ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2015

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

W.P. No. 53 (S/S) of 2010
alongwith W.P. No. 56 (S/S) of 2010

Munni Lal Verma & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amit Bose

Counsel for the Respondents:
C.S.C.

Police Regulation-Regulation 493-a and (c) read with U.P. Police Officer Subordinate Ranks (Punishment & Appeal) Rules 1991-Rule-8 (2)(a)-Dismissal of Police person-by exercising power under Rule 8 (2)(b)-on ground of conviction in criminal case-argument that against conviction-criminal appeal conviction suspended by granting bail-criminal appeal still pending-held-in view of mandatory provision of Regulation 493 (a) and (c)-if appeal allowed-it shall be open to file review of dismissal-order impugned warrant no interference.

Held: Para-48
For the reasons aforesaid, this Court is of the considered opinion that merely because appeal was pending against the order of the trial court and the execution of the sentence had been suspended, it cannot be said that, punishment order cannot be passed by the disciplinary authority. If and when the appeal against conviction is allowed, the delinquent employee can seek review of the decision passed by the disciplinary authority. Thus, this Court declines to exercise its discretionary jurisdiction under Article 226 of the Constitution of India in favour of the petitioners as this Court do not find any valid ground to interfere with the impugned orders.

Case Law discussed:
AIR 1961 SC 751; 1985 (3) SCC 398; 1989 (1) UPLBEC 624; C.M.W.P. No. 1344 of 2012, C.M.W.P. No. 1917 OF 2012; C.M.W.P. No. 2705 of 2012; W.P. No. 1735 (S/S) 2011; W.P. No. 39 (S/S) 2013; Special Appeal Defective 71 of 2015; 1995 (3) SCC 377; 1997 (11) SCC 383: 1996 SCC (L & S) 668; 1997 (7) SCC 514; 1995 (2) SCC 573; 2005 (1) UPLBEC 83; 2002 (49) ALR 419; W.P. No. 662 (S/B) of 2015; Special Appeal No. 99 of 2014; 1998 (1) AWC 636; 1949 All England Law Reports 381; 1952 SCR 683; AIR 1959 SC 422; (2003) 6 SCC 186.

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

1. Heard Mr. Amit Bose, learned Counsel for the petitioners and Mrs. Sangeeta Chandra, learned Chief Standing Counsel, assisted by Mr. Badrul Hasan, learned Additional Chief Standing Counsel.

2. Petitioners of writ petition No. 53 (S/S) of 2010 have questioned the validity and correctness of the order of dismissal dated 24.9.2008 and 17.10.2008 passed by the Superintendent of Police, Rai Bareli and Superintendent of Police, Food Cell, U.P. Police, Lucknow, respectively, whereas petitioner of writ petition No. 56 (S/S) of 2010 has questioned the validity and correctness of the order of dismissal dated 25.9.2008 passed by the Deputy Inspector of Police (Establishment), Economic Offence Research Organization, U.P., Lucknow.

3. Since the common questions of law and facts and involved in above-captioned writ petitions, therefore, both the writ petitions have been clubbed and are being decided by a common order.

4. Shorn off unnecessary details the facts of the case are as under :

5. Petitioners of writ petition No. 53 (S/S) of 2010 were posted as Constables of Civil Police, Police Station Misrikh, District Sitapur, whereas petitioner of writ petition No. 56 (S/S) of 2010 was posted as Sub-Inspector of Civil Police, Police Station Misrikh, District Sitapur. On 10.2.1981, an encounter took place at Village Sarsai within the circle of Police Station Misrikh, District Sitapur, led by the Station Officer Incharge of Police Station Misrikh, District Sitapur including the petitioners and other police officers. In the said encounter, three criminals, namely, Girish, Rameshwar and Chetrani alias Dhania were killed. In respect of the incident, First Information Report was lodged at Police Station Misrikh, District Sitapur against the aforesaid criminal persons, on the basis of which, a criminal case was registered at Police Station Misrikh, District Sitapur.

6. After the aforesaid incident, father of one of the accused (Girish), namely, Sri Jai Dayal Srivastava submitted a representation before the Home Minister, Government of U.P., Lucknow, stating therein that the police had arrested the aforesaid three persons and had murdered them and in order to cover up the said criminal act of murder by the police party, the incident leading to the alleged murder was depicted as an encounter in which all the said three persons were killed. On the said representation, an inquiry was instituted and the same was entrusted to the Crime Branch, Criminal Investigation Department, U.P. Thereafter, the Crime Branch took over the investigation of the said criminal case and lodged an FIR at Police Station Misrikh, District Sitapur against eight police officers including the Station Officer-In-charge of Police Station Misrikh, District Sitapur (Sri Braj Gopal Verma), Inspector, the petitioners and 32 members of the public under Sections 147/148/149/342/302/201/120-B I.P.C. read with Section 25 of the Arms Act on 13.09.1983.

7. According to the petitioners, vide judgment and order dated 07.08.2008, Additional Sessions Judge/ Fast Track Court-7, Sitapur, all the fourteen police officers, including the petitioners, against whom the charge-sheet was submitted, were convicted of the offences punishable under Sections 147/148/149/218/302 I.P.C., but, all the members of the public against whom also charge-sheet was submitted, were acquitted of all the charges leveled against them. Immediately thereafter, all the accused persons including the petitioners were taken in custody and confined in the District Jail, Sitapur on 7.8.2008.

8. In these backgrounds, petitioner No.1-Munni Lal Verma and petitioner No.2-Ram Singh were dismissed from service vide orders dated 24.9.2008 and 17.10.2008 by the Superintendent of Police, Raibareli and Superintendent of Police, Food Cell, U.P., Police, Lucknow, respectively, in exercise of powers under Section 8 (2) (a) of the Rules, 1991. Petitioner-Hari Shankar Mishra of writ petition No. 56 (S/S) of 2010 was initially suspended vide order dated 23.9.2008 but subsequently vide order dated 25.9.2008, the Deputy Inspector General of Police (Establishment), Economic Offences Research Organization, U.P., Lucknow dismissed him in exercise of powers under Section 8 (2) (a) of Rules, 1991.

9. In the meantime, against the judgment and order dated 7.8.2008

whereby they were convicted and sentenced to imprisonment, the petitioners had approached this Court by filing Criminal Appeal No. 1853 of 2008 and a Division Bench of this Court, vide order dated 30.11.2009, suspended the sentence of all the accused persons including the petitioners and released them on bail. In pursuance to the order dated 30.11.2009, the petitioners were released from jail. Thereafter, the above-captioned writ petitions have been filed by the petitioners.

10. Submission of learned Counsel for the petitioners Mr. Amit Bose is that the impugned orders of dismissal from service have been passed against the petitioners only on the ground of conviction and sentence in exercise of powers under Clause (a) of the Second Proviso to Article 311 (2) of the Constitution read with Rule 8 (2) (a) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 [in short, referred to as "1991 Rules"]. He submitted that provisions of Rule 8 (2) (a) of Rules, 1991 are in pari materia with the provisions of Clause (a) of the Second Proviso to Article 311 (2) of the Constitution. Further submission is that it is not the mere conviction that would entail the punishment to a police officer, but, it is the conduct leading to a conviction that can be a ground to punish a police officer. In such a situation, the Appointing Authority has to consider whether any major penalty of either dismissal, removal or reduction in rank would be commensurate with the conduct which has led to the conviction of a police officer. But, in the present case, the impugned orders of dismissal from service have been passed against the petitioners only on the ground of having been convicted and sentenced but the conduct of the petitioners which led to their conviction has not been taken into consideration at all.

11. Elaborating his submission, Mr. Amit Bose has submitted that the petitioners had no role to play in the alleged fake encounter as no evidence was led during trial of the petitioners that they had either actively participated in the alleged fake encounter or they had done any covert or overt act resulting in the death of three persons. The only evidence that has come on record was that the police officers including the petitioners were present at the spot. In such a situation and assuming for sake of argument that the entire incident was a fake encounter, the conduct of the petitioners would not justify any punishment being imposed on them much less the punishment of dismissal from service.

12. Mr. Amit Bose has next contended that the issue of departmental proceedings against a police officer who has been tried on a criminal charges and has been acquitted are governed by the provisions of Paras 492 and 493 of the U.P. Police Regulations. From perusal of the aforesaid provisions, it is apparent that whenever a police officer has been tried on criminal charges and acquitted, it would not be permissible for the Superintendent of Police to re-examine the truth or otherwise of the findings of facts recorded by the competent court and the findings recorded by the competent court in this regard, have to be taken to be final. Moreover, departmental proceedings against a police officer who has been acquitted on criminal charges can be conducted only if the findings of the court are not inconsistent with the

view that the accused has been guilty of negligence or unfit for the discharge of his duty within the meaning of Section 7 of the Police Act. In other words, departmental proceedings against a police officer who has been acquitted can be conducted if the charges leveled in the criminal case also lead to allegations of committing misconduct by the police officer in the discharge of his official duties. In these backgrounds, submission of the learned Counsel for the petitioners is that if a police officer is alleged to have committed a criminal offence in relation to his work and conduct and he has been acquitted in the trial for the said criminal offence on findings which do not amount to exoneration of the charge, departmental proceedings can be conducted against such a police officer even in respect of the act or omission relating to the said criminal offence despite his acquittal by the criminal court. But, in such a situation also, the matter has to be referred to the Deputy Inspector General of Police of the range for his permission to conduct departmental proceedings against the police officer concerned.

13. In support of his submissions, Mr. Amit Bose has contended that the aforesaid provisions of Paras 492 and 493 of the U.P. Police Regulations came up for consideration before a Division Bench of this Hon'ble Court in the case of Kedar Nath Yadav Vs State of U.P. Reported in 2005 (3) ESC 1955, wherein it was held that the said provisions continued to be in force despite the enactment of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 and whenever a police officer is tried for having committed a criminal offence, departmental proceedings have to await the verdict in the trial as well as the judicial appeal, if any, filed against the judgment of conviction. Therefore, in view of the aforesaid provisions of Para 492 of the U.P. Police Regulations and in view of the fact that the petitioners had already filed Criminal Appeal No. 1853 of 2008:Braj Gopal Verma and others Vs. State on 14.08.2008 i.e. within a week of the pronouncement of the conviction and sentence of the petitioners and other police officers. Therefore, it was incumbent on the part of the Superintendent of Police concerned to have waited for the outcome of the appeal filed by the petitioners before taking any disciplinary action against them as mandated by the provisions of Para 492 of the U.P. Police Regulations. Thus, the Superintendent of Police as well as Deputy Inspector General of Police concerned, in the instant case, have totally acted contrary to the provisions of Para 492 of the U.P. Police Regulations.

14. Mr. Amit Bose, learned Counsel for the petitioner has submitted that this Court, vide judgment and order dated 12.5.2005 passed in Writ Petition No. 3554 (S/S) of 2004: Girdhari Lal Vs. State of U.P. and others, has set aside an order of dismissal from service passed against a police officer who was dismissed from service on his conviction in a criminal case on the ground that the appeal against the conviction was pending and as such the order of dismissal from service was contrary to the provisions of Para 492 of the U.P. Police Regulations.

15. To strengthen his aforesaid contentions, Mr. Amit Bose has relied upon the judgment of the Apex Court in State of U.P. Vs. Babu Ram Upadhya : AIR 1961 SC 751, Union of India Vs. Tulsi Ram Patel : 1985 (3) SCC 398 and the judgment of this

Court in Dhani Ram Vs. Superintendent of Police, Hardoi : 1989 (1) UPLBEC 624, Brij Pal Singh Vs. State of U.P. & others (Civil Misc. Writ Petition No. 1344 of 2012,, decided on 10.1.2012), Veer Pal Singh & others Vs. State of U.P. and others (Civil Misc. Writ Petition No. 1917 of 2012, decided on 12.1.2012), Dhirendra Kumar Tiwari Vs. State of U.P. and others (Civil Misc. Writ Petition No. 2705 of 2012, decided on 16.1.2012), Surendra Singh Vs. State of U.P. & others (writ petition No. 1735 (SS) of 2011, decided on 6.1.2012), Vijay Kumar Tiwari Vs. State of U.P. & others (writ petition No. 39 (SS) of 2013, decided on 1.9.2014) and State of U.P. and others Vs. Vijay Kumar Tiwari (Special Appeal Defective No. 71 of 2015).

16. Refuting the submissions of the learned Counsel for the petitioner, Mrs. Sangeeta Chandra, learned Chief Standing Counsel, assisted by Mr. Badrul Hasan, learned Additional Chief Standing Counsel, has submitted that appropriate decision has been taken by the competent authority (the Superintendent of Police, Food Cell, U.P. Police, Lucknow), dismissing the petitioners on the basis of their conviction in the criminal case by the Additional Sessions Judge/Fast Tract Court no.7, Sitapur, under the provisions of Rule 8 (2) (a) of the Rules 1991. As regard the conduct of the petitioners, which led to convictions, while performance of duty as a Police Officer, it is submitted that the petitioners had shown false encounter and had murdered three persons. The petitioners have been found to have misused their office as a Police Officer by the learned Trial Court. This observation is sufficient for the petitioners to have been dismissed from service under Section 8(2) (a) of the Rules 1991 and the second proviso to Article 311 (2) of the Constitution of India. The petitioners have misused their powers of a Police Officer. Further the perusal of the judgment of the learned Trial Court would establish that the conduct of the petitioners was sufficient for the dismissal from service.

17. Mrs. Sangeeta Chandra has submitted that the petitioners are governed by the specific Rules framed for them i.e. Rules, 1991, therefore, as the petitioners have been convicted and not acquitted, the provisions of Police Regulations would not be applicable and the petitioners were rightly dismissed from service. There is no prohibition that the outcome of appeal is to be waited for.

18. So far as placing reliance upon Tulsi Ram Patel (supra) by the Counsel for the petitioner is concerned, learned Counsel for the State has submitted that the second proviso will apply where the conduct of a Government Servant is such as he deserves the punishment of dismissal, removal or reduction in rank and if under second proviso, a disciplinary authority comes to know that a Government Servant has been convicted of a criminal charge, his conduct itself warranting major penalty, then, the Government Servant is not entitled to an inquiry. Mrs. Sangeeta Chandra, on the basis of observations made in Tulsi Ram Patel (supra), has contended that there cannot be any departmental trial or even a rudimentary enquiry in case of conviction followed by punishment of rigorous imprisonment.

19. It is also submitted that in Tulsi Ram Patel (supra), the Constitution Bench has held that under the exclusionary effect, the Second Proviso to Article 311

(2), it cannot be said that while considering the facts and circumstances of each case, the Disciplinary Authority must also hear the delinquent employee and if he is not heard or given a chance to satisfy the authority regarding final orders that may be passed by it, there would be no consideration and the order would be vitiated. The view taken in Divisional Personal Officer Southern Railway Vs. T.R. Challapan : 1976 (3) SCC 190, was held to be unacceptable. The consideration of what penalty should be imposed by the Disciplinary Authority should be ex parte and by the authority itself. It was also held that in case the Service Rules provided for giving of a Show-Cause Notice and considering the reply of the delinquent employee, such Rules must be read as directory and not mandatory because if held otherwise, they would run counter to the exclusionary effect of the second proviso to Article 311(2). Para 493 (a) provides that in case a police officer is convicted and sentenced to rigorous imprisonment, there shall not be any departmental trial necessary and the Superintendent of Police shall ordinarily dismiss such an officer and if he proposes to do otherwise, then, he may refer the matter to the D.I.G. of the Range stating his reasons clearly. Her submission is that para 493 provides for the same course of action as was being provided by sub-clause (a) of second proviso to Article 311 (2) of the Constitution of India. Further para 493 lays down that it shall not be open for the Superintendent of Police to re-examine the correctness of the findings of fact in issue when a criminal Court has pronounced upon them and they shall act as a form of departmental res judicata.

20. So far as Kedar Nath Yadav's and Girdhari Lal's cases relied upon by the petitioner's counsel is concerned, Mrs. Sangeeta Chandra has submitted that in fact para 493 (a) has been replaced by Rule 8 (2) (a) of the Rules, 1991, which is in pari materia, with Article 311 (2) of Second proviso (a) and, hence, as observed by the Hon'ble Supreme Court in Tulsi Ram Patel (supra), the exclusionary effect of Article 311 (2), second proviso would apply with full force and no departmental trial shall be necessary in such a case and if para-492 provides for the Superintendent of Police to await the result of criminal appeal filed against the judgment of the trial Court before taking departmental action against such an employee, it would be unconstitutional as held by a Division Bench of this Court in Vijay Shanker Tiwari (Supra).

21. Clarifying the position, Mrs. Sangeeta Chandra has vehemently argued that since the Division Bench in Kedar Nath Yadav (Supra) has held that Para-493 of the Police Regulations has not been replaced by any corresponding rule in the later Rules of 1991, it cannot be said to have been impliedly repealed, and, therefore, Regulation 493 (a) would be as binding upon the State Respondents as Regulation-493(c). Since Para-493(a) clearly provides that no departmental trial shall be necessary if conviction by a trial court results in rigorous imprisonment of more than 10 years, the same would act against the writ petitioners herein, with equal and binding force. A Division Bench of this Court in the case of Vijay Shanker Tiwari (supra) on relying upon the case of Tulsi Ram Patel (supra) has held in Paras-10 and 11 thus :-

"10. Regulation 492, however, requires the Superintendent of Police to

await decision of judicial appeal, if any, before deciding this question as to whether department action is necessary. This runs counter to clause (a) of second proviso to Article 311(2). Supreme Court in Tulsi Ram Patel's case (supra)" has held that neither the Act nor the Rule nor the government instructions can alter or liberalise the effect of the second proviso to Article 311(2). In this connection Supreme Court has laid down as under :

"Service rules may reproduce the provisions of the second proviso authorizing the disciplinary authority to dispense with the inquiry contemplated by clause (2) ofArticle 311in the three cases mentioned in the second proviso to that clause or any one or more of them. Such a rule, however, cannot be valid and constitutional without reference to the second proviso toArticle 311(2)and cannot be read apart from it. Thus, while the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules, the source of his power to dispense with the inquiry is derived from the second proviso toArticle 311 (2)and not from any service rules. There is a well-established distinction between the source of authority to exercise a power and the source of such power."

Supreme Court accordingly, in para 122 of its judgment, held that last part of Rule 37 of the CISF Rules which provides for a notice before imposing penalty of dismissal to the delinquent government servant, would be void as violating the second proviso to Article 311(2), "because it would whittle down the exclusionary effect of the second proviso". Supreme Court, however, did not declare it ultra vires and treated it as directory and not mandatory. The reasons for treating the Rules which are in conflict with second proviso to Article 311(2) as directory as given by Supreme Court, are as under :

"It is, however, a well-settled rule of construction of statutes that where two interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected. Such constitutionality can be preserved by interpreting that statutory provision as directory and not mandatory. It is equally well-settled that where a statutory provision is directory, the courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity - see Craies on Statute Law, Seventh Edition, at page 229. In such a case breach of such statutory provisions would not furnish any cause of action or ground of challenge to a government servant for at the very threshold, such cause of action or ground of challenge would be barred by the second proviso toArticle 311(2)."

11. Regulation 492 whittles down the effect of clause (a) of second proviso to Article 311(2) and, therefore, cannot survive being in conflict with it. But for the reasons given by Supreme Court in Tulsi Ram Patel's case this Regulation can be saved by treating it directory and not mandatory. Regulation 492 is therefore, declared directory only."

22. To strengthen her aforesaid submissions, Mrs. Sangeeta Chandra has relied upon Deputy Director of Collegiate Education (Administration) Madras Vs. S. Nagoor Meera: 1995 (3) SCC 377, Union

of India Vs. V.K. Bhaskar : 1997 (11) SCC 383, Karam Singh Vs. State of Punjab : 1996 SCC (L&S) 668, Union of India and others Vs. Ramesh Kumar : 1997 (7) SCC 514, Rama Narang Vs. Ramesh Narang : 1995 (2) SCC 573 and Government of Andhra Pradesh & another Vs. B. Jagjeevan Rao : 2014 (13) SCC 239.

23. I have heard learned Counsel for the parties and perused the record.

24. It is not in dispute that the order of dismissal has been passed after dispensing with the enquiry to be conducted against the petitioners under clause (a) of the Second Proviso to Article 311 (2) of the Constitution of India read with Rule 8 (2) (a) of Rule, 1991. Therefore, in order to appreciate the rival submissions of the learned Counsel for the parties, this Court deem it appropriate to reproduce Article 311 of the Constitution of India as well as Rule 8 (2) (a) of Rule, 1991, which are as under :

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State-

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause 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 ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

"8. Dismissal and removal - (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."

25. Clause (2) of Article 311 of the Constitution provides inter alia that no person who is a member of a civil service of the Union or of a State shall be dismissed, removed or reduced in rank except after an inquiry in which he had been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges. However, clause (a) of the second proviso provides that clause (2) shall not apply 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.

26. Undisputed facts are that the petitioners were named in a criminal case registered under Sections 147/148/149/342/ 201/302/201/120-B of Indian Penal Code read with Section 25 of the Arms Act. Learned Additional Sessions Judge/Fast Track Court, Sitapur, sentenced all the convicted persons including the petitioners to life imprisonment and fine of Rs.5000/- for the offence under Section 302 I.P.C., to rigorous imprisonment for one year for the offences under Sections 147/148 I.P.C. and to two years rigorous imprisonment for the offence under Section 218 I.P.C. Immediately thereafter, all the convicted persons including the petitioners were taken in custody and lodged in District Jail, Sitapur with effect from 7.8.2008. On knowing the conviction of the petitioners in a heinous offence i.e. under Section 302 I.P.C., the Disciplinary Authority have dismissed the services of the petitioners.

27. Sri Amit Bose, learned Counsel for the petitioners has argued that he is not disputing the power under Article 311(2) second proviso (a) or Rule 8(2)(a) or even Para 493 (a) of the Police Regulations but his submission was that these provisions could be applied and should be applied, only after decision in criminal appeal and there should be postponement of the order of dismissal, till decision in appeal.

28. Regulations 492 and 493 are extracted as under:

"492. Whenever a police officer has been Judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary.

493. It will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer who has been tried judicially to re-examine the truth of any facts in issue at his judicial trial, and the finding of the Court on these facts must be taken as final.

Thus, (a) if the accused has been convicted and sentenced to rigorous imprisonment, no departmental trial will be necessary, as the fact that he has been found deserving of rigorous imprisonment must be taken as conclusively proving his unfitness for the discharge of his duty within the meaning ofSection 7of the Police Act. In such cases the Superintendent of Police will without further proceedings ordinarily pass an order of dismissal, obtaining the formal

order of the Deputy Inspector General when necessary under paragraph 479 (a). Should he wish to do otherwise he must refer the matter to the Deputy Inspector General of the range for orders.

(b) If the accused has been convicted but sentenced to a punishment less than of rigorous imprisonment a departmental trial will be necessary, if further action is thought desirable, but the question in issue at this trial will be merely (1) whether the offence of which the accused has been convicted amounts to an offence underSection 7of the Police Act, (2) if so, what punishment should be imposed. In such cases the Superintendent of Police will (i) call upon the accused to show cause why any particular penalty should not be inflicted on him (ii) record anything the accused Officers has to urge against such penalty without allowing him to dispute the findings of the Court, and (iii) write a finding and order in the ordinary way dealing with any plea raised by the accused officers which is relevant to (1) and (2) above.

(c) If the accused has been judicially acquitted or discharged, and the period for filing an appeal has elapsed and/or no appeal has been filed the Superintendent of Police must at once reinstate him if he has been suspended; but should the findings of the Court not be inconsistent with the view that the accused has been guilty of negligence in, or unfitness for, the discharge of his duty within the meaning ofSection 7of the Police Act, the Superintendent of Police may refer the matter to the Deputy Inspector General and ask for permission to try the accused departmentally for such negligence or unfitness."

29. It is pertinent to mention here that when the Police Regulations were framed, the British ruled the country and the Police was utilized as an instrument for oppression and suppression of native population and to perpetuate foreign rule. The conditions are now different as India is independent and, therefore, the Police Regulations, which had been framed before Independence and in the wake of Revolt of 1857, with the intent of protecting and preserving the police powers are no longer to be treated as having binding and statutory force. A Division Bench of this Court in the case of Nurul Hasan v. Senior Superintendent of Police, Lucknow : 1985 (3) LCD 208 observed that the conditions have changed since the time when the Police Regulations were famed and the State Government should immediately consider the question of amending the Police Regulations. It was observed in Para 51 :-

"It is now well known that the standard of discipline in the police force has deteriorated and the police personnel who are entrusted with the task of maintaining law & order, have been found, times out of number to be law breakers and involved in commission of serious cognizable offence but on account of limited scope of the provisions of Para 496 of the Police Regulations immediate action by way of suspension cannot be taken against them even though the situation as also the gravity of the offence might require immediate suspension .. "

30. Taking into account the observations made in the case of Nurul Hasan (supra), the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991 were framed in which the Preamble of the Rules itself mentioned as follows :-

"In exercise of powers under Sub-sections (2) and (3) of Section 46 read

with Sections 2 and 7 of the Police Act, 1861 (Act No. 5 of 1861) and all other power enabling him in this behalf and in supersession of all existing rules issued in this behalf, the Governor is pleased to make the following rules with a view to regulating the departmental proceedings, punishment and appeals of the Police Officers of the subordinate ranks of the Uttar Pradesh Force."

31. The Police Regulations have been issued as executive instructions/orders and not all of them have been considered to be binding or to have statutory force. However, Chapter XXXII of the Police Regulations has been held by the Hon'ble Supreme Court in the case of Babu Ram Upadhyaya (supra) to be a result of an exercise of Statutory Rule making powers contained in Section 7 of the Police Act 1861. The Rules of 1991 stand on a higher footing in the hierarchy of statutory laws as has been held by a Full Bench decision in the case of R.B. Dixit v. Union of India & others : 2005 (1) UPLBEC 83, wherein the Hon'ble Full Bench relied upon the case of Smart Chip v. State of U.P.: 2002 (49) ALR 419 observed that in every legal system there was a hierarchy of norms. In the Indian Legal system, this hierarchy has the Constitution of India at the top, the statutory laws/enactments made by the Parliament or the State Legislature and thereafter delegated legislation, which may be either in the form of Rules/Regulations made under such Acts followed by executive instructions or Government Orders. In the case of a conflict between the higher law and a lower law, the higher law will prevail. Therefore, the Regulations being lower in the hierarchy than Rules and the Rules being framed in supersession of all existing laws/statutory provisions made in this behalf (made with respect to departmental action against the subordinate police officers). The Rule of 1991 would prevail particularly when the language of Rule 8(2)(a) is pari materia with the language of the Constitution Article 311 (2) Second proviso Clause (a).

32. On perusal of Scheme of Chapter-XXXII, it is evident that a proceeding against a police officer will consist of a magisterial or police inquiry followed if this inquiry shows the need for further action by a judicial trial or departmental trial or both consecutively, but at the same time under Para-489 of the Police Regulations, it is provided that Police Officer may be departmentally tried under Section 7 of the Police Act after he has been tried judicially; or after a magisterial inquiry under Cr.P.C. or after a police investigation under Cr.P.C. or a departmental inquiry, where the offense is only an offense under Section 7 or a non-cognizable offense of which the Superintendent of Police considers it unnecessary at that stage to forward a report in writing to the District Magistrate. The scheme of the Regulations themselves describe that a proceeding against the police officer consists of three components; it may be a magisterial or a police inquiry followed by a judicial trial or a departmental trial, or both consecutively, but at the same time says that no departmental trial will be necessary if the judicial trial results in conviction and punishment of rigorous imprisonment, where the Superintendent of Police shall ordinarily dismiss the police officer concerned having been proved in judicial trial to be unfit to remain a police officer and in case he wishes to do otherwise, then the matter

shall be referred by him to D.I.G. of the Range. The intention of the Police Regulations at the time when they were framed was to protect to Police Officers as India before independence was a Police State. After independence, the circumstances have changed and a great deal of water has flowed down the river. Article 311(2) (a) of the Constitution clearly lays down that reasonable opportunity of hearing / disciplinary proceedings are unnecessary 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. The Rule 8 (2) (a) of U.P. Police Officers of Subordinate Rank (Discipline & Appeal) Rules is also pari materia and cast in the same language as that of the Constitution which means that in case of conviction on a criminal charge, the misconduct which led to the said conviction may result in major penalty without the necessity of holding departmental proceedings.

33. Mrs. Sangeeta Chandra, learned Chief Standing Counsel has relied upon two Division Benches orders passed by this Court in the case of State of U.P. v. Uday Narayan Sachan (Writ Petition No. 662 (S/B) of 2015 decided on 14.05.2015) and in Vijay Prakash Srivastava v. State of U.P. & others (Special Appeal No. 99 of 2014 decided on 21.02.2014). In the case of Vijay Prakash Srivastava's case, the grievance of the appellants was that the Disciplinary Authority is required to consider the conduct of the employee, which led to his conviction on a criminal charge and mere conviction would not be sufficient to justify the order of dismissal. The Division Bench, relying upon the case of S. Nagoormeera, came to the conclusion that to await the decision of the appeal against conviction would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. Since the delinquent employee had been convicted for an offence under Section 302 I.P.C. read with Section 34 of I.P.C., the conduct which led to conviction was held sufficient for passing an order of dismissal, the mere pendency of the appeal would not operate to stay the conviction.

34. In the case of Uday Narayan Sachan (supra), the respondent had been convicted under Section 302 read with Section 34 of the I.P.C. and Section 3(2)(V) of the S.C./S.T. Act by the Additional Sessions Judge, Fatehpur. Reliance was placed on the judgment of conviction passed by the criminal court and the police constable was dismissed from service in exercise of powers under Rule 8 of the Rule of 1991. The Learned Tribunal had placed reliance upon the Regulation 492 and a judgment rendered by Hon'ble Single Judge in the case of Vijay Prasad Pandey v. State of U.P. & others : 1998 (1) AWC 636 in coming to the conclusion that since the appeal had been filed in which there was a stay on the execution of the sentence without suspending the conviction of the first respondent, under Para-492, the Superintendent of Police had to await the decision in the appeal before taking any departmental action including that of dismissal. The Hon'ble Division Bench considered Rule-8 of the Rules of 1991 and also a judgment rendered by it in the case of State of U.P. & others v. Prem Milan Tiwari - 2015 (3) ADJ 407 and came to the conclusion that suspension of execution of sentence in appeal or mere

pendency of appeal cannot be held to be a sufficient ground for taking action under Para-493(a).

35. In the case of Prem Milan Tiwari (supra), the Division Bench considered Rule-8 of the Rules of 1991, the case of Tulsi Ram Patel (supra) and Shanker Das - 1985 (2) SCC 358 and S. Nagoormeera (supra) and B. Jagjeevan Rao - 2014 (13) SCC 239 and the Hon'ble Division Bench observed as follows :

"11. We are of the view that the principle of law which has been laid down by the Supreme Court in the decision in S. Nagoor Meera and recently in B. Jagjeevan Rao's case, (supra) must govern the facts of the present case. The respondent was a constable in the police and was convicted of a heinous crime punishable under Section 302 of the Penal Code read with Sections 120B and 149. Can the State be compelled or required to take back in service such a person, pending the disposal of the appeal ? Plainly not. The learned counsel appearing on behalf of the respondent sought to distinguish those two decisions on the ground that the employee had been convicted of offences under the Prevention of Corruption Act 1988 where the conduct had a direct bearing on the service of the employee as an officer of the State. In our view, this would not make any difference to the construction of clause (a) of the second proviso to Article 311. What clause (a) of the second proviso does is to stipulate that the requirement of clause (2) of holding an inquiry consistent with the principles of natural justice would not apply where a person is dismissed, removed or reduced in rank on the ground of conduct which had led to his conviction on a criminal charge. In the present case, the respondent was a constable in the police. He was found guilty after a session's trial of an offence punishable under Section 302 read with Section 120B of the Penal Code. In such a case, clause (a) of the second proviso to Article 311 (2) would clearly stand attracted. The State cannot be regarded as having acted with perversity in dismissing a person who has been convicted of a serious offence of the nature involved in pursuance of the provisions of the second proviso to Article 311 (2) and, as in the present case, under Rule 8(2)(a) which is pari materia. The learned Single Judge, with respect, was in error in holding that there was no application of mind to the conduct which has led to the conviction. The conduct of the respondent which 9 has led to the conviction of a charge under Section 302 cannot, by any circumstance, be regarded as warranting any treatment other than the punishment of dismissal under clause (a) of the second proviso to Article 311 (2) or under Rule 8(2)(a). Ultimately, as has been held by the Supreme Court until the conviction is set aside by an appellate or higher court, it would not be advisable to retain such a person in service. If he succeeds in the appeal or in any other proceeding, the matter can always be reviewed in such a manner that he would not suffer any prejudice."

36. Insofar as Para 493(a) of the Police Regulations is concerned, no judgment has been cited by the Learned Counsel for the Petitioner except the judgment rendered in the case of Vijay Prasad Pandey v. State of U.P. & others - 1998 (1) AWC 636, a judgment rendered by Hon'ble Mr. Justice Alok Chakraborty (as he then was). The said judgment of Vijay Prasad Pandey's case has been considered by a Division Bench of this

Court in the case of State of U.P. v. Uday Narayan Sachan (Writ Petition No. 662/2015) and the said judgment has been distinguished on the ground of later law as settled by the Hon'ble Supreme Court in the case of B. Jagjeewan Rao (supra). Thus, in my opinion, it can safely be said that the Police Regulations 492 applies only in cases where departmental proceedings are necessarily to be undertaken (where criminal trial results either in acquittal or minor penalty/fine). Para-493(a) on the other hand is completely in sinc with the Article 311(2) second proviso clause (a) of the Constitution of India, and it is not necessary to hold a departmental proceedings at all in such cases.

37. Mrs. Sangeeta Chandra, learned Chief Standing Counsel has also relied upon three judgments rendered by three Hon'ble Single Judges in the case of Daman Singh v. Secretary/ G.M., District Cooperative Banks Ltd., Kanpur and others - 2008 (10) ADJ 612, Naresh Pratap Singh v. State of U.P. & another : 2002 (49) ALR 331 and Writ Petition No. 3103 (S/S) of 2009 (Brijesh Singh v. State of U.P. & others) wherein the Hon'ble Single Judges were considering similar controversy where an employee was punished on the basis of misconduct, which led to his conviction and the Hon'ble Court relied upon the case of S. Nagoor Meera to hold that merely because appeal was pending against the order of the trial court and the execution of the sentence had been suspended, it cannot be said that, punishment order cannot be passed by the disciplinary authority. If and when the appeal against conviction was allowed, the delinquent employee can seek review of the decision passed by the disciplinary authority.

38. Mrs. Chandra has also relied upon the judgments rendered by the Hon'ble Supreme Court in the following cases to argue that if two interpretations are possible, an interpretation which leads to inconsistency and absurdity must be avoided, the judgments which have been cited are :-

1. Holmes v. Bradfield Rural District Council - 1949 All England Law Reports 381.

2. Shamarao V. Parulekar v. District Magistrate, Thana, Bombay and 2 others - 1952 SCR 683.

3. N.T. Veluswami Thevar v. Raja Nainar and others - AIR 1959 SC 422.

4. D. Saibaba v. Bar Council of India and others - (2003) 6 SCC 186.

39. In the case of Holmes v. Bradfield Rural District Council (supra), the King's Bench Division was considering the case where the claimant, a builder claimed compensation under the Town and Country Planning (Interim Development Act, 1943) from the local planning authority for expenditure incurred on work rendered abortive by the revocation of permission for development. The issue was whether compensation was recoverable in respect of professional work (the preparation of plan) although no building operation had been carried out on the site and although the plan had been prepared before the withdrawal of permission for the same development. The Court held that compensation was payable and rejected the contention of the Counsel for the Rural District Council that only when some kind of physical work is done on the site can one add the expenditure incurred in making the plans for that work. If the order revoking the permission is made before any physical work has been done on the land, one cannot be compensated for the expenditure made on plan having

been prepared in contemplation of the work. Regarding this argument, the Hon'ble Division Bench observed thus :-

"That would lead, as it seems to the court, to a very unfortunate and absurd position, for it would mean that a man who has prepared plans and has done a mere hour's work on the site is entitled to compensation for the preparation of the plans, while another man who has had similar plans prepared and incurred the same expense, but has not actually started the work on the site, is not entitled to include the cost of the plans in "the expenditure incurred in carrying out" the work. The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but, if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things. We can see nothing inappropriate in applying the words in s. 7 (3), "shall be deemed to be included in the expenditure incurred in carrying out that work," to plans which have been made, even though the physical work has not been started. The sub-section does not say that the expenditure on plans is necessarily to be added to something else, or can only be included in the expenditure incurred in carrying out the work if there are other items to be included with them. Part of the expenditure incurred in carrying out the work is incurred in the preparation of plans, and, in the opinion of this court, the reasonable interpretation of the words of the sub-section is that, if plans are prepared for the purpose of carrying out work for which permission is subsequently given, and that permission is revoked before the actual building work has been begun the expenditure incurred on those plans is to be "deemed to be included in the expenditure incurred in carrying out that work."."

40. In the case of N.T. Veluswami Thevar v. Raja Nainar (supra), the Hon'ble Supreme Court was considering, the scope of an inquiry in an election petition wherein election was called in question under Section 100(1)(c) of the Representation of People Act, 1951, on the ground that a nomination paper had been improperly rejected. The question of interpretation of the expression "improperly rejected" was being considered, the Hon'ble Court in Para-13 observed that a candidate may be subject to more than one disqualification and his nomination paper may be questioned on all those grounds and supposing the Returning Officer upheld one objection and rejected the nomination paper on the basis of that objection alone without going into other objections, was it open for the respondents in the election petition to adduce evidence on other objections also? If it was not open then the result would be anomalous. The Hon'ble Court observed ".....It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies....."

41. In the case of Shamarao V. Parulekar v. District Magistrate, Thana, Bombay and 2 others (supra), the Hon'ble Supreme Court observed thus at page 690

: ".....It is the duty of Courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used, that is to say, if one construction will lead to an absurdity while another will give effect to what common sense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided. (See the speech of Lord Wensleydale in Grey v. Pearson (1) quoted with approval by the Privy Council inNarayana Swami v. Emperor(2); also Salmon v. Duncombe(3).) The rule is also set out in the text books: See Maxwell on the Interpretation of Statutes, 9th edition, page 236, and Craies on Statute Law, 5th edition, pages 89 to 93. ....."

42. In the case of D. Saibaba v. Bar Council of India and others (supra), the Hon'ble Supreme Court placing reliance upon Justice G.P. Singh's Treatise Principles of Statutory Interpretations" observed thus:

"16. Placing such a construction, as we propose to, on the provision ofSection 48AAis permitted by well settled principles of interpretation. Justice G.P. Singh states in Principles of Statutory Interpretation (Eighth Edition, 2001),

"It may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed." (p.45)

The rule of literal interpretation is also not to be read literally. Such flexibility to the rule has to be attributed as is attributable to the English language itself.

17. The learned author states again:

"In selecting out of different interpretations 'the court will adopt that which is just, reasonable and sensible rather than that which is none of those things' as it may be presumed 'that the Legislature should have used the word in that interpretation which least offends our sense of justice'. (p.113, ibid)

"The courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative 'on the principle expressed in the maxim: ut res magis valeat quam pereat'." (p.36, ibid)

"If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results."(pp.112-113, ibid).

18. Reading word for word and assigning a literal meaning toSection 48AAwould lead to absurdity, futility and to such consequences as the Parliament could have never intended. The provision has an ambiguity and is capable of being

read in more ways than one. We must, therefore, assign the provision a meaning __ and so read it __ as would give life to an otherwise lifeless letter and enable the power of review conferred thereby being meaningfully availed and effectively exercised."

43. Smt. Chandra also argued that where two interpretations are possible and the Hon'ble Courts have to decide whether a provision is mandatory or directory, a just approach would be to consider what is conducive to public policy. Smt. Chandra relied upon the case of Indian Financial Association of Seventh Day Adventists v. M.A. Unneerikutty and another - (2006) 6 SCC 351, paras 9, 11 to 14 and 17 to 19 were cited of which only a few are being cited herein below :-

"9. Learned counsel for the appellant questioned correctness of the judgment rendered by the Division Bench on the ground that the agreements were pre-planned and executed simultaneously as one integrated inseverable transaction. Stamp papers were purchased on the same day. The defendant No. 2 though an employee of the appellant No.1 Institution was a party to the illegal transaction. Obvious intention was to declare only the reduced amount of Rs.5 lakhs as the apparent sale price and to pay Rs.3 lakhs as uncounted money. In the meantime to have hold on each other another agreement was prepared declaring the actual price of Rs.8 lakhs. It was further urged thatSection 23read withSection 24of the Contract Act rendered the agreements void. The High Court should have noted that the agreements were immoral or opposed to public policy. This is the essence ofSection 23of the Contract Act. Similarly,Section 24postulates that the agreement would be void if the considerations and the object are unlawful in part. Closing down a well-running school managed by dedicated missionaries and closing a functional church would cause comparatively more hardships as against the specific performance of a tainted transaction. Same cannot be enforced in a suit for specific performance of contract.

10. .....

11. Principles relating to enforcement of a tainted transaction have been dealt with by this Court in various cases.

12.....

13. ,...

14. .....

15. .....

16.....

17. The term 'public policy has an entirely different and more extensive meaning from the policy of the law. Winfield defined it as a principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and varies from generation to generation. Judges, as trusted interpreters of the law, have to interpret it. While doing so precedents will also guide them to a substantial extent.

18. .....

19. The doctrine of public policy may be summarized thus:

"Public policy or the policy of the law is an illusive concept: it has been described as "untrustworthy guide". "variable quality", "uncertain one", "unruly house", etc., the primary duty of a Court of a law is to enforce a promise which the parties have made and to uphold the sanctity of contract which form the basis of society, but in certain

cases, the Court may relieve them of their duty on a rule founded on what is called the public policy, but the doctrine is extended not only to harmful cases but also to harmful tendencies. This doctrine of public policy is only a branch of common law, and just like any other branch of common law it is governed by precedents. The principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public."

44. The Police Regulations Para 493 as a whole has been held in the case of Kedar Nath Yadav (supra) to have not been replaced by the 1991 Rules and 493-a is as binding upon the Disciplinary Authority as 493-c. In the case of Kedar Nath Yadav, the Hon'ble Division Bench was considering the Para 493-c and similarly in the case of Dhani Ram (surpa) and in the case of Vijay Prakash Tiwari (Special Appeal (D) No. 71/2015) also clause (c) of Para 493 of the Police Regulations was under consideration. The Hon'ble Court held Para 493, Clause (c) to be binding and it was held that in the course of departmental proceedings against a Police Officer, who has already been judicially tried, it was not open to the Appointing Authority to re-examine the truth of any facts in issue at his judicial trial and the finding of the court on these facts must be taken as final.

45. In the present case, obviously, the petitioners have been convicted because of their role in the crime. It is difficult to fathom that any other view of the matter could have been taken by the disciplinary authority on consideration of the conduct of the petitioners which had led to their conviction, than, their removal from service. It is not a case where a lesser punishment than removal from service could have been awarded. However, even if the version of the petitioner is accepted on its face value, in view of the facts of the present case and considering the seriousness of the criminal offence for which the petitioners have been convicted, in my view, it is not a case where the disciplinary authority could have taken any other view of the matter even if an opportunity of hearing was given to the petitioners. Thus, it would have been an empty formality, therefore, no prejudice has been caused to them. Principles of natural justice are not like an unruly horse. Their application depends upon the facts of a case and not in a factual vacuum. Moreover, it is also trite that even if there has been violation of the principles of natural justice, this Court under Article 226 of the Constitution of India is not bound to interfere in exercise of its extraordinary jurisdiction because by doing so it would be restoring an illegality.

46. A person convicted under Section 302 of the Indian Penal Code should not be reinstated in service till he is absolved in appeal. Therefore, doing so on the plea of violation of proviso to Rule 14 (iii) of the Rules would amount to bringing to life another illegality, and would do more harm than good. Reference may be made in this regard to the judgments of Supreme Court reported in the case of M. C. Mehta Vs. Union of India, reported in (1999) 6 SCC 237, and State of Maharashtra Vs. Prashu, reported in (1994) 2 SCC 481. Except for the writ of habeas corpus and cases involving violation of fundamental rights invocation of the writ jurisdiction under Article 226 is not as a matter of right but discretionary.

47. Thus, I am of the view that considering the conviction of the

petitioner under Section 302 IPC, giving of notice would have been an empty formality, therefore, no prejudice has been caused to the petitioners.

48. For the reasons aforesaid, this Court is of the considered opinion that merely because appeal was pending against the order of the trial court and the execution of the sentence had been suspended, it cannot be said that, punishment order cannot be passed by the disciplinary authority. If and when the appeal against conviction is allowed, the delinquent employee can seek review of the decision passed by the disciplinary authority. Thus, this Court declines to exercise its discretionary jurisdiction under Article 226 of the Constitution of India in favour of the petitioners as this Court do not find any valid ground to interfere with the impugned orders.

49. Accordingly, the writ petitions filed by the petitioners being devoid of merits, are hereby dismissed.

50. Costs easy

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE HARSH KUMAR, J.

Writ Tax No. 101 of 2012

Union of India & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vivek Singh, Tarun Varma

Counsel for the Respondents:
C.S.C., B.P. Singh, Vivek Verma

Constitution of India, Art.-285-Demand of Service Tax-by Municipal Corporation Varanasi-unless exempted by Central Government-Service Tax can not be avoided-in view of Apex Court judgment in case of Rajkot municipal corporation as well as Union of India case-petitioner to deposit entire amount within one month-the Secretary Nagar Vikas Sansthan to constitute mediation committee.

Held: Para-10
Having heard learned counsel for the parties and examined the record of the present writ petition, we are of the considered opinion that as on date, the law as explained by the Apex Court in the case of Union of India and others Vs. State of U.P. and others 2007 (11) SCC 324 and that laid down in the case of Rajkot Municipal Corporation Vs. Union of India (Supra), stands on record. The petitioner railways cannot avoid the liability of payment of service charges, however, no property tax can be levied upon the property of the Railways.

Case Law discussed:
2010-CALHN (SC)-3-168; 2007 (11) SCC 324

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

1. Heard Sri Tarun Verma, learned Special Counsel on behalf of petitioners and learned Standing Counsel for the State-respondents.

2. The Union of India through Divisional Railway Manager, North Eastern Railway, Varanasi, and the Divisional Railway Manager, North Eastern Railway, Varanasi, as petitioner nos. 1 and 2, have approached this Court against the demand of service charges raised by Nagar Nigam, Varanasi vide notices issued in December, 2011, which bears the subject "regarding payment of house tax" on property C-33/9-R. The Nagar Nigam, Varanasi has demanded an

amount of Rs.2, 22, 37, 185/- as arrears of balance tax, surcharge and the current demand.

3. In Rajkot Municipal Corporation vs. Union of India 2010-CALHN (SC)-3-168 decided on 19.11.2009, the Supreme Court, while hearing an appeal against the judgment of Gujarat High Court, by which the High Court had quashed all the demands raised by the Municipal Corporation against the properties of the Central Government imposing property taxes on the ground that under Article 285 (1) of Constitution of India, no such demand can be raised by the State Government against the Central Government, held as follows:-

"(4) Article 285 of the Constitution provides that:

(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution is liable or treated as liable, so long as that tax continues to be levied in that State.

(5) In Union of India and ors, vs. State of Uttar Pradesh and ors, 2007 (11) SCC 324, this Court upheld the decision of the High Court that charges for supply of water or for other services rendered under any statutory obligation, is a fee and not tax. It was held that the Union of India was liable to pay such charges and should honour the bills served in that behalf. Referring to Section 52 of the U.P. Water Supply and Sewerage Act, 1975, it was held that the charges were loosely termed as "tax", that the nomenclature was not important and what was charged is a fee for the supply of water as well as maintenance of the sewerage system, and such service charges are to be considered as a fee and were not hit by Article 285 of the Constitution. It was further made clear that what was exempted by Article 285 was a tax on the property of Union of India but not a charge for service which were being rendered in the nature of water supply or for maintenance of sewerage system.

(6) When these appeals were earlier listed for hearing, both sides agreed that they will attempt a broad consensus on several pending issues and narrow down the areas of controversy and agree for a dispute resolution mechanism. We are told that in pursuance of it, discussions were held among various departments of the Government of India with the Department of Urban Development. In pursuance of it, an affidavit dated 9.4.2009 has been filed on behalf of Union of India crystallizing its stand on various issues. Union of India has now agreed in principle for the following: (i) It is liable to pay service charges to the municipal corporations for providing services like supply of water, conservancy/sewerage disposal, apart from general services like approach roads with street lights, drains etc. (ii) It will pay service charges to the Municipal Corporations, for the services, as stated in its circulars dated 10.5.1954, 29.3.1967, 25.5.1976 and 26.8.1986, but will not pay any taxes. (iii) Having regard to the fact that only service like supply of water could be metered and other services like drainage, solid waste management/approach roads, street lighting etc., could not be metered, the percentage of property tax will be worked out as service charges, on the

basis of instructions issued by the Ministry of Finance. (iv) The concerned Ministry of the Union to which the property belongs will enter into separate contracts with the respective municipal corporation for supply of services and payment of service charges and pay the bills for annual service charges regularly. (v) Union of India and its departments will periodically review the arrangements with the respective municipal corporations, as suggested by its advisory committees and make modifications or revisions in the rates of service charges. (vi) Whenever properties of State Government are exempted, such exemption shall apply to properties of Central Government also. Under no circumstances, the service charges payable by the Union of India will be more than the service charges paid by the State Government, (vii) The arrangement will not affect the legal rights conferred by the appropriate laws, in regard to any property held by the union.

(7) The Union of India has also stated that taking note of the relevant circumstances, it has decided to pay service charges at the following rates: (a) 75% of the property tax levied on private owners, where the properties of the Union are provided by the municipal corporations with all services/facilities as were provided to other areas within the municipal corporation; (b) 50% of the property tax levied on private owners, in regard to properties of the Union, where only some of the services/facilities were availed; and (c) upto a maximum of one-third (33 and 1/3%) of the property tax levied on private owners in regard to properties which did not avail any of the services provided by the municipal corporation, as they were self-sufficient on account of all services being provided by the Union itself.

(8) It was also clarified that where no services were availed from the municipal corporation, a rate within the ceiling of 33 and 1/3% of the property tax, will be negotiated and settled having regard to the relevant circumstances. In so far as properties of Indian Railways are concerned, it was stated that as it owns properties in virtually every municipal corporation in India and normally all its properties do not utilise the services provided by municipal corporations, Railways propose to pay only a token service charge of 5% or such other rate as may be agreed by mutual negotiations.

(9) Learned counsel for the appellants submitted that the appellant municipal corporations submitted that they were broadly in agreement with what has been stated and agreed by Union of India in the said affidavit. The appellant-Municipal Corporations also confirmed and agreed:

(i) that they will not levy or demand any "property tax" in respect of the properties belonging to Union of India and used for the purposes of the Government; (ii) that the demands will relate only to service charges for direct services like supply of water and conservancy/sewerage disposal services and other general services such as approach roads with street lighting, drainage etc.; (iii) that they broadly agreed to the rates of service charges agreed by Union of India; and (iv) that if there is defaults or if negotiations with the concerned departments for in regard to service charges fail they will not take any coercive steps for recovery (like cutting off supplies) nor resort to revenue recovery proceedings, but will take recourse to other remedies available to them in law for recovery.

(10) The appellants, however, expressed reservations only in regard to the stand of the Railways that it will only pay nominal service charges at 5% of the property tax. They point out that there can be no property of Railways which can be termed as 100% self sufficient in regard to services, as common indirect services provided by the Municipal Corporation (like approach roads with street lighting etc.) will be enjoyed by them. They also drew our attention to the fact that Ministry of Railways (Railway Board) had also issued a circular dated 24.7.1954, similar to the circulars issued by the Government of India, Ministry of Finance, providing for payment of part of the property tax, as services charges for water, scavenging etc. The learned Solicitor General however stated that she was not sure whether the said circular continues in force or was superseded by other circulars. Be that as it may.

(11). In view of the above, there is no need to consider the appeals on merits. We dispose of appeals and pending applications by recording the following broad agreement between the parties: (i) The Union of India & its departments will pay service charges for the services provided by appellant Municipal Corporations. They will not pay any property tax. The service charges will be paid at 75%, 50%, or 33 1/3% respectively of the property tax levied on property owners, depending upon whether Union of India or its department is utilising the full services, or partial services or nil services. The Union of India represented by its concerned department will enter into agreements/understandings in regard to service charges for each of its properties, with the respective municipal corporation. (ii) The above arrangement is open to modification or periodical revisions by mutual consent. In the event of disagreement on any issue, parties will resort to a dispute resolution mechanism by reference to a three Member Mediation Committee consisting of a representative of the Central Government, a representative of concerned Municipal Corporation and a senior representative (preferably the Secretary in charge of the department of municipal administration) of the State of Gujarat. (iii) If Railways or any other department of Union of India owning a property changes the agreement/understanding unilaterally, or fail to reach a settlement through the Medication Committee in regard to any disputes, or fails to clear the dues, it is open to the concerned Municipal Corporation to initiate such action, as it deems fit in accordance with law by approaching the Jurisdictional Courts/Tribunal for final and interim reliefs. (iv) The municipal corporations shall not resort to coercive steps (such as stoppage of services/services) nor resort to revenue recovery proceedings for recovery of service charges from Union of India or its departments. (v) The services charges payable by Union of India will under no circumstances be more than the service charges paid by State Government for its properties. Whenever exemptions or concessions are granted to the properties belonging to the State Government, the same shall also apply to the properties of Union of India. (vi) If the Railways does not abide by the four general circulars of the Union of India dated 10.5.1954, 29.3.67, 28.5.1976 and 26.8.1986 and the general consensus set out above, it is open to Municipal Corporation to take suitable action as is permissible in law."

4. In compliance with the judgment of the Apex Court in Rajkot Municipal Corporation vs. Union of India (supra) the Central Government vide Office Memorandum dated 15/17.12.2009 issued by UCD/LSG Section, Ministry of Urban Development, Government of India provided, that the Union of India and its departments

will pay service charges for the services provided by appellant Municipal Corporations. No property tax will be paid by Union of India but service charges calculated @ 75%, 50%, 33 1/3% of Property Tax levied on property owners will be paid, depending upon utilization of full or partial or nil services. For this purpose agreements will be entered into Union of India represented by concerned departments with respective Municipal Corporation. The arrangement will be open to modification or revision by mutual consent. In the event of disagreement, the same shall be resolved by a three Member Mediation Committee consisting of a representative of Central Government, a representative of concerned Municipal Corporation & a senior representative (preferably the Secretary in charge of department of Municipal administration) of the State.

5. The Railway Board has by its letter dated 9.3.2010 accepted the policy decision taken by the Central Government in compliance with the judgments of the Supreme Court.

6. The petitioners did not approach the Nagar Nigam, Varanasi protesting to the levy of service charges and requesting a Mediation Monitoring Committee to be constituted. It is only after the demand has been raised, the petitioners appear to have realised that they have to comply with the judgment of the Suprement Court, the decision taken by the Ministry of Urban Development, Government of India and Railway Board in accordance with the procedure set out and in case of any dispute in resolving the same through the Mediation Monitoring Committee.

7. Under the interim order of the Court dated 23.7.2012 the petitioners were called upon to deposit 1/3rd of the total demand, within one month of the order and the recovery of balance was stayed.

8. Counsel for the petitioners has referred to us another judgement of Division Bench passed in Tax Writ Petition No.1292 of 2011 "Cantonment Board, Varanasi Vs. Union of India and others", wherein the writ petition was disposed of vide order dated 03.10.2013 with the direction that parties will enter into agreement in accordance with the judgment of the Apex Court in the case of Rajkot Municipal Corporation Vs. Union of India (Supra) as well as the office memorandum of Ministry of Finance within one month and the amount already paid by the petitioners will be treated as payment of the first installment towards payment of the services charges calculated from the year as mentioned in the order. Remaining amount was directed to be paid by the petitioners in three equal monthly installments. It is stated that said order has been challenged before Apex Court by means of Civil Appeal No.10771 of 2014 by the Railway Department, wherein no interim order has been granted and the appeal is likely to be heard in near future.

9. It is submitted before us that similar arrangement may be made in respect of the service charges demanded by the Municipal Corporation, Varanasi.

10. Having heard learned counsel for the parties and examined the record of the present writ petition, we are of the considered opinion that as on date, the law as explained by the Apex Court in the case of Union of India and others Vs. State of U.P. and others 2007 (11) SCC

324 and that laid down in the case of Rajkot Municipal Corporation Vs. Union of India (Supra), stands on record. The petitioner railways cannot avoid the liability of payment of service charges, however, no property tax can be levied upon the property of the Railways.

11. Since the demand under challenge is stated to be for the year 2011-12, we deem it fit and proper to provide that the petitioners may deposit the entire money as demanded under protest within one month from today. Thereafter they may make an application before the Secretary of Nagar Vikas U.P. Shashan for constitution of Mediation Committee, on which the Mediation Committee comprising of a representative of Central Government, a representative of concerned Municipal Corporation and a Senior representative (preferably the Secretary In-charge of Department of Municipal Administration) shall be constituted within one month of the receipt of such request. The Committee shall determine the issues as may be raised by parties in the matter of levy and collection of service charges. The amount deposited by the petitioners in terms of the order passed by us today, shall abide by the decision to be taken by the Mediation Committee. The Mediation Committee shall finalize the proceedings within two months by means of a reasoned order.

12. The writ petition is disposed of.

13. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2015

BEFORE

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

Service Single No. 584 of 1998

Ram Deo Tewari ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
S.B. Pandey, S.P. Singh, Shiv Shankar Singh

Counsel for the Respondents:
C.S.C.

Civil Services Regulations Art.-370-Pension benefits-work charged employee-after 3 years 10 months and 7 days regularization-retired -whether period of working in work charge establishment countable for pension purpose ?-held-'no'-reasons disclosed.

Held: Para-11
As indicated above, the service of the petitioner in the regular establishment is only for a period of 3 years,10 months and 21 days, he is not entitled to get the pensionary benefits as claimed by hi. Further, for the reasons indicated above, t he services performed by the petitioner in the work charged establishment are not liable to be counted as qualifying services for the purposes of payment of post-retiral /terminal benefits.

Case Law discussed:
2014 (2) AWC 1771; 2010 (8) ADJ 664; (2009) 3 SCC 661; (1979) 4 SCC 440; (1997) 2 SCC 517

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

1. Heard Sri Uma Shanker Tiwari, Advocate holding brief on behalf of Sri Shiv Shanker Singh, learned Counsel for the petitioner and Sri Badrul Hasan, learned Additional Chief Standing Counsel.

2. Through instant writ petition, the petitioner has soughtfor a writ of mandamus commanding the opposite parties to give post retrial benefits i.e. pension and gratuity to the petitioner w.e.f. 1.2.1998 and onwards.

3. According to the petitioner's Counsel,the petitioner was initially appointed as Mechanic in work charge establishment in Gandak Project Chap Branch Division, Deoria in 3rd Circle Gorampur, Irrigation Department in the basic salary of Rs. 825/- per month. Thereafter, in the year 1977 he was transferred to 11th Circle, Irrigation Works, Faizabad and thereafter he was posted in Sharda Canal Division, 43 Faizabad.

4. It has been pointed out that the services of the petitioner was regularized by means of the order dated 3.3.1994 on the post of Mate in the pay scale of Rs. 725-1025 and the petitioner was posted at Sharda Shayak Khand-43 and ultimately retired on 31.1.1998 on attaining the age of 60 years but in an arbitrary manner he has been denied the pension and other retiral dues, which is unjust and unwarranted.

5. In contrast, the learned Standing Counsel on the basis of averments made in the counter affidavit and the Supplementary Counter Affidavit stated that the petitioner was appointed in the Work Charged Establishment w.e.f. 1.1.1975 and thereafter on availability of the vacant post in the regular establishment, he was given appointment in the regular establishment on 4.3.1994 and petitioner after working for about 3 years 10 months and 27 days attained the age of superannuation on 31.1.1998. As his services are less than 10 years, therefore, petitioner is not entitled for pensionary benefits. It is also stated that the Work Charged Employees are paid salaries from the fund available in the sanctioned projects under which they are employed and after completion of the work in the concerned project, their services come to an end.

6. To strengthen the aforesaid contention, the learned Standing Counsel has relied upon a recent judgment of Division Bench headed by the Hon'ble the Chief Justice in Special Appeal Defective No. 23 of 2014:Jai Prakash Vs. State of U.P. and others; 2014(2) AWC 1771, wherein it has been held that the work charged employees constitute a distinct class and they cannot be equated with regular employees and in the absence of any specific provision to that effect in Article 370 (ii) of the Civil Services Regulations. They are not entitled for pensionary benefits.

7. I have considered the submission of the learned Counsel for the parties and gone through the record. There is no dispute to the fact that the petitioner was engaged as work charged employee and on account of availability of the clear vacancy he was given regular appointment vide order dated 3.3.1994. After rendering about 3 years 10 months and 27 days service, he attained the age of superannuation on 31.1.1998. As per the provisions of Article 370 of the Civil Services Regulations continuous/temporary or officiating service under the Government of Uttar Pradesh followed without interpretations by confirmation in the same or any other post shall qualify for pension except i)periods of temporary or officiating service in non-pensionable establishment ii) period of service in work charged establishment and iii) period of service in a post and from contingencies. Article 370 reads as under:-

"Article 370 of the Civil Service Regulations, as applicable in the State of Uttar Pradesh, provides that continuous, temporary or officiating service under the Government of Uttar Pradesh followed without interpretations by confirmation in the same or any other post shall qualify for pension except;

(i)periods of temporary or officiating service in non-pensionable establishment;

(ii)periods of service in work charged establishment; and

(iii)periods of service in a post paid from contingencies."

8. A plain reading of the provisions of Article 370 of the Civil Services Regulations makes it clear that the period of service in work charged establishment cannot be counted for the purpose of determining the qualifying service for grant of pension. A Full Bench of this Court in Pawan Kumar Yadav Vs. State of U.P. and others; 2010(8) ADJ 664 after pointing out the difference between a person appointed in a regular establishment and in a work charged establishment, held that a work charged employee engaged in connection with the affairs of the State, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a 'Government servant' within the meaning of Rule 2(a) of U.P. Recruitment of Dependents of Government Servant (Dying in Harness) Rules, 1974, and thus his dependents on his death in harness are not entitled to compassionate appointment under the Rules. The reasons given by the Full Bench reads as under:

"20. In respect of the employees the State Government in Irrigation Department, Public Works Department, Minor Irrigation, Rural Engineering Services, Grounds Water Department has provided for employment in the regular establishment and workcharge establishment. The person appointed in regular establishment are appointed against a post, after following due procedure prescribed under the rules. In workcharge establishment the employees are not appointed by following any procedure or looking into their qualification. They do not work against any post or regular vacancy. They only get consolidated salary under the limits of sanction provided by Government Order dated 6th April, 1929. The conditions of their employment is provided in paragraphs 667, 668 and 669 of Chapter XXI under the Head of Establishment in Financial Hand Book Volume IV. Their payments are provided to be made in same Financial Hand Book Volume IV in Paragraph Nos.458, 459, 460, 461, 462 and 463.

21. Shri M.C. Chaturvedi, learned Chief Standing Counsel submits that by Government Order dated 1.1.2000 Paragraphs 667, 668 and 669 of Financial Hand Book Volume 4 have been deleted and that thereafter the payments are not being made to them from the budget allotted from the regular establishment, and they are not entitled to any allowance or pensionary benefits. They are paid from contingencies and are required to work until the work is available. The services of workcharge employees are regularised only when regular vacancy is available. Until then they cannot be treated as government servants".

9. In the case of Punjab State Electricity Board and others Vs. Jagjiwan Ram and others; (2009) 3 SCC 661,

examined the issue whether work charged employees in the service of Punjab State Electricity Board, who were subsequently appointed on a regular basis, could claim that the service rendered by them as work charged employees should be counted for the purpose of grant of time bound promotional scale/promotional increments and after taking note of the earlier decisions in Jaswant Singh & Ors. Vs. Union of India & Ors; (1979) 4 SCC 440 and State of Rajasthan Vs. Kunji Raman; (1997) 2 SCC 517, the Apex Court observed that the work charged employees constitute a distinct class and they cannot be equated with any other category or class of employees, much less regular employees and they are not entitled to service benefits which are admissible to regular employees under the relevant rules or policy framed by the employer. The relevant paragraphs of the report reads as under:-

"9. We have considered the respective submissions. Generally speaking, a work charged establishment is an establishment of which the expenses are chargeable to works. The pay and allowances of the employees who are engaged on a work charged establishment are usually shown under a specified sub-head of the estimated cost of works. The work charged employees are engaged for execution of a specified work or project and their engagement comes to an end on completion of the work or project. The source and mode of engagement/recruitment of work charged employees, their pay and conditions of employment are altogether different from the persons appointed in the regular establishment against sanctioned posts after following the procedure prescribed under the relevant Act or rules and their duties and responsibilities are also substantially different than those of regular employees.

10.The work charged employees can claim protection under the Industrial Disputes Act or the rights flowing from any particular statute but they cannot be treated at par with the employees of regular establishment. They can neither claim regularization of service as of right nor they can claim pay scales and other financial benefits at par with regular employees. If the service of a work charged employee is regularized under any statute or a scheme framed by the employer, then he becomes member of regular establishment from the date of regularization. His service in the work charged establishment cannot be clubbed with service in a regular establishment unless a specific provision to that effect is made either in the relevant statute or the scheme of regularization. In other words, if the statute or scheme under which service of work charged employee is regularized does not provide for counting of past service, the work charged employee cannot claim benefit of such service for the purpose of fixation of seniority in the regular cadre, promotion to the higher posts, fixation of pay in the higher scales, grant of increments etc."

10. Recently, a Division Bench of this Court in Jai Prakash's case [supra] after taking into consideration various pronouncement s of the Apex Court referred to herein above including the judgment rendered by the Apex Court in Punjab State Electricity Board & Anr. Vs. Narata Singh and Anr. reported in (2010) 4 SCC 317 held in last but one paragraph as under:-

"These decisions of the Supreme Court and the Full Bench of this Court leave no manner of doubt that in view of the material difference between an employee working in a work charged establishment and an employee working in a regular establishment, the service

rendered in a work charged establishment cannot be clubbed with service in a regular establishment unless there is a specific provision to that effect in the relevant Statutes. Article 370(ii) of the Civil Service Regulations specifically, on the contrary, excludes the period of service rendered in a work charged establishment for the purposes of payment of pension and we have in the earlier part of this judgment held that the decision of the Supreme Court in Narata Singh (supra), which relates to Rule 3.17(i) of the Punjab Electricity Rules, does not advance the case of the appellant. In this view of the matter, the appellant is not justified in contending that the period of service rendered from 1 October 1982 to 5 January 1996 as a work charged employee should be added for the purpose of computing the qualifying service for payment of pension."

11. As indicated above, the service of the petitioner in the regular establishment is only for a period of 3 years,10 months and 21 days, he is not entitled to get the pensionary benefits as claimed by hi. Further, for the reasons indicated above, t he services performed by the petitioner in the work charged establishment are not liable to be counted as qualifying services for the purposes of payment of post-retiral /terminal benefits.

12. In view of the aforesaid discussions, the relief as claimed by the petitioner cannot be granted and the writ petition lacks merit and is liable to be dismissed.

13. Accordingly, the writ petition is dismissed.

14. Costs easy.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2015

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

Special Appeal Defective No. 647 of 2015

M/s Maya Press Pvt. Ltd. Allahabad & Anr. ...Appellants
Versus
Union of India & Ors. ...Respondents

Counsel for the Appellants:
Sri Bhagwati Prasad Singh, Sri Krishna Mohan

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri S. Upadhyay

Constitution of India, Art.-226-Writ Petition-petitioner to disclose all matterial true facts-if matterial facts discovered by Courts to subsequently-Judge should impose exemplary cost also-Learned Single Judge rightly impose cost of Rs. One Lacs-Appellate Court declined to interfere.

Held: Para-23
Learned Single Judge has relied upon various pronouncements of the Hon'ble Apex Court laying down that if a litigant is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such a person. A litigant, who seeks shelter of falsehood, misrepresentation and suppression of facts in invoking the extraordinary equitable jurisdiction of this Court conferred by Article 226 of the Constitution of India, is not liable for any indulgence.

Case Law discussed:
(2012) 6 SCC 430; (2010) 2 SCC 114; [(2012) 12 SCC 133]

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

1. This intra court appeal under the Rules of the Court is directed against the judgment and order dated 31.07.2015 passed by learned Single Judge dismissing the Writ Petition No. 39655 of 2015.

2. First appellant is a company incorporated under the provisions of the Companies Act, 1956 having registered office at 281 Muthiganj, Allahabad and the second appellant is the Director of the company. Both the appellants filed writ petition seeking a writ of certiorari to quash the notice dated 22.05.2015 issued by Assistant Regional Provident Fund Commissioner/Recovery Officer, respondent no. 3 herein under Section 8-B (i) of the EPF & MP Act, 1952 (hereinafter referred to as Act, 1952) and Income Tax Act, 1961 issued to appellant no. 2 to show cause why he may not be detain in civil prison for failure to satisfy the demand raised by Recovery Certificate RRC No. 5065 dated 20.04.2001, 40731 dated 08.04.2004, 45857 dated 27.04.2000 for a sum of Rs.71,81,297/- and has also failed to pay the interest under Section 7Q of the Act, 1952.

3. An objection was raised by the respondents in the writ petition that the present petition is the second petition for the same cause of action. Learned Single Judge after hearing the matter on 20th July, 2015 passed the following order.

"By means of present writ petition, the petitioners have prayed for rejecting the impugned recovery notice dated 22.5.2015 under Section 8-B (i) of the EPF & MP Act, 1952 and the Income Tax Act, 1961 issued by the respondent no.3 to the petitioner no.2 and further prayed for direction to the respondents to decide the petitioner's representation dated 11.1.2014and 4.7.2014 after affording due opportunity of hearing to the petitioners.

Shri Amit Negi, learned counsel for the contesting respondents states that the petitioner had earlier filed Writ Petition No.11936 of 2009 (M/s Maya Press (P) Ltd. & Anr. v. Union of India & Ors.) for quashing the warrant of arrest dated 26.11.2008 issued by the Recovery Officer, Employees Provident Fund Organization, Varanasi, pursuant to the recovery certificate issued under Section 8-C of the Employees Provident Fund and Misc. Provisions Act for recovery of Rs.71,81,297/-. This Court vide order dated 6.3.2009 had disposed of the writ petition with following observations:-

"The petitioners will file an application under Section 8-E of the Employees Provident Fund and Miscellaneous Provisions Act before the authorised officer seeking time to make the payment. This application shall be filed on or before the 31st March, 2009. If such an application is filed, the authority will pass appropriate orders on the said application expeditiously after affording an opportunity of hearing to the petitioners. In the meantime, the warrant of arrest dated 26.11.2008 shall remain in abeyance till the disposal of the petitioners' application provided the petitioners deposits a sum of Rs. twenty lac within four weeks from today.

The writ petition is disposed of.

A certified copy of this order shall be made available to the petitioners on payment of usual charges within 24 hours.

Shri Negi, learned counsel for the respondents submits that there is material concealment in the matter. Nowhere it has been averred regarding the previous writ petition. He further apprised to the Court that in compliance of the order passed by this Court the petitioner had also not

deposited Rs.20 lacs within stipulated time and had filed Special Appeal No.670 of 2009 (M/s Maya Press (P) Ltd. & Anr. v. Union of India & Ors.) assailing the aforesaid order dated 6.3.2009. The special appeal was dismissed by order dated 6.5.2009. It is submitted that the petitioner had deliberately violated the earlier order even though the same had attained finality on the ground that the appeal was also rejected and as such no interference may be made in the present writ petition. This writ petition may be treated as second writ petition for the same cause of action.

Shri Krishna Mohan, learned counsel for the petitioners prays for week's time to obtain instructions in the matter. Put up this matter on 27.7.2015 as fresh."

4. When the matter was taken up subsequently, the petitioner-appellants made an application with a prayer to dismiss the writ petition as withdrawn. The application was supported by affidavit of Shri S.K. Bhattacharya alleging himself to be the pairokar of the petitioners. In paragraph 2 of the affidavit, it was stated that upon inspection of the record, it transpires that the previous litigation was done by the second petitioner personally and deponent is a pairokar and had no knowledge of the previous litigation.

5. Learned Single Judge on a perusal of the record while returning a finding that the petitioners in both the writ petitions are the same and affidavit of both the petition was sworn of Shri S.K. Bhattacharya and, thus, the second petitioner and the deponent of the writ petition were very well aware that an earlier writ petition was filed and was dismissed and the judgment was also affirmed by dismissal of the special appeal, held that not only a 2nd writ petition based on the same cause of action has been filed without disclosing the facts pertaining to the fact of filing and dismissal of the earlier writ petition and special appeal, a false affidavit has also been filed in support of the withdrawal application as well.

6. Learned Single Judge on a detail examination of facts and after appreciating the various case laws dismissed the writ petition with the heavy cost of Rs.1 lac to be recovered from the second appellant and pairokar of the writ petition Shri S.K. Bhattacharya by the District Magistrate, Allahabad.

7. The first submission advanced by Shri B.P. Singh, learned Senior Advocate assisted by Shri Krishna Mohan for the appellant is that the learned Single Judge erred in holding that writ petition was a second writ petition, inasmuch as the amount of recovery or the period of dues even if may be same, the relief claimed in the earlier Writ Petition No. 11936 of 2009 was entirely different from the relief claimed in the subsequent writ petition and the stage of recovery were also different. It is further submitted that two writ petitions challenging the different notice of recovery cannot be said to be treated as writ petitions for the same cause of action. Writ Petition No. 11936 of 2009 was filed by the present appellants seeking the following reliefs.

"(i) call for record of the case and issue a writ, order or direction in the nature of certiorari quashing the impugned warrant of arrest dated 26.11.2008 (contained in Annexure No. 8 to the writ petition) and further recovery proceedings in pursuance thereof.

(ii) issue a writ, order or direction in the nature of mandamus commanding the

respondents not to execute the impugned warrant of arrest.

(iii) issue any other suitable order or direction as may be deemed to be necessary under the facts and circumstances of the case.

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

8. Annexure 8, quashing of which, was sought in the said writ petition was a warrant of arrest issued by Recovery Officer, Employees Provident Fund Organisation in respect of failure on the part of the two petitioners to satisfy the demand made by certificate Nos. 5065, 8518, 40731 and 45857 dated 20.04.2001, 05.04.2002, 08.04.2004, and 17.04.2006 forwarded by the Authorised Officer for an amount of Rs.71,81,297/- towards outstanding against appellant no. 1-company.

9. Before the learned Single Judge, liability was admitted and the stand taken was that sometime be provided to secure the liability. Learned Single Judge disposed of the writ petition vide judgment and order dated 06.03.2009 by making following observations.

"The petitioner admits his liability and only seeks indulgence of the Court to get some breathing time to clear its liabilities.

Considering the facts and circumstances of the case that has been brought on record, I dispose of the petition with the following directions:

The petitioners will file an application under Section 8-E of the Employees Provident Fund and Miscellaneous Provisions Act before the authorised officer seeking time to make the payment. This application shall be filed on or before the 31st Marhc, 2009. If such an application is filed, the authority will pass appropriate orders on the said application expeditiously after affording an opportunity of hearing to the petitioners. In the meantime, the warrant of arrest dated 26.11.2008 shall remain in abeyance till the disposal of the petitioners' application provided the petitioners deposits a sum of Rs. twenty lac within four weeks from today.

The writ petition is disposed of.

A certified copy of this order shall be made available to the petitioners on payment of usual charges within 24 hours."

10. The order was challenged in Special Appeal No. 670 of 2009, which was dismissed by a Division Bench vide judgment and order dated 06.05.2009 by passing the following order.

"Writ petitioner-appellant, aggrieved by the order dated 6th March, 2009 passed by the learned Single Judge in Writ Petition No. 11936 of 2009, has preferred this Appeal under Rule 5 of Chapter VIII of the Allahabad High Court Rules.

On failure to make payment of the statutory dues under the Employees Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act'), the Recovery Officer, Employees Provident Funds Organisation, Varanasi issued warrant of arrest dated 26th November, 2008. The petitioner-appellant challenged the aforesaid warrant of arrest in the writ petition which has given rise to the impugned order. Neither before the learned Single Judge nor before us the writ petitioner-appellant has denied its liability and, in fact, admits the liability.

In fact, before the learned Single Judge, it was the stand of the appellant

that he be given some breathing time to clear its liability. Taking note of the aforesaid stand, the learned Single Judge gave liberty to the writ petitioner-appellant to make an application under Section 8(E) of the Act seeking time to make payment by 31st March, 2009. It also observed that if such an application is filed, the Competent Authority will pass an appropriate order and in the meantime the warrant of arrest dated 26th November, 2008 shall remain in abeyance till the disposal of the applicant's application provided it deposits a sum of Rs. 20 lacs within four weeks from the date of the said order.

Writ petitioner-appellant instead of complying the said order has chosen to file this appeal.

Mr. Ashok Khare appearing on behalf of the appellant submits that the learned Single Judge erred in holding that the application dated 30th April, 2003 was an application under Section 8(E) of the Act and according to him, the said application was also under Section 8(F) of the Act. We are of the opinion that the aforesaid submission has no bearing to the facts of the present case. The petitioner has admitted its liability and the learned Single Judge gave indulgence to him to file application seeking time to make the payment and on condition of deposit of a sum of Rs. 20 lacs, directed that the warrant of arrest shall be kept in abeyance.

The Writ Court is a Court of equity and in the face of the appellant's own admission of its liability, any interference by this Court shall be inexpedient. We do not find any merit in the appeal and it is dismissed accordingly."

11. Without disclosing the factum of filing the earlier Writ Petition No. 11936 of 2009 and its dismissal as well as filing and dismissal of Special Appeal No. 670 of 2009, the present writ petition was filed. Incidently the affidavit in both the writ petition is of the same person, i.e., Shri S.K. Bhattacharya, who happens to be the deponent of the affidavit filed in support of the stay application in the present special appeal. Admittedly, in the subsequent writ petition, there was not even a whisper with respect to dismissal of the first writ petition and special appeal.

12. A perusal of the two writ petitions, which are on record of this special appeal as Annexure to the affidavit filed in support of the stay application, we find that they are based on the same cause of action, i.e., warrant of arrest, pursuant to the recovery certificate issued under Section 8-c of the Act, 1952 for the same amount of recovery, i.e., Rs.71,81,297/-. The date of warrant of arrest in the two writ petitions may be different, but there can be no manner of doubt that both the writ petitions are based on the same cause of action and, thus, the subsequent writ petition being a second writ petition for the same cause of action, is not liable to be entertained and has rightly been dismissed by the learned Single Judge.

13. The argument advanced by the learned Senior Counsel for the appellant that both the writ petitions are based on different cause of action, is misconceived and liable to be rejected.

14. The cause of action in both the writ petitions is the same, i.e., warrant of arrest issued by Recovery Officer, Employees Provident Fund Organisation for failure on the part of the applicant to satisfy the recovery certificate issued under Section 8-c of Act, 1952 towards outstanding statutory dues under the said Act.

15. The next submission advanced by the learned counsel for the appellants that in view of the subsequent developments, after dismissal of Writ Petition No. 11936 of 2009, which was affirmed in appeal does not prevent the appellant from challenging the order passed in proceedings subsequently and the said writ petition cannot be said to be a second writ petition for the same relief.

16. This argument is again misconceived and has only been advanced to be rejected.

17. From a perusal of the pleadings of the writ petition, we do not find details of any subsequent developments, which might have taken place after the dismissal of earlier Writ Petition No. 11936 of 2009 on the basis of which it could be said that the fresh cause of action has accrued to the petitioner to file another writ petition. In the absence of pleadings in the writ petition in respect of subsequent developments, the argument has no legs to stand and cannot be accepted.

18. The issue being well settled that a second writ petition for the same cause of action is not liable to be entertained, we find no fault with the judgment of the learned Single Judge in dismissing the writ petition.

19. Coming to the question of deliberate concealment of fact by the deponent in the writ petition and making false averment in the affidavit filed in support of the withdrawal application, again on a perusal of the record, we do not find any fault with the finding of the learned Single Judge on this aspect.

20. Admittedly, the averments in the 1st Writ Petition No. 11936 of 2009 were supported by the affidavit of Shri S.K. Bhattacharya as pairokar and the affidavit in support of the subsequent writ petition was also filed by him. Thus, there is no justification in not disclosing the fact of filing and dismissal of the earlier writ petition and special appeal. Again in the affidavit filed by Shri S.K. Bhattacharya in support of the withdrawal application, it was stated as under.

"1. That the deponent is the pairokar on behalf of the petitioners in this writ petition. He had no knowledge of the previous litigations as such he could not brief the facts to the petitioners counsel and as such is fully acquainted with the facts of the case deposed to below.

2. That after getting intimations before this Hon'ble Court the deponent inspected the records and came to know that the previous litigation were done by the petitioner no. 2 personally, who is aged about 79 years and has been keeping ailing health and is unable to move from Kolkata to Allahabad."

21. The falsity in the statement made by Shri S.K. Bhattarcharya in the affidavit filed in support of the withdrawal application becomes writ large from a perusal of the aforesaid averments. Even if it is presumed for the sake of argument that he forgot the fact of filing and dismissal of the earlier writ petition and special appeal, but once it is asserted that the deponent inspected the record, there was absolutely no reason or occasion to make the abovequoted averment in the said affidavit, it is a deliberate attempt on his part and the allegations made in the affidavit are patently false.

22. It is crystal clear that the deponent deliberately did not disclose the fact of filing and dismissal of the earlier

writ petition and special appeal in the subsequent writ petition and when this fact came to the notice of the learned Single Judge, on an objection being raised by the respondents, he again made totally false allegations in the affidavit filed in support of the application to dismiss the writ petition as withdrawn. Hence, we find no flaw in the judgment of the learned Single Judge holding that the appellant and the deponent misused the process of this Court, firstly in order to procure an order by concealing material facts in the writ petition and subsequently filing a false affidavit to save himself from the wreath of this Court.

23. Learned Single Judge has relied upon various pronouncements of the Hon'ble Apex Court laying down that if a litigant is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such a person. A litigant, who seeks shelter of falsehood, misrepresentation and suppression of facts in invoking the extraordinary equitable jurisdiction of this Court conferred by Article 226 of the Constitution of India, is not liable for any indulgence.

24. Hon'ble Apex Court in the case of A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, (2012) 6 SCC 430 held as under:-

"43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrongdoer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

43.5. It is the bounden obligation of the court to neutralise any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process."

25. Again in the case of Dalip Singh v. State of U.P. & Ors., (2010) 2 SCC 114, Hon'ble Apex Court noticed that an altogether new creed of dishonest litigants, have flooded the Court. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings.

26. Supreme Court in the case of V. Chandrashekaran & Anr. vs. Administrative Officer & Ors., [(2012) 12 SCC 133] held that a petition or affidavit containing misleading or inaccurate statement amounts to abuse of process of Court, a litigant cannot take inconsistent positions. In paragraph 45 of the report, Hon'ble Apex Court held as under.

"45. The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the

court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court."

27. For the aforesaid facts and discussions, we do not find any good ground to interfere with the order of the learned Single Judge dismissing the writ petition of the petitioner-appellants and imposing cost on both of them and the same is hereby affirmed.

28. The special appeal, accordingly, stands dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal Defective No. 784 of 2015

Om Prakash Chaubey ..Appellant
Versus
D.I.O.S. Varanasi & Ors. ...Respondents

Counsel for the Appellants:
Shankar Bhagwan Singh, Raj Nath Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India-Art.-226-Dismissal of Writ Petition-as infructuous-on statement made by Counsel-recall by another Counsel-rejection saying not maintainable-held-not proper-order impugned being termination-can not be infectious-application by another counsel-maintainable.

Held: Para-7
However, even if that be so, we are of the view that the ends of justice would require that the order of dismissal of the writ petition as infructuous by efflux of time should be recalled. The appellant has challenged an order of termination. The cause of the appellant against the order of termination continues to survive and has not been rendered infructuous by lapse of time.

Case Law discussed:
(2015) 7 SCC 373

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

1. The appellant filed a writ petition under Article 226 of the Constitution seeking to challenge an order dated 18 May 1993 passed by the Manager of the Harihar Mahadev Inter College, Deochandpur, Varanasi by which his services were terminated. The appellant also sought a mandamus restraining interference in the discharge of his duty as Assistant Teacher in the L.T. Grade. The petition came up for hearing before the learned Single Judge on 1 November 2010 and the following order was passed:

"Learned counsel for the petitioner states that this writ petition has become infructuous by efflux of time.

It is accordingly dismissed."

2. The appellant moved a recall application stating that he had no knowledge of the order dated 1 November 2010 since despite enquiry his previous counsel had not furnished a satisfactory response and that it was only ten days prior thereto when he was informed from the office of the District Inspector of Schools, Varanasi that the petition had been dismissed on 1 November 2010. It

may be also noted that the appellant stated that he was regularly working in the institution and had never furnished instructions to his earlier counsel to make the statement that the petition had been rendered infructuous by lapse of time. The relevant averments in that regard were as follows:

"6. That aforesaid writ petition was not infructuous by efflux of time as stated by previous counsel of the petitioner but petitioner is regularly working in the aforesaid institution as Assistant Teacher in L.T. Grade in Sri Harihar Mahadeo Inter College, Deochandpur, Varanasi and petitioner was full hope for his regularization but on account of statement of previous counsel matter of regularization has been stopped and petitioner suffering from great loss.

7. That no any consent was taken by the previous counsel to the petitioner before giving the statement before this Hon'ble Court that writ petition has been became infructuous by efflux of time but on account of imagination aforesaid statement was given by the previous counsel which is not true."

3. The learned Single Judge dismissed the recall application on 16 October 2015 with the following order:

"1. This is an application seeking recall of order dated 1.11.2010.

2. The aforesaid order was passed on the statement made by counsel for petitioner. Application for recall has been filed by a different counsel, who was not present on that date and has not made the statement. This application by a different counsel is not maintainable inasmuch the Court recollect that counsel, who appeared on behalf of petitioner on that day initially tried to argue the matter on merits, but finding some difficulty, he made statement for dismissal of writ petition as infructuous. I, therefore, find no reason to recall the said order.

3. The Restoration Application, along with delay condonation application, is hereby rejected."

4. The only ground on which the recall application has been dismissed is that it was filed by a counsel who was not present on the date of the earlier order of dismissal. In the view of the learned Single Judge, an application by a different counsel was not maintainable. The Court observed that it could recollect that the counsel who appeared on behalf of the appellant on that date had initially tried to argue the matter on merits but finding some difficulty, he had made a statement to the effect that the petition be dismissed as infructuous.

5. In our view, the real issue to be decided is whether such a statement which was made by the learned counsel appearing on behalf of the appellant to the effect that the petition had been rendered infructuous by efflux of time would bind the appellant so as to prevent him from applying for recall of the order. The learned Single Judge has held against the appellant on the ground that the recall application was filed by some other Advocate. The fact that the recall application was filed by some other Advocate would assume relevance if the appellant sought to dispute whether such a statement was actually made before the learned Single Judge. For the purpose of the special appeal, we shall proceed on the basis that such a statement was made before the learned Single Judge on 1 November 2010 to the effect that the petition had been rendered infructuous by efflux of time. The issue is not as to

whether the statement was made but whether even if made, the appellant would be precluded from applying for recall on the ground that the statement did not reflect the correct state of affairs.

6. We may note, as we have observed above, that the challenge in the present case was to an order terminating the services of the appellant which had been passed on 18 May 1993. The writ petition was pending in Court thereafter for nearly 17 years. There is no reason to presuppose that a petition challenging an order of termination of this nature would be rendered infructuous by efflux of time. The issue as to whether the petition is or is not rendered infructuous by lapse of time, is a matter which can certainly be agitated before the Court if the litigant on whose behalf a statement was made by the counsel seeks to urge that the statement was made mistakenly and without authority of the client. The appellant was entitled to urge that the issue in regard to the legality of the order of termination was a live issue and that he was continuing in the service of the institution.

7. In our view, the learned Single Judge ought not to have dismissed the recall application merely on the ground that it was made by counsel other than the person who has appeared on behalf of the appellant when the matter was heard on 1 November 2010. The fact that the application was made by a new counsel may at the highest dis-entitle the appellant from questioning whether the recital in the order of the learned Single Judge dated 1 November 2010 is a correct statement of what had actually transpired in the Court. Hence, for the purpose of this appeal, we have proceeded on the basis that the learned Single Judge on 1 November 2010 correctly recorded the statement which was made before the Court by the counsel. However, even if that be so, we are of the view that the ends of justice would require that the order of dismissal of the writ petition as infructuous by efflux of time should be recalled. The appellant has challenged an order of termination. The cause of the appellant against the order of termination continues to survive and has not been rendered infructuous by lapse of time.

8. At this stage, it would be necessary to advert to a recent judgment of the Supreme Court in Himalayan Coop. Group Housing Society vs. Balwan Singh1 where the following principles have been laid down.

"Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the Court should be wary to accept such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the Court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for

the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights."

9. These principles would clearly stand attracted to the fact of this case. For these reasons, we allow the special appeal and accordingly set aside both the orders dated 1 November 2010 and 16 October 2015. Writ-A No. 18410 of 1993 is restored to the file of the learned Single Judge for disposal afresh. However, we clarify that we have not expressed any opinion on the merits of the rights and contentions of the parties in the writ petition which will have to be adjudicated upon by the learned Single Judge.

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

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2015

BEFORE
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Second Appeal No. 998 of 2015

Smt. Hirakali & Anr. ...Appellants
Versus
Ankur Agarwal & Anr. ...Respondents

Counsel for the Appellants:
Sri Keshav Dhar Tripathi

Counsel for the Respondents:

C.P.C. Section-100-Second Appeal-Suit for specific performance-decreed by Courts below-ground regarding escalation of value of property subject matter of suit-not taken before Lower Appellate Court-can not be available in Second appeal-no substantial question of law found involved-suit rightly decreed by Court below.

Held: Para-9
On examination of the reasoning recorded by the trial court, which are affirmed by the learned first appellate court in first appeal, I am of the view that the judgments of the trial court as well as the first appellate court are well reasoned and based upon proper appreciation of the entire evidence on record. No perversity or infirmity is found in the concurrent findings of fact recorded by the trial cout that has been affirmed by the first appellate court to warrant interference in this appeal. No question of law, much less a substantial question of law was involved in the case before this Court. None of the contentions of the learned counsel for the appellant- plaintiffs can be sustained.

Case Law discussed:
Laws (SC)-2008-1-13; ((2008) 12 SCC 67)

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

1. Original suit no. 934/2006 (Ankur Agrawal v. Smt. Hirakali & others) was filed for specific performance of registered contract dated 25.06.2009 executed between the plaintiff Ankur Agrawal and Om Prakash (predecessor in interest of defendants) for sell of disputed property in favour of the plaintiffs. According to plaint case, plaintiffs and Om Prakash had executed said registered sale-deed in which it was agreed that owner of disputed property Om Prakash will sell the said property for a consideration of Rs. 1,60,000/- in favour of plaintiffs, and at the time of execution of said agreement to sell Om Prakash had received advance of Rs. 70,000/- .The

plaintiff had been ready and willing to perform his part of such contract but earlier Om Prakash and thereafter his successor in interest, namely, defendants had not executed the sale deed; therefore, plaintiffs had filed suit for specific performance of said contract.

2. Defendants (present appellants) had filed written-statement in original suit. Then trial court had framed issues, accepted evidences of the parties and thereafter Additional Civil Judge (S.D.) Court No.-4 Bareilly had passed the judgment dated 25.05.2009, by which suit was decreed and defendants were directed to receive a consideration of Rs. 90,000/- from plaintiffs and execute the sale deed in his favour.

3. Aggrieved by the said judgment dated 25.05.2009, defendants had filed Civil Appeal no. 50/2009 (Smt. Hirakali & another v. Ankur Agrawal & another. This appeal was preferred by the three defendants of original suit whereas the defendant Sunil Kumar s/o Om Prakash had not preferred appeal, so he was made formal respondent in first appeal. The Additional Judge/ Special Judge (SC/ST Act), Bareilly had afforded opportunity of hearing to the parties, heard their arguments, framed point of determination and thereafter passed judgment dated 30.07.2015, by which first appeal was dismissed and judgment of trial court was confirmed. Aggrieved by the judgments of trial court as well as the first appellate court, this second appeal has been preferred by the appellants of first appeal. (two defendants of original suit).

4. Learned counsel for the appellants contended that appellants had no knowledge of registered agreement to sell, but the two courts below had erroneously passed the judgment against it. He also contended that finding of the two courts below are erroneous and perverse which cannot sustained. He also placed alternative arguments that at the time of specific performance of contract of sale of property, court should consider the equity that after long time of passing of the agreement to sell the value of property would enhance, thereafter at the time of granting of relief for specific performance, amount of consideration should be enhanced.

5. A perusal of the records reveal that it has been admitted fact that Om Prakash was original owner of the disputed property for which registered agreement to sell was executed, and later on Om Prakash had died. The defendants/appellants had challenged the execution of registered agreement to sell by Om Prakash in favour of plaintiffs/respondents. On this point, the trial court had framed issue no.-1 to the effect that whether predecessor in interest of defendants, namely, Om Prakash had executed the registered agreement to sell dated 25.06.2005 in favour of plaintiff for sale of disputed property. On this point trial court had accepted evidences of the parties. In this regard, plaintiff had adduced four witnesses in oral evidences and defendants/appellants side had also adduced three witnesses in oral evidences. Trial court had discussed oral and documentary evidences and thereafter gave specific finding of fact in favour of plaintiffs/respondents holding that Om Prakash had executed registered agreement to sell with plaintiff for sale of disputed property to plaintiff for consideration of Rs. 1,60,000/- and thereafter accepted Rs. 70,000/- as advance consideration. When these findings were challenged by the appellants side in first appeal, then first

appellate court had also considered the facts, circumstances and evidences and confirmed findings of trial court on this point.

6. So far as perversity of appreciation of evidences by two courts below is concerned, in this regard a perusal of evidences and findings reveal that both the courts below had rightly reached to the conclusion that Om Prakash had entered into agreement with plaintiffs/respondents and executed registered agreement to sell disputed property as mentioned in the plaint. The case of defendants (present appellants) was simply of denial. Admittedly they were not a party to said agreement to sell and had no personal knowledge about it when plaintiff had properly proved the plaint case regarding execution of registered agreement to sell in question and discharged his burden. Then the trial court as well as first appellate court had rightly reached to the conclusion mentioned in the judgment on this point. There appears no illegality or perversity in finding of the two courts below. The dispute between the parties in this matter is only that whether predecessor in interest and owner of disputed property (Om Prakash) had executed disputed registered agreement to sell in favour of Ankur Agrawal as mentioned in plaint or not. It is a question of fact that can only be decided on the basis of evidences. There was nothing in it that may be treated as point of law . Two courts below had appreciated facts, evidences, circumstances and thereafter gave concurrent findings of facts that plaint case in this regard has been proved and Om Prakash and Ankur Agrawal had executed the registered agreement to sell as mentioned in plaint. By the decree of two courts below the defendants were directed to receive remaining amount to sale consideration to the extent of Rs. 90,000/- and execute the sale deed of said property. No question of law arises in this matter relating to dispute between the parties.

7. Learned counsel for the appellants had cited the case of Pratap lakshmand Muchandi Vs. Shamlal Uddavadas Wadhwa, Laws (SC)-2008-1-13 and also sited in ((2008) 12 SCC 67), in which Apex Court had held as under:

"16. But at the same time it is also true that the agreement to sell was executed way back in the year 1982. Since after 1982 much water has flown under the bridge, the value of the real estate has shot up very high, therefore, while exercising our jurisdiction under Section 20 of the Specific Relief Act, 1963 we would like to be equitable and would not allow the sale of property to be executed for a sum of Rs 1,20,000. The litigation has prolonged for almost 25 years and now at last reached at the end of the journey. Therefore, we have to settle the equity between the parties. We hold that the agreement to sell was genuine and it was executed for bona fide necessity but because of the passage of time we direct that the respondents shall pay a sum of Rs 5 lakhs in addition to Rs 1,10,000 as out of Rs 1,20,000, Rs 10,000 has already been paid as advance. On receipt of Rs 1,10,000 and Rs 5 lakhs (Rs 6,10,000) the appellants shall execute the sale deed for the property in question."

8. I am in agreement with this contention that if litigation has prolonged for about 25 years or so, then equity should be considered so that any party may not be prejudiced without sufficient reason. The citation as above discussed the agreement executed between the parties for almost 25 years but in present matter this is not a case. In present matter the registered agreement to

sell was executed on 25.06.2005 and it was agreed between the parties and within one year the registered sale deed would be executed. Since then plaintiffs/respondents is showing his eagerness and willingness to get the said contract executed. Earlier he had sent several notices before the lapse of period of one year. Thereafter he again sent notice for specific performance of said agreement to sell. On the other hand defendants/ respondents had been ignoring those notices and taking undue benefit of their possession and had been delaying the matter. It is pertinent to mention that no plea of the escalation of value of property was taken by the defendants/appellants either in their written statement or in first appeal. In fact no such plea was raised by the appellants in first appeal and its plea has suddenly been taken directly in second appeal before this court. Rule-2 of Order XLI CPC provides for the grounds which may be taken in appeal. It lays down that the appellant shall, not except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Therefore this reason also the new plea of the escalation of value of property should be permitted to be taken directly in second appeal. In absence of such plea before first appellate court, appellant had no right to argue on this point even before first appellate court then permitting him on such point in second appeal directly for admission of appeal may cause pre judice to rights of respondents.

9. On examination of the reasoning recorded by the trial court, which are affirmed by the learned first appellate court in first appeal, I am of the view that the judgments of the trial court as well as the first appellate court are well reasoned and based upon proper appreciation of the entire evidence on record. No perversity or infirmity is found in the concurrent findings of fact recorded by the trial cout that has been affirmed by the first appellate court to warrant interference in this appeal. No question of law, much less a substantial question of law was involved in the case before this Court. None of the contentions of the learned counsel for the appellant- plaintiffs can be sustained.

10. In view of the above, this Court finds that no substantial question of law arises in this appeal. The second appeal is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2015

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE SHASHI KANT, J.

C..M.W.P. No. 1146 of 2014

Smt. Chandrawati @ Chandri & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Preetpal Singh Rathore, Sri Anil Tiwari

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

Land Acquisition Act, 1894, Section-4 and 6 readwith Right to fair compensation & Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013-Section 24-Lease back policy of Gramin Abadi Land-award made 5 years prior to 1/1/14-on two negative conditions of Section 24-proceeding shall be deemed to elasped-petition allowed.

Held: Para-14 & 22

14. Thus, it is well settled by various pronouncements of the Hon'ble Apex

Court noted above that even if one of the two negative conditions prescribed in Section 24 (2) stands fulfilled and the award is made five years prior to commencement of Act, 2013, which is 01.01.2014, the proceedings shall be deemed to have lapsed.

22. In view of the undisputed and admitted facts of the case that award was made on 11.01.2000 and the petitioners have not received the compensation and since the same was deposited with the A.D.M. (L.A.), in view of the law laid down by the Hon'ble Apex Court referred to above, will not tantamount to compensation paid to the land holders/persons interested, inasmuch as the law stands settled that unless the deposit is made in the court to which a reference would lie in accordance with Section 31 of the Act, 1894 and the acquisition proceedings initiated under the old Act cannot escape the mischief of Section 24 (2) of Act, 2013.

Case Law discussed:
(2014) 3 SCC 183; (2014) 6 SCC 586; (2014) 6 SCC 583; (2014) 6 SCC 564; (2015) 3 SCC 353; (2015) 4 SCC 325; 2015 (3) SCC 541; (2015) 3 SCC 597

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

1. Heard Shri Anil Tiwari, learned Senior Counsel appearing for the petitioner, learned Standing Counsel for the State respondents and Shri Shivam Yadav appearing for respondent nos. 4 to 6.

2. Dispute in this petition is in respect of khasra plot no. 236, area 6-13-0 situate in village Gejha Tilpatabad, NOIDA, district Gautam Budh Nagar (hereinafter referred to as 'land in dispute').

3. The land in dispute was recorded in the name of one Ram Chandra s/o Phussi. He transferred an area of 0-6-6-2/3 (6 biswa and 6-2/3 biswansi) by means of a registered sale deed dated 10.12.1982 in favour of petitioner no. 1. Petitioner no. 2 claims to have purchased area of 1000 sq. mtrs. from petitioner no. 1 by way of registered sale deed dated 13.11.2011.

4. The plot in dispute was subject matter of acquisition for planned development in district Ghaziabad through New Okhla Industrial Development Authority (hereinafter referred to as 'NOIDA Authority'). Notification under Section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act, 1894') read with Section 17 (1) and (4) of the said Act, was issued on 13.01.1995. Notification under Section 6 was published on 23.05.1997. A notice dated 20th June, 2013 was issued to petitioner no. 2 and two others for demolition of the constructions standing over the land in dispute. Petitioner no. 2 and the other noticees challenged the same by filing Writ Petition No. 36148 of 2013 on the allegation that constructions were standing on the land in dispute long before the date of purchase of land. However, relying upon the description of the property in the sale deed, which was shown as vacant plot of land having no covered area, a Division Bench of this Court vide order dated 29.07.2013 dismissed the writ petition finding no illegality or infirmity in the notice for demolition.

5. The two petitioners filed the instant petition seeking a writ, order or direction in the nature of mandamus to command the respondent-NOIDA to exempt the land in dispute from notification dated 31.01.1995. Another writ, order or direction in the nature of mandamus was also sought to command the respondent-NOIDA to complete and conclude the lease back proceedings initiated by them in pursuance of 3rd Amendment of Regulation 2006. Further a mandamus to

command the respondent nos. 2 to 6 not to take any coercive action against the petitioners with regard to their exclusive and peaceful possession over plot no. 236 was also prayed for.

6. The writ petition was filed on the allegation that in view of the 3rd Amendment in Regulation 2006 providing that Gramin abadi land upto 30th June, 2011 may be regularised and may be leased back to respective farmers and since in the survey undertaken by NOIDA, an abadi was found over the land in dispute, therefore, under the lease back policy, the land in dispute ought to have been returned back to the petitioners. However, subsequently, the petitioners made an application seeking amendment in the pleadings, which was allowed vide order dated 15.01.2014. After amendment, following reliefs came to be sought for in the writ petition.

"(i) issue an appropriate writ, order or direction in the nature of mandamus to declare and treat the land acquisition proceedings culminated in the award dated 11.01.2000 with regard to the area 1000 square yards which is part of Gata No. 236 village Geja Tilpatabad, Pargana and Tehsil Dadri, District Gautam Budh Nagar as lapsed by operation of law as contained in Section 24 (2) of Act namely "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013".

Or alternatively

Direct the respondents to consider the claim of the petitioners for lease back the disputed land under the provisions of the Regulation namely "The New Okhla Industrial Development Authority Rural Abadi Site (Management and Regularization for Residential Purpose) Regulation 2006" as amended from time to time.

(ii) issue a writ, order or direction in the nature of mandamus directing the respondents no. 2 to 6 for not to take any coercive action against the petitioners with regard to their exclusive and peaceful possession in Khasra No. 236 Village Gejha, Tilapatabad Tehsil Dadri, District Gautam Budh Nagar. Issue any other suitable writ, order or direction which this Hon'ble court may deem fit and proper under the circumstances of the case."

7. The aforesaid reliefs were claimed through amendment on the basis of the allegations, which were already there in paragraph 31 of the writ petition that since neither any compensation has been given to the petitioners nor possession has been taken from them, so the acquisition proceedings shall be deemed to have lapsed in view of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the 'Act 2013'). Section 24 of the Act, 2013 reads as under.

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.- (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894),-

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act;

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

8. A bare reading of Section 24 (2) of Act, 2013 goes to show that upon fulfilment of two conditions mentioned therein, the acquisition proceedings made under the old Act shall be deemed to have lapsed. The said two conditions are:-

(1) award under the said section 11 has been made five years or more prior to the commencement of the new Act, i.e., prior to 01.01.2014.

(2) the physical possession of the land has not been taken or the compensation has not been paid.

9. In the present case, according to the pleadings in the counter affidavit filed by NOIDA, the award was declared on 11.01.2000. It may be relevant to quote paragraph 8 of the counter affidavit.

"8. That the contents of paragraph nos. 3 and 4 of the writ petition are not admitted and are denied. It is further submitted that Khasra No. 236 area 6-13-0 Bigha was acquired in the year 1995 itself through notification U/s-4/17 dated 13.01.1995 and notification U/s-6/17 dated 21.09.1995. The possession of aforesaid land was taken over by the authority way back on 23.05.1997 and 20.12.1997. Further, award with regarding the aforesaid acquisition was declared on 11.01.2000. New Okhla Industrial Development Authority Rural Abadi Site (Management and Regularisation for Residential Purposes) Regulations, 2006 is applicable to those who are original tenure holders of the revenue villages within the territorial limit of NOIDA. In the present case, the petitioner no. 1 is the resident of New Delhi and never came to NOIDA for residential purposes. It is further being clarified that she further sold out the property to petitioner no. 2 in the year 2011 to the person who also is not the resident of same revenue village. Moreover, sale to the petitioner no. 2 was made almost after about 16 years of acquisition. However, the said sale and purchase of acquired land clearly shows that there was no Abadi over the land in question. Therefore, no benefit whatsoever can be granted to the petitioners."

10. In view of the aforesaid averment made in the counter affidavit admitting that the award has been declared on 11.01.2000, the first condition prescribed in Section 24 of Act, 2013 stands fulfilled. The question as to whether the possession of land in dispute which was subject matter of acquisition has been taken by the respondent-NOIDA, is a disputed question of fact, inasmuch as averments on oath contrary to each other

have been made by both the parties. However, said issue will not detain us from proceeding further in the matter, inasmuch as the second condition in Section 24 (2) of the Act, 2013 consists of two contingencies, physical possession of the land has not been taken or the compensation has not been paid. The use of word 'or' by the Legislature clearly goes to show that, in case, where an award has been made five years or more prior to commencement of the Act and either of the two contingencies, viz., physical possession of the land has not been taken or the compensation has not been paid, is satisfied, such acquisition proceedings were deemed to have lapsed. The provisions of Section 24 (2) has been subject matter of interpretation by Hon'ble Apex Court in the case of Pune Municipal Corporation & Anr. Vs. Harakchand Misirimal Solanki & Ors., (2014) 3 SCC 183. It may be relevant to quote paragraphs 10 and 11 of the report, where this issue has been discussed and answered.

"10. Insofar as sub-section (1) of Section 24 is concerned, it begins with non obstante clause. By this, Parliament has given overriding effect to this provision over all other provisions of 2013 Act. It is provided in clause (a) that where the land acquisition proceedings have been initiated under the 1894 Act but no award under Section 11 is made, then the provisions of 2013 Act shall apply relating to the determination of compensation. Clause (b) of Section 24 (1) makes provision that where land acquisition proceedings have been initiated under the 1894 Act and award has been made under Section 11, then such proceedings shall continue under the provisions of the 1894 Act as if that Act has not been repealed.

11. Section 24 (2) also begins with non obstante clause. This provision has overriding effect over Section 24 (1). Section 24 (2) enacts that in relation to the land acquisition proceedings initiated under 1894 Act, where an award has been made five years or more prior to the commencement of the 2013 Act and either of the two contingencies is satisfied, viz; (i) physical possession of the land has not been taken or

(ii) the compensation has not been paid; such acquisition proceedings shall be deemed to have lapsed. On the lapse of such acquisition proceedings, if the appropriate government still chooses to acquire the land which was the subject matter of acquisition under the 1894 Act then it has to initiate the proceedings afresh under the 2013 Act. The proviso appended to Section 24 (2) deals with a situation where in respect of the acquisition initiated under the 1894 Act an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries then all the beneficiaries specified in Section 4 notification become entitled to compensation under 2013 Act."

11. The same view has been reiterated in the case of Bharat Kumar Vs. State of Haryana & Anr., (2014) 6 SCC 586. After noticing the provisions of Section 24 of the Act, 2013, it has been held as under.

"Sub-section (2) of Section 24 commences with a non obstante clause. It is a beneficial provision. In view of this provision, if the physical possession of the land has not been taken by the acquiring authority though the award is passed and if the compensation has not been paid to the land owners or has not been deposited before the appropriate forum, the proceedings initiated under the 1894 Act is deemed to have been lapsed."

12. The ratio of the decision of the Pune Municipal Corporation (supra) has

been reaffirmed by the Hon'ble Apex Court in the case of Bimla Devi & Ors. Vs. State of Haryana & Ors., (2014) 6 SCC 583, Union of India & Ors. Vs. Shiv Raj & Ors., (2014) 6 SCC 564, Shree Balaji Nagar Residential Association Vs. State of Tamil Nadu & Ors., (2015) 3 SCC 353 and Velaxan Kumar Vs. Union of India & Ors., (2015) 4 SCC 325.

13. Again, in a recent decision in the case of Rajiv Chowdhrie HUF Vs. Union of India & Ors., 2015 (3) SCC 541, the ratio of the decision in the case of Pune Municipal Corporation (supra) has been reaffirmed.

14. Thus, it is well settled by various pronouncements of the Hon'ble Apex Court noted above that even if one of the two negative conditions prescribed in Section 24 (2) stands fulfilled and the award is made five years prior to commencement of Act, 2013, which is 01.01.2014, the proceedings shall be deemed to have lapsed.

15. In the light of the aforesaid, we now proceed to test whether the compensation has not been paid to the petitioners and, thus, the second alternative negative condition prescribed by Section 24 (2) stands fulfilled.

16. In the counter affidavit filed on behalf of the NOIDA in paragraphs 35 and 37, it has been pleaded as under.

"35. That the contents of paragraph no. 15 of the 1st supplementary affidavit need no reply from the side of answering respondents. It is, however, submitted that 95% of compensation has already been disbursed by the answering respondents. The petitioners with mala fide intention did not accept the compensation, as such, it has been deposited with A.D.M. (L.A.).

37. That the contents of paragraph no. 17 of the 1st supplementary affidavit are not admitted and are denied. It is further submitted that compensation has already been paid by the answering respondents, which has been deposited with ADM (LA), the same can very well be received by the petitioners."

17. In view of the aforesaid averments, it is, thus, clear that compensation has neither been paid to the petitioners nor it has been deposited in the court to which a reference under Section 18 would be submitted as mandated by Section 31 of Act, 1894, which reads as under.

"31. Payment of compensation or deposit of same in court. - (1) On making an award under Section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.

(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the court to which a reference under Section 18 would be submitted: "

18. Thus, Section 31 of Act, 1894 enjoins upon the Collector of making an award under Section 11 to tender payment of compensation to persons interested entitled thereto according to the award. It further mandates the Collector to make payment of compensation to them unless prevented by one of the contingencies contemplated in sub-section (2), which are:

(i) the person interested entitled to compensation did not consent to receive it, (ii) there is no person competent to alienate the land, and (iii) there is dispute as to the title to receive compensation or as to the apportionment of it.

19. If due to any of the contingencies contemplated in Section 31 (2) of Act, 1894, the Collector is prevented from making payment of compensation to the persons interested who are entitled to compensation, he is required to deposit the compensation in the court to which reference under Section 18 may be made.

20. While interpreting the expression 'compensation has not been paid' used in Section 24 (2), Hon'ble Apex Court in the case of Pune Municipal Corporation (supra), has held as under.

"15. Simply put, Section 31 of the 1894 Act makes provision for payment of compensation or deposit of the same in the court. This provision requires that the Collector should tender payment of compensation as awarded by him to the persons interested who are entitled to compensation. If due to happening of any contingency as contemplated in Section 31 (2), the compensation has not been paid, the Collector should deposit the amount of compensation in the court to which reference can be made under Section 18.

16. The mandatory nature of the provision in Section 31 (2) with regard to deposit of the compensation in the court is further fortified by the provisions contained in Section 32, 33 and 34. As a matter of fact, Section 33 gives power to the court, on an application by a person interested or claiming an interest in such money, to pass an order to invest the amount so deposited in such government or other approved securities and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as it may consider proper so that the parties interested therein may have the benefit therefrom as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be.

17. While enacting Section 24 (2), Parliament definitely had in its view Section 31 of the 1894 Act. From that one thing is clear that it did not intend to equate the word "paid" to "offered" or "tendered". But at the same time, we do not think that by use of the word "paid", Parliament intended receipt of compensation by the landowners/persons interested. In our view, it is not appropriate to give a literal construction to the expression "paid" used in this sub-section (sub-section (2) of Section 24). If a literal construction were to be given, then it would amount to ignoring procedure, mode and manner of deposit provided in Section 31 (2) of the 1894 Act in the event of happening of any of the contingencies contemplated therein which may prevent the Collector from making actual payment of compensation. We are of the view, therefore, that for the purposes of Section 24 (2), the compensation shall be regarded as "paid" if the compensation has been offered to the person interested and such compensation has been deposited in the court where reference under Section 18 can be made on happening of any of the contingencies contemplated under Section 31 (2) of the 1894 Act. In other words, the compensation may be said to have been "paid" within the meaning of Section 24 (2) when the Collector (or for that matter Land Acquisition Officer) has discharged his obligation and deposited the amount of compensation in court and made that amount

available to the interested person to be dealt with as provided in Sections 32 and 33.

18. 1894 Act being an expropriatory legislation has to be strictly followed. The procedure, mode and manner for payment of compensation are prescribed in Part V (Sections 31-34) of the 1894 Act. The Collector, with regard to the payment of compensation, can only act in the manner so provided. It is settled proposition of law (classic statement of Lord Roche in Nazir Ahmad[1]) that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

21. The same view has been reiterated in the case of Bharat Kumar (supra), Bimla Devi (supra), Rajiv Chowdhrie HUF (supra) and Sita Ram Vs. State of Haryana & Anr., (2015) 3 SCC 597.

22. In view of the undisputed and admitted facts of the case that award was made on 11.01.2000 and the petitioners have not received the compensation and since the same was deposited with the A.D.M. (L.A.), in view of the law laid down by the Hon'ble Apex Court referred to above, will not tantamount to compensation paid to the land holders/persons interested, inasmuch as the law stands settled that unless the deposit is made in the court to which a reference would lie in accordance with Section 31 of the Act, 1894 and the acquisition proceedings initiated under the old Act cannot escape the mischief of Section 24 (2) of Act, 2013.

23. In view of the aforesaid facts and discussions and the reasons recorded by us, the acquisition proceedings in respect of the petitioners' land stands lapsed.

24. The writ petition, accordingly, stands allowed. The impugned notification in so far as the land of the petitioners is concerned, the same stands quashed.

25. We, however, leave it open to the State Government, if it so chooses, to initiate proceedings for acquisition of the land in dispute afresh in accordance with the provisions of Act, 2013.

26. However, in the facts and circumstances, we do not make any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2015

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

W.P. No. 2156 (S/S) of 2009

Syed Amirul Haq ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amit Bose

Counsel for the Respondents:
C.S.C.

U.P. Police Officer Subordinate Ranks (Punishment and Appeal) Rules-1991-Rule-14(i)-disciplinary proceeding against police constable-concluded for dismissal-without deciding the question-whether unauthorized absence was willful or beyond his control-petitioner suffering from paralytic attack-treatment by different doctors in different hospitals-can not be termed unauthorized absence from duty-held-entitled for reinstatement as the petitioner already retired-arrears of salary during period of suspension to punishment not payable-but

for purpose of post retiral benefits-shall be taken into account.

Held: Para-19, 20 & 22

19. If employee is unable to attend duties for a reason like mishap; serious ailment of his or in family; law and order problem; failure of transport etc., it cannot be termed as a case of deliberate or willful absence.

20. At this juncture it would be relevant to point out that Paralysis of the muscles of the face, arm, and leg on one side of the body is called hemiplegia ("hemi" means "half") and usually results from damage to the opposite side of the brain. Damage to the nerves of the spinal cord affects different parts of the body, depending on the amount of damage and where it occurred. Paralysis is a serious ailment and it affects not only the locomotion of the body but it also cause loss of sense. Therefore, the disease with which petitioner was suffering, is of serious nature and his absence cannot be said to be willful.

22. Thus it is a settled position of law since long that in a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.

Case Law discussed:

2009 (2) SCC 570; (1995 Supp. (3); (2012) 3 SCC 178; (2004) 4 SCC 560

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

1. Heard Mr Amit Bose, learned Counsel for the petitioner and learned Standing Counsel.

2. Through the present writ petition under Article 226 of the Constitution of India, the petitioner has questioned the validity of the order dated 20.2.2006 [Annexure-1 to the writ petition] whereby the petitioner has been removed from service by the Superintendent of Police, Chandauli. The petitioner has also assailed the appellate order dated 16.10.2006 passed by the Deputy Inspector General of Police, Varanasi Range, Varanasi contained in Annexure No. 12 to the writ petition as also the revisional order dated 3.9.2008/20.9.2008 passed by the Inspector General of Police, Varanasi Zone, Varanasi.

3. Brief facts of the case, in a narrow compass, are that while working as Constable at police-out post Tara Jeevanpur, Police Station Alinagar, District Chandauli, the petitioner proceeded on three days leave on 16.12.2001 but he did not report for duties on expiry of sanctioned leave and as such, vide order dated 6.12.2003, the Superintendent of Police, Chandauli suspended the petitioner in contemplation of departmental inquiry on the ground of unauthorized absence and the Circle Officer, Chakia, Chandauli, was appointed as Preliminary Enquiry Officer. However, the said preliminary inquiry was not conducted and the file was returned by the Circle Officer.

4. According to the petitioner, while he was on leave, on 17.12.2001, he suffered a paralytic attack on the right side of his body as a consequence whereof he was completely bed ridden and even loss locomotion. Immediately thereafter, on 18.12.2001, he was rushed to the State Unani Hospital, Musafirkhana, District Sultanpur, where he remained under treatment upto 19.12.2001 but since there was no improvement in the condition, he was taken by the members of family to State Unani Hospital, Ghazipur, where also

his condition did not improve and remained precarious. After being under treatment in different doctors, he again got himself treated at State Unani Hospital, Musafirkhana, district Sultanpur, where he remained under treatment from 7.1.2003 to 20.12.2003.

5. The petitioner on regaining health after a long illness and when he regain physical movement of his body, he joined his duties on 4.4.2004. Subsequently, vide order dated 9.4.2004, the Superintendent of Police directed the Circle Officer, Chandauli, District Varanasi to conduct preliminary inquiry into the charge leveled against him for his being absent from duty w.e.f. 20.12.2001 to 3.4.2004. The Preliminary Inquiry Officer, after due inquiry, submitted its report on 4.6.2004, holding the petitioner guilty of being absent from duty and recommended the punishment of fine equivalent to one month's salary be imposed on the petitioner and the period of his absence from duty be sanctioned as leave without pay. However, the said recommendation of the Preliminary Inquiry Officer was not accepted by the Senior Superintendent of Police, Varanasi and, therefore, vide order dated 10.6.2004, the Superintendent of Police instituted departmental proceedings under Section 14 (1) of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 and appointed the Circle Officer, Sakaldiha, District Varanasi, as the Inquiry Officer. It may be clarified that on 18.6.2004, the petitioner was reinstated in service without prejudice to the departmental inquiry to be conducted against him. It was provided that the orders with regard to the pay and allowances for the period he was under suspension would be passed later on.

6. Pursuant to the aforesaid reinstatement order, the petitioner was posted at police station Chakia, district Varanasi in the month of June, 2004. On 1.7.2004, the petitioner again suffered a second paralytic attack on the left side of his body in the Police Line, Varanasi. On 1/2.7.2004, the petitioner was relieved for joining at police station Chakia, district Varanasi in absentia. However, the petitioner could not join at police station Chakia on account of second paralytic attack. On 6.1.2005, a charge-sheet was issued against the petitioner by the Circle Officer, Sakaldiha, District Chandauli, to which the petitioner submitted his reply on 7.2.2005. The Inquiry Officer submitted his report on 9.12.2005 holding the petitioner guilty of being absent from duty from 20.12.2001 to 4.4.2004 and also on account of his absent from duty and his failure to join at police station Chakia, District Chandauli and recommended the punishment of removal from service be imposed on the petitioner. Subsequently, vide order dated 10.12.2004, the petitioner was placed under suspension on the ground of not joining at police station Chakia. On 29.12.2005, a show cause notice was issued to the petitioner, to which the petitioner submitted his reply on 13.2.2006. However, the Superintendent of Police, Chandauli, vide order dated 20.2.2006, removed the petitioner from services.

7. Not being satisfied with the order of removal, the petitioner preferred an appeal before the Deputy Inspector General of Police, Varanasi Range, Varanasi, which was dismissed vide order dated 16.10.2006. Being aggrieved, the petitioner filed revision, which too was dismissed vide order dated 29.9.2008.

8. Hence the petitioner has filed the instant writ petition assailing all the aforesaid orders.

9. Counsel for the petitioner has vehemently argued that the impugned order of removal has been passed without considering the reply of the petitioner and looking to the serious ailment with which petitioner was suffering at the relevant time. The Punishing Authority as well as the Inquiry Officer failed to consider the medical certificate submitted by the petitioner and disbelieved the same without any verification from the doctors. They also failed to consider the very vital fact that the petitioner's absence from duty was not deliberate or willful but it was on account of ineluctable circumstances. Moreover, while passing the order of punishment, the punishing authority on one hand has regularized the period of absence from duty of the petitioner and on the other hand for the same alleged absence, passed the impugned order of removal.

10. In contrast, learned Standing Counsel stated that on account of unauthorized absence from duty, the petitioner, namely, Syed Anwarul Haq was subjected to disciplinary proceedings and after due process of law, the order of removal from service was passed. It has been clarified that the inquiry against the petitioner was conducted in consonance with the principles of natural justice. The appeal and the Revision was decided with speaking order. Therefore, there is no illegality in the impugned orders and the writ petition is liable to be dismissed.

11. I have given my anxious consideration to the facts and circumstances of the case and have also examined the material on record including the original record produced by the Standing Counsel.

12. There is no dispute to the fact that after remaining absent for the period, referred to above, the petitioner was allowed to resume his duties vide order dated 18.6.2004 passed by the Senior Superintendent of Police, Varanasi without prejudice to the departmental inquiry to be conducted against him. It was also provided in the aforesaid order that necessary orders with regard to the arrears of pay and allowances would be passed later on.

13. In the instant case, on perusal of the averments made in the counter affidavit, it comes out that no reason has been indicated as to why the medical certificate issued by the doctor was not accepted by the authorities. There is no whisper as to how the authorities came to the conclusion that the medical certificates were fabricated one. The Inquiry Officer/Disciplinary Authority had neither summoned the doctor nor otherwise made an efforts to verify the genuineness of the medical certificate. Thus the Inquiry Officer/disciplinary authority has violated the principle of natural justice. A perusal of relevant record reveals that it is the definite stand of the petitioner before the Inquiry Officer to summon the three doctors who had treated him to prove the factum of his illness and the genuineness of the medical certificates submitted by him but the Inquiry Officer did not summon the aforesaid witnesses causing serious prejudice to the petitioner. No documents have been brought on record on the basis of which genuineness of the Medical Certificates produced by the petitioner were doubted by the Inquiry Officer and believed by other authorities. Without summoning and examining the Doctor, the conclusion of the authorities that the Medical certificates are not genuine documents, is wholly erroneous and unjustified. No finding could have been recorded by the Inquiry Officer with regard to certificates or the factum of illness of the

petitioner without summoning the doctors, and denial by them with regard to illness and treatment given to the petitioner by them. As regard the finding recorded by the Inquiry Officer that the petitioner did not inform the authorities of his illness, the record which have been produced by the respondents, shows that there are various applications and medical certificates available on the record submitted by the petitioner with regard to grant of leave and extension of leave . The different doctors like, In-charge Medical Officer, State Unani Hospital, Musafirkhana,Sultanpur and Medical Officer GHMC & Hospital,Ghazipur had diagnosed the petitioner as a patient of paralysis on right side of the body. Apart from above, the petitioner had attacked the impugned orders on the ground of various defects in the disciplinary proceedings.

14. In a recent decision i.e. Roop Singh Negi vs. Punjab National Bank 2009(2) SCC 570, the Apex Court while narrating the duty of the inquiry officer, disciplinary authority and appellate authority, held that the material brought on record pointing out the guilt are required to be proved.

15. The Apex Court in the case of Ministry of Finance and another Vs. S.B.Ramesh (1998 SCD page 1046) and S.C. Gioratra Vs. United Commercial Bank and others (1995 Supp.(3) has held that if the enquiry officer did not prove the documentary evidences relied upon in the enquiry and without proving the charges levelled against the petitioner, submitted his enquiry report, it vitiates the entire proceedings due to non-observance of principle of natural justice.

16. Undoubtedly, the petitioner was principally charged for unauthorized absence from duty. In the case of petitioner referring to unauthorized absence, the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant.

17. The question whether `unauthorized absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

18. The question whether "Unauthorized absence from duty" amounts to failure of devotion to duty or behavior unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances, have been dealt in detail by the Hon'ble Supreme Court in the case of Krushnakant B. Parmar vs. Union of India and another (2012) 3 SCC 178 observed in paragraphs 17,18 and 19 as under:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report duty, such absence cannot be held to willful. Absence from duty,

such absence cannot be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the inquiry officer on appreciation of evidence though held that the appellant was unauthorisedly absence from duty but failed to hold that the absence was willful; the disciplinary authority as also the appellate authority, failed to appreciate the same and wrongly held the appellant guilty."

19. If employee is unable to attend duties for a reason like mishap; serious ailment of his or in family; law and order problem; failure of transport etc., it cannot be termed as a case of deliberate or willful absence.

20. At this juncture it would be relevant to point out that Paralysis of the muscles of the face, arm, and leg on one side of the body is called hemiplegia ("hemi" means "half") and usually results from damage to the opposite side of the brain. Damage to the nerves of the spinal cord affects different parts of the body, depending on the amount of damage and where it occurred. Paralysis is a serious ailment and it affects not only the locomotion of the body but it also cause loss of sense. Therefore, the disease with which petitioner was suffering, is of serious nature and his absence cannot be said to be willful.

21. In Shri Bhagwan Lal Arya v. commissioner of Police,Delhi (2004) 4 SCC 560, the Apex Court opined that the unauthorized absence was not a grave misconduct inasmuch as the employee had proceeded on leave under compulsion because of his grave condition of health. Be it noted, in the said, it has also been observed that no reasonable disciplinary authority would term absence on medical grounds with proper medical certificate from Government doctors as a grave misconduct.

22. Thus it is a settled position of law since long that in a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.

23. In the present case, the Inquiry Officer on appreciation of documents though held that the petitioner was unauthorisedly absent from duty but failed to hold that the absence was willful; the disciplinary authority, appellate authority as well as Revisional Authority also failed to appreciate the same and wrongly held the petitioner guilty.

24. Lastly, it may be pointed that the impugned order of dismissal dated 20.2.2006 suffers from one more defect as the Superintendent of Police, Chandauli has dismissed the petitioner from the date of suspension i.e. 6.12.2003, which is wholly unjustified and per se bad in law.

Further, as averred above, on 18.6.2004, the petitioner was reinstated in service without prejudice to the departmental inquiry to be conducted against him and in the said order, it was provided that the orders with regard to the pay and allowances for the period he was under suspension would be passed later on but no such order was ever passed.

25. In view of the aforesaid discussions, the writ petition is allowed in part. The impugned orders of removal dated 20.2.2006 passed by disciplinary authority, affirmed by the Appellate Authority and Revisional Authority cannot be sustained are hereby set aside.

26. Taking into consideration the fact that the petitioner has suffered a lot since the disciplinary proceeding was drawn in 2001 and in the interregnum, the petitioner attained the age of superannuation, I am not remitting the proceeding to the disciplinary authority for any further action. Further, keeping in mind the fact that the petitioner had not worked for a long time, I direct that petitioner shall be treated as reinstated in service from the date of dismissal to the date of retirement for the purposes of payment of post retiral dues like amount of G.P.F., leave encashment, gratuity, amount of Group Insurance and pension. However, the petitioner will not be entitled for any back-wages. The exercise for payment of retiral dues and pension shall be completed within a period of four months from the date of production of certified copy of this order by the respondents/government authorities.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2015

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

Criminal Appeal No. 2402 of 1981

Tej Pal Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Krishna Capoor, D.N. Wali, Dr. Arun Srivastava, I.N. Mulla, Pramod Dwivedi, Rahul Kakran, S.N. Mulla, Sikandar Kochar, Virendra Singh

Counsel for the Respondent:
A.G.A.. P.N. Mishra

Cr.P.C.-Section-384, 385, 386-Criminal Appeal-disposal-when original record of Trail Court-not traceable-nor reconstruction, nor retrial possible-in as much as all prosecution witness died-except to allow the appeal and set-a-side conviction-in view of Law laid down by Apex Court-no other option Appeal allowed.

Held: Para-16
In view of the aforesaid discussion, considering the judgment of the Apex Court and of this Court, since inspite of best efforts neither reconstruction of record is possible nor re-trial is possible, hence, the criminal appeal can not be deci ded on merit in absence of relevant prosecution papers including the statement of witnesses and as such there is no option but to set aside the impugned judgment of conviction. In view of the fact, the judgment and order of conviction and sentence dated 16.10.1981 passed by 5th Additional District and Sessions Judge, Bijnor in Session Trial No. 350/79, under sections 147, 148, 302/149 IPC, P.S. Chandpur, District Bijnor, is hereby set aside.

Case Law discussed:
Crl. Appeal No. 466 of 1980; AIR 1996 Supreme Court 2439 (1); AIR 2004 SC 3235; 1981 Crl.L.J 65; 1982 (19) ACC 128; 2010 (69) ACC 749; [1988 JIC 355]

(Delivered by Hon'ble Arvind Kumar Tripathi, J.)

1. Heard learned counsel for the appellants, learned AGA and perused the record.

2. The present appeal has been preferred by appellant no. 1 to 5 against the judgment and order of conviction and sentence dated 16.10.1981 passed by 5th Additional District and Sessions Judge, Bijnor in Session Trial No. 350/79, under sections 147, 148, 302/149 IPC, P.S. Chandpur, District Bijnor.

3. Appellant no. 5 died and as such the appeal in respect of him stood abated. In respect of appellant no. 1 to 4, namely, Tej Pal Singh, Prem Pal Singh, Sheo Dhian Singh, Om Pal Singh, in compliance of the Non Bailable Warrant issued by this Court, they surrendered before the C.J.M. Bijnor and were released on bail on 26.10.2015.

4. As per office report dated 28.4.2003, lower court record was not received. Thereafter on 29.4.2003, the other coordinate Bench of this Court directed to obtain the lower court record. As per office report, the information was received from District Court Bijnor to the effect that the lower court record was missing, hence, the direction was issued for reconstruction of the lower court record. Subsequently, the information was given that the witness Smt. Naraini Devi had expired and the direction was issued on 3.1.2014 to obtain report in respect of another witness Balbir. On 17.11.2015, the information was given that the other witness Balbir had died on 14.7.2014. Hence, learned AGA was given time to obtain instruction regarding death of witness Balbir. Today, Mr. Chandrajeet Yadav, learned AGA informed that as per instruction received in his office, the information regarding death of witness Balbir is correct.

5. In view of the fact, neither reconstruction of the complete relevant record specially statement of witness is possible nor the retrial for deciding the appeal. Hence, in view of the judgment of the Apex Court as well as of this Court in Criminal Appeal No. 466 of 1980, Sukhlal & Others Vs. State of U.P., there is no option but to allow this appeal.

6. Sections 384, 385 and 386 Cr.P.C. are reproduced hereinbelow.

"384. Summary dismissal of appeal.

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court con- siders that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law.

385. Procedure for hearing appeals not dismissed summarily.- (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf; 3

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint to the complainant;

(iv) if the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

386. Powers of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

7. A cumulative reading of the above referred three Sections (384, 385, 386) make it abundantly clear that the appeal is to be decided on merit after perusal of lower court record and hearing the appellant or his counsel and the prosecution if the appeal is not dismissed summarily under Section 384 Cr.P.C.

8. In an authoritative pronouncement reported in AIR 1996 Supreme Court 2439 (1) Bani Singh and others Vs. State of U.P., Hon'ble Apex Court has elaborated meaning of Section 385 and 386 of Criminal Procedure Code 1973 in Para No. 8 of the judgment which is being reproduced hereinbelow:

"Section 385 (2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it `shall', after issuing notice as required by sub-section (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously, the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that `after perusing such record' the Court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the Court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard."

9. In the case of State of U.P. Vs. Abhai Raj Singh and another reported in AIR 2004 SC 3235, in Para 8, it has been held as under:

"It has been the consistent view taken by several High Courts that when records are destroyed by fire or on account of natural or unnatural calamities, reconstruction should be ordered. In Queen Empress v. Khimat Singh, (1889

A.W.N. 55), the view taken was that the provisions of Section 423(1) of the Criminal Procedure Code, 1898 (in short 'the Old Code') made it obligatory for the Court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for re-construction. The said view was reiterated more than six decades back in Re Sevugaperumal and Ors. (AIR 1943 (Madras) 391). The view has been reiterated by several High Courts as well, even thereafter."

10. Again in the same case, Hon'ble Apex Court has expressed about various alternative steps to be taken in the matter of loss of records in Para 10 of the judgment which is extracted as hereinbelow:

"We, therefore, set aside the order of the High Court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. Om Pal has died during the pendency of the appeal before this Court. The High Court shall direct re-construction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the Prosecuting Agency as well as the defending parties and their respective counsel. If it is possible to have the records reconstructed to enable the High Court itself to hear and dispose of the appeals in the manner envisaged under Section 386 of the Code, rehear the appeals and dispose of the same, on its own merits and in accordance with law. If it finds that re-construction is not practicable but by order retrial interest of justice could be better served - adopt that course and direct retrial - and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by Sessions Court is also rendered impossible due to loss of vitally important basic records - in that case and situation only, the direction given in the impugned judgment shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

11. In a similar case where lower court record was not available and reconstruction of record did not succeed, a division Bench of this Court has in the case of Sita Ram and others Vs. State 1981 Crl.L.J 65, made observation in Para 11 which is quoted herebelow:

"On a careful consideration of the relevant statutory provisions and the principle laid down in the cases cited before us we are of the opinion that where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to try to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case since witnesses normally would be available and it would not cause undue strain on the memory of witnesses. Copies of F.I.R., statements of witnesses under Section 161 Cr. P.C. reports of medical examination etc. would also be normally available if the time gap

between the incident and the order of retrial is not unduely long. Where, however, the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of F.I.R. and statements of witnesses under Section 161 Cr. P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witnesses are available, apart from the fact that heavy strain would be put on the memory of witnesses, it would not be possible to test their statements made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardship to the accused and waste of time, money and energy of the State."

12. In the above referred case of Sita Ram (supra) the division Bench acquitted the accused in view of the fact that the lower court record could not be reconstructed. This aspect of Sita Ram case (supra) was again considered by another division Bench of this Court in the case of Ram Nath Vs. State 1982 (19) ACC 128 (decided on 3.11.1981) wherein also following observations were made:-

"After making the aforementioned observations and in view of the fact that the court was not in a position to have the record of the case re-constructed, the Bench directed acquittal of the accused in that case. The principle laid down in Sita Ram's case fully applies to the facts of the present case. As all attempts to have the record re-constructed have failed, this Court is not in a position to affirm the conviction recorded by the trial court. So far as the question of ordering a re-trial is concerned, we find that in the instant case the incident in connection with which the accused were prosecuted, took place as far back as 13th of September, 1970, that is, more than eleven years earlier. In such circumstances it will not be desirable to direct a re-trial. In this view of the matter we have no option but to allow Criminal Appeal No.857 of 1976 and to set aside the conviction and sentence of Ram Nath and to acquit him of the offence with which he has been charged."

13 . In similar circumstances another division Bench of this Court in the case of Brahmanand Shukla Vs. State of U.P. 2010 (69) ACC 749 made following observation in Para 10:-

"In the present case, as we have mentioned in the earlier part of the judgment only a copy of the Trial Court's judgment is available and no other documents like FIR, post-mortem report, copies of the documents which had been filed by the prosecution and were exhibited during trial, the statement of the witnesses recorded under section 161, Cr.P.C. are available despite various attempts to reconstruct the record. The incident is of the year 1979 i.e., the incident took place about 30 years back. In these circumstances, no fruitful purpose would be served by ordering retrial as the same cannot be conducted at all in absence of these documents.

In the light of the above discussions and circumstances mentioned above, we have no other alternative but to allow the appeal, set aside the conviction and sentence of the appellant and to acquit him."

14. In similar circumstances another division Bench of this Court in the case of Sita Ram and Others Vs. State made following observation in Para 12 and 13:-

"12. In the present case the incident took place on 23-8-1971. The appellants were convicted by the Sessions Court by an order dated 18-11-1974. The appeal has been pending in this Court for about six years. We are informed that copies of the First Information Report and statements of witnesses recorded under Section 161, Cr. P.C. have been weeded out and are not available. All attempts to reconstruct the record have proved futile. In such a situation it is not permissible for us to affirm the order of conviction of the appellants, since in the absence of the record we cannot possibly feel satisfied that the appellants have been rightly convicted. Due to lapse of time and non-availability of papers like First Information Report, statements under Section 161, Criminal Procedure Code etc, we do not consider it either just or expedient to order retrial of the case.

13. In the circumstances the appeal is allowed. The order of the court below convicting and sentencing the appellants is set aside and they are acquitted. They are on bail. They need not surrender. Their bail bonds are discharged. "

15. In similar circumstances another division Bench of this Court in the case of Kesari and Others Vs. State of U.P. [1988 JIC 355] made following observation in Para 3 and 4:-

"3. Under these circumstances, the lower court's record could not be obtained and without the same, the appeal cannot be heard on merits. It appears that the re-construction of the record is also not possible, in-as-much as original documents have all burnt out.

4.. Under these circumstances, both the appeals stand allowed and the conviction of the appellants and sentences awarded to them are hereby set aside. They are on bail. They need not surrender. Their bail bonds and sureties shall stand discharged. "

16. In view of the aforesaid discussion, considering the judgment of the Apex Court and of this Court, since inspite of best efforts neither reconstruction of record is possible nor re-trial is possible, hence, the criminal appeal can not be deci ded on merit in absence of relevant prosecution papers including the statement of witnesses and as such there is no option but to set aside the impugned judgment of conviction. In view of the fact, the judgment and order of conviction and sentence dated 16.10.1981 passed by 5th Additional District and Sessions Judge, Bijnor in Session Trial No. 350/79, under sections 147, 148, 302/149 IPC, P.S. Chandpur, District Bijnor, is hereby set aside.

16. Accordingly, the present appeal is allowed. The appellants are on bail. The sureties shall stand discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.12.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc. Bench No. 2771 of 2003

M/S Kaka Advt. Agency ...Petitioner
Versus
The State of U.P. ...Respondent

Counsel for the Petitioner:
Apoorv Tiwari, Hemant Kumar Misra

Counsel for the Respondent:
C.S.C.

Constitution of India, Art.-226-Opportunity of hearing-black listing and stoppage of work-raising criminal activities of fraud in getting Bill cleared-incident of fraud totally unfounded-order quashed with direction to take appropriate decision-within time bound period in presence of petitioner.

Held: Para-20
In the given set of facts and circumstances, instead of this Court adjudicating on other issues raised by the petitioner, it appears just and proper that the department itself re-examines the entire matter and takes an objective and considered decision on the show notice dated 19.04.2002. In the given scenario, we are also of the view that where all the facts have not been stated by the respondents in their counter affidavit; and where the petitioner is also claiming that the report of Prabhari Nideshak was not made available to it; and it is more than a decade old matter, the opportunity to the petitioner of making oral submissions would help removing communication gap between the parties and would serve the cause of justice.

(Delivered by Hon'ble Dinesh Maheshwari, J.)

1. The petitioner, said to be an accredited agency with Indian Newspaper Society, Delhi, has filed this writ petition questioning the order dated 18.02.2003 (Annexure -11) whereby it has been held guilty of fraudulent conduct with the respondents; and has been removed from the panel of registered advertising agencies of the Information and Public Relations Department of the Government of Uttar Pradesh.

2. After having heard the learned Counsel for the parties and having perused the material placed on record, we have formed the opinion that the matter requires re-consideration by the authorities concerned. Thus, when the matter is proposed to be restored to the file of the department for re-consideration, dilatation on all the issues raised in this petition does not appear necessary. Only a brief reference to the relevant aspects and would suffice.

3. The petitioner had undertaken the work of publication of an advertisement of respondent No.2, which was to be published in the newspaper 'Dainik Jagaran' on the Republic Day of the year 2001 (i.e., 26.01.2001). The petitioner, alleging to have carried out the work as assigned, raised the bill for the advertisement in question and also made a demand for its other outstanding bills. However, by the order dated 06.03.2002, the respondent No.2 proceeded to order stoppage of work assignment to the petitioner until an enquiry, while observing that several cases of fraudulent dealing of the petitioner had come to the fore. Thereafter, by the orders issued on 15.03.2002, the respondent No.2 alleged that the petitioner had wrongly suggested publication of the advertisement in New Delhi Edition of the Newspaper Dainik Jagaran dated 26.01.2001 on page No.11 though in fact, some other advertisement of the Government of India was published on the said page; and therefore, payment of an amount of Rs.33,800/- was wrongfully obtained by the petitioner, which was liable to be recovered. With these findings and observations, the respondent No.2 also proceeded to blacklist the petitioner for any future dealing with the department.

4. Aggrieved by the action aforesaid, the petitioner filed a writ petition in this Court bearing No.1787 (MS) of 2002. However, on 12.04.2002, the department, realizing its mistake of not affording opportunity of showing cause to the

petitioner, proceeded to withdraw the aforesaid orders dated 06.03.2002 and 15.03.2002 and further ordered that the decision would be taken in relation to the petitioner after issuance of notice and opportunity of hearing. The said writ petition, therefore, became infructuous.

5. Thereafter, on 19.04.2002, while reiterating the same allegations, the petitioner was put to notice and was called upon to show as to why it be not removed from the panel of registered advertising agencies. The petitioner responded to the said notice with the assertion that the referred advertisement was indeed published on 26.01.2001 in New Delhi Edition of the newspaper Dainik Jagaran; and furnished a copy of the newspaper alongwith a communication from the publisher about publication of the advertisement and receiving of payment from the petitioner. The respondent No.2, thereafter, proceeded to pass the impugned order dated 18.02.2003 wherein, while rejecting the explanation of the petitioner, it was observed that the advertisement was not published on page No.11 of the edition of newspaper dated 26.01.2001, as was claimed by the petitioner in the voucher; and that clearly established fraudulent dealing of the petitioner. Thus, the petitioner was ordered to be removed from the panel of registered advertising agencies.

6. Seeking to question the order aforesaid, the petitioner has filed this writ petition and it has specifically been averred in the petition that the advertisement was indeed published on the given date, but no such voucher/invoice was submitted that the same was published on page No.11. Thus, according to the petitioner, the impugned order remains entirely baseless and unsustainable. The averments as taken in this regard in paragraph - 37 of the petition read as under:-

"37. That the petitioner after publishing the advertisement on the basis of offer given by the opposite party no.2 for publishing the same in the Dainik Jagaran, Delhi Edition, had submitted voucher along with the relevant proof that the same had been published by him on the said date and he has not submitted any voucher/invoice that he has published the same at page-11 in the newspaper on 26.1.2001. As such, the said allegation which is the sole basis for passing the impugned order that the petitioner had played fraud is wholly incorrect and illegal and thus renders the impugned order as unsustainable in the eyes of law."

7. The respondents have filed their counter affidavit and have maintained that blacklisting of the petitioner is perfectly legal, proper and justified. The respondents have also suggested in the counter affidavit that the advertisement in question was alleged to have been published at page No.11 of the newspaper concerned on 26.01.2001, but upon enquiry, it was found that no such advertisement was published at page No.11; and on the said page, a different advertisement of Government of India appeared. However, even while alleging that the petitioner-agency raised a fraudulent bill, the respondents chose not to annex a copy thereof with the counter affidavit. On the other hand, it is also noticed that so far the above-quoted core averments in paragraph - 37 of the petition are concerned, a cryptic and cursory reply is stated in paragraph - 15 of the counter affidavit with a general denial of the contents of paragraphs - 35 to 43 of the petition but without adverting to the specific assertion of the petitioner. This

paragraph - 15 of the counter affidavit reads as under:-

"15. That the contents of paras 35 to 43 of the Writ Petition are denied in the manner stated being misleading based on misconception and interpretation and also incorrect. Detailed submissions in this regard have already been made in the preceding paragraphs which are reiterated and reaffirmed herewith."

8. It may be observed that in this writ petition, the petitioner had also moved an application for summoning the original voucher submitted by it in respect of the questioned advertisement dated 26.01.2001; and it appears that in the past, when this matter was examined by a Co-ordinate Bench of this Court, the Standing Counsel was directed to produce the record. The record was indeed brought before the Court on a few occasions, but the matter could not be argued finally. Though the record is not available with the Standing Counsel today, who has expressed willingness to produce the same, if so required, but, as indicated hereinabove, having heard the learned counsel and having perused the material placed on record, when we find that the matter requires re-consideration by the department, it does not appear necessary to enter into any factual enquiry at this stage and in this petition.

9. It has been strenuously argued on behalf of the petitioner that there was no mention in the work order that the advertisement be published on any specific page or at page No.11; and it was never claimed by the petitioner that the advertisement was published on page No.11. It is also submitted that the impugned order dated 18.02.2003 has been passed on the basis of a so-called report of Prabhari Nideshak, but a copy thereof was never supplied to the petitioner. Learned counsel for the petitioner has referred to and relied upon the decisions of the Hon'ble Supreme Court in Gorkha Security Services Vs Government (NCT of Delhi) and others [(2014) 9 SCC 105] and M/s Erusian Equipment & Chemicals Ltd. Vs State of West Bengal and another and other connected Appeal [(1975) 1 SCC 70] with the submissions that adequate and meaningful opportunity of show cause having not been given and the department having proceeded on irrelevant consideration, the impugned order deserves to be set aside.

10. Per contra, the learned Standing Counsel has duly supported the action impugned and submitted that when it had been a case of the petitioner having misled the department and having claimed the bill on incorrect statement of facts, the impugned action cannot be said to be unjustified, particularly when the impugned order has been passed after due show cause notice and after taking into consideration the explanation of the petitioner.

11. The question in the present case essentially is as to whether the impugned order dated 18.02.2003 could be said to have been passed on relevant considerations and after adequate and meaningful opportunity of showing cause to the petitioner?

12. It remains trite that the order of blacklisting or permanent debarring has the effect of depriving a person of equal opportunity of participation in public contracts; and when any person is sought to be permanently excluded from dealing with the State in its transactions, such an action has to be supported by legality. The requirement of adequate opportunity of

showing cause against such a harshest possible action has been reiterated by the Hon'ble Supreme Court in the case of Gorkha Security Services (supra) in the following:-

"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action."

"22. .... To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

13. Thus, an adequate and meaningful opportunity to the person concerned to show cause and to present his case before the authorities in a proposed action of blacklisting/debarring is a well established norm; and is not a matter of empty formality.

14. In the case of Erusian Equipment & Chemicals (supra), a three Judges' Bench of the Hon'ble Supreme Court has been pleased to observe and hold, inter alia, as under:-

"17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The

State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

21. With regard to the case of the petitioners, it is made clear that the authorities will give an opportunity to the petitioners to represent their case and the authorities will hear the petitioners as to whether their name should be put on the blacklist or not. This is made clear that the decision on this question will not have any effect on the proceedings pending in Calcutta High Court where the petitioner has challenged the adjudication proceedings under the Foreign Exchange Regulations Act. Any decision of the authorities on the blacklisting will have no effect on the correctness of any of the facts involved in those proceedings."

15. It may be noticed that the Apex Court has observed in the case of Gorkha Security Services (supra) that after giving show cause notice and opportunity to reply, it is not necessary to give an oral hearing; and in the case of Erusian Equipment & Chemicals (supra) that sometimes duty to act fairly could be sustained without providing opportunity of an oral hearing. However, in Erusian Equipment & Chemicals (supra), the three Judges' Bench of the Hon'ble Apex Court has further observed that it would depend on the nature of interest to be affected and the circumstances in which a power was exercised and the nature of sanctions involved; and therein, the authorities were directed to hear the petitioners on the question as to whether their names should be put on the blacklist or not.

16. Coming to the facts and scenario of the present case, it is apparent on the face of record that the basic allegation against the petitioner had not been that the advertisement in question was not published in the named newspaper, i.e., Dainik Jagaran in its relevant edition i.e., dated 26.01.2001. The allegation had been that the advertisement was not found published on page No.11 that carried some other advertisement of Government of

India. The petitioner has placed on record a photostat of the newspaper concerned and prima facie, it appears that the advertisement of the respondents did appear in the relevant edition of the newspaper, but at a different place or in a supplement. However, the fact of the matter remains that the petitioner has consistently maintained that neither there was any order for publication of the advertisement at page No.11 nor any claim was made for any such publication at the particular page, i.e., page No.11. As noticed hereinabove, the specific averment taken in the petition in this regard has not met with a specific and cogent reply from the respondents. Thus, the core and fundamental fact remains a matter of obscurity if the petitioner claimed it to be an advertisement published at page - 11 as alleged.

17. Apart from the above and even if it be assumed for the sake of arguments that somewhere "page No.11" came to be mentioned by the petitioner, the respondents have not pondered over the question if it were a matter of any attempt on the part of the petitioner at deception or defrauding. The respondents also appear to have omitted to consider if any penalty lesser than permanent exclusion would be sufficient, if the petitioner is at all held guilty of incorrect billing, i.e., of incorrect mentioning of page number of the concerned publication.

18. The background aspects had also been that the petitioner was allegedly making a claim for other pending bills; and the petitioner was straightway debarred under the orders dated 06.03.2002 and 15.03.2002, which were later on withdrawn upon the department realising its mistake of not standing in conformity with the dictum of the Hon'ble Supreme Court.

19. In a comprehension of the facts and surrounding factors, we are clearly of the view that the impugned order dated 18.02.2003, even when passed after a show cause notice, cannot be said to be a considered decision fulfilling all the requirements of objectivity and fairness.

20. In the given set of facts and circumstances, instead of this Court adjudicating on other issues raised by the petitioner, it appears just and proper that the department itself re-examines the entire matter and takes an objective and considered decision on the show notice dated 19.04.2002. In the given scenario, we are also of the view that where all the facts have not been stated by the respondents in their counter affidavit; and where the petitioner is also claiming that the report of Prabhari Nideshak was not made available to it; and it is more than a decade old matter, the opportunity to the petitioner of making oral submissions would help removing communication gap between the parties and would serve the cause of justice.

21. Accordingly and in view of above, this petition is allowed to the extent and in the manner that the impugned order dated 18.02.2003 is set aside and the matter stands remitted for consideration afresh by the Director (Information), U.P.

22. In the interest of justice, it is also provided that it shall be permissible for the petitioner to submit an additional representation stating all its grounds and viewpoints with supporting documents, if any. It shall be required of the Director concerned to examine the record of the matter, to extend an opportunity of personal hearing to the petitioner and thereafter, to take a decision objectively

and dispassionately in the matter. For the purpose of carrying out the requirements of this order, in the first place, the petitioner shall remain present in the office of the Director concerned on 05.01.2016. The Director shall also be expected to take the decision expeditiously, preferably within two months from the first date of appearance of the petitioner.

23. No costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.12.2015

BEFORE
THE HON'BLE ASHWANI KUMAR SINGH, J.

U/S 482/378/407 No. 2803 of 2006

Dr. Manoj Kumar ...Applicant
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Arun Sinha, Riyaz Ahmad

Counsel for the Respondents:
Govt. Advocate, Arun Kumar Shukla

Cr.P.C. Section-482-Charge sheet-quashing-offence under section 304-A IPC-if allegation as it is accepted no case made out against applicant-as per postmortem report-deceased suffering from septicemia-as last stage-no grass negligence found-as per law developed by Apex Court in Jacob Mathew case-in criminal negligence-should be much higher-as per statement made by mother of deceased-no role of applicant specified-charge sheet quashed-application allowed.

Held: Para-14
Looking into the facts of the case, I find that it is not a case where the doctor had administered a wrong medicine, which was not to be given. As opined by the Doctor, who conducted the postmortem, the child was already suffering from septicemia, which must have taken some time to develop and must have been at its last stage. There was absolutely no gross negligence on part of the applicant. There may be liability in civil law or may be not - this Court does not express any opinion on the same but since there is no criminal negligence of higher degree, in light of the observations of Hon'ble the Supreme Court in the decisions referred to herein above, no case under Section 304-A is made out against the applicant.

Case Law discussed:
2005 Supreme Court Cases (Cri) 1369-sub para (5) and (6) of paragraph 48; (2009) 1 SCC (Cri) 958

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

1. Heard learned counsel for the applicant, learned State Counsel and perused the relevant material on record as well as counter affidavit filed by opposite party no.2. None is present on behalf of opposite party no.2.

2. This petition under Section 482 Cr.P.C. has been preferred for quashing the charge sheet of case no.1289/06, State v. Dr.Manoj Kuar; Crime no.220/05, under Section 304-A I.P.C., P.S.Ghazipur, District Lucknow, pending in the Court of Special C.J.M. (Customs), Lucknow and also for quashing the proceedings pursuant to filing of the charge sheet including the bailable warrant issued on 26.9.2006.

3. This Court vide order dated 8.11.2006 issued notice to opposite party no.2 calling for filing objection/counter affidavit, if any, within four weeks. Rejoinder affidavit, if any, was directed to be filed within one week thereafter. The Court also passed interim order staying the proceedings of the case including issuance of warrant.

4. It is pertinent to disclose the prosecution case: Briefly stated, the informant Abhay Singh(a practising Advocate in the Courts at Lucknow, as averred in para 17 of the application) lodged F.I.R. on 1.5.2005 at 13:30 hours regarding the incident which had taken place on 30.4.2005 at about 11:00 p.m.-12:00 night. It was stated in the F.I.R. by informant Abhay Singh that on 28.4.2005 his son suddenly got ill; informant's wife took him to Jwala Nursing Home, near Munshipulia, Ring Road, Lucknow; the doctor of the Nursing Home attended the patient, prescribed medicines and advised for X-ray and blood test; the informant paid the amount which was asked; the condition of the boy on 30.4.2005 at 11:00 p.m. got deteriorated and informant's wife again took him to Nursing Home where the doctor of the Nursing Home did not open the door and refused to extend medical treatment. It is further stated in the F.I.R. that the informant on 30.4.2005 had gone to attend the marriage of his cousin sister; informant's son on 30.4.2005 at about 12:00 night died due to negligence of the doctor of Jwala Hospital.

5. The investigating officer took up the investigation and recorded the statements of the informant, informant's wife, Smt.Rekha Devi(mother of the deceased), witness Nandu, son of Rampal Gupta; witness Ram Singh son of Sant Ram and witness Ram Saran Gaur, son of Bharat Prasad under Section 161 Cr.P.C.

6. The postmortem on the body of the deceased was conducted on 2.5.2005 and as per opinion of the doctor who conducted the postmortem, the cause of death was - 'death due to septicemia as a result of acute lung disease'. .

7. Learned counsel has vehemently submitted that there is no evidence on record to make out a case against the applicant under Section 304-A I.P.C. It is submitted that the only allegation as levelled in the F.I.R. and in the statement of the informant recorded under Section 161 Cr.P.C. is against Jwala Hospital, D-2226 Indira Nagar, Lucknow. The informant has not named the applicant in the first information report nor in his statement recorded under Section 161 Cr.P.C., though it is natural that he must have been informed, the name of doctor, by his wife, Smt. Rekha Devi, in whose statement under Section 161 Cr.P.C., name of Dr.Manoj Kumar finds place that he did not open the door and refused to extend medical treatment and due to his negligence, the child died in front of the hospital. There is hearsay evidence in this regard given by witnesses Nandu and Ram Singh. Witness Ram Saran Gaur is the only witness who is said to have accompanied Smt. Rekha Devi to the hospital and he has corroborated the evidence that Dr. Manoj Kumar did not open the door and refused to give medical treatment, as such, due to negligence and not getting treatment, the boy expired.

8. Learned counsel states that the whole story has been concocted by the informant for pressurising the applicant to extract uncalled for or unjustified compensation. It is admitted that wife of the informant, Smt.Rekha Devi had come to Jwala Hospital along with her child on 29.4.2005, though her child had got ill on 28.4.2005, as mentioned in the F.I.R. The doctor of the Hospital attended the child, Aditya Kumar, aged about one and a half years and prescribed medicines for him and advised for blood-test and X-ray of the chest. The prescription of Jwala Hospital is annexed as Annexure CA-1 to the affidavit filed by informant-opposite party no.2. The prescription (Annexure CA-1) also indicates

that the child was prescribed Coscopin Paed. Syr. on 30.4.2005 and X-ray of chest was found to be normal and nothing abnormal was detected.

9. Learned counsel states that the allegation made by Smt.Rekha Devi, mother of the deceased that she had visited the hospital on 30.4.2005 at about 11:00 p.m. along with her neighbour, Ram Saran is totally false, as averred in para 14 of the application. The hospital provides 24 hours' emergency. One more aspect of the matter for consideration is that the applicant, who is the proprietor of the Nursing Home, would come himself at 11:00 P.M., so late in night, to open the doors of Nursing Home and refuse to attend his own patient, who was attended a day before and on the same day, as borne out from the prescription (Annexure CA-1), and was provided medical treatment. This allegation against applicant, he being proprietor of the Nursing Home, has been levelled with some ulterior motive, may be for some financial gains. There is no allegation in the F.I.R., nor in the statement of any witness that there was any negligence on part of the applicant or any other doctor of the Hospital in attending the child on 29.4.2015 or prescribing the medicines. The child was properly attended and was prescribed the required medicines.

10. Learned counsel states that even if the facts of the case are proved, it would not make out a case of criminal rashness or negligence on part of the accused applicant. In support of his contention, learned counsel has relied upon the decision of Hon'ble the Supreme Court reported in Jacob Mathew v. State of Punjab and another, reported in 2005 Supreme Court Cases (Cri) 1369 - in sub-paras (5) and (6) of paragraph 48, it has been held as under :

"(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution."

""6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

Further, in para 14 of the report, it has been held as under :

"14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions [1937 AC 576 : (1937) 2 All ER 552 (HL)] stated: (All ER p. 556 C)

"Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high

degree of negligence is required to be proved before the felony is established."

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. In Riddell v. Reid [(1942) 2 All ER 161 : 1943 AC 1 (HL)] (AC at p. 31) Lord Porter said in his speech --

"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability." (Charlesworth & Percy, ibid., para 1.13)"

Para 28 of the report reads as under :

"28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. ....."

11. The following extract from Merry and Mc.Call Smith: Errors, Medicine and the law, cited with approval in Dr.Suresh Gupta case, (2004) 6 SCC 422 (at pp. 247-48 of the book) reads as under:

"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high -- a standard traditionally described as gross negligence."

* *

"Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis."

12. Paragraphs 15 and 17 also needs consideration. They read as follows :-

"15. The fore-quoted statement of law in Andrews [1937 AC 576 : (1937) 2 All ER 552 (HL)] has been noted with approval by this Court in Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] . The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must

amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment."

"17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree."

Para 51 of the report reads as follows :

"51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against."

13. In a decision reported in (2009) 1 SCC (Cri) 958, Martin F.D'Souza v. Mohd. Ishfaq, Hon'ble the Supreme Court has observed in paragraphs 103 and 104 as follows:

"103. ..... However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications."

"104. Hence courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in Indian Medical Assn. v. V.P. Shantha [(1995) 6 SCC 651] should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide SCC para 22): (V.P. Shantha case [(1995) 6 SCC 651] , SCC p. 665)"

"22. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."

14. Looking into the facts of the case, I find that it is not a case where the doctor had administered a wrong medicine, which was not to be given. As opined by the Doctor, who conducted the postmortem, the child was already suffering from septicemia, which must have taken some time to develop and must have been at its last stage. There was absolutely no gross negligence on part of the applicant. There may be liability in civil law or may be not - this Court does not express any opinion on the same but since there is no criminal negligence of higher degree, in light of the observations of Hon'ble the Supreme Court in the decisions referred to herein above, no case under Section 304-A is made out against the applicant.

15. Accordingly, the application under Section 482 Cr.P.C. is hereby

allowed. The charge sheet of case no.1289/06, State v. Dr.Manoj Kuar; Crime no.220/05, under Section 304-A I.P.C., P.S.Ghazipur, District Lucknow and the proceedings arising therefrom including bailable warrant issued on 26.9.2006 by Special C.J.M. (Customs), Lucknow are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2015

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

W.P. No. 5584 (SS) of 2010
along with W.P. No. 6851 (SS) of 2010

Jitendra Mohan Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Opp.Parties

Counsel for the Petitioner:
Om Prakash Mani Tripathi

Counsel for the Opp.Parties:
C.S.C. , Jyotinjay Verma , Niraj Chaurasia , Omkar Singh and R.P.Verma

Intermediate Education Act 1921-Section-7-A-read with the U.P. High School & Intermediate Colleges (Payment of salary of Teachers and employee) Act 1971-Section-9-payment of salary from state-exchequer-teachers in private institution appointed by management-without creation of post-whether mandamus can be issued for creation of post and payment of salary?-held-'No'.

Held: Para-22
In the present case also, the petitioners were appointed on the post of Assistant Teacher in the Institution in question by the Committee of Management on its own, without their being any valid order issued by the competent authority. It is also true that the petitioners were appointed above the sanctioned strength. In view of Section 9 of the Payment of Salary Act, the institution can make appointment only against the post which has been created by the order of Director of Education. Therefore, in view of the aforesaid Full Bench judgments of this Court, no mandamus for payment of salary as well as creation of post of Assistant Teacher in the Institution in question can be issued while exercising powers under Article 226 of the Constitution of India.

Case Law discussed:
(2000(2); 2004 (1) UPLBEC 746; W.P. No. 2054(SS) of 2000 read with W.P. No. 1406 (SS) of 2001; 1999 (35) ALR 191; Special Appeal Defective No. 673 of 2014; AIR 1995 SC 1121

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

1. Heard Mr. O.P.M. Tripathi, Mr. Shishir Chandra, learned counsel for the petitioners, Mr. Neeraj Chaurasiya, learned counsel for the District Basic Education Officer, Ambedkar Nagar (opposite party No.3) and Mr. Omkar Singh, learned counsel for the Committee of Management (opposite party No.4).

2. By means of the above-captioned writ petitions under Article 226 of the Constitution of India, petitioners have prayed for issuance of writ in the nature of Mandamus directing the opposite parties No. 2-Director, Basic Education, Uttar Pradesh and opposite party No.3-District Basic Education Officer, Ambedkar Nagar to create post of Assistant Teacher (Science) in Pandit Nehru Smarak, Purwa Madhyamik Vidyalaya Sarve Nikaspur, District Ambedkar Nagar, and make payment of salary in admissible grade of Assistant Teacher to the petitioners with all consequential benefits w.e.f. the date when they joined the aforesaid School on the post of Assistant Teacher (LT Grade) or in the

alternative, to create posts of Assistant Teacher in the School to accommodate petitioners for the purpose of Payment of Salary.

3. A brief reference to the factual aspects leaving out the maize of unnecessary facts would suffice as under :

4. Pandit Nehru Purwa Madhyamik Vidyalaya Sarvenikaspur, District Ambedkar Nagar (hereinafter referred to as the "Institution"), a recognized institution by the State Government under the provisions of Uttar Pradesh Basic Education Act, 1972, is covered under grant-in-aid scheme of the State Government w.e.f. 7.4.1980. In order to impart proper education to the students of the institution, the Committee of Management wrote various letters to the District Basic Education Officer, Ambedkar Nagar to accord permission to make appointments of the teachers in the institution but no heed was paid by the District Basic Education Officer, Ambedkar Nagar. Accordingly, the Committee of Management, after intimating the necessities of the teachers to be appointed in the institution, advertised four posts of Assistant Teachers in daily newspapers, namely, "Mourya Samrat" and "Kabeer Times" dated 5.8.2008. Thereafter, the Manager of the Institution wrote a letter to the District Basic Education Officer, informing thereby that four posts of Assistant Teachers have been advertised on 5.8.2008 through daily newspapers, namely, "Mourya Samrat" and "Kabeer Times" and selection/interview on the aforesaid post is scheduled to be held on 24.8.2008 and, therefore, it was requested to send his representative for holding selection and interview on the post in question.

5. Pursuant to the advertisement so issued by the Committee of Management of the Institution, petitioners applied for selection and appointment on the post of Assistant Teacher along with other candidates. The Selection Committee so instituted by the Committee of Management had taken interview of the suitable candidate on 24.8.2008 and submitted its report to the Committee of Management. Thereafter, on the basis of the report of the Selection Committee, the Committee of Management issued appointment letters to the petitioners on the post of Assistant Teacher. In pursuance to the appointment letter, the petitioners joined their duties on 27.8.2008 and since then, they are discharging their duties. The Manager of the Committee of Management informed the Basic Education Officer, Ambedkar Nagar regarding filling up of four posts of Assistant Teachers in the institution as well as their joining, but no heed was paid by the opposite party No.3-District Basic Education Officer, Ambedkar Nagar, though various letters having been written by the Manager of the Institution. In these compelling circumstances, the petitioners made representation to the District Basic Education, praying therein for issue suitable direction for payment of salary to the petitioners but no heed was paid.

6. Feeling aggrieved by the inaction of the opposite parties, petitioners have filed the above-captioned writ petitions, with the prayer, as referred hereinabove.

7. Submission of the learned counsel for the petitioners is that the petitioners were appointed on the post in question after following the procedure of selection strictly on the basis of quality points obtained by them. In pursuance to the appointment order dated 26.8.2008, petitioners resumed their duties on 27.8.2008 and since then, they have

been discharging their duties to the entire satisfaction of the authorities concerned. It has been submitted that under Section 9 of the Payment of Salaries Act, 1978 [hereinafter referred to as the "Act"], the Director is the competent authority to create the posts as the creation of the posts is in his sole domain and Section 10 of the Act imposes liability upon the State Government to ensure payment of salary to the teachers and other employees of every institution in respect of any period after the date of appointment. His submission is that in the institution in question, six sections are approved to be run and as per the prescribed norms, 9 teachers are required to be deputed to impart education at the rate of 11/2 teachers for one section. In the Institution in question, six posts are sanctioned, whereas as per the norms, nine posts ought to have been sanctioned by the competent authority.

8. Elaborating his submissions, counsel for the petitioners submitted that two posts of Assistant Teacher resulted on account of retirement of Sri R.D. Verma in the year 2008 and in 2009, on retirement of Sri Shyam Raj Mourya, whereas the third post of Assistant Teacher had become available on 30.6.2012 on account of retirement of Sri Upendra Mohan Tiwari. Thus, in the institution in question, total sanctioned posts of Assistant Teacher are five including one post of Head Master and out of five posts, three posts are lying vacant. Therefore, the opposite parties may be directed to accommodate the petitioners against the vacant posts and be paid salary accordingly.

9. It has been stated that once the institution is recognized and comes within the definition of Section (e) of Section 2 of the Uttar Pradesh Junior High School (Payment of Salary to the teachers and other employees) Act, 1972 and receives grant as defined under Section (f) of the Act, the State is liable to make payment of salary to the petitioner as they are imparting education in the institution in the subject Science w.e.f. 27.8.2008. Therefore, in denying salary to the petitioners is violative of Article 14 and 16 of the Constitution of India.

10. In support of his submissions, learned counsel for the petitioners have placed reliance upon the judgment of the Apex Court rendered in Chandigarh Administration and others Vs. Rajni Vali (Mrs.) and others (2000 (2) SCC 442) and this Court's judgment reported in 2004 (1) UPLBEC 746 : Committee of Managment Jaribandhan Higher Secondary School, Baij Nath Ganj, Goriganj, Allahabad and another Vs. State of U.P. and others and Committee of Management, Anand Singh Intermediate College, Pratapgarh Vs. State of U.P. and others (writ petition No. 2054 (SS) of 2000) read with writ petition No. 1406 (SS) of 2001 : Anand Prasad Tiwari and others Vs. State of U.P. and others, decided on 9.2.2004.

11. Per contra, Mr. Neeraj Chaurasiya, learned counsel for the opposite party No.3-District Basic Education Officer, Ambedkar Nagar, has submitted that the Basic Education Officer, Ambedkar Nagar had wrote letter dated 4.9.2015 and thereafter reminder dated 14.9.2015, seeking the information from the Additional Director Education (Basic) with regard to the letter dated 26.9.1992 written by the Assistant Director Education (Basic) addressed to the Additional Director Education (Basic), whereby recommendation of the the District Basic Education was forwarded for creation of three additional post of Assistant Teacher

in the institution. In reply to the aforesaid letter, vide letter dated 16.9.2015, the District Basic Education Officer was informed by the Education Directorate, Allahabad that after examination of record, it was found that the matter has not been received in the Directorate and the Assistant Director Education (Basic) Faizabad has not sent any subsequent correspondence in this regard, therefore, the question of issuing the post creation order/permission does not arise at all.

12. Mr. Neeraj Chaurasiya has further contended that as per Government Order dated 2.7.1990, presently, only one post of Head Master, four Assistant Teacher, and one Clerk is permissible in the institution and at the time of appointment of petitioners in the institution in question, four teachers were already working in the institution.

13. Elaborating his submissions, Mr. Neeraj Chaurasiya has submitted that on 21.8.2015, the Block Education Officer, Jahangirgunj, Ambedkar Nagar has made the inspection of the institution in question and during inspection, in Class-VI, against the 23 students enrolled only 13 were found present, in Class-VII, against 37 students enrolled, only 11 were found present and in Class-VIII, against 42 students enrolled, only 19 were found present in the institution. In these backgrounds, Mr. Chaurasiya has submitted that since the appointments of the petitioners are de horse the Rules, therefore, the present writ petition deserves to be dismissed.

14. I have heard learned Counsel for the parties and perused the records.

15. In order to appreciate the submissions of the learned Counsel for the parties, it is apt to mention here that two Full Benches of this Court have held that creation of post under Section 9 of U.P. Act No. 24 of 1971, is a condition precedent before a writ of mandamus to pay salary to the teachers appointed from State Exchaquer can be issued. Reference may be made to the decisions rendered in Gopal Dubey vs. District Inspector of Schools :1999 (35) ALR 191 and State of U.P. through its Secretary, Secondary Education & Ors. Vs. C/M, Sri Sukhpal Intermediate College, Tirhut, Sultanpur & Ors. (Special Appeal Defective No.673 of 2014 decided on 12.5.2015).

16. In Gopal Dubey (supra), the issue which fell for consideration before the Full Bench of this Court was whether a presumption can be drawn that the post of a Lecturer stands sanctioned by the Director of Education merely because recognition has been granted by the Board in respect of a subject under the Act of 1921. The following issue was formulated:

"Whether on recognition being granted by the Board in respect of a subject in an Institution under Section 7-A of the U.P. Intermediate Education Act, 1921 ((U.P. Act No. II of 1921), it will be presumed that the post of Lecturer in such subject stands sanctioned by the Director of Education under Section 9 of the Payment of Salaries Act?"

17. The Full Bench in that case rejected the submission that since the Director of Education is an ex officio Chairman of the Board under the Act of 1921 and the Board had accorded its recognition to the institution for a particular subject, it must be presumed that the Director had sanctioned the post of a Lecturer in the subject. Dealing with the submission, the Full Bench held as follows:

"...This contention does not commend acceptance. Section 9 of the Payment of Salaries Act expressly mandates that no Institution shall create a new post of teacher or other employee except with the previous approval of the Director or such other officer as may be empowered in that behalf by the Director. Since the statute requires the thing to be done in a particular manner, then it has to be done in that manner or not at all. It follows, therefore, that prior approval of the Director in writing must be obtained before the management creates a new post of teacher in the recognised Institution. The requirement of the statute cannot be presumed because the Director happens to be the authority or one of the authorities concerned in the matter of accord of recognition for opening a new subject in a College. It is relevant to note here that recognition for opening a subject in a College is accorded by the Director under the provisions of the Intermediate Education Act, which is a statute to establish a Board to regulate and supervise the system of High School and Intermediate Education in Uttar Pradesh, prescribe courses therefor and oversee related activities ; whereas the Payment of Salaries Act is enacted to regulate the payment of salaries to teachers and other employees of the High Schools and intermediate Colleges and to provide for matters connected therewith. The two statutes, in our considered view, operate in different fields. While dealing with matters like recognition and payment of salary of teachers and other employees relevant matters to be taken into consideration are different. Regarding recognition, the authority has to satisfy itself about necessary infrastructure, the facilities available in the Educational Institution, the benefit to the students of the locality in opening the new subject in the Institution, the potentiality of the Institution to cater to the needs of the students of the locality, etc. While dealing with the question of granting approval for creation of a post of a teacher or other employee in an Institution, the primary consideration is the preparedness of the State Government to bear the financial liability of the new post proposed to be created. It follows, therefore, that the contention that since the Director is associated with the matter regarding grant of permission/ recognition for opening new subject in the Institution, it is presumed that he has given his consent for creating new posts of teachers and other employees for that subject is not correct. This contention, if accepted, may lead to situation that the management creates posts of teachers and other employees in connection with the new subject and the State Government is compelled to bear the financial liability without any further involvement in the matter. Such a situation, as we read the provisions of the two enactments, is not contemplated. It also does not appeal to common logic. The result is that for the purpose of creating a new post of teacher or other employee for/in connection with a new subject, which it has been permitted to open, the management has to obtain prior approval of the Director as required, under Section 9 of the Payment of Salaries Act. This statutory mandate cannot be said to have been satisfied by raising a presumption on the basis of recognition granted for that subject."

18. In taking this view, the Full Bench placed reliance on the judgment of the Supreme Court in Director of Education Vs Gajadhar Prasad Verma :AIR 1995 SC 1121. The Supreme Court in that case has held that

in view of Section 9 of the Payment of Salaries Act of 1971, no institution could create new posts of teachers or other employees except with the previous approval of the Director and the failure of the management to obtain prior approval dis-entitled it to obtain reimbursement of the salary of such a teacher or employee. The Supreme Court held as follows:

"4. Be that as it may, the crucial question is whether the school of the respondent can claim reimbursement of the salary of such clerk from the Government? The U.P High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (24 of 197 1), regulates the payment of the salary by the Government. Section 9 is relevant in that behalf. It provides that no institution shall create a new post of teacher or other employee except with the previous approval of the Director or such officer as may be empowered in that behalf by the Director. Admittedly, no steps have been taken by the Management to have obtained prior approval of the Director or any other authorised officer for creation of the additional post of clerk. The prior approval of the Director or the empowered officer is a condition precedent and mandatory, for creation of an additional post of a teacher or other employee. The reason behind Section 9 is that prior to grant of aid the Government had before it the relevant data of the posts for which the grant of aid was sanctioned. To make the Government to reimburse the salary of an additional teacher or an employee, the Government should have similar relevant material and data to have it duly verified and decision taken to grant sanction of the additional post. The inspecting and reporting officers are enjoined to make personal inspection and submit the report of the existing correct facts. The dereliction of duty or incorrect or false reports would be misconduct entailing them to disciplinary action for dismissal from the posts held by them. Therefore, the failure to obtain prior approval disentitles the Management to obtain reimbursement of the salary of such teacher or other employee."

(emphasis supplied)

19. In C/M Sri Sukhpal Intermediate College (supra), the Full Bench, in which I was also one of the Members, were formulated four questions, which reads as under :

(1) Whether in the absence of any sanctioned post, can a direction in the exercise of powers under Article 226 of the Constitution of India be given for payment of salary when admittedly no post has been sanctioned by the competent authority;

(2) Which of the two decisions in the case of Rajesh Yadav (supra) and Om Prakash Verma (supra) keeping in view the Full Bench decision in the case of Gopal Dubey (supra), lays down the law correctly;

(3) Whether the State Government or its authorities, who are authorized to create posts, by virtue of their inaction can defy creation of posts in an institution keeping in view the larger interest of the society namely education which is specifically in the hands of the State Government; and

(4) Whether the State Government under the garb of threat of contempt could proceed to issue a direction for payment of salary to a teacher who was never appointed in the institution as admitted in the present case."

20. The Full Bench, while dealing with the aforesaid questions, have taken

note of the provisions contained in three statutes in the State of Uttar Pradesh, which are as under :

(i) The Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971;

(ii) The Intermediate Education Act, 1921; and

(iii) The Uttar Pradesh Secondary Education Services Selection Board Act, 1982.

21. On considering the relevant provisions of the aforesaid Act and also the decision of the Full Bench in Gopal Dubey (supra), Om Prakash Verma (supra) and Rajesh Yadav (supra), the Full Bench has come to the conclusion that in the absence of a sanctioned post, the High Court under Article 226 of the Constitution would not be justified in issuing a mandamus for the payment of salary, particularly since a mandamus cannot lie in the absence of a legal right, based on the existence of a statutory duty. The relevant portion of the judgment is reproduced as under :

"In our view, the field of dispute in the present case, is governed by the judgment of the Full Bench in Gopal Dubey (supra). The judgment in Gopal Dubey clearly holds that the Act of 1971 operates in a field which is distinct from the Act of 1921. The mere fact that recognition has been granted to an institution or, for that matter, for conducting a new course or subject or for an additional section, would not give rise to a presumption of a financial sanction having been granted to the creation of a post. A financial liability cannot be foisted on the State to reimburse the salary payable to the employee or the teacher on the basis of such a presumption. For the purpose of creating a new post of a teacher or other employee, the management has to obtain the prior approval of the Director as required under Section 9 of the Act 1971. Without the prior approval of the Director, a new post cannot be sanctioned or created. Section 9 is mandatory. This principle in Gopal Dubey's case follows specifically the judgment of the Supreme Court in Gajadhar Prasad Verma's case which was rendered while interpreting the provisions of Section 9 of the Act of 1971. The High Court cannot issue a direction contrary to the mandate of Section 9. Orders under Article 226 must conform to law and cannot be contrary to the mandate of law. No mandamus can issue - interim or final - for the payment of salary by the state in the absence of the prior approval of the Director."

22. In the present case also, the petitioners were appointed on the post of Assistant Teacher in the Institution in question by the Committee of Management on its own, without their being any valid order issued by the competent authority. It is also true that the petitioners were appointed above the sanctioned strength. In view of Section 9 of the Payment of Salary Act, the institution can make appointment only against the post which has been created by the order of Director of Education. Therefore, in view of the aforesaid Full Bench judgments of this Court, no mandamus for payment of salary as well as creation of post of Assistant Teacher in the Institution in question can be issued while exercising powers under Article 226 of the Constitution of India.

23. For the reasons aforesaid, this Court is of the view that the judgments, which have been relied by the learned Counsel for the petitioners, are not

applicable in the facts and circumstances of the case and the writ petition is liable to be dismissed.

24. Accordingly, the writ petitions are dismissed. However, there is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2015

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 5907 of 2009

Daya Ram ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Dhruv Kumar

Counsel for the Respondent:
C.S.C.

Constitution of India, Art.-226-read with U.P. Government Servant (Discipline and Appeal)Rules 1999-Rule 7 (i)-dismissal from service-order passed mechanically without considering the conduct of petitioner on conviction-held in view of Tulsi Ram Patel as well as Divisional Officer Southern Railway-order quashed with liberty to pass fresh order.

Held: Para-6
In view of the above, the impugned order dated 18.05.2009 can not be sustained and the same is accordingly quashed, however, with liberty to the Disciplinary Authority to take afresh decision keeping in mind the legal position narrated herein above within a period of two months from the date of production of a certified copy of this order. Consequences shall follow as per law.

Case Law discussed:
1985 (3) SCC 398; 1976 (1) SCR 783

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

1. Heard learned counsel for the parties.

2. The petitioner was employed as Statistical Assistant in the National Savings Directorate under the State Government. He was involved in a criminal case under Section 304 Part-I/149 I.P.C. wherein after trial he was convicted by the Court of criminal jurisdiction on 24.04.2009. His appeal against the same is pending wherein he has been enlarged on bail.

3. Consequent to his conviction, the petitioner was dismissed from service vide order dated 18.05.2009 passed by the Additional Director Savings, U.P.

4. On a perusal of the order of dismissal it is revealed that the same has been passed mechanically merely on the ground of conviction. The legal position is very well settled that a conviction does not automatically lead to dismissal, removal, reduction in rank etc. The Disciplinary Authority has to pass an order in this regard in writing. It is required to consider the conduct which has led to his conviction and based on such consideration of conduct a final opinion has to be formed as to whether any punishment is required to be imposed upon him or not. This is the requirement under Article 311 (2) of the Proviso as also Proviso (i) of Rule 7 of the U.P. Government Servants (Discipline & Appeal) Rules, 1999 and the law laid down by the Hon'ble Supreme Court in the case of Union of India Vs. Tulsi Ram Patel, 1985(3) SCC 398 which still holds the ground. In the case of Tulsi Ram Patel (Supra), the Supreme Court observed and held as under:-

"Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India and another, this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

5. The Supreme Court in the case of Divisional Officer, Southern Railway and another Vs. T. R. Challappan, 1976 (1) SCR 783, has held that on the conviction of an employee on a criminal charge, the order of punishment cannot be passed unless the conduct which had led to his conviction is also considered. The scrutiny or examination of conduct of an employee leading to his conviction is to be done ex-parte and an opportunity of hearing is not to be provided for this purpose to the employee.

6. In view of the above, the impugned order dated 18.05.2009 can not be sustained and the same is accordingly quashed, however, with liberty to the Disciplinary Authority to take afresh decision keeping in mind the legal position narrated herein above

within a period of two months from the date of production of a certified copy of this order. Consequences shall follow as per law.

7. However, the question of arrears and salary etc. shall depend upon the fresh decision which is to be taken as aforesaid and shall not be paid till the such decision though the petitioner shall be allowed to join and discharge the duties as aforesaid and shall be paid the current salary.

8. The petitioner shall submit a copy of the judgment of the Court of criminal jurisdiction convicting him as also the appeal filed by him before the Disciplinary Authority, to facilitate the decision as aforesaid.

9. The writ petition is allowed in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Matter Under Article 227 No. 6852 of 2015

Dhooram Chaudhary ...Petitioner
Versus
Mr. Mulayam Singh Yadav & Ors. ...Respondents

Counsel for the Petitioner:
Aseem Kumar Rai

Counsel for the Respondents:
C.S.C.

Constitution of India-Art.-227-Petition against interlocutory order-granting stay against summoning of O.P. No. 1-firstly the application on behalf of stranger-not maintainable -the applicant disclosed his credence as "Public Spirited Social Worker" but concealed the fact of M.L.A. Belonging to opposition-having no concern with suo moto action-except to file complaint-petition is nothing but to get cheap popularity-petition dismissed with cost of Rs. 1 Lacs.

Held: Para-8
The applicant has no concern with the proceedings initiated, suo moto, by the court below, neither is the applicant a complainant, therefore, what motivated the applicant to approach this court assailing the impugned order passed by the revisional court has not been explained.

Case Law discussed:
(2010) 4 SCC 728; (2012) 6 SCC 430; (2010) 2 SCC 114; (2012) 12 SCC 133

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

1. The applicant has approached this Court in a petition under Article 227 of the Constitution, inter alia, seeking a direction to set aside the order dated 22 August 2015 passed by the second respondent, Sessions Judge, Mahoba in Criminal Revision being Revision No. 46/15; a further direction has been sought directing the "appropriate authorities to take appropriate action against the first respondent".

2. The applicant claims to be a "public spirited social worker". The first respondent is President of the ruling party of the State, a Member of the Parliament, former Chief Minister of the State and Former Defence Minister of India. The Judicial Magistrate at Kulpahar, District Mahoba had suo moto taken cognizance of certain comments, purportedly, made by the first respondent against the modesty of women thus, summoning the first respondent under

Sections 504, 505, 509, 116 IPC read with Section 3 and 4 of the Indian Representation of Women Prohibition Act 1996 by order dated 21 August 2015, aggrieved, the first respondent preferred a revision under Section 397 CrPC against the summoning order. The learned Revisional Court/Sessions Judge, Mahoba vide order dated 22 August 2015 stayed the order summoning the first respondent. The order is being assailed in the present petition.

3. The applicant claims to be a public spirited social worker, however, the learned Advocate General would inform that the applicant is a former Member of Legislative Assembly (MLA) belonging to the opposition party, the petition at this behest under Article 227 of the Constitution would not be maintainable, rather, the petition is a gross misuse of the process of Court, the Criminal Revision against the summoning order is pending, therefore, there was no occasion for a stranger to have approached this Court.

4. Learned counsel for the applicant when confronted with the credentials of the applicant i.e. being a former MLA belonging to a rival political party, the learned counsel for the applicant would submit that he would like to withdraw the petition.

5. The learned Advocate General would submit that the petition being gross misuse of the process of the Court should be dismissed with heavy cost.

6. The record would reveal that the learned Judicial Magistrate had taken suo moto cognizance under Section 190(1) Cr.P.C of the offence mentioned herein above, thereafter, it appears that a miscellaneous case was also instituted against the first respondent and one Bhagirath Yadav for threatening the landlord of the Magistrate. The cognizance was taken on some news items published in the daily "Hindustan Times" and "Kanpur Metro" published from Lucknow and Kanpur respectively, it was alleged that derogatory remarks uttered by the first respondent was also carried by certain news channels of the electronic media.

7. Be that as it may, the fact remains that the first respondent has already committed himself to the judicial process and has submitted himself before the revisional Court assailing the cognizance order and the consequent summoning order, in these circumstances it appears that the present proceedings before this Court has been initiated in the most casual and irresponsible manner. A number of paragraphs of the petition, viz para 14 would reflect that initially a public interest litigation petition was sought to be filed but it appears on legal advise, the petition was converted into a petition under Article 227, however, it appears the pleadings were accordingly, not amended nor corrected.

8. The applicant has no concern with the proceedings initiated, suo moto, by the court below, neither is the applicant a complainant, therefore, what motivated the applicant to approach this court assailing the impugned order passed by the revisional court has not been explained.

9. The learned counsel for the applicant would not dispute that under criminal jurisprudence, it was open for the applicant to file a complaint, against the first respondent if he so desired, before the concerned Police Station, but instead of adopting recourse as available under law, the applicant appears to have

ventured in approaching this Court for publicity. It is not being disputed that the applicant is a former MLA and presently associated with a political party which is in opposition to the party to which the first respondent is the President.

10. In these circumstances, the objection raised by the learned Advocate General that the petition is a gross misuse of the process of the Court cannot be brushed aside lightly.

11. Another feature of the petition is that the learned Sessions Judge has been impleaded in personal capacity, but the pleadings would reflect that no allegation has been made against the second respondent. The second relief is for a direction to the "appropriate authorities" for taking action against the first respondent, but the authorities have neither been arrayed as parties nor described in the petition.

12. Supreme Court in of Oswal Fats and Oils Limited vs. Additional Commissioner (Administrative), Bareilly Division1 observed as follows:-

"20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person."

13. The observations in A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam2 are also apposite holding:-

43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrongdoer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

43.5. It is the bounden obligation of the court to neutralise any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process."

14. In Dalip Singh v. State of U.P. & Ors.3, Supreme Court noticed an altogether new creed of dishonest litigants, who have flooded the Court. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings.

15. Supreme Court in the case of V. Chandrashekaran and another vs.

Administrative Officer and others4 observed that a petition or affidavit containing misleading or inaccurate statement amounts to abuse of process of Court, a litigant cannot take inconsistent positions. Paras 45, is extracted:-

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

16. In this view of the matter, the petition is dismissed with heavy cost of Rs. 1,00,000/-.

17. The applicant shall deposit the cost with the District Magistrate, Mahoba within one month, failing which, it will be open for the District Magistrate, Mahoba to recover the sum as arrears of land revenue. 50 percent of the sum to be deposited with the Registrar General, High Court, Allahabad to be utilized by the Mediation and Conciliation Center of the High Court, Allahabad and the remaining 50 percent to be used by Mediation and Conciliation Center of the District Mahoba.

18. Registrar General of this Court shall forward a copy of this order to the District Magistrate, Mahoba for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2015

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

Service Single No. 8006 of 2010

Ashok [objection filed] ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
S.A. Khan

Counsel for the Respondents:
C.S.C., R.D. Shahi

U.P. Regularization of Daily wages appointment on group 'D' Rules, Rule-4(i)- petitioner working as Mali since 1989-seeking regularization-as juniors to petitioner have already regularized-in Janardan Yadav case-Rule 4(i) interpreted as person seeking regularization must be in service on commencement of the Act-being appointed prior to 29.06.1991-no where continuous working required-petition disposed of with direction to consider regularization within 3 months.

Held: Para-5

It is also relevant to mention that this Court in the case of Janardan yadav vs.State of U.P. [(2008) 1 UPLBEC 498, held that this Court does not find any ambiguity in Rule 4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules. In the situation, the stand of the State is contrary to the Rules and it amounts to adding and reading certain words in Rule 4(1) which have not been inserted by the legislature. As the rules are applicable only to daily wage employees, the Rules framing authority was well aware that such employee could not have worked continuously throughout and therefore, has clearly provided that the

engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rule.

Case Law discussed:
[(2008) 1 UPLBEC 498

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

1. Heard Counsel for the petitioner and the Standing Counsel on behalf of the respondents.

2. Petitioner has filed the instant writ petition praying inter-alia for direction to the opposite parties to consider the case of the petitioner for regularisation on the post of Maali from the date the persons engaged after the year 1989 have been regularized.

3. Counsel for the petitioner submits that the petitioner has performed his duties in Mahdoiya Gram Samaj Vriksha, Lucknow Range from the year 1989 to 1996 and thereafter he was posted under Sharda Sahay Nagar, Lucknow Range from 1996 to June,1986. After being posted at different places, the petitioner was lastly posted under Narauni Vanshigarh LIT Section, and performed duties to the satisfaction of the authorities concerned. The grievance of the petitioner is that his case for regularization has not been considered by the opposite parties, though he has served the department for more than two decades and was working on the cut off date as provided in the U. P. Regularization of Daily Wages Appointments on Group 'D' Rules, 2001. He further submits that six persons were regularized in the year 2002-03 but the petitioner has been treated differently and as such the action of the respondents is in breach of the provisions of Article 14 and 16 of the Constitution.

4. Learned counsel for the petitioner has vehemently contended that denial of benefit of regularization for which the petitioner is legally entitled, is highly arbitrary, unjustified and causing great injustice to the petitioners apart from being discriminatory. Further, he submits that the petitioner has rendered several long years of service but he has yet not been regularized, whereas persons junior to him have been regularised. He further submitted that on account of interim order dated 24.11.2010, the petitioner is being paid minimum of pay scale admissible to the petitioners' cadre. In contrast, learned Standing Counsel has submitted that the petitioner has not worked regularly since the date of their engagement and infact had worked intermittently with breaks in his services and as such in view of Rule 4(1)(a) he is not entitled for regularization as claimed.

5. It is not disputed that the petitioner was engaged in 1989 and was working on the cut off date provided in Regularization Rules The requirement under the Regularisation Rules is that an incumbent was directly appointed on daily wage basis in a government service before 29.6.1991 and is/are continuing in service as such on the date of commencement of the said Rules. The further requirement under the Rules is that the person must have possessed requisite qualification required for regular appointment on that post at the time of such employment on daily wage basis. It is also relevant to mention that this Court in the case of Janardan yadav vs.State of U.P. [(2008) 1 UPLBEC 498, held that this Court does not find any ambiguity in Rule 4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that

the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules. In the situation, the stand of the State is contrary to the Rules and it amounts to adding and reading certain words in Rule 4(1) which have not been inserted by the legislature. As the rules are applicable only to daily wage employees, the Rules framing authority was well aware that such employee could not have worked continuously throughout and therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rule.

6. Needless to observe here that recently the State Government has issued a Government Order dated 13.8.2015 whereby it has been provided that persons working on daily wage/work charge/contractual basis in the department of the State Government, its autonomous bodies, public undertakings/local bodies, development authorities and Zila Pancahyat, who were engaged upto 31.3.1996 shall be regularized.

7. In view of above, the opposite parties are directed to consider the case of the petitioners for regularization under the U. P. Regularization of Daily Wages Appointments on Group 'D' Rules, 2001 and in the light of law laid down in Janardan case [supra] within a maximum period of three months from the date of presentation of a certified copy of this order.

8. With the aforesaid observations and directions, the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2015

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

Application U/S 482 No. 12600 of 2015

Smt. Reeta Chaudhary & Anr. Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Ram Surat Saroj

Counsel for the Respondents:
Govt. Advocate, Manjeet Singh, Shambhu Chopra

Cr.P.C.-Section-482-Quashing of criminal proceeding-on basis of compromise-offence u/s 452, 323, 504, 506 IPC-Learned Magistrate-rejected application on ground offence under section 452 being non compoundable-held-keeping in view of guidelines of Apex Court in Gyan Singh case-criminal proceeding quashed.

Held: Para-9 & 12

9. The parties have entered into compromise and have decided to keep harmony between them in future and to live with peace and love. The trial is at the initial stage of framing charges. The evidence is yet to be led in the Court. It has not even started. In view of compromise between the parties, there is a minimal chance of witnesses coming forward in support of the prosecution case. The chance of conviction, therefore, appears to be remote.

12. Considering the facts and circumstances of this case as discussed earlier in the light of aforesaid guidelines laid down by the Hon'ble Apex Court, it does not appear just and proper to dismiss the present application only due to the reason that the F.I.R. incorporates

one non-compoundable offence i.e. 452 I.P.C.

Case Law discussed:
(2012) 10 SCC 303; (2015) 8 SCC 307; (2014) 6 SCC 466; (2012) 10 SCC 303.

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

1. The applicants have invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. with prayer to quash the entire proceedings of Case No. 1365 of 2012 (State Vs. Pankaj Chaudhary and others), arising out of Case Crime No. 772 of 2011, under Sections 452, 323, 504, 506 I.P.C., P.S. Kasna, District Gautam Buddh Nagar, on the basis of a compromise executed between the applicants and opposite party no. 2.

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

3. Brief facts of the case are that a civil dispute arose between the parties in respect of some landed property, which also gave rise to lodging of an F.I.R. by opposite party no. 2 against the applicants under the aforesaid sections. However, good sense prevailed between the parties and they entered into a compromise before Delhi High Court Mediation and Conciliation Centre on 10.01.2014. An application for compounding the offence was filed before the Court of Chief Judicial Magistrate-II, Gautam Buddh Nagar, but the court below did not take cognizance of that application on the ground that Section 452 I.P.C. is a non-compoundable offence. The applicants have approached this Court for quashing the criminal proceedings on the basis of the fact that compromise between the parties has taken place and now there is no dispute left between them.

4. The submission of learned counsel for the applicants is that the parties have settled the matter and they have decided to keep harmony between them to enable them to live with peace and love. The compromise entered between them records that they have no grudge against each other and the complainant / opposite party no. 2 has specifically agreed that he has no objection if the F.I.R. in question is quashed. Further, both the parties have undertaken not to indulge in any litigation against each other in future. Therefore, continuance of the criminal proceedings in pursuance of the aforesaid F.I.R. will be an exercise in futile and mere wastage of precious time of this Court as well as Investigating Agencies.

5. Learned counsel for the applicants has supported his submissions with the verdict of Hon'ble Apex Court given in case of Gian Singh Vs. State of Punjab (2012) 10 SCC 303.

6. Learned counsel appearing for opposite party no. 2 has not contested the submissions of learned counsel for the applicants and he also prays that the criminal proceedings be quashed. Opposite party no. 2 has filed an affidavit stating therein that he has no objection if the aforesaid F.I.R. is quashed. He has requested this Court that the criminal proceedings may be quashed with direction to the applicants to comply with the terms and conditions stipulated in the settlement dated 10.01.2014. However, learned A.G.A. has brought to the notice of this Court one recent judgment of Hon'ble Supreme Court rendered in the case of State of Madhya Pradesh Vs. Manish and Others (2015) 8 SCC 307 wherein the Apex Court has set aside the

order of Madhya Pradesh High Court by which the Madhya Pradesh High Court had quashed the criminal proceedings under Sections 307, 294 read with Section 34 I.P.C. as well as Sections 25 and 27 of the Arms Act in exercise of its power under Section 482 Cr.P.C. on the ground that the disputes were amicably settled between the parties.

7. In the aforesaid case of Manish (supra), the Apex Court has considered the law laid down in its earlier judgment of Gian Singh (supra) and has held that offences under Sections 307, 294 read with Section 34 I.P.C. as well as Sections 25 and 27 of the Arms Act are such in nature that by no stretch of imagination those can be held to be offence between private parties simpliciter. Such offences have serious impact on society at large. As these offences are definitely against society, the private respondents will have to necessarily face trial and come out unscathed by demonstrating their innocence.

8. In so far as the case in hand is concerned, the submission of learned A.G.A. is that Section 452 I.P.C. is also a non-compoundable offence having its impact on society at large, hence in view of the recent judgment of the Apex Court the criminal proceedings cannot be quashed.

9. Having heard learned counsel for the parties and having perused the record, it appears that a civil dispute between both the parties had culminated into a criminal case under Sections 452, 323, 504. 506 I.P.C. The F.I.R. lodged by opposite party no. 2 which is Annexure No. 1 clearly shows that the allegations against the applicants is only of scuffle (hatha-pai) with opposite party no. 2, using filthy language and threatening. No serious injury has been caused to anyone. The parties have entered into compromise and have decided to keep harmony between them in future and to live with peace and love. The trial is at the initial stage of framing charges. The evidence is yet to be led in the Court. It has not even started. In view of compromise between the parties, there is a minimal chance of witnesses coming forward in support of the prosecution case. The chance of conviction, therefore, appears to be remote.

10. Hon'ble Apex Court in a recent case of Narinder Singh & Ors. Vs. State of Punjab & Anr. (2014) 6 SCC 466 has quashed the criminal proceedings under Sections 307/324/323/34 I.P.C. on the basis of compromise entered into between the parties and has quashed the order of Punjab and Haryana High Court by which the High Court had refused to exercise its extraordinary discretion under Section 482 Cr.P.C. on the ground that the injury suffered by the complainant were serious in nature.

11. In Gian Singh Vs. State of Punjab (2012) 10 SCC 303 the three Judge Bench of Hon'ble Apex Court has laid down the guidelines regarding the legal position as to in what circumstnaces and in what type of cases such exercise of inherent powers under Section 482 Cr.P.C. can be invoked dehors Section 320 Cr.P.C. for the purpose of quashing of criminal proceedings as under:-

"the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from

the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plentitude with no statutory limitation but it has to be exercised in accord with the guidelines engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse f the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act, or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavor stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

12. Considering the facts and circumstances of this case as discussed earlier in the light of aforesaid guidelines laid down by the Hon'ble Apex Court, it does not appear just and proper to dismiss the present application only due to the reason that the F.I.R. incorporates one non-compoundable offence i.e. 452 I.P.C.

13. Accordingly, the application is allowed and the entire proceedings of Case No. 1365 of 2012 (State Vs. Pankaj Chaudhary and others), arising out of Case Crime No. 772 of 2011, under Sections 452, 323, 504, 506 I.P.C. are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2015

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

Writ-C No. -18086 of 2014

Morning Walkers Association & Ors.
...Petitioners
Versus
Allahabad Cantonment Board .Respondents

Counsel for the Petitioner:
Abu Bakht

Counsel for the Respondents:
Prashant Mathur, Satish Kumar Rai

Constitution of India, Art.-19 (i)(d)- Prohibition on morning and evening walking in Cant. Area without pass-without intention of interruption of right of movement-on public road-necessity of taking pass-held unhealthy decision-whenever such situation occurs-authorities to take decision only after discussion from the institute like High Court.

Held: Para-50 & 51

50. The aforesaid discussion is also necessary for any action to be taken in future as public convenience cannot be overlooked. A person suffering from any immediate serious ailment like a heart-attack at midnight, would not obviously be asked to wait upon to obtain a pass for commuting on a road if he resides in the vicinity to reach the hospital. This is just one practical aspect of the matter and there are many such shades which require consideration including other public conveniences.

51. It is for all the aforesaid reasons that we hold that the petitioners are right in their submission that they do not require to be imposed with a condition of obtaining a pass from the military authorities in the background and purpose aforesaid. We also are of the opinion that in case the Cantonment Board proceeds to take any steps in future in the light of the letter dated 7th January, 2015, it may inform to the public at large and particularly to institutions like the High Court before taking up any such measures for discussion so that the point of view of public convenience may not be left unheeded in any of its dimension. The respondents are therefore directed to act accordingly.

Case Law discussed:
W.P. No. 3549 of 1997; AIR 1998 SC 431; W.P. No. 4271 OF 2007; PIL No. 361 of 2012.

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

1. This petition has been filed by a collective group of individuals describing themselves as the Morning Walkers Association through Sri Promod Kumar Jain, a Senior Counsel of the High Court accompanied by a couple of Senior Counsels, Sri W.H. Khan and Sri V.M. Zaidi and with the support of Sri G.S. Hajela another counsel of this Court. Sri Ram Chandra Gupta is the petitioner no. 6. They are all residents of adjoining localities in the vicinity of New Cantonment at Allahabad. They submit that they are regular morning and evening walkers on the roads that fall inside the New Cantonment area including the roads that are accessible to the public, particularly Cariappa Road, Ponappa Road and Lawrence Road.

2. Their morning walks were interrupted by checkings carried out by armed soldiers of the Indian Army at the entry point and crossings of such roads with an insistence to obtain a requisite pass from the military authorities. This

sparked off the controversy in February, 2014.

3. On enquiry, the petitioners allege that for the purpose of commuting on such roads an application for issuance of a temporary pass to a civilian has to be moved and pass obtained, the format whereof is Annexure - 1 to the writ petition. The petitioners were orally informed that an amount of Rs.150/- has to be paid as a fee for the said pass.

4. They contend that the morning and evening walkers in the locality of the Cantonment area are all respectable citizens of the city including Hon'ble Judges of the High Court, Advocates, Academicians, Businessmen and practically people from all walks of life that comprise of male and female population both. The roads that are being used for the said purpose have been open to the public at large, particularly Cariappa Road, Ponappa Road, Ashoka Road, Hastings Road, Auckland Road and other connecting roads that crisscross the roads in the Cantt Area. The said roads are also linked with the other areas and merely because these roads are linked with roads within the Cantt Area does not change their nature as public utility roads so as to impose such commuting restrictions that are now sought to be imposed by the respondents by insisting commutation on issuance of passes. It is this routine daily pilgrimage that has come under a military scanner that forms the factual matrix giving rise to the issues involved in the present petition.

5. Learned Senior Counsel for the petitioners Sri Ravi Kiran Jain is right when he submits that a walk for a human being is as essential as a swim for a fish and a flight for a bird. It is natural, as a human being is physically designed, by nature, to negotiate distances. It is his elixir of life. Walking, as an exercise and as a means of adventure, is natural to man and the present petitioners have come forward to protect such natural behaviour, asserting it as a right, calling upon the court to instruct the respondents not to interrupt their morning walks on streets open to the public within the cantonment limits of the New Cantt. Allahabad by policing, as it offends their lawful right to traverse and commute freely on the grounds of violation of the rights of freedom in its various dimensions enshrined under Part - III of the Constitution of India.

6. Sri Jain, learned Senior Counsel then invited the attention of the Court to Article 19(1)(d) of the Constitution of India and also cited the division bench judgment of the Karnataka High Court in the case of Nitin G. Khot Vs. Station Commandant, Belgaum, Writ Petition No. 3549 of 1997 decided on 23rd January, 1998. A copy of the said judgment has been placed before us to contend that this issue has been decided and the ratio of the said decision is clearly attracted on the facts of the present case to construe that the said restrictions which are sought to be imposed are unreasonable as they tend to close down such roads of the Cantonment for commutation including morning and evening walks.

7. He has further invited the attention of the Court to the order dated 24th August, 1998 in Special Leave to Appeal No. 8218 of 1998 whereby the Apex Court dismissed the Special Leave Petition filed by the military authorities challenging the aforesaid decision of the Karnataka High Court.

8. To further buttress his submissions Sri Jain has fundamentally questioned not only the said restrictions being imposed as without authority but also as unconstitutional and for that he has referred to the constitutional provisions leading to the judgment of the Apex Court in the case of Naga People's Movement of Human Rights Vs. Union of India, AIR 1998 SC 431.

9. He therefore submits that neither the roads can be shutout for such commutation and even otherwise the same being a street as defined under Section 2(zza) of the Cantonment Act 2006, any attempt for such closure is invalid through indirect methods by the respondent - military authorities. He submits that such prohibition cannot be imposed except by the procedure prescribed under the 2006 Cantonment Act and which powers cannot be assumed by the military authorities exclusively to themselves by attempting policing and prohibiting commutation to the disadvantage of the public at large for no valid purpose. The contention therefore is that such unreasonable fetters which are not backed up by any law for the time being in force, by imposition of military authority, should not be permitted in the manner as sought to be imposed by the respondents.

10. The respondents filed a short counter affidavit asserting their authority to do so and also have tried to justify their action that this was being done in order to secure military interest as well as it would also protect the citizens at large so that security is not compromised in any manner. This was necessary to facilitate movements with the minimum of inconvenience. They have taken a particular plea with regard to three roads, namely Cariappa Road, Ponappa Road and Rajiv Gandhi Road (Lawrence Road) that these roads are exclusively within the control of the military authorities as such land is classified as A-1 Defence Land under the Cantonment Land Administration Rules 1937.

11. They have also in their affidavit indicated the duties of a Station Commander that includes taking action in the case of any disturbance in consultation with the local authorities as well as a host of other military activities as indicated therein. The affidavit also refers to an antiquated rule for the acquisition, custody, relinquishment etc. of military lands in India (ACR Rules 1944) to urge that roads which are under the immediate control of the Army include "Imperial Military Roads" and for that the said rules still hold the field, on the strength whereof, military authorities are justified in imposing such restrictions.

12. The respondents have also relied on the judgment of the Delhi High Court dated 28th May, 2003 in Traders Welfare Association Vs. Union of India and others to contend that wherever there is a security concern, the areas exclusively used for armed forces can be cordoned off from the general public. Another judgment that has been relied on is that in the case of Dr. G.S. Ahluwalia Vs. Union of India and others by the Madhya Pradesh High Court in Writ Petition No. 4271 of 2007 where in the name of security, the installation of an iron gate subject to checking for security has been upheld. Another judgment of the Andhra Pradesh High Court in the case of Father (Parish Priest) Holy Family Church and others Vs. Government of India and

others in PIL No. 361 of 2012 decided on 26.11.2012 has been relied upon to contend that the category of Class - A(1) Defence Land which has a military road, is not within the exclusive right of the public to commute moreso when the public already has alternative connections to the areas through which commutation is sought.

13. The hearing of this case was postponed on two occasions on account of certain other matters that were being heard including a PIL No. 4519 of 2011 that came to be decided on 14th August, 2014 by a division bench of this court in relation to the restrictions imposed by prohibiting commutation on another road known as Newa Road within the same Cantonment at Allahabad. The closure of the said road to the public was found to be justified on the ground that the road was being exclusively used for an approach to a sensitive military installation namely an arsenal and target firing training area, and therefore when an alternative road is available to the affected residents connecting the said road via another road, then the closure would be justified. It was further indicated by the respondents therein that as a temporary measure a road passing through Class - A(1) Land would be made available till the construction of the military installations are completed. This judgment has also been relied on by the respondent in their support.

14. Apart from this, the learned ASGI, Sri Ashok Mehta, Sri Gyan Prakash and Sri Satish Rai for the respondents have brought to our notice the decision of the Ministry of Defence communicated through Letter dated 27th January, 2015 to urge that in view of the provisions of Section 258 a street as defined under Section 2(zza) can be permanently closed only by the Cantonment Board for security reasons alone upon following the procedure as indicated therein and therefore in order to avoid any inconvenience such steps should be taken only after following the said procedure and obtaining statutory approval.

15. Thus the contention of the respondents is as indicated in Paragraph 26 of their counter affidavit that no road as referred to in the writ petition has been shutoff completely and instead only security measures are being undertaken. In Paragraph 32, they have come up with a case that no fee shall be charged for entry passes and no police verification shall be insisted upon as provided for in the proforma.

16. Sri Rai learned counsel for the Central Government has passed on a copy of the letter of the Defence Ministry dated 6th October, 2008 indicating the category of passes that are to be issued for defence installations.

17. It is in the aforesaid background that we had adjourned the delivery of judgment and then again listed the case for further hearing and upon conclusion of the arguments that the judgment was again reserved by us.

18. Before we deal with the statutory provisions under the Cantonment Act 2006 and the Cantonment Land Administration Rules 1937, it would be appropriate to refer to a brief constitutional history and also the objects and reasons that were discussed and are mentioned when the Cantonment Act 2006 was revisited by the Parliament and amended through Act No. 41 of 2006.

19. After gaining independence and while framing the Constitution the longest debate that occupied the constituent assembly was the Chapter on fundamental rights enshrined under Part - III of the Constitution including Article 19(1)(d) of the Constitution with which we are presently concerned.

20. Matters of public liberty and reasonable restrictions, the community interest of individual and State interests were debated at length but for the purpose of their interpretation and to spell out the importance of such rights one has to necessarily refer to the period of emergency that was imposed in an around 1975 with the advent of certain constitutional amendments that came to be challenged in several cases before the Apex Court that defined and reiterated such fundamental rights being protected against unreasonable laws that attempted to hit at the roots of the basic principles of democracy. Matters went so far so as to take away the power of the High Court to issue prerogative writs while considering validity of laws by the Centre. The infamous 46 Amendment Act 1976 introduce Section 39 whereby the Constitution was amended adding Article 226-A which read as follows:-

"226-A. Constitutional validity of Central laws not to be considered in proceedings under Article 226. - Notwithstanding anything in Article 226, the High Court shall not consider the constitutional validity of any Central law in any proceedings under that article."

21. The parliament swiftly, after the political scenario changed by a revolutionary open public franchise mandate, demolished such unworthy laws and repealed the same by omitting the above through Section 8(2) of the 43rd Amendment Act 1977 that reads as follows:

[Section 8(2) provides. "(2) Any proceedings pending before a High Court under Article 226 of the Constitution immediately before the commencement of this Act may be dealt with by the High Court as if the said Article 226-A had been omitted with effect on and from the 1st day of February, 1977."]

22. The question involved herein is the protection of the fundamental rights guaranteed under Article 14, 19(1)(d) read with Article 19(5) and Article 21 of the Constitution of India. The same are extracted hereinunder for reference:-

"Article 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19. Protection of certain rights regarding freedom of speech, etc: (1) All citizens shall have the right-

(d). to move freely throughout the territory of India.

Article 19(5). Nothing in [sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty

except according to procedure established by law."

23. The constitution very carefully engrafts the legislative territories between the Parliament and the State Legislatures captioned under Part XI, Chapter -I (Distribution of Legislature, powers - Article 245 to 255). Article 246 of the Constitution prescribes the matters enumerated in List I in the 7th Schedule to be within the exclusive domain of Parliament. Similarly the State Legislature has the exclusive powers under List II of the same schedule to legislate laws subject to List I and List III thereof. The joint obligation, namely what can be described as the common areas of distribution of legislative powers between the Parliament and the State legislatures, is provided for under List III, the concurrent list. The residuary powers of parliament are under Article 248 and to make laws on the request of the States under Article 249. The emergency powers of Parliament to legislate on State matters is contained in Article 250. The other articles of Chapter I of Part XI also carve out definitions of specific areas of Legislation and the priority of a legislation to prevail in matters of inconsistency of laws. Thus the competence of the Union Parliament and State legislatures is defined as above.

24. The State legislatures have been, subject to the laws falling within the competence of the Parliament, have been given exclusive authority to legislate laws on the subject of Public Order (List-II Entry-1) and Police - including railway and village police, subject to the provisions of Entry 2-A of List - I. Thus Public order and policing is clearly a State subject matter. A cantonment area as defined under Section 3 of Cantonments Act 2006, is also subject to such laws with some exceptions vis-a-vis the members and establishment of exclusive armed forces. However the Parliament can make laws extending the powers and jurisdiction of police forces to any other State subject to the limitations contained in Entry 80 of List - I. The overriding power of the Parliament in respect of policing under Entry 2 of List II (State list, is the deployment of armed forces of the Union in aid of the civil power of the State as per Entry 2-A of List - I (Union List). This exception and its fall outs, as well as the extent of the competence of the Union Government to make such laws and their enforceability have been dealt with in detail in the judgment of the Apex Court in the case of Naga People's Movement of Human Rights Vs. Union of India, AIR 1998 SC 431 that has been relied on by the petitioners. Policing and Public Order are thus within the exclusive civil powers of the State but the Centre to aid such civil power has been authorized under the Constitution to frame laws as explained above.

25. A little bit of Constitutional history post independence may be referred to in this context. After the repeal of Article 259 way back in 1956 through the 7th Amendment Act, the 42nd Amendment of 1976 within its sweep also granted the Union Government powers to deploy armed forces to deal with any grave situation of law and order in any State through Article 257-A quoted hereinunder:-

"[Article 257-A. Assistance to States by deployment of armed forces or other forces of the Union]"

26. This provision was again by a prudent and wide Act of Parliament

namely the 44th Amendment Act 1978, repealed. The parliament therefore twice in the past had intervened and prevented any laws to continue giving formal powers to the Armed Forces from entering into the realm of law and order, that touches also public order and policing. This is no adjudication on any such issue but legislative powers remain limited within the area of competence of the Union Parliament as noted above.

27. The power of the parliament to frame laws about the constitution and regulation of Cantonments is provided for under Entry 3 of List -I as follows:-

List - I Entry - 3. Delimitation of cantonment areas, local self-government in such areas, the constitution and power within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

28. Cantonments were earlier governed by the Cantonments Act 1924 and its allied laws. The 1924 Act came to be repealed under Section 360 of the Cantonments Act 2006 published in the gazette on 14.9.2006 that came into force w.e.f. 18.12.2006 as per Section 1(3) thereof. The objects and reasons that were spelt out at the time of presentation of the Bill introducing the New Act are as follows:-

"THE CANTONMENTS ACT, 2006
(41 OF 2006)
[13th September, 2006]

An act to consolidate and amend the law relating to the administration of cantonments with a view to impart greater democratization, improvement of their financial base to make provisions for development activities and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows:-

Statement of Objects and Reasons. - The Cantonments Act, 1924 (2 of 1924) makes provisions relating to the administration of cantonments. As cantonments are Central territories under the Constitution, the civil bodies functioning in these areas are not covered under State municipal laws.

2. In view of the present day, aspirations and needs of the people residing in cantonment areas and in order to bring in modern municipal management procedures/techniques in such areas, it is proposed to enact a new legislation by replacing the Cantonments Act, 1924 to provide for - (i) greater democratization; (ii) reservation of seats in Cantonment Boards for women and the Scheduled Castes/Scheduled Tribes; (iii) better financial management;(iv) extension of centrally sponsored development schemes to such areas; (v) management of defence lands and their audit etc.

3. The new legislation has been modified with a view to re-enact the existing Act in the context of Seventy-Fourth Constitutional Amendment and to provide for better urban management in cantonment as recommended by the Standing Committee of Parliament on Defence and the Action Taken Note of the Government on their recommendations. Broadly, the proposed modifications could be caegorised as under:-

(i) Greater Democratisation.- The Bill envisages enhanced representation for elected members to make proper balance

between the elected and nominated one. Reservation of seats in the Cantonment Boards for women and the Scheduled Castes/Scheduled Tribes would also fall in this category. In this proposed Bill, parity has been brought between the official and elected members of the Board and with this, the number of elected members would increase. The enhanced representation for elected members will cater for increased civil population in the cantonment areas.

(ii) Land Management;- Over the years, the defence land ownership has increased to 17.31 lakh acres out of which about 2 lakh acres of such lands are situated within 62 notified cantonment being managed under the existing Act. There is no statute to cover the management of about 15 lakh acres of defence lands lying outside the cantonments. As on date, these defence lands are regulated by executive instructions (not covered under any statute), issued by the Central Government from time-to-time through Acquisition, Custody, Relinquishment, etc. of Military Lands in India (ACR) Rules, 1944, which are non-statutory in nature.

The Management of Cantonment Board properties and the defence lands outside the Cantonments is different from each other in a sense that the former is covered under the existing Act and the Cantonment Property Rules, 1925 made thereafter, whereas, there is no such legislation or rules for the latter. The Standing Committee of Parliament (12th Lok Sabha) recommended that provisions may be made in the Cantonments Act itself regarding management of defence lands, their records, consolidation of earlier policies and land audit.

Statutory provisions have accordingly made and a new Chapter on management of defence lands has been added in the Bill. The provisions contained in this chapter will, inter alia, enable the Central Government to notify the defence lands, consolidate land management policies and records in regard to defence lands, carry out land audits to detect abuse if any, nonutilisation and sub-optimal utilization of lands.

*[*Received the assent of the President on 13.9.2006 and published in the Gazette of India, Ext.,Pt. II, S. 1, dated 14.9.2006.]*

The Standing Committee of Parliament has also recommended making legal provisions to tackle encroachments on defence lands situated all over the country. Accordingly, the problem of encroachment is not proposed to be tackled through the provisions contained in Clauses 239, 248, 249, 253 and 257 of the proposed Bill. This would be in addition to the powers available to the Government under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

(iii) Development impetus;- In addition, provisions have been made which would given necessary impetus to development activities, To keep pace with recent developments, provisions have also been made for developmental and welfare activities like (town planning, old age homes, houses for disabled and working women hostels, rain water harvesting, nonconventional energy and other miscellaneous developmental activities which are important to sustain the environment and taking steps for social development.

(iv) Resource Generation- Provisions have been incorporated in the new Bill to

streamline financial administration, improve finance base and change the tax mechanism keeping in view the needs of modern municipal administration. Provisions have also been made for a Cantonment Development Fund in which, any sum received from Government or an individual or association (by way of gift or deposit) or from centrally sponsored scheme, may be credited.

The Standing Committee of Parliament (12th Lok Sabha) had also made a recommendation for extension of centrally sponsored development schemes in cantonments for uniform development of States. Provisions in clauses 10 and 108 of the Bill have therefore been made making every Board a "deemed municipality' for the purpose of Article 243-O(e) of the Constitution. This would enable the Cantonment Boards to avail benefits and advantages of centrally sponsored schemes for social and economic development as are presently available to other municipalities in various States.

Under Article 285 of the Constitution, the properties of Central Government are exempted from all taxes imposed by local authorities in the States. Representations were received that for the services rendered by the local bodies and the financial implications involved, some payment in the form of service charges may be made to them. Consequently, the Central Government issued certain executive orders making provision for payment of service charges to local bodies since 1954.

There is no specific statutory provisions to give legal backing to the said decision/orders made by the Government in this regard from time-to-time. It is, therefore, proposed to make a provision in the Bill for payments to be made to the Cantonment Boards for service charge by the Central and the State Governments, after ascertaining the same.

4. The Bill seeks to achieve the above objectives."

29. The aforesaid recital of objects and reasons in the bill which received the assent of the President in Clause 3(ii) as highlighted above does indicate the 1944 Rules which have been relied upon by the respondents are non-statutory in nature.

30. Having given this background the real grievance of the petitioners is about dignified morning or evening walks being undertaken by them in the New Cantt area in a respectable way and not under any shadow of toting guns.

31. Walking with dignity is a respectful way of enjoying this freedom. Brisk walking is a suggested healthy exercise. Thomas Jefferson, the famous American President, responsible for the drafting of the U.S. Constitution with the ideals of freedom enshrined in his 'writings' said, "walking is the best possible exercise. Habituate yourself to walk very far." Accompanied morning and evening walks are at times a close knit family routine outing. It also serves as a forum for dialogues and discussions with exchange of views in a friend's company. Many problems that are a cause of deep concern or mental worry get resolved during morning and evening walks and one gets also acquainted with people and ideas. Maitland describes this as the motto of the philosophic tramp "Solvitur Ambulando" (it is solved by walking).

32. To look at a citizen of this country on a morning or evening stroll on a street with unwarranted suspicion is tinkering with his constitutional liberties and therefore the rule of law needs to be observed when it comes to any reasonable restrictions being imposed to curtail such liberty in the name of State interest. Freedom guaranteed in the post-independence republican constitutional era is aimed at removing all unreasonable State - imposed sovereign fetters that existed in a colonial regime to promote alien rule interests. The people of India have given unto themselves a constitution with fundamental rights that are inalienable subject only to reasonable restrictions to the law made by the legislature. They are therefore to be governed now, not by the command of a monarch, but by the rule of law. There is a temptation to understand such freedoms in one's own individual interest, but this may reflect a general collective interest when it comes to a cause relating to normal public life. This then becomes a debate of public interest as against exclusive State interest. A restriction applied in an unreasonable way gives rise to protests, as in the present case, to a call before the courts.

33. To begin with, the first issue is with regard to the status of such roads which is being claimed by the respondents to be exclusively 'Imperial military roads' as per the 1944 Rules relied upon by the respondents. We may observe that there is no scope for any capitation of any road being "Imperial" in nature after India became independent and adopted a Republican Constitution. It is for this reason that while introducing the bill for the new Act in Parliament the 1944 Rules were not acknowledged to be having a statutory force in the objects and reasons. Nonetheless merely because a road which has been constructed over a land that came to be classified as Class A(1) land would not take away its status of a street as defined under Section 2(zza) of the 2006 Act. The streets which have been mentioned in the writ petition are connected with the pure civilian areas directly adjacent to such roads, namely the High Court, Bungalow of Judges and also civilian occupants of bungalows within the cantonment including residential areas. Thus these streets and roads are an access to civilians as well who reside within the cantonment. This is necessary to emphasize as the respondents themselves have not disputed this position but they contend that since there are military establishments as well on these roads, they intend to impose restrictions.

34. We have no doubt that any military installation which is exclusive for military purpose, for example the Sub-Area Headquarters or the Residences of military officials, are not open to the public at large for free entry, but streets which are being used by the public as well including civilians within the cantonment and outside, are not even proposed to be completely shut down by the respondents themselves. The petitioners therefore for a morning and evening walk on such streets are not required to seek entries through a pass or on such roads which are also of public utility, for which there is no authorization either under the 2006 Act or the Rules framed thereunder. The respondents have been unable to show any such law or rule requiring morning and evening walkers to obtain passes. What the respondents have come forward appears to be a letter issued by the Ministry of Defence dated 6th October, 2008, that is extracted hereinunder:-

No. 23(26)/2008/D (GS-III)
GOVERNMENT OF INDIA
MINISTRY OF DEFENCE
^^^^^

New Delhi - 110 011, dated 6th October, 2008

To
The Chief of Army Staff
The Chief of Naval Staff
The Chief of Air Staff

Subject: Passes for the Defence Installations.

Sir,

In supercession of the orders contained in this Ministry's letter No.PC-19201/2/GSI(b)(v)/2719/I/D(GS.III) dated 24-10-1977, I am directed to say that the President is pleased to approve the adoption of the following procedure in regard to the provisions of identity documents for civilians associated with Defence areas.

2. Following identity document will be issued to civilian personnel in the form of IAFZ 3049, 3049A, 3050 and 3052:-

(a) IAFZ 3049 - This will be issued to all Gazetted officers working in a unit located within the perimeter of Defence establishment.

(b) IAFZ 3049A - This will be issued to all non-gazetted officers and other employees of the Government who are working in a unit located within the perimeter of Defence establishment.

(c) IAFZ - 3050 - This is a temporary pass that may be issued to Government employees who are entitled for 3049/3049A pending delay.

(d) IAFZ - 3052 - Casual Visitors will be issued with a temporary pass on the form IAFZ - 3052 valid for the day of issue only.

(e) For all other personnel such as dependant family members of defence personnel/defence civilians, servants, contractors, vendors, shopkeepers, labours etc. suitable passes, for specified periods of validity as convenient, may be designed with colour codes for classification, and implemented by the authorities delegated by Military Commanders of the Area or Station irrespective of services.

3. Authority for Issue of Passes. Various passes mentioned at para 2 above shall be issued by the designated Security Officer/Authority and shall be valid for the concerned Station/Area only, Area Commanders shall, nominate Security Officers within their area of responsibility. However, Commanding Officers of respective units may issue special passes in respect of areas where restricted entry of personnel is required owing to the sensitiveness, with the approval of Area Commander.

4. The documents mentioned at para 2 above are identity documents and do not entitle the holder to enter any establishment.

5. On transfer from one station to another, the identity document will be surrendered to the issuing authority at new station. The issuing authority at new station will, in turn, issue a new pass and destroy the previous one under intimation to the old station of the individual for completion of their records.

6. Cost of Photographs. The cost of photographs required for identity passes in respect of the employees, their families and dependents will be borne by the individuals concerned.

7. Replacement. Permanent passes will be replaced in the following cases:-

(a) when worn out by normal wear and tear.

(b) when more than two alterations become necessary.

(c) when there is a change in the facial appearance of the holder.

(d) when there is a change in the name of the holder.

(e) when lost.

(f) On expiry of validity due to transfer from one station to another.

8. A permanent pass will be considered as worn out by normal wear and tear on completion of five years of its issue. A duplication fee of Rs. 20/- will be charged for any replacement that becomes necessary within this period due to damage of pass under circumstances beyond one's control.

9. Labourers will be issued tokens and their records will be maintained by concerned unit and contractor.

10. Loss of Passes. The loss of any pass should be immediately reported to the officer commanding/security officer of the unit/establishment, explaining the circumstances under which it occurred to enable him to issue a new pass. Report of the loss should be supported with a report lodged with the Police Station. Duplication fees of 20/- will be charged in addition to the cost of photographs. Additionally, a fine of Rs. 100/-, 150/-, 200/- will be charged towards First, Second and Third loss respectively apart from the normal disciplinary action.

11. Duplication fees towards loss of tokens by labours will be based on actual cost of manufacture of Rs. 20/- whichever is higher. Fine towards loss of each pass/token by Contractors, vendors, shopkeepers and labours may be implemented by pass issuing authority as considered suitable however the same should not exceed Rs. 500/-.

12. Expenditures incurred towards printing of passes and manufacture of tokens may be met from Public funds. Detailed orders including fines, duplication fees etc. are to be issued by respective authorities issuing passes.

13. Further amplifying orders may be issued by service Headquarters, as required.

14. This letter with the concurrence of the Ministry of Defence/Finance/GS vide Dy. No. 2194/GS/2008 dated 16th September, 2008.

Yours faithfully,

(JAI RAJ)

Under Secretary to the Government of India

Copy to:

The Controller General of Defence Accounts*

Director of Audit Defence Service

All Controllers of Defence Accounts*

All the Senior Dy. Directors of Audit, D.S.

CGS/MI Directorate/GS I (b)(ii)

Security Officer, Ministry of Defence

Ministry of Defence (Coord)

Section D(Est-I), D(Civ), D(Coord), D(FY) to take action regarding ordinance Factories.

CG (Admin)

*(Copies signed in Ink - to be sent to all the Controllers of Defence Accounts)

Copy also to:

D(Air-II); D(Navy); Air Hqrs,(Dte of Int); Navy (Int.) and DGMI/MI-11"

35. The aforesaid letter has been handed down by the learned counsel for the respondents which indicates that passes are required for the purpose indicated therein vis-a-vis the defence installations. The said letter does not indicate that a person who is either a

civilian resident of the cantonment or is a morning or evening walker like the petitioners is also required to get a pass for such commutation over a street that is constructed over Class A(1) land and is undisputedly a road also open to use for civilians. The said letter dated 6th October, 2008 therefore cannot be imposed upon the petitioners as they are not demanding a pass for entering into a defence installation. The said letter clearly indicates that whenever a civilian wants to enter into a defence installation, he may be required to obtain a pass in a manner prescribed therein but the present is not a case that in any way can be said to be governed by the said letter. Thus the insistence of obtaining a pass by the petitioners for going on a morning or evening walk does not appeal to reason and is an unreasonable imposition which is not supported by any provision of law.

36. The next comes the issue of the status of the road on which insistence is being made by the respondents relying on the decisions that have been cited on their behalf to contend that if the road is exclusively over Class A-1 land, then such restrictions can be imposed. Our task has become easier with the handing down of the communication about the decision taken by the Ministry of Defence dated 7th January, 2015 that is extracted hereinunder:-

"No. 4(2)/2015-D(Q&C)
Govt. of India
Ministry of Defence
New Delhi, dated the 7th January, 2015

To,
1. The Chief of Army Staff,
Army Headquarters, New Delhi
2. The Chief of Naval Staff,
Naval Headquarters, New Delhi
3. The Chief of Air Staff,
Air Headquarters, New Delhi
4. The Directorate General, Defence Estates
New Delhi

Subject: Closure of Roads in Cantonments

Sir,

It has been brought to the notice of the Ministry of Defence that public roads in Cantonments are being closed by the Local Military Authorities without any statutory authority to do so and without following the procedure prescribed to Section 258 of the Cantonments Act, 2006. Under the said Section 258, a street, as defined under section 2(zza) of the said Act, can be permanently closed only by a Cantonment Board for security reasons alone after:

(c) giving a public notice inviting objections and suggestions from the general public; and

(d) obtaining prior permission of the GoC-In-C or the Principal Director of the Command.

2. The matter has been considered in the Ministry of Defence and it has been decided that no public road, outside Unit Lines, in a Cantonment shall be closed by any authority, other than a Cantonment Board, for any reasons other than security, and without following the procedure laid down under section 258 of the Cantonments Act, 2006. If in the opinion of LMA, any road needs to be closed for security reasons, it will approach the local Cantonment Board to set the process in motion as required under section 258 of the Cantonments Act, 2006.

3. Henceforth, it will be the responsibility of the GoC-In-C and

Principal Director Defence Estates of the Command to ensure that no road in a Cantonment, outside Unit Lines, is closed arbitrarily or on grounds other than security or without following the procedure as prescribed under the said section 258. While deciding matters pertaining to closure of roads, the competent authority shall objectively weigh the security considerations and the inconvenience that may be caused to general public. Where it becomes unavoidable to close a road, efforts should be made to provide an alternative road before enforcing the closure order.

4. It has further been decided that roads already closed without following the procedure as delineated in the Cantonments Act, 2006 should be opened forthwith, and closed again, if such closure is required, after following the laid down procedure and obtaining the statutory approval.

5. The DG DE and Services Headquarters shall ensure compliance of the aforesaid directions. They will also submit a compliance report with regard to para 4 above to the Ministry of Defence within 30 days from the issue of this letter.

Yours faithfully,

(Nitin Chayando)
Director (L&C)"

37. In the present case no such decision has been taken or brought to our notice by the respondents under the procedure laid down under Section 258 of the 2006 Act. It is not in dispute that the roads in question are not streets within the meaning of Section 2(zza) of the 2006 Act. Consequently, the Defence Ministry itself appears to be aware of such insistence coming to their notice that have been causing public inconvenience and was sought to be dealt with through the aforesaid clarification. Apart from this, even if any such decision under Section 258 is arrived at, its validity or otherwise would still be a matter of legal debate as it directly involves the usage of a street by the public as defined under Section 2(zza) of the 2006 Act. It is also clear from a reading of the said letter that any such attempt is subject to objections being taken by the public at large and would not be a matter of imposition of any military executive orders but would rather be governed by the due process of the 2006 Act.

38. It is here that we would like to clarify that none of the judgments that have been relied upon by the respondents have dealt with the issue of morning and evening walkers as involved in the present case and have applied the law as was to be understood on the facts of those cases. In particular we would like to mention that the decision of this court dated 14th August, 2014 in PIL No. 4519 of 2011 exclusively was concerned with an approach road to a sensitive military installation of an arsenal and a target training area and keeping this fact in view that the said decision was rendered indicating that closure of road for general public was in the security interest of the armed forces. The facts of this case are clearly distinguishable where the roads in issue are accessible to the civilians public and which according to the counter affidavit filed by the respondents the same has not been shut down completely. There is yet another judgment which deserves mention at this stage which the court has come across by a learned Single Judge of this Court in Second Appeal No. 420 of 2006. The right claimed therein was also

of passage over a road in the cantonment limits of District Bareilly that arose out of a suit file in a representative capacity. The defendant Defence Department took a plea that there was an alternative road available and even otherwise the road in dispute therein was the internal road of the Jat Regiment Centre, also constructed over Class A(1) land and maintained by the Military Engineering Services. On such facts it was found the administrative control of the military authorities to prevent encroachment was available. The dispute therein was the control over the land between the military authorities and military estate officers and it was held that such a land which was not a public road and was meant for a military establishment, particularly the Unit of the Jat Regimental Centre, the suit was dismissed and the second appellate court also did not find any substantial question of law involved for interference. It is on this ground that the judgment of the Karnataka High Court in the case of Nitin G. Khot (supra) was found to be not applicable on the facts of that case.

39. The aforesaid judgment is clearly distinguishable on facts and even otherwise the said judgment of the learned Single Judge on legal issues, particularly the definition of the word "street" under Section 2(zza) read with the power of closure of a street under Section 258 of the 2006 Act neither appears to have been raised or considered. The said judgment is also not on the provisions of the Cantonments Act 2006. Thus the aforesaid judgment also does not come to the aid of the respondents.

40. Apart from this as indicated hereinabove the powers to police are nowhere provided under the 2006 Act allowing any such measure that is sought to be imposed against morning and evening walkers in the present case. It is not the case of the respondents in their counter affidavit that any of the petitioners have violated any law or that commutation on such streets or roads would be violation of any law if they are used by the public for morning and evening walks or commutation.

41. The present case becomes more distinguishable as in the past also the attempts made to shutdown roads by installation of iron gates and installation of cattle catchers was being attempted. The respondents have relied on the judgment in the case of G.S. Ahluwalia (supra) to support their contentions. In this regard, it would be useful to refer to the counter affidavits filed by the respondents in Writ Petition (PIL) No. 51777 of 2010, Jani Babu Sonkar Vs. Union of India and others. Two counter affidavits were filed therein, one on behalf of the Cantonment Board Allahabad and the other on behalf of the Defence Ministry sworn by Col. G.P.S. Kaushik working as Adm. Commandant, Station Cell, Headquarters MP, C & A Sub Area Allahabad.

42. In the counter affidavit filed on behalf of Cantonment Board through Smt. Bhawana Singh, the then Chief Executive Officer, Section 258 was clearly relied upon by the Cantonment Board in relation to closure of streets which has now been indicated in the present case through the communication of the Ministry of Defence dated 7th January, 2015 extracted hereinabove. In Paragraph 6 of the said counter affidavit it has been asserted that certain Schools, Hospitals and the residential civil areas are

maintained by the Cantonment Board for the benefit of the residents and employees residing within the cantonment limits who normally uses the roads maintained by the army authorities including that situate over Class A(1) land. In Paragraph 7 of the said counter affidavit it has been stated that five schools exist in the New Cantt. Area of Allahabad with which we are presently concerned and a regular hospital is also maintained by the cantonment board to cater a large number of civilian population who reside in R.A. Bazar, Triveni Vihar Colony, Ganga Vihar Colony and other colonies and all the roads connected with the cantonment areas are used by the residents with the other part of the city of Allahabad connected to the municipal limits.

43. Another revelation made in the said counter affidavit in Paragraph 10 thereof is that on the basis of a census which was carried out that an approximate 60% of the population was civilian within the cantonment area.

44. Apart from this, the counter affidavit filed on behalf of the Ministry of Defence and the military authorities referred to hereinabove in PIL No. 51777 of 2010 reasserts the maintenance of Lawrence Road (Rajiv Gandhi Road) as an internal cantonment road existing on Class A(1) Land maintained by the Military Engineering Services which connects army units, army and civilian defence residential areas with a small pocket of cantonment civil notified area, R.A. Bazar. It has been asserted in Paragraph 15 of the said counter affidavit that neither the setting up of cattle traps or digging on the roads had impeded any kind of free passage to the public, School Children or similarly situate persons. In Paragraph 18 it has been asserted that the main Rejiv Gandhi Road is open to all kind of traffic. The counter affidavit also asserts security concerns but at the same time Paragraphs 25 and 26 are worth quoting:-

Para 25. That during day time all the gates are open and absolutely no restrictions have been imposed on any kind of movement. Due to increased security threat during night time gates only on Rajiv Gandhi Road and at one end of Ponappa Road are being closed between 10 p.m. to 6 p.m. It will be appreciated that after 10 p.m. little or no movement takes place on these roads, as Schools, Banks, Offices, market places close down by this time.

Para 26. That to allow entry and exit to the New Cantonment area all other roads namely Cariappa Road, Ashoka Road, Nyay Marg, Akbar Road, and south end of Ponappa Road are open during night allowing absolutely free access to New Cantt. Area including access to Military and Cantonment General Hospital.

45. The said petition in which the aforesaid counter affidavit had been filed was a public interest litigation objecting to impediment of traffic and setting up of iron gates and cattle traps by the military authorities. For this, the justification given in the counter affidavit was that cattle traps were being laid in order to avoid stray cattle being huddled within cantonment limits. It also acknowledges the existence of the High Court and the Judges Colony in an absolutely close proximity of the said New Cantt. Area.

46. Learned counsel for the petitioners has also orally indicated and

which fact does not appear to be disputed that the very gates of the residence of Hon'ble the Chief Justice opens directly in front of Ponappa Road which is one of the roads presently involved and the access to the Judges Colony in Shambhu Barracks is also via Cariappa Road.

47. From the aforesaid facts it is clear that the respondents have not intended to create obstructions or restrictions, then it is not understood as to on what basis an insistence is being made by the respondents on the petitioners to obtain passes for morning and evening walks. In this regard, it is worth quoting Paragraph 9 of the counter affidavit sworn by Col. Kaushik in Writ Petition (PIL) No. 51777 of 2010, referred to hereinabove, which is as follows:-

Para 9. That Cantonment road are the only place in the Allahabad where not only the Cantonment residents but also large number of residents from all over the Allahabad town come for morning and evening walks. Presence of stray cattle and road littered with cattle dung, urine and nauseating odour denies residents of Allahabad of such an opportunity besides posing serious health risks."

48. Thus the very passage and convenience of morning and evening walkers within the cantonment area is acknowledged by the respondents themselves.

49. The aforesaid stand taken in the above mentioned public interest litigation by the respondents themselves leaves no room for doubt that the petitioners are not unwelcome on the streets in question as morning and evening walkers. In such a situation, imposing a condition for obtaining passes is neither a legal requirement under any law as discussed hereinabove nor does it appear to be in conformity with the rights protected and guaranteed under Article 19(1)(d) of the Constitution of India. There is no discernible rational nexus for asking morning and evening walkers to obtain a military pass for commuting on a street as involved presently in the case.

50. The aforesaid discussion is also necessary for any action to be taken in future as public convenience cannot be overlooked. A person suffering from any immediate serious ailment like a heart-attack at midnight, would not obviously be asked to wait upon to obtain a pass for commuting on a road if he resides in the vicinity to reach the hospital. This is just one practical aspect of the matter and there are many such shades which require consideration including other public conveniences.

51. It is for all the aforesaid reasons that we hold that the petitioners are right in their submission that they do not require to be imposed with a condition of obtaining a pass from the military authorities in the background and purpose aforesaid. We also are of the opinion that in case the Cantonment Board proceeds to take any steps in future in the light of the letter dated 7th January, 2015, it may inform to the public at large and particularly to institutions like the High Court before taking up any such measures for discussion so that the point of view of public convenience may not be left unheeded in any of its dimension. The respondents are therefore directed to act accordingly.

52. The writ petition stands allowed with the aforesaid directions and observations.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2015

BEFORE
THE HON'BLE OM PRAKASH-VII, J

Application U/S 482 No. 30994 of 2015

Sabir & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Vinod Kumar Shukla

Counsel for the Respondents:
G.A.

Cr.P.C. Section-482-complaint case-summoning order-challenged on ground against same occurrence-final report submitted-complainant have opportunity to file protest application-hence second complainant barred by law-held-Learned Magistrate consolidated both cases-no question of second complainant-case law relied by applicant-not applicable rather support the complainant-application misconceived -rejected.

Held: Para-7
From perusal of the revisional court's order dated 22.9.2015 (annexure 6 to the affidavit accompanying the application), it appears that court concerned has consolidated both the matter. No any benefit goes in favour of the the applicants with the law laid down in the above cited Jai Ram (Supra) case, rather it helps to the complainant.

Case Law discussed:
(All) 2013-5-16

(Delivered by Hon'ble Om Prakash-VII, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed with a prayer to quash the order dated 22.9.2015 passed by Addl. District & Sessions Judge, Court No.5, Bijnor in revision no. 153 of 2015 (Sabir & others Vs. Mohd. Irfan and another) as well as order dated 7.4.2014 passed by Additional Chief Judicial Magistrate-I, Bijnor in case no.326 of 2013 (Mohd. Irfan Vs. Sabir & others). Further prayer has been made to stay the effect and operation of the impugned orders.

3. Submission of the learned counsel for the applicants is that initially the matter was investigated, in which, police after investigation, submitted the final report. The opposite party no.2 filed the complaint on the basis of same set of evidence on 27.5.2013. Summoning order was passed by the Magistrate concerned against the applicants. The applicants had challenged the summoning order in the criminal revision, which was dismissed on 22.9.2015 on the basis of insufficient ground. It was further submitted that since the final report was submitted, the complaint filed subsequent thereof is barred by law. Complainant had opportunity to file the protest petition in the final report, but the court concerned did not take into account this aspect of the matter and illegally taking cognizance summoned the applicants. Learned counsel for the applicants has also placed reliance on the case law of this Court in support of his contention.

4. On the other hand, learned A.G.A. argued that only on the basis of submission of the final report after investigation by the police, the complaint filed by the complainant is not barred by the provisions of law. The present complaint cannot be treated as second complaint. Proceedings of the complaint

case are not barred and cannot be quashed on the ground taken by the applicants.

5. I have considered the rival submissions advanced by the learned counsel for the parties and have also considered the law laid down by this Court in the case of Jai Ram Vs. State of U.P., LAW (All) 2013 - 5 -16, as relied upon by the learned counsel for the applicants.

6. Regarding maintainability of the second complaint, this Court in the case of Jai Ram (supra) has held in paragraphs 8, 9 & 10 as under.

"8. There is no dispute regarding maintainability of second complaint as laid down in various pronouncements. Hon'ble Supreme Court in the case of Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar - (AIR 1962 SC 876). has laid down thus:

"There is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under Section 203 of the Code of Criminal Procedure. As however, a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under Section 204(1) of the Code of Criminal Procedure, exceptional circumstances must exist for the entertainment of the second complaint on the same allegations; in other words, there must be good reasons, why the Magistrate thinks that there is "sufficient ground for the proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under s. 203 of the Code of Criminal Procedure. The question now is, what should be those exceptional circumstances ? In Queen Empress v. Dolagobind Dass (1), Maclean, C. J. said: "I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of coordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice.".

In the same decision, the Apex Court also has laid down the test to determine the exceptional circumstances which are.--(1) manifest error; (2) manifest miscarriage of justice; and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings".

9. The Hon'ble Apex Court made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In the judgment of Pramatha Nath Talukdar and another (supra) the Hon'ble Apex Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. The Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence.

10. In Mahesh Chand vs. B. Janardhan Reddy and another - (2003) 1 SCC 734, the Hon'ble Apex Court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous case was

dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In Mahesh Chand (supra) the Hon'ble Apex Court relied on the ratio in Pramatha Nath (supra) and held that if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances as has been pointed out in Pramatha Nath (supra).

In Shiv Shankar Singh Vs State of Bihar and another (2012) 1 SCC 130, the Hon'ble Apex Court has held as under:

"It is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit."

7. In the present matter, as is evident from the record, after initiation of the police investigation, complaint was also filed by the complainant. Perusal of the record also shows that no any complaint was dismissed by the court concerned on merit. The submission raised by the learned counsel for the applicants that it is a second complaint is not acceptable. It is true that the complainant may file the protest petition on the final report and the court dealing with the matter is empowered to treat the protest petition as complaint, but only on this basis the complaint filed by the complainant cannot be treated as second complaint. Learned counsel for the applicants also did not disclose the final result of the final report. From perusal of the revisional court's order dated 22.9.2015 (annexure 6 to the affidavit accompanying the application), it appears that court concerned has consolidated both the matter. No any benefit goes in favour of the the applicants with the law laid down in the above cited Jai Ram (Supra) case, rather it helps to the complainant.

8. In view of the above, no ground for quashing the proceedings of the aforesaid case as well as the summoning order is made out which may call for any interference by this Court in exercise of its inherent power under Section 482 Cr.P.C. as the same do not suffer from any illegality or infirmity.

9. The Application u/s 482 Cr.P.C. is devoid of merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.11.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Application U/S 482 No. 32703 of 2015

Arun Jaitley ...Applicant

Versus

State of U.P. ..Opp. Party

Counsel for the Applicant:
Mr. Tarun Agarwal, Mr. Manindar Singh Gill, Mr. Ravi Kant, Mr. Nalin Kohli

Counsel for the Opp. Party:

Mr. V.B. Singh, Mr. Imran Ullah, Mr. Akhilesh Singh

(A) Cr.P.C.-Section 196-Suo moto cognizance taken by Magistrate u/s 190 (i)(a)(b)and (c)-without prior permission from government-held-illegal-not sustainable.

Held: Para-10 & 13

10. In the opinion of the Court, therefore, cognizance taken under either of clauses (a), (b) or (c) of Section 190(1) would have to conform with the requirements of Section 196. This clearly flows from the opening words of Section 190 itself, which make it subject to the provisions of Chapter XIV. Section 505 of the Penal Code finds specific mention in Section 196 Cr.P.C. Admittedly, Section 124A stands comprised in Chapter VI of the Penal Code and would therefore, stand covered in clause (a) of Section 196. It therefore, clearly follows that the Magistrate could not have taken cognizance except with the previous sanction of the Government.

13. In light of the above, this Court holds that the Magistrate clearly erred in proceeding to exercise jurisdiction under Section 190(1)(c) and therefore, the order taking cognizance of the alleged offence and issuance of summons cannot be sustained.

(B) Indian Penal Code-Section 124-A-Offence-what Constitute?-explained-healthy criticism or even intellectual disagreement to judgment-not a crime-views printed in article may be unacceptable or unpalatable to some one-but not liable to be punished.

Held: Para-26

The Magistrate appears to have closed his eyes to the well-settled view that healthy criticism or even intellectual disagreement with a particular view of a judge contained in a judgment of the court is not a crime. The view expressed may be unacceptable or even unpalatable to some. However the same does not render it liable to prosecution under the Penal Code.

Case Law discussed:

W.P. (Civil) No. 13 of 2015; (1993) 3 SCC 339; (1999) 1 SCC 728; 1999 (3) ALD 193; AIR 1962 SC 955; (2003) 8 SCC 461; (2015) 5 SCC 1; (1974) 1 SCC 374; (1988) 3 SCC 177; 1993 (Supp) 1 SCC 499; (1998) 5 SCC 749; (2015) 1 SCC 749.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The applicant seeks to invoke the inherent powers of the Court conferred by Section 482 Cr.P.C. for quashing of Complaint Case No. 382 of 2015 and an order dated 19.10.2015, passed by the Judicial Magistrate, Kulpahar, Mahoba, U.P.

A. BACKGROUND FACTS

2. The record reveals that the Judicial Magistrate taking suo moto cognizance has proceeded to summon the applicant under Sections 124 A and 505 of the Penal Code. The concerned Magistrate has taken cognizance of the alleged offences on the basis of an article written by the applicant and posted on his Facebook page. The article is titled as "NJAC Judgement-An Alternative View'. The Magistrate has recorded that no citizen has a right to disrespect the three pillars of our democracy namely, the Executive, Legislature and the Judiciary. He then proceeds to record that an order of a Court can be questioned only by following a procedure prescribed by law. The order then states that no person is entitled to create or generate hatred or contempt against an elected Government established by law. The Magistrate upon recording the above conclusions holds that the comments made by the applicant undoubtedly spread hatred and contempt

against a duly elected Government and accordingly, in his opinion, the applicant prima facie appears to have committed offences under Section 124A and 505 I.P.C.

3. Referring to the provisions of Section190(1)(c), the Magistrate recorded that the above mentioned section of the Criminal Procedure Code conferred upon him a power to take suo moto cognizance. He then records that the power to take suo moto cognizance under clause (c) of sub-Section (1) of Section 190 of Cr.P.C. is not trammelled by the territorial jurisdiction of a Magistrate and that since the comments made by the applicant were widely published in the print and electronic media throughout the nation, it was open to a Magistrate anywhere in the country to exercise suo moto powers. He accordingly, proceeded to take cognizance under Section 190(1)(c) of the Criminal Procedure Code and issued summons to the applicant seeking his appearance before the Court on 19 November 2015.

4. The views expressed by the applicant in the article authored by him and dated 18 October 2015 is a critique of a judgement rendered by a Constitution Bench of the Supreme Court of India1 which ruled upon the validity of the National Judicial Appointments Commission Act, 2014 and the Ninety Nineth Constitutional amendment. The excerpts of the said article read as follows:

"The judgement ignores the larger constitutional structure of India. Unquestionably, independence of the judiciary is a part of the basic structure of the Constitution. It needs to be preserved. But the judgement ignores the fact that there are several other features of the Constitution which comprise the basic structure. The most important basic structure of the Indian Constitution is Parliamentary democracy. The next important basic structure of the Indian Constitution is an elected Government which represents the will of the sovereign. The Prime Minister in Parliamentary democracy is the most important accountable institution. The Leader of the Opposition is an essential aspect of that basic structure representing the alternative voice in Parliament. The Law Minister represents a key basic structure of the Constitution; the Council of Ministers, which is accountable to Parliament. All these institutions, Parliamentary sovereignty, an elected Government, a Prime Minister, Leader of Opposition, Law Minister are a part of the Constitution's basic structure. They represent the will of the people. The majority opinion was understandably concerned with one basic structure- independence of judiciary - but to rubbish all other basic structures by referring to them as "politicians" and passing the judgement on a rationale that India's democracy has to be saved from its elected representatives. The Indian democracy cannot be a tyranny of the unelected and if the elected are undermined, democracy itself would be in danger. Are not institutions like the Election Commission and the CAG not credible enough even though they are appointed by elected Governments?

The judgement interprets the provision of Article 124 and 217 of the Constitution. Article 124 deals with the appointment of Judges in the Supreme Court and Article 217 deals with the appointment of Judges of the High Court.

Both provide for the appointment to be made by the President in consultation with the Chief Justice of India. The mandate of the Constitution was that Chief Justice of India is

only a 'Consultee'. The President is the Appointing Authority. The basic principle of interpretation is that a law may be interpreted to give it an expanded meaning, but they cannot be rewritten to mean the very opposite. In the second Judge's case, the Court declared Chief Justice the Appointing Authority and the President a 'Consultee'. In the third Judge's case, the courts interpreted the Chief Justice to mean a Collegium of Judges. President's primacy was replaced with the Chief Justice's or the Collegium's primacy. In the fourth Judge's case (the present one) has now interpreted Article 124 and 217 to imply 'Exclusivity' of the Chief Justice in the matter of appointment excluding the role of the President almost entirely.

No principle of interpretation of law anywhere in the world, gives the judicial institutions the jurisdiction to interpret a constitutional provision to mean the opposite of what the Constituent Assembly had said. This is the second fundamental error in the judgement. The court can only interpret - it cannot be the third chamber of the legislature to rewrite a law.

Having struck down the 99th Constitutional Amendment, the Court decided to re-legislate. The court quashed the 99th Constitutional Amendment. The court is entitled to do so. While quashing the same, it re-legislated the repealed provisions of Article 124 and 217 which only the legislature can do. This is the third error in the judgement.

5. The article then ends with the following words:

As someone who is equally concerned about the independence of judiciary and the sovereignty of India's Parliament, I believe that the two can and must co-exist. Independence of the judiciary is an important basic structure of the Constitution. To strengthen it, one does not have to weaken Parliamentary sovereignty which is not only an essential basic structure but is the soul of our democracy."

B. SUBMISSIONS

6. The learned Senior Counsel appearing in support of this application has raised both procedural as well as fundamental objections to the proceedings initiated by the Magistrate. Elaborating his submissions on the aspect of the procedural flaws, he submits that Section 124A as well as Section 505 IPC are both offences which fall within the ambit of Section 196 of the Criminal Procedure Code. Referring to the provisions of Section 196, the learned counsel submits that there is a complete bar on any Court taking cognizance of an offence falling under Chapter VI of the Penal Code as well as Section 505 without the previous sanction of the Central Government or of the State Government. It is, therefore, his submission that the Magistrate clearly acted in excess of jurisdiction in proceeding to take cognizance and summoning the applicant without complying with the provisions of Section 196. Referring to a judgement rendered by two learned Judges of the Supreme Court in State of Maharashtra Vs. Dr Budhikota Subbarao2, he submits that the use of the words 'no' and "shall' in Section 196 make it abundantly clear that the bar on the power of a Court taking cognizance of an offence is absolute and complete. He submits that Section 196 therefore, clearly barred the Magistrate from assuming jurisdiction or even taking notice. He has also placed reliance on an order of the Supreme Court in Manoj Rai and Others Vs. State of M.P.3 to contend that in a case where no sanction was given in accordance with the provisions of Section 196, the entire proceedings were liable to be

quashed. On this aspect of the matter, he has further placed reliance upon a judgement rendered by a learned Single Judge of the Andhra Pradesh High Court in Kandi Buchi Reddy Vs. State of Andhra Pradesh4. This was a case which dealt with a chargesheet filed against the petitioner alleging commission of offences under Section 124A and 506 IPC. The issue of sanction as required under Section 196 of the Code of Criminal Procedure directly fell for consideration and stood answered in the following terms

"Admittedly, Section 124-A IPC is an offence contained under Chapter-VI of the Indian Penal Code. Therefore, sanction of the appropriate Government is a pre-requisite for taking cognizance of the offence under the said Section. The learned Public Prosecutor has fairly conceded that before the charge-sheet was filed, no sanction has been obtained."

7. The second limb of the submissions advanced by the learned Senior Counsel was with respect to the scope and ambit of Sections 124-A and 505 of the Penal Code. It was submitted that the article written by the applicant was a fair criticism of the judgement rendered by the Constitution Bench and that nothing contained therein would qualify as amounting to a commission of an offence either under Section 124A or Section 505 of the Penal Code. The article, he would submit, can by no stretch of imagination be said to contain words which were aimed to bring or attempted to bring into hatred or contempt a Government established by law. Referring to the ingredients of Section 505 of the Penal Code, he submits that the article neither caused nor was it intended to cause any fear or alarm amongst the general public nor did it in any manner tend to induce any person to commit an offence against the State or against public tranquillity. He further submits that the applicant had authored the article bonafidely and in exercise of the fundamental rights guaranteed under Article 19(1)(a) of the Constitution of India. He submits that criticism of a judgement is not contempt and in any view of the matter can never be described as sedition.

8. The learned Advocate General who appeared in the proceedings stated that no sanction had been accorded for the initiation of proceedings by the concerned Magistrate and that the suo moto cognizance taken by him as well as the issuance of summons was not preceded by any order having been made under Section 196 of the Criminal Procedure Code.

C. PROCEDURAL ILLEGALITY

9. The provisions of Sub Section 190 of the Criminal Procedure Code are prefaced by the words "subject to the provisions of this Chapter'. Clause (c) of sub-Section (1) confers a power on the Magistrate to take cognizance of an offence upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. The jurisdiction of the Magistrate therefore, to take suo moto cognizance of an offence is not in doubt. What however, falls for consideration is whether such suo moto cognizance can be taken without following the procedure prescribed under Section 196 of the Code of Criminal Procedure. The Court must take note of the fact that Section 190(1)(c) is not given overriding effect over other provisions falling in Chapter XIV of the Criminal Procedure Code. Neither does Section 196 carve an exception in respect

thereof or exclude clause (c) of Section 190 (1) from the width of its operation.

10. In the opinion of the Court, therefore, cognizance taken under either of clauses (a), (b) or (c) of Section 190(1) would have to conform with the requirements of Section 196. This clearly flows from the opening words of Section 190 itself, which make it subject to the provisions of Chapter XIV. Section 505 of the Penal Code finds specific mention in Section 196 Cr.P.C. Admittedly, Section 124A stands comprised in Chapter VI of the Penal Code and would therefore, stand covered in clause (a) of Section 196. It therefore, clearly follows that the Magistrate could not have taken cognizance except with the previous sanction of the Government.

11. The language employed in Section 196 is para materia to that used in Section 197, which provision fell for consideration before the Supreme Court in State of Maharashtra (supra). Their Lordships held the requirements of that provision to be of a mandatory character. Taking note of the use of the words "no' and "shall' in the said provision, their Lordships proceeded to hold that it was abundantly clear that the bar on the exercise of the power of the Court to take cognizance of any offence is absolute and complete. The bar was held to stand extended to a Court from entertaining a complaint or even taking notice or exercising jurisdiction. The principles enunciated in State of Maharashtra (supra) stands applied in Manoj Rai (supra) and Kandi Buchi Reddy (supra).

12. The requirement of sanction as a prerequisite for taking cognizance was a principle which was reiterated by a learned Judge of the Calcutta High Court in Aveek Sarkar Vs. State of West Bengal5. The learned Judge held that the absence of sanction was fatal and could not be brought within the pale of section 460 (e) of the Criminal Procedure Code or in other words characterized as an irregularity of procedure which would not vitiate proceedings.

13. In light of the above, this Court holds that the Magistrate clearly erred in proceeding to exercise jurisdiction under Section 190(1)(c) and therefore, the order taking cognizance of the alleged offence and issuance of summons cannot be sustained.

14. The order of the Magistrate in light of the submissions advanced before this Court is liable to be tested on its merits also. The expression of views by the applicant in the article in question is stated to have in the opinion of the Magistrate resulted in a prima facie commission of offences referable to Section 124A and Section 505 IPC.

D. SEDITION AND PUBLIC TRANQUILITY

15. The article is on record and stands appended to the paper book as Annexure-3. Having gone through the same, this Court now proceeds to examine as to whether its contents can by any stretch of imagination be said to have resulted in commission of offences under Section 124A or Section 505 of the Penal Code. Section 124 A of the Penal Code reads as under:

"Whoever by words, either spoken or written, or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred to contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with transportation for life or any shorter term to which fine may

be added or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1. The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2. Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exiting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

Explanation 3. Comments expressing disapprobation of the administrative of other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

16. The ingredients of an offence referable to Section 124A fell for consideration before a Constitution Bench of the Supreme Court in Kedar Nath Singh Vs. State of Bihar6. Their Lordships lucidly dwelt upon the interplay between Section 124 A of the Penal Code and Article 19 of the Constitution of India and declared the law in the following terms:

"24. In this case, we are directly concerned with the question how for the offence, as defined in s. 124A of the Indian Penal Code, is consistent with the fundamental right guaranteed by Art. 19(1)(a) of the Constitution, which is in these terms :

"19. (1) All citizens shall have the right.

(a) to freedom of speech and expression..."

This guaranteed right is subject to the right of the legislature to impose reasonable restrictions, the ambit of which is indicated by clause (2), which, in its amended form, reads as follows :

"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

It has not been questioned before us that the fundamental right guaranteed by Art. 19(1)(a) of the freedom of speech and expression is not an absolute right. It is common ground that the right is subject to such reasonable restrictions as would come within the purview of clause (2), which comprises (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc., etc. With reference to the constitutionality of s. 124A or s. 505 of the Indian Penal Code, as to how far they are consistent with the requirements of clause (2) of Art. 19 with particular reference to security of the State and public order, the section, it must be noted, penalises any spoke or written words or signs or visible representations, etc., which have the effect of bringing, or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression "the Government established by law" has to be distinguished from the person's for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued

existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in s. 124A has been characterised, comes under Chapter VI relating to offences against the State. Hence any acts within the meaning of s. 124A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.

25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of 'sedition'. What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But, in our opinion, such words written or spoke would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine quo non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words, which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia,

security of the State and public order. We have, therefore, to determine how far the Sections 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt Majumdar v. The King Emperor (1942) F.C.R. 38 that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorders by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced s. 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in clause (2) of Art. 19 of the Constitution, if on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as load down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid."

17. The Supreme Court in Nazir Khan Vs. State of Delhi7 explained "sedition" in the following words: -

"37. Section 124A deals with "Sedition'. Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. .....The object of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion..."

18. The above guiding principles laid down by the Supreme Court in the judgments noted above came to be followed in a recent judgment of the Bombay High Court. Two learned judges of the Bombay High Court in Sanskar Marathe Vs. State of Maharashtra8 were faced with a case of a political cartoonist who was alleged to have defamed Parliament. The criminal complaint alleged that the cartoons apart from being defamatory also amounted to acts of sedition. The Division Bench after noticing the law laid down by the Supreme Court on the subject held: -

"15... A citizen has a right to say or write whatever he likes about the Government or its measures, by way of criticism or comments, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder..."

16...But for that reason, the freedom of speech and expression available to the third respondent to express his indignation against corruption in the political system in strong terms or visual representations could not be encroached upon when there is no allegation of incitement to violence or the tendency or the intention to create public disorder."

19. Now for words written or spoken to fall within the meaning of sedition, the words would have to be held to have the effect of subverting the Government by violent means or tend to bring about public disorder or the use of violence or incitement to violence. The words or action in order to fall within the meaning of sedition, it was held by the Constitution Bench, would have to travel or stand raised to a degree of revolution against the Government in order to fall within the mischief of the penal provision. At the same

time, the Supreme Court held that words however, strongly worded or words which used strong terms with respect to the measures or acts of the Government, strong speech, strong criticism would clearly be outside the scope of the section. It was held that a citizen had a right to say or write whatever he likes about the Government or its measures by way of criticism or comments so long as he did not incite people to resort to violence against the Government established by law or with the intention of creating public disorder. In fact, it was upon these considerations that their Lordships held that if the words or actions in question had not intended to or had not been employed to create disturbance of law and order and yet been restricted from being aired or voiced then such an interpretation would render the provisions of Section 124 A unconstitutional in view of Article 19.

20. From the above exposition of the law by the Constitution Bench, it is clear that the section aims at rendering penal only such activity which is intended to or which would have a tendency to create disorder or disturbance of public peace. In order for the words written or spoken to fall within the ambit of section 124A, they would necessarily have to be of a category which would qualify as having a "pernicious tendency' of creating public disorder or disturbance of law and order. Only then would the law step in to prevent such activity.

21. The contents of the article written by the applicant can by no stretch of imagination be said to be intended to create public disorder or be designed or aimed at exciting the public against a Government established by law or an organ of the State. The article merely seeks to voice the opinion and the view of the author of the need to strike a balance between the functioning of two important pillars of the country. It is surely not a call to arms.

22. For the aforesaid reasons, this Court is of the firm opinion that none of the ingredients essential for invoking the provisions of Sections 124A or 505 of the Penal Code stood attracted to the article in question. The Magistrate has committed a manifest illegality in forming an opinion that an offence under the above provisions stood prima facie committed.

E. THE FREEDOM OF SPEECH

23. The freedom of speech and expression guaranteed by our Constitution to all citizens requires us to tolerate even unpopular views. The free flow of ideas and opinions is an essential concomitant for the intellectual growth of the citizenry. Plurality of views and opinions is an essential facet of a democracy and of great societal importance. It is this underlying theme that envelopes the concept of the "market place of ideas'. In Shreya Singhal Vs. Union of India9 the Supreme Court quoted with approval the views expressed by Brandies J. in Whitney v. California [274 US 357] who explained the contents of the right to free speech in the following words: -

".... Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears....."

24. In Shreya Singhal (supra) the Supreme Court after noticing the body of precedents rendered by different Courts of the world held:-

"13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most

basic of human rights. The first is discussion, the second is advocacy and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a)."

25. The article in question therefore was liable to be tested on the above principles. The Court notes that the order of the Magistrate does not record that the contents penned by the applicant would tend to incite the people to insurrection or rebellion. Disrespect, even if it were assumed that the article did so, does not render the action liable to prosecution for offenses under section 124A or section 505. The right to air an opinion, to dissent, intellectual discourse are the heart and soul of the freedom of speech and expression which stands conferred upon all citizens by our Constitution.

26. The Magistrate appears to have closed his eyes to the well-settled view that healthy criticism or even intellectual disagreement with a particular view of a judge contained in a judgment of the court is not a crime. The view expressed may be unacceptable or even unpalatable to some. However the same does not render it liable to prosecution under the Penal Code. The Magistrate would have done well to remember the words of the venerable Justice Krishna Ayer in Baradakant Mishra v. Registrar of Orissa High Court10 who observed: -

" 409.....Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary, but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally overzealous, criticism cannot be overlooked. Justice is no cloistered virtue."

It was in the above light that the Supreme Court in P.N. Duda v. P. Shiv Shankar11 quoted with approval the following extract from the judgment of Lord Atkin in Ambard v. Attorney General of Trinidad and Tobago [(1936) 1 All ER 704] "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

F. THE CAUTION

27. One last aspect of the matter which must necessarily be adverted to in the opinion of the Court is this. The initiation of criminal prosecution has serious consequences. It relates to the life and liberty of a citizen and carries with it grave consequences. Viewed in that light it is obvious that the exercise of power by the Magistrate must be preceded by due application of mind and circumspection. A note of caution in this regard was sounded by our Supreme Court as far back as in Punjab National Bank v. Surendra Prasad Sinha12. This judicial interpose was reiterated in Pepsi Foods Ltd. v. Special Judicial Magistrate13 and more recently in P.S. Meherhomji v. K.T. Vijaykumar14.

28. However in the facts of the present case this Court finds that the assumption of jurisdiction and the issuance of process failed to adhere to the principles laid down in the judgments aforementioned. The Magistrate failed to bear in mind the impact of the prohibition under section 196 of the Criminal Procedure Code. Compliance with its provisions was a prerequisite for taking cognizance. The contents of the article in question was liable to be scrutinized on the touchstone of whether it contained statements which met the basic ingredients

required to qualify as an act of "sedition' or an act intended to induce persons to commit an offense against the State. Was the article a call to arms, rebellion, insurrection? The answer must obviously be in the negative. The Magistrate in the opinion of the Court clearly failed to apply judicial mind, acted irresponsibly and failed to bear in mind the caution and circumspection which should have preceded his assuming jurisdiction and issuing summons.

G. OPERATIVE DIRECTIONS

29. For the aforesaid reasons, the instant application shall stand allowed. Consequently all proceedings relating to Complaint Case No. 382 of 2015 State v. Arun Jaitley u/s 124A, 505 IPC P.S. Kulpahar District Mahoba pending in the court of the Judicial Magistrate Kulpahar Mahoba U.P. as well as the order issuing summons dated 19 October 2015 shall stand quashed and set aside.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2015

BEFORE
THE HON'BLE MRS. RANJANA PANDYA, J.

Application U/S 482 No. 32940 of 2015

Mohit Chaudhary ...Applicant
Versus
State of U.P. & Anr. .....Opp. Parties

Counsel for the Applicant:
Samit Gopal

Counsel for the Opp. Parties:
G.A.

Cr.P.C.-Section 482-Quashing of criminal proceeding including summoning order-offence u/s 213 Gangsters & Anti Social Activities (Prevention) Act 1986-on ground all charge sheet relied by authorities-concluded in acquittal-petitioner being Addl. Advocate General worked as standing counsel in different public sector-appearing standing counsel for state of J & K-before Hon'ble Supreme Court-held-matter pending Since 1999-applicant not even surrendered before Trail Court hence proceeding delayed-all ground can be raised and considered by the Trail Court itself-warrant no interference-Application rejected.

Held: Para-12
Thus, the factual aspect of the matter cannot be examined by this Court while examining the matter under Section 482 Cr.P.C. The cases mentioned in the gang-chart have ended in acquittal or not has to be seen by the trial court while deciding the case of applicant under Section 2/3 Gangster Act. The validity of the approval/sanction of the D.M. can also be looked into by the trial court. The matter is pending since 1999 and the applicant has not yet surrendered.

Case Law discussed:
1992 Supp (1) SCC 335; (2006) 7 SCC 296; (2008) 1 SCC 474; (2008) 8 SCC 781; (2009) 9 SCC 682; JT 2010 (6) 588; 2011 (1) SCC 74; JT 2012 (2) SC 237; 2008 (62) ACC 650; AIR 1992 Supreme Court 604; AIR 1960 SC 866.

(Delivered by Hon'ble Mrs. Ranjana Pandya, J.)

1. This Criminal Misc. Application No. 32940 of 2015 has been preferred under Section 482 Cr.P.C. with prayer to quash the proceedings of G.S.T. No. 350 of 1999, State of U.P. Vs. Rakesh Chaudhary and others, arising out of Case Crime No. 376 of 1997 under Section 2/3 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Mathura as well as the summoning order dated 29.10.1999 passed by the Special Judge (Gangsters

Act), Agra in aforementioned G.S.T No. 350 of 1990. Further prayer is to stay the proceedings of G.S.T. No. 350 of 1999 and also the summoning order dated 29.10.1999 during the pendency of the present application.

2. Heard Sri G.S. Chaturvedi, learned counsel for the applicant and learned A.G.A. for the State.

3. It has been contended on behalf of the applicant that the learned court below has passed a cryptic order without assigning any reasons. It is further submitted that in all the cases mentioned in the gang-chart, the applicant has been acquitted. The applicant is a qualified advocate on record of the Hon'ble Supreme Court of India. He has a law firm at New Delhi and does legal consulting and litigation cases on behalf of various Indian and Foreign Corporate Groups, Legal Entities and their subsidiary companies. It is further submitted that the applicant has been Standing Counsel for various Public Sector Banks/Entities like PNB, Allahabad Bank, NSIC etc. He has worked in various heavy stakes tax matters as a panel counsel for the Union of India before the Hon'ble Apex Court and presently is designated as Standing Counsel for State of J & K before the Hon'ble Apex Court with the status of Additional Advocate General. He has also been appointed as amicus curiae in matters by the Hon'ble Apex Court. He has also qualified A.R.O. Exam. He has been falsely implicated due to enmity when he was a student. On 29.10.1999, cognizance was taken by the Court. No notice of any kind was ever served upon the applicant. Thereafter, bailable warrants were issued against him which were also not served. Later on, non-bailable warrants were ordered to be issued. The applicant and co-accused Rakesh Chaudhary after lodging of the F.I.R. moved bail application (bearing number 353 of 1997) before the Special Judge (Gangsters Act), Agra but, ultimately, the bail application was rejected in absence of the applicant. No approval/sanction was granted by the District Magistrate. Thus, the prayer sought for is liable to be allowed.

4. Learned A.G.A. while supporting summoning order has stated that the relief prayed for in this application cannot be granted under the provisions of Section 482 Cr.P.C.

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

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

6. The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Supreme Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used

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

7. In Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

8. In the present case, fortunately and interestingly it is not the allegation of applicants that there is any non-compliance of order passed by Court under Cr.P.C. or that there is any abuse of process on the part of Court or that there is any failure or travesty of justice on the part of Court below.

9. In 2008 (62) ACC 650, Pankaj Kumar Vs. State of Maharashtra, the Hon'ble Court has laid down as under

"10. ....The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. The powers have to be exercised saparingly, with circumspection and in the rarest of rare cases, where the Court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to be quashed. (See: Janata Dal v. H.S. Chowdhary and others, Kurukshetra University and another v. State of Haryana and another, and State of Haryana and others v. Bhajan Lal and others).

11. Although in Bhajan Lal's case (supra), the Court by way of illustration, formulated as many as seven categories of cases, wherein the extra-ordinary power under the aforestated provisions could be exercised by the High Court to prevent abuse of process of the Court yet it was clarified that it was not possible to lay down precise and inflexible guidelines or any rigid formula or to give an exhaustive list of the circumstances in which such power could be exercised."

10. In State of Haryana and others Vs. Ch. Bhajan Lal and others reported in AIR 1992 Supreme Court 604, the Hon'ble Apex Court while referring the case of R.P. Kapur Vs. The State of Punjab, AIR 1960 SC 866, has observed in para 88 as under:-

88. Gahendragadkar, J. speaking for the Court while considering the inherent powers of the High Court in quashing the First Information Report Under Section 561-A of the old Code (corresponding to Section 482 of the new Code) in R.P. Kapur v. The State of Punjab (cited above) at page 393 made the following observation:-

Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issues against the accused person.

11. In State of Haryana and others Vs. Ch. Bhajan Lal and others (supra), the Hon'ble Apex Court has further observed in paras 105 and 106 as under:-

"105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as

contemplated Under Section 155 (2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where theproceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

106. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim and caprice."

12. Thus, the factual aspect of the matter cannot be examined by this Court while examining the matter under Section 482 Cr.P.C. The cases mentioned in the gang-chart have ended in acquittal or not has to be seen by the trial court while deciding the case of applicant under Section 2/3 Gangster Act. The validity of the approval/sanction of the D.M. can also be looked into by the trial court. The matter is pending since 1999 and the applicant has not yet surrendered.

13. Accordingly, this application has no force, which is dismissed.
