may be filed within two weeks next. List thereafter for hearing on admission.

In the meanwhile and until further orders, both investigation and the arrest of the petitioner shall remain stayed."

6. The District Magistrate, Shahjahanpur vide order dated 20.01.1993 had suspended the petitioner on the basis of the allegations which were levelled against the petitioner as per the First Information Report. Aggrieved with the order dated 20.01.1993, the petitioner had filed writ petition and the same had been disposed of vide order dated 02.04.1993 with direction to the respondents to complete the disciplinary proceeding against petitioner within three months. Thereafter, the petitioner had been charge-sheeted on 15.03.1994 and in response he has submitted reply on 02.04.1994. Thereafter, the petitioner had received show cause notice dated 23.04.1994 sent by the respondent No. 1 stating therein that all the charges against the petitioner were found to be correct as per inquiry report and if the petitioner is to say anything, he may submit his response.

7. It has been averred in the writ petition that no copy of the inquiry report had ever been given to the petitioner and the same had been conducted behind his back and no opportunity had been afforded to the petitioner and further the petitioner had been denied the right to cross-examine the witnesses. It appears from the record that in spite of the categorical direction issued by this Court for concluding the inquiry in the matter but the same had not taken place within stipulated time. The petitioner was compelled again to approach this Court by means of Contempt Petition No. 1120 of 1994 and the Hon'ble Contempt Court vide order dated 22.07.1994 had issued notices to the respondent No. 1. After receiving notices, the petitioner had received communication dated 02.09.1994 by which it had been indicates that the petitioner's service had already been terminated vide order dated 01.08.1994. It has also been averred that the petitioner had assailed the termination order dated 01.08.1994 through Writ Petition No. 33183 of 1994 and meanwhile, the petitioner had also moved an application to the State Government through Commissioner with prayer for initiation of fresh inquiry. Thereafter, vide letter dated 01.05.2003, the District Assistant Registrar Co-operative Society directed the Additional Development Officer (Co-operative) to conduct the fresh enquiry in the matter and as per the direction the Additional Development Officer (Co-operative) conducted the inquiry and submitted report on 06.05.2003. Meanwhile, the police has also inquired into the matter in pursuance to the direction issued by this Court dated 14.10.2003 and after conducting the inquiry the investigating officer had submitted final report on 22.12.2007. It is categorically averred in the Paragraph No. 30 of the writ petition that learned Sessions Judge, Shahjahanpur vide order dated 16.07.2008 had accepted the final report.

8. It is relevant to mention at this stage that the petitioner who had filed earlier writ petition which was pending consideration before this Court was finally disposed of vide order dated 08.1.2012 with observation that the petitioner may filed appeal before the Divisional Commissioner under Rule 11 of the Uttar Pradesh Government Servant (Discipline & Appeal) 1999 and the same may be considered and decided within two months. The Commissioner, Bareilly Division, Bareilly vide order dated 15.07.2013 had dismissed the appeal. The same is assailed by means of the present writ petition.

9. Learned counsel for the petitioner submits that the impugned order dated 15.07.2013 passed by respondent No. 3 and order dated 01.08.1994 passed by the respondent No. 1 cannot be sustained on the ground that the disciplinary proceedings were vitiated in law and as such no opportunity of personal hearing had ever been afforded to the petitioner nor even the inquiry report had been supplied to him and further submits that even he had not been permitted to cross-examine the witnesses, therefore, the complete inquiry was against the principles of natural justice.

10. Learned counsel for the petitioner further submits that the allegation had been levelled against the petitioner for asking bribe of Rs. 500/- from on Sri Satnam Singh against whom he had firstly lodged the F.I.R., the complete story was concocted and had deliberately implicated him just only to malign and tarnish the image of the petitioner. He further submits that in the present matter, the police had inquired into the matter and investigated thoroughly regarding the alleged incidence and once it had been investigated by the police department and submitted the final report and further the same had been accepted by the learned Sessions Judge on 16.07.2008, then in view of the aforesaid circumstances, the impugned order cannot be sustained and petitioner cannot be held for guilty of such petty offence and whereas the departmental inquiry had been taken place in violation of principles of natural justice. Therefore, the order impugned cannot be sustained.

11. Sri Pankaj Rai, learned Additional Chief Standing Counsel submits that in the departmental proceeding, the petitioner had been given ample opportunity to defend himself and in the departmental inquiry, he was found to be guilty even his departmental appeal has also been rejected, therefore, at this stage, he cannot be permitted to submit that the inquiry was in violation of the principles of natural justice. He further submits that the criminal proceedings are entirely different even if the final report had been submitted in the criminal matter, even though the departmental proceeding would not be vitiated and the petitioner is not entitled for any relief in this regard.

12. Heard rival submissions of learned counsel for the parties and perused the record.

13. Bare perusal of the impugned orders, the allegation which had been levelled by one Sri Satnam Singh S/o Sri Gurdeep Singh who was admittedly the defaulter and had moved a representation to the District Magistrate that the petitioner had asked Rs. 500/- from him and, therefore, he may be apprehended, therefore, the direction was issued on 18.01.1993 to Superior Officers to apprehend the petitioner on the spot and it has been alleged that the petitioner was apprehended while receiving Rs. 500/- and once he was caught, he misbehaved to the Superior Officers. It is relevant to notice at this stage, that the said plot had been designed on the dictate of a defaulter and as per departmental inquiry, nothing concrete had been established regarding the alleged incidence. Once after thorough inquiry, the police department had submitted final report regarding the alleged incidence and not found the petitioner guilty for taking any bribe then the order impugned cannot be sustained in

the light of the aforesaid facts and circumstances whereas in the departmental inquiry, the procedure was flagrantly violated. Even the inquiry report had not been supplied to the petitioner and he had been denied for the cross-examination in the said proceedings.

14. The aforementioned facts would eventually prove that there were various flaws in the inquiry process, the allegation was levelled against petitioner by a person who was admittedly defaulter, his version has been taken as sacrosanct by the department and no efforts had been made to find out the correct facts by the department and even his past service record had not been taken into consideration, very leisurely allegations were made and complainant version was taken as gospel truth and every efforts were made just to nab the petitioner. As already noticed above, since the charge on which punishment has been imposed on behest of the defaulter, even though same was thoroughly investigated by the police and once the final report had been submitted in favour of the petitioner and further whole departmental inquiry was made in violation to natural justice, then what is left to be considered and examined by this Court as to whether punishment imposed was commensurate with the said charges.

15. Learned counsel for the petitioner has relied upon the judgment passed in State of U.P. Vs. Shatrughan Lal and another, AIR 1998 SC 3038. For ready reference, paragraph Nos. 4, 5, 6, 7, 9 & 10 are reproduced herein below:-

"4. Now, one of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. this opportunity has to be an effective opportunity and not a mere pretence. In departmental proceedings where charge-sheet is issued and the documents which are proposed to be utilised against that person are indicated in the charge sheet but copies thereof are not supplied to him in spite of his request, and he is, at the same time, called upon to submit his reply, it cannot be said that an effective opportunity to defend was provided to him. (see: Chandrama Tewari vs. Union of India 1987 (Supp.) SCC 518: AIR 1988 SC 177; Kashinath Dikshita vs. Union of India & Ors. 1986 (3) SCC 229: AIR 1986 SC 2118; State of Uttar Pradesh vs. Mohd. Sharif (1982) 2 SCC 376: AIR 1982 SC 937).

5. In High Court of Punjab & Haryana vs. Amrik Singh 1995 (Supp.) 1 SCC 321, it was indicated that the delinquent officer must be supplied copies of documents relied upon in support of the charges. It was further indicated that if the documents are voluminous and copies cannot be supplied, then such officer must be given an opportunity to inspect the same, or else, the principles of natural justice would be violated.

6. Preliminary inquiry which is conducted invariably on the back of the delinquent employee may, often, constitute the whole basis of the charge-sheet. Before a person is, therefore, called upon to submit his reply to the charge sheet, he must, on a request made by him in that behalf, be supplied the copies of the statements of witnesses recorded during the preliminary enquiry particularly if those witnesses are proposed to be examined at the departmental trial. This principle was reiterated in Kashinath Dikshita vs.

Union of India & Ors. (1986) 3 SCC 229 (supra), wherein it was also laid down that this lapse would vitiate the departmental proceedings unless it was shown and established as a fact that non-supply of copies of those document in his defence.

7. Applying the above principles to the instant case, it will be seen that the copies of the documents which were indicated in the charge sheet to be relied upon as proof in support of articles of charges were not supplied to the respondent nor was any offer made to him to inspect those documents.

9. This paragraph of the written statement contains an admission of the appellant that copies of the documents specified in the charge sheet were not supplied to the respondent as the respondent had every right to inspect them at any time. This assertion clearly indicates that although it is admitted that the copies of the documents were not supplied to the respondent and although he had the right to inspect those documents, neither were the copies given to him nor were the records made available to him for inspection. If the appellant did not intend to give copies of the documents to the respondent, it should have been indicated to the respondent in writing that he may inspect those documents. Merely saying that the respondent could have inspected the documents at any time is not enough. He has to be informed that the documents, of which the copies were asked for by him may be inspected. The access to record must be assured to him.

10. It has also been found that during the course of the preliminary enquiry, a number of witnesses were examined against the respondent in his absence, and rightly so, as the delinquents are not associated in the preliminary enquiry, and thereafter the charge sheet was drawn up. The copies of those statements, though asked for by the respondent, were not supplied to him. Since there was a failure on the part of the appellant in this regard too, the principles of natural justice were violated and the respondent was not afforded an effective opportunity of hearing, particularly as the appellant failed to establish that non-supply of the copies of statements recorded during preliminary enquiry had not caused any prejudice to the respondent in defending himself. "

16. Learned counsel for the petitioner has also relied upon the judgment passed in Hardwari Lal. Vs. State of U.P. and others, AIR 2000 SC 277. For ready reference, paragraph Nos. 3 & 5 are reproduced herein below:-

3. Before us the sole ground urged is as to the non-observance of the principles of natural justice in not examining the complainant, Shri Virender Singh, and witness, Jagdish Ram. The Tribunal as well as the High Court have brushed aside the grievance made by the appellant that the non-examination of those two persons has prejudiced his case. Examination of these two witnesses would have revealed as to whether the complaint made by Virender Singh was the best person to speak to its veracity. So also, Jagdish Ram, who had accompanied the appellant to the hospital for medical examination, would have been an important witness to prove the state or the condition of the appellant. We do no think the Tribunal and the High Court were justified in thinking that non-examination of these two persons could not be material. In these circumstances, we are

of the view that the High Court and the Tribunal erred in not attaching importance to this contention of the appellant.

5. In the circumstances, we are satisfied that there was no proper enquiry held by the authorities and on this short ground we quash the order of dismissal passed against the appellant by setting aside the order made by the High Court affirming the order of the Tribunal and direct that the appellant be reinstated in service. Considering the fact of long lapse of time before the date of dismissal and reinstatement, and no blame can be pout only on the door of the respondents, we think it appropriate to award 50 per cent of the back salary being payable to the appellant. We thus allow the appeal, filed by the appellant. However, there shall be no order as to costs.

17. In the case of State of U.P. v. Ramakant Yadav, 2003 (1) AWC 84 (SC) ; 2002 (3) UPLBEC 2799, the Supreme Court reversed the order of the High Court whereby the punishment had been reduced to reinstatement in service on payment of 50% of back wages with a warning to the delinquent, and held that the High Court ought not to have Interfered with the quantum of punishment in the facts of that case. The Supreme Court in the case of State of U.P. v. Ashok Kumar Singh, AIR 1996 SC 736, held that where the employee had absented himself from duty without leave on several occasions, the High Court was not correct in holding that his absence from duty would not amount to such a great charge so as to impose the penalty of dismissal from service.

18. On the contrary the Apex Court in the case of Ranjit Thakur v. Union of India and Ors., AIR 1987 SC 2386, has held that "the question of the choice and quantum of punishment is within the Jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Marital, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

19. In the case of Union of India and others v. Giriraj Sharma, AIR 1994 SC 215, the Apex Court held that over-staying of leave subsequent to the order of rejection of application for extension of leave could not be considered to be a sever enough charge to warrant punishment of dismissal from service and the same was held to be harsh and disproportionate. A Division Bench of this Court in the case of Harpal Singh v. State Public Services Tribunal, Lucknow and Ors. 2000 (2) AWC 1075 : 2000 (86) FLR 334, held that where it was on account of negligence of the constable of the G.R.P. that one passenger was misbehaved with and was murdered, the same could not be a case of serious misconduct and held that the punishment of dismissal from service was totally disproportionate to the offence and thus directed reinstatement of the employee in service, with half back wages and also ordered that he be given a severe warning.

Further, in the case of Alexandar Pal Singh v. Divisional Operating Superintendent, 1987 (2) ATC 922 (SC), the Supreme Court held that ordinarily the Court or Tribunal cannot interfere with the discretion of the punishing authority in imposing particular penalty but this rule has an exception. If the penalty imposed is grossly disproportionate with the misconduct committed, then the Court can interfere. The railway employee on being charged with negligence in not reporting to the railway hospital for treatment was removed from service. The Supreme Court found it fit to interfere with the punishment of removal from service and modified it to withholding of two Increments.

20. A Division Bench of this Court in the case of Suresh Kumar Tiwari v. D.I.G., P.A.C. and Anr., 2001 (4) AWC 2630, 2002 Lab IC 259, has, while reiterating the view of the Supreme Court, held that the High Court normally does not interfere with the quantum of punishment unless the punishment shocks the conscience of the Court.

21. In the light of the law laid down by the Apex Court as well as this Court, in my view the broad principle which emerges is that normally, it is the disciplinary authority which should be best left with the duty of imposing the punishment after considering the facts and circumstances of the case. However, it is well settled that in case, if on the admitted facts, the punishment imposed is grossly disproportionate to the offence, which shocks the conscience of the Court, the Court has the power and jurisdiction to interfere with the punishment imposed.

22. Considering the facts and circumstances of the case, the punishment awarded to the petitioner of dismissal from service is too harsh and totally disproportionate to the charges, for which he had been found guilty. The punishment of dismissal from service are resorted only if there is very grave misconduct. The punishment from dismissal from service imposed on the petitioner is too harsh and is liable to be set-aside.

23. Accordingly, the impugned order dated 15.07.2013 passed by respondent No. 3 and order dated 01.08.1994 passed by the respondent No. 1 cannot be sustained and are quashed.

24. In view of above, the writ petition is allowed with the direction to the respondents concerned to pay to the petitioner half of the salary since removal from the department on basis of no work no pay and further respondents to pay entire arrears within two months time from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2015

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-C No. 46759 of 2014

Mohd. Wazid ...Petitioner
Versus
The Presiding Officer Cen. Govt. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ranjeet Asthana, Sri Abhishek Srivastava

Counsel for the Respondents:
Sri Anadi Krishna Narayana, Sri Ashok Kr. Lal

Constitution of India, Art.-226-Rejection of claim-for back wages mainly on ground-workman failed to proof of working for certain period-while petitioner workman already moved to summon the record and also vehemently pressed-but no order passed-held-in view of 'Director fisheries Terminal Department'-award-unsustainable-matter remitted back for fresh consideration.

Held: Para-8
I find that that the petitioner has pressed his application for summoning of the relevant document, however, the respondent No.1 did not pass any order on the said application and merely observed in concluding paragraph No.23 of the impugned award that "I do not find that there is any malafide intention of the opposite party in withholding the records because the opposite party, their witnesses have specifically stated that the workman did not work during the period 2005-06." Thus the respondent No.1 merely relied upon the allegations made by the Respondent No.2. No reasons have been assigned by the Respondent No.1 for the aforesaid conclusion. The Respondent No.1 should have considered the application of the petitioner for summoning of the records and should have directed the Respondent no.2 to produce the records in evidence. The action of the Respondent No.2 in not doing so cannot be sustained in view of the law laid down by Hon'ble Supreme Court in the cases of Director, Fisheries Terminal Department (supra) and R.M. Yellatti (supra).

Case Law discussed:
(2011) 2 SCC (L & T) 153; (2010) 1 SCC (L & T)1 , (2010) 1 SCC 47.

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

1. Heard Sri Ranjeet Asthana, learned counsel for the petitioner. No one appears on behalf of the Respondent No.2 even in the revised call.

2. Briefly stated the facts of the present case are that undisputedly the petitioner was engaged on temporary basis by the Respondent No.2 as messenger at Naini Branch, Allahabad for the period from 6.5.2000 to 8.9.2004. However, according to the petitioner he continuously worked from 6.5.2000 till 4th November, 2006 on which date his services were illegally terminated by the Respondent No.2. Thereafter he raised an industrial dispute and the Central Government vide order dated 7.1.2008 referred the following question to the prescribed authority:

"2. Whether the action of the management of Bank of Baroda, in terminating the services of Sri Mohd. Wazid Messenger, with effect from 4.11.2006 is justified and legal? If not to what relief the concerned workman is entitled to?"

3. It appears that the aforesaid reference was registered as Industrial Dispute Case No. 25 of 2008. During the course of proceeding in the aforesaid Industrial Dispute case, before the Respondent No.1 the petitioner filed 25 documents and the Respondent No.2 filed 10 documents. The Respondent No.2 produced two witnesses, namely, Sri Ram Palat (MW-1), who was an officer of the bank and Sri Manglesh Dubey (MW-2). The witnesses were examined. As per impugned award the petitioner filed photostat copies of some vouchers. He moved an application dated 26th October, 2009 before the Respondent No.1 for summoning certain documents. Despite the application moved by the petitioner, the records were not summoned. Although in the impugned award the Respondent No.1 noted the facts in some

detail but he rejected the claim of the petitioner without consideration to the facts of the case and his application for summoning of the records. The relevant portion of the impugned award is reproduced below:

"22. I have respectfully gone through the principle laid down by the Hon'ble Apex Court, but considering the facts and circumstances of the present case, I am of the view that the workman cannot take any benefit from this decision.

23. I have examined the contention of the workman that the opposite party did not file the relevant documents relating to the period 2005-06. I do not find that there is any malafide intention of the opposite party in withholding the records because the opposite party, their witnesses have specifically stated that the workman did not work during the period 2005-06. This fact can also be relied because when the workman himself is filing all the related vouchers etc. then he could not have also filed the other entire document relating to the period 2005-06, but there is no such document which may prove that the workman has completed 240 days of continuous working. Therefore, the workman has miserably failed to prove this case.

24. Reference is therefore, decided against the workman and in favour of the management."

4. From paragraph No. 21 of the impugned award it is evident that the petitioner pressed his application for summoning of the records and also relied upon a judgment of Hon'ble Supreme Court in the case of Devinder Singh Vs. Municipal Council Sanaur (2011) 2 SCC (L&T) 153.

5. In the case of Devender Singh (supra) while dealing with the industrial dispute under Section 25 of the Act, the Hon'ble Supreme Court held as under:

"12. Section 2 (s) contains an exhaustive definition of the term "workman". The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term "workman".

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a peroson is a workman within the meaning of Section 2 (s) of the Act. it is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee

or a person appointed on contract basis. There is nothing in the plain language of Section 2 (s) from which it can be inferred that only a person employed on a regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

6. In the case of Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda (2010) 1 SCC (L&T) 1, (2010) 1 SCC 47 while considering the case of a daily wager workman under the Industrial Dispute Act, 1947 (hereinafter referred to as the 'Act') held in paragraph Nos. 16,17,18 and 19 as under:

"16. This Court in R.M. Yellatti Vs. Asstt. Executive Engineer has observed : (SCC p. 116, para 17)

"17. ..... However, applying general principles and on reading the [aforesaid] judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appoin tment or termination, if any, the wage register, the attendance register, etc. Drawing the adverse inference ultimately would depend thereafter on the facts of each case."

17. Applying the principles laid down in the above case by this Court, the evidence produced by the appellant has not been consistent. The appellant claims that the respondent did not work for 240 days. The respondent was a workman hired on a daily-wage basis. So it is obvious, as this Court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the appellant employer to prove that he id not complete 240 days of service in the requisite period of constitute continuous service.

18. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witnesses produced by the appellant stated that the respondent stopped coming to work from February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also.

19. It has also been observed by the High Court that the muster roll for 1986-1987 was not completely produced. The appellant has inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, in spite of the direction issued by the Labour Court to produce the same. In fact there has been partically no challenge to the deposition of the respondent during cross-examination. In this regard, it would be pertinent to mention the observation of the three-Judge Bench of this Court in Municipal Corpn. Faridabad Vs. Siri Niwas wherein it is observed: (SCC p. 198, para 15)

"15. A court of law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld."

7. From the law laid down by Hon'ble Supreme Court in the case of Director, Fisheries Terminal Department (supra) and also the law laid down by the Hon'ble Supreme Court in the Case of R.M. Yellatti Vs. Asstt. Executive Engineer (2006) 1 SCC 106 para 17 it is clear that in case of termination of services of daily-wages earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case.

8. I find that that the petitioner has pressed his application for summoning of the relevant document, however, the respondent No.1 did not pass any order on the said application and merely observed in concluding paragraph No.23 of the impugned award that "I do not find that there is any malafide intention of the opposite party in withholding the records because the opposite party, their witnesses have specifically stated that the workman did not work during the period 2005-06." Thus the respondent No.1 merely relied upon the allegations made by the Respondent No.2. No reasons have been assigned by the Respondent No.1 for the aforesaid conclusion. The Respondent No.1 should have considered the application of the petitioner for summoning of the records and should have directed the Respondent no.2 to produce the records in evidence. The action of the Respondent No.2 in not doing so cannot be sustained in view of the law laid down by Hon'ble Supreme Court in the cases of Director, Fisheries Terminal Department (supra) and R.M. Yellatti (supra).

9. In view of the above discussions, the impugned award dated 31.12.2013 passed by the Respondent No.1 in Industrial Dispute No. 25 of 2008 cannot be sustained and is hereby set aside. The matter is remitted back to the Respondent No.1 to decide the aforesaid case afresh in accordance with law after affording to the parties concerned.

10. It is further directed that the Respondent No.1 shall make effort to decide the case as expeditiously as possible preferably within a period of four months from the date of production of a certified copy of this order.

11. The writ petition is allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2015

BEFORE
THE HON'BLE DR. DHANANAJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNEET KUMAR, J.

Writ-C No. 50570 OF 2014

Neeraj Kumar Rai & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shri Seemant Singh, Shri Sadanand Singh

Counsel for the Respondents:
C.S.C., Shri Anil Kumar Pandey, Shri Gyan Prakash, Shri Kshetresh Chandra Shukla, Shri R.A. Akhtar

Right of Children to Free and Compulsory Education Act 2009-Section 23(1)-Power of national council for teacher education - amendment in criteria-prescribing minimum academic qualification-eligibility criteria from 45% to 50%-held-once regulatory authority laid down minimum qualification-not permissible for writ court to sit over as expert body.

Held: Para-12
In our view, the true meaning of the notification dated 29 July 2011 would have to be construed on the basis of the language of the notification as it stands. If NCTE intends to make eligible candidates with a Postgraduate degree with at least 50 percent marks, nothing prevents the regulatory authority from amending the notification. However, we are emphatically of the view that once an expert statutory body has been vested under Section 23(1) of the Act of 2009 with the function of laying down the minimum qualifications for appointment of teachers, it would not be permissible for the Court under Article 226 of the Constitution to tinker with the qualifications as prescribed or to expand the ambit of the prescribed qualifications by including a Postgraduate degree with a stipulated percentage of marks as sufficient compliance. These are matters which lie in the realm of policy for the expert authority. NCTE has sufficient powers under the law to amend the notification. The High Court cannot while interpreting the notification rewrite the language of the notification. The High Court cannot add or include additional categories.

Case Law discussed:
[2010 (7) ADJ 403 (FB)]; 2009 (1) ADJ 232.

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

1. By these proceedings which have been instituted by 31 petitioners under Article 226 of the Constitution, there is a challenge to the constitutional validity of Clause (III) (i) (a) of a notification dated 29 July 2011 issued by the National Council for Teacher Education1 for the purpose of amending earlier notifications laying down minimum qualifications of eligibility for appointment as a teacher. NCTE has issued the said notification in exercise of powers conferred by Section 23 (1) of the Right of Children to Free and Compulsory Education Act, 20092.

2. The petitioners have passed the Teacher Eligibility Test3 after completing their B Ed course and after being awarded the degree qualification. Admittedly, the petitioners did not secure more than 45 percent marks in the Bachelor's degree examination. They obtained admission to the B Ed course on the strength of having obtained more than 50 percent marks in the Postgraduate degree examination. The State Government issued a Government Order dated 27 September 2011 for making appointments of Assistant Teachers in Junior Basic Schools. Following an amendment made by NCTE on 29 July 2011, the State Government issued a Government Order dated 27 September 2011. An advertisement was issued on 30 November 2011 by District Basic Education Officers in the State for appointments of teachers in Junior Basic Schools, for teaching students between the classes I to V. These facts are not in dispute.

3. The Regulations framed by NCTE in 2002, 2005 and 2007 provided, inter

alia, for eligibility to seek admission to the B Ed degree programme. In all the three sets of Regulations, the requirement of eligibility was that a candidate should have obtained at least 45 percent marks either in the Bachelor's degree or in the Master's degree. Clause 4 of the 2002 Regulations provided that candidates with at least 45 percent marks in the Bachelor's/Master's degree with at least two school subjects at the Graduation level would be eligible for admission. Clause 3 of the Regulations of 2005, contained a similar stipulation. Clause 3.2 of the 2007 Regulations similarly provided for eligibility by stipulating that candidates with at least 45 percent marks either in the Bachelor's degree and/or in the Master's degree or any other qualification equivalent thereto, are eligible for admission to the B Ed degree programme. On 31 August 2009, a notification was issued by NCTE under which it was stipulated that, for admission to the B Ed degree programme, a candidate should have obtained either a Bachelor's or Master's degree with at least 50 percent marks. The requirement of a minimum of 45 percent marks in the Bachelor's or Master's degree was, thus, enhanced in the Regulations of 2009, to 50 percent.

4. NCTE issued a notification on 23 August 2010, in exercise of powers conferred by Section 23(1) of the Act of 2009 for the purpose of laying down minimum qualifications for a person to be eligible for appointment as a teacher in classes I to VIII in a school referred to in Section 2 (n) of the Act of 2009. Paragraph 3 of the notification provided for the training to be undergone. On 29 July 2011, Para 3 of the principal notification was amended. As amended, the requirement is as follows:-

"(III) For para 3 of the Principal Notification the following shall be substituted, namely:-

(i) Training to be undergone. - A person -

(a) with Graduation with at least 50% marks and B. Ed. qualification or with at least 45% marks and 1-year Bachelor in Education (B. Ed.), in accordance with the NCTE (Recognition, Norms and Procedure) Regulations issued from time to time in this regard, shall also be eligible for appointment to Class I to V up to 1st January 2012, provided he/she undergoes, after appointment, an NCTE recognized 6-month Special Programme in Elementary Education;

(b) with D. Ed. (Special Education) or B. Ed. (Special Education) qualification shall undergo, after appointment an NCTE recognized 6-month Special Programme in Elementary Education."

5. The grievance of the petitioners is that they were not being considered for selection and appointment as teachers in Junior Basic Schools in pursuance of the advertisements issued by the State Government, on the ground that they had not secured at least 45 percent marks in the Graduation. The submission of the petitioners is that in framing the amending notification dated 29 July 2011, NCTE has overlooked the position that a person with at least 50 percent marks at the Graduate or Postgraduate stage is eligible for admission to the B Ed degree programme. Consequently, it has been urged that the requirement which has been laid down in the notification dated 29 July 2011 should incorporate, in addition, a Post-graduation with at least 50 percent marks. This submission proceeds on the basis that the notification dated 29 July

2011 uses the expression "in accordance with the NCTE (Recognition, Norms and Procedure) Regulations issued from time to time" in this regard. Based on those words, it has been submitted that a person who had received less than 45 percent marks in the Graduation but had received more than 50 percent marks in the Post-graduation was eligible for admission to the B Ed degree course. Hence, there is no reason or rational to exclude candidates, such as the petitioners, who have secured less than 45 percent marks in their Graduation, so long as they have completed the B Ed degree qualifications on the strength of having obtained more than 50 percent marks in the Postgraduate degree programme.

6. This is the submission which falls for consideration.

7. Now, at the outset, it must be noted that there are two distinct facets. The first is the requirement which has been laid down by NCTE for securing admission for the B Ed degree course. The second is the requirement which has been laid down by NCTE under Section 23 (1) of the Act of 2009 for teaching classes I to VIII. Insofar as the eligibility requirements for admission to the B Ed degree course are concerned, the Regulations framed by NCTE in 2002, 2005 and 2007 required a candidate to obtain at least 45 percent marks either in the Bachelor's degree course or in the Master's degree course. In 2009, this requirement of 45 percent marks at the minimum was enhanced to 50 percent when a notification was issued 31 August 2009.

8. The notification issued by NCTE on 29 July 2011 under Section 23(1), on the other hand, prescribes the requirements in terms of minimum qualifications and training for a teacher for teaching students of classes I to VIII. Section 23 of the Act of 2009, inter-alia, provides as follows:-

"23. Qualifications for appointment and terms and conditions of service of teachers.- (1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.

9. Under sub-section (1) of Section 23, to be eligible for appointment as a teacher, a person must possess such minimum qualifications as are laid down by an academic authority authorized by the Central Government. NCTE is that academic authority authorized by the Central Government. Under sub-section (2), the Central Government was vested with the power to relax the minimum qualifications required for appointment as a teacher for a period of not more than

five years, where the State did not have adequate number of institutions offering courses or training in teacher education, or teachers possessing the minimum qualifications laid down under sub-section (1). Under the proviso to sub-section (2), a teacher who, at the commencement of the Act, did not possess the minimum qualifications prescribed in sub-section (1), was required to acquire them within a period of five years. Now, while issuing the notification on 29 July 2011 prescribing the training to be undergone, NCTE stipulated two categories in Clause (III) (i) (a). The first category consists of persons with Graduation with at least 50 percent marks and a B Ed qualification. The second category consists of persons with a Graduation with at least 45 percent marks and a one year B Ed in accordance with the NCTE (Recognition, Norms and Procedure) Regulations issued from time to time. The separate requirements of at least 50 percent marks in the Graduation (for the first category) and 45 percent marks in Graduation (for the second category) are obviously made having due regard to the fact that prior to 31 August 2009 and under the Regulations of 2002, 2005 and 2007, a Graduation with at least 45 percent marks was the eligibility condition for admission to the B Ed degree course (though, as we have noted, a Post-graduation with a minimum of 45 percent marks was also eligible). With effect from 31 August 2009, the requirement of eligibility was enhanced to 50 percent marks in the Graduation or Post-graduation for admission to the B Ed degree course. Clause (III) (i) (a), therefore, brought within its purview candidates who have at least 45 percent marks or, as the case may be, at least 50 percent marks in the Graduation having due regard to the provisions of the Regulations of 2002, 2005, 2007 and 2009. Significantly, NCTE, while framing the requirement in the notification of 29 July 2011, did not contemplate that those with a Postgraduate degree with at least 45 percent or 50 percent marks, as the case may be, would be brought within the purview of the notification. NCTE could have but has not done so. We are unable to read into the words "in accordance with the NCTE (Recognition, Norms and Procedure) Regulations issued from time to time" an implicit addition of a Post-graduation with at least 45 percent marks so as to cover those candidates who may not have secured at least 45 percent marks in the Graduation. Eligibility for admission to the B Ed degree course is one thing and the requirement for teaching students of classes I to V is quite another. The notification dated 29 July 2011 lays down minimum qualifications for a person to be eligible for appointment as a teacher. In our view, there is nothing arbitrary or unconstitutional in NCTE laying down the requirement that in order to provide instruction in Junior Basic Schools for teaching students from classes I to VIII, a person must be a Graduate with at least a minimum of marks as stipulated therein. Hence, merely because the petitioners have obtained more than 50 percent marks in the Postgraduate degree, that would not make them eligible in terms of Clause (III) (i) (a) of the notification dated 29 July 2011 when, admittedly, they do not have a minimum of 50 percent marks in the Graduation.

10. Reliance was sought to be placed on behalf of the petitioners on a counter affidavit which has been filed on behalf of the NCTE in the present proceedings. Paragraphs 5 and 6 of the affidavit read as follows:-

"5. That on the issue of prescribing minimum marks, these minimum marks were stipulated in accordance with the minimum marks required for seeking admission in the B. Ed Course as laid down in the NCTE (Recognition, Norms and Procedure) Regulations, notified from time to time. As per NCTE's Regulations 2007/2009, the entry qualification for B. Ed is as under:

"Candidates with at least 45%/50% marks either in the Bachelor's Degree and/or in the Master's Degree or any other qualification equivalent thereto, are eligible for admission to the programme."

Accordingly, in case, the candidate has acquired the minimum percentage of marks as per NCTE's Regulations either in Bachelor's Degree and/or in the Master's Degree or any other qualification equivalent thereto, is eligible to appear in Teacher Eligibility Test by virtue of the NCTE's Regulations in this regard.

6. That as regards another claim of the petitioner with regard to becoming a school teacher merely by acquiring a teacher education qualification, it may be mentioned that acquiring a degree or diploma in various teacher education courses does not confer any right of such person to become a teacher. It merely makes such a person eligible for appointment as school teacher. It is for the appointment authority or the recruitment agency to appoint teachers in accordance with the extant recruitment rules. The notification issued by the NCTE laying down the teacher qualifications is in accordance with the mandate given to it by the Central Government for setting the norms from the view point of quality. Accordingly the various qualifications specified in the NCTE notification including the requirement of passing TET are in accordance with law. The contention of the petitioners that by acquiring a teacher education qualification a right has been conferred upon them to become a school teacher, as per prevailing recruitment rules at the time of obtaining the teacher qualification, is not tenable in the eyes of law."

11. Similarly, reliance was placed on a counter affidavit filed by the NCTE in Special Appeal No 2076 of 2011 in similar terms.

12. In our view, the true meaning of the notification dated 29 July 2011 would have to be construed on the basis of the language of the notification as it stands. If NCTE intends to make eligible candidates with a Postgraduate degree with at least 50 percent marks, nothing prevents the regulatory authority from amending the notification. However, we are emphatically of the view that once an expert statutory body has been vested under Section 23(1) of the Act of 2009 with the function of laying down the minimum qualifications for appointment of teachers, it would not be permissible for the Court under Article 226 of the Constitution to tinker with the qualifications as prescribed or to expand the ambit of the prescribed qualifications by including a Postgraduate degree with a stipulated percentage of marks as sufficient compliance. These are matters which lie in the realm of policy for the expert authority. NCTE has sufficient powers under the law to amend the notification. The High Court cannot while interpreting the notification rewrite the language of the notification. The High Court cannot add or include additional categories.

13. Learned Senior Counsel appearing on behalf of the petitioners has sought to place reliance on two Full Bench

judgments of this Court. The judgment of the Full Bench in Jitendra Kumar Soni Vs State of U P4 held that it was not open to the State Government to exclude students who had obtained their degree or diploma, inter alia, in LT/B P Ed/D P Ed/C P Ed from institutions and universities established by law situate at places outside the State and duly recognized by NCTE from applying either for the Special BTC or BTC course. The second judgment of the Full Bench in Bhupendra Nath Tripathi Vs State of U P5 held, inter-alia, that a degree which was being granted earlier by Universities in exercise of powers under Section 22 of the University Grants Commission Act, 1956 could not be inferior than a degree of B Ed now awarded from institutions after their recognition under Section 14 (3) of the NCTE Act, 1993. The Full Bench held that the exclusion of candidates (from the field of eligibility for the Special Basic Training Course 2007) who have obtained a B Ed degree prior to the enforcement of the NCTE Act, 1993 or after the enforcement thereof during the period when the application of the institution or university for recognition was pending consideration, would be violative of Article 14 of the Constitution. Neither of the two decisions of the Full Bench have any relevance to the issue which has been raised in these proceedings. Plainly, the petitioners do not meet the requirements contained in the notification dated 29 July 2011.

14. For these reasons, we hold that there is no substance in the writ petition. The petition shall stand, accordingly, dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2015

BEFORE

THE HON'BLE RAMESH SINHA, J.

Application u/s 482 No. 50877 of 2014

Gajraj Singh ...Applicant

Versus

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

Counsel for the Applicant:
Sri Ajay Vashistha

Counsel for the Opp. Party:
Govt. Advocate.

Cr.P.C. Section 482-Release of minor girl-offence u/s 363/366 IPC-rejection of ground being minor-of age 17 years 6 month 5 days-in view law laid down by Apex Court in Smt. Parvati Devi and Kalyani Chaudhary-even a minor can not be detained in Nari Niketan against her will-being girl-detention amounts illegal confinement-order impugned quashed-direction to release forthwith to go anywhere according to her wish.

Held: Para-8

In the case in hand, the question of the applicant being a minor is irrelevant as even a minor cannot be kept in protective home against her will. The applicant may hardly be said that she is not a women or girl which come within a preview of Suppression of Immoral Traffic in Women and Girls Act. Thus, it is clear cut case of illegal confinement of minor against her wishes violating fundamental right. Hence, the impugned order dated 26.05.2014 passed by the Special Judge/ Additional Sessions Judge, Court No.1, Kasganj is hereby quashed and it is directed the Superintendent of Nari Niketan, Mathura to release the victim Dolly daughter of Gajraj Sing be set at liberty to go in according to her own wish.

Case Law discussed:
1992 All Crl. Cases 32; 1978 Criminal Law Journal 103.

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Ajay Vashistha, learned counsel for the applicant and Sri I.B. Yadav, learned AGA for the State.

2. The present application under Section 482 Cr.P.C. has been filed for quashing of the impugned order dated 26.05.2014 passed by Special Judge/ Additional Sessions Judge, Court No.1, Kasganj, in S.T. No. 31 of 2014 (State Vs. Ajeet and others), under Sections 363, 366 IPC and 3/4 Protection of Children from Sexual Offence Act, 2012, P.S. Sahawar, District Kasganj.

3. The fact as emerges out from the record is that the first information report lodged by applicant who is father of the victim girl on 23.02.2014 which was registered as Case Crime No. 52 of 2014 under Sections 363, 366 IPC, P.S. Sahawar, District Kasganj with an allegation that on 23.02.2014 her minor daughter whose date of birth is 18.08.1996, was enticed away by one Ajit son of Rajvir Singh along with Rajveer and Virendra son of Deen Dayal. On 20.05.2014 daughter of the applicant was recovered from the possession of co-accused Ajit and chargesheet has been submitted in the case against Ajit only under Section 366 and 363 and 3/ 4 POCSO Act. The applicant thereafter moved an application before the Special Judge/ Additional Sessions Judge Court No.1, Kasganj to release his minor daughter and simultaneously as he is her natural guardian being father and on 20.05.2014 girl be given in his custody. The accused Ajit also moved an application on 24.05.2014 for the custody of the victim on the ground that he was her husband as both of them have married on 03.03.2014. The accused Ajit as well as the victim girl filed a writ petition being Civil Misc. Writ Petition No.1473 of 2014 which was disposed of by this Court on on 10.03.2014 with a direction that restraining any person from interfering in their matrimonial life as she is major. The Court rejected the application of the applicant as well as the accused Ajit and come to the conclusion that the girl was minor who was sent to Nari Niketan and further order that when she attain majority, the victim girl should be released. Hence the present petition has been filed by the applicant for quashing of the impugned order passed by the court below.

4. It has been submitted by learned counsel for the applicant that the applicant is father of the victim girl and she is minor as per the high school certificate her date of birth is 18.08.1996 and he being a natural guardian the custody of the victim girl should be given to him.

5. Learned AGA has tried to justify the order passed by the trial court rejecting the application of the applicant as well as accused has opposed the prayer for quashing of the order and stated that said order has been passed by the court below in accordance with law.

6. Considering the submissions advanced by learned counsel for the parties and perused the report, the claim of the applicant that her daughter was a minor girl as per the high school certificate her date of birth is 18.08.1996 and at the time of incident she was 17 year six months and 5 days. He further submits that as per the medical report the girl has also found to be less than 18 years on the date of incident but she, as per her statement recorded under Section 164 Cr.P.C. stated her age is 21 years and

further stated that she had voluntarily gone with the applicant and on her own sweet will marriage with accused Ajit and the said fact was also informed by her parent that she would marry with Ajit Singh but her parents were against the said marriage. In her statement she also stated that Ajit had not enticed her away and she has voluntarily accompanied with Ajit. The court below while deciding the custody of the victim on the application filed by the applicant as well as Ajit Singh had also tried to know wish of the victim who has stated that she wants to go with her husband Ajit Singh but finding her to be minor, it found proper for sending her Nari Niketan till she attained majority. It is well settled law that a minor can not be confined in Nari Niketan against her wishes. In this regard, the Judgement of this Court in the case of Smt. Parvati Devi Vs. State of U.P. and another reported in 1992 All Crl. Cases 32 in which it has been observed by the Apex Court that the confinement of a victim in Nari Niketan against her wishes, cannot be authorised under any provisions of the Code. There is no such legal provision wherein the Magistrate has been authorized to issue directions that a minor female child shall, against her wishes, be kept in Nari Niketan.

7. In the case of Mrs. Kalyani Chaudhory Vs State of U.P. and others reported in 1978 Criminal Law Journal 103, a Division Bench of this Court held that no person can be kept in protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act or under some other law permitting her detention in such a Home.

8. In the case in hand, the question of the applicant being a minor is irrelevant as even a minor cannot be kept in protective home against her will. The applicant may hardly be said that she is not a women or girl which come within a preview of Suppression of Immoral Traffic in Women and Girls Act. Thus, it is clear cut case of illegal confinement of minor against her wishes violating fundamental right. Hence, the impugned order dated 26.05.2014 passed by the Special Judge/ Additional Sessions Judge, Court No.1, Kasganj is hereby quashed and it is directed the Superintendent of Nari Niketan, Mathura to release the victim Dolly daughter of Gajraj Sing be set at liberty to go in according to her own wish.

9. The present application stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. -57990 of 2014

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

Counsel for the Petitioner:
Sri Gopal Srivastava, Sri H.R. Mishra

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Retirement Benefits Rules, 1961-Rule 3(3), 5(i), Rule 7(c)-claim of family pension-by second wife with consent of first wife-in service record her name already shown as nominee-held-when marriage itself void-consent of first wife-immaterial- rejection-held-proper-petition dismissed.

Held: Para-33

For the reasons and law stated, hereinabove, the second wife cannot claim pension on the consent of the first wife, even if the second wife is eligible under the Rules to receive family pension, as long as, the first wife is alive or does not remarry.

Case Law discussed:

1988 (25) ACC 119; [(2001) 1 U.P.L.B.E.C. 8691]; [(2004) 3 U.P.L.B.E.C 2292]; [2000 (1) ESC 577 (S.C.)]; 2000 (1) ESC 135 (S.C.); AIR 1984 SC 346.

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

1. The petitioner is the second wife of Prem Narain Srivastava (deceased), according to the petitioner, the marriage was solemnized, with the consent of the first wife namely Smt. Kunti Devi in 1954. The husband of the petitioner a Gram Panchayat Adhikari was working with the respondent no. 3, Zila Panchayat Raj Adhikari, Basti. The petitioner was nominated for receiving gratuity, G.P.F. and life insurance. The husband retired on 31.03.1997, on attaining the age of superannuation, subsequently, died on 20.10.2002; petitioner made an application for family pension which was not granted, aggrieved, the petitioner approached the Court by filing (Writ Petition no. 53165 of 2003) petition challenging the rejection order dated 04.03.2004, passed by the respondent no. 2, Director, Pension Nideshalaya, U.P. Lucknow. The writ petition was allowed by judgment and order dated 15.07.2013. The operative portion of judgment being relevant is extracted:

"The petitioner has brought on record the papers showing nomination made by her husband in her favour in respect of the Gratuity, General Provident Fund and Group Insurance, as Annexure-2 to the writ petition. Said statement has been made in paragraph-8 of the writ petition. In paragraph-12 of the counter affidavit, whereunder paragraph-8 of the writ petition has been replied, said statement of fact has not been denied. Thus, this fact is established that husband of the petitioner had made nomination in favour of the petitioner for his other post retiral benefits and the first wife of late Prem Narain Lal Srivastava has given her affidavit that she has no objection in case the petitioner is granted family pension. However, I find that in the impugned order the Director, Pension Directorate, Lucknow has failed to advert to those material facts and documents. Thus, the impugned order has been passed without application of mind and as such, the same needs to be quashed. Accordingly, the order dated 04.03.2004 passed by the Director, Pension Directorate, U.P., Lucknow, the respondent no. 1, is hereby quashed. The matter is remitted back to the Director, Pension Directorate, U.P., Lucknow, to reconsider the same afresh after giving opportunity to the petitioner and pass appropriate order in accordance with law within six weeks from the date of communication of this order.

Accordingly, the writ petition is allowed.

No order as to costs."

2. The order was not complied with, aggrieved the petitioner filed Contempt Petition1 (No. 2965 of 2014), the Court on 13.05.2014 directed the Director, Pension Nideshalaya, U.P., Lucknow to comply the order of the writ court. The respondent no. 2 by impugned order dated 24.06.2014 rejected the claim of the petitioner, for the reason, that since the deceased employee, in the pension paper,

had mentioned the name of both the wives, accordingly, direction/opinion was sought from the State Government. The Government vide letter dated 23.10.2013, pursuant to Government Order dated 24.08.1966, opined that in the event of the deceased employee having two wives the senior wife would be entitled to family pension until her death/remarriage. The family pension being non transferable cannot be given to the petitioner, even on an affidavit of the senior wife relinquishing her claim, to family pension in favour of the petitioner.

3. Sri H.R. Mishra, learned Senior Advocate, assisted by Sri Gopal Srivastava, learned counsel appearing for the petitioner would submit that since the first wife has no objection, in case second wife is given family pension and further the first wife had given her consent, on an affidavit, to the competent authority, thus, would contend, that the petitioner, also being a nominee for gratuity, G.P.F., and group insurance, is entitled to family pension, further, the impugned order is in teeth of the judgment and order dated 15.07.2013 passed in the earlier writ petition.

4. In rebuttal, learned Standing Counsel, would submit that the impugned order is legal, family as defined in the Rules, would not include the second wife, hence the petitioner is not entitled to family pension, as long as, the first wife is alive and eligible to receive the family pension.

5. Rival submissions fall for consideration.

6. The sole question to be determined is as to whether the first wife (senior wife), of the deceased employee, could relinquish her claim to family pension upon the second wife under the Rules.

7. It is not in dispute between the parties that the provisions of the Uttar Pradesh Retirement Benefits Rules, 19612 is applicable in respect of the grant of family pension. The Rules have been framed in exercise of powers conferred under the proviso to Article 309 of the Constitution of India. Rule 2 provides that the Rules shall apply to all officers under the rule making power of the Governor.

8. Further, the pension provisions contained in Civil Service Regulations shall continue to apply to the officers except in so far as they are inconsistent with any of the provisions of these rules.

9. Sub-section (3) of rule 3 defines "family", part relevant for the case is extracted:

"[(3) "Family" means the following relatives of an officer:

(i) wife, in the case of any male officer;

(ii) husband, in the case of a female officer;

(iii).....
(iv).....
(v).....
(vi).....
(vii).....
(viii).....
(4).....
(5).....

10. Part-II of the Rules provides for Death-cum-Retirement Gratuity and Part-III deals with Family Pension.

11. Rule 7(1) under Part-III provides, family pension may be granted to the family of an officer who dies. Rule 7(1) is as follows:-

"7. Family Pension.-(1) A family pension not exceeding the amount specified in sub-rule (2) below may be granted for a period of ten years to the family of an officer who dies, whether after retirement or while still in service after completion of not less than 20 years' qualifying service:"

12. Sub-rule (3) of rule 7 provides that pension shall not be payable under this Part to a person mentioned thereunder and would include a widowed female member of the family, in the event of her remarriage and to a person who is not a member of the deceased officer's family, sub-rule reads as follows:-

"(3) No pension shall be payable under this Part-

(a) to a persons mentioned in clause (b) of sub-rule (4) below, unless the pension sanctioning authority is satisfied that such person was dependent on the deceased officer for support;

(b) to an unmarried female member of the family, in the event of her marriage;

(c) to a widowed female member of the family, in the event of her remarriage;

(d) to a brother of the deceased officer on his attaining the age of 18 years; and

(e) to a person who is not a member of the deceased officer's family.

(4) Except as may be provided by a nomination under sub-rule (5) below:

(a) a pension sanctioned under this Part shall be granted-

(i) to the eldest surviving widow, if the deceased was a male officer or to the husband, if the deceased was a female officer;

(ii) failing the widow or husband, as the case may be, to the eldest surviving son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) these failing, to the eldest widowed daughter; and

Note.- The expression "eldest surviving widow" occurring in clause (a) (i) above, should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows.

(5) A Government Servant shall immediately after his confirmation, make a nomination in Form "E" indicating the order in which a pension sanctioned under his part should be payable to the members of his family, and to the extent it is valid, the pension will be payable in accordance with such nomination provided the nominee concerned is not ineligible, on the date on which the pension may become payable to him or her to receive the pension under the provisions of sub-rule(3). In case the nominee concerned is or has become ineligible to receive the pension under the said sub-rule, the pension shall be granted to the person next lower in the order in such nomination. The provisions of sub-rules (5)(b),(7) and (8) of Rule 6 shall apply in respect of nominations under this sub-rule.

(6)(a) a pension awarded under this part shall not be payable to more than one member of the deceased officer's family at the same time.

(b) If a pension awarded under this part ceases to be payable before the expiry

of the period mentioned in the proviso to sub-rule (1) on account of death or marriage of the recipient or any other causes, it will be regranted to the person next lower in the order mentioned in sub-rule (4) or to the person next lower in the order shown in the nomination under sub-rule (5), as the case may be, who satisfies the other provisions of this part."

13. A bare perusal of the Rules, is indicative that the definition of family does not include the second wife, it only refers to 'wife', and family pension, as per Rule 7(1), is granted to the member of the 'family' of an officer, sub-rule 3(e) of Rule 7 provides, pension is not payable to a person who is not a member of the deceased/officer's family, sub-rule 4(a)(i) provides that pension shall be sanctioned under Part III to the eldest surviving widow and the note appended to the rule clarifies that expression "eldest surviving widow" should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows.

14. Sub-rule (5) requires the Government Servant to make nomination indicating the order in which pension sanctioned would be payable to the members of his 'family', provided the nominee concerned is not ineligible, on the date on which the pension may become payable to him or her to receive the pension under the provisions of sub-rule (3) of rule 7. Thus, the scheme of the Rules provide that in case the Government servant leaves behind two wives, the second wife not being a member of the family, is not eligible to family pension, as long as, the first wife survives. Further, there could not have been any nomination in favour of the second wife as she was ineligible to have been nominated under sub-rule (5), being not a member of the family, thus, ineligible to receive pension under sub-rule (3) of rule 7.

15. Learned counsel for the petitioner has not brought on record Form-E i.e. nomination in favour of the petitioner for pension, whereas, nomination to receive the gratuity and other payments have been brought on record. Nomination for death-cum-retirement gratuity is dealt with under rule 6 and is not applicable to nominations for pension under sub-rule (5) of rule 7, both being under different Part of the Rules.

16. Taking a case that there was nomination in favour of the second wife, the pension would have been payable in accordance to such nomination provided the nominee is not ineligible, on the date on which the pension became payable to her under sub-rule 3 of rule 7. In the facts of the present case, since the first wife is alive on the date on which the family pension became due, the second wife cannot set up a claim for family pension even on the consent of the first wife, further, nomination in favour of second wife would be invalid as she being not a member of the government servants family (sub-rule (3)(e) of rule 7).

17. Learned Standing Counsel would submit that after enactment of Hindu Marriage Act 19553 the second marriage would be void, hence the second wife would otherwise be ineligible for family pension.

18. There is merit in the argument of learned Standing Counsel, provided the

second marriage was contracted after the enactment of Hindu Marriage Act, however, in the facts of the present case, it is pleaded that the petitioner had contracted marriage with the Government Servant in 1954 i.e. before the commencement of Hindu Marriage Act, hence her marriage would not be void.

19. The Hindu Marriage Act came into force on 18.05.1955, the Act amended and codified the law relating to marriage among Hindus. Section 4 provides that the Act has an overriding effect. Section 4 is extracted:

"4. Overriding effect of Act.-Save as otherwise expressly provided in this Act.-

(a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is consistent with any of the provisions contained in this Act."

20. Section 5 provides the the conditions for Hindu marriage between two Hindus and one of the condition provides that neither party should have a spouse living at the time of marriage. Section 5(i) is reproduced:-

"5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of marriage;"

21. Section 11 provides for void marriages. Section 11 is as follows:-

"11. Void Marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party]4, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

22. Section 29 of the Hindu Marriage Act saves the marriages performed between Hindus before the commencement of the Act. Section 29(1) is reproduced:-

"29. Savings.-(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste."

23. Thus as per the scheme of the Hindu Marriage Act, marriage between two Hindus solemnized before the commencement of the Hindu Marriage Act, which was otherwise legal and valid, would be saved under Section 29 of the Act and would not be void under Section 11. Thus, the marriage between the deceased government servant and the petitioner cannot be said to be a void marriage, as being solemnized prior to the enactment of the Hindu Marriage Act. Had the Government servant contracted a second marriage after the commencement of the Hindu Marriage Act, the marriage would have been void under the Hindu Marriage Act and a nullity in the eye of

law, second wife would have no right of being a legally wedded wife.

24. Further, the U.P. Government Servant Conduct Rules, 1956 which came into force on 28th July, 1956, rule 29 prohibits a Government Servant from bigamous marriage. Rule 29 reads as follows:-

"29. Bigamous marriages-(1) No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him."

25. Thus, two Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act, if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules, therefore, the "second wife" as referred to under the pension rules would only include second wife whose marriage is permissible under the personal law, but in the case of Hindus the second wife will have no right, whatsoever, as the law prohibits second marriage, as long as, the government servant has a spouse who is alive. Thus for harmonious construction of the Rules governing pension, wherever, the rule provides for wives, it has to be interpreted as per the law governing marriage as applicable to the government servant and in cases where the second marriage is void under the law, second wife will have no status of a widow of the government servant.

26. As regards, eligibility to family pension, the pension is to be disbursed as per the provisions of the Rules. The rules clearly state that only eligible person is entitled to receive family pension but where pension awarded ceases to be payable on the death or marriage of the recipient or for any other reason, it will be regranted to the persons next lower in the order mentioned in sub-rule (4) of Rule 7. The hindu second wife would not be eligible for family pension as long as the first wife is alive and has not remarried. There is no provision in the Rules for relinquishment of family pension in favour of another person.

27. The Supreme Court in Bakulabai and another v. Gangaram and another5, held that the marriage of a Hindu woman with a Hindu male with a living spouse performed after the coming into force of the Hindu Marriage Act, 1955 is null and void and the woman is not entitled to maintenance under Section 125 of the Cr.P.C.

28. This Court in Shakuntala Devi (Smt.) Versus Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad and another6, while dealing with two wifes wherein the nomination was in favour of the second wife it was held that it cannot defeat the claim of the legally wedded wife, only legally wedded wife is entitled to retiral benefits and provident fund and appointment under Dying-in-Harness Rules.

29. Similarly, view was expressed in Poonam Devi (Smt.) Versus Chief Engineer, Electricity Board and others7.

30. The Supreme Court in Rameshwari Devi Versus State of Bihar and others8, where the Government servant being a Hindu having two living

wives died while in service, held that second marriage was void under the Hindu law and hence second wife having no status of widow is not entitled to anything, however, children from the second wife would equally share the benefits of gratuity and family pension as per law.

31. In G.L. Bhatia v. Union of India and another9, the Supreme Court held that if a nomination is made contrary to statutory provision, it would be inoperative. In the facts of that case, the husband of the deceased employee claimed family pension while nomination was not in his favour. The authorities rejected the claim of the husband for the reason that he was staying separately from the wife and thus was not entitled to family pension. The Apex Court held that the husband was entitled to family pension, where the rights of the parties are governed by statutory provisions, the individual nomination contrary to the statute will not operate.

32. The Apex Court in Smt. Sarbati Devi and another Versus Smt. Usha Devi10, AIR 1984 SC 346, held that a mere nomination made in an insurance policy does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

33. For the reasons and law stated, hereinabove, the second wife cannot claim pension on the consent of the first wife, even if the second wife is eligible under the Rules to receive family pension, as long as, the first wife is alive or does not remarry.

34. I do not find any illegality or infirmity in the order.

35. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2015

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

Writ-C No. 58211 of 2014

Smt. Urmila Devi ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bimal Prasad

Counsel for the Respondents:
C.S.C., Sri R.B. Yadav

Uttar Pradesh Scheduled Comodities Distribution Order 2004- clause 28-pending appeal-G. O. Creating third party rights if proper? Whether the direction contained for interim arrangement by creating third party rights in case of 'Vinod Misra' and 'Jagannath Upadhyay' is proper? held-'No' in absence of interim order in appeal-not annulled the order under appeal-accordingly interim mandamus issued in Vinod Misra and Jagannath Upadhyay not correct law.

Held: Para-24

We, accordingly, hold that the authorization granted to a person to conduct a fair price shop only constitutes such a person as an agent of the State Government under Clause 4(2) of the Control Order. If the authorization is suspended or cancelled, a remedy of an appeal is provided in Clause 28(3). During the pendency of an appeal, a provision has been made in Clause 28(5), for seeking a direction that the order under appeal shall not take effect until the appeal is disposed of. If the order of suspension or cancellation has not been stayed pending the disposal of the appeal, the cancellation or suspension, as the case may be, shall continue to remain in effect. The mere filing or pendency of an appeal or an application for stay does not result in a deemed or automatic stay of the order of suspension or cancellation. There is no such deeming provision. In such a situation, the State is at liberty to make necessary administrative arrangements to ensure the proper distribution of scheduled commodities based on the public interest in the proper functioning of the Public Distribution Scheme and on an assessment of local needs and requirements that would sub-serve the interest of the beneficiaries. We, therefore, hold that the interim mandamus in Vinod Mishra and the judgment in Jagannath Upadhyay's case (supra) which took a contrary view do not reflect the correct position in law and would consequently stand overruled. The Principal Secretary, Food and Civil Supplies, shall now on the basis of the present judgment, issue a circular to all the Divisional Commissioners and concerned officials of the State so that necessary steps in compliance are taken. The learned Standing Counsel has apprised the Court that the Government Order dated 10 July 2014 has since been withdrawn by the Principal Secretary, Food and Civil Supplies on 26 November 2014 and a new Government Order has been issued.

Case Law discussed:

Misc. Bench No. 11977 of 2010; Misc. Bench No. 10373 of 2011; Writ -C No. 30600 of 2012; Writ-C No. 36241 of 2014; AIR 1968 SC 372; (1998) 5 SCC 637; (1998) 2 SCC 44.

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

1. The present reference to the Full Bench has been occasioned by an order of the Division Bench dated 3 November 2014. Before we set out the issues which have been referred for adjudication by the Full Bench, a brief reference to the background in which the reference arose would be in order.

2. Clause 3 of the Uttar Pradesh Scheduled Commodities Distribution Order, 20041 provides that with a view to effecting a fair distribution of scheduled commodities, the State Government may issue directions under Section 3 of the Essential Commodities Act, 19552 to set up such number of fair price shops in an area and in the manner as it deems fit. Clause 4 requires that a fair price shop be run through such person and in such manner as the Collector, subject to the directions of the State Government, may decide. A person appointed to run a fair price shop under sub-clause (1) acts as an agent of the State Government. Moreover, under sub-clause (3), a person so appointed is required to sign an agreement, as directed by the State Government, regarding the running of a fair price shop in terms of the draft appended to the Control Order before the competent authority prior to the coming into effect of the appointment. Several provisions have been thereafter made in the Control Order for identification of families living below the poverty line, the issuance of ration cards, the quantities that may be purchased, increase in the

number of units and for dealing with malpractices, including in regard to the issuance of bogus ration cards. Clause 25 requires the agent to observe such conditions as the State Government or the Collector may, by an order in writing, direct from time to time in respect of opening of the shop, maintenance of stocks, supply and distribution of scheduled commodities, maintenance of accounts, keeping of registers, filing of returns, issuance of receipts and other matters. There is a prohibition on the transfer of an agency under Clause 26. Clause 27 provides for a penalty. In that clause, contraventions of the provisions of the Control Order, are liable to be punished in accordance with the orders issued by the State Government from time to time. Clause 28 provides for an appeal and is in the following terms:-

"28. Appeal. - (1) All appeals shall lie before the Concerned Divisional Commissioner who shall hear and dispose of the same or may by order delegate his/her powers to the Assistant Commissioner Food for hearing and disposing of the appeal.

(2) Any person aggrieved by an order of the Food Officer or the designated authority refusing the issue or renewal of a ration card or cancellation of the ration card may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(3) Any agent aggrieved by an order of the competent authority suspending or cancelling agreement of the fair price shop may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(4) No such appeal shall be disposed of unless the aggrieved person or agent has been given a reasonable opportunity of being heard.

(5) Pending the disposal of an appeal the Appellate Authority may direct that the order under appeal shall not take effect until the appeal is disposed of."

3. In sub-clause (3) of Clause 28, an agent who is aggrieved by the order of a competent authority, suspending or cancelling an agreement of a fair price shop, has the remedy of an appeal to the appellate authority. Under Clause 28(5), the appellate authority is empowered, pending the disposal of the appeal, to direct that the order under appeal shall not take effect until the appeal is disposed of.

4. The issue which forms the bone of contention is whether, upon the suspension or cancellation of a licence of a fair price shop and pending the disposal of an appeal, it is open to the State Government to make an interim or temporary arrangement by the appointment of a new fair price shop holder. Initially, this issue came up for consideration before a Division Bench of this Court at Lucknow consisting of Uma Nath Singh and Anil Kumar, JJ in Vinod Kumar Mishra Vs. State of U.P., through Secretary, Food & Civil Supplies & Ors.3 On 16 September 2011, the Division Bench issued an interim direction in the following terms:-

"We have heard learned counsel for parties and perused the pleadings of writ petition.

Of late we are noticing that on account of allotment of fair price shops on temporary basis, though under the resolution of Gaon Sabha, as a result of cancellation of earlier licence of fair price

shops, lots of unnecessary litigations have been generated at the cost of public exchequer. Therefore, we direct the Principal Secretary, Food and Civil Supplies to ensure that till the matter is finally settled and the Statutory Appeal is decided, the fair price shops shall not be allotted on adhoc basis and shall be attached only to some other neighbouring fair price shops, in order to avoid creating third party rights.

This order shall be circulated to all the Divisional Commissioners and District Collectors forthwith for compliance by the Principal Secretary.

Registrar of this Court shall issue a copy of this order to the Principal Secretary, Food and Civil Supplies immediately for compliance.

List the matter on 28.09.2011 for arguments."

5. On 19 October 2011, another writ petition, Jagannath Upadhyay Vs. State of U.P., through Principal Secretary, Food & Civil Supplies & Ors.4, came up before the same Division Bench at Lucknow. The Division Bench in that case was seized of a grievance that though the appeal filed under Clause 28(3) was pending before the Commissioner, the State had proceeded to create third party rights. This, the Division Bench held, was contrary to the directions issued on 16 September 2011 at the interim stage in Vinod Kumar Mishra (supra). Though the directions which were issued on 16 September 2011 were of an interlocutory nature, this time, the Division Bench in Jagannath Upadhyay's case disposed of the writ petition finally in terms of the interim directions in the earlier case with the following observations:-

"Learned counsel for petitioner submitted that though appeal of petitioner filed under Order 28(3) of the U.P. Schedule Commodities Distribution Order, 2004 is pending before the Commissioner concerned still the respondents have proceeded to create a third party right which is contrary to the directions given in order dated 16.09.2011 passed in Writ Petition No. 11977 (MB) of 2010 (Vinod Kumar Mishra Vs. State of U.P. & others).

Thus, we take a serious view of the matter and with a note of caution dispose of this writ petition with direction to authorities to act in terms of the directions as contained in the aforesaid order which on reproduction reads as under:-

"We have heard learned counsel for parties and perused the pleadings of writ petition.

Of late we are noticing that on account of allotment of fair price shops on temporary basis, though under the resolution of Gaon Sabha, as a result of cancellation of earlier licence of fair price shops, lots of unnecessary litigations have been generated at the cost of public exchequer. Therefore, we direct the Principal Secretary, Food and Civil Supplies to ensure that till the matter is finally settled and the Statutory Appeal is decided, the fair price shops shall not be allotted on ad hoc basis and shall be attached only to some other neighbouring fair price shops, in order to avoid creating third party rights.

This order shall be circulated to all the Divisional Commissioners and District Collectors forthwith for compliance by the Principal Secretary.

Registrar of this Court shall issue a copy of this order to the Principal

Secretary, Food and Civil Supplies immediately for compliance.

List the matter on 28.09.2011 for arguments."

Writ petition thus stands disposed of."

6. Subsequently, Vinod Kumar Mishra's case (supra), in which interim directions had been issued on 16 September 2011, was heard by the Division Bench at Lucknow and was disposed of with the following observations:-

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

The licence of fair price shop of the petitioner was set aside by the appellate forum. Thereafter, it was was restored and after restoration, the same was granted in favour of the private-opposite party.

Submission of learned counsel for the petitioner is that in view of settled law, the licence of fair price shop cannot be granted in favour of the private opposite party and it should have been restored in favour of the petitioner. In case, it is so, that aspect of the matter can be looked into by the District Supply Officer concerned. Accordingly, we give liberty to the petitioner to represent his cause before the District Supply Officer, District-Barabanki, who shall look into the matter and take a decision with regard to present controversy, in accordance with law, by passing a speaking and reasoned order expeditiously say preferably within a period of two months from the date of receipt of certified copy of the present order and communicate the decision to the petitioner.

Subject to above, the writ petition is disposed of finally."

7. Thus, it is clear that in the original case in which an interim direction had been issued, namely, Vinod Kumar Mishra (supra), the final judgment of the Division Bench was that liberty was granted to the petitioner to represent his cause before the District Supply Officer, who was directed to take a fresh decision with a reasoned and speaking order. However, as we have noted above, in the meantime, in Jagannath Upadhyay's case (supra), the interim direction in Vinod Kumar Mishra's case, had been converted into a final operative direction. The consequence thereof was a direction to the effect that the Principal Secretary (Food and Civil Supplies) would ensure that until an appeal is decided under Clause 28(3), the fair price shop should not be allotted on an adhoc basis and units of the existing fair price shop shall be attached only to some other neighbouring fair price shop without creating third party rights. In Wahid Khan Vs. State of U.P. and others5, which was decided on 21 June 2012, the authorization of the petitioner for conducting a fair price shop had been cancelled and an appeal was pending. In the writ petition, it was urged that pending the disposal of the appeal, no third party rights should be created. The Division Bench, while dismissing the writ petition, had observed as follows:-

"A fair price shop is settled under the Control Order 2004 for the benefit of the card holders belonging to the poor strata of the society. After the cancellation of the authorization, the fair price shop owner is not left with any rights, to seek a direction for restraining the district administration to allot the shop to any other person during the pendency of the appeal. Where no interim order is granted by the Commissioner, the Court is not

required to act against the very object of the scheme to provide for essential commodities at reasonable price to the poor persons on their door steps. The restriction on making fresh allotment causes extreme hardships to the poor persons for whose benefit the fair price shop is run. Such an order is against the object of public distribution system. It will be a travesty of justice to punish the poor people to travel long distances to collect the scheduled commodities from the fair price shop to which their cards are attached, until the appeal of the person, who has been found guilty of the charges of irregularities, is decided."

8. Subsequently, another writ petition, Rajeshwar Prasad Vs. State of U.P. and 3 others6, came up before a Division Bench of this Court. In that case, the authorization of the petitioner to sell scheduled commodities had been cancelled for irregularities in distribution after a notice to show cause. The petitioner filed an appeal before the Commissioner under Clause 28 of the Control Order and thereafter moved this Court, seeking directions restraining the State from settling the shop afresh until his appeal was decided. In support of the writ petition, reliance was placed on the general mandamus, which was issued at Lucknow in Jagannath Upadhyay's case (supra). The Division Bench by a judgment dated 16 July 2014 held as follows :-

"5. We have, sitting in Division Bench, issued several orders clarifying that no general mandamus can be issued by this Court. The High Court in its extraordinary jurisdiction must confine itself to the facts of the case and issues raised before it. The Supreme Court has also cautioned that the High Courts should not ordinarily, unless it is imperative and in the interest of general public, issue any such directions, which result into serious injustice to large number of people. Where the fair price shop is cancelled and an appeal is pending, the card holders are attached to some other shops, which in rural areas are at the distances of several kilometers. The pendency of the appeals forces thousands of the beneficiaries under the Scheme living below poverty line and seeking benefit under the Antyodaya and Anyapurna Schemes to travel a long distance to collect their entitlement of scheduled commodities.

6. The object of the Public Distribution Scheme is to provide scheduled commodities to the beneficiaries at their doorsteps regularly on fair and reasonable prices. The beneficiaries cannot be punished on account of irregularities committed by the fair price shop dealer, who has suffered cancellation of the licence and has filed an appeal. In such cases fresh shops should be immediately settled for the benefits of the beneficiaries under the Scheme subject to the result of the appeal.

7. We find that the general mandamus issued on 19.10.2011 is causing injustice to the general public specially poor persons, who have to travel several kilometers until the person, who has committed irregularities, gets a decision in his appeal.

8. We thus declare that firstly no such general mandamus can be issued by the Court and secondly the Court is not required to pass orders which ultimately result into hardships to the people at large.

9. If any Government Order has been issued in compliance with the directions of this Court dated 19.10.2011 by which a

general mandamus is issued, such orders shall be forthwith withdrawn. The State Government will give publicity to the orders with directions that in cases of cancellations of fair price shop, the fresh fair price shop should be immediately settled for the convenience of the general public.

10. This writ petition has been filed within a few days of filing the appeal. There is no such delay much less unreasonable delay to interfere in the matter.

11.The writ petition is accordingly dismissed. A copy of the order will be given to Chief Standing Counsel for compliance."

9. The writ petition was accordingly dismissed. The Division Bench also observed that if any Government Order had been issued in compliance with the directions issued on 19 October 2011 in Jagannath Upadhyay's case (supra), that shall be withdrawn forthwith.

10. A Division Bench of this Court at Lucknow considered the provisions of Clause 28 of the Control Order in Vinod Kumar Vs. State of U.P. and others7. That decision was rendered on 19 August 2014. The Division Bench, while construing the provisions of Clause 28, observed as follows:-

"Clause 28 (3) provides for an appellate remedy before the Appellate Authority against an order of suspension or cancellation of an agreement in respect of a fair price shop. Under sub-clause (5), the Appellate Authority is duly empowered, pending disposal of the appeal, to direct that the order against which an appeal has been filed, shall not take effect until the appeal is disposed of. Clearly, therefore, the Appellate Authority is vested with the power to grant a stay, pending disposal of an appeal, against an order of cancellation or, as the case may be, suspension of an agreement in respect of a fair price shop. Hence, the licence holder is entitled to pursue the remedy which is provided in Clause 28 of the Control Order. The Control Order has been made in accordance with the provisions of Section 3 of the Essential Commodities Act, 1955. A person aggrieved by the suspension or cancellation of the licence is entitled to move the Appellate Authority for an interim stay. If the licence holder either does not move an application for an interim stay, or having moved an application fails to obtain an order of stay, it would not then be possible for such a licence holder to urge that pending disposal of an appeal filed by him, no steps should be taken for making alternate arrangements until the appeal is finally disposed of. The mere filing of an appeal, as the provisions of Clause 28 would indicate, does not operate as a stay of the order which is impugned. Unless an application for the grant a stay is moved before the Appellate Authority and the Appellate Authority stays the order of suspension or cancellation, the order of suspension or cancellation, as the case may be, would continue to remain in force until the appeal is finally disposed of. Having regard to this position in law which clearly emerges from Clause 28, it would not be correct to hold that the mere filing of an appeal before the Appellate Authority would either operate as a stay of the order of suspension or cancellation or preclude the State from making alternate arrangements for the due distribution of essential commodities pending disposal of the appeal. The State

may either attach the card holders of the erstwhile licensee, whose licence has been suspended or cancelled, to another fair price shop or may appoint a fresh licensee to whom the fair price shop may be allotted subject to the result of the appeal. In these matters, it is necessary not to lose sight of the fact that the private interest of the licence holder is always subordinate to the public interest in ensuring the due and proper supply of food grains to residents of the area. In a given case, the State may, if it is of the view that an order of attachment of the card holders to another fair price shop would be administratively efficient, pass such an order. However, it may well happen that attaching the card holders to another fair price shop would entail and require the card holders to traverse a long distance which would be inconvenient and ultimately result in seriously affecting the right of the residents to an efficient supply of food grains under the public distribution system. Ultimately, it is for the State to take a considered decision having regard to the predominant aspect of public interest in each case."

11. We may note, at this stage, that the Division Bench at Lucknow duly took note of the interim order which was passed in Vinod Kumar Mishra (supra) on 16 September 2011 and to the final order disposing of that petition on 12 December 2011. The Division Bench also took note of the judgment of a Division Bench in Wahid Khan (supra). The attention of the Division Bench at Lucknow was, however, not drawn to the fact that the interim directions in Vinod Kumar Mishra's case had been embodied in the form of a final operative judgment in Jagannath Upadhyay's case. Had this fact been drawn to the attention of the Division Bench, it would be reasonable to assume that the conflict between two Division Benches would have resulted in a reference to a Full Bench.

12. The present reference before the Full Bench has been occasioned as a result of the conflict between the views expressed in the final judgment of the Division Bench in Jagannath Upadhyay's case and in Rajeshwar Prasad. We may also note that the view of the Division Bench in Wahid Khan is along the same lines as in Rajeshwar Prasad. The following questions have been referred for adjudication by the Full Bench in this reference :-

"(a) Whether the Division Bench in the case of Rajeshwar Prasad (supra) was justified in declaring the mandamus issued by a coordinate Bench as bad and thereby directing that any Government Order issued in pursuance thereof may be withdrawn forthwith or it should have referred the matter to a larger bench.

(b) Whether both the Division Benches in the case of Jagannath Upadhyay (supra) and Rajeshwar Prasad (supra) were correct in issuing general mandamus either way in the matter of fresh settlement of shop during the pendency of the appeal before the Commissioner or not."

13. We proceed to deal with each of the two questions separately.

Re Question '(a)'

14. The narration in the earlier part of this judgment would indicate that in Jagannath Upadhyay's case (supra), a Division Bench of this Court in its judgment dated 19 October 2011 had

followed the interim directions issued in Vinod Kumar Mishra's case (supra) on 16 September 2011. The interim directions were to the effect that when an agent, whose authorization to conduct a fair price shop had been terminated, files an appeal under Section 28(3) of the Control Order, the Principal Secretary, Food and Civil Supplies, shall ensure that until the matter is finally settled and the statutory appeal is decided, the fair price shop shall not be allotted on an adhoc basis and that the unit holders would only be attached to a neighbouring fair price shop in order to avoid creating third party rights. In Jagannath Upadhyay's case, the Division Bench adopted the interim directions in the earlier decision and converted them into a final operative order in its judgment dated 19 October 2011. Thus, what was initially an interim direction assumed the character of a final judgment albeit in another case. Once this was the position, and when a subsequent Division Bench hearing Wahid Khan's case was apprised of the final judgment dated 19 October 2011 in Jagannath Upadhyay's case, the judgment of the coordinate Division Bench ought to have been followed or, if the Division Bench had reservations about the correctness of the view, a reference ought to have been made to the Full Bench. The judgment in Wahid Khan's case was rendered on 21 June 2012 and expressly refers to the final judgment dated 19 October 2011 in which a general mandamus had been issued. Subsequently, in Rajeshwar Prasad's case, which was decided on 16 July 2014, once again a reference was made to the final decision in Jagannath Upadhyay's case. Despite the fact that there was a final judgment in Jagannath Upadhyay's case, the Division Bench observed in its operative directions that the Government Order which had been issued in compliance with the directions of the Court on 19 October 2011, shall be withdrawn forthwith. On merits, the Division Bench took the view that the general mandamus which was issued on 19 October 2011 was causing injustice to the general public, specially those who are below the poverty line who had to travel large distances until the agent, whose authorization has been cancelled for irregularities, gets a decision on his appeal.

15. We will, as a larger bench, be required to consider the merits of the issues separately. But insofar as question '(a)' is concerned, this Court has to deal with the issue of propriety and procedure. The law on the issue is clearly well settled. An earlier judgment of a coordinate Bench binds a subsequent Bench of the High Court. If a subsequent Bench, considering the same issue is of the view that the earlier decision is erroneous or has failed to consider the correct legal position, the correct course of action is to make an order referring the case to a larger bench. Consequently, if a Single Judge is inclined to disagree with the view of another Single Judge, a reference is made to a Division Bench and if a Division Bench is unable to subscribe to the view of an earlier Division Bench on the subject, a reference has to be made to the Full Bench. This is not merely a matter of procedure but of judicial propriety which is founded on sound considerations of public policy. Adjudication of cases in the High Court must have an element of certainty. Consistency in judicial decision making is a hallmark of a system based on the rule of law. Errors in judicial decision-making can be resolved by adopting recourse to

well settled judicial procedures within the Court which consist of making a reference to the larger bench.

16. This position has been set out in several decisions of the Supreme Court. In Tribhovandas Purshottamdas Thakkar Vs. Ratilal Motilal Patel8, while dealing with a case in which a Judge of the High Court had failed to follow an earlier judgment of a larger bench in the same Court, the Supreme Court observed as follows :-

"...Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in Bhagwan v. Ram Chand: (AIR p. 1773, para 18).

"18. ... It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be re-considered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

17. We may advert to the decision in State of Tripura Vs. Tripura Bar Association and others9, in which the following position in law was laid down:-

"We are of the view that the Division Bench of the High Court which has delivered the impugned judgment being a coordinate Bench could not have taken a view different from that taken by the earlier Division Bench of the High Court in the case of Durgadas Purkayastha. If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger Bench. We have perused the reasons given by the learned Judges for not referring the matter to a larger Bench. We are not satisfied that the said reasons justified their deciding the matter and not referring it to the larger Bench..."

18. In Usha Kumar Vs. State of Bihar and others10, the Supreme Court observed as follows:-

"...One Division Bench cannot ignore or refuse to follow the decision of an earlier Division Bench of the same Court and proceed to give its decision contrary to the decision given by the earlier Division Bench. If it is inclined to take a different view, a request should be made to the Chief Justice to refer the same to a Full Bench..."

19. For these reasons, we answer the first question, by holding that the Division Bench which decided the issue in Rajeshwar Prasad (supra) was not justified in declaring the mandamus issued by a coordinate Bench as bad and thereby directing that any Government Order issued in pursuance thereof may be withdrawn forthwith. The correct course of action for the Division Benches which

heard Wahid Khan and Rajeshwar Prasad (supra), if they found themselves unable to agree with the earlier decisions, was to have referred the matter to a larger bench.

Re Question '(b)'

20. The second question which has been referred for decision by the Full Bench essentially turns upon the merits of the issue. The Control Order provides in Clause 28(3) a remedy of an appeal to an agent who is aggrieved by the suspension or cancellation of his agreement for a fair price shop. Sub-clause (5) of Clause 28 contemplates that pending the disposal of the appeal, the appellate authority may direct that the order under appeal shall not take effect until the appeal is disposed of.

21. Where a person whose authorization to conduct a fair price shop is aggrieved either by the suspension or cancellation of that authorization, such a person is entitled to pursue the remedy of a statutory appeal. In such an appeal, a provision for seeking an interim stay has been made in sub-clause (5) of Clause 28 of the Control Order. If the order of suspension or cancellation is not stayed, it necessarily continues to remain in force and effect pending the disposal of the appeal. If no application for stay is made at all, the same consequence would follow. Equally, if an application for stay has been made and refused, the order of suspension or cancellation, as the case may be, would continue to remain in force. The mere filing or pendency of an appeal or, for that matter, even the pendency of an application for stay in the appeal does not operate to stay the order of suspension or cancellation. An order of suspension or cancellation would continue to remain in effect unless and until it is either stayed at the interim stage under Clause 28(5) or upon the order being set aside at the final disposal of the appeal. In view of this clear position in law, it is not open to a person whose authorization is suspended or cancelled to seek an order from the writ court under Article 226 of the Constitution restraining the State from making alternate arrangements despite the fact that no stay operates during the pendency of the appeal. If a stay has been refused, undoubtedly, the agent whose authorization has been suspended or cancelled, may take recourse to his lawful remedies but unless and until the operation and effect of the suspension or cancellation has been stayed or set aside, the plain consequence in law is that it would continue to remain in full force and effect.

22. The provisions of the Control Order are conceived in public interest. The object and purpose of the Control Order is to enable the State to discharge its fundamental duty and obligation of ensuring the equitable distribution of scheduled commodities. The Control Order is conceived in the interest of those to whom the public distribution system is intended, who belong to the marginalized sections of society, including persons below the poverty line. It is their interest which is paramount. The State has to make proper arrangements to ensure the equitable distribution of essential commodities to those persons and must be guided by the public interest in securing the equitable distribution of food grains, which is the paramount concern. It would, to our mind, be a travesty of justice to hold that a person whose authorization has been suspended or cancelled for irregularities in the distribution of food grains, has a right or entitlement to

prevent the State from making alternate arrangements pending the disposal of the appeal, even though the order of suspension or cancellation has not been stayed. The person whose authorization has been cancelled or suspended is merely constituted as an agent of the State Government by Clause 4(2) of the Control Order. His rights and entitlement can certainly not be paramount over the public interest in securing proper distribution of food grains to the marginalized sections of society.

23. For these reasons, we hold that the Division Bench in Jagannath Upadhyay's case was not justified or, for that matter, correct in law in issuing a general mandamus to the effect that the Principal Secretary, Food and Civil Supplies shall ensure that till a statutory appeal is decided, the fair price shop shall not be allotted on an adhoc basis and shall be attached to some other neighbouring fair price shop. What arrangement should be made when an authorization has been suspended or cancelled, is an administrative matter for the State which has to bear in mind issues of public interest and local need over and above the private interest. In consequence, the Government Order which was issued on 10 July 2014 in pursuance of the directions issued by the Division Bench in Jagannath Upadhyay's case (supra), decided on 19 October 2011, would have no meaning and must be recalled by the Principal Secretary, Food and Civil Supplies forthwith. As regards, the general mandamus which was issued by the Division Bench in Rajeshwar Prasad (supra), we have already held that if the Division Bench were to disagree with the earlier decisions, the correct course of action would have been to refer the matter to the Full Bench. Since, eventually the conflicting views have been referred to the Full Bench, we have put the matter to rest by this judgment.

24. We, accordingly, hold that the authorization granted to a person to conduct a fair price shop only constitutes such a person as an agent of the State Government under Clause 4(2) of the Control Order. If the authorization is suspended or cancelled, a remedy of an appeal is provided in Clause 28(3). During the pendency of an appeal, a provision has been made in Clause 28(5), for seeking a direction that the order under appeal shall not take effect until the appeal is disposed of. If the order of suspension or cancellation has not been stayed pending the disposal of the appeal, the cancellation or suspension, as the case may be, shall continue to remain in effect. The mere filing or pendency of an appeal or an application for stay does not result in a deemed or automatic stay of the order of suspension or cancellation. There is no such deeming provision. In such a situation, the State is at liberty to make necessary administrative arrangements to ensure the proper distribution of scheduled commodities based on the public interest in the proper functioning of the Public Distribution Scheme and on an assessment of local needs and requirements that would sub-serve the interest of the beneficiaries. We, therefore, hold that the interim mandamus in Vinod Mishra and the judgment in Jagannath Upadhyay's case (supra) which took a contrary view do not reflect the correct position in law and would consequently stand overruled. The Principal Secretary, Food and Civil Supplies, shall now on the basis of the present judgment, issue a circular to all the Divisional Commissioners and concerned officials of the State so that necessary steps in compliance are taken. The

learned Standing Counsel has apprised the Court that the Government Order dated 10 July 2014 has since been withdrawn by the Principal Secretary, Food and Civil Supplies on 26 November 2014 and a new Government Order has been issued.

25. The reference to the Full Bench is answered in the aforesaid terms. The writ petition shall now be placed before the regular Bench in accordance with the roster of work for disposal in the light of this decision.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2015

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

C.M.W.P. No. 58619 of 2014

Smt. Afroz Jahan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena

Counsel for the Respondents:
C.S.C., Sri Chandra Pal Singh, Sri Umesh Vats.

U.P. Kshetra Panchayat & Zila Panchayat Adhiniyam 1961-Section 9-A-Temporary appointment of Pramukh-vacancy caused-on confinement in jail-District Magistrate by exercising power appointed petitioner-subsequent removal and appointment of respondent-3 and the respondent-4-held illegal-after temporary arrangement-the District Magistrate became functus officio-unless temporary Pramukh fails to discharge its duty-order quashed.

Held: Para-11

In the instant case, the petitioner was discharging his duties as officiating Pramukh. There was no occasion for the District Magistrate to exercise further powers under Section 9-A of the Act of 1961 since no temporary vacancy had occurred. Merely because some members had made a complaint against the petitioner will not allow or justify the District Magistrate to pass a fresh order under Section 9-A of the Act. For removal of the Pramukh including an officiating Pramukh, the procedure to be followed would be by bringing a motion of no confidence under Section 15 of the Act.

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

1. Sri Yogendra Singh alias Bhura was elected as the Pramukh of the Kshetra Panchayat Dilari, District Moradabad. It transpires that a criminal case, being Case Crime No.142 of 2013 under Section 147, 148, 149 and 302 of the Indian Penal Code was instituted against this Pramukh who was, subsequently, arrested and sent to jail. At the present moment, the said Pramukh continues to languish in jail and has not been bailed out on account of which a temporary vacancy has occurred in the office of the Pramukh and necessary arrangement is required to be made by the District Magistrate under Section 9-A of the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 (hereinafter referred to as the "Act").

2. The District Magistrate, in exercise of his powers under Section 9-A of the Act, issued an order dated 27.01.2014 appointing the petitioner, who an elected member of the kshetra panchayat, as an officiating Pramukh.

3. It transpires that some complaint was given by certain members against the

petitioner and, based on this complaint, the District Magistrate passed a fresh order dated 30.09.2014 removing the petitioner from the post of officiating Pramukh and appointing the Sub-Divisional Magistrate as the officiating Pramukh. Subsequently, by another order dated 15.10.2014 the District Magistrate modified its order dated 30.09.2014 and appointed Smt. Sazida Begum-respondent no.4 as the officiating Pramukh. The petitioner, being aggrieved by the action of the District Magistrate in removing the petitioner and appointing respondent no.3 and thereafter, respondent no.4 as officiating Pramukh has filed the present writ petition.

4. We have heard Sri Amit Saxena, the learned counsel for the petitioner, Sri Umesh Vats, the learned counsel for respondent no.4 and the learned Standing Counsel for respondents no.1, 2 and 3.

5. Learned counsel for the petitioner submitted and contended vehemently that once the power has been exercised by the District Magistrate under Section 9-A of the Act, he becomes functus officio and could not pass another order removing the petitioner from the post of officiating Pramukh and appointing another member as the officiating Pramukh. It was contended that power can only be exercised when there is a temporary vacancy and, in the absence of a temporary vacancy it was not open to the District Magistrate to exercise the powers afresh by removing him on some unfounded charges and appointing another member to officiate as the Pramukh. It was further contended that assuming without admitting that the District Magistrate had the powers under Section 9-A, the said order was violative of the principles of natural justice as the impugned order clearly indicated that he was removed on a certain charge made by certain members to which he was entitled to submit a reply and be given an opportunity of hearing, which in the instant case had not been done.

6. On the other hand, the learned Standing Counsel for respondents no.1, 2 and 3 and Sri Umesh Vats, the learned counsel for respondent no.4 contended that the District Magistrate has the power to make arrangement as he thinks fit and, in this regard, can change the temporary Pramukh if he finds that such arrangement so made was not for the benefit of the kshetra panchayat. The learned counsel contended that the District Magistrate has been given the power to make temporary arrangement to appoint a person as an officiating Pramukh under Section 9-A of the Act where the Pramukh was unable to discharge his functions owing to absence, illness or any other cause and, in view of Clause 16 of the U.P. General Clauses Act, where a power to make the appointment is conferred upon an authority, such power to appoint also includes the power to suspend or dismiss any person so appointed in exercise of that power. It was contended that in the light of Clause 16 of the U.P. General Clauses Act, the District Magistrate had the power to remove the officiating Pramukh.

7. Having heard the learned counsel for the parties, it would be appropriate to have a look at Section 9-A, which was substituted by U.P. Act No.44 of 2007. For facility, the said provision is extracted hereunder:

"9-A. Temporary arrangement in certain cases. - When the Pramukh is unable to discharge his functions owing to

absence, illness or any other cause, the District Magistrate may, by order, make such arrangement, as he thinks fit, for discharge of the functions of the Pramukh until the date on which the Pramukh resumes his duties."

8. From a perusal of the aforesaid provision, it is apparently clear that where the Pramukh is unable to discharge his functions owing to absence, illness or any other cause, the District Magistrate would make such arrangement as he thinks fit for the discharge of the functions of the Pramukh until the date on which the Pramukh resumes his duty. The said provision makes it apparently clear and explicit without any room for doubt that the District Magistrate has been conferred the power only when a temporary vacancy on the post of Pramukh arises and that such power cannot be exercised where such temporary vacancy is not available.

9. In the instant case, the Pramukh was arrested and sent to jail. Consequently, the said Pramukh could not discharge the functions of the Pramukh and the work of the kshetra panchayat was suffering. Therefore, a temporary vacancy arose and the District Magistrate was justified in exercising the powers and make such arrangement as he thought fit for the discharge of the functions of the Pramukh by appointing the petitioner to officiate as the Pramukh.

10. In our view, once this power has been exercised the District Magistrate becomes functus officio and could not pass any further order, inasmuch as the said temporary vacancy gets filled up. In the event, the temporary Pramukh failed to discharge his functions owing to absence, illness or any other cause, in that scenario, the District Magistrate gets fresh powers to order and make arrangement as he thinks fit for the discharge of the functions of the Pramukh and not otherwise.

11. In the instant case, the petitioner was discharging his duties as officiating Pramukh. There was no occasion for the District Magistrate to exercise further powers under Section 9-A of the Act of 1961 since no temporary vacancy had occurred. Merely because some members had made a complaint against the petitioner will not allow or justify the District Magistrate to pass a fresh order under Section 9-A of the Act. For removal of the Pramukh including an officiating Pramukh, the procedure to be followed would be by bringing a motion of no confidence under Section 15 of the Act.

12. Clause 16 of the U.P. General Clauses Act will not be applicable, inasmuch as the said power can only be exercised, if no different intention appears under the Act. The Act gives power to the District Magistrate to make temporary arrangements. The power to remove a Pramukh lies with the members of the kshetra panchayat by bringing a motion of no confidence against the Pramukh under Section 15 of the Act.

13. Consequently, we are of the opinion that the District Magistrate is denuded of his powers for removal of an officiating Pramukh appointed by him under Section 9-A of the Act.

14. In view of the aforesaid, the District Magistrate becomes functus officio the moment he passes an order under Section 9-A of the Act and that the District Magistrate can exercise his

powers afresh when another temporary vacancy occurs.

15. The respondents concede that the District Magistrate could not have appointed a Sub-Divisional Magistrate and that only a member of the kshetra panchayat could be appointed as a temporary Pramukh as held by a Division Bench of this Court in Smt. Mamta Kanaujia and others Vs. State of U.P. and others, 2009 (3) ALJ 339.

16. In the light of the aforesaid, the impugned orders dated 30.9.2014 and 15.10.2014 cannot be sustained and are quashed.

17. The writ petition is allowed. The District Magistrate is directed to give the charge of officiating Pramukh to the petitioner forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-A No. 60741 of 2010
Along with Writ-A No. 61524 of 2010, Writ-A No. 66305 of 2010, Writ-A No. 61529 of 2010

Hansraj Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri M.K. Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Recovery of excess amount-wrongly paid towards promotional pay-petitioners working as Tube well operator-given promotional pay w.e.f. 1990-while in 2006 after retirement-tress out wrong done in fixation-instead of 1994-benefit given from 1990-held-petitioner not being instrumental in getting excess amount-in view of contingencies contained in judgment of Apex Court in Rafiq Masih case-recovery not proper.

Held: Para-20
If there were possibility of any doubt being entertained with regard to the basic proposition with respect to recovery of amounts paid by mistake to employees, the same has been accorded a quietus by the above pronouncement of the Apex Court.

Case Law discussed:
(2004) 2 ESC, 791; 2011 (5) ESC 3035; 2014 (8) SCC 883; Civil Appeal No. 11527 of 2014 .

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Shri M.K. Mishra, learned counsel for the petitioners and Shri H.C. Pathak, learned Standing Counsel appearing for the contesting respondents.

2. The parties are agreed that all these four connected writ petitions involve the same controversy and stem from similar orders of recovery of pay made against the petitioners. Accordingly, and with their consent all these writ petitions are being disposed of by this common judgment.

3. Arguments have been advanced by the learned counsel for the parties treating Writ Petition No.60741 of 2010, to be the leading writ petition. However, it would be appropriate to briefly notice the facts of each case.

Writ Petition No.60741 of 2010.

4. All the petitioners are "Tube-well Operators" who were appointed in the Irrigation Department, Government of U.P. on different dates between 1968-1970. Upon successful completion of 14 to 16 years of satisfactory service they were granted promotional pay scale of Rs.1200-2040/- with effect from 01/5/1990. The petitioners subsequently retired from service in 2006-2007. However, during the course of finalization of their pension papers, it appears that the issuance of grant of the pay scale of Rs.1200-2040/- came up for consideration and the respondents took the view that the said promotional pay scale was liable to be granted to them with effect from 10/10/1994. These decisions of the State Government stand embodied in the orders 18/12/2006 and 22/12/2006. It was on the basis of the aforementioned orders that individual orders of recovery of differential pay scales were issued against the petitioners on 05/10/2007.

Writ Petition No.61524 of 2010.

5. The three petitioners in this writ petition are "Tube-well Operators" who were working in the Irrigation Department and had been similarly granted pay scale of Rs.1200-2040/- with effect from 01/5/1990. These petitioners who were appointed in the years 1969, 1971 and 1976 have since retired upon attaining the age of superannuation in the year 2008 and 2010. Upon the State Government passing the orders dated 18/12/2006 and 22/12/2006, orders of recovery dated 20/12/2008 (against the petitioner nos.1 and 2 herein) and 08/4/2008 (against the petitioner no.3) came to be passed.

6. Aggrieved by the aforesaid, the present writ petition came to be filed before this Court.

Writ Petition No.66305 of 2010.

7. Here too, the 15 petitioners are said to be "Tube-well Operators" who had been appointed in the years 1950, 1968, 1969 and 1970. Upon completion of their qualifying service, they were granted the promotional pay scale of Rs.1200-2040/- with effect from 01/5/1990.

8. They subsequently retired from service in the years 2007, 2008, 2009 and 2010.

9. Against all these petitioners and consequent to the orders dated 18/10/2006 and 22/12/2006, similar orders of recovery have been passed on 23/8/2007.

Writ Petition No.61529 of 2010.

10. The petitioners herein were appointed as "Tube-well Operators" in the Irrigation Department of the State of U.P. in the years 1971 and 1976. They too upon completion of 14 to 16 years of satisfactory service were granted the promotional pay scale of Rs.1200-2040/- with effect from 01/5/1990. They have since retired from service in the years 2009, 2010 and 2011. Consequent to the orders dated 18/12/2006 and 22/12/2006 orders of recovery dated 27/12/2007 were issued against the petitioners and which form subject matter of challenge in this writ petition.

11. The admitted facts as they emerge from the pleadings of the parties are:that the petitioners upon completion of 14 to 16 years of service as "Tube-well Operator" in the Irrigation Department were granted a promotional pay scale of Rs.1200-2040/-. Continuing in service,

they were granted revised pay scales and also retired from service in 2006-2007. It appears that with effect from 10/10/1994, the petitioners were drawing Rs.1320/- and with consequential pay revisions they at the time of retirement were earning Rs.5500/-. The pay scale of Rs.1200-2040/- in which the petitioners were drawing Rs.1320/- as on 10/10/1994, was granted to them with effect from 01/5/1990. It thereafter transpires that certain clarifications were received from the State Government with regard to the dates from which the said pay revisions were liable to be granted to the employees. These instructions are contained in the communications of the State Government dated 18/10/2006 and 22/12/2006. Pursuant thereto, all the petitioners were served with orders dated 05/10/2007 (Annexures-1 to 5) to the writ petition. These orders disclose the amounts which the petitioners had drawn and retained at the relevant time and what was actually payable to them as per the directives of the Government. These pay revision orders carried a note that insofar as the retired employees are concerned, the excess payment made to them shall be recovered in one installment. It is at this stage that the petitioners approached this Court.

12. From the records it transpires that these orders passed in 2007 were assailed before this Court only in 2010 and this Court while entertaining the writ petitions did not grant any interim protection to the petitioners. Consequently, the learned counsel for the petitioners informs, that the excess amounts have been recovered from all the petitioners.

13. Learned counsel for the petitioners has submitted that the excess amount which is sought to be recovered from the petitioners is an action which is clearly arbitrary, inasmuch as the pay revision is sought to be affected after more than 17 years. Elaborating his submissions, learned counsel for the petitioners submitted that the petitioners had been granted the benefit of Pay Band of Rs.1200-2040 with effect from 01/5/1990, and it was this decision which was sought to be reviewed by the orders dated 05/10/2007. He further submitted that the respondents nowhere contended that the said excess payments came to be made to the petitioners by virtue of concealment of any material facts and or any misrepresentation by them. He therefore, submitted, that the impugned orders of recovery were clearly arbitrary and are accordingly liable to be quashed by this Court.

14. Learned Standing Counsel while opposing these writ petitions has contended that the pay revisions came to be made pursuant to the clarifications received from the Statement Government and that therefore, the petitioners cannot be permitted to retain the excess amount. He further submitted that the petitioners do not dispute the correctness of the clarifications issued by the State Government and at least no such ground has been taken in the writ petition which may cloud the validity of the clarifications issued by the State Government.

15. In response to the above submissions, advanced on behalf of the State Government, the learned counsel for the petitioners while reiterating his submissions further urged that the action of the respondents was not only arbitrary, but was also discriminatory. He submitted that the recoveries sought to be made from the petitioners was confined to

employees posted only in six Districts out of the 71 Districts of the State of U.P. He further submitted that the State Government had taken no steps for recovery from the pay or pensionary benefits of the employees who had retired prior to 23/8/2007. These pleas of discrimination have been specifically taken in paragraphs 21 and 22 of the writ petition and the only traverse which the State Government has averred is that the discrepancies in grant of pay scales came to light only in the course of test checking in some districts and that accordingly it cannot be stated that the provisions of Articles 14 and 16 of the Constitution of India had not been violated.

16. The vexed question of recovery from the pay or pensionary benefits of employees has engaged the attention of not just this Court, but also the Apex Court from time to time. Following a long line of decision rendered by the Apex Court a Bench of this Court in Dr. Gopalji Mishra Vs. State of U.P. & Ors (2004) 2 ESC, 791 was pleased to hold as follows in paragraph 20:

"20. So far as the payment of excess amount, which the petitioner was not entitled is concerned, as there has been no misrepresentation or fraud on the part of the petitioner, he cannot be asked to refund the same. More so, petitioner might have spent the same considering his own money. Recovery thereof would cause great financial hardship to the petitioner. In such circumstances, recovery should not be permitted. [Vide Shyam Babu Verma and Ors. v. Union of India and Ors., (1994) 2 SCC 521 ; Sahib Ram v. State of Haryana and Ors., 1995 Suppl (1) SCC 18 and V. Gangaram v. Regional Joint Director and Ors., AIR 1997 SC 2776]".

17. The basic proposition laid down in the above decision has been consistently followed by this Court and again reiterated in Dr. Avinash Chand Goel Vs. State of U.P. & Ors, 2011 (5) ESC 3035. Following was laid down in paragraph 7:

"7. In the present case the established principle of law, that a person cannot be asked to repay the amount, which was not due to him, but has been paid to him without any misappropriation or fraud, is squarely applicable. In this case the petitioner had protested even to the alleged wrong fixation of the pay. He has given details of his entitlement for the correctness of the applicability of the pay scale and the benefits to be drawn by him under the orders of the Supreme Court in Chandra Prakash's case in, which not only the seniority but consequential benefits were also allowed to be given to those medical officers who were to be given promotions. In such case, the principle of law 'no work no pay' will not be applicable."

18. There is perhaps no need to burden this judgement with reference to further precedents, but in order to complete the sequence, it would be apposite to note that the seeming contradictions on certain judgments rendered by the Apex Court in this regard, led to a reference being made to a 3 Judges' Bench of the Supreme Court of India in State of Punjab & Ors. Vs. Rafiq Masih (White Washer) etc and the judgment handed down by the said Bench which stands reported in 2014 (8) SCC 883 in paragraph 13 held as under:

"13. Therefore, in our opinion, the decisions of the Court based on different

scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same rounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgements and the latter judgement."

19. Upon the reference being so returned, the main matter [Civil Appeal No. 11527 of 2014 State of Punjab and others -v- Rafiq Masih (Whitewasher) decided on 18.12.2014] came up for consideration before the Hon'ble Supreme Court of India again when the Court after taking note of all its earlier judgments handed down in this regard was pleased to record its conclusions in paragraph 12 as under:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

20. If there were possibility of any doubt being entertained with regard to the basic proposition with respect to recovery of amounts paid by mistake to employees, the same has been accorded a quietus by the above pronouncement of the Apex Court.

21. A perusal of the broad proposition laid down in the aforesaid judgment of the Apex Court establishes that the case of the petitioners would clearly fall within the categories (i), (ii) and (iii).

22. Consequently, the impugned orders of recovery dated 05/10/2007, passed in Writ Petition No.60741 of 2010, impugned orders dated 20/12/2008 and 08/4/2008, passed in Writ Petition No.61524 of 2010, impugned order dated 23/8/2007, passed in Writ Petition No.66305 of 2010, and impugned order dated 27/12/2007 passed in Writ Petition No.61529 of 2010 cannot be sustained and are liable to be quashed.

23. Accordingly, and in view of the above, all these writ petitions stand allowed.

24. All the impugned orders dated 05/10/2007, 20/12/2008 and 08/4/2008, 23/8/2007, and 27/12/2007, made against the petitioners shall stand quashed. The petitioners shall be entitled to the refund of sums recovered from them pursuant to the aforesaid orders.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-A No. 62804 of 2009

Afjal Khan ...Petitioner
Versus
State of U.P. & Ors. . ..Respondents

Counsel for the Petitioner:
Sri Anil Kumar Pathak

Counsel for the Respondents:
C.S.C.

U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules 1991-Rule 8(2)(b)-dismissal by evoking power under rule-without recording satisfaction about impractically to hold enquiry-rather self contradictory findings recorded-on one hand conclusive and adequate evidence-on other in departmental enquiry no person would come to give evidence-order not refer or rely upon any such material to justify impugned order-quashed.

Held: Para-15 & 16

15. More importantly, it must be borne in mind that when powers under provisions such as those contained in Clause (b) of Rule 8(2) are exercised, there must exists material before the authority which enables him to form an opinion that it is not reasonably practicable to hold the departmental inquiry. No such material appears to have been in existence at the time when the impugned order was passed. At least, the order does not refer to or rely upon any such material. Nor was any such material laid before this Court to justify the passing of the order impugned.

16. In the opinion of the Court, the circumstances and the nature of the persons who were likely to be involved in bringing home the charge against the petitioner were clearly present and there was no material on the basis of which a reasonable person could have come to a conclusion that it was not reasonably practicable to hold a regular inquiry against the petitioner.

Case Law discussed:
2014 (13) SCC 244; SCC p. 369, para 5.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The challenge in the present writ petition is to an order dated 9.2.2009 dismissing the petitioner, who was a Constable in the Armed Police, from service. The order itself has been passed in exercise of powers conferred by Rule 8(2)(b) of the U.P. Police Officers of Subordinate Rank (Punishment And Appeal) Rules, 1991 (hereinafter referred to as the "Rules, 1991"). The provision aforementioned confers discretion upon the Authority to dispense with the inquiry contemplated and liable to be conducted before dismissing/removing a person or inflicting upon him the punishment of reduction in rank. A reading of the aforesaid provision shows that the said power is available to be exercised if the Authority is satisfied that for reasons recorded in writing, it is not practicable to hold such an inquiry. The provision in such sense is akin

to Article 311 (2) of the Constitution of India.

2. A reading of the impugned order establishes that the respondent No. 2 has chosen to exercise the said power on the ground that in the departmental proceedings, no person will come forward to give evidence. He further records that the continuance of the petitioner in service would have a deleterious effect on other employees of the Department.

3. A reading of the impugned order shows that on 5.2.2009, information with regard to the conduct of the petitioner was received at about 4:25 in the evening and when police authorities arrived on the scene, it is alleged, that the petitioner was found in an intoxicated state and that his rifle was placed against the wall. Finding the petitioner in such a state, the police authorities, who had arrived at the scene, took into their custody the weapon and ammunition on the person of the petitioner whereafter, he was taken for a medical examination to Lala Lajpat Rai Hospital, Kanpur. The impugned order further records that upon a medical examination being conducted, the authorities submitted a report which corroborated the fact of the Petitioner being under the influence of alcohol and in a state of inebriation during duty hours. The impugned order then proceeds to record various findings on the past conduct of the petitioner and concludes that the conduct of the petitioner was clearly unbecoming of a member of a disciplined force and that his continuance in service would clearly not be in the general interest of discipline in the Department and that the conduct of the petitioner clearly amounted to shaking the confidence which the members of the general public were entitled to expect from a member of a disciplined force.

4. It is in the aforesaid backdrop that ultimately the respondent No. 2 proceeds to record that no person would come forward to give evidence against the petitioner and in the absence of evidence being submitted against him he would get away scot free. The respondent No. 2 thereafter proceeds to impose the punishment of dismissal upon him by exercise of powers under Rule 8(2)(b) of the Rules, 1991.

5. Learned counsel appearing for the Petitioner has submitted that the impugned order is clearly illegal inasmuch as there was no material before the Respondent Authority which justified the formation of opinion that it was not "reasonably practicable" to hold the enquiry against the Petitioner. He would submit that the circumstances did not warrant the invocation of powers conferred by Rule 8 (2) (b) of the Rules, 1991. He has further submitted that the respondent has committed a manifest illegality inasmuch as on the one hand he records that there was more than ample evidence against the Petitioner and on the other that no one would come forward to depose against him.

6. Learned counsel appearing for the contesting respondents and opposing the writ petition has submitted that the petitioner's work and conduct was never satisfactory and that earlier too he had been suspended from duty in 1994 and that he was also imposed penalty in the year 1997. Referring to the material gathered in the course of inquiry into the above incident, the learned Standing Counsel further pointed out that on the

date of occurrence of the incident in question, the petitioner was found to be present in the Branch premises in a drunken state and is alleged to have misbehaved with the customers. Upon receiving such information, the police of P.S. Najirabad reached the bank premises and took him as also his rifle and ammunition into their custody. He submitted that the medical examination corroborated the fact that the Petitioner was intoxicated at the relevant time and the respondent was therefore justified in terminating the services of the Petitioner. He submitted that the invocation of powers under Rule 8(2)(b) of the Rules, 1991 was based upon the subjective satisfaction of the respondent and the same did not commend any interference by this Court under Article 226 of the Constitution of India.

7. Before proceeding further it would be apposite to notice the language of Rule 8 upon which the resolution of the instant controversy would pivot:-

"8.Dismissal and removal-- (1) No police officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.

2. No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules:

Provided that this rule shall not apply:

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry."

8. A bare reading of the aforesaid provision makes it apparent that the holding of an inquiry and initiation of disciplinary proceedings against a police officer who is liable to be dismissed/removed from service, reduced in rank is the normal rule. Rule 8(2)(b) is in the nature of an exception and resorted thereto is to be had where the authority is satisfied that it would not be "reasonably practicable" to hold an inquiry. The satisfaction must be born out from the record in light of the fact that the said provision itself mandates that the authority would record reasons in support of his conclusion that it is not reasonably practicable to hold such an inquiry.

9. In the opinion of the Court, no doubt the subjective satisfaction recorded by the Disciplinary Authority exercising power under Rule 8 (2)(b) is entitled to weight and is not be lightly interfered with. This because he is the man on the spot and has access to the material on the basis of which the opinion is formed. Here, however, a caveat needs to be inserted.

10. Firstly, when such an order is questioned in Court, the validity of the order cannot be upheld on the mere ipse dixit of the Disciplinary Authority. In

other words the satisfaction arrived at by the Disciplinary Authority cannot be arbitrary but must be based on objectivity. Secondly, the Court must be apprised of the material or the objective facts which compelled him to form the opinion that it was not "reasonably practicable" to hold the enquiry.

11. Considering a case which involved interpretation of the second proviso to Article 311 (2) of the Constitution of India (a provision in pari materia to Rule 8[2][b]) the Supreme Court of India in Risal Singh Vs. State of Haryana & ors. 2014 (13) SCC 244 reiterated the dictum laid down by the Apex Court in Union of India Vs. Tulsiram Patel [1985 (3) SCC 398] and Jaswant Singh Vs. State of Punjab [1991 (1) SCC 362] in the following terms:-

"6. We have already reproduced the order passed by the competent authority. On a bare perusal of the same, it is clear as day that it is bereft of reason. Non-ascribing of reason while passing an order dispensing with enquiry, which otherwise is a must, definitely invalidates such an action. In this context, reference to the authority in Union of India v. Tulsiram Patel2 is apposite. In the said case the Constitution Bench, while dealing with the exercise of power under Article 311(2)(b), has ruled thus: (SCC p. 503, para 130)

"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold' the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable' and not "impracticable'. According to the Oxford English Dictionary "practicable' means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible'. Webster's Third New International Dictionary defines the word "practicable' inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible'. Further, the words used are not "not practicable' but "not reasonably practicable'. Webster's Third New International Dictionary defines the word "reasonably' as "in a reasonable manner: to a fairly sufficient extent'. Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."

12. In Jaswant Singh v. State of Punjab the Court, while dealing with the exercise of power as conferred by way of exception under Article 311(2)(b) of the Constitution, opined as follows: (SCC p. 369, para 5)

"5. ... Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at SCR p. 270 of Tulsiram case: (SCC p. 504, para 130)

A disciplinary authority is not expected to dispense with a disciplinary

inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.'

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the authority concerned. When the satisfaction of the authority concerned is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the officer concerned."

8. After so stating, the two-Judge Bench quashed the order of dismissal and directed the appellant to be reinstated in service forthwith with the monetary benefits. Be it noted, it was also observed therein that it would be open to the employer, if so advised, notwithstanding the lapse of time, to proceed with the disciplinary proceedings.

9. Recently, in Reena Rani v. State of Haryana, after referring to the various authorities in the field, the Court ruled that when reasons are not ascribed, the order is vitiated and accordingly set aside the order of dismissal which had been concurred with by the Single Judge and directed for reinstatement in service with all consequential benefits. It has also been observed therein that the order passed by this Court would not preclude the competent authority from taking action against the appellant in accordance with law.

10. Tested on the touchstone of the aforesaid authorities, the irresistible conclusion is that the order passed by the Superintendent of Police dispensing with the inquiry is totally unsustainable and is hereby annulled. As the foundation founders, the order of the High Court giving the stamp of approval to the ultimate order without addressing the lis from a proper perspective is also indefensible and resultantly, the order of dismissal passed by the disciplinary authority has to pave the path of extinction."

13. It is in the above background that the order impugned here is liable to be judged. A perusal of the order assailed in this writ petition shows that the disciplinary authority has taken a self-contradictory stand. On the one hand, he records that there is conclusive and adequate evidence against the petitioner, and in the same breath, he proceeds to hold that in the departmental inquiry no person would come forward to give evidence against the petitioner.

14. It is not borne out from the record as to and on what material, this apprehension was based. Admittedly, the petitioner is alleged to have been apprehended at the branch of the Bank by the police authorities in a state of intoxication. Even it were assumed, for the sake of argument, that the members of the police force who apprehended the petitioner would not come forward, the bank officers and employees, who were witnesses to the incident were always there. The order of the Disciplinary Authority does not even whisper that an attempt was made to muster the statements of the members of the police party who had apprehended the petitioner at the bank premises and that they had refused. More fundamentally it was

admitted that the petitioner on being apprehended at the bank premises was taken to a hospital, where he underwent a medical examination. The result of the said medical examination proved that the petitioner was in a state of intoxication at the relevant time. The impugned order nowhere records as to why it was not practicable to either examine the attending doctors and other persons involved in the medical examination of the petitioner. The impugned order also does not record that it was impracticable to have the Medical Examination report proved.

15. More importantly, it must be borne in mind that when powers under provisions such as those contained in Clause (b) of Rule 8(2) are exercised, there must exists material before the authority which enables him to form an opinion that it is not reasonably practicable to hold the departmental inquiry. No such material appears to have been in existence at the time when the impugned order was passed. At least, the order does not refer to or rely upon any such material. Nor was any such material laid before this Court to justify the passing of the order impugned.

16. In the opinion of the Court, the circumstances and the nature of the persons who were likely to be involved in bringing home the charge against the petitioner were clearly present and there was no material on the basis of which a reasonable person could have come to a conclusion that it was not reasonably practicable to hold a regular inquiry against the petitioner.

17. Accordingly and in view of the above, this Court has no option but to record its conclusion that the impugned order cannot be sustained. In view of the above conclusions the present writ petition deserves to be and is consequently allowed.

18. The order dated 9.2.2009 is hereby quashed. However, in the facts and circumstances of the case, it is left open to the respondent to conduct a regular departmental inquiry against the petitioner in respect of the incident in question in accordance with the rules applicable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ-A No. 67791 of 2014

Shiv Sewak Prasad Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Denial of gratuity and pension-on ground of pendency of criminal case-admittedly no pecuniary loss caused to department based on allegations of criminal case-retirement benefit cannot be withheld.

Held: Para-8

It is also not the case of respondents that in the criminal case, there is any allegation of loss to the Government and there is recovery to be made from the petitioner, which is the only exception recognized by this Court in the above mentioned authorities where final

pension etc. may not be paid and respondents may withhold the same.

Case Law discussed:
W.P. No. 25554 of 2010; W.P. No. 26972 of 2013; W.P. No. 10099 of 2013; W.P. No. 17141 of 2012; Spl. Appeal D No. 1278 of 2013; Spl. Appeal D No. 416 of 2014; 2013 (9) ADJ 199 (DB).

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

1. Heard Shri Vijay Gautam, learned counsel for the petitioner, Shri Pankaj Rai, learned Additional Chief Standing counsel for the respondents and perused the record.

2. Considering the pure legal submission advanced by learned counsel for the petitioner, learned Additional Chief Standing Counsel stated that he does not propose to file any counter affidavit but would make oral submissions and the writ petition may be disposed of finally at this stage under the Rules of this Court, hence I proceed accordingly.

3. By means of present writ petition, the petitioner has prayed for quashing the impugned order dated 16.1.2014 passed by respondent no.5, by which the gratuity amount and other retiral benefits have been withheld on account of pendency of criminal case against the petitioner. He has further prayed for a direction to the respondent authorities to pay the gratuity amount and other post retiral benefits i.e. leave eacashment, insurance amount, arrears, difference of regular pension since 1.2.2014 and other amount to him along with interest.

4. It is contended by learned counsel for the petitioner that during pendency of a criminal case, retiral benefits and pension amount cannot be withheld and this issue has been considered and decided by this Court in Writ Petition No.25554 of 2010 (Lalta Prasad Yadav Vs. State of U.P. & 4 Ors.) decided on 15.5.2013, Writ Petition No.26972 of 2013 (Santosh Kumar Singh Vs. State of U.P. & 4 Ors.) decided on 14.05.2013, Writ Petition No. 10099 of 2013, HC 11AP Mishir Lal Vs. The state of U.P. and others, decided on 26.02.2013 and Writ Petition No. 17141 of 2012, HC 122 AP Deo Narain Singh Vs. State of U.P. and others, decided on 20.07.2012. It is also submitted that one of the judgment of learned Single Judge was also assailed before a Division Bench in Special Appeal No. 84 (Defective) of 2013, which has also been dismissed.

5. Learned Standing Counsel has placed reliance on a Division Bench judgment of this Court in State of UP and 2 ors vs. Jai Prakash Special Appeal Defective No.1278 of 2013 decided on 17.12.2013. The Division Bench relied on Regulation 351-A of the Civil Services Regulation, which empowers the State Government to recover from the pension the amount of loss found in judicial or departmental proceedings, to have been sustained by the Government by the negligence or fraud during his service. In the said case the Division Bench further found that Regulations 351, 351-A and 351-AA of the Civil Services Regulations operate in different fields. Regulation 351-AA specifically provides that where a departmental or judicial proceeding or any enquiry by the Administrative Tribunal is pending on the date of retirement, a provisional pension under Regulation 919-A may be sanctioned. Regulation 919-A (3) contains a specific

prohibition on the payment of Death-Cum-Retirement Gratuity to a government servant until the conclusion of departmental or judicial proceeding and the issue of final orders thereon.

6. However, Shri Vijay Gautam has placed reliance on a subsequent Division Bench judgment in Special Appeal Defective No.416 of 2014 (State of UP and 3 ors vs. Faini Singh) decided on 25.4.2014, by which the Division Bench has dismissed the appeal filed by the State Government. The relevant para-21 of the judgment is reproduced as below:-

"21. We may point out that a mere pendency of any judicial proceeding cannot be a ground to exercise the powers under Article 351AA read with Regulation 919A for withholding the retiral dues. The nature of allegations and the gravity of charge has to be taken into consideration by the competent authority before making an order to withhold the retiral dues. In case the pendency of any judicial proceeding is held to be sufficient, a minor offence or even a parking ticket may be a ground to withhold the pension of a retired employee. Such a situation is not contemplated under the powers conferred on the competent authority under the Civil Services Regulations."

7. Shri Vijay Gautam, learned counsel for the petitioner has further relied upon a Division Bench judgment in Narendra Kumar Singh vs. State of UP and others 2013 (9) ADJ 199 (DB) decided on 5.10.2013. The relevant paras of the judgment are reproduced as below:-

"9. In the case of D.S.Nakara Vs. Union of India, reported in (1983) 1 SCC, 305, the Apex Court has observed as under :

"From the discussion three things emerge : (1) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to article 309 and clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch....."

10. The ratio laid down in these cases had been subsequently followed by the Apex Court in series of its decisions including the case of Secretary, O.N.G.C. Limited Vs. V.U.Warrier, reported in 2005 (5) SCC, 245.

11. Division Bench of this Court in the case of Mahesh Bal Bhardwaj Vs. U.P. Co-operative Federation Ltd. and another (Supra) has held that gratuity and other post retiral dues, which the petitioner is otherwise entitled under the Rules, could not have been withheld either on the pretext that criminal proceedings were pending against the petitioner or for the reason that on the outcome of the criminal trial, some more punishment was intended to be awarded.

12. Learned Single Judge of this Court in the case of Radhey Shyam Shukla Vs. State of U.P. and another (Supra) has also taken the similar view and has held that mere pendency of the criminal proceedings would not authorize withholding of gratuity.

13. Division Bench of this Court in the case of Lal Sharan Vs. State of U.P. and others (Supra) has held that mere intention to obtain sanction for initiating disciplinary enquiry could not be basis for withholding the post retiral dues unless sanctioned, granted and the disciplinary proceedings started.

14. Apex Court in the case of State of Punjab and another Vs. Iqbal Singh, (Supra) has further held that since the cut of the pension and the gratuity adversely affects the retired employee as such order can not be passed without giving reasonable opportunity of making his defence.

15. We have also perused the Government Order dated 28.10.1980, annexure-CA-1 to the counter affidavit, which has been made basis for withholding the part of the pension and allowing the interim pension. This Government Order provides the payment of interim pension where the departmental proceeding are pending. None of the circular, Government Order or any provision has been referred before us, which provides that where no departmental proceeding is pending, still the pension can be withheld."

8. It is also not the case of respondents that in the criminal case, there is any allegation of loss to the Government and there is recovery to be made from the petitioner, which is the only exception recognized by this Court in the above mentioned authorities where final pension etc. may not be paid and respondents may withhold the same.

9. For the reason stated therein, and in view of the above authorities, the writ petition is allowed and the impugned order dated 16.1.2014 is set aside. The respondents are directed to pay retiral benefits and final pension to petitioner forthwith within a period of two months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2015

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

Writ-C No. 69020 of 2014

Sri Gurudwara Committee, Chakeri ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri B. Dayal, Sri Niraj Agarwal, Sri Vishnu Sahai

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Ishan Shishu, Sri Ramesh Chandra Agrahari

Constitution of India, Art.-226- Alternative remedy-Revision-order passed by District Judge rejecting objection under section 3-A(4) of National High way Act, 1956-only the Principal Judge of Civil Court has jurisdiction, hence reference bad-held-Principal Civil Court as defined under section 3(15) of General Clause Act 1897-'District Judge' being judge of Principal Civil Court having original jurisdiction-order passed by District Judge remedy to evoke revisional jurisdiction writ either under Article 226 or 227-not maintainable-conversion of Writ Petition into revision permitted.

Held: Para-17 & 18

17. It is noteworthy and not denied by the petitioner that when his case was not referred to the Court but a reference had been made by the competent

authority to the principal civil court of original jurisdiction by the impugned order dated 21.09.2014 under Section 3-H (4) of the Act, 1956, the petitioner had filed his own claim petition on 18.01.2013 claiming that he was a person entitled to receive compensation (as averred in paragraph 9 of the writ petition). Thus the petitioner had himself submitted to the jurisdiction of the District Judge, Kanpur being the principal civil court having original jurisdiction in the matter and it is not that the District Judge did not have jurisdiction to entertain the reference and examine the dispute since the statutory provision of Section 3-H (4) confers such power upon the principal civil court having original jurisdiction.

18. Therefore considering the matter in its entirety and with regard to the facts of the case and the case law referred to hereinabove , I am of the view this writ petition under Article 226 of the Constitution of India is not maintainable and the only remedy for the petitioner is by way of a revision as held by the Supreme Court in the case of Sadhana Lodh (supra).

Case Law discussed:
(2003) 3 SCC 524; (1976) 3 SCC 719; AIR 1977 SC 747 [1977 (2) SCC 457]; AIR 1981 SC 701[1981(2) SCC 103]; (1972) 4 SCC 168.

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

1. The petitioner in this writ petition is seeking quashing of the order dated 21.09.2012 passed by the Prescribed Authority under the National Highways Act, 1956 (hereinafter referred to as the Act, 1956) under Section 3-H (4) and the order dated 05.12.2014 passed by the Additional Judge, Kanpur Nagar.

2. Briefly stated the case of the petitioner is that he is the owner of two plots, namely, plot no.48 measuring 53.55 sqm. and another plot no.49 measuring 136.50 sqm. situated in Village Safipur, Kanpur Nagar which he purchased from one Kallu by means of a registered sale deed dated 06.11.1952. The said two plots were acquired for widening of the National Highway No.25. The compensation for the two plots was determined at Rs.42,89,237/-. There being several claimants a notice was issued to the President of the Guru Singh Sabha Harjender Nagar, President Gurudwara Committee, Chakeri, Aerodrome, Kanpur Nagar, Niyantrak Pradhikari, Principal Harjender Nagar Inter College and the Manager, Khalsa Vidyalaya Sabha Harjender Nagar. No notice is stated to have been issued to the petitioner and the petitioner remained in the dark about the proceedings. On 21.09.2012 the impugned order was passed by the Authority under Section 3-H (4) of the Act, 1956 making a reference to the District Judge, Kanpur Nagar. When the petitioner came to know about this, he filed a claim petition on 18.01.2013 with a prayer for a declaration that he was a person entitled to receive the compensation amount. Along with the claim petition the petitioner is stated to have filed the Khatauni 1360 Fasli of village Safipur, Tehsil and District Kanpur Nagar in respect of Khata No.12 and also the copy of the registered sale deed dated 06.11.1952. He also filed a copy of the registered sale deed which was executed in favour of the Khalsa Degree College by the petitioner on 25.09.2006. The reference was heard by the Additional District Judge, Court no.24, Kanpur Nagar along with the claim petition of the petitioner. The petitioner's claim petition was rejected on the ground that his name was not mentioned as one of the claimants in the reference order and as

such his case could not be considered. An allegation has also been made by the petitioner of collusion between the claimant Harjendar Nagar Inter College, Harjendar Nagar, Kanpur Nagar and Guru Singh Sabha, Harjendar Nagar, Kanpur Nagar and it is also stated that an application was filed by the Manager, Harjendar Nagar Inter College, Harjendar Nagar, Kanpur Nagar who gave up his claim and prayed that the amount be awarded in favour of the Gurdwara, Guru Singh Sabha, Harjendar Nagar, Kanpur Nagar and in pursuance of the said collusive compromise the impugned order dated 05.12.2014 was passed directing that the amount of compensation be paid to the Gurdwara, Guru Singh Sabha, Harjendar Nagar, Kanpur Nagar.

3. The case of the petitioner, further, is that according to the competent authority notice was issued to the petitioner (as stated in paragraph 14 of the writ petition) and the name of the petitioner was also mutated in the revenue records in pursuance of the sale deed dated 06.11.1952 and therefore making a reference only in respect of two organisation, namely Harjendar Nagar Inter College, Harjendar Nagar, Kanpur Nagar and Guru Singh Sabha, Harjendar Nagar, Kanpur Nagar was illegal and without jurisdiction. It is also stated that the sale deed was in the name of Gurdwara Committee, Chakeri, Aerodrome, Kanpur Nagar and the claim of Gurdwara Committee was also mutated in the revenue records and therefore the dispute at the most could only be between the petitioner and the Khalsa Girls Degree College in whose favour a lease deed was executed by the petitioner on 25.09.2006.

4. The case of the petitioner further is that under the provisions of Section 3-H (3) of the Act, 1956 the competent authority was required to first determine the persons who in its opinion are entitled to receive the amount payable to each of them and only if a dispute arises then he may refer the same under Section 3-H (4) of the Act, 1956 to the decision of the principal civil court of original jurisdiction within whose limits the land in question is situated.

5. Section 3-H (3) and Section 3-H (4) of the Act, 1956 read as under:-

"3H. Deposit and payment of amount. (1) .....

(3) Where several persons claim to be interested in the amount deposited under subsection (1), the competent authority shall determine the persons who in its opinion are entitled to receive the amount payable to each of them.

(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated. "

6. At the outset a preliminary objection was raised by Sri Anoop Trivedi, learned counsel appearing on behalf of the Caveator along with Ramesh Chandra Agrahari that since the petitioner had challenged the order dated 05.12.2014 passed by the Additional District Judge, Kanpur Nagar, therefore, the writ petition is not maintainable and the only remedy available to the petitioner is by way of a revision under Section 115 of the Civil Procedure Code.

7. In support of his submission reliance has been placed upon a judgment of the Supreme Court reported in (2003) 3 SCC 524, Sadhna Lodh Vs. National Insurance Company Ltd., wherein it has been held that where the statutory right to file an appeal has been provided for it is not open to the High Court to entertain the petition under Article 227 of the Constitution of India. Even if where remedy by way of appeal has not been provided against the order and judgment of the District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where the remedy for filing a revision before the High Court under Section 115 of the Civil Procedure Code has been expressly barred by a State Enactment only in such a case a petition under Article 227 of the Constitution of India would lie and not under Article 226 of the Constitution of India. Paragraph 6 of the judgment reads as follows:

"[6] The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see National Insurance Co. Ltd, Chandigarh vs. Nicolletta Rohtagi and others 2002(7) SCC 456). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115 C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution."

8. Sri Vishnu Sahai, learned counsel for the petitioner on the other hand submitted that the provisions of 3-H (3) of the Act, 1956 were mandatory and before a reference could be made to the principal civil court having original jurisdiction, the competent authority under Section 3-H

(3) of the Act was required to determine the persons who in its opinion are entitled to receive the amount payable to each of them and only if dispute arises at to the apportionment of the amount payable to each of the claimants a reference was required to be made under Section 3-H (4) to the principal civil court having original jurisdiction within whose jurisdiction the land is situated.

9. The submission of Sri Vishnu Sahai further is that if the initial order dated 21.09.2012 is itself bad making the reference to the principal civil court and the same is quashed the subsequent order of the Additional District Judge 05.12.2014 would automatically become nonest and stand quashed and therefore the writ petition was maintainable so far as the order dated 21.09.2012 was concerned. In any case the said order could not be quashed in revisional proceedings and therefore the writ petition was maintainable. He has referred to certain decisions.

10. Reference has been made to the judgment reported in (1976) 3 SCC 719, Shri Farid Ahmad Abdul Samad and Another Vs. The Municipal corporation of the City of Ahmedabad and Another. This was a case where land belonging to the appellants had been acquired by the Corporation under compulsory acquisition. The appellants had recorded for a personal hearing with regard to their objections but the same was denied to them. After the acquisition was confirmed the appellants preferred an appeal to the City Civil Court at Ahmedabad. The civil court rejected the claim of the appellants and appellants thereafter took the matter to the High Court of Gujarat under Article 227 of the Constitution of India. The High Court refused to interfere holding that Section 5 of the Land Acquisition Act was duly complied with. Hence the SLP. In the S.L.P. the Supreme Court held that hearing objection under Section 5-A of the Land Acquisition Act to be given by the Commissioner under the Bombay Act cannot be replaced by a kind of appeal hearing by the City Civil Judge. The Bombay Act assigned the duty of hearing objections to the Commissioner who alone can hear them and not the City Civil Judge even assuming that all the objections could be entertained by him in appeal. From these observations it is sought to be submitted by the learned counsel that since the petitioners had not been heard by the competent authority under Section 3-H (3) this Court could interfere with the order of reference made under Section 3-H (4). In my opinion the jurisdiction which is exercised by the principal civil court having original jurisdiction is not an appellate jurisdiction and the reference made under Section 3-H (4) is not by way of appeal and if the Act, 1956 does not provide for any further appeal against the order of the principal civil court passed under Section 3-H (4) the remedy before the aggrieved party would only be by way of revision.

11. Reference was then made to the case reported in AIR 1977 SC 747 [1977 (2) SCC 457], Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another. This was the case disciplinary proceedings against the respondents-Conductors of the Road Transport Department in the State of Hyderabad. Disciplinary action was taken against the respondents herein in certain cash and ticket irregularities and they were dismissed from service by the Divisional Controller of the Mysore

Government Road Transport Department in December, 1960. The dismissal order was affirmed by the General Manger of the Mysore Government, Road Transport Department. They filed suits for declaration of their order of dismissal from service as illegal. The suits were decreed in favour of the respondents on the ground of contravention of Article 311 (1) of the Constitution of India.

12. The submission on behalf of the respondents in the case was that the original order of dismissal was without jurisdiction and void being in contravention of Article 311 (1) of the Constitution of India and the order passed in Departmental Appeal by the General Manager could not cure the initial defects.

13. In my opinion the said judgment is absolutely no application to the facts of the present case as in this case there is no statutory right of appeal provided by the Act, 1956 and the jurisdiction exercised by the principal civil court was an original jurisdiction and not an appellate jurisdiction or by way of departmental appeal. The appeal preferred before the General Manager and the order passed by him were orders passed in exercise of quasi judicial powers and the same cannot be held to be akin to the original jurisdiction exercised by the principal civil court under Section 3-H (4) of the Act, 1956 nor is it an order passed under any provision of the Civil Procedure Code.

14. Reference has also been made to the judgment report in AIR 1981 SC 701 [1981 (2) SCC 103], Kshitish Chandra Bose Vs. Commissioner of Ranchi. That was a case where the trial court had decreed the plaintiff's suit on the question of title and adverse possession. The defendant filed an appeal before the Additional Judicial Commissioner, Ranchi (Chota Nagpur) which affirmed the finding of the trial court and maintained the decree on both points. The respondent then filed a second appeal in the High Court which remanded the case to the trial court for a decision only on the question of title. After remand the Additional Judicial Commissioner held that the municipality had approved its title to the land in dispute and dismissed the plaintiff's suit. The plaintiff then went up in appeal to the High Court which affirmed the finding of the Additional Judicial Commissioner and dismissed the appeal by judgment dated 30.09.1967 (the second judgment).

15. The submission of the learned counsel in the case was that the finding so far as the adverse possession is concerned, the same had become final as the finding of the High Court in its first judgment had not been challenged in the Supreme Court. The said judgment also, in my opinion, has no application to the facts of the present case since against the order of the trial court the defendant had preferred an appeal before the High Court on one point, namely, that of title, therefore this court fails to see as to how the said judgment has any application to the facts of the present case on the question of maintainability of the present writ petition under Article 226 of the Constitution.

16. The General Clauses Act, 1897, in Section 3 (15), defines "District Judge" as 'judge of principal Civil Court of original jurisdiction but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

This means that the principal Civil Court of original jurisdiction contemplated in Section 3-H (4) of the National Highways Act, 1956 is the District Judge of the Civil Court within the limits of whose jurisdiction the land is situated.

17. It is noteworthy and not denied by the petitioner that when his case was not referred to the Court but a reference had been made by the competent authority to the principal civil court of original jurisdiction by the impugned order dated 21.09.2014 under Section 3-H (4) of the Act, 1956, the petitioner had filed his own claim petition on 18.01.2013 claiming that he was a person entitled to receive compensation (as averred in paragraph 9 of the writ petition). Thus the petitioner had himself submitted to the jurisdiction of the District Judge, Kanpur being the principal civil court having original jurisdiction in the matter and it is not that the District Judge did not have jurisdiction to entertain the reference and examine the dispute since the statutory provision of Section 3-H (4) confers such power upon the principal civil court having original jurisdiction.

18. Therefore considering the matter in its entirety and with regard to the facts of the case and the case law referred to hereinabove , I am of the view this writ petition under Article 226 of the Constitution of India is not maintainable and the only remedy for the petitioner is by way of a revision as held by the Supreme Court in the case of Sadhana Lodh (supra).

19. In (1972) 4 SCC 168, The Reliable Water Supply Service of India Vs. Union of India and Others the Supreme Court has held that the High Court was competent to convert an appeal into a revision. Similar view has been taken by a Division Bench of the Kerala High Court in Nafeesa Vs. Deputy Collector and Special Land Acquisition Officer. This was a case under the National Highways Act, 1956 where a reference had been made by the Competent Authority under Section 3-H (4) of the Act to the principal civil court of original jurisdiction and the learned judges held that there is no provision in the National Highways Act which provides a right of appeal against the decision by the Court on a reference under Section 3-H (4). It was also held that the principal civil court of original jurisdiction is a court subordinate to the High Court and since no appeal lies to the High Court against that decision a revision under Section 115 CPC would lie and accordingly the Kerala High Court had converted the regular first appeal into a civil revision petition under Section 115 CPC.

20. Therefore on a conspectus of facts and law discussed above this writ petition under Article 226 of the Constitution of India is not maintainable. However, the writ petition is ordered to be converted as a Civil Revision Petition under Section 115 CPC with a further direction to the Registry of this Court to give it a regular number as a civil revision petition and thereafter list the case before the appropriate Bench having jurisdiction in the matter.

21. Sri Vishnu Sahai, learned counsel for the petitioner also made various submissions on the merits of the case but since this Court has no jurisdiction to enter into those questions under Article 226 of the Constitution, no

reference is being made to those submissions.
