APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE RAKESH SIRVASTAVA, J.

Special Appeal No. 37 of 2015

Praveen Kumar Sharma (Inre 1106 S/S 2011) ...Appellant
Versus
Union of India & Ors. ...Respondents

Counsel for the Appellant:
Amit Bose

Counsel for the Respondents:
A.S.G.

High Court Rules-Chapter VII Rul-V-Special Appeal-Central Reserve Police Force Rules 1955-Rule-31(c)-'Deserter'-when declared-scope of disciplinary proceeding-explained-inspite of full opportunity-delinquented employee neither joined duty-nor participated in disciplinary action-even on declaration of deserter-not ceased to be member of force-neither the authorities nor Single Judge committed any error-to warrant interference-special appeal dismissed.

Held: Para-12
In the present case, the respondents have proceeded squarely in conformity with law and even after declaring the appellant as a deserter, adopted disciplinary proceedings and afforded fullest opportunity of defence to the appellant. A look at the material on record makes it further clear that the appellant had not only avoided to join the duties but also avoided to participate in the inquiry proceedings. A suggestion about his treatment for stammering, in our view, remains too remote and hardly provides justification for his not participating in the inquiry proceedings. The fact of the appellant having not rejoined after expiry of period of his leave had not been a matter of dispute. The allegation against him of absence from duty, even after expiry of period of leave and without any just cause, has been duly established in the departmental proceedings and had been rather of undeniable facts.

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

1. The petitioner-appellant, who was appointed as Constable (Bigular) in the Central Reserve Police Force ('CRPF') but was ultimately awarded the punishment of removal from service for absenteeism, has preferred this intra-Court Appeal against the order dated 7.1.2015 passed in Writ Petition No.1106 (SS) of 2011 whereby, the learned Single Judge has dismissed the writ petition after finding no merit in challenge to the orders passed in the departmental proceedings.

2. The basic ground of challenge to the departmental proceedings by the petitioner-appellant had been that when an order had already been passed declaring him a 'deserter', the respondents were neither justified nor authorized to take any disciplinary action against him; and hence, no such order of removal could have been passed in the disciplinary proceedings.

3. The relevant background aspects of the matter had been as follows: The petitioner-appellant was appointed in CRPF as Constable (Bigular) on 16.9.2003. He applied for earned leave that was granted for the period 12.03.2008 to 10.04.2008. However, he failed to report on duty after expiry of the period of sanctioned leave. It appears from the material placed on record that the

respondents, under the communications dated 18.04.2008, 20.04.2008 and 03.05.2008, asked and directed the petitioner to report on duty at the earliest but he failed to comply; and even an arrest warrant issued on 23.05.2008 remained unexecuted. Ultimately, a Court of Inquiry was ordered on 25.06.2008 and after its report, the Commandant passed an order on 23.05.2009 declaring the petitioner as deserter from the service in terms of Rule 31 (c) of the Central Reserve Police Force Rules, 1955 ['the Rules of 1955'] which have been framed by the Central Government in exercise of powers vested in it under Section 18 of the Central Reserve Police Force Act, 1949 ['the Act of 1949']. The said order dated 23.05.2009, while declaring the appellant as deserter, further provided in terms of Rule 31 ibid. that the appellant would not cease to be the member of Force and whenever he would report or surrender, shall be treated to be guilty of the offence described in Section 10 (m) of the Act 1949 and would also be liable to be punished under Section 11 (1) of the said Act.

4. After having declared the appellant as deserter, the department issued a charge sheet to him under the memorandum dated 02.06.2009, essentially on the allegation that he had misconducted himself for not reporting on duty after availing 30 days' earned leave from 12.03.2008 to 10.04.2008 and thus, he was absent from duty without any leave or permission of the appropriate authority w.e.f. 11.04.2008. The appellant submitted a representation dated 12.06.2009 suggesting that he was undergoing treatment in Guru Tej Bahadur Hospital at Delhi for stammering and had furnished Medical Certificates to the authorities concerned; and that he was still under treatment and would report on being declared fit. In this communication, the appellant also suggested his temporary changed address at Ghaziabad.

5. In the matter of inquiry against the appellant, the Deputy Commandant was appointed as Enquiry Officer and it is borne out that notices were sent even to his suggested changed address too, but the appellant failed to respond and failed to participate in the enquiry. Ultimately, the enquiry proceedings were concluded ex parte and the Enquiry Officer submitted his report dated 08.09.2009 finding the appellant guilty of charge of absence without leave and overstaying without sufficient cause. Under the communication dated 15.10.2009, the enquiry report was also forwarded to the appellant by the disciplinary authority requiring him to make representation, if so desired, but the appellant failed to respond. Ultimately, the Commandant, 85th Battalion, Central Reserve Police Force, Bijapur (Chattisgarh), after considering the entire matter, awarded the punishment of removal from service to the appellant by his order dated 16.11.2009. The appeal preferred by the appellant was dismissed by the Deputy Inspector General of Police, Central Reserve Police Force, Lucknow Range, Lucknow on 04.03.2010 and then, the revision preferred by him was also dismissed by the Director General on 24.11.2010.

6. The appellant filed the writ petition leading to this appeal, seeking to question the orders aforesaid. As noticed, basically the ground of challenge by the appellant had been that once he was declared to be a deserter, any other

disciplinary action could not have been taken against him and order of removal could not have been passed.

7. The learned Single Judge surveyed the relevant provisions of the Act of 1949 and Rules of 1955 and then, specifically referred to Rule 31 (c) thereof. The learned Single Judge found the contention on the part of the appellant being totally devoid of merit in view of the plain and clear language of Sub-Rule (c) of Rule 31 ibid. that even on being declared as deserter, an absentee does not cease to belong to the Force. The consideration of the learned Single Judge, which also carries reproduction of the relevant Rule 31 of the Rules of 1955, could be taken note of as under:-

"Section 9 of the CRPF Act provides punishment for "more heinous offences". Section 10 of the Act provides punishment "for less heinous offences". Sub-Section (m) of Section 10 of the Act provides that if a member of the Force absents himself without leave, or without sufficient cause over-stays leave granted to him, may be punished with imprisonment for a term which may extend to one year, or with fine which may extend to three months' pay, or with both. Apart from making "more heinous offences" and "less heinous offences" punishable, Section 11 of the CRPF Act provides for minor punishments, according to which, any member of the Force, if found guilty of disobedience, neglect of duty or remissness in the discharge of duty or he is found guilty of other misconducts in his capacity as a member of Force, he may be awarded various punishments described in Section 11 of the Act in addition to or in lieu of suspension or dismissal.

Rule 27 of the CRPF Rules contains statutory prescription relating to procedure for award of punishment. Rule 31 of the CRPF Rules deals with desertion and absence without leave. Rule 31 (a) of the CRPF Rules provides that if a member of the Force is liable for trial under Section 9(f) or Section 10 (m) or for deserting the Force while not on active duty then the Commandant shall assemble a Court of Inquiry consisting of at least one Gazetted Officer and two other members to enquire into the desertion, absence, or overstay of leave of the member of the Force concerned. The Court of Inquiry is required to record evidence and its findings. Sub Rule (c) of Rule 31 provides that the Commandant shall then publish in the Force Order the findings of the Court of Inquiry and the absentee shall be declared a deserter from the Force from the date of his illegal absence.

Rule 31 of the CRPF Rules is reads as under:-

"31. Desertion and Absence without leave:-(a) If a member of the Force who becomes liable for trial under clause (f) of section 9 or clause (m) of section 10 or for deserting the Force while not on active duty under clause (p) of section 10 read with clause (f) of section 9, does not return of his own free will or is not apprehended within sixty days of the commencement of the desertion, absence or overstay of leave, then the Commandant shall assemble a Court of Inquiry consisting of at least one Gazetted Officer and two other members who shall be either superior or Subordinate Officers to inquire into the desertion, absence or overstay of leave of the offender and such other matters as may be brought before them.

(b) The Court of Inquiry shall record evidence and its findings. The Court's record shall be admissible in evidence in any subsequent proceedings taken against the absentee.

(c) The Commandant shall then publish in the Force Order the findings of the Court of Inquiry and the absentee shall be declared a deserter from the Force from the date of his illegal absence, but he shall not thereby cease to belong to the Force. This shall, however, not bar to enlisting another man in the place of the deserter."

What is relevant to notice, at this juncture, to consider the arguments raised by learned counsel for the petitioner in its correct perspective, is the phrase "but he shall not thereby cease to belong to Force" occurring in sub Rule (c) of Rule 31 of the CRPF Rules. After publishing the findings of the Court of Inquiry in the Force Order, the absentee can be declared as a deserter from the Force. If the provisions of Rule 31 (c) of the CRPF Rules are read appropriately, it would mean that such a declaration of a member of the Force as a deserter will not result in automatic cessation of his membership of the Force. This is amply clear from a bare reading of the provisions contained in Rule 31(c) of the Rules. In my considered opinion, no other meaning can be assigned to the aforesaid provisions of Rule 31(c) of the Rules and hence, the submission made by the learned counsel for the petitioner that once a member of the force is declared to be a deserter, he ceases to be a member of the Force and thus, any disciplinary proceedings resulting in his removal cannot be undertaken, merits rejection. The provision contained in Rule 31(c) of the Rules are more than explicit, according to which, mere declaration of a member of the Force as a deserter would not resultantly amount to depanelling him from the Force, so as to make him immune from being subjected to disciplinary action or enquiry if he is charged of some misconduct which is otherwise punishable."

8. Seeking to question the order so passed by the learned Single Judge, the basic contention on behalf of the appellant is that when he had been declared to be a deserter by the order dated 23.5.2009, no departmental proceedings were permissible against him on the very same charge of absence from duty. It is submitted that on a true interpretation, the meaning and effect of Rule 31 of the Rules of 1995 could not be that a declared deserter would be deemed to be a member of Force only for the purpose of passing of a formal order of dismissal or removal from service on the basis of a departmental enquiry, which would be nothing but farce. It is submitted that a member of Force, when being declared as deserter, could not be continued as a Member only for the purpose of formal departmental enquiry and for all practical purposes, his removal is complete once he is declared to be a deserter; and such declaration virtually amounts to cessation of his membership of the Force. It is also submitted that the appellant could not have been charged with the offence of or act of misconduct of absence from duty once he had been declared as deserter and at the most, he could have been charged of the act of desertion.

9. Having given thoughtful consideration to the submissions made and having examined the record, we find the case of the appellant totally bereft of substance.

10. The referred Rule 31 of the Rules of 1955 is reproduced in the passage quoted hereinabove. It is evident that this particular provision has been made looking to the peculiar nature of the service, i.e., the Central Reserve Police Force and in relation to the particular nature absentees, for the purpose of assembling the Court of Inquiry to examine the questions of desertion, absence and overstay and to declare the absentee as deserter. The declaration that a particular enlisted person has deserted need to be put on record and to be published so as to inform all the concerned; and then, the Rule enables enlisting of another person in place of the deserter so that the depletion of manpower in the Force could be balanced. However, it has consciously been provided in the said Rule that irrespective of such declaration, the deserter would not cease to belong to Force; meaning thereby that merely by way of absence, a member of the Force cannot escape all other responsibilities and liabilities, which include his liability to be put to trial for the offence of desertion as also the liability to be subjected to disciplinary proceedings for the delinquency related with absenteeism.

11. The suggestion that once a person is declared to be a deserter, he could not be subjected to disciplinary proceedings remains baseless and rather stands squarely at contradiction to the true meaning, intent, purport and effect of the Rules of 1955. The proceedings for declaring a person as deserter are entirely different and are meant for achieving different purpose; and they cannot be taken to be of substitute of the disciplinary proceedings, meant for awarding appropriate punishment for delinquency.

12. In the present case, the respondents have proceeded squarely in conformity with law and even after declaring the appellant as a deserter, adopted disciplinary proceedings and afforded fullest opportunity of defence to the appellant. A look at the material on record makes it further clear that the appellant had not only avoided to join the duties but also avoided to participate in the inquiry proceedings. A suggestion about his treatment for stammering, in our view, remains too remote and hardly provides justification for his not participating in the inquiry proceedings. The fact of the appellant having not rejoined after expiry of period of his leave had not been a matter of dispute. The allegation against him of absence from duty, even after expiry of period of leave and without any just cause, has been duly established in the departmental proceedings and had been rather of undeniable facts.

13. In the totality of the circumstances, it appears that the respondents have taken a rather liberal view of the matter and have only awarded the appellant punishment of removal from service, although in such matters of absenteeism, the punishment of dismissal from service may be awarded. In any case, we are clearly of the view that the respondents have rightly adopted disciplinary proceedings against the appellant; and the orders as passed against him call for no interference.

14. The learned Single Judge, in our view, has not committed any error in

dismissing the baseless writ petition filed by the appellant.

15. Consequently, this Appeal stands dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
HON'BLE RAKESH SRIVASTAVA, J.

Special Appeal No. 106 of 2015

Vikas Chandra Srivastava 666(S/S) 2015 ...Appellant

Versus

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

Counsel for the Appellant:
Arvind Kumar

Counsel for the Respondents:
C.S.C.

High Court Rules-Chapter VIII Rule-5-Special Appeal-against judgment of Single Judge-as direction of State Government to file Civil Suit-for loss of 8.83 Lakhs-even after retirement-writ petition not maintainable being mere communication-held justified-warrants-no interference-Appeal dismissed.

Held: Para-17
In the present case, as noticed, the departmental proceedings stood annulled with the order of the learned Single Judge dated 08.01.2010 in Writ Petition No. 1127 (SS) of 2007. There are allegations of misfeasance against the appellant; and the respondents assert that by his acts and omissions, the appellant caused loss to the Government that was required to be recovered. Though, in these proceedings, no comments are being made finally on the merits of the claim of the respondents, but in the totality of circumstances, we are clearly of the view that an action in the writ jurisdiction, so as to even prevent filing of a Civil Suit, was not to be entertained; and the learned Single Judge cannot be faulted in finding the writ petition to be entirely misconceived.

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

1. By way of this intra-Court Appeal, the petitioner-appellant seeks to challenge the order dated 9.3.2015 passed in Writ Petition No.666 (SS) of 2015 whereby, the learned Single Judge has declined to exercise writ jurisdiction under Article 226 of the Constitution of India in the appellant's challenge to the communications dated 09.09.2013 and 16.09.2013, by which, the concerned authorities were directed to file a Civil Suit for recovery of the amount of loss said to have been caused by the appellant to the Government.

2. Put in a nutshell, the basic submissions of the petitioner-appellant in the writ petition had been that no such Civil Suit was maintainable against him and hence, the orders issued for filing of the suit suffered from want of authority of law; and further, for having been issued without opportunity of hearing, called for interference in the writ jurisdiction. The learned Single Judge, however, found the writ petition to be rather misconceived with the observations that the question of maintainability of the suit was to be examined by the trial Court, where the petitioner-appellant could file his objections. The learned Single Judge, therefore, dismissed the writ petition with a short order that reads as under:-

"Supplementary affidavit filed in court, today, be placed on record.

By means of instant writ petition, the petitioner is challenging the order dated 09.09.2013 and 16.09.2013 by which directions have been issued to Engineer-in-Chief, Public works Department, to file a suit for recovery of losses caused by the petitioner to the department.

On a query being made to learned counsel for petitioner as to how the present writ petition is maintainable, learned counsel for petitioner submitted that the order of filing of civil suit against the petitioner for recovery towards the losses caused by him to the department is without authority of law and the same has been passed without affording any opportunity of hearing to the petitioner, therefore, the instant writ petition is maintainable.

Sri Badrul Hasan, learned Additional Chief Standing Counsel, while opposing the writ petition submitted that the petitioner will get ample opportunity to contest the suit by raising all pleas as have been raised by him in the instant writ petition, therefore, the writ petition is not maintainable.

I have considered the submission of learned counsel for rival parties and gone through the record as well as the impugned order.

The State Government has directed for filing of civil suit for recovery of losses caused by the petitioner to the department. The question as to whether the civil suit would be maintainable or not, is to be examined by the trial court, where the petitioner may file his objection.

In view of above, this Court, while exercising extra-ordinary jurisdiction under Article 226 of the Constitution, finds that the writ petition being misconceived is not maintainable.

Accordingly, the writ petition is dismissed."

3. Put in brief, the relevant background aspects of the matter had been that the appellant served with the Public Works Department of the Government of Uttar Pradesh and retired from service on 31.07.2005 as Junior Engineer. Prior to his retirement, departmental proceedings were initiated against the appellant by the order dated 27.3.2004 for the irregularities, said to have been committed during the period 2002-04; and he was placed under suspension by the order dated 31.3.2004. The appellant superannuated during the pendency of enquiry.

4. It appears that permission to continue with the proceedings after retirement of the appellant under Regulation 351-A of the Civil Service Regulations was granted on 10.5.2006. Ultimately, the departmental proceedings were concluded by an order of the concerned Chief Engineer dated 28.12.2006 whereby, an amount of Rs.8.83 lakhs was ordered to be recovered from the post-retiral dues of the appellant after he was found liable for the loss caused to the Public Exchequer to the above extent.

5. Aggrieved by the aforesaid order dated 28.12.2006, the petitioner-appellant preferred a Writ Petition [No.1127 (SS) of 2007] which was considered and allowed by a learned Single Judge on 08.01.2010, essentially on the ground that the enquiry proceedings were conducted in disregard of the principles of natural justice and as such, the impugned order suffered from serious infirmities. The order of recovery was accordingly quashed with directions to the respondents to "make the payment of all the retiral benefits forthwith". The petitioner-appellant asserts that this order

dated 08.01.2010 passed in Writ Petition No.1127 (SS) of 2007 has attained finality.

6. The petitioner-appellant had stated grievance in the manner that in the teeth of the aforesaid order of this Court dated 08.01.2010, the respondent-Chief Engineer addressed a communication to the State Government on 22.11.2010 seeking permission to recover the loss through the Civil Court as 'civil liability' of the appellant whereupon, the State Government constituted a Committee who made a recommendation for audit inspection and, on the basis of the audit report, the State Government proceeded to issue a direction to recover an amount of Rs.30,69,072/- from the appellant by way of a Civil Suit; and a communication was, accordingly, sent by the Secretary to the Chief Engineer (Development), Public Works Department on 09.09.2013; and later on, consequential communication was issued by the Chief Engineer (Litigation) to the Chief Engineer, Faizabad Division, Faizabad on 16.09.2013 for filing of the Civil Suit. Pursuant to the aforesaid communications, a legal notice dated 31.12.2014 was sent by the ADGC (Civil), Faizabad to the appellant and upon receipt of this notice, the appellant filed the writ petition leading to this appeal against the aforesaid communications dated 09.09.2013 and 16.09.2013.

7. The writ petition was essentially founded on the ground that the said communications were wholly without jurisdiction and were issued after nine years of the retirement of appellant and without prior opportunity of hearing to him. The appellant also filed a supplementary affidavit in support of the writ petition with the submissions that there was no alternative remedy available to him to challenge to the impugned orders/directions issued by the State Government and hence, the remedy of writ petition had rightly been taken recourse of. It was also submitted that the impugned orders/directions were wholly without jurisdiction as the Service Regulations and Conduct Rules do not confer any such power on the State Government. It was yet further submitted that the impugned directions/orders had been issued in violation of the principles of natural justice. It was still further submitted that the civil liability could not be determined by the Civil Court and that the jurisdiction of the Civil Court was barred under the U.P. Public Services Tribunal Act, 1976 ['the Act of 1976']. It was also submitted that directions could not be issued by the State Government for curtailing or attaching the pension, which is recognized as a right to property by the Hon'ble Supreme Court.

8. As noticed above, the learned Single Judge found the writ petition to be rather misconceived, particularly when the maintainability of the Civil Suit was to be examined by the trial Court, where the appellant could file his objections.

9. Learned counsel for the appellant has strenuously argued that the learned Single Judge has not appreciated the grounds urged on behalf of the petitioner-appellant and has erred in treating the petition as misconceived. Learned counsel has particularly referred to the decision of the learned Single Judge of this Court dated 08.01.2010 in Writ Petition No.1127 (SS) of 2007 and submitted that earlier, the question of loss to the Government was dealt with in the impugned departmental order dated

28.12.2006 and was finally pronounced against the respondents by this Court and thereafter, all the retiral dues were also paid to the appellant. Thus, according to the learned counsel, the respondents are not entitled to initiate any proceeding and that too by way of Civil Suit on the same cause of action. Learned counsel has also submitted that the impugned communications dated 09.09.2013 and 16.09.2013 could not have been challenged by the petitioner-appellant in any other proceedings and in not entertaining the writ petition would practically amount to rendering the appellant remediless in his challenge to these wholly unauthorized orders. Learned counsel has also submitted that the orders impugned, apart from being contrary to the final order of this Court, also suffer from violation of the principles of natural justice inasmuch as the appellant was not afforded any opportunity of hearing before passing the same. Learned counsel has also submitted that the proposed action against the appellant is directly barred by the principles of res judicata as also under the Act of 1976 and hence, the matter calls for interference in the writ jurisdiction. Learned counsel has referred to the decision of the Hon'ble Supreme Court in the case of Punjab State Civil Supplies Corpn. Ltd. Versus Sikander Singh [(2006) 3 SCC 736] and has also referred to Section 6 of the Act of 1976.

10. Having given thoughtful consideration to the submissions made on behalf of the petitioner-appellant and having examined the record, we are satisfied that the writ petition as filed by the appellant could have only been, and has rightly been, dismissed as misconceived.

11. In the first place, we are unable to find any legal right in the appellant to even question the impugned communications dated 09.09.2013 and 16.09.2013 by way of a writ petition. As noticed, they had only been intra-departmental communications from one office to the other with a direction that a Civil Suit for recovery of the amount be filed against the appellant. Such communications neither envisaged any opportunity of hearing to the appellant nor, by themselves, imposed a liability on the appellant. Pursuant to the said communications, the officers concerned appeared to have made preparations for filing of a Civil Suit and before doing so, a notice was served upon the appellant, calling upon him to make payment and informing him that on failure, a Civil Suit would be filed. These communications by themselves cannot be considered furnishing a cause to the petitioner-appellant to maintain an action by way of writ petition. Thus, the submission that the petitioner is rendered remediless as regards his challenge to these communications remains baseless and is of no avail.

12. Apart from the above and even if it be given that upon considering himself aggrieved, the petitioner-appellant was entitled to approach this Court in the writ jurisdiction, it remains trite that exercise of writ jurisdiction is essentially that of discretion of the Court that could always be declined on the relevant facts and factors.

13. The petitioner-appellant wanted to assert, and the same has been the endeavour before us too, that the recovery of any amount from him towards the alleged loss by way of a Civil Suit would

be directly hit by the principles of res judicata in view of the order dated 08.01.2010 passed in Writ Petition No.1127 (SS) of 2007. For the order proposed to be passed, we would refrain from making final comments on the suggestion of the petitioner-appellant, but prima facie, it is difficult to accept the submissions that merely for the disciplinary proceedings having been quashed for the reasons stated in the order dated 08.01.2010 and retiral dues having been paid, the appellant has acquired total immunity from an action in the Civil Court for recovery of the amount of alleged loss caused to the Government. However, without any further comment in this regard, suffice it to observe for the present purpose that the question as to whether a particular suit or issue is to be tried by the Civil Court, or is not to be tried for having been directly and substantially in issue in a formal proceeding between the same parties, is to be determined with reference to several factors; and the plea of res judicata is required to be determined on the basis of several questions of facts. The foundation of plea of res judicata has to be laid in the pleadings before the Court and then decision on such a plea is to be invited in accordance with law. The principles of res judicata cannot be applied in abstract and that too before a Civil Suit has in fact been filed or an action has been taken, where such a plea could be taken and determined. The proper stage for determination of the question of res judicata could only be upon filing of a suit and raising of this question in appropriate manner.

14. Similarly, the other submission, as regards bar over the action per Section 6 of the Act of 1976 also appears to be a pre-mature one. Though prima facie, it is again difficult to accede that Section 6 of the Act of 1976, which bars filing of Civil Suit against a Government or local authority, as such would bar the action of the present nature by the Government too in the Civil Court, but without final comments even in that regard, for the present purpose, suffice it say that under the Code of Civil Procedure, even a question of bar of the suit could be raised in appropriate manner and at the appropriate stage.

15. So far as the referred decision of the Hon'ble Supreme Court in the case of Sikander Singh (supra) is concerned, it is difficult to find any support to the case of the appellant therefrom. In the first place, it is noticed that the said decision was rendered in the proceedings arising out of a Civil Suit, which was filed by the appellant-Corporation for recovery of price of quantity of wheat which was found to be short for the negligence of the defendants; and it had been a common action against the two defendants. The trial Court found defendant No.1 alone guilty of misappropriation of the goods and held the appellant entitled to recover the amount towards price of goods and interest @ 18% per annum. The High Court, in appeal, held that the audit report was not admissible in evidence as the contents were not proved and in any event, no interest was payable on the amount of damages. The Hon'ble Supreme Court found that in the departmental proceedings, the defendant No.1 was asked by the appellant to deposit requisite number of bags or pay the price thereof while holding him responsible towards 2/3rd of loss, and the said order was complied with and had attained finality. It was held that such a

matter could not be re-opened. As regards defendant No.2, it was noticed that no finding had been arrived at that he, for any intent and purpose, appropriated any article to his advantage and thus, the Hon'ble Supreme Court questioned as to how he could have been proceeded under the common law by way of Civil Suit? Yet further, the Hon'ble Supreme Court observed that a suit might have been maintainable only if he was found to have misappropriated the goods. The appellant has chosen to refer to paragraphs 18 and 19 of the said decision. However, it appears appropriate to reproduce paragraphs 18 to 20 of the said decision for the present purpose as under:-

"18. The Appellant is "State" within the meaning of Article 12 of the Constitution. The terms and conditions of service by and between the appellants and the respondents herein are governed by the service rules and/or terms and conditions of contract. If the respondents herein had committed misconduct they could have been and in fact were departmentally proceeded with. In the said departmental proceedings appropriate punishments had been imposed upon them. So far as Respondent-defendant 1 is concerned, therein his negligence had been held to have contributed to the loss of 2/3rd of the shortages and by way of penalty, he was asked by the Appellate Authority to deposit the requisite number of bags of wheat and/ or pay the price thereof. The said order having been complied with attained finality, it is binding on the appellant. The dispute cannot, therefore, be permitted to be reopened.

19. If the Appellant herein intended to proceed further against the Respondent-defendant 1, it could have done so by questioning the correctness or otherwise of the said order of the Appellate Authority before an appropriate forum. Deposit of the requisite number of bags of wheat and/or price thereof resulted in Respondent-defendant 1's reinstatement pursuant to an order passed by the High Court as also this Court. For his act of misconduct, he had also been denied back wages. If in the departmental proceedings, Respondent-defendant 1 had been asked to pay a penalty by way of recovery of loss to the extent of which he was found responsible, we are of the opinion that no civil suit could have been maintained for the selfsame cause of action.

20. So far as Respondent-defendant 2 is concerned, no finding of fact has been arrived at that he for any intent and purport appropriated any article to his advantage. In the absence of such a finding, we fail to understand as to how under the common law, he could be proceeded against by way of a civil suit for recovery of money. A civil suit for recovery might have been maintainable only if he was found to have misappropriated the goods. Admittedly he has not. He was said to be negligent in performing his duties."

16. Thus, one of the factual aspect clearly emerging from the said decision is that as against defendant No.1 therein, recovery of loss had already been ordered and effected; and therefore, the Hon'ble Supreme Court found that the matter could not have been re-opened. Secondly, in relation to defendant No.2, the Hon'ble Supreme Court clearly observed that a suit for recovery might have been maintainable if he was found to have misappropriated the goods.

17. In the present case, as noticed, the departmental proceedings stood

annulled with the order of the learned Single Judge dated 08.01.2010 in Writ Petition No. 1127 (SS) of 2007. There are allegations of misfeasance against the appellant; and the respondents assert that by his acts and omissions, the appellant caused loss to the Government that was required to be recovered. Though, in these proceedings, no comments are being made finally on the merits of the claim of the respondents, but in the totality of circumstances, we are clearly of the view that an action in the writ jurisdiction, so as to even prevent filing of a Civil Suit, was not to be entertained; and the learned Single Judge cannot be faulted in finding the writ petition to be entirely misconceived.

18. Accordingly and in view of the above, this Appeal fails and is, therefore, dismissed. However, in the interest of justice, we again make it clear that none of the observations herein would be construed as final opinion on the merits of the issues/questions that may be raised in an action before the Civil Court and such issues/questions shall be determined by the Civil Court strictly in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.07.2015

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Service Single No. 145 of 2006

Dinesh Narayan Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Kumar Singh

Counsel for the Respondents:
C.S.C.

U.P. Civil Services Regulations-Regulation 351-A-Recovery from gratuity-based upon show cause notice-neither charge sheeted-nor disciplinary action initiated-whether such recovery can be justified? held-'No'-as per regulation 351-A-after retirement without permission of Governor-no such order could be passed-even without charge sheet-order quashed.

Held: Para-14
Once it is concluded that no disciplinary proceedings were pending against the petitioner and the same are incapable of being initiated against him after retirement, passing of the impugned order merely on the strength of show cause notice which stood abated is void-abnitio and the impugned order of recovery cannot be enforced against the petitioner.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard learned Counsel for the petitioner and learned Standing Counsel for respondents.

2. By means of this writ petition, the petitioner has assailed the order dated 12.12.2005 whereby a recovery of Rs. 89728.02 has been imposed on him and proportionate amount of gratuity stands withheld from the post-retiral dues admissible to the petitioner. There is a prayer for release of the amount coupled with the prayer for setting aside the impugned order.

3. The impugned order has come to be passed on the basis of show cause notice issued to the petitioner on 08.07.2005 in respect of allegations which relate from 1993-94 to 1996-97. Concededly the allegations are stale and relate to period of time beyond four years from the date of petitioner's attaining the age of superannuation on 30.11.2005.

4. Learned Counsel for the petitioner while assailing the impugned order has made submissions which are two fold, firstly, that the reply submitted against the show cause notice on 09.10.2005 has not been adverted to at all by the punishing authority and secondly, the impugned order could not have been passed by the departmental authority after the date when the petitioner had already attained the age of superannuation and that too without initiation of regular disciplinary proceeding.

5. On the contrary learned Standing Counsel has submitted that show cause notice was issued to the petitioner prior to his retirement on 08.07.2005 for the alleged loss, therefore, the punishing authority was well within his jurisdiction to pass the impugned order, as such, the impugned order does not suffer from any jurisdictional error. On the aspect of the matter as to why reply submitted by the petitioner was not considered, learned Standing Counsel has pointed out that no such reply was filed by the petitioner, therefore, the question of consideration of such a reply did not arise at the time of passing of the impugned order.

6. In the context of rival submissions advanced, the question that crops up for consideration is as to whether the disciplinary proceedings on the strength of show cause notice dated 08.07.2005 could at all be treated to be pending on attaining the age of superannuation against the petitioner who retired on 30.11.2005 or the show cause notice dated 08.07.2015 which was intended to impose minor penalty after the petitioner's retirement stood abated and fresh proceedings ought to have been initiated in accordance with Regulation 351-A of the Civil Service Regulations applicable to the petitioner being a pensioner before imposing the penalty of recovery. For better appreciation of the issue involved in the writ petition, it is necessary to reproduce Rule-3 and Rule-10 of The Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, which envisage the penalties minor and major :-

"Rule 3. Penalties.-The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed upon the Government servants:

Minor Penalties:

(i) Censure;

(ii) Withholding of increments for a specified period;

(iii) Stoppage at an efficiency bar;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders:

(v) Fine in case of persons holding Group 'D' posts;

Provided that the amount of such fine shall in no case exceed twenty-five percent of the month's pay in which fine is imposed.

Major Penalties:

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time scale or to a lower stage in a time scale;

(iii) Removal from the service which does not disqualify from future employment;

(iv) Dismissal from the service which disqualified from future employment;

Explanation.-The following shall not amount to penalty within the meaning of this rule, namely:

(i) Withholding of increment of a Government servant for failure to pass a departmental examination or for failure to fulfil any other condition in accordance with the rules or orders governing the service;

(ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar;

(iii) Reversion of a person appointed on probation to the service during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation;

(iv) Termination of the service of a person appointed on probation during or at the end of the period of probation in accordance with the terms of the service or the rules and orders governing such probation.

Rule 10- Procedure for imposing minor penalties-

(1) Where the Disciplinary Authority is satisfied that good and sufficient reasons exist for adopting such a course, it may, subject to the provisions of sub-rule (2) impose one or more of the minor penalties mentioned in Rule 3.

(2) The Government Servant shall be informed of the substance of the imputations against him and called upon to submit his explanation within a reasonable time. The Disciplinary Authority shall, after considering the said explanation, if any, and the relevant records, pass such orders as he considers proper and where a penalty is imposed, reason thereof shall be given.

(3) The order shall be communicated to the concerned Government Servant."

7. It is undisputed that issuance of notice dated 08.07.2005 in terms of Rule-10 was with an intention of imposing minor penalty, however, no penalty was imposed till the petitioner attained the age of superannuation and after his retirement, the impugned punishment order of recovery has been passed without holding any fresh enqiry.

8. Once the punishment of recovery is imposed by a departmental authority, it is necessary to look into the scope of an order of recovery in the context of minor penalties envisaged under Clause IV of Rule- 3 which is reproduced as under :-

"Minor Penalties:

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders;"

9. A plain reading of the relevant rule extracted above makes it clear that a recovery order passed against a delinquent employee has necessarily to be passed for recovery from pay. In the instant case, although the order of recovery has been passed but the said order is incapable of being enforced against the petitioner after his retirement in as much as, the petitioner ceased to be on the pay roll from the date of his retirement and recovery from his pay became impossible.

10. From a plain reading of the entire set of Minor Penalties prescribed under the rules, it can be reasonably deduced that the proceedings in respect of

minor penalties have to culminate into final order before a government servant attains the age of superannuation. Once the scope of minor penalty is of a description like this, the natural conclusion is that the proceedings initiated in respect of minor penalty consequent upon the retirement of a government servant stand abated.

11. Now coming to the question as to whether the proceedings of recovery can be initiated against the Government servant after the date of retirement or not, reference to Regulation 351-A is necessary and the same is extract below:-

Regulation 351-A : The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty or grave mis-conduct, or to have caused, pecuniary loss to government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;

Provided that--

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with Sub-clause (ii)(a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Provincial Government:

(ii) shall be instituted before the officer's retirement from service or within a year from the date on which he was last on duty whichever is later;

(iii) shall be in respect of an event which took place not more than one year before the date on which the officer was last on duty and;

(iv) shall be conducted by such authority and in such places whether in India or elsewhere, as the Provincial Government may direct;

(2) all such departmental proceedings shall be conducted, if the officer concerned so requests in accordance with the procedure applicable to departmental proceedings on which an order of dismissal from service may be made; and

(3) such judicial proceedings, if not instituted while the officer was on duty, shall have been instituted in accordance with Sub-clauses (ii) and (iii) of Clause (1).

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes

such proceedings shall without delay intimate the fact to the Audit Officer concerned.

Explanation- For the purpose of this article-

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted;

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court."

12. From a perusal of Regulation 351-A, it is seen that there are two essential requirements as a condition precedent for the initiation / continuation of disciplinary proceedings against government servant after attaining the age of superannuation; firstly, the disciplinary proceedings for penalty other than minor have to be pending against the Government servant on the date of retirement or he has to be placed under suspension as on the date of retirement. The existence of any of the two eventualities are sufficient for continuing disciplinary proceedings against the Government servant after attaining the age of superannuation. In the instant case, the petitioner was merely issued a show cause notice which stood abated as has been observed herein above, therefore, in absence of the petitioner being either placed under suspension or regular charge sheet issued against him, it can be safely concluded that no disciplinary proceedings were pending against the petitioner as on the date of his retirement.

13. Secondly, the disciplinary proceedings are permissible to be drawn against a pensioner with the sanction of his excellency the Governor, provided the allegation levelled against the pensioner pertain to a period of time which does not relate to a period beyond four years from the date of his retirement. In the instant case, neither there is any sanction of His Excellency the Governor nor the allegations in the show cause notice pertain to a period of time which fall within the scope of statutory rule being beyond a period of four years from the date of petitioner's retirement, therefore, on this account also there is no scope for subjecting the petitioner to the disciplinary proceedings as is permissible under Regulation 351-A.

14. Once it is concluded that no disciplinary proceedings were pending against the petitioner and the same are incapable of being initiated against him after retirement, passing of the impugned order merely on the strength of show cause notice which stood abated is void-abnitio and the impugned order of recovery cannot be enforced against the petitioner.

15. The submission of learned Counsel for the petitioner regarding non consideration of his reply to the show cause notice as pleaded by him does not merit consideration once this Court is of the opinion that the impugned order passed against the petitioner is wholly without jurisdiction. .

16. In the result writ petition succeed and the impugned order of recovery is hereby set aside.

17. Accordingly, the writ petition is allowed and respondents are directed to release the balance amount of gratuity of Rs. 89728.02 in favour of the petitioner along with interest as admissible according to the Government Orders applicable in this behalf. Necessary compliance of this order passed by this Court be made within a period of three months from the date a certified copy of this order is filed before the competent authority.

18. No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2015

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

Special Appeal Defective No. 215 of 2015

Santosh Kumar Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri R.C. Dwivedi

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act 1921-Section 16-E-(II)-Rescission of removal of difficulties order w.e.f. 25.01.99-power of management-appointment on short term vacancy-caused to death or leave of incumbent-held-process of selection initiated prior or on the date of enforcement-shall continue-management can appoint against sort term vacancy for limited period six month or till end of academic session-law laid down by in Subhash Chandra Tripathi-affirmed.

Held: Para-20 (a)(b)(c)(d)

20. We consequently answer the reference in the following terms:

(a) Despite the rescission of the Removal of Difficulties Orders by Section 33-E of U P Act No 13 of 1999 with effect from 25 January 1999, the power of the Committee of Management to make appointments against short term vacancies, where the process of appointment had been initiated prior to 25 January 1999 by the publication of an advertisement, would continue to be preserved;

(b) On the enforcement of the provisions of Section 33-E, the power of a Committee of Management to make ad hoc appointments against short term vacancies would not stand abrogated in a case where the process of selection had been initiated prior to 25 January 1999;

(c) Under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in Subhash Chandra Tripathi (supra) is affirmed as laying down a correct interpretation of the judgment in A A Calton (supra).

Case Law discussed:
(1983) 3 SCC 33; 1995 AWC 1035; (1990) 3 SCC 157; (2010) 13 SCC 467; AIR 1991 SC 1612; (2011) 9 SCC 613; (2015) 3 SCC 177; [2011 (1) ESC 221 (All) (DB)].

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

1. The present reference to the Full Bench has been occasioned by a referring order of a Division Bench of this Court dated 20 March 2015. The questions which have been referred for decision by the Full Bench are thus:

(a) Whether even after the rescission of Removal of Difficulties Orders under Section 33-E of the Uttar Pradesh Secondary Education Services Selection Board Act, 19821 (U P Act No 5 of 1982), with effect from 25 January 1999, the Committee of Management retains the power to make ad-hoc appointment against short term vacancies only because it had published an advertisement for the purpose prior to 25 January 1999;

(b) Whether on enforcement of Section 33-E of the Act rescinding the Removal of Difficulties Orders issued earlier, the Committee of Management has lost all powers to make ad-hoc appointment against short term vacancies;

(c) Whether under Section 16-E of the Intermediate Education Act 19212, there is a power with the Committee of Management to make ad-hoc appointment against short term vacancies and if so then for what period; and

(d) Whether the Division Bench in the case of Subhash Chandra Tripathi Vs State of U P3 has laid down the correct law.

2. The Act established the Secondary Education Services Selection Board4 for selection of teachers in institutions recognized under the Act of 1921. Section 16 of the Act provides that notwithstanding anything to the contrary contained in the Act of 1921 or the regulations made thereunder but subject to certain specified provisions of the Act, every appointment of a teacher shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the Management only on the recommendation of the Board. Section 32 provides that the provisions of the Act of 1921 and the regulations made thereunder, insofar as they are not inconsistent with the provisions of the Act or its regulations, shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher. Section 33 of the Act provides that the State Government may, for the purposes of removing any difficulty, by a notified order, direct that the provisions of the Act shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission as it may deem to be necessary or expedient. Section 33-E was introduced into the Act by U P Act No 13 of 1999 so as to provide for the rescission of the Removal of Difficulties Orders made under Section 33 of the Act and is in the following terms:

" 33-E. Rescission of Orders.- The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh

Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982 are hereby rescinded."

3. Section 33-E was introduced with effect from 25 January 1999. Prior to the introduction of Section 33-E, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 19815 was issued in exercise of the power conferred by Section 33 to remove difficulties. Para 2 of the Removal of Difficulties Order provided for the vacancies on which ad hoc appointments could be made while Para 3 referred to the duration of ad hoc appointments. The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 19816 was thereafter notified. Para 2 of Removal of Difficulties (Second) Order provided the procedure for filling up short term vacancies, while Para 3 provided for the duration of ad hoc appointments.

4. The issue which has been referred to for adjudication before the Full Bench relates to a situation where the process of selection for making an ad hoc appointment had commenced prior to 25 January 1999 when the Removal of Difficulties Orders stood rescinded as a result of the insertion of Section 33-E.

5. A reference was earlier made to a Division Bench of this Court by a learned Single Judge in Subhash Chandra Tripathi (supra) of the following questions:

"(a) Whether in respect short term vacancy, appointment can be made by the Committee of Management subsequent to 25 January 1999 when the power to make ad hoc appointment by the Committee of Management itself has been withdrawn by addition of Section 33-E to U P Act No 5 of 1982; and

(b) Whether initiation of process by an advertisement prior to 25 January 1999 can lead to suggest that even after statutory withdrawal of the substantive power of the Committee of Management to make ad hoc appointment against short term vacancy, it still retains the same after 25 January 1999, merely because the process of selection was initiated earlier."

6. The Division Bench, by a judgment dated 12 December 2011 answered the reference in the following terms:

"(a) A short term vacancy for which the process of appointment was started to fill it up by the ad hoc appointment by the Committee of Management of the College prior to 25.1.1999 can be filled up and the appointment can be made by the Committee of management even after the rescission of the Removal of Difficulties Orders by inserting Section 33-E to the U P Act No 5 of 1982.

(b) The initiation of process by an advertisement prior to 25.1.1999 by the Committee of Management to fill up a short term vacancy by ad hoc appointment can be continued and concluded and appointment letters issued even after initiation of Section 33E to the UP Act No 5 of 1982 w e f 25.1.1999."

7. In taking this view, the Division Bench relied upon a decision of the Supreme Court in A A Calton Vs Director of Education7. The Division Bench held that in a situation where the selection process had been initiated prior to the rescission of the Removal of Difficulties Orders on 25 January 1999 by the insertion of Section 33-E, the Committee

of Management would have the power to make an ad hoc appointment on short term vacancies. The Division Bench held that, as a matter of interpretation, a view which has stood the test of time and has been applied consistently to cases coming to the Court should not be easily reconsidered for departure unless it was principally wrong. A large number of teachers were appointed on ad hoc basis on short term vacancies for which the selection process had commenced prior to 25 January 1999 and the endeavour of the Court should not be to unsettle the position of law which had held the field. The Division Bench took note of the fact that the position in law has in Deshraj Singh Negi Vs State of U P8 been adopted by a learned Single Judge and in other decisions which should not be lightly disturbed.

8. The reference before the Full Bench is now by a Division Bench of this Court. The questions which have been formulated for decision are principally the same as those which were answered by the Division Bench on a reference being made by a learned Single Judge in Subhash Chandra Tripathi (supra).

9. In A A Calton (supra), a Selection Committee had been constituted under Section 16-E of the Act of 1921. The selection was not approved by the Regional Deputy Director of Education and the matter was again remitted to the Selection Committee. A second recommendation of the Selection Committee was also disapproved by the Regional Deputy Director after which a third recommendation was made. The appellant, who was one of the recommended candidates but placed below the first candidate, challenged the selection. The High Court allowed the writ petition holding that the selection made by the Selection Committee on the third occasion was without jurisdiction. As a result of an amendment made with effect from 18 August 1975 by U P Act No 26 of 1975, the power of the Director to make an appointment under Section 16-F (4) of the Act of 1921 was taken away in the case of minority institutions. The Supreme Court held that though the power was expressly taken away by the amending Act, the provisions of the amending Act did not apply to pending proceedings under Section 16-F and the amendment was not made applicable retrospectively either expressly or by necessary implication. The Supreme Court held as follows:

"It is no doubt true that the Act was amended by U P Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment under Section 16-F (4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post upto the date on which the Director becomes entitled to make a selection under Section 16-F (4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognised constitutional

limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U P Act No 26 of 1975 should have been followed in the present case."

10. The decision in A A Calton (supra) is, therefore, an authority for the proposition that once a process of selection has been initiated, a subsequent amendment of the law by which the power to make an appointment has specifically been taken away from a statutory authority - in that case from the Director - would have no application to a pending selection process which must be governed by the law as it stood when the selection process was initiated. Undoubtedly, the Legislature does have the power to make a law with retrospective effect but unless the law is made expressly retrospective or retrospective by necessary implication, the position of law as it stood when the selection process was initiated, would govern the selection.

11. In certain other contexts, the Supreme Court has held, for instance, that a selection process has to be governed by the Rules and Government Orders in existence on the date on which the process is initiated. In N T Devin Katti Vs Karnataka Public Service Commission9, the Supreme Court held as follows:

"...Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or the amended government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate the amended Rules shall be applicable to the pending selections. See P Mahendran Vs State of Karnataka10."

12. In State of Bihar Vs Mithilesh Kumar11, the Supreme Court held that a change in the norms of recruitment could be applied prospectively and could not affect those who have been selected for being recommended for appointment after following the norms which were in place at the time when the selection process was commenced. The submission to the

contrary was based on the decision in Shankarsan Dash Vs Union of India12 to the effect that mere inclusion in a select panel did not confer indefeasible right to appointment. The Supreme Court explained the position in law as follows:

"The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect...While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case the fact situation is different since the claim of the respondent to be appointed had been negated by a change in policy after the selection process had begun."

13. In a subsequent decision in Government of Andhra Pradesh Vs Sri Sevadas Vidyamandir High School13, the Supreme Court held that a ban on recruitment to grant-in-aid posts had been issued after the school in question had been permitted by the State to fill up vacant posts. The Supreme Court held that in these circumstances, the State could not contend that the process of rationalization which was introduced subsequently, would also apply to private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier.

14. The judgment in A A Calton (supra) has been recently followed in a decision of the Supreme Court in Kulwant Singh Vs Daya Ram14 in the context of the principle that vacancies which had occurred prior to an amendment of rules would be governed by the unamended rules and not by the amended rules where the amended rules are not made retrospective either expressly or by implication.

15. The judgment of the Division Bench in Subhash Chandra Tripathi's case was based on the law laid down by the Supreme Court in A A Calton (supra). In the referring judgment, the Division Bench has doubted the correctness of that view based on a judgment of the Supreme Court in Shankarsan Dash (supra). In the view of the Division Bench, the Supreme Court has held that even a selection does not confer a right of appointment. Hence, the view which has been taken by the Division Bench is that a mere initiation of the process of selection will not result in the retention of the power of appointment by the authority concerned even when the power of appointment had been withdrawn under a statutory provision, in this case Section 33-E. The decision in Shankarsan Dash (supra) of a Constitution Bench of the Supreme Court dealt with the issue as to whether a candidate whose name appears in the merit list on the basis of a competitive examination acquires an indefeasible right of appointment as a government servant merely because a vacancy exists. In that context, the Supreme Court held as follows:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely

amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha15, Miss Neelim Shangla v. State of Haryana16, or Jitendra Kumar v. State of Punjab17"

16. These observations of the Supreme Court would indicate that the issue in Shankarsan Dash (supra) was completely distinct. A candidate who is on a select list does not have an indefeasible right to appointment merely because a vacancy exists. That is not the issue in the present case. The issue in the present case is whether a process of selection which was initiated prior to the insertion of Section 33-E which rescinded the Removal of Difficulties Orders must be governed by the law as it then stood at the time when the process was initiated by the issuance of an advertisement. Plainly, the issue is not about the right of a particular candidate to appointment but whether the selection process should be governed by the law as it stood when the selection process was initiated. On this aspect, the consistent position of law has been laid down in the judgment of the Supreme Court in A A Calton (supra).

17. The Division Bench of this Court, while deciding the case of Subhash Chandra Tripathi has also adverted to a judgment of another Division Bench in Daya Shanker Mishra Vs District Inspector of Schools18. In Daya Shanker Mishra's case, the Division Bench held that after the insertion of Section 33-E, there should have been some provision for filling up substantive vacancies by making ad hoc appointments. The Division Bench held that if an ad hoc appointment were not to be made at all and an educational institution requires the services of teachers, the interest of students would be seriously prejudiced in the absence of an adequate complement of teachers for imparting education. In Subhash Chandra Tripathi's case, apart from following the law laid down by the Supreme Court in A A Calton's case, the reasoning in Daya Shanker Mishra was pressed into aid as an additional ground for supporting the conclusion. For the purposes of this reference to the Full Bench, it would be appropriate for the Court to answer the issues which have been raised, based on the consistent position of law as it emerges from the decisions of the Supreme Court.

18. Section 16-E of the Act of 1921 provides for the procedure for selection of teachers and heads of institutions. Sub-section (11) of Section 16-E is to the following effect:

"(11) Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise of an incumbent occurring during an educational session, may be

made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed:

Provided that no appointment made under this sub-section shall, in any case, continue beyond the end of the educational session during which such appointment was made."

19. Sub-section (11) of Section 16-E has thus made a specific provision in regard to appointments in the case of temporary vacancies caused by (i) the grant of leave to an incumbent for a period not exceeding six months; or (ii) by death, termination or otherwise of an incumbent occurring during an educational session. The object of the provision is to ensure that where a temporary vacancy arises as a result of fortuitous circumstances, such as leave, death, termination or otherwise, the educational needs of students should not be disturbed. The purpose of making an arrangement in the case of a temporary vacancy is to protect the interest of education so that students are not left in the lurch by the absence of a teacher in the midst of an academic session. The proviso to sub-section (11), however, stipulates that an appointment which is made under the provisions of sub-section (11) shall, in no case, continue beyond the end of the educational session during which the appointment was made. The proviso is intended to ensure that the purpose of appointment against a temporary vacancy caused due to the absence of a teacher in the midst of an academic session is met by continuing the appointment during and until the end of the academic session but not further. This is a provision which has been made by the state legislature in its legislating wisdom. The statutory provision provides both for the circumstances in which a temporary vacancy can be filled up and the length of an appointment made against a temporary vacancy. The difficulty which arises is because the Board, which has been constituted under the Act, does not fulfill its mandate of promptly selecting teachers for regular appointment. The District Inspector of Schools is in possession of necessary factual data in regard to the dates of appointment and retirement of teachers of aided institutions. This can be summoned by the Board even if the management does not comply with its duty to intimate vacancies. There can be no justification for the Board not to discharge its duties with dispatch and expedition. This is liable to result in a situation where the educational needs of students are seriously disturbed due to the unavailability of duly selected teachers. Ad hoc appointments in temporary vacancies also cause a state of uncertainty for teachers and lay them open to grave exploitation at the hands of certain managements of educational institutions. Thus, considering the matter both from the perspective of the interest of education as well as the welfare of teachers, it is necessary that the Board must take due and proper steps well in advance of an anticipated vacancy to initiate the process of selection. Similarly, the State Government would do well to streamline the procedure for making appointments in respect of temporary vacancies consistent with the mandate of Section 16-E (11) so that, while the interest of students is protected, the teachers are not exposed to exploitation.

20. We consequently answer the reference in the following terms:

(a) Despite the rescission of the Removal of Difficulties Orders by Section 33-E of U P Act No 13 of 1999 with effect from 25 January 1999, the power of the Committee of Management to make appointments against short term

vacancies, where the process of appointment had been initiated prior to 25 January 1999 by the publication of an advertisement, would continue to be preserved;

(b) On the enforcement of the provisions of Section 33-E, the power of a Committee of Management to make ad hoc appointments against short term vacancies would not stand abrogated in a case where the process of selection had been initiated prior to 25 January 1999;

(c) Under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in Subhash Chandra Tripathi (supra) is affirmed as laying down a correct interpretation of the judgment in A A Calton (supra).

21. The reference to the Full Bench is answered in the aforesaid terms. The special appeal shall now be placed before the appropriate Bench for disposal in the light of this judgment.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal Defective No. 268 of 2014

Transport Corporation of India Varanasi ...Appellant

Versus

Vijayanand Singh @ Vijaymal Singh & Anr. ...Respondents

Counsel for the Petitioner:
Sri Dharampal Singh, Sri S. Niranjan, Sri P.K. Dubey

Counsel for the Respondents:
Sri P.C. Pathak, Sri Rajeev Mishra

C.P.C.-Section 100-Second Appeal-Against order rejecting First Appeal -as not maintainable-in Original Suit on date fixed neither Plaintiff/Appellant appeared nor adduced any evidence advanced-Trail Court in accordance with previous order 17 Rule 2 C.P.C dismissed the Suit due to want of evidence-meaning thereby dismissed in default-held not a decree within definition of Section 2(2) C.P.C.-hence appeal under Section 96 not maintainable-no question of Second Appeal-dismissed as not maintainable.

Held: Para-26
The dismissal of the suit of the trial court as per the order referred to above was not an adjudication of the rights of the parties involved in the suit which can be formally expressed. It was simply an order of dismissal of the suit without any adjudication of any lis or rights of the parties. Therefore, the order of the trial court dated 24.7.2013 does not conform to the definition of a decree as contained in Section 2(2) C.P.C. In that situation, as it was not a decree, it was not amiable to appeal under Section 96 C.P.C.

Case Law discussed:
(1999) 4 SCC 89; (2015) 2 SCC 682; AIR 1977 MP 1 (FB)

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

1. The suit of the plaintiff/appellant was dismissed by the court of Civil Judge

(S.D.), Varanasi on 24.7.2013 for the non-presence of the plaintiff/appellant and for want of evidence, after rejecting the application for adjournment.

2. An appeal preferred against the above order by the plaintiff/appellant was dismissed by the appellate court vide judgment and order dated 18.10.2014 as not maintainable with observation to apply under Order 9 Rule 9 C.P.C. for recall of the above order.

3. The above two orders have been assailed by the plaintiff/appellant by means of this second appeal.

4. The office of the Stamp Reporter has reported that the second appeal is not maintainable.

5. On query being made as to why the appeal is not maintainable a further report was submitted that the instant appeal is not maintainable in view of Order 42 Rule 1 C.P.C.

6. Order 42 Rule 1 C.P.C. simply provides that Rules of Order 41 C.P.C. shall apply to the appeals from appellate decrees. It is difficult to comprehend the above objection of the office of the Stamp Reporter as Rule 1 of Order 42 C.P.C. in no way prohibits further appeal from the order dismissing the appeal.

7. In view of above, the objection of the Stamp Reporter is overruled.

8. I have heard Sri Dharampal Singh, Senior advocate on behalf of plaintiff/appellant and Sri Rajeev Mishra for the defendants/respondents.

9. Sri Singh has argued that the lower appellate court has manifestly erred in law in dismissing the appeal as not maintainable. The suit of the plaintiff/appellant was not dismissed in default simplicitor but also for insufficient evidence. Therefore, the order dismissing the suit was appealable and not liable to be set aside under Order 9 Rule 9 C.P.C.

10. Sri Rajeev Mishra, on the other hand, contends that in view of Order 17 Rule 2 and 3 C.P.C., the order dismissing the suit in default can be recalled, if necessary, under Order 9 Rule 9 C.P.C. and since the order is not in the nature of decree the appeal has rightly been dismissed as not maintainable.

11. On the respective submissions of the parties, the only question of law involved in this second appeal is whether the order of the trial court dismissing the suit in default and for want of evidence is appealable under Section 96 C.P.C., and consequently the present appeal is maintainable.

12. Learned counsel for the parties agreed for the final disposal of the appeal at the stage of admission by dealing with the above aspect of the matter, as no factual dispute is involved and accordingly addressed the Court on the above substantial question of law as formulated during the course of arguments & made known to them..

13. The relevant part of the order dated 24.7.2013 of the trial court dismissing the suit reads as under:

"अतः स्थगन प्रार्थनापत्र 158घ निरस्त किया जाता है वादी का वाद वादी की अनुपस्थिति एवम् साक्ष्याभाव में खारिज किया जाता है। पत्रावली दाखिल दफ्तर हो।..."

14. The trial court by the above order dismissed the suit for absence of the

plaintiff/appellant and for want of evidence.

15. Rule 3 of Order 17 C.P.C. enables the Court to proceed with the suit notwithstanding failure of either of the party to produce evidence. It reads as under:

"3. Court may proceed notwithstanding either party fails to produce evidence, etc. - Where, any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, -

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them, is absent, proceed under Rule 2."

16. Under Rule 3 aforesaid where, any party to the suit fails to adduce evidence or to perform any other act for which time has been allowed by the Court, the Court may proceed with and decide the suit, if the parties are present, or if any one of them is absent, proceed under Rule 2 of Order 17 C.P.C. Thus, this rule provides for two options to the Court. The first option to proceed with the suit and decide it if the parties are present. The second option to proceed under Rule 2 if any one of the parties is absent.

17. Rule 2 of Order 17 C.P.C. provides that where on the date of hearing any party fails to appear the Court may dispose of the suit in one of the modes directed in that behalf by Order 9 C.P.C. or make such order as it thinks fit.

18. In other words, the above rule permits the Court to proceed under Order 9 C.P.C. if the party fails to appear in suit on the adjourned date of hearing.

19. Order 9 Rule 8 C.P.C. in turn provides that where on the date of hearing of the suit defendant appears and the plaintiff fails to appear, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof.

20. A conjoint reading of all the above three provisions would reveal that where the party fails to produce the evidence and is not present, the Court can proceed under Rule 2 of Order 17 C.P.C. which permits the Court to dispose of the suit in one of the modes prescribed under Order 9 C.P.C. One of the modes prescribed under Order 9 C.P.C. is contained under Rule 8 of Order 9 C.P.C. which empowers the Court to dismiss the suit in default for absence of the plaintiff if the defendant is present.

21. Thus, a suit can be dismissed in default both for the absence of the plaintiff and for want of production of evidence on his behalf.

22. In the instant case, the suit was fixed for evidence of the plaintiff on the adjourned date. On the adjourned date the plaintiff failed to appear to adduce any evidence. The Court, therefore, proceeded in accordance with Rule 3 of Order 17 C.P.C. read with Rule 2 of Order 17 C.P.C. to dispose of the suit in one of the modes prescribed under Order 9 C.P.C. Since the defendant was present and plaintiff had failed to appear and adduce evidence the suit was dismissed in default. Therefore, the dismissal of the

suit for want of evidence was essentially dismissal in default as contemplated by Rule 8 Order 9 C.P.C. Accordingly, it was open for the plaintiff to have applied under 9 Rule 9 C.P.C. for setting aside the dismissal on the fulfilment of the conditions laid down therein.

23. A plain reading of Section 96 C.P.C. postulates that the appeal lies against a decree passed by the Court exercising original jurisdiction and not against any judgment or order. The term 'decree' has been defined in Section 2(2) C.P.C. to mean a formal expression of an adjudication which conclusively determines the rights of the parties with regard to to all or any of the matters in controversy in the suit. Accordingly, adjudication of a lis involved in a suit between the parties is necessary to constitute a decree. In the case of R. Rathinavel Chettiar1 it has been held that a decree must fulfil the following essential elements:

(i)There must be an adjudication in a suit.

(ii)The adjudication must determine the rights of the parties in respect of, or any of the matters in controversy.

(iii)Such determination must be a conclusive determination resulting in a formal expression of the adjudication.

24. The aforesaid decision has been followed with approval by the Supreme Court recently in the case of Rajni Rani2.

25. The reliance placed upon the case of Budhulal Kasturchand3 is of no assistance. In the aforesaid case the court was only concern with the dismissal of the suit for default in payment of costs for adjournment. It was not a case of dismissal of suit simplicitor for default of the party to appear on adjourned date of hearing rather in the said case parties were present.

26. The dismissal of the suit of the trial court as per the order referred to above was not an adjudication of the rights of the parties involved in the suit which can be formally expressed. It was simply an order of dismissal of the suit without any adjudication of any lis or rights of the parties. Therefore, the order of the trial court dated 24.7.2013 does not conform to the definition of a decree as contained in Section 2(2) C.P.C. In that situation, as it was not a decree, it was not amiable to appeal under Section 96 C.P.C.

27. In view of the aforesaid facts and circumstances, I am of the opinion that the lower appellate court committed no error in law in dismissing the appeal of the plaintiff as not maintainable.

28. In the event the appeal was not maintainable before the lower appellate court, as there was no decree to be appealed against, the second appeal before this Court would also not be maintainable.

29. The substantial question of law involved in this appeal is accordingly answered and it is held that the order of the trial court dismissing the suit for absence of plaintiff and for want of evidence is not in the nature of a decree against which an appeal would lie under Section 96 C.P.C. Consequently, no further appeal would lie against it under Section 100 C.P.C. to this Court.

30. The appeal is, therefore, dismissed with no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2015

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

Special Appeal No. 310 of 2015

U.P. Power Corporation Ltd. Lucknow & Anr. ...Appellants
Versus
Nitin Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri J.P. Pandey

Counsel for the Respondents:
C.S.C., Sri Siddharth Khare

U.P. Public Service (Reservation for SC/ST and other Backward Classes) Act 1994-Section 3 (6)-Petitioner under OBC quota-participated in written examination-getting much higher marks than last candidates of General candidate-can not be treated as reserved candidate-Learned Single Judge rightly declined to interfere-appeal dismissed.

Held: Para-14
For these reasons, we are of the view that there was no error in the judgment of the learned Single Judge. The learned Single Judge has upheld the right of the appellants to carry out short-listing. However, the appellants have been faulted for having excluded candidates belonging to the reserved categories from the short-list of candidates for the unreserved posts which has resulted in a situation where candidates with higher marks failed to get short-listed for the unreserved posts merely because they belong to a reserved category. The view of the learned Single Judge and directions which have been issued consequently do not suffer from any error.

Case Law discussed:
(2009) 5 SCC 1; 2007 (2) ADJ 150 (DB)2; 2008 AWC 1391

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

1. The special appeal has arisen from the judgment of a learned Single Judge dated 16 April 2015.

2. An advertisement was issued by the Electricity Service Commission1 for recruitment on 2211 posts of Technician Grade-II (Trainee) Electrical. Of these posts, the posts reserved for OBC, Scheduled Caste and Scheduled Tribe candidates were as follows:

(i) OBC - 597 posts;
(ii) Scheduled Castes - 464 posts; and
(iii) Scheduled Tribes - 44 posts.

3. Thus, out of 2211 posts that were advertised, 1105 were reserved. 1106 posts were unreserved and were to be filled up by open competition. The selection process comprised of a written test followed by an interview. The Commission released a list of candidates who were declared to be successful in the written examination on the basis of which candidates were to be called for an interview. The Commission called three times the number of candidates for interview from each category applying what is described as a '3x formula'. The petitioners who filed writ proceedings before the learned Single Judge were candidates belonging to the OBC category. Their grievance was that though the last candidate from the unreserved category had secured lower marks, none of the petitioners were called for the interview.

4. In the affidavit which has been filed on behalf of the Commission, it has

been stated that results of successful candidates were declared for the written test category-wise. In other words, candidates belonging to the OBC category were confined only against the merit list of the OBC category. Consequently, an OBC candidate who may have been meritorious enough to be within the short-list for the unreserved posts was not included in the short-list on the ground that such a candidate could only compete for a post in the category to which the candidate belongs. Hence, the Commission stated that in the process of short-listing, candidates were short-listed for interview category-wise. This is clear from the following averments contained in paragraph 8 of the affidavit filed by the Secretary to the Commission in the special appeal which reads as follows:

"That it is stated that a counter affidavit on behalf of the appellants was filed in the aforesaid writ petition. It was specifically contended on behalf of the appellants in the said counter affidavit that the candidates had applied for selection on the post of TG-II category-wise and as per law, the results of the successful candidates in the written test were also declared category-wise and since the petitioners-Respondents were of the OBC category and therefore, they can set up their claims under their own category and they have no right under the law to over-lap under the different category for which they have never applied. It is, thus, a specific stand was taken on behalf of the appellants that the successful candidates were invited for interview in the ratio of 3 times of the existing vacancy of their own category in which they had applied for and since the petitioners have secured less marks and therefore, they were out of the zone of consideration in their own category as the candidates securing higher marks in their own category i.e. OBC were available. The petitioners can not contend for encroachment of posts which do not fall under their own reserved category."

5. The learned Single Judge in the course of the judgement indicated the consequence of the procedure of shortlisting which was followed by the Commission, in the following observations:

"...The petitioners have been left out of the field of consideration for being called in the interview only because there were a large number of candidates in the OBC category who had secured higher marks than the petitioners and by applying the three times formula it has resulted in the ouster of the petitioners from the field of consideration for being called for interview. On the contrary the petitioners having secured higher marks in the written test than the last unreserved category candidate, were entitled to compete against the unreserved vacancies/ posts solely by virtue of their higher merit and they cannot be relegated to take the seats reserved for the OBC category to which they belong. OBC candidates having lower marks than the petitioners would have to be adjusted against the seats reserved for OBC..."

6. In the view of the learned Single Judge, a candidate belonging to a particular reserved category would be entitled to be considered for short-listing in the unreserved category if the position on merit of a candidate was such as to fall within the number of short-listed candidates in the unreserved category. Accordingly, a direction was issued by the learned Single Judge to the appellants

to apply the formula of shortlisting uniformly to all categories reserved as well as unreserved.

7. The Power Corporation and the Commission are in appeal.

8. The submission which has been urged on behalf of the appellants is based on the provisions of Section 3 (6) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994. Section 3(6) provides as follows:

"(6) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1)"

9. The submission is that the principle which is enunciated in sub-section (6) of Section 3 applies only at the stage of final selection and not at an intermediate stage when a short-list of candidates is drawn up for being called for interview. At the present stage, it has been submitted that the appellants were justified in taking recourse to the process of short-listing by confining reserved category candidates to their own category and necessarily therefore by excluding them from the unreserved category for the purpose of shortlisting. That is the submission which falls for consideration.

10. Section 3 (6) is a statutory recognition of the principle that if a candidate belonging to a reserved category is selected on the basis of merit in open competition with general candidates, such a candidate is to be adjusted not against the vacancies reserved for the reserved category to which the candidate belongs but against the unreserved seats. This proceeds on the foundation that where a candidate is meritorious enough to be placed within the zone of selected candidates independent of any claim of reservation and purely on the basis of the merit of the candidate, the candidate ought not to be relegated to a seat against the reserved category. The simple reason for this principle is that reservation is a process by which a certain number of posts or seats is carved out for stipulated categories such as OBC, Scheduled Castes and Scheduled Tribes. Unreserved seats do not constitute a reservation for candidates belonging to categories other than the reserved categories. An unreserved post or seat is one in which every individual irrespective of the category to which the person belongs can compete in open merit. Hence, the principle which is embodied in Section 3 (6) is not confined in its application only at the stage when the final select list is to be drawn up. If the submission of the appellants were to be accepted, that would result in seriously absurd consequences. As the learned Single Judge noted, in the present case itself, the petitioners who belong to the OBC category had in fact secured higher marks in the written test than the last short-listed candidate from the unreserved category. However, they were sought to be excluded from short-listing for the unreserved posts only on the ground that as a candidate who had declared himself or herself to be of a reserved category, that candidate would have to be excluded from shortlisting from the unreserved category even if on the basis of the position in merit, such a

candidate would otherwise fall in the list of short-listed candidates in the open or unreserved category. Such a consequence would not be permissible in law.

11. The principle of law has been laid down in the judgment of the Supreme Court in Andhra Pradesh Public Service Commission vs. Baloji Badhavath2 in the following observations:

"One other aspect of the matter must be kept in mind. If category wise statement is prepared, as has been directed by the High Court, it may be detrimental to the interest of the meritorious candidates belonging to the reserved categories. The reserved category candidates have two options. If they are meritorious enough to compete with the open category candidates, they are recruited in that category. The candidates below them would be considered for appointment in the reserved categories. This is now a well settled principle of law as has been laid down by this Court in several decisions. (See for example, Union of India v. Satya Prakash3, SCC Paras 18 to 20; Ritesh R. Shah v. Dr. Y.L. Yamul4, SCR at pp. 700-701 and Rajesh Kumar Daria v. Rajasthan Public Service Commission5, SCC para 9.)"

12. In a decision of a Division Bench of this Court in Sanjeev Kumar Singh vs. State of U.P.6, the Division Bench held that competition commences only at the stage where all the persons who fulfill the requisite conditions are short-listed. In that context, it was also held that a concession in fee or relaxation in the upper age limit are provisions not concerned with the process of selection. The Division Bench observed in para 53 as follows:

"In a selection which can be termed as open competition with general category candidates, the candidature of the reserved category candidates as well as the general category candidates is to be tested on the same merit and if in that case a reserved category candidate succeeds in the open competition with general category candidates, he would be placed amongst the general category candidates."

13. The judgment in Sanjeev Kumar Singh (supra) was followed by another Division Bench of this Court in Shiv Prakash Yadav vs. State of U.P. In that case, the learned Single Judge had held that once a reserved category candidate had exercised his option to be treated as a reserved category candidate, the provision of Section 3 (6) of the Act would not apply. This view was held to be erroneous in view of the judgment of the Division Bench in Sanjeev Kumar Singh's case (supra).

14. For these reasons, we are of the view that there was no error in the judgment of the learned Single Judge. The learned Single Judge has upheld the right of the appellants to carry out short-listing. However, the appellants have been faulted for having excluded candidates belonging to the reserved categories from the short-list of candidates for the unreserved posts which has resulted in a situation where candidates with higher marks failed to get short-listed for the unreserved posts merely because they belong to a reserved category. The view of the learned Single Judge and directions which have been issued consequently do not suffer from any error.

15. The special appeal is, accordingly, dismissed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2015

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

Special Appeal Defective No. 421 of 2015

Dalip Singh & Ors. ...Appellants
Versus
Vikram Singh & Ors. ...Respondents

Counsel for the Petitioner:
Sri N.B. Nigam

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

U.P. Consolidation of Holdings Act 1953-Section 6(i)-Cancellation of consolidation proceeding-on ground of delay in conclusion of proceeding due to dereliction in duty-learned Single Judge quashed notification and directed to conclude and finalize the proceeding itself-whether can such direction issued? held-'No'-in view of law developed by Apex Court in Hari Bhajan Singh case-no individual right of any tenure holder effected.

Held: Para-7
The principle of law which has been laid down in the judgment of the Division Bench and in the judgment of the Supreme Court is that before persons have entered into possession of the holdings allotted to them, they do not acquire any right, title or interest and they would not lose their rights by the issuance of a notification under Section 6 of the Act. That is the position in law. The writ petition challenging the notification under Section 6 of the Act was not maintainable since there were no rights enuring to the benefit of the original petitioners which were taken away or affected by a notification under Section 6 of the Act.

Case Law discussed:
2011 AIR SCW 195; 1976 RD 35

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

1. The appellants are in appeal against a judgment and order of the learned Single Judge dated 27 April 2015. The appellants claim to be tenure holders of Village Hanspur, Gutaiyaj Natthapur, Tehsil Puwaya, District Shahjahanpur. The village was placed under consolidation and a notification was issued under Section 4 of the U.P. Consolidation of Holdings Act, 19531 on 5 August 1972. The first, second and third respondents, who are the original petitioners, moved an application before the Consolidation Officer, Shahjahanpur in 2011-12 nearly forty years after the commencement of consolidation proceedings in 1972 and nearly thirty two years after the framing of a preliminary consolidation scheme in 1980. The Consolidation Officer by an order dated 28 July 2012 rejected the application. Appeals were filed against the order of the Consolidation Officer. The Settlement Officer (Consolidation) by an order dated 12 November 2012 remanded the proceedings back to the Consolidation Officer for disposal afresh. On 9 July 2013, a notification was issued by the Consolidation Commissioner under Section 6(1) of the Act cancelling the notification under Section 4 of the Act. The first, second and third respondents filed a writ petition seeking to challenge the legality of the notification dated 9 July 2013 and also seeking a mandamus to the consolidation authorities to conclude the consolidation proceedings expeditiously. The appellants, who are tenure holders, were not parties to the proceedings. The writ petition was allowed by a learned Single Judge by a judgment and order dated 27 April 2015 in the following terms:

"The writ petition has been filed for quashing the notification dated 09.07.2013 by which consolidation operation has been closed in village Hanspur, Gutaiyaj Natthapur, tehsil Puwaya, District Shahjahanpur. Impugned notification does not contain any reason as such the counter affidavit has been called for. In the counter affidavit it has been stated that in spite of efforts made by the consolidation authority they could not be able to demarcate the chak as well as deliver possession, although more than 40 years have passed, as such the notification under section 6 was issued.

The reason given in the counter affidavit shows that there was dereliction in discharge of statutory duties. If consolidation authorities could not demarcate the Chaks and deliver possession over it, then it can not be a ground for quashing the consolidation proceeding.

In the result, the writ petition is succeeded and is allowed. The notification dated 09.07.2013 issued by Consolidation Commissioner, U.P. is quashed.

District Deputy Director of Consolidation, Shahjahanpur is directed to ensure the demarcation of the chaks and delivery of possession by deputing necessary police force in the villages upto June, 2015."

2. The submission which has been urged on behalf of the appellants is that it is a well settled principle of law that an order passed under Section 6(1) of the Act cancelling a notification under Section 4 of the Act does not affect the rights of any individual and has no civil consequences, since before persons enter into possession of the holdings allotted to them, they do not acquire any right, title or interest nor do they lose any of the rights, title or interest in their original holdings. Hence, it has been held by the Supreme Court that such an order is not even required to be preceded by an opportunity of being heard. Reliance was placed on the judgment of the Supreme Court in Harbhajan Singh Vs. State of Himachal Pradesh2 where similar provisions of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 were considered. A similar view was taken in an earlier decision of a Division Bench of this Court in Agricultural & Industrial Syndicate Ltd. Vs. State of U.P.3

3. On the other hand, it was sought to be urged on behalf of the first, second and third respondents that there was no lawful justification for the issuance of a notification under Section 6 of the Act cancelling the earlier notification under Section 4 of the Act and, as the learned Single Judge observed, there was a dereliction of duty on the part of the consolidation authorities in completing the consolidation operations. In view thereof, the learned Single Judge has it is urged, correctly issued the impugned direction.

4. Section 4 of the Act empowers the State Government, where it is of the opinion that a district or part thereof may be brought under consolidation operations, to make a declaration to that effect through a gazette notification. Thereupon, it is lawful for any officer or authority empowered by the District Deputy Director of Consolidation, inter alia, to enter upon and survey the land within such areas; and to do all acts, if necessary, to ascertain the suitability of the area for consolidation operations.

Section 6 of the Act empowers the State Government to cancel at any time a notification made under Section 4 of the Act in respect of the whole or any part of the area specified therein. The consequence of the issuance of a notification under sub-section 1 is provided in sub-section 2.

5. The provisions of Sections 4 and 6 of the Act came up for consideration before a Division Bench of this Court in Agricultural & Industrial Syndicate Ltd. (supra). The Division Bench held that when the Director of Consolidation issues a notification under Section 4 or Section 6, he performs neither a quasi judicial function nor does he exercise an administrative power. In the view of the Division Bench, the power was of a legislative nature. Moreover, it was held that if a notification is issued under Section 6, the land holder has no rights which are affected in consequence of such a notification. The Supreme Court in the judgment in Harbhajan Singh (supra) while considering a similar provision contained in Section 16(1) of the Consolidation Act in the State of Himachal Pradesh held as follows:-

"It is, thus, clear that it is only when the persons entitled to possession of holdings under the Act have been delivered possession of the holdings that they acquire rights, title and interest in the new holding allotted to them and the consolidation scheme in the area is deemed to have come into force. Till such possession of the allotted land under the consolidation scheme is delivered to the allottees and the consolidation scheme is deemed to come into force, the State Government has the power under Section 16(1) of the Act to cancel the declaration under Section 14(1) of the Act."

6. The Supreme Court also held as follows:

"We have already held that the State Government can issue a notification under Section 16(1) of the Act cancelling the declaration under Section 14(1) of the Act in respect of any area at any time before the persons entitled to possession of holdings under the Act have entered into possession of the holdings allotted to them. Since before the persons enter into possession of the holdings allotted to them, they do not acquire any right, title and interest in the holdings allotted to them and they do not lose in any manner their rights, title and interest in their original holdings, their rights are not affected by the issuance of a notification under Section 16(1) of the Act. In other words, a notification under Section 16(1) of the Act issued by the State Government before delivery of possession of the allotted holdings to persons has no civil consequences and, therefore, the State Government is not required to follow the principles of natural justice before issuing such a notification."

7. The principle of law which has been laid down in the judgment of the Division Bench and in the judgment of the Supreme Court is that before persons have entered into possession of the holdings allotted to them, they do not acquire any right, title or interest and they would not lose their rights by the issuance of a notification under Section 6 of the Act. That is the position in law. The writ petition challenging the notification under Section 6 of the Act was not maintainable since there were no rights enuring to the benefit of the original petitioners which were taken away or affected by a notification under Section 6 of the Act.

8. A counter affidavit was filed in the proceedings before the learned Single Judge by the Consolidation Officer stating that after the notification was issued under Section

4A(2) of the Act on 30 May 1970 for launching consolidation operations, the consolidation authorities made several attempts to complete the work of demarcation and delivery of possession of chaks but the rival groups in the village seriously opposed the work of demarcation. There was an apprehension of a breach of peace in the village, as a result of which it became impossible to start and complete the work at the stage of Section 24 of the Act. The village was notified in 1970 and though more than 40 years had elapsed, the village consolidation scheme could not be implemented. In these compelling circumstances, the District Deputy Director of Consolidation directed the District Consolidation Authority to submit a report on whether a consolidation scheme in the village could be completed or not. Pursuant thereto, the Settlement Officer (Consolidation) and the Consolidation Officer visited the village. In the course of the enquiry, it was found that during the pendency of certain writ petitions before this Court, stay orders had been passed and there was serious local opposition to the work of demarcation. Despite the passage of nearly forty years, the villagers were still in possession of their original holdings and almost all the villagers were in favour of the issuance of a notification under Section 6 of the Act. The Settlement Officer (Consolidation) reported the matter to the District Deputy Director of Consolidation who, in turn, forwarded it to the Consolidation Commissioner for appropriate action. It was on this basis that a decision was taken to cancel the notification under Section 4 of the Act since it was found that there was no need to effect a change, the villagers being in possession of their plots for almost forty years.

9. The submission which has been urged on behalf of the appellants has a clear basis in the law which has been laid down in the judgment of the Supreme Court as well as in the judgment of the Division Bench of this Court noted above. The issuance of a notification under Section 6 of the Act cannot be regarded as arbitrary having due regard to the facts and circumstances of the case noted above. No rights enuring to the benefit of the first, second and third respondents stood affected by the issuance of a notification under Section 6 of the Act. Hence, the order of the learned Single Judge quashing the notification was clearly not warranted. The learned Single Judge, in fact, issued a further direction to the consolidation authorities to ensure the demarcation of chaks and the delivery of possession with the assistance of police force. These directions have caused serious prejudice to the appellants who are not parties to the proceedings and would be directly affected by such directions.

10. For these reasons, we hold that the impugned judgment and order dated 27 April 2015 is unsustainable. The special appeal is accordingly allowed by setting aside the judgment and order of the learned Single Judge dated 27 April 2015. The writ petition filed by the first, second and third respondents shall, in consequence, stand dismissed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2015

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

Special Appeal Defective No. 456 of 2015

State of U.P. & Ors. ...Appellants

Versus

Yogendra Nath Singh ...Respondent

Counsel for the Petitioner:
Sri C.B. Yadav, Addl. Adv. General, Sri Shashank Shekhar Singh, Addl. C.S.C., Ramanand Pandey, S.C.

Counsel for the Respondents:
Sri A.B. Singh

Constitution of India, Art.-226-Payment of gratuity and pension-an employee of DRDA-entitlement not disputed-learned Single Judge rightly issued mandamus-special appeal by state government-on ground central government not giving necessary fund-can not be ground to deny such benefits-direction by Single Judge modified to the extant having binding force-upon agency-appeal disposed of.

Held: Para-5
The relationship of employer and employee is between the respondent and the DRDA which is a society registered under the Act of 1860. Hence, the mandamus which has been issued by the learned Single Judge would operate against the society with whom there is a relationship of employer and employee. The purported difficulty which the State Government faces in regard to receiving the share of the Union Government towards the expenditure cannot, in our view, affect the entitlement of an employee or his right to receive the payment of gratuity from his employer once the entitlement is not in dispute. Any dispute or difficulty as between the State and the Union Governments has to be resolved at the governmental level and cannot be a ground to deny the payment of gratuity. All that we need to clarify is that the mandamus which has been issued by the learned Single Judge will operate against the DRDA of which the respondent is an employee and which is a society under the Act of 1860.

Case Law discussed:

W.P. No. 20025 of 2006; Special Appeal (Defective) No. 687 of 2010

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

1. This special appeal has arisen from a judgment and order of the learned Single Judge dated 12 February 2015. By the judgment in appeal, the learned Single Judge issued a mandamus to the appellants for the payment of gratuity to the original petitioner, the respondent to the special appeal, in terms of a notification dated 6 September 1997 under which employees of registered societies have been notified to be entitled to gratuity under the Payment of Gratuity Act 19721.

2. The respondent was appointed as a junior clerk and retired from service on 30 January 2009. By his writ petition, he sought a mandamus for the payment of gratuity and post retiral benefits within a specified period and sought to challenge an order passed by the Commissioner, Rural Development on 13 January 2010. The Commissioner, Rural Development held that employees of the District Rural Development Agency2 are not governed by the rules framed under Article 309 of the Constitution and are not employees of the State and consequently would not be entitled to the payment of gratuity. Before this Court, there is no dispute about the entitlement of the respondent to the payment of gratuity in terms of the notification dated 6 September 1997 issued by the Central Government under Section 1(3)(c) of the Act of 1972. The notification was taken note of in a judgment dated 14 March 2012 of a learned Single Judge of this Court in Matadeen Yadav vs. State of U.P. and others3. The learned Single Judge, in our

view, correctly held that in order to entitle an employee to the payment of gratuity, it is not necessary that the employee must be employed by the State or by the Central Government. Admittedly, DRDA is a society registered under the Societies Registration Act 18604. The manner in which the society was constituted was taken due note of in a judgment of the Division Bench of this Court in State of U.P. & Ors. vs. Pitamber5 decided on 19 August 2010. The Division Bench observed as follows:

"...The respondent herein is working in the DRDA, which was earlier created in each district of the State under the directions of the Government of India for ensuring effective implementation of rural development programmes. Formal creation of DRDA was contemplated under the Office Memorandum of the Government of India dated 24.10.1980, which provided that DRDA will be created as a Society in each district. The State Government, vide Government Order dated 24.11.1980, created DRDAs in each district. The Central Government issued an Office Memorandum dated 10.03.1981 pursuant to which all DRDAs prepared almost identical Bye-laws. As regards the structure of DRDAs, District Magistrates are the Head of each DRDA and total funding is being done by the Central Government and State Government in the ratio of 70 - 30. Applying the test of funding and pervasive control which the State have over the DRDAs, there can be no dispute that the DRDA is a State within the meaning of Article 12 of the Constitution of India..."

3. The submission which has been urged on behalf of the State by the learned Additional Advocate General is that DRDA, as an agency, was constituted by the State Government under the directions of the Government of India and in terms of an office memorandum dated 24 October 1980 which contemplated that such an agency would be created as a society in each district. The State Government issued a Government Order on 24 November 1980 for the creation of DRDAs in every district. The grievance of the State Government is that though the funds required by the DRDAs were to be shared in the proportion of 70:30 between the Union and the State Governments, the Union Government has not been meeting its obligation. In this regard, on 6 November 2011, the Union Government in the Ministry of Rural Development clarified that the DRDAs should manage the expenditure on gratuity etc. from the overall funds available with them.

4. The learned Additional Advocate General drew the attention of the Court to the communications addressed by the State Government to the Union Government, among them, a letter dated 1 April 2015 addressed by the Chief Minister to the Prime Minister regarding a request for the disbursement of an amount of Rs.26.69 crores and to a letter dated 13 May 2015 of the Principal Secretary in the department of Rural Development to the Secretary in the Union Ministry of Rural Development seeking release of a shortfall of Rs.32.42 crores for 2014-15 and the release of the first installment for 2015-16 in the amount of Rs.103.26 crores. The submission is that DRDAs in every district are headed by District Magistrates and though the relationship of employer and employee is between each employee and the DRDA, ultimately the District Magistrates would look to the

State Government for being placed with funds for disbursing the liability if any. Consequently, it was submitted that unless the Central Government bears its part of the financial expenditure as claimed by the State, there is no reason or justification to fasten the liability on the State Government alone.

5. The issue before the Court is as to whether the dispute in regard to the funding requirement of the DRDA, can in any manner, affect the entitlement of an employee to the payment of gratuity. The entitlement of an employee to receive gratuity is not in dispute. As an employee of a registered society, and as held in the judgment of the learned Single Judge in Matadeen Yadav's case, the respondent was entitled to the payment of gratuity under the Act of 1972. The relationship of employer and employee is between the respondent and the DRDA which is a society registered under the Act of 1860. Hence, the mandamus which has been issued by the learned Single Judge would operate against the society with whom there is a relationship of employer and employee. The purported difficulty which the State Government faces in regard to receiving the share of the Union Government towards the expenditure cannot, in our view, affect the entitlement of an employee or his right to receive the payment of gratuity from his employer once the entitlement is not in dispute. Any dispute or difficulty as between the State and the Union Governments has to be resolved at the governmental level and cannot be a ground to deny the payment of gratuity. All that we need to clarify is that the mandamus which has been issued by the learned Single Judge will operate against the DRDA of which the respondent is an employee and which is a society under the Act of 1860.

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

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2015

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

Special Appeal Defective No. 503 of 2015

Smt. Somwati ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Mohd. Navi Hussain

Counsel for the Respondents:
C.S.C., Sri Ravindra Kumar Gaur

Constitution of India, Art.-226-Writ petition-claim of family pension-dismissal by learned Single Judge on laches-whether justified?-held-'No'-as no third party rights affected-from delay-the sufferer person is only petitioner itself-delay not fatal-appeal allowed.

Held: Para-6

We are of the view that the learned Single Judge was manifestly in error in dismissing the writ petition on the ground of laches. The appropriate remedy would be to direct that the claim of the appellant be duly verified in accordance with law. We clarify that authorities shall duly scrutinize the basis of the claim on merits and if the appellant is entitled to the payment of family pension, such payment, for a period of three years prior to the filing the writ petition, shall be effected in favour of the appellant. We clarify that this would be subject to due verification of each and every factual averment which is contained in the petition by the

competent authority. This exercise shall be completed within a period of four months from the date of receipt of a certified copy of this order. The appellant would be entitled to simple interest at the rate of 6% per annum.

Case Law discussed:
AWC-2008-6-6434

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

1. The appellant, who sought a writ directing the payment of family pension to her as a widow of a deceased employee who was working as a Peon in the office of the Town Area Committee, Atmadpur, District Agra, is aggrieved by the dismissal of her petition on the ground of laches.

2. The case of the appellant is that her husband was a peon in the Town Area Committee, Atmadpur, Agra. It has been stated that he attained the age of superannuation on 31 December 1997. The grievance of the appellant is that after the death of her spouse on 5 October 2001, she was entitled to payment of family pension which, however, was not released.

3. The writ petition was filed in May 2015 for the release of family pension and other benefits to which the appellant would be entitled to after the death of her husband. The learned Single Judge dismissed the writ petition holding that it was barred by laches.

4. The right to receive pension or, for that matter, family pension is a continuing right. The failure of the employer to deny such pension would constitute a continuing wrong. A distinction has to be made between cases where a delay in moving the Court results in a situation where vested rights of third parties are disrupted. Consequently, issues such as seniority have to be adjudicated at the earliest. On the other hand, a matter such as pension relates to the employee himself and where family pension is involved, it does not affect rights of third parties in spite of delay. Consequently, it is also well settled that a claim to pension, where pension has not been paid, is based on a continuing wrong and relief can be granted even if there is a delay. However, on the entitlement of arrears, it would be open to the High Court to restrict the relief by confining the payment of arrears to a period of three years prior to the date of the filing of the writ petition.

5. This principle was summarized in Union of India vs. Tarsem Singh1 by the Supreme Court :

"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the

claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

6. We are of the view that the learned Single Judge was manifestly in error in dismissing the writ petition on the ground of laches. The appropriate remedy would be to direct that the claim of the appellant be duly verified in accordance with law. We clarify that authorities shall duly scrutinize the basis of the claim on merits and if the appellant is entitled to the payment of family pension, such payment, for a period of three years prior to the filing the writ petition, shall be effected in favour of the appellant. We clarify that this would be subject to due verification of each and every factual averment which is contained in the petition by the competent authority. This exercise shall be completed within a period of four months from the date of receipt of a certified copy of this order. The appellant would be entitled to simple interest at the rate of 6% per annum.

7. By way of abundant caution, we clarify that the direction for the payment of family pension and interest would operate only if, upon due verification of the factual averments on the basis of which the claim was set up, the claim is found to be substantiated by the competent authority.

8. The special appeal is, accordingly, allowed.

9. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2015

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

Misc Singh No. 735 of 2010

Vishwanath Singh ...Petitioner
Versus
Commissioner Lucknow Mandal Lko. & Anr. ...Respondents

Counsel for the Petitioner:
Anurag Srivastava

Counsel for the Respondents:
C.S.C.

Arms Act, 1959-Section 17 (3)-Cancellation of fire arms license-on ground number of FIR lodged-without considering effect on public peace or safety-ignored by District Magistrate as well as appellate authority held-unsustainable-quashed.

Held: Para-13, 14 and 15

13. As averred above, in the case at hand, the District Magistrate, has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is, have referred to some applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis of cancelling the licence. The order

passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of anything contained in Section 17(3) of the Act.

14. Having considered the submissions made by the learned counsel for the parties and the case laws, referred to above, I am of the view that the Appellate Court has committed an error in not considering the facts in its correct prospective and has also failed to appreciate the grounds mentioned in Section 17(3) of the Arms Act regarding revocation or for suspending a licence. In the backdrop of the aforesaid facts, the order passed by the Appellate Authority cannot be legally sustained.

15. For the reasons stated herein-above, the writ petition is allowed and the order dated 07.01.2010 passed by the Commissioner as also the order dated 26.06.2009 passed by the District Magistrate, Raebareli are hereby set aside. The District Magistrate shall pass a fresh order after taking into account all relevant aspects and the prescription provided under Section 17 of the Arms Act.

Case Law discussed:
[2013 (31) LCD 1313]; [2014 (4) ADJ 744 (LB)], 2011 (29) LCD 1045; 2011 (29) LCD 829; 2011 (29) LCD 1041; [2009 (67) ACC 157]; [2013 (31) LCD 1460]; [2006 (24) LCD 114].

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

1. By means of the instant writ petition, the petitioner has sought for quashing of the impugned order dated 07.01.2010 passed by the appellate authority/Commissioner and the order dated 29.06.2009 passed by opposite party no.2/District Magistrate, Raibareli, by which fire arm license of the petitioner has been cancelled.

2. Submission of learned counsel for petitioner is that petitioner is a law abiding person of District Raebareli, where he is engaged in business and is also a Center Incharge of Dariyapur Sugar Mill. In the village the family of petitioner and Sri Shiv Narain Singh, due to political rivalry, is on inimical terms. It is said that in the by-election of the year 2000, the family members of Sri Shiv Narain Singh with the help of anti-social elements grievously assaulted the brother of the petitioner, namely, Sri Dal Bahadur Singh for which an FIR at Case Crime No. 88 of 2000 was registered against the accused persons. In the year 2005, during election when the wife of the petitioner was contesting, the family members of Sri Shiv Narain Singh with the help of anti-social elements badly assaulted the petitioner on 16.10.2005, FIR of which was registered at Case crime No. 64 of 2005. It is said that on the very same day i.e. 16.10.2005 another FIR has again been registered at Case Crime No. 66 of 2005 against Sri Vinod Singh and other persons, who were the family members of Sri Shiv Narain Singh in respect to Marpeat took place in the night of 16.10.2005 with the family members of the petitioner. Learned counsel for petitioner also submitted that as a counter blast, a false FIR was lodged at Case Crime No. 6431 of 2005 against the petitioner by the wife of Sri Shiv Narain Singh. In the meantime also another false FIR has been lodged against the petitioner on account of murder of the son of Sri Shiv Narain Singh.

3. Learned counsel for petitioner further submits that Superintendent of police Raebareli-opposite party no.3, wrote a letter dated 30.10.2007 to the Station Incharge, Police Station Jagatpur,

District Raebareli-opposite party no.4 seeking information in respect of the matter relating to cancellation of arm licenses of the petitioner on the basis of some parameters given therein as per Section 17 of the Arms Act and in reply thereto the opposite party no.4 on 10.12.2007 submitted incorrect report in contravention to the provisions of Section 17(3)(b) of the Arms Act, 1959 and recommended for cancellation of license of the petitioner under the influence and pressure exerted by the rival group.

4. According to petitioner's counsel the petitioner challenged the order dated 29.06.2009 by filing an appeal (Appeal No. 603 of 2009-10 Vishwanath Singh vs. District Magistrate Raebareli) before the appellate authority i.e. the Commissioner, Lucknow Division, Lucknow-opposite party no.1, but the same was rejected vide order dated 07.01.2010 without appreciating the material documents available on record in an erroneous and unjustified manner.

5. It has been vehemently contended by the learned counsel for petitioner that under Section 17(3)(b) of the Act, power has been conferred upon the licensing authority to suspend or revoke a license of fire-arm, if he deems necessary to do so for the security of public peace, but in the present case the opposite party no.2 while passing the impugned order dated 29.06.2009 failed to show at least, prima-facie, that as to how the possession of the arms by the petitioner would endanger the public peace. Thus, it is clear that the same has been passed only on the basis of recommendations submitted by the opposite party no.3, who was influenced with political motivation of Sri Shiv Narain Singh.

6. Sri Badrul Hasan, learned Additional Chief Standing counsel, while opposing the writ petition, submitted that the impugned orders dated 29.06.2009 and 07.01.2010 have been passed in consonance with provisions of the Act as the licensing authority after considering the material facts on record has given a categorical finding of fact that the petitioner has violated the terms and conditions of arms license. It is submitted that the impugned orders are absolutely valid and the same are legal, valid and justified as the same have been passed after affording due opportunity to the petitioner. Therefore, the writ petition is liable to be dismissed.

7. Thus, the trivial question involved in this writ petition is as to whether licensing authority is vested with the power under the Arms Act to revoke/cancel the license of a public person mere on involvement in a criminal case or pendency of a criminal case.

8. To answer the aforesaid question, it would be apt to refer relevant paragraphs of Rakesh Kumar Vs. District Magistrate, Raebareli and others; [2013(31) LCD 1313], wherein it has been held that merely because of pendency of a criminal case, the arms-licenses of the petitioner cannot be cancelled. Relevant paras 12, 13, 14 and 15 read as under:

"12. Further, this Court in the case of Sahab Singh Vs. Commissioner Agra Region, Agra and others, 2006 (24) LCD 374 , in paragraph No. 3 held as under:-

The submission of the petitioner is That merely because of pendency of a criminal case, the arms licence of the

petitioner cannot be cancelled. in support of the said submission, learned counsel for the petitioner has placed reliance on two decisions of this Court in the case of Hausla Prasad Tiwari v. State of U.P. and Ishwar @ Bhuri v. State of U.P. . It has further been submitted that in view of the Full Bench decision of this Court in the cases of Balaram Singh v. State of U.P. and Ors. Kailash Nath v. State of U.P. 1985 A.W.C. 493 as well as the Division Bench decision of this Court in the case of Sadri Ram v. District Magistrate, Azamgarh and Ors. , the arms licence of the petitioner cannot be placed under suspension pending enquiry."

13. In the case of Mulayam Singh v. State of U.P., 2013 (80) ACC 786 in paragraph Nos. 11 and 12 held as under:-

"Para No. 11 - The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under the Arms Act, has been dealt with by a Division Bench of this Court reported in 1978 AWC, 122 (Sheo Prasad Mishra vs. District Magistrate). The division Bench relied upon the earlier decision of another Division Bench of this Court in the case of Masi Uddin vs. Commissioner, Allahabad, 1972 ALJ 573 wherein it has been held:-

"A licence may be cancelled, inter-alia, on the ground that it is "necessary for the security of public peace or for public safety, to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the licence. The mere existence of enmity between a licencee and another person would not establish the "necessary" connection with security of the public peace or public safety.

In the case before us also the District Magistrate has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is to have referred to some applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis for cancelling the licence. The order passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of anything contained in Section 17(3)(b) of the Act."

Para No. 12 - Similar view has been taken by this Court in various decisions relying upon the Division Bench judgment passed in Sheo Prasad Mishra(supra). There is no doubt that the District Magistrate and the Commissioner i.e. administrative authorities are bound to take appropriate action in the matter of grant of licence and also its cancellation for the purpose of maintaining peace and harmony in the society. The assessment of administrative authorities with regard to grant or cancellation of licence should not be interfered in usual course by the Court in its extraordinary jurisdiction unless there is illegality or arbitrariness."

14. In the case of Raj Kumar Verma Vs. State of U.P. , 2013 (80) ACC 231 this Court in paragraph No. 3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The

District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranquility shall not create the ground for the cancellation of Armed Licence. In Ram Suchi vs. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh vs. State of UP 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant. "

15. Further, in the case of C.P. Sahu v. State, 1984 AWC 145, this Court while interpreting the provisions of Section 17(3) of the Act held as under:-

"The object of the enquiry that a licensing authority may, while proceeding to consider the question as to whether or not an arms licence should be revoked or suspended, like to make, clearly is to enable the licensing authority to come to a conclusion as to whether or not the facts stated in clauses (a) to (e) of Section 17(3) exist and as already explained, it is not obliged to before considering that a case for revocation/suspension of license has been made out, associate the licensee in such enquiry, in this view of the matter it can safely be taken that where a licensing authority embarks upon such an enquiry it is, till then not convinced about existence of the conditions mentioned in clauses (a) to (e) of Section 17(3) , of the Act. So long as it is not so convinced no case to make an order either revoking or suspending an arms licence as contemplated by the section will be made out."

9. The aforesaid view has been reiterated in Hridaya Narain Tiwari v. State of U.P. and others; [2014 (4) ADJ 744 (LB)], Rama Kushwaha vs. State of U.P. & others, reported in 2011 (29) LCD 1045, Hiramani Singh vs. State of U.P. & others, reported in 2011(29)LCD 829 and Rajendra Singh vs. Commissioner, Lucknow Division, Lucknow and others, reported in 2011 (29) LCD 1041, wherein it has been propounded that involvement in criminal case or pendency of criminal case cannot be a ground for cancellation/revocation of firearm license.

10. In the case of Jageshwar Vs. State of U.P. and others; [2009 (67) ACC 157], it has been held that mere involvement in criminal case cannot in any way affect the public Security or public interest.

11. In Thakur Prasad Vs. State of U.P. and others reported in [2013 (31) LCD 1460], this court propounded that "Public Peace" or "Public Safety" do not mean ordinary disturbance of law and order, but the public safety means safety of the public at large and not safety of few persons only. Relevant paras 9, 10 and 11 of the said case read as under:

"9. Further, while passing the impugned order also the licensing

authority has not given any adequate finding that if petitioner holds the arms license then the same shall be against the public peace or public safety.

"10. Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17(3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this Court in the case of Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998(16) LCD 905], wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pending of a criminal case.

11. Further , this Court in the case of Habib Vs. State of U.P., 2002 ACC 783, held as under:-

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo Prasad Misra Vs. District Magistrate, Basti and Ors,. 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above-mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary-affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence. It is submitted by petitioner's counsel that the petitioner has been acquitted of the charges."

12. At this juncture, it would be relevant to add that Ram Karpal Singh vs. Commissioner, Devi Patan Mandal, Gonda and others ; [2006 (24) LCD 114] is quite applicable in the present case as in the present case, the District Magistrate while cancelling the license has not recorded any finding based on cogent material relating to breach of public peace or tranquility on account of continuance of Arms license in petitioner's possession. The mere existence of enmity between a licensee and another person would not establish "necessary" connection with security of public peace or public safety.

13. As averred above, in the case at hand, the District Magistrate, has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is, have referred to some

applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis of cancelling the licence. The order passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of anything contained in Section 17(3) of the Act.

14. Having considered the submissions made by the learned counsel for the parties and the case laws, referred to above, I am of the view that the Appellate Court has committed an error in not considering the facts in its correct prospective and has also failed to appreciate the grounds mentioned in Section 17(3) of the Arms Act regarding revocation or for suspending a licence. In the backdrop of the aforesaid facts, the order passed by the Appellate Authority cannot be legally sustained.

15. For the reasons stated herein-above, the writ petition is allowed and the order dated 07.01.2010 passed by the Commissioner as also the order dated 26.06.2009 passed by the District Magistrate, Raebareli are hereby set aside. The District Magistrate shall pass a fresh order after taking into account all relevant aspects and the prescription provided under Section 17 of the Arms Act.

16. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.07.2015

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

Misc. Single No. 2159 of 2007

Jai Prakash Singh & Ors. ...Petitioner
Versus
Additional District Judge Raebareli & Ors. ...Respondents

Counsel for the Petitioner:
Rajendra Singh Chauhan

Counsel for the Respondents:
C.S.C., Mohammad Adil Khan

C.P.C-Order VI Rule 17- Amendment of plaint-suit for declaration and possession-claiming right of inheritance-after remand in Second Appeal-by virtue of amendment-putting claim based upon adverse possession-held-when not taken this plea at earliest possible-after evidence-can not be allowed-order passed by First Appellate court-set-a-side.

Held: Para-20
Having examined the instant matter in the light of the aforesaid legal proposition, it comes out that respondents no. 2 and 3 filed a suit claiming title by succession and sought a declaration in this regard. As averred above, earlier the matter went up to the second appeal stage and was sent back to the first appellate court for deciding the appeal afresh. It may be noted that the suit of respondent no. 2 had been dismissed by the trial court. When the matter was remanded, the private respondents no. 2 and 3 filed an application, seeking amendment in the suit by taking a plea of adverse possession on the basis of observation made by this Court in the second appeal. In my opinion, the learned Additional District Judge, Court No. 1, Raebareli committed an error in allowing the said amendment, overlooking the fact that it had changed the very nature of the suit by claiming title on the basis of adverse possession and abandoning the earlier plea of title by succession.

Case Law discussed:
AIR 1985 SC 817; AIR 1992 SC 1604; JT 1998 (4) SC 484; [2002 (20) LCD 192]; AIR 2005

SCW 3827; [2006 (100) RD 522]; AIR 1922 Privy Council 249; (2007) 5 SCC 602; [2002 (20) LCD 192]; (2007) 5 SCC 602; (2008) 7 SCC 85; (2009) 10 SCC 84.

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

1. At the very outset, it is relevant to mention that during the pendency of this writ petition, petitioner no. 1 (Jai Prakash Singh) died and as such his legal heirs, namely, Harish Kumar Singh (son) and Smt. Ram Dulari (wife) have been substituted in his place as petitioner nos. 1/1 and 1/2.

2. By means of present writ petition, petitioners have challenged the order dated 24.03.2007 passed by Additional District Judge, Court No. 1, Raebareli (opposite party no. 1) in Appeal No. 36/80; Jagdamba Singh & another Vs. Jung Bahadur Singh and another, whereby the opposite party no. 1 has allowed the amendment application moved by the opposite party nos. 2 and 3.

3. Brief facts of the case are that opposite party no. 2 and 3 filed a suit for declaration and possession, on the basis of successions, before the IVth Additional Munsif Magistrate, Raebareli. After considering the facts and hearing both the parties, the Munsif Magistrate had dismissed the suit for declaration and possession preferred by opposite party nos. 2 and 3 on 29.01.1980 inter alia on the ground that it is not proved that Lalla Singh could legally inherit the rights of Smt. Umrai. It was also held by the trial court that the plaintiffs have claimed their rights only on the ground of inheritance and not on the ground of adverse possession. It was also held that the plaintiffs cannot be declared to be owner of the disputed land.

4. Against the aforesaid judgment and order passed by the trial court, the opposite party nos. 2 and 3 preferred an appeal, which was allowed by opposite party no. 1 on the ground that due to long standing possession, the plaintiffs have perfected their right by prescription. It was further held by the learned Additional District Judge/opposite party no. 1 that even if, the plea of adverse possession was not taken, it does not prevent the court from declaring that the appellant have perfected their rights by adverse possession.

5. Feeling aggrieved by the judgment of first appellate court, the father of petitioners had preferred a Second Appeal before the High Court and the High Court after hearing both the parties, has set aside the judgment and decree passed by first appellate court on 22.12.2004 and remitted the matter to first appellate court to decide the matter afresh after giving opportunity of hearing to the parties. After passing of judgment dated 20.12.2004, the opposite party no. 2 and 3 filed an application in the suit under Order VI Rule 17 C.P.C. for amending the plaint and sought a plea of adverse possession. Against the said amendment application, the petitioners had filed an objection before the opposite party no. 1 stating therein that there is inordinate delay of several long years and through amendment they want to fill the lacunae, which is not permissible as it will change the basic nature. It has further been stated in the objection that two different statement cannot run concurrently in the pleadings relating to successions and adverse possession, as such the amendment application is liable to be rejected.

6. Learned counsel for the petitioners has contended that the Court below, without

considering the facts and legal aspects of the case, allowed the amendment application in arbitrary manner vide order dated 24.03.2007. It is well settled law that any amendment under Order 6 Rule 17 be made at an earliest stage. The appellate court ought to have decided the appeal on the basis of pleadings and evidence on record, but in the instant case the appellate court provided to raise new plea not originally pleaded by way of amendment in an arbitrary manner. Two different pleadings one of succession and another is of adverse possession cannot run concurrently, therefore the opposite party no. 1 has committed manifest error of law in allowing the amendment application, which changed the nature of original suit.

7. Learned Counsel for the contesting respondent, while opposing the writ petition, has submitted that Additional District Judge, Court No. 1, Raebareli (opposite party no. 1) on a consideration of the entire facts and law applicable thereto, allowed the application for amendment vide order dated 24.03.2007 on payment of Rs. 500/- as cost. It has been submitted that after the order dated 24.03.2007, the amendment in the plaint had already been incorporated by the answering opposite parties and the cost has already been deposited in Court but the petitioners have declined to receive the cost. The court below on a consideration of the entire facts and circumstances of the case as well as the law laid down by the Apex Court and this Court, wherein it has been propounded that rule of procedure are hand made and should not be allowed to be mistress of justice and further merits and demerits of the case shall not be considered while allowing the application for amendment, hence the amendment can be allowed at any stage of the proceedings, if it does not change the nature of the suit.

8. In order to decide the lis involved in this petition, it would be proper to refer the legal proposition laid down in various case laws on the subject.

9. In Vineet Kumar v. Mangal Sain Wadhera; AIR 1985 SC 817, the Hon'ble Supreme Court held that normally amendment is not allowed if it changes the cause of action, but where the amendment does not constitute the addition of a new cause of action, or raises a new case, but amounts to not more than adding to the facts already on record, the amendment should be allowed even after the statutory period of limitation.

10. In Jagdish vs. Nathu Singh; AIR 1992 SC 1604 the Hon'ble Apex Court with regard to amendment in plaint held as under:

"12. ....the Court may allow to certain extent even the conversion of the nature of the suit, provided it does not give rise to entirely a new cause of action. An amendment sought in a plaint filed for specific performance may be allowed to be done without abandoning the said relief about amendment seeking for damages for breach of contract may be permitted."

11. In the case of Shallendr Amar Singh v. Harnam Singh Cornalius decided on 04.12.1996, this Court observed that dispossession and adverse possession are two different concepts, which are not mutual to each other.

12. In G. Nagamma and others v. Siromanamma and another; JT 1998 (4) SC 484, the Hon'ble Apex Court held that in an application under Order VI, Rule 17, even an alternative relief can be sought, however, it should not change the cause

of action or materially affect the relief claimed earlier.

13. In Ramroop v. the Deputy Director of Consolidation, Varanasi and others; [2002 (20) LCD 192], this Court observed as under:

"6. It is well settled in law that a new case based upon the facts, which were available to the plaintiff at the time of filing of original plaint but were not pleaded in the original plaint, cannot be permitted to be set up by way of amendment. A reference in this regard may be made to the decisions in Basanti Dei v. Vijaya Krushna Patnaik and others, reported in AIR 1976 Orissa 218, Fakir Charan Mohanty v. Krutibaskar, reported in AIR 1984 NOC 284 and Full Bench decision of Madhya Pradesh High Court in Lazarus Chhindwara v. Smt. Lavina Lazarus, Indore and others, reported in AIR 1979 MP 70 (FB) and also a decision of this Court in Gayatri Devi v. Om Prakash Gautam and others, reported in AIR 1985 Alld. 356."

14. In Salem Advocate Bar Association v. Union of India; AIR 2005 SCW 3827, the Apex Court has held that if the nature of the suit is going to be changed and it has not been proved on the basis of pleadings that the plaintiff was not aware regarding the fact or development which was to be amended by amendment application, the amendment is not permissible.

15. In Rama Shanker Keshari @ Patili Vs. Ist Additional District Judge, Sonebhadra and others; [2006 (100) RD 522], this Court observed as under:

"9. The decision of the Trial Court is correct. The defendants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case."

16. Nevertheless, one distinct cause of action cannot be substituted for another nor the subject matter of the suit can be changed by means of an amendment. The following passage from the decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung, AIR 1922 Privy Council 249, succinctly summarises the principle which may be kept in mind while dealing with the prayer for amendment of the pleadings:

"All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit."

17. In view of the above, the case laws relied upon by the respondents are of no avail. Even in the case of Usha Balashaheb Swami and others v. Kiran Appaso Swami and others, (2007) 5 SCC 602, the Apex Court observed that the proviso to Order 6 Rule 17 of the Code, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

18. In view of Order VI Rule 17 of the Code of Civil Procedure, no

application for amendment shall be allowed after the trial has commenced unless the court comes to conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. Moreover, there is no explanation in the application for amendment as to why it could not be brought on record at the first instance and why there was such a long delay. In the circumstances narrated above, the case laws relied upon by the respondents are of no help to them.

19. In veiw of the legal proposition enunciated in Ram Roop Vs. The Deputy Director of Consolidation [2002(20) LCD192], Usha Balashaheb Swami and others vs. Kiran Appaso Swami and others (2007)5 SCC 602 and Gautam Sarup vs. Leela Jetly and others (2008)7 SCC 85, Revajeetu Builders and Developers vs. Narayanaswamay and sons and others (2009)10 SCC 84, it is imminently clear that the facts, which were within the knowledge of the plaintiff at the time of filing of original plaint but were not pleaded in the original plaint, cannot be permitted to be set up by way of amendment.

20. Having examined the instant matter in the light of the aforesaid legal proposition, it comes out that respondents no. 2 and 3 filed a suit claiming title by succession and sought a declaration in this regard. As averred above, earlier the matter went up to the second appeal stage and was sent back to the first appellate court for deciding the appeal afresh. It may be noted that the suit of respondent no. 2 had been dismissed by the trial court. When the matter was remanded, the private respondents no. 2 and 3 filed an application, seeking amendment in the suit by taking a plea of adverse possession on the basis of observation made by this Court in the second appeal. In my opinion, the learned Additional District Judge, Court No. 1, Raebareli committed an error in allowing the said amendment, overlooking the fact that it had changed the very nature of the suit by claiming title on the basis of adverse possession and abandoning the earlier plea of title by succession.

21. For the reasons aforesaid, the writ petition is allowed and the impugned order dated 24.03.2007 passed by Additional District Judge, Court No. 1, Raebareli (opposite party no. 1) in Appeal No. 36/80; Jagdamba Singh & another Vs. Jung Bahadur Singh and another, is hereby set aside. As the parties are litigating since the year 1976 when the regular suit was filed, the lower court is directed to make an earnest endeavour to conclude the proceedings by 31.12.2015. The trial court is further directed not to grant any adjournment at the drop of hat and only genuine and in exceptional circumstances, adjournment should be permitted so that precious time of the Court is not wasted and long pending litigation comes to an end.

22. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2015

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE ASHOK PAL SINGH, J.

Misc. Bench No. 3519 of 2015

Shaheen Parveen & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Omkar Singh

Counsel for the Respondents:
Govt. Advocate

Constitution of India-Art. 226-FIR Quashing-offence under section 361, 363 and 366 IPC-prosecutrix carrying 7 month pregnancy- in statements under section 164 Cr.P.C.-stated to join the company on her own-victim may be below that 17 years-if separated-unborn child shall ultimately be sufferer-when main prosecution witness not supporting prosecution's allegations-no better evidence could be to continue the further proceeding-held-amounts to abuse the process of Court-quashed.

Held: Para-29
The stand of the Prosecuting Agency that the victim was a few months below age of majority when she joined the company of the accused/petitioner No.2, and therefore offence has been committed, cannot be accepted if ground reality is taken into account. It has come on record that the prosecutrix is an expecting mother and is carrying a pregnancy of 31 weeks. Coupled with this fact is the statement of the prosecutrix wherein she has said that she was neither kidnapped nor abducted, rather has been living with petitioner No.2 as his wife. It is the prosecutrix who went in the company of the accused, willingly, knowingly, and rather than the accused taking the prosecutrix out of the custody of the lawful guardian; the victim herself had eloped with petitioner No.2. In the considered opinion of the Court, substantial justice cannot be sacrificed at the altar of technicality, as is being concluded by the Investigating Agency.

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

1. Shaheen Parveen and Mohd. Sarfaraj have approached this Court to seek a writ in the nature of CERTIORARI to quash First Information Report bearing Case Crime No.-121 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Madiyawan, District Lucknow (Annexure-1).

2. Case set up by the petitioners is that the petitioners having attained marriageable age got married. Marriage, however, is not being accepted by respondent No.4 who happens to be the mother of petitioner No.1. Under the circumstances, aggrieved by the fact that the petitioner No.1 got married of her own accord, impugned criminal proceedings have been initiated.

3. Short counter affidavit on behalf of the Prosecuting Agency has been filed today alongwith medical examination report of the victim/prosecutrix and also the statement of prosecutrix recorded under Section 164 Cr.P.C. on 8.5.2015, which is taken on record.

4. In the short counter affidavit, it has been stated that the prosecutrix/victim is carrying a pregnancy of 31 weeks (Annexure No.-SCA-2). In paragraph 4 of the affidavit, it has been admitted that the prosecutrix/victim did not support the prosecution case in her statement recorded under Section 164 Cr.P.C. (Annexure No.-SCA-3). The Investigating Agency, however, is concluding that offence has been committed, on the ground that at the point in time when the prosecutrix went in the company of petitioner no.-2, she was less than 18 years of age.

5. We have heard learned Counsel for the petitioners, Sri Deep Kamal, learned Counsel for respondent no.-4 and also the learned Counsel for the Prosecuting Agency.

6. Petitioner no.-2 is accused of committing an offence under Sections 363/366 of the Indian Penal Code.

7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any

person from lawful guardianship shall be punished in terms of sentence provided in the provision.

8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted reads as under:-

*"Whoever takes or entices any minor under *[sixteen] years of age if a male, or under **[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

Explanation: - The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception: - This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

9. Section 366 of the Indian Penal Code inheres that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with a sentence, as provided in the provision.

10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.

11. In the peculiar facts and circumstances of this case, theCourt has minutely examined the facts that have emerged on investigation of the case.

12. Documents placed collectively as Annexure SCA-2 indicate that the victim has been found to be above 18 years of age. The document further makes it evident that the victim is having pregnancy of 31 weeks gestation on 7.5.2015. The document also makes it clear that at the time of medical examination, the victim gave the history in the following words :

"The victim had gone last year with the boy and got married in February, 2014 staying with husband and at present, she is seven months pregnant."

13. Annexure SCA-3 is the statement of the victim recorded under Section 164 CrPC on 8.5.2015. When translated, statement reads as under :

"I on 10.2.2014, of my own free will, without coercion, left my house and went to Barabanki with Sarfaraj and stayed there for one week. On 18.2.2014, I got married to Sarfaraj in a Maszid in Sulemanpur, and also contracted a Court marriage. My marriage has been solemnized with Sarfaraj of my own free will. I want to live with him. I am eight months pregnant. Therefore, I want to go with my husband. My husband has fear of my family members."

14. The Investigating Agency is concluding that at the point in time when the victim left in the company of the accused, she was a few months less than 18 years, which is the relevant age mentioned in

Section 361 of the Indian Penal Code, above extracted. Clearly, the Investigating Agency is taking a hypertechnical view of the issue. The other relevant facts and circumstances of the case are being ignored.

15. The issue whether the victim was kidnapped or abducted is required to be examined in context of the statement of the prosecutrix recorded under Section 164 Cr.P.C.

16. If the statement of the prosecutrix, above noted, is taken into account, it becomes evident that ingredients of the offence under Sections 363/366 of the Indian Penal Code in regard to coercion, kidnapping or abduction allegedly committed by Sarfaraj, are not satisfied. The provisions of Section 363 of the Indian Penal Code are required to be considered in context of provisions of Section 361 of the Indian Penal Code. So as to satisfy the ingredients of Section 361 of the Indian Penal Code, it has to be established by the prosecuting agency that the accused/sarfaraj took or enticed the prosecutrix out of the keeping of the lawful guardian of the prosecutrix, without the consent of the guardian/respondent no. 4. In the case in hand, it is the case of the prosecutrix herself that she of her free will went with Sarfaraj, lived with him, wants to live with him and is expecting his child. Element of coercion and enticement by Sarfaraj is absent, although consent of the guardian had not been taken.

17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/ defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

19. The facts that have emerged from the record make it evident that the impugned criminal proceedings have been initiated because mother of the Prosecutrix/victim (respondent no.-4) has not accepted the marriage of her daughter with petitioner No.2.

20. In case, despite the evidence that has come on record, as noted above, proceedings are not quashed, petitioner no.-2 would be required to face criminal charges and undergo the agony of a trial.

21. We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial

life of petitioner No.1/the alleged victim would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).

26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got

married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.

27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise of trial is going to be in futility, as observed hereinabove.

28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.

29. The stand of the Prosecuting Agency that the victim was a few months below age of majority when she joined the company of the accused/petitioner No.2, and therefore offence has been committed, cannot be accepted if ground reality is taken into account. It has come on record that the prosecutrix is an expecting mother and is carrying a pregnancy of 31 weeks. Coupled with this fact is the statement of the prosecutrix wherein she has said that she was neither kidnapped nor abducted, rather has been living with petitioner No.2 as his wife. It is the prosecutrix who went in the company of the accused, willingly, knowingly, and rather than the accused taking the prosecutrix out of the custody of the lawful guardian; the victim herself had eloped with petitioner No.2. In the considered opinion of the Court, substantial justice cannot be sacrificed at the altar of technicality, as is being concluded by the Investigating Agency.

30. In view of above, petitioner No.2 cannot be said to have committed offence either under Section 363 I.P.C. read with Section 361 I.P.C. or under Section 366 I.P.C.

31. In the above noted facts and circumstances, we are of the view that ends of justice would be served if the petition is allowed.

32. The writ petition is allowed. Accordingly, First Information Report lodged as Case Crime No.-121 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Madiyawan, District Lucknow and all consequent proceedings are hereby quashed.

33. Let a copy of this order be forwarded to Senior Superintendent of Police, Lucknow.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.07.2015

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

W.P. No. 4019 of 2015 (M/S)

Swapnil Verma & Anr. ...Petitioners
Versus
Principal Judge, Family Court, Lucknow ...Opp. Party

Counsel for the Petitioners:
Ashish Bhatt , Anil Sharma and Desh Mitra Anand

Counsel for the Opp. Party:

Hindu Marriage Act, 1956-Section-13(B)- petitioner-seeking -exemption from statutory period divorce petition on mutual consent-Family Judge refused to pass any order on merit ignoring statutory period-neither the Family Judge nor High Curt can issue such direction-held-order passed by Family Judge-justified.

Held: Para-15
It is clear from the judgments of the Supreme Court reproduced herein above that in curtailing the statutory period of six months and granting a decree of divorce by mutual consent, the Supreme Court has exercised power under Article 142 of the Constitution of India. This power is not available to any other Court in the land, including this Court. In Anil Kumar Jain v. Maya Jain (supra), the Supreme Court has clearly held, in no uncertain terms, that the doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution of India. Neither can the High Court, nor the Civil Court, can pass orders before the period prescribed under the relevant provisions of the Act, or on grounds not provided for in Section 13 and 13-B of the statute. This principle of law has been reiterated by the Supreme Court in Manish Goel v. Rohini Goel (supra).

Case Law discussed:
1995 Supp. (4) SCC 411; AIR 1999 Andhra Pradesh 91; AIR 2005 Madhya Pradesh 106; AIR 2005 Delhi 365; (2009) 10 SCC 415; (2010) 4 SCC 393

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

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

2. According to the petitioners, their marriage was solemnized on 17.6.2010 as per Hindu rites and rituals at Madhuban Marriage Hall Mohan Road, Lucknow and after marriage, they lived together for sometime and from the wedlock, a baby, namely, Aaradhya, was born, who is at present 5 years old. In the year 2012, due to some quarrel, petitioner No.2-Anjali Verma lodged an FIR against the petitioner No.1.-Swapnil Verma, which was registered as Case Crime No. 302/12 under Sections 498 IPC and 3/4 of the Dowry Prohibition Act at police station Sikanderpur district Ballia and since then, petitioners are living separately.

3. It has been stated by the petitioners that since they did not cohabitated so long and further it is impossible for them to live together, therefore, they decided to enter into compromise to take divorce by mutual consent and filed a petition before the competent court. In these backgrounds, on 2.7.2015, petitioners have filed a suit for mutual divorce under Section 13 (B) of the Hindu Marriage Act, 1955 before the Principal Judge, Family Court, Lucknow,

which was registered as Suit No. 1553 of 2012 but the opposite party-Principal Judge, Family Court, Lucknow, has fixed the suit for 3.1.2016. Therefore, the petitioner is constrained to approach this court by filing the present writ petition, seeking a writ in the nature of mandamus directing the opposite party to conclude the suit No. 1553 of 2012 for mutual divorce filed under Section 13 (B) of Hindu Marriage Act, 1955 : Swapnil Verma and Anjali Verma, expeditiously.

4. Submission of the learned counsel for the petitioners is that there is no chance of conciliation between the petitioners and as such, it will be justified to issue decree of divorce expeditiously preferably in case of similarly aged persons like petitioners but the opposite party has fixed the suit in the month of January, 2016. His submission is that since the relationship of the petitioners are not recoverable, therefore, a decree of mutual divorce ought to have been passed by the opposite party on waiving off the statutory period as provided under Section 13 (B) of the Act but the opposite party has fixed the suit for hearing on 3.1.2016.

5. To strengthen his arguments, learned counsel for the petitioner has placed reliance upon the cases reported in 1995 Supp. (4) SCC 411 : Payal Jindal (Mrs) Vs. A.K. Jindal; AIR 1999 Andhra Pradesh 91 : In Re: Grandhi Venkata Chitti Abbai and another; AIR 2005 Madhya Pradesh 106 : Dineshkumar Shukla Vs. Smt. Neeta; AIR 2005 Delhi 365 : Ms. Anita Sharma and another Vs. Nil

6. I have heard learned counsel for the petitioner and perused the record.

7. A short point for decision in this writ petition is whether this Court under Article 227 of the Constitution of India has power to direct the Principal Judge, Family Court, Lucknow to decide Suit No. 1553 of 2012, which has been filed by the petitioners for mutual divorce under Section 13 (B) of the Hindu Marriage Act, by waiving off the statutory period as provided under Section 13 (B) of the Act.

8. At this juncture, reference may be made to the provisions of Section 13B of the Act and the same is reproduced hereinbelow :

"13B. Divorce by mutual consent. -

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in Sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the

marriage to be dissolved with effect from the date of the decree."

9. A bare perusal of the provisions of the aforesaid section makes it clear that sub-section (1) of section 13B is the enabling section for presenting a petition for dissolution of a marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties should be living separately for a period of one year or more and that they have not been able to live together. Sub-section (2) of Section 13B, however, provides the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the Court. From further perusal of the aforesaid provision of the Act, it also comes out that on a motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in Sub-section (1) and not later than 18 months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

10. From the analysis of the Section 13-B, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both.

11. In Anil Kumar Jain v. Maya Jain, reported in (2009)10 SCC 415, the Supreme Court has held that it has power under Article 142 of the Constitution of India to convert proceedings under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and grant a decree for mutual divorce without waiting for the statutory period of six months, by applying the doctrine of irretrievable break-down of marriage. However, the Apex Court has categorically held, in no uncertain terms, that except for the Supreme Court, no High Court or Civil Court has the power to grant relief by invoking the doctrine of irretrievable break-down of marriage. This is what the Supreme Court has held:

"28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955,

for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties."

(emphasis supplied)

12. The above principles of law are reiterated by the Supreme Court in Manish Goel v. Rohini Goel, reported in (2010) 4 SCC 393, in the following terms:

"12. In Anjana Kishore v. Puneet Kishore, this Court while allowing a transfer petition directed the Court concerned to decide the case of divorce by mutual consent, ignoring the statutory requirement of moving the motion after expiry of the period of six months under Section 13-B(2) of the Act. In Anil Kumar Jain, this Court held that an order of waiving the statutory requirements can be passed only by this Court in exercise of its powers under Article 142 of the Constitution. The said power is not vested with any other court.

13. However, we have also noticed various judgments of this Court taking a contrary view to the effect that in case the legal ground for grant of divorce is missing, exercising such power tantamounts to legislation and thus transgression of the powers of the legislature, which is not permissible in law (vide Chetan Dass v. Kamla Devi and Vishnu Dutt Sharma v. Manju Sharma).

14. Generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla, State of U.P. v. Harish Chandra, Union of India v. Kirloskar Pneumatic, University of Allahabad v. Dr. Anand Prakash Mishra

and Karnataka SRTS v. Ashrafulla Khan)."

13. The ratio of the judgments in Anil Kumar Jain v. Maya Jain (supra) and Manish Goel v. Rohini Goel (supra), is that the order of waiving the statutory requirements can only be passed by the Supreme Court in exercise of its power under Article 142 of the Constitution of India and that such power is not vested in any other Court.

14. In the background of the above legal position propounded by the Supreme Court, I may now advert to the grounds pleaded by the petitioners, in support of their prayers to curtail the statutory period of six months under Section 13-B(2) of the Act, and to direct that the petition for divorce by mutual consent be disposed of, expeditiously. It has been averred in the petition, and submitted by learned counsel for the petitioners that the parties have not been cohabiting with each other or performing their marital obligations since the year 2012. As the marriage has broken down irretrievably and both the petitioners have mutually agreed that it be dissolved, the waiting period of six months ought to be curtailed. In this regard, reliance has been placed upon the judgments of the Supreme Court and this Court, quoted hereinabove.

15. It is clear from the judgments of the Supreme Court reproduced herein above that in curtailing the statutory period of six months and granting a decree of divorce by mutual consent, the Supreme Court has exercised power under Article 142 of the Constitution of India. This power is not available to any other Court in the land, including this Court. In Anil Kumar Jain v. Maya Jain (supra), the Supreme Court has clearly held, in no uncertain terms, that the doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution of India. Neither can the High Court, nor the Civil Court, can pass orders before the period prescribed under the relevant provisions of the Act, or on grounds not provided for in Section 13 and 13-B of the statute. This principle of law has been reiterated by the Supreme Court in Manish Goel v. Rohini Goel (supra).

16. For the reasons aforesaid, I am of the considered view that the grievance of the petitioners for truncating the statutory waiting period of six months envisaged under Section 13-B(2) of the Act, for the reason that their marriage has broken down irretrievably, is, therefore, not within the scope of adjudication of this Court, considering that such power can be exercised only by the Apex Court under Article 142 of the Constitution of India.

17. So far as the judgments, which have been relied upon by the learned counsel for the petitioners, the same are of no avail to the petitioners in the facts and circumstances of the present case.

18. The writ petition is, therefore, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2015

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Misc. Single No. 4174 of 2015

Smt. Umman Bibi ...Petitioner
Versus
Board of Revenue U.P.Lucknow & Ors.
...Respondents

Counsel for the Petitioner:
Rakesh Kumar Srivastava, Atul Dixit

Counsel for the Respondents:
C.S.C., Yogesh Singh

U.P. Land Revenue Act, Section-219 (2) with Act no. 20 of 1997-Maintainability of Second Revision-first revision filed before commissioner-during pendency of first revision-against same order second revision filed before Board of Revenue-first revision before commissioner stood dismissed as withdrawn-before admission of Second Revision-argument that when in second revision dated fixed for admission-pending first revision before commissioner was withdrawn-held-when amended provision put bar of second revision-withdrawl without liberty to file fresh-larger Bench of Board rightly-held not maintainable-petition dismissed.

Held: Para-14
It is immaterial whether the second revision preferred by the petitioner had come up for admission on 21.2.2015 i.e., at the time when the first revision was already dismissed as withdrawn. Since no liberty was sought or given while withdrawing the first revision, as such, I am of the considered opinion that the second revision preferred by the petitioner was not maintainable. The larger Bench of the Board of Revenue by the impugned judgment and order has rightly come to conclusion that the second revision by the petitioner before Board of Revenue was not maintainable. The larger Bench was also right in dismissing the revision preferred by the petitioner as there was no question of remanding or sending the matter back to the authority who had made the reference to the larger Bench, once the larger Bench of the Board of Revenue had come to conclusion that the second revision was not maintainable.

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Notice on behalf of opposite parties no.1 to 3 has been accepted by learned Chief Standing Counsel, whereas notice on behalf of opposite parties no. 4 and 5 has been accepted by Mr. Yogesh Singh, Advocate.

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

3. Since a trivial question is involved in this writ petition, as such, with the consent of parties' counsel the writ petition is being decided finally at the admission stage.

4. The instant writ petition has been filed challenging the judgment and order dated 29.06.2015 passed on reference by larger Bench of the Board of Revenue in Revision No.89/L.R./2015/District Ambedkar Nagar.

5. As per given facts of the case, the Tehsildar, Akbarpur, District Ambedkar Nagar vide order dated 12.05.2014 had decided the mutation proceedings under Section 34 of U.P. Land Revenue Act by holding that the petitioner is not the second wife of late Abrar Husain. The orders were passed in favour of opposite parties no.4 and 5. The appeal preferred by the petitioner under Section 210 of Land Revenue Act was dismissed by Sub Divisional Officer vide judgment and order dated 29.12.2014. It was thereafter that the petitioner had preferred revision under Section 219 Land Revenue Act initially before the Commissioner, Faizabad Division, Faizabad on 6.1.2015

(for convenience it is mentioned as 'first revision'). An application for withdrawal was moved on 29.1.2015. The said application was allowed and the revision was dismissed as not pressed vide order dated 29.1.2015.

6. The petitioner had preferred another revision under Section 219 of Land Revenue Act before the Board of Revenue, Lucknow on 12.1.2015 (for convenience it is mentioned as 'second revision'). The second revision, on being filed, was directed to be listed for admission on 21.2.2015. The opposite parties no.4 and 5 had raised objections before the Board of Revenue regarding maintainability of second revision on the ground that it is barred under Section 219 (2) of Land Revenue Act. The learned Member of Board of Revenue vide order dated 21.2.2015 had referred the matter to the larger Bench for authoritative decision as he had observed that there were conflicting judgments on the issue. It was thereafter that the larger Bench of the Board of Revenue had considered the issue in question and by the impugned order has come to conclusion that in the given facts and circumstances the second revision preferred by the petitioner was not maintainable and has accordingly dismissed the second revision.

7. Learned counsel for the petitioner submits that the judgment and order passed by the larger Bench of Board of Revenue is patently wrong and illegal. It is submitted that amendment in Section 219 of Land Revenue Act was enacted vide U.P. Act No.20 of 1997 with effect from 18th August, 1997. As per the amended Section 219, sub Section (2) of Land Revenue Act, which is relevant for the controversy involved in the present petition, if an application under this section has been moved by any person either to the Board, or to the Commissioner, or to the Additional Commissioner, or to the Collector or to the Record Officer or to the Settlement Officer, no further application by the same person shall be entertained by any other of them.

8. The submission is that the first revision preferred by the petitioner before the Commissioner Faizabad Division, Faizabad was withdrawn as not pressed even before the second revision was considered for admission by the Board of Revenue, as such, it cannot be said that the revision preferred by the petitioner before the Board of Revenue was not maintainable. It is submitted that the language of Sub-Section (2) of Land Revenue Act clearly provides that "no further application by same person shall be entertained by any other of them". Emphasis is that at the time of entertainment i.e., the time when the case was considered by the Board of Revenue, it was to be seen whether any revision against the same impugned order was pending before any other authority or not. Since the petitioner had already got the first revision dismissed as withdrawn/not pressed at the time when the second revision was considered for admission by the Board of Revenue, as such, the bar imposed under Sectin 219 (2) of Land Revenue Act will not be attracted.

9. Mr. Mohd. Arif Khan, learned Senior Advocate assisted by Mr. Yogesh Singh, learned counsel for opposite parties no. 4 and 5, on the other hand submits that it is irrelevant as to when the second revision was considered for admission. The question is as to whether

the second revision preferred by the petitioner before the Board of Revenue was at all maintainable or not. It is submitted that Sub-Section (2) of Section 219 of Land Revenue Act clearly provides that no second application for revision can be moved by any person, in case he has already preferred a revision before the Board of Revenue or the Commissioner, or the Additional Commissioner, or the Collector or to the Record Officer or to the Settlement Officer, against the same order.

10. I have considered the submissions made by parties counsel and gone through the records.

11. The sole question involved in this writ petition is whether the revision preferred by the petitioner before the Board of Revenue could be treated as a second revision against the impugned order dated 12.5.2015 passed by Tehsildar and order dated 29.12.2014 passed by Sub Divisional Officer and whether the revision preferred by the petitioner before the Board of Revenue was maintainable when the petitioner had already withdrawn the earlier revision (first revision).

12. In order to decide the aforesaid question, it is relevant to first examine the relevant provision i.e., Section 219 of U.P. Land Revenue Act, 1901. For convenience Section 219 of U.P. Land Revenue Act reads as under:-

"[219. Revision.-(1) The Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer may call for the record of any case decided or proceeding held by any revenue Court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of the order passed or proceeding held and if such subordinate revenue Court appears to have-

(a) exercised a jurisdiction not vested in it by law, or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity,

the Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer, as the case may be, pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person either to the Board, or to the Commissioner, or to the Additional Commissioner, or the Collector or to the Record Officer or to the Settlement Officer, no further application by the same person shall be entertained by any other of them.]"

13. Before amendment in Section 219 of Land Revenue act the revision was first preferred before the Commissioner/Additional Commissioner, as the case may be, under Section 218 of Land Revenue Act and thereafter revision could be filed under Section 219 of Land Revenue Act. Vide U.P. Act No.20 of 1997 Section 218 has been omitted and Section 219 has been amended. Now second revision is barred. Under Sub-Section (2) of Section 219 of Land Revenue Act it has been specifically provided that if an application for revision has been moved by

any person either to the Board or to the Commissioner, or to the Additional Commissioner or to the Collector, or to the Record Officer, or to the Settlement Officer no further application by the same person shall be entertained by any other of them, meaning thereby that in case any person has preferred any revision under Section 219 of Land Revenue Act, he is not entitled to file any other revision against the same order before any other authority. It is the admitted case of the petitioner that against the order passed in appeal under Section 210 of Land Revenue Act dated 29.12.2014, he had first preferred a revision under Section 219 of Land Revenue Act before the Commissioner, Faizabad Division, Faizabad. This revision was preferred on 6.1.2015. During pendency of first revision, petitioner had preferred second revision against the same order before the Board of Revenue on 12.1.2015. It was thereafter that the petitioner had moved an application for withdrawal of first revision before the Commissioner, Faizabad Division, Faizabad on 29.1.2015 which was allowed and the first revision was dismissed as not pressed vide order dated 29.1.2015. The second revision preferred by the petitioner came up for admission on 21.2.2015. At that time an objection regarding maintainability of this revision was raised by the opposite parties. Learned Member of Board of Revenue considering the submissions had referred the matter to the larger Bench and it was thereafter that by the impugned order the larger Bench of Board of Revenue has held that the second revision preferred by the petitioner was not maintainable.

14. So far as the contention of learned counsel for the petitioner that the second revision preferred by the petitioner had come up for admission before the Board of Revenue on 21.2.2015 and at that time no revision was pending, as such, it cannot be treated to be a second revision and Board of Revenue has wrongly come to conclusion that it was not maintainable is concerned, suffice is to observe that the provision under Section 219 (2) of Land Revenue Act are very much clear. It is specifically provided that if an application for revision has been preferred before any of the authorities given, no further application by the same person shall be entertained, meaning thereby that once first revision was preferred by the petitioner which was dismissed as withdrawn without seeking any liberty to file revision again, the second revision was not maintainable. Even in the application for withdrawal the petitioner had not disclosed that he has preferred another revision before the Board of Revenue and do not want to pursue this revision. The application for withdrawal was filed simply on the ground that petitioner does not want to pursue the revision and it may be dismissed as withdrawn. The petitioner had not sought any liberty to file fresh revision, the first revision was, as such, dismissed as withdrawn without providing any liberty to file another revision. It is immaterial whether the second revision preferred by the petitioner had come up for admission on 21.2.2015 i.e., at the time when the first revision was already dismissed as withdrawn. Since no liberty was sought or given while withdrawing the first revision, as such, I am of the considered opinion that the second revision preferred by the petitioner was not maintainable. The larger Bench of the Board of Revenue by the impugned judgment and order has rightly come to conclusion that the second revision by the petitioner before Board of Revenue was not maintainable. The larger Bench was

also right in dismissing the revision preferred by the petitioner as there was no question of remanding or sending the matter back to the authority who had made the reference to the larger Bench, once the larger Bench of the Board of Revenue had come to conclusion that the second revision was not maintainable.

15. In view of above, the writ petition fails and is accordingly dismissed.

16. However, it is made clear that the petitioner would be at liberty to avail any legal remedy available to her in law. In case any such recourse is adopted, the matter may be considered and decided without being influenced by any observations made by this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2015

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

Writ-A No. 4436 of 2009

Awadh Bihari Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri J.P.N. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Pension benefits-petitioner working as collection peon-working continuously w.e.f. 01.06.1970 retired 31.07.02-claim of pension denied-on ground of seasonal working and not in temporary capacity-from original service record a work 'temporary' struck down and substituted by seasonal (Samayik)-held-keeping in view of Parsidh Narayan and Dhooma Ram case, as well working in particular pay scale with other benefits- as regular employee-as per G.O. 01.07.89 entitled for pension-necessary direction issued.

Held: Para-23
After careful consideration of the matter, I am of the view that for the reasons stated herein-above, the impugned order of the Sub-Divisional Magistrate dated 12.12.2008 is unsustainable and it needs to be set aside. Accordingly, it is set aside.

Case Law discussed:
2006 (1) ESC 611; 1989 ACJ 337; W.P. No. 26668 of 2002; W.P. No. 56632 of 2005; Special Appeal No. 743 of 2005; W.P. No. 4211 of 2008; Special Appeal No. 508 of 2008; Writ-A No. 42138 of 2007

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

1. The petitioner is a retired Collection Peon. He is presently 73 years old. He has preferred this writ petition seeking writ of certiorari for quashing of the impugned order dated 12.12.2008 passed by fourth respondent i.e. Up-Ziladhikari, Tehsil Sikanderpur, District Ballia, whereby the claim of the petitioner for the post retiral benefit including pension has been rejected on the ground that he was a Seasonal Collection Peon and not a Collection Peon (Temporary).

2. The petitioner claims that he was initially appointed on 01.06.1970 as a Collection Peon in District Ballia. He worked till the year 1981 with some artificial breaks. He was again appointed on 20.03.1982 as a Collection Peon (Temporary) on substantive post and worked till the date of his retirement i.e. 31 July 2002 uninterruptedly.

3. It is stated that the State Government on 01.07.1989 issued a Government Order providing therein that temporary employees, who have completed 10 years of regular service, are entitled to get all retiral benefits.

4. The association of the Collection Peons preferred Writ Petition No.11009 of 1998 for a direction upon the concerned authorities to regularize the services of the members of the association. The said writ petition was disposed of on 19 March 1998 by directing the respondents to consider the claim of the members of the association for regularization. In the meantime, the petitioner retired, reaching the age of superannuation on 31 July 2002. When the petitioner's representation for the post retiral benefit and pension was not considered by the competent authority, he preferred Writ Petition No.38974 of 2008 (Awadh Bihari Shukla v. State of U.P. & others). The said writ petition was disposed of on 5 August 2008 with a direction to the concerned authority to consider the grievance of the petitioner.

5. In compliance of the said order, the petitioner's claim has been rejected by the impugned order amongst other grounds that the petitioner was not a Collection Peon (Temporary) but he was a Seasonal Collection Peon, therefore, he is not entitled for the pension and other post retiral benefits.

6. It is averred by the petitioner that the impugned order has been passed by Up-Ziladhikari, who has no authority in the matter of the Seasonal Collection Peon as the appropriate authority is the District Magistrate.

7. The petitioner has averred in the writ petition that in the similar circumstances, one Prasidh Narain Upadhyay had filed Writ Petition No.53567 of 1997, which was allowed by this Court and a direction was issued to the authority concerned to make payment of the post retiral benefits to Prasidh Narain Upadhyay and the said order has been complied with. It is also averred in the writ petition that the respondents have treated the petitioner differently and he has been discriminated, inasmuch as in respect of two similarly placed persons, namely, Ram Nagina Pandey and Dhooma Singh Yadav, who were also Seasonal Collection Peons, they had also filed Writ Petition No.18230 of 2000, both persons retired in the year 2005. This Court vide order dated 28 April 2006 had issued direction to the District Magistrate to consider the grievance of the petitioners therein. The District Magistrate has granted the pension and other benefits. A copy of the order of the District Magistrate is on record as annexure-8 to the writ petition.

8. This Court had directed the Standing Counsel to produce the original record of the petitioner. In compliance thereof the original record has been produced.

9. A perusal of the service record of the petitioner, it is evident that in his service record, he has been shown as Temporary but such entry has been struck off by different ink without any initial and in place of Temporary the word Seasonal Collection Peon, i.e. Samyik Sangrah Chaprasi has been mentioned in one of the column. The word "Temporary" has been struck off and Samyik Sangrah Chaprasi has been transcribed.

10. Learned Standing Counsel was confronted with the aforesaid fabrication which has been made without any initial of competent authority. He has produced

the instructions which have been received from Up-Ziladhikari wherein it is mentioned that it was simply a human error. The instructions are taken on record.

11. Learned counsel for the petitioner has submitted that the petitioner was a Seasonal Collection Peon (Temporary) and in Prasidh Narain Upadhyay's case also, the similar attempt had been made that in the service record, it was mentioned that he was a Seasonal Collection Peon.

12. A Division Bench of this Court in the case of Board of Revenue & others v. Prasidh Narain Upadhyay, 2006 (1) ESC 611, has taken the view that if a temporary employee has worked for a long period whether he has been confirmed or not is immaterial, is entitled for pensionary benefits and the term "qualifying service", which is defined under Regulation 361 of Section 1 of Chapter XVI of the Civil Service Regulations, has been interpreted by the Court and it has been held that the temporary employee also is entitled for the retiral benefit which is available to every government servant. The Division Bench has relied on the earlier decision of this Court in the case of Dr. Hari Shankar Ashopa v. State of U.P. & others, 1989 ACJ 337.

13. Learned counsel for the petitioner has also relied on the following judgments:

(i) Writ Petition No.26668 of 2002 (Kedar Ram v. State of U.P. & others)

(ii) Writ Petition No.56632 of 2005 (Karuna Nidhan Rai v. State of U.P. & others)

(iii) Special Appeal No.743 of 2005 (Board of Revenue & others v. Prasidh Narain Upadhay)

(iv) Writ Petition No.4211 of 2008 (Girja Prasad v. State of U.P. & others)

(v) Special Appeal No.(508) of 2008 (State of U.P. v. Panmati Devi & another)

(vi) Writ-A No.42138 of 2007 (Surya Dev Gond v. State of U.P. & others).

14. Learned Standing Counsel submits that Rule 5 of the Uttar Pradesh Collection Peon's Service Rules, 2004 deals with the mode of recruitment, which provides that fifty per cent collection peons shall be appointed by direct recruitment through the Selection Committee and remaining fifty per cent posts shall be filled through the Selection Committee from amongst such Seasonal Collection Peons who have worked satisfactorily for at least four Fasals and whose age on the first day of July of the year in which selection is made does exiceed 45 years. It is further submitted by learned Standing Counsel that since the petitioner has not been engaged in terms of the Rule 5, he is not entitled for the pension.

15. In rejoinder, learned counsel for the petitioner submits that Rule 5 would have applicable in the case of the petitioner as the Uttar Pradesh Peon's Regularization Rules, 2005 was not applicable to the petitioner, who stood retired in the year 2002 and these rules are prospective in operation.

16. I have considered the rival submission of the learned counsel for the parties and perused the record.

17. Indisputably, the petitioner was working since the year 1997 with some breaks and retired in 2002.

18. The service record of the petitioner produced by learned Standing Counsel indicates that the petitioner has been given all the benefits of regular employee such as regular pay-scale, increments and other benefits. He was given the pay-scale of Rs.750-940 by the order of the District Magistrate from 01.01.1993 and regular increment was sanctioned to him by the order of the District Magistrate from 01.01.1993 onwards annually. All these orders of the District Magistrate has been duly counter-signed by the Tehsildar in the service record.

19. From the facts in the case of Prasidh Narain Upadhyay (supra), which has been followed in Girja Prasad (supra), it is evident that in those cases, the petitioners therein had been working as Seasonal Collection Peon on temporary basis on substantive post.

20. Learned Standing Counsel has failed to satisfy the Court that in the case of Dhooma Singh Yadav and Ram Nagina Pandey, the District Magistrate has not passed the order for the payment of pension following the judgment passed in Prasidh Narain Upadhyay's case. Thus, there is no justifiable reason for discriminating the petitioner with the petitioners in the aforesaid cases as they were also similarly placed persons.

21. Learned Standing Counsel has also failed to satisfy the Court that in the case of Dhooma Singh Yadav, who was also Seasonal Collection Peon, the District Magistrate has passed the order whereias in the case of the petitioner the Sub-Divisional Magistrate has passed the order.

22. It is stated at the bar that against the judgment in Prasidh Narain Upadhyay (supra) a special leave petition was filed, which was dismissed by the Supreme Court. It is also stated that against the orders of the learned Single Judge in the case of Girja Prasad v. State of U.P. & others (supra) and Kedar Ram v. State of U.P. & others (supra), special appeal has been filed but no interim order has been granted therein.

23. After careful consideration of the matter, I am of the view that for the reasons stated herein-above, the impugned order of the Sub-Divisional Magistrate dated 12.12.2008 is unsustainable and it needs to be set aside. Accordingly, it is set aside.

24. The matter is remitted to the District Magistrate to pass a fresh order in the light of the observations made herein-above and in the case of Board of Revenue & others v. Prasidh Narain Upadhyay (supra), the District Magistrate shall also bear in mind that he has passed the orders in similar matter in the cases of Dhooma Singh Yadav & Ram Nagina Pandey which is annexure-8 to the writ petition. The aforesaid exercise shall be completed by the District Magistrate expeditiously within two months from the date of the communication of the order. He shall pay regard to the fact that the petitioner is 73 years old person.

25. From a perusal of the service record, it is evident that officer concerned who has made the correction, there is no initial. The Sub-Divisional Magistrate in his instructions has tried to explain it as a human error, it appears that Sub-Divisional Magistrate is not aware about the meaning of the word. He has not disclosed that who has made the correction in the service record.

26. I find sufficient force in the submission of learned counsel for the

petitioner that it is a serious fabrication in the public record, accordingly, the District Magistrate may hold an enquiry about the said fabrication and direct to file an F.I.R. against the person who is found guilty in the enquiry. However, the District Magistrate shall pass the order in respect of the petitioner's pension at the first stage and will not hold the order on the ground that the enquiry is pending.

27. The service record and original record is returned to the learned Standing Counsel.

28. The writ petition is allowed.

29. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.06.2015

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

Misc. Single No. 5520 of 2008

Laloo Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Pawan Kumar Trivedi, Ajay Mishra, Ayodhya Prasad Singh, Manoj Kumar Singh, Piyush Kr. Singh

Counsel for the Respondent:
C.S.C., Suresh Tiwari

Constitution of India, Art.-226-Cancellation of fair price shop-without supplying copy of enquiry report-on the complaint-without personal hearing-entails civil consequences-principle of Natural Justice- violated-order suffer from legal infirmity-not sustainable-quashed.

Held: Para-16

Thus from the series of decisions, referred to hereinabove, it clearly comes out that the preliminary enquiry report, inspection report or complaint or any other document which is utilized by the authority while cancelling the licence of a fair price shop licence, same has to be supplied to the licence holder and personal hearing is also to be afforded otherwise the proceedings would be in blatant disregard of the principles of natural justice. Here in the present case, it is not the case of the opposite parties that copy of the report submitted by the Nayab Tehsildar was supplied to the petitioner but he failed to submit his version. Needless to say, once again, that every order which entails civil consequences, must be in consonance with the principles of natural justice. The petitioner raised a plea of violation of principles justice before the appellate authority too but the same was not dealt with in a just and proper manner by the appellate authority causing serious prejudice to the petitioner. Therefore, not only the order of cancellation but also the order of appellate authority suffers from legal infirmities and cannot be sustained. It may be clarified that counsel for petitioner has attacked the impugned order on various other grounds, but as the order is faulty being in blatant disregard of the principles of natural justice, I refrain my self from dealing other grounds.

Case Law discussed:
(1993) 3 SCC 259; (1998) 7 SCC 66; 2001 (19) LCD 513; 2006 (24) LCD 1521; 2008 (16) LCD 891; [2011 (29) LCD 626].

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

1. Petitioner, who is a fair price shop licensee of fair price shop situated in village panchayat Itahuva, Bloc Kaiserganj, District Bahraich, aggrieved by the order of cancellation of fair price

shop license dated 16.07.2007 passed by Sub Divisional Officer, Kaiserganj, District Bahraich, preffed an appeal before the Commissioner, Devi Patan Mandal Gonda. The appeal No. 268/323 so preferred by the petitioner was rejected vide order dated 27.08.2008 passed by the Commissioner.

2. The aforesaid both the orders are under challenge in the present writ petition.

3. The main ground of attack of the petitioner's counsel is that the order of cancellation of fair price shop license was cancelled by the Sub Divisional Officer, Kaiserganj, without issuing any show cause notice or associating the petitioner in any manner in the enquiry. As would be evident from the perusal of the said impugned order dated 16.07.2007 that some enquiry was conducted by the Naib Tehsildar and on the basis of said enquiry, the Sub Divisional Officer passed the impugned order. No where in the said impugned order it has been mentioned that Naib Tehsildar while conducting enquiry has recorded the statement of the petitioner or issued any notice to him for putting his version.

4. Learned counsel for petitioner has contended that the Sub Divisional Officer, Kaiserganj, District Bahraich has committed manifest error in law by cancelling the license of fair price shop of the petitioner vide order dated 16.07.2007 without providing opportunity of hearing to the petitioner, as such, the impugned order has been passed in gross violation of principles of natural justice.

5. It has further been contended by the learned counsel for petitioner that the aforesaid plea of non-affording of opportunity and the order of cancellation being ex-parte was specifically raised before the appellate authority i.e. the Commissioner, Devi Patan Mandal, Gonda but the appellate authority rejected the appeal in a cursory manner without dealing with the pleas raised by the petitioner. Therefore, the appellate order is also bad in law and cannot be sustained.

6. On the other hand, learned standing counsel while defending the aforesaid two orders, submitted that the order of cancellation was passed by the Sub Divisional Officer, Kaiserganj, on the basis of report submitted by the Naib Tehsildar. It has also brought to the notice of the Court that the petitioner who was the licensee of the fair price shop, had suffered paralytic attack and was taking assistance of his son for running the shop. It has also been mentioned in the counter affidavit that the petitioner has committed irregularities in distribution of scheduled commodities.

7. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than

decision in a quasi-judicial enquiry. [emphasis supplied]

8. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statue or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil rights" but of civil liberties, material deprivations and non-pecuniary damages in its wide umbrella comes everything that affects a citizen in his civil life.

9. In D.K. Yadav Vs. J.M.A. Industries; (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under: -

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive."

10. In National Building Construction Corporation v. S. Raghunathan; (1998) 7 SCC 66, the Apex Court in unequivocal words that a person is entitled to judicial review, if he is able to show that the decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

11. In M/s Mahatma Gandhi Upbhokta Sahkari Samiti vs. State of U.P. and others 2001(19)LCD 513 the controversy involved was that the order of cancellation was passed on the basis of inquiry conducted by Sub Divisional Magistrate but the copy of the inquiry report on which reliance was placed, was not furnished to the petitioner. A Division Bench of this Court held that when report of inquiry has been relied upon, that report has to be furnished to the person, who is affected by the same.

12. The said legal position has been reiterated and followed in a number of decisions rendered by this Court. In the case of Dori Lal vs. State of U.P. and others 2006(24)LCD 1521, it has been held that the order cancelling the licence passed without the petitioner being provided the copy of the resolution of the

village Panchayat as well as the enquiry report, if any, and without being afforded opportunity of submitting explanation and hearing, amounts to gross violation of principle of natural justice and hence the order is liable to be quashed.

13. In Rajpal Singh vs. State of U.P. and others 2008(16) LCD 891, it has been held by this Court that non-furnishing of the inspection report of the Supply Inspector, which was relied upon for cancellation of the licence, amounts to violation of principle of natural justice, hence, the order of cancellation as well as the appellate order was not sustainable in the eyes of law.

14. Recently, a co-ordinate bench of this Court in Sita Devi vs. Commissioner, Lucknow & others [2011(29) LCD 626] held that the action of the authority in passing the order of cancellation without supplying the copy of the preliminary enquiry report while proving the charges against the petitioner on the basis of said enquiry report is hit by the grave legal infirmity and whole action of the authority is in great disregard of the principles of natural justice.

15. After peeping into the contentions of both the parties and the series of case laws, referred to above, I am of the considered opinion that the cancellation of a agreement/licence of a party is a serious business and cannot be taken lightly. In order to justify the action taken to cancel such an agreement/licence, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purposes including the principles of natural justice. The non-supply of a document utilized against the aggrieved person before the cancellation of his allotment of fair price shop licence/agreement offends the well-established principle that no person should be condemned unheard.

16. Thus from the series of decisions, referred to hereinabove, it clearly comes out that the preliminary enquiry report, inspection report or complaint or any other document which is utilized by the authority while cancelling the licence of a fair price shop licence, same has to be supplied to the licence holder and personal hearing is also to be afforded otherwise the proceedings would be in blatant disregard of the principles of natural justice. Here in the present case, it is not the case of the opposite parties that copy of the report submitted by the Nayab Tehsildar was supplied to the petitioner but he failed to submit his version. Needless to say, once again, that every order which entails civil consequences, must be in consonance with the principles of natural justice. The petitioner raised a plea of violation of principles justice before the appellate authority too but the same was not dealt with in a just and proper manner by the appellate authority causing serious prejudice to the petitioner. Therefore, not only the order of cancellation but also the order of appellate authority suffers from legal infirmities and cannot be sustained. It may be clarified that counsel for petitioner has attacked the impugned order on various other grounds, but as the order is faulty being in blatant disregard of the principles of natural justice, I refrain my self from dealing other grounds.

17. In view of the above, the impugned order dated 27.08.2008 passed

by the appellate authority and the order of cancellation of fair price shop license dated 16.07.2007 are hereby quashed. Needless to say that this order shall not preclude the competent authority from passing appropriate order in accordance with law.

18. The writ petition stands allowed in above terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.07.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
HON'BLE SHRI NARAYAN SHUKLA, J.

Misc. Bench No. 6051 of 2015

Prabuddha Nagrik Chetna Manch Gonda [PIL] ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Hari Ram Shukla

Counsel for the Respondents:
A.S.G., Manish Mathur

Representation of People Act, 1951-Section 33(7) Nomination of Candidate-validity of such provision-being contrary to Rule 101-ultravires-held-'No' embargo in contesting more than one constituency-but the candidate having largest vote-shall be declared.

Held: Para-8
Following the view which has already been expressed by the Division Bench with which we respectfully concur, we see no reason to entertain the challenge to Section 33 (7) which is lacking in substance.

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

1. The petition invoking the jurisdiction in public interest seeks two reliefs in regard to the law pertaining to elections to Parliament and the State legislature. The first relief is in respect of Rule 64 of the Conduct of Election Rules, 19611 under which a candidate to whom the largest number of valid votes have been given, is to be declared to be elected under Section 66 of the Representation of the People Act, 19512. The petitioner seeks a mandamus by this Court to refrain from giving effect to the expression "to whom the largest number of valid votes have been given".

2. The contention of the petitioner is that Sections 14 and 15 of the Act of 1951 contain no provision under which a candidate with the largest number of votes is to be declared to be elected. Section 14 provides for a notification of a general election to the House of the People. Sub-section (2) of Section 14 empowers the President by notification to call upon all Parliamentary constituencies to elect members in accordance with the provisions of the Act on such dates as may be recommended by the Election Commission. A similar provision is contained in Section 15 in relation to the State Legislative Assembly.

3. Rule 64 adopts the first past the post principle since a candidate with the largest number of valid votes is to be declared as elected. The petitioner has not challenged the constitutional validity of Rule 64. But, technicalities apart, there is no reasonable basis for this Court to come to the conclusion that the provision is ultra vires. The manner in which elections have to be held and results computed and declared is a matter of legislative policy. Rule 64 provides an acceptable mode for

declaration of results in a democracy by postulating that a candidate with the largest number of valid votes would be declared to be elected. This does not either infringe the provisions of the parent legislation or for that matter of the Constitution. Hence we see no substance in the challenge.

4. The petitioner has also challenged the validity of Section 33 (7) of the Act of 1951. Under clauses (a) and (b) of Section 33 (7), a person cannot be nominated as a candidate for an election for more than two constituencies at a general election to the House of the People or, as the case may be, the Legislative Assembly of the State.

5. Article 101 of the Constitution provides as follows:

"101. Vacation of seats.-- (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State, and if a person is chosen a member both of Parliament and of a House of the Legislature of a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament--

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the as may be, and his resignation is accepted by the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant:

Provided that in the case of any resignation referred to in sub clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Chairman or the Speaker, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

6. The constitutional validity of Section 33 (7) has been upheld by a Division Bench of this Court in Raja John Bunch vs. Union of India & others3 in a judgment delivered on 28 April 2014. The Division Bench observed as follows:

"Article 101 does not contain any prohibition or restriction on a person contesting an election or filing a nomination from more than one constituency. Clause (1) of Article 101 provides that a person shall not be a member of both the Houses of Parliament. Clause (2) of Article 101 provides that no person shall be a member of Parliament and of a House of the Legislature of a State. If such an eventuality occurs, then, upon the expiry of the period specified in the rules made by the President, the seat held in

Parliament would become vacant, unless the person has previously resigned his seat in the Legislature of the State.

Sub-clause (b) of Clause (3) of Article 101 allows a member of either House of Parliament to resign his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be. The seat becomes vacant upon the acceptance of the resignation by the Chairman or the Speaker.

Consequently, a plain reading of Article 101 would indicate that it does not place any restriction on the number of constituencies from which a person may file his/her nomination during the course of a general election. Such a restriction is imposed in sub-section (7) of Section 33 of the Representation of the People Act, 1951. There is nothing inconsistent between Article 101 and Section 33 (7). Under Section 70, if a person is elected to more than one seat in either House of Parliament or of the Legislature of a State, he has to resign from all but one of the seats within the prescribed time failing which all the seats shall become vacant.

The submission is that the provision by which a candidate may contest or file his nomination from more than one seat (subject to a maximum of two) results in a situation where the constituency would be unrepresented once the candidate resigns from the seat. This circumstance would not, in our view, render a provision unconstitutional. A seat may fall vacant for a variety of reasons including, amongst them, the disqualifications which are contained in Article 102 of the Constitution. The seat which falls vacant has to be filled up in accordance with law.

As a matter of fact, Article 101 (3) (b) contemplates that a seat would become vacant when the resignation of a member of either House of Parliament from his seat is accepted by the Chairman or the Speaker, as the case may be."

7. The Division Bench observed that the Election Commission of India in 2004 suggested amendments to the law to provide that a person cannot contest from more than one constituency at a time. However, the Division Bench noted that these are matters of legislative policy. The Division Bench held as follows:

"In a cases pertaining to the enactment of a particular law or policy, the Court would not be justified in issuing a writ of mandamus directing that the law should be amended. A mandamus to that effect cannot be issued by the High Court under Article 226 of the Constitution. No direction can be issued to a legislative body to enact a law or to amend an existing law. The alternate reliefs which have been sought in the petition are all basically matters of legislative policy. The Election Commission of India, which is vested with the authority under Article 324 of the Constitution of superintendence, direction and control over elections, has formulated its suggestions for electoral reforms. The matter must rest there, insofar as this Court is concerned. We find no reason to entertain the petition or to accept the submission that Section 33 (7) and Section 70 of the Representation of the People Act, 1951 are contrary to Article 101 of the Constitution. We also decline to entertain the other reliefs which have been pressed in the alternate."

8. Following the view which has already been expressed by the Division Bench with which we respectfully concur, we see no reason to entertain the challenge to Section 33 (7) which is lacking in substance.

9. For these reasons, there is no merit in the petition which is, accordingly, dismissed. There shall be no reason as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2015

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

Criminal Misc. Writ Petition No. 10792 of 2015

Smt. Rina Kumari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohit Pandey

Counsel for the Respondents:
A.G.A.

Constitution of India, Art.-226-Petitioner seeking transfer of investigation from Civil Police to CBCID-offence under Section 452, 376, 506 IPC read with Section 3 (i)Xii SC/ST-conduct of Police from stage of lodging FIR-even supporting the FIR version u/s 161 Cr.P.C.-submitting final report without statement of 164 Cr.P.C.-learned Magistrate while rejecting final report-passing structure against I.O.-considering conduct of I.O.-state government to transfer investigation to CBCID-petition allowed.

Held: Para-42, 43

42. We direct Chief Secretary, U.P. Government; Principal Secretary (Home), U.P. Government; and, Secretary (Appointment), U.P. Government to immediately look into the matter, take appropriate steps and finalize scheme(s) so as to make U.P. Police Force, a real law and order enforcing machinery which should appear to be working and bring confidence of people, back. It should also reflect upon the steps taken by aforesaid officials in respect of matters of non-registration of reports by police officials whenever information of occurrence of a cognizable offence is conveyed. The steps taken shall also show, how aforesaid officials have ensured compliance of directions given by this Court as well as Apex Court in Roop Ram Vs. State of U.P. (supra) and Lalita Kumari Vs. Government of U.P. (supra). In case of lapses on the part of concerned police officials, how steps would be taken to punish the guilty officials should also be a part of the scheme. They shall also submit a progress report, on expiry of six months from the date of delivery of this judgment, showing steps taken by them in this regard and the consequences thereof. They shall make inquiry and inform the Court about the officers who have disobeyed Court's order regarding registration of first information report so that separate proceeding of contempt may be drawn against them.

43. In the present case since conduct of Investigating Officer is suspicious and lacks independence and fairness, we direct the State Government to transfer inquiry to C.B.C.I.D., who shall proceed with investigation and complete the same within a period of three months.

Case Law discussed:
2009 (5)ADJ 707; 2014 (2) SCC 1; (1991) 4 SCC 406; (1980) 3 SCC 526; (1995) 3 SCC 757; (2004) 5 SCC 26.

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

1. This writ petition under Article 226 of the Constitution of India has been filed by Smt. Rina Kumari seeking a mandamus commanding respondent no. 2, i.e., Superintendent of Police, Rampur to transfer investigation of Case Crime no. 278-C/2014, under Sections 452, 376, 506 I.P.C. and 3(1)XII SC/ST Act, Police Station Milak, District Rampur from the present Investigating Officer, Dr. Tej Veer Singh, Circle Officer, Milak, Rampur to any other officer and to direct a fair investigation.

2. The facts, in brief, are that the petitioner fell victim to criminal act of

respondent no. 5, Bal Kishan son of Sohan Lal, who forcibly entered the house of petitioner on 06.05.2014 at about 6.00 pm, and, committed rape at knife point. When she raised alarm, respondent no. 5 ran away, assaulting petitioner. She went to police station but no report was registered, whereupon she had no option but to move application under Section 156(3) Cr.P.C. before the concerned Magistrate. Ultimately, under his order, the report was lodged on 10.06.2014 at 13.00 hours against respondent no. 5.

3. Petitioner's statement under Section 161 Cr.P.C. was recorded by Investigating Officer only on 07.08.2014 in which she confirmed the offence of rape committed by respondent no. 5 and fortified the information given in first information report. Her statement under Section 164 Cr.P.C. was recorded before Magistrate on 12.09.2014 where also she confirmed her allegations levelled against respondent no. 5. Despite that the Investigating Officer, on the basis of some affidavits of some persons, submitted a final report no. 17 of 2015 on 15.10.2014.

4. The petitioner filed protest petition after receiving notice on 23.02.2015. The Judicial Magistrate/ Additional Civil Judge (Junior Division), Court No. 1, Rampur heard the matter and making strictures against Investigating Officer, rejected final report. He directed for further investigation in the matter vide order dated 07.04.2015. Since thereafter, the Investigating Officer has not done anything in the matter, being in collusion with respondent no. 5 and, therefore, petitioner apprehend that present Investigating Officer is biased. He is not doing fair and partial inquiry therefore, it should be transferred to some other officer with a further direction to complete it expeditiously.

5. While entertaining above writ petition on 04.05.2015, this Court required the Investigating Officer to appear alongwith case diary to show progress and the kind of investigation he has done in the matter.

6. On 18.05.2015 Dr. Tej Veer Singh, Circle Officer, appeared before this Court. He filed an affidavit, sworn on the same date i.e. 18.05.2015 in which he stated that though the victim, i.e., petitioner and her sister-in-law (Nand), Mamta, both supported first information report, but some independent persons, namely, Brij Lal, Jageer Singh and Mukhtiyar Singh and five others stated that they have not heard any hue and cry and no such incident had taken place. There was a dispute with respect to land over which the alleged 'Gher' was constructed. The accused respondent no. 5 is the real brother of father-in-law of petitioner and was implicated in a false case. The Investigating Officer in para 20, 21 and 22 of his affidavit specifically said as under:

"20. That after doing investigation without being biased in a very fair manner the deponent was of the view that no such incident had taken place rather younger brother of Bal Kishan who is father in law of the informant has launched false prosecution to grab the property of his own brother.

21. That the accused Bal Kishan is 50 years old and has good reputation in the village and none of the independent witnesses have supported the version of the first information report.

22. That the deponent while concluding the investigation gave his specific opinion that from the investigation as done by him in the period of 04 months he could not find any reliable evidence against accused, Bal Kishan and the story as developed by the informant in the first information report is nothing but all tissue of lies and launched only with intention to harass and blackmail the accused for grabbing his property. The deponent after doing unbiased investigation prepared final report on 15.10.2014 while exonerating the accused, Bal Kishan."

7. He also made adverse comments over the order passed by Judicial Magistrate on 07.04.2015 declining to accept final report. In para 27 of the affidavit, the Investigating Officer said:

"27. That at this stage it will be not out of place to mention here that the order dated 07.04.2015 the Magistrate does not seem to have perused the case diary properly and has wrongly written that the statement under Section 164 Cr.P.C. was not copied in the case diary, although it is very well present in the Parcha no. 6 dated 12.09.2014."

8. He further said that on 17.04.2015 he himself has requested the Superintendent of Police, Rampur to assign further investigating to some other officer.

9. This Court enquired from Dr. Tej Veer Singh, Investigating Officer, as to why report was not lodged by police when the victim, i.e., petitioner went to lodge her report on the date of incident, particularly when matter relates to a serious offence under Section 376 IPC considering directions given by this Court in Roop Ram Vs. State of U.P. 2009(5) ADJ 707 and Apex Court in Lalita Kumari Vs. Government of U.P., 2014(2) SCC 1, but he could give no reply.

10. We also inquired from him, when the victim herself had supported her case in repeated statements given, either under Section 161 Cr.P.C. or 164 Cr.P.C., how he could say that there was no evidence whatsoever and only on the basis of some strangers statements, who had not seen any such incident for the reason that statement of persons who are not witnesses of any incident cannot prove that no such incident took place, particularly when there were two persons, namely, the victim as well as her sister-in-law who fortified first information report in their statements, but here also he could give no reply whatsoever.

11. We also could not understand as to why no attempt was made to have medical examination of victim on the date of incident when she had gone to police station to lodge first information report and what medical examination would reveal after several months of incident. The suggestion of Investigating Officer that victim was not cooperating, does not appear to be correct for the reason that in her statement given before Investigating Officer as well as in the Court under Section 164 Cr.P.C., she has reiterated the same facts as mentioned in report and there is no variation whatsoever. Even before this Court she has maintained her version.

12. Moreover, photocopy of case diary contains 10 parchas dated 10.06.2014, 11.06.2014, 13.06.2014, 04.08.2014, 07.08.2014, 12.09.2014,

23.09.2014, 12.10.2014, 14.10.2014 and 15.10.2014.

13. Parcha no. 7 dated 23.09.2014 shows that Investigating Officer received by post eight affidavits of Mukhtiyar Singh son of Sri Fauji Singh; Indrapal son of Sri Khem Karan; Brijlal son of Sri Mast Ram; Zorawar son of Sri Indraman; Tota Ram son of Sri Umrao; Jageer Singh son of Sri Nihal Singh; Ram Das son of Sri Sukhan; and, Bandu Ram son of Sri Munna Lal, which were almost in similar language and noted down in the said parcha. He also received a copy of sale deed, also noted down in the said parcha. The deponents of affidavits said to appear before Investigating Officer on 14.10.2014. Sri Mukhtiyar Singh, Indrapal, Brijlal, Zorawar, Tota Ram, Jageer Singh, Ram Das and Bandu Ram verified the facts stated in their affidavits, earlier sent by post.

14. The entire report, nowhere shows any attempt on the part of Investigating Officer to find out, who arranged those affidavits to be sent by post and what was the occasion therefor. When he recorded statement of accused after receiving said affidavits and having the statements of deponents of affidavits, who verified the same, what sanctity can be attributed to a statement in negative when affirmance was already there.

15. Since the matter is pending for further investigation, we are refraining ourselves from making such observations which may influence investigation and prejudice either of the parties but cannot desist from observing that Investigating Officer, Dr. Tejveer Singh has shown a complete negligence in an inquiry where serious allegation of offence of rape is involved. He has failed to show prudent and scientific investigation in the matter.

16. From very beginning he appears to have a particular mind set that accused, being elder brother of father-in-law of the victim, may not have committed such an offence; and there appears to be a property dispute. The Investigating Officer has proceeded as if he was deciding a civil dispute. He has completely ignored straight and relevant evidence available to him.

17. We reiterate our prima facie observations that the conduct of Investigating Officer, in the case in hand, is clearly partisan and inclined to protect the accused. The complainant-victim has been dealt with in a most illegal and discarded manner. This is from the very beginning, when she visited police station for lodging report but denied by police, compelling her to approach Magistrate under Section 156(3) Cr.P.C. and it is his order under which the report was lodged after more than a month of the date of incident.

18. In a case where heinous crime of rape is involved, an immediate and earliest investigation can provide crucial and relevant evidence which may wither away with passage of time. Unfortunately police herein has shown a conduct which has helped accused. This conduct apparently defy the directions of this Court as well as Apex Court whereunder they were under obligation to register a report and proceed for investigation without any further delay.

19. The second attempt is made by police by submitting final report in the matter which was rejected by Judicial Magistrate concerned, making aspersions against Investigating Officer. We are surprised to see

that Investigating Officer has the audacity of condemning order of Judicial Magistrate, in his affidavit filed before this Court, contending that Judicial Magistrate has omitted to consider some vital aspects while rejecting final report. This conduct of Investigating Officer is self speaking and manifests his commitment to help the accused by gong to any extent.

20. We are also surprised to see the way in which police officers are making investigation in matters involving heinous crime. We find virtually a complete apathy on their part. If something has/could happen on its own, one may thank to his luck but police would not be able to turn anything of its own efforts. It is like a woodcraft structure. Conduct of Investigating Officer prima facie shows his biased attitude towards accused.

21. This situation we find almost in every third case, coming before this Court. Probably it is this laxity on the part of police which is causing increase of crime rate, extremely, in State of U.P. Virtually every person in this State is afraid that anything may happen at any time anywhere. There is lack of confidence in law enforcing machinery. The law and order situation is very vulnerable.

22. Learned Additional Advocate General, present in the Court, at one point of time finds himself optionless but to concede about deteriorating condition of law and order in the State of U.P. and also failure on the part of Police, not only in prevention of crime but also detection/ investigation and prosecution. It reminds us a situation where a legal luminary in Apex Court (Hon'ble V.R. Krishna Iyer, J.) had to observe, "Who can police the Police".

23. Police Force is meant for protection of people. Its sole aim and purpose is to maintain law and order by preventing crime. If committed, to investigate out and book the guilty person, and get punished in accordance with law. There is no other agency in the State except 'Police' who has this statutory as well as constitutional obligation for protection of people.

24. Unfortunately, it is still living in colonial State of affairs when Police used to be deployed against public to crush their genuine demands. Police, at that time, reflected glorified image of ruling Colonial State. It treated inhabitants of country as slaves and that is why always tried, not to allow them to raise their voice, against ruling Empire. More than half a century back, India attained its independence. Still nothing has noticeably improved. Though we are now governed by Constitution, given by the people of India to itself so as to function, "for the people', "by the people', "of the people' but Police has not mend its ways.

25. Today people are frightened more with Police than criminals. There is virtually a lack of confidence with this Uniformed Force. Judicial cognizance can be taken of several heinous crimes, committed almost daily, many a times with the nexus of Politicians/Criminals/Police personnel making common and innocent people, target. Criminality on the part of Police is highly dangerous, being a double edged weapon. When they commit crime, they are themselves being investigating agency, naively cover up the matter. The Courts of law, ultimately and ordinarily, fail to punish guilty for want of proper evidence for which the agency is responsible.

26. In criminal prosecution, eyes and ear of courts of law, basically, is the

Prosecuting Agency. When agency itself is indulged in a cover up mission, it is almost impossible to bring guilty person to book and punish. Police officials have become so daredevil that they do not hesitate in committing day light, daring offences, and thereby to stick to it, may be for the reason that they are well equipped with the system of covering it up. The situation is really alarming and needs immediate remedial measures. The public dissatisfaction and distress cannot wait indefinitely if it is not attended now. It may be too late in the day. It may burst in a people's revolution, we are witnessing in some other parts of the world.

27. In Delhi Judicial Service Association Vs. State of Gujarat & Ors., (1991) 4 SCC 406 where brutal behaviour of police in arrest and assault of a Chief Judicial Magistrate of Nadiad was considered in contempt petition as well as writ petitions entertained directly, the Court observed:

"Aberrations of police officers and police excesses in dealing with the law and order situation have been the subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it.." (Para 39)

28. Hon'ble Krishna Ayer, J in Prem Shankar Shukla Vs. Delhi Administration, (1980) 3 SCC 526 observed:

"If today freedom of the forlorn person falls to the police somewhere, tomorrow the freedom of many may fall elsewhere with none to whimper unless the court process invigilates in time and polices the police before it is too late."

29. In a concurring judgment in Dhananjay Sharma Vs. State of Haryana & Ors. (1995) 3 SCC 757 Hon'ble Faizan Uddin, J in para 58 observed:

"58. It is in common knowledge that in recent times our administrative system is passing through a most practical phase, particularly, the policing system which is not as effective as it ought to be and unless some practical correctional steps and measures are taken without further delay, the danger looms large when the whole orderly society may be in jeopardy. It would, indeed, be a sad day if the general public starts entertaining an impression that the police force does not exist for the protection of society's benefits but it operates mainly for its own benefit and. once such an impression comes to prevail, it would lead to disastrous consequences." (emphasis added)

30. The Court took judicial notice in para 57 of the judgment that every morning, one opens newspapers and goes through its various columns, feels very much anguished and depressed, reading reports of custodial rapes, deaths, kidnapping, abduction, fake police encounters and all sorts of other offences and lawlessness by police personnel, of which countless glaring and concrete examples are not lacking.

31. In Daroga Singh & Ors. Vs. B.K. Pandey (2004) 5 SCC 26 the Court remarked object with which the Police Force was created and said that police is the executive force of State to which is entrusted the duty of maintaining law and order and of enforcing regulations for prevention and detection of crime. It is considered by society as an organised force of civil officers under the command of State, engaged in the preservation of law and order in society and maintaining peace by enforcement of laws and

prevention and detection of crime. One, who is entrusted with the task of maintaining discipline in society, must, first itself be disciplined. Police is an agency to which social control belongs. Therefore the Police has to come up to the expectations of society. Then the Court reminded itself, policing role, the country witnessed during British Raj, and, in para 44, said:

"44. We have not been able to forget the policing role of the police of British Raj wherein an attitude of hostility between the police and the policed under the colonial rule was understandable. It is unfortunate that in one of the largest constitutional democracies of the world the police has not been able to change its that trait of hostility."

32. We have no manner of doubt that Police Force constitutes real backbone of State's power to maintain law and order. But it would be possible only when agency works with real devotion and honesty to its constitutional and legal obligation, instead of satisfying its petty material demands. Come what may, still Police is Police. It can make wonders and miracles. No one has the capacity or courage to Police the Police. Harden criminals can be shown wholly innocent and innocent, honest and simple ones may be depicted a hardcore criminal. Irrespective of nature of crime committed and brought to its notice, still may not feel any anxiety to bring culprits to Courts with effective prosecution so as to ensure appropriate punishment to them. It may manage to set the State in a way that criminals may ensure their freedom by threatening victims etc. and making witnesses to loose their life and heart for supporting prosecution. The public at large has no control over it. State has to take care of this situation.

33. The real problem lies with officials responsible for investigation. It appears that they lack basic knowledge and technique. Everything proceeds in a casual fashion. Time and again, Courts have shown their disappointment with the ways, Police has worked out a case but it has made no impact upon Police Force. Unfortunately, observations and expectations of Courts have gone in vain. The Police Force have not mend its ways. Most of the matters do not come to the Court. When somebody dares to take up a matter to Court, only then the extent to which Police act ruthlessly and arbitrarily, is experienced by Courts also. The situation is really very grim and disappointing. It is high time when State should look into large spectrum of reforms to correct Police and policing in State, else things may render uncontrollable.

34. We find no hesitation and constrain to observe that the way in which police has proceeded in this matter, less say is better. Virtually there is no effective investigation whatsoever, till date. If this is the situation in a case where a girl has been subjected to a heinous crime of rape, what one can expect in other matters. It is now high time where the State Government and officials holding high position in Department of Home and other relevant ones, should wake up from slumber and take remedial corrective measures to make Police Force more effective, active and people oriented.

35. Besides above, there is another serious aspect on which the Police has shown virtually a contemptuous attitude to the Court.

36. This Court seriously deprecated general practice followed by police

officials in denying to register first information reports, despite information given regarding occurrence of a cognizable offence. This was noticed in Roop Ram Vs. State of U.P. (supra) and in paras 26, 27, 28, 29 and 30 of the judgment, Court said:

"26. However, this matter does not end here. It is true that for an orderly society, the importance of an effective and efficient police force dedicated to the public service is of utmost importance and is the necessity of the time. It is a matter of common knowledge that the people run from pillar to post after occurrence of a serious crime for mere registration of the report but the concerned police authorities failed to realise trauma and harassment of such people and simply ignore the observance of their statutory duty despite of the same being declared mandatory and is the law of the land settled by the Apex Court. Crime detection and adjudication are two separate though inseparable wings of justice delivery system. The former is the basic obligation of the police and latter is in the hands of judiciary. Though the Code provides for an alternative remedy of approaching the Superintendent of Police and thereafter to the Magistrate concerned under Section 156(3) but such remedy instead of providing any solace and relief to the harried lot, on the contrary is adding to their sufferance due to persistent lacklusture attitude of police compelling a common man to run from one authority to another for a simple cause of registration of an information constituting commission of a cognizable offence, so that the police may make investigation according to the procedure prescribed in the Code.

27. The subordinate courts are already heavily burdened with the huge number of such cases where the people having approached the police authorities in vain, then had approached the Magistrate concerned under Section 156(3). Even this Court is now being burdened for the only reason that the information has not been registered by the police under Section 154. What normally ought to have been an exception has turned out to be a routine exercise. A very large number of applications are being filed under Section 156(3) of the Code before the Magistrates concerned and consequential proceedings are coming frequently to this Court also. Huge time is consumed only in such matters though it could have been utilized for other matters of substance and that too only for the reason that the police has shown blatant slackness in observance of its statutory obligations. It appears that the police is conveniently omitting to remind itself that its fundamental and basic duty is to prevent occurrence of any crime and if it has already occurred, to investigate and detect the crime so as to bring the accused to justice. The first step in this regard is as soon as the information of a cognizable offence is received, it must register the same and thereafter to proceed to investigate the matter in accordance with law.

28. This Court also take judicial notice of the fact that the tendency developed with the police authorities in refusing to register F.I.R. is not for any valid reason, as said above, but perhaps for administrative reasons namely to show to the higher authorities improvement of law and order in the area within their jurisdiction on the ground that number of F.I.R. registration has got down drastically comparing to the corresponding past or in respect to the period when some other police officers were posted thereat. It appears that the State Government and the higher authorities of the police department, while assessing the performance of a police

Officer-in-charge of a police station, take into consideration whether F.I.R.'s have reduced comparing to the predecessor in office as a major factor to judge the position of law and order. The basic data taken into account by the State Government or the higher authorities of the police department is the number of F.I.R. of cognizable offence registered in the concerned police station. Probably this has led the tendency in the concerned police authorities to refuse recording of F.I.R. and thereby creating artificially good record showing reduction in crime rate due to lesser recording of F.I.R. It totally ignores the fact that due to non-registration of F.I.R. in a large number of cases, pertaining to cognizable offence, the people are compelled to approach the Magistrate by filing applications under Section 156(3) of the Code. This demonstrates that the declaration of law by the Apex Court as well as this Court that police is under a statutory obligation to register F.I.R. has gone down on blind eyes with the police authorities as well as the Government. The situation has not shown any improvement in the method of functioning of the police authorities in such matters despite of repeated observations by the Court.

29. The Court cannot overlook the fact that criminal justice system in the State is already over burdened. A large number of vacancies of judicial officers in subordinate courts are lying for one or the other reason. Mere inaction on the part of police authorities in observance of their statutory duty and/or faulty system of investigation is adding further to the already over burdened justice system. This has gone to an extent that the people who are arrested in the early younger age are still awaiting for their trial etc., though have attained advanced old age. In many of the matters, large number of accused have died but the Court proceedings could not have been completed and even not commenced in some of the cases. In many others the trial etc., suffers due to death of material witnesses due to prolonged time taken in the Courts. At this stage, it would be prudent to notice some of the observations/ directions of the Apex Court in Lalita Kumari v. Government of Uttar Pradesh and Ors. . Paras 4 and 5 the Apex Court held:

4. It is a matter of experience of one of us (B. N. Agrawal, J.), while acting as Judge of the Patna High Court, Chief Justice of the Orissa High Court and Judge of this Court that inspite of law laid down by this Court, the police authorities concerned do not register F.I.Rs. unless some direction is given by the Chief Judicial Magistrate or the High Court or this Court. Further, experience shows that even after orders are passed by the Courts concerned for registration of the case, the police does not take the necessary steps and when matters are brought to the notice of the inspecting Judges of the High Court during the course of inspection of the Courts and Superintendents of Police are taken to task, then only F.I. Rs. are registered. In a large number of cases investigations do not commence even after registration of F.I. Rs. and in a case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable dispatch. At times it has been found that when harsh orders are passed by the members of the judiciary in a State, the police becomes hostile to them, for instance, in Bihar when a bail petition filed by a police personnel, who was the accused was rejected by a member of the Bihar Superior Judicial Service, he was

assaulted in the court room for which contempt proceeding was initiated by the Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.

5. On the other hand, there are innumerable cases that where the complainant is a practical person, F.I. Rs. are registered immediately, copies thereof are made over to the complainant on the same day, investigation proceeds with supersonic jet speed, immediate steps are taken for apprehending the accused and recovery of the kidnapped persons and the properties which were the subject-matter of theft or dacoity. In the case before us allegations have been made that the Station House Officer of the police station concerned is pressurising the complainant to withdraw the complaint, which, if true, is a very disturbing state of affairs. We do not know, there may be innumerable such instances.

30. It is high time now that this Court must endeavour to find out some ways to make the police authority adhere to their statutory duties. The time perhaps has ripened when this Court in exercise of its inherent power must look into this disease in a more serious manner and find out ways by issuing appropriate directions to the concerned authorities, which may result in compelling the police authorities either to observe their statutory duties faithfully or to face consequences."

37. Having said so this Court issued certain directions in para 32, which read as under:

"(i) When a Police Officer-in-charge of the police station or any other Police Officer, acting under the direction of the Officer-in-charge of police station refuses to register an information disclosing a cognizable offence, the informant may either approach the Superintendent of Police under Section 154(3) or the Magistrate concerned under Section 156(3) of the Code ;

(ii) If the informant approaches the Superintendent of Police, who finds that the refusal of registration of F.I.R. by the Police Officer-in-charge of the police station was unjust or for reasons other than valid, and where he directs for investigation, he shall initiate disciplinary proceedings against the Officer-in-charge of the police station for such non-observance of statutory obligation treating the same to be a serious misconduct justifying a major penalty and complete the proceedings within three months from the date he passes an order for investigation into the matter ;

(iii) Where, the informant approaches the Magistrate concerned under Section 156(3) of the Code and the Magistrate ultimately finds that information discloses a cognizable offence and direct the police to proceed for investigation, he shall cause a copy of the order sent to Superintendent of Police/ Senior Superintendent of Police (hereinafter referred to as the S.P./S.S.P.) of the concerned district and such S.P./S.S.P. shall cause a disciplinary inquiry into the matter to find out the person guilty of such dereliction of duty, i.e., failure to discharge statutory obligation, i.e., registration of an information disclosing cognizable offence treating the said failure as a serious misconduct justifying major penalty and shall complete the disciplinary proceedings within three months from the date of receipt of the copy of the order from the concerned Magistrate. After completing the disciplinary proceedings, the S.P./S.S.P. concerned shall inform about the action taken against the

concerned police Officer-in-charge of the police station to the Magistrate concerned within 15 days from the date of action taken by him but not later than four months from the date of receipt of the copy of the order from the Magistrate concerned ;

(iv) The Magistrate concerned shall review the cases in which the copy of the orders passed under Section 156(3) of the Code has been sent to concerned S.P./S.S.P. quarterly and when it is found that the concerned S.P./S.S.P. has also failed to comply with the above directions of this Court, he shall sent a copy of his order alongwith the information about non-compliance of this Court's order/direction by the concerned S.P./S.S.P. to the Director General of Police, U. P., Lucknow and the Principal Secretary (Home), U. P., Lucknow who shall look into the matter and take appropriate action as directed above against the police Officer-in-charge of the police station concerned as well as the S.P./S.S.P. concerned for his inaction also into the matter within three months and communicate about the action within next one month to the Magistrate concerned. The Principal Secretary (Home), U. P., Lucknow and the Director General of Police, U. P., Lucknow shall also submit a report regarding number of the cases informed by the concerned Magistrate in a calendar year and also the action taken by them as directed above by the end of February of every year to the Registrar General of this Court ; and (v) Besides above, non-compliance of the above directions of this Court shall also be treated to be a deliberate defiance by the concerned authorities above mentioned constituting contempt of this Court and may be taken up before the Court concerned having jurisdiction in the matter, whenever it is brought to the notice of this Court."

38. The matter pending before Apex Court in Lalita Kumari Vs. Government of U.P. (supra) came to be disposed of finally vide judgment dated 12.11.2013. In para 111 of the judgment the Court said:

"111. In view of the aforesaid discussion, we hold:

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

39. The Apex Court also thus held that whenever information of a cognizable offence is given to a police officer registration of report is mandatory. Despite aforesaid authorities, in the present case, concerned police officials initially declined to register First Information Report of a cognizable offence under Section 376 I.P.C. which compelled the informant to approach Magistrate concerned under Section 156(3) Cr.P.C. and when Magistrate passed order, only then report was registered.

40. Despite repeated query, the officials of respondent-State, present in the Court, could not tell any reason as to why report was not registered by police when informant conveyed information regarding occurrence of a cognizable offence. This conduct of police officials of concerned police station is not only illegal but shows a blatant flagrant disobedience and non-compliance of directions of this Court as well as Apex Court, in the aforesaid decisions. To utter dismay of this Court, even superior field officers as well as departmental officers starting from Circle Officer upto Principal Secretary, Home, have not evolved any mechanism to ensure that Court's directions are not disobeyed by subordinate police officials and if there is such violation, appropriate action is taken by competent superior officers.

41. It appears that entire police department virtually has no respect to the orders of Courts and feel happy to function by way of total inaction, apathy to grievances of public at large and to the issues of law and order, heinous crime etc. This situation also demands immediate corrective as well as punitive measures, else the things may go beyond control.

42. We direct Chief Secretary, U.P. Government; Principal Secretary (Home), U.P. Government; and, Secretary (Appointment), U.P. Government to immediately look into the matter, take appropriate steps and finalize scheme(s) so as to make U.P. Police Force, a real law and order enforcing machinery which should appear to be working and bring confidence of people, back. It should also reflect upon the steps taken by aforesaid officials in respect of matters of non-registration of reports by police officials whenever information of occurrence of a

cognizable offence is conveyed. The steps taken shall also show, how aforesaid officials have ensured compliance of directions given by this Court as well as Apex Court in Roop Ram Vs. State of U.P. (supra) and Lalita Kumari Vs. Government of U.P. (supra). In case of lapses on the part of concerned police officials, how steps would be taken to punish the guilty officials should also be a part of the scheme. They shall also submit a progress report, on expiry of six months from the date of delivery of this judgment, showing steps taken by them in this regard and the consequences thereof. They shall make inquiry and inform the Court about the officers who have disobeyed Court's order regarding registration of first information report so that separate proceeding of contempt may be drawn against them.

43. In the present case since conduct of Investigating Officer is suspicious and lacks independence and fairness, we direct the State Government to transfer inquiry to C.B.C.I.D., who shall proceed with investigation and complete the same within a period of three months.

44. We dispose of the writ petition in the manner as aforesaid and with the direction as given hereinabove.

45. A copy of this order shall forthwith be furnished to Chief Secretary, U.P. Government; Principal Secretary (Home), U.P. Government; and, Secretary (Appointment), U.P. Government, for communication and compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2015

BEFORE
THE HON'BLE BAL KIRSHNA NARAYANA, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Civil Misc. Habeas Corpus W.P. No. 11547 of 2015

Shiv Kumar alias Mukhiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri I.K. Chaturvedi

Counsel for the Respondents:
A.G.A., A.S.G.I.(2015/0403), Sri Firoz Ahmad

Constitution of India, Art.-226-Habeas Corpus Petition-challenging detention order-passed by D. M-exercising power u/s 3(2) of N.S. Act-no pertinent of relevant material placed-complicity of petitioner not proved-crime so committed not in daring manner to disturb public order or tranquility-detention order quashed.

Held: Para-26
We have very carefully gone through the counter affidavits filed by the State and Union of India, there is nothing therein which may indicate that the prosecution has been enable to collect any further evidence which may indicate at the complicity of the petitioner in the commission of the crime which has been made the basis for passing the impugned detention order apart from the statement of witness Sunder.

Case Law discussed:
(2010)9 Supreme Court Cases 618; (1987) 3 SCC 502; (1989) 4 SCC 556; (1990) 1 SCC 35; (1996) 11 SCC 393; (2007) 7 SCC 378; 2012 (2) SCC 176; (2012) 2 SCC 386;

(Delivered by Hon'ble B.K. Narayana, J.)

1. Heard Sri I.K.Chaturvedi, learned counsel for the petitioner, learned AGA for the respondent nos. 1,2 and 3 and Sri Firoz Ahmad, learned counsel for the Union of India/ respondent no.2.

2. Pleadings between the parties have been exchanged and the matter is ripe for final disposal.

3. By means of this writ petition the petitioner has challenged the detention order dated 04.08.2014/14.08.2014 passed by the District Magistrate, Banda, respondent no.3 (Annexure-10) by which he in exercise of his power under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as the Act) has ordered that the petitioner be detained in District Jail, Banda stating the grounds of detention as required under Section 8 of the Act as well as the order dated 23.09.2014 passed by the State Govt. confirming the detention order dated 04.08.2014/14.0.2014 (Annexure 15) to the writ petition.

4. The brief facts of the case as emerging from the pleadings of the parties are that an FIR was lodged by one Chandra Bhushan, resident of village Baurali Azam on 06.02.2014 at 6.20 p.m. against unknown persons at P.S. Bisanda, District Banda stating therein that Km. Sandhya who was daughter of his relative Ram Naresh Patel, aged about six years, had come to his house along with her grand mother to participate in a religious ceremony (yagya) organised in his house, had gone missing on 31.01.2014 at about 4.00 p.m. from his house in village Baurali Azam.

5. The aforesaid FIR was registered as case crime no. 22 of 2014, under Section 363 IPC, at P.S. Bisanda, District Banda.

6. The dead body of the deceased Sandhya was recovered from a well in the village on 08.02.2014. Inquest was conducted on 08.02.2013 between 7.30 p.m. to 9.30 p.m. and post mortem was performed on 09.02.2014 at 2.00 p.m. and since the deceased's post mortem report indicated that the she before being thrown into the well was throttled to death after being subjected to rape, case crime no. 22 of 2014 which was earlier registered under Section 363 IPC was converted under sections 363, 376, 302, 201 IPC and Section 4 of Prevention of Children from Sexual Offences Act, 2012. The investigation of the case continued for several months without making any headway despite the frequent change of Investigating Officers. The name of the petitioner as an accused in the aforesaid case surfaced for the first time in the statement of one Sunder recorded by the Investigating Officer on 18.05.2014 in which he stated that on the date of the incident he had seen the deceased sitting on the lap of the petitioner in his guava grove at 5.15 p.m.. On the basis of his last seen evidence, the Investigating Officer submitted charge sheet against the petitioner on 26.05.2014 and sent him to jail. The bail application moved by the petitioner moved before the Special Judge/ Additional Sessions Judge, Court No.1 Banda was rejected by him by his order dated 14.07.2014. Thereafter the petitioner moved a application for bail before the High Court which was registered as bail application no. 41263 of 2014.

7. While the petitioner was confined in jail in connection with the aforesaid case, the impugned order of preventive detention was passed by the respondent no.3 on 04.08.2014 against the petitioner and served upon him in District Jail Banda along with the grounds of detention under Section 8 of the National Security Act. The order of preventive detention dated 04.08.2014/14.08.2014 passed by respondent no.3 apart from narrating the facts already stated hereinabove further reflected that the same was passed on the basis of report of S.P., Banda which itself was based upon the confidential report of the local

intelligence unit forwarded to him by Inspector In-charge stating that the petitioner who was accused in case crime no. 22 of 2014, under Section 302, 201 and 376 IPC had moved a bail application before the High Court and there was every likelihood of his being released on bail and in case he was released on bail there was strong possibility of his involving himself in illegal activities and hence his detention under the Act was imperative in order to maintain public order. The impugned order also reflects that after the dead body of the victim Km. Sandhya was found in a well and it came to light that before being murdered, she had been raped the members of the public became very angry and demanded District Magistrate to get the case solved soon and an atmosphere of fear had gripped the community. Public order had been disturbed and with a view to maintain law and order, heavy police force had to be deployed at the post mortem house. Angry villagers had organised a demonstration in front of the D.M.'s residence information whereof was promptly given to the superior officers through R.T. Set and additional police forces were requisitioned from other police stations. As a result of the heinous offence of rape and murder of a minor girl committed by the petitioner and his subsequent act of throwing her dead body in the well, the tranquillity of the community was totally disturbed and an atmosphere of fear had prevailed.

8. The petitioner filed a representation before the State of U.P. through Secretary Home Secretary, State of U.P. and before the Union of India through Home Secretary and also before the District Magistrate, Banda on 12.08.2014. In his representation the petitioner had categorically stated that the petitioner who was an old man aged about 60 years was absolutely innocent and he had falsely been implicated as an accused in the case crime no. 22 of 2014 by the local police as a measure of vendata against his uncle Shishupal who had filed several complaints before the higher authorities against the local police highlighting the inaction on the part of the local police in the investigation of the case in hand and their deliberate attempt to shield Reshma and her husband Arjun whose names had figured as prime suspects in the concerned case during investigation, by introducing a got up witness Sunder after 2-1/2 months of the incident who gave evidence of last seen against the petitioner in his statement recorded under Section 161 Cr.P.C. The State Govt. approved the detention order dated 04.08.2014/ 14.08.2014 passed by the District Magistrate, Banda vide order dated 13.08.2014 (Annexure-13). The Central Govt. also rejected the petitioner's representation by order dated 03.09.2014 (Annexure-14). The petitioner appeared before the Advisory Board and thereafter on the basis of the opinion of the Advisory Board tendered under Section 11 of the Act, the State Govt. passed an order on 23.09.2014 for detention of the petitioner in jail for twelve months commencing from 04.08.2014.

9. Learned cousnel for the petitioner submitted that the subjective satisfaction of the respondent no.3 (detaining authority) recorded in the impugned detention order is based upon insufficient, non existent and irrelevant grounds which has totally invalidated the same and further more since the respondent no.3 (detaining authority) has exercised his power under Section 3(2) of National

Security Act illegally and arbitrarily, the impugned order cannot be sustained and accordingly is liable to be quashed.

10. Per Contra learned AGA submitted that the petitioner has been accused of having committed the heinous offence of raping a minor girl and thereafter committing her murder and throwing her dead body in a well. He further submitted that the act of the petitioner affected the community and lead to disturbance of current life of the community so as to amount to disturbance of public order and it did not effect merely an individual leaving the tranquillity of the society undisturbed. The satisfaction of the detaining authority is based on the relevant materials placed before him showing that the act of the petitioner was such that it disturbed the tempo of life of the community, there was disturbance in the village as well as in the places nearby. He next submitted that the detaining authority upon being apprised that the petitioner had moved bail application for his release before the Hon'ble High Court and there was every likelihood of the petitioner being released on bail and since at the very prospect of the petitioner being enlarged on bail, a feeling of fear had gripped the villagers and if he was actually released on bail, he would again indulge in anti-social activities and hence to prevent such prejudicial activity in future, the detaining authority had rightly passed the detention order against the petitioner and the same warrants no interference by this Court.

11. We have carefully considered the submissions made by the learned counsel for the parties, perused the pleadings of the parties as well as the other material brought on record and the case laws cited before us to which we will refer as and when the context requires.

12. The Apex Court in the case of Pebam Ningol Mikoi Devi Vs. State of Manipur and others reported in (2010) 9 Supreme Court Cases 618 has examined the scope of Judicial review of the subjective satisfaction of detaining authority. Paragraph 21 of its verdict rendered in the aforesaid case, which is relevant for our purpose is being reproduced herein below"

"21. To decide the correctness or otherwise of the detention order, two issues of importance arise before this Court. The first is, regarding the documents and material on which reliance was placed by the detaining Authority in passing the detention order. Secondly, with those materials, the detaining authority was justified in arriving at a finding that the detenu should be detained under the National Security Act without any trial. In matters of this nature, this Court normally will not go into the correctness of the decision as such but will only look into decision making process. Judicial review, it may be noted, is not an appeal from a decision but review of the manner in which the decision was made. The purpose of review is to ensure that the individual receives a fair treatment."

13. We now proceed to examine some of the decisions of the Apex Court which may have relevance in determining in what manner such subjective satisfaction of the Authority must be arrived at, in particular on Section 3(2) of the National Security Act. In Fazal Ghosi v. State of Uttar Pradesh, (1987) 3 SCC 502, this Court observed that: "The

District Magistrate, it is true, has stated that the detention of the detenus was effected because he was satisfied that it was necessary to prevent them from acting prejudicially to the maintenance of public order, but there is no reference to any material in support of that satisfaction. We are aware that the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material. We are concerned here not with the sufficiency of that material but with the existence of any relevant material at all." (emphasis supplied) (Para 3).

14. In Shafiq Ahmed v. District Magistrate, Meerut, (1989) 4 SCC 556, the Apex Court opined :- "Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject to closest scrutiny and examination by the courts." (emphasis supplied) (Para 5).

This Court further added:

"...there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the action of the petitioner which are prejudicial to the maintenance of public order. Existence of materials relevant to the formation of the satisfaction and having rational nexus to the formation of the satisfaction that because of certain conduct "it is necessary" to make an order "detaining" such person, are subject to judicial review." (emphasis supplied) (Para 5).

15. In State of Punjab v. Sukhpal Singh, (1990) 1 SCC 35, the Apex Court held:

"...the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in." (emphasis supplied) (Para 9).

16. In State of Rajasthan v. Talib Khan, (1996) 11 SCC 393, the Apex Court observed that:

"...what is material and mandatory is the communication of the grounds of detention to the detenu together with documents in support of subjective satisfaction reached by the detaining authority." (emphasis supplied) (Para 8).

17. The legal position what emerges from these rulings is that, there must be a reasonable basis for the detention order, and there must be material to support the same. The Court is entitled to scrutinize the material relied upon by the Authority in coming to its conclusion, and accordingly determine if there is an objective basis for the subjective satisfaction. The subjective satisfaction must be two fold. The detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order and the authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting.

18. In order to determine the validity of the impugned detentionorder in the light of the principles laid down in the aforesaid decisions, it will be necessary to examine the materials relied by the detaining authority while passing the

impugned deteintion order. The documents relied upon by the District Magistrate mentioned in the grounds of detention are :-

1. Copy of the FIR lodged by one Chandra Bhushan on 06.02.2014, which was entered at G.D. No.27 at about 6.20 p.m. by S.I.- V.K. Shukla.

2. The report made by Chandra Bhushan Patel regarding recovery of the dead body of the victim from a well in village on 08.02.2014 which was entered at G.D. No. 29 at 6.10 p.m. on 08.02.2014.

3. Certified copy of the inquest report and other documents prepared during inquest.

4. Post mortem report of the deceased.

5. News items published in 10.02.014 editions of daily newspapers Hindustan and Dainik Jagran.

6. Statements of the informant Chandra Bhushan recorded under Section 161 Cr.P.C.

7. Statement of witness Sunder recorded under Section 161 Cr.P.C..

8. Copy of the site plan.

9. Report of the sponsoring authority, Superintendent of Police, Banda dated 30.07.2014.

19. We are conscious of the fact that the grounds stated in the order of detention are sufficient or not, is not within the ambit of the discretion of the court and it is the subjective satisfaction of the detaining authority which is implied. However, the Apex Court in paragraph no. 28 of its judgment in the Pebam Ningol Mikoi Devi (supra), has observed that if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority under the National Security Act is non existent, misconceived and irrelevant order, the order of detention would be in valid.

20. The Apex Court in the case of Mohd. Yousuf Rather Vs. State of Jammu & Kashmir and Ors. (AIR 1979 SC 1925) has observed that under Article 22(5), a detenu has two rights (1) to be informed, as soon as may be, of the grounds on which his detention is based and (2) to be afforded the earliest opportunity of making a representation against his detention. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first right and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second right. No distinction can be made between introductory facts, background facts and `grounds' as such; if the actual allegations were vague and irrelevant, detention would be rendered invalid.

21. We have very carefully scanned the grounds of detention and the documents relied on by the detaining authority while passing the order of detention against the petitioner, and in our considered opinion grounds on which the detention order has been passed have no probative value and were extraneous to the scope, purpose and object of the National Security Act for the following reasons.

22. The documents mentioned at sl. no. 1, 2,3, 4 and 5 do not contain any reference to the petitioner as the petitioner's name as an accused in case crime no. 22 of 2014 had not surfaced till the dates on which the aforesaid documents had come to the existence.

Chandra Bhushan, informant in case crime no. 22 of 2014, whose statement recorded under Section 161 Cr.P.C. and which finds mention at sl. no. 6 herein above has not named the petitioner as an accused in the FIR. Similarly the document mentioned at sl. no. 8, site plan of the alleged place of incident was also wholly irrelevant for the purpose of subjective satisfaction of detaining authority. Same is the position with regard to the report of the sponsoring authority dated 30.07.2017 which is mentioned at sl. no.9 and which contains the same facts on the impugned detention is founded. The reliance placed by the detaining authority on the statement made by the only witness of the incident to the Investigating Officer after more than 2-1/2 months of the occurrence (sl. no.7) without any explanation for his failure to come forward promptly or at least within a reasonable period, cannot be said to be sufficient to form the subjective satisfaction of the detaining authority as it is settled law that the statements under Section 161 Cr.P.C. cannot be taken as sufficient grounds in the absence of any supportive or corroborative grounds. Section 161 Cr.P.C. statements are not considered as substantive evidence but can only be used to contradict the witnesses in the course of the trial as is evident from the wordings of Section 162(1) Cr.P.C. and has been so held time and again by the Apex Court.

23. In Rajendra Singh v. State of Uttar Pradesh, (2007) 7 SCC 378, the Apex Court laid down that:

"A statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of the proviso to Sub-section (1) of Section 162 Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the High Court committed a manifest error of law in relying upon wholly inadmissible evidence..."

24. Even if for the sake of argument it is assumed that the statement of Sunder made to the Investigating Officer under Section 161 Cr.P.C. relied by the detaining authority while forming subjective satisfaction, the facts stated by Sudner in his statement under Section 161 Cr.P.C. do not suggest any positive or direct involvement of the petitioner in the commission of crime which was later made the basis for passing of order of preventive detention against him. The witness Sunder had simply told the Investigating Officer in his statement that on the date of the incident he had seen the victim sitting on the lap of the petitioner at about 5.20 p.m. and he suspected that the petitioner may have committed the murder of the victim. He has nowhere stated that he had either seen the petitioner raping the victim or throwing her dead body into the well in the village after throttling her to death. Apart from the aforesaid last seen evidence of Sunder which saw the light of the day after an inordinate delay and explained of more than 2-1/2 months, there is no corroborative or supportive material indicating at this complicity in the commission of the crime in question. There is further neither any allegation nor any material on record showing that the crime in question was committed by the petitioner in a daring manner and in full view of the public in a crowded place so as to disturb the public order or tranquillity of the locality.

25. Furthermore, as already observed none of the other documents substantiate the involvement of the detenu in unlawful activities as alleged in the detention order.

26. We have very carefully gone through the counter affidavits filed by the State and Union of India, there is nothing therein which may indicate that the prosecution has been enable to collect any further evidence which may indicate at the complicity of the petitioner in the commission of the crime which has been made the basis for passing the impugned detention order apart from the statement of witness Sunder.

27. Thus, it is clear that there was no pertinent or relevant material on the basis of which, the detention order could be passed.

28. In the instant case the offences alleged to have been committed by the petitioner are under the provisions of the Indian Penal Code for which the normal law is sufficient to deal with the offence, if proved. The detaining authority, in our opinion has wrongly taken the easy way out and has resorted to an order of preventive detention, in order to avoid investigation of the case in which the petitioner was made an accused more than 2-1/2 months after the incident, on the basis of extremely weak circumstantial evidence.

29. The Apex Court in the case of Yumman Ongbi Lembi Leima Vs. State of Manipur and others, 2012 (2) SCC 176, the Apex Court has held as hereunder:-

"27. As has been observed in various cases of similar nature by this Court, the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Indian Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention."

30. Paragraphs 4,5, 8 and 9 of the judgement rendered by the Apex Court in the case of Mungauala Yadamma Vs. State of Andhra Pradesh and others reported in (2012)2 SCC386, in which the Apex Court has examined the parameters within which order of prevention detention can be passed are quoted herein below:-

"4. On behalf of the appellant, it has been urged that the ground taken for issuance of the detention order was improper and not available in view of the reasoned judgment of this Court in Rekha v. State of T.N. Where a similar question had arisen and in para 23 of the judgment, a three-Judge Bench of this Court was of the view that criminal cases were already going on against the detenue under various provisions of the Penal Code, 1860, as well as under the Drugs and Cosmetics Act, 1940, and that if he was found guilty, he would be convicted and given appropriate sentence. Their Lordships also indicated that in their

opinion, the ordinary law of the land was sufficient to deal with the situation, and hence, recourse to the preventive detention law was illegal.

5. It has been submitted by Mr. Anil Kumar Tandale, learned advocate appearing for the appellant, that in the instant case also all the offences alleged to have committed by the husband of the appellant, were under the provisions of the Andhra Pradesh Prohibition Act, 1995, for which the normal law was sufficient to deal with the offence, if proved. He submitted that the detaining authority had wrongfully taken the easy way out and had resorted to an order of preventive detention in order to avoid having to investigate the cases filed against the appellant.

8. In fact, recently, in Yumman Ongbi Lembi Leima v. State of Manipur we had occasion to consider the same issue and the three-Judge Bench had held that the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws, as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order warranting the issuance of such an order.

9. No doubt, the offences alleged to have been committed by the appellant are such as to attract punishment under the Andhra Pradesh Prohibition Act, but that in our view has to be done under the said laws and taking recourse to preventive detention laws would not be warranted Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenue may have committed. After all, preventive detention in most case is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial. Accordingly, while following the three Judge Bench decision in Rekha case we allow the appeal and set aside the order passed by the High Court dated 20.7.2011 and also quash the detention order dated 15.2.2011, issued by the Collector and District Magistrate, Ranga Reddy District, Andhra Pradesh."

31. The Apex Court in paragraph nos. 13, 14, 15, 18, 29, 33 and 34 of its verdict given in the case of Rekha Vs. State of Tamilnadu through Secretary to Government and another, reported in (2011)5 SCC 244, which are being quoted herein below has again dealt with the circumstances under which the power of preventive detention can be exercised:-

"13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R Vs. Secy. Of State for the Home Dept.

14. Article 21 is the most important of the fundamental rights guaranteed by

the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical, arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.

15. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer.

18. In State of of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 (para 23) this Court observed :

"...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54."

29. Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution :14: of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

33. No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which

is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

34. Hence, the observation in para 34 in Haradhan Saha's case (supra) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law."

32. Thus in view of the forgoing discussions, we have no hesitation in holding that the impugned detention order cannot be sustained and is liable to be quashed.

33. This habeas corpus writ petition is accordingly allowed and the impugned detention order dated 04/14.08.2014 (Annexure-10) as well as the order of the State Government dated 23.09.2014 confirming the detention order dated 04/14.08.2014 are hereby quashed. The petitioner shall be released forthwith if he is not wanted in any other case.

34. There shall however be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2015

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

Criminal Misc. Application No. 18749 of 2015
(U/S 482 CR.P.C.)

Alok Kumar Mishra & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri R.P. Mishra

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

Cr.P.C.-Section 482-Summoning order seeking direction for quashing-from allegations of complaint-can not be said no offence made out-disputed question of facts-can not be seen by High Court-applicant can raise this question in discharge application-rejected direction for expeditious disposal of bail as per Supreme Court direction given.

Held: Para-6

From the perusal of the material on record and looking into the facts of the case, at this stage, it cannot be said that no offence is made out against the applicant. All the submissions made at the Bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage, only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of R.P. Kapur Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P. Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (para 10) 2005 SCC (Cr.) 283. The disputed defence of the accused cannot be considered at this stage. Moreover, the applicant has got a right of discharge under section 239 or 227/228 Cr.P.C. as the case may be through a proper application for the said purpose and she is free to take all the submissions in the said discharge application before the Trial Court.

Case Law discussed:
AIR 1989 SC 1; AIR 1960 SC 866; 1992 SCC (Cr.) 426; 1992 SCC (Cr.) 192; 2005 SCC (Cr.) 283; 2005 Cr.L.J. 755; 2009 (3) ADJ 322 (SC).

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

1. Heard learned counsel for the applicants and learned AGA and perused the record.

2. The applicants have invoked the inherent jurisdiction of this court under section 482 Cr.P.C. by praying for quashing of the summoning order dated 25.2.2015 passed by the A.C.J.M. Court No. 9, Allahabad, as well as the entire proceedings of Case No. 136 of 2011, Azaj Ahmad Vs. Sri Rajesh Kumar Mishra and another, under section 406, 323 and 504 I.P.C. P.S. Handia, District Allahabad.

3. Learned counsel for the applicants has submitted that there is no material to connect the applicants with the alleged crime. There is no witness of the occurrence but they have wrongly been summoned without any basis, hence the impugned summoning order as well as the entire proceeding of the Complaint Case be quashed.

4. The record shows that the complainant and the witnesses have been examined under section 200 and 202 Cr.P.C. and they have supported the prosecution story. At the initial stage of summoning only prima-facie case is to be seen. Therefore, looking into the prima-facie evidence on record, it cannot be said that no offence is made out against the applicant. The legal position is well settled that if an offence is disclosed, the court will not normally interfere.

5. So far as the inherent powers of the court are concerned, it has been reiterated by Hon'ble Apex Court in a catena of judgements that while exercising its inherent powers under section 482 Cr.P.C., the Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by the evidence or not. The High Court would have to proceed entirely on the basis of the allegations made in the complaint or the documents accompanying the same per se; it has no jurisdiction to examine the correctness or otherwise of the allegations. (State of Bihar Vs. Murad Ali Khan and others AIR 1989 SC 1).

6. From the perusal of the material on record and looking into the facts of the case, at this stage, it cannot be said that no offence is made out against the applicant. All the submissions made at the Bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage, only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of R.P. Kapur Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P. Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (para 10) 2005 SCC (Cr.) 283. The disputed defence of the accused cannot be considered at this stage. Moreover, the applicant has got a right of discharge under section 239 or 227/228 Cr.P.C. as the case may be through a proper application for the said purpose and she is free to take all the submissions in the said discharge application before the Trial Court.

7. Thus on the basis of the aforesaid discussions, the instant application

appears to have no force and it is liable to be dismissed.

8. The application is, accordingly, dismissed.

9. However, it is directed that in case the applicants appear before the court concerned within thirty days from today and apply for bail, the same shall be heard and disposed of expeditiously, if possible, on the same day by the courts below in view of the settled law laid by the Seven Judges' decision of this Court in the case of Amrawati and another Vs. State of U.P. reported in 2005 Cr.L.J. 755 approved by Hon'ble Apex Court in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-A No. -36228 of 2015

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

Counsel for the Petitioner:
Sri S.K. Singh, Sri D.K. Singh, Sri G.K. Singh, Sri S.K. Mishra, Sri V.K. Singh

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

Constitution of India, Art.-226-'Principle of Resjudicata'-dismissal of PIL questioning appointment of Chairman and member of Selection Board-petitioner being candidate for selection of principal in Intermediate College-seeking quo warranto-the chairman and members of Board-being clerk and L.T. Grade teachers-even not qualified for post of principal-can not consider the eligibility and suitability in interview-Court can not be mute spectator-to allow the government to break the back bone of education-held-petition maintainable.

Held: Para-30
We would like to observe that consideration for entertaining a PIL and grant of interim orders therein proceed on different footing. The present writ petition has been filed by a candidate, who is to face interview, for issuing a writ of quo warranto, this petition has no concern with the earlier petitions filed, as this is for a different relief. We further find that issues raised in the petition have important significance for the cause of education in the State, the writ petition must, therefore, be entertained. The objection of the State, in this regard, stands rejected.

Case Law discussed:
[2013 (8) SCC 20]

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

1. Following questions having vital significance for the cause of education in the State of Uttar Pradesh, arise for our consideration in the present writ petition:-

(i) What should be the minimum qualifications for appointment of Chairman and Members of U.P. Secondary Education Service Commission Board, even in respect of persons specified under Section 4 (iv) of the Act, should it be at par with the qualification for persons specified under clause (i) (ii) & (iii) of Section 4 on the principle of 'Ejusdem Generis' ?

(ii) Whether, respondent nos. 4 to 6 who were working as L.T. Grade Teacher i.e. on a post which is at the lowest ladder of the faculty posts is a recognised Intermediate College could be appointed

as Chairman and Member of the Secondary Education Service Selection Board, for making make selection on the post of Principal/ Lecturer/ Assistant Teacher in a recognised aided Intermediate institution?

2. While entertaining this petition on 3.7.2015, time was granted to the learned counsel appearing for State to verify the credentials of respondent nos. 4 to 6, on the strength of which they came to be appointed as officiating Chairman and Members of the Board.

3. Learned Chief Standing Counsel alongwith the Advocate General of the State have appeared and have passed on the instructions received in the matter from the Principal Secretary of the State, which are taken on record. This order is being passed relying upon the facts so adduced before us by the State.

4. Petitioner before this Hon'ble Court is an applicant for the post of Principal in a recognised and aided intermediate college. She has approached this Court for issuing a writ of quo warranto questioning the appointment and continuance of respondent Nos. 4, 5 & 6 as officiating Chairman and members of the U.P. Secondary Education Service Selection Board, Allahabad, on the ground that the appointment of these three persons who were only working as L.T. Grade Teachers on the relevant date is perse arbitrary and based on misreading of the intent of Section 4 of U.P. Act No. 5 of 1982.

5. The qualification prescribed for appointment of Chairman and Members of the Board, as contained in Section 4 (1) to (3) of the U.P. Act No. 5 of 1982 and reproduced in the writ petition are as follows:-

" 4. Composition of the Board:- (1) The Board shall consist of a Chairman and ten members who shall be appointed by the State Government.

(2) A person shall not be qualified for appointment as Chairman unless he,-

(a) is or has been a Vice-Chancellor of any University established by law; or

(b) is or has been in the opinion of the State Government an outstanding officer of the Administrative Service not below the rank of Secretary to the State Government or Director of Education, Uttar Pradesh;

(c) is in the opinion of the State Government, an eminent person having made valuable contribution in the field of education.

3.Of the Members,-

(a) two shall be persons who are educationists having made significant contribution in the field of education.

(b) two shall be persons who are or have been, in the opinion of the State Government, an outstanding officer of the State Education Service not below the rank of Additional Director;

(c) other shall be persons, who,-

(i) have worked as a Professor in any University established by law in Uttar Pradesh or as a Reader of any Degree College recognised by, or affiliated to, such University for a period of not less than ten years; or

(ii) have worked as a Principal of any institution recognised under the Intermediate Education Act, 1921 for a period not less than ten years; or

(iii) are, in the opinion of the State Government, an eminent educationist having made valuable contribution in the field of education.

(iv) is in the opinion of the State Government, an eminent person having made vaulable contribution in the field of education.

4. Every appointment under this Section shall take effect from the date on which it is notified by the State Government."

6. We may, at the very outset, record that the Chief Standing Counsel made an allegation against the petitioner has deliberately quoted unamended Section 4(3)(c)(iv) of the Act and that the correct provision reads as under:-

"(iv) is interested in the field of education and a graduate from a recognized University."

Submission is that in view of the language of sub clause (iv), the only qualification for appointment of Member is that he has to be a graduate from a recognised University and has interest in the field of education.

7. Sri G.K. Singh, learned Senior Advocate, assisted by Sri S.K. Mishra, Advocate informed the Court that Section 4 of the Act has been quoted from an authentic book of a renowned publisher there may be some mistake in the book itself, which is neither deliberate nor intentional. We direct the learned counsel for the petitioner to make necessary corrections today itself so as to bring it in conformity with the amendment made in the year 2008.

8. We may now turn to the basic issue, as raised in the present petition.

9. U.P. Act No. 5 of 1982 was introduced for constituting, a Service Selection Board, as a substitute for the mechanism of selection of Principal and Teachers in a recognised aided intermediate colleges in the State of Uttar Pradesh under the U.P. Intermediate Education Act.

10. The U.P. Intermediate Education Act, 1921 (hereinafter referred to as Act 1921) contemplated nomination of subject experts for every selection committee to be constituted. These subject experts were to be the persons, who had academic qualification and experience in the field of education. Reference may be had to the provisions of Section 16-F of the Act 1921. Sub section (4) to Section 16-F of the Act 1921 provided for the panel to be drawn by the Director in such manner as may be prescribed. It had to be revised once in every 3 years. Regulation 14 of Chapter-II of the Regulations framed under Act, 1921 lays down the category of persons, who can be included in the panel of experts to be prepared by the Director. Regulation 14 is being quoted below:-

"14. The panel of Experts referred to in sub-section (4) of Section 16-F shall be drawn by the Director for each region separately for the selection of heads of institutions and for the selection of teachers from amongst the categories of persons given below after they have been given their consent in writing to act as Experts:-

(a) Persons who may be appointed as experts for the selection of heads of institution-

(i) Principals of Degree Colleges, Training Colleges, Agricultural Colleges and Polytechnics including Central Schools;

(ii) Gazetted Officers of the Education Department not below the P.E.S. level, whether serving or retired;

(iii) Professors and Readers of Universities and Degree Colleges;

(iv) Lecturers of Universities and Degree Colleges provided they have worked as such for at least ten years.

(v) Any other person considered suitable by the Director;

(b) persons who may be appointed as experts for the selection of teachers-

(i) Principal or Headmaster of any Intermediate College, High Schools or Government Normal School, whether serving or retired;

(ii) Gazetted Officer of the Education Department not below the rank of a Deputy Inspector of Schools, whether serving or retired;

(iii) Lecturers of Degree Colleges, Training Colleges or Polytechnics and Gazetted Officers of Education Department of at least five years' standing;

(iv) Any other person considered suitable by the Director.

The number of experts on each regional panel shall be such as may be considered necessary by the Director, provided that experts appointed for the selection of teachers of Intermediate classes shall be experts in that subject (i.e they should possess the minimum qualifications prescribed by the Board for a teacher of Intermediate classes in the subject concerned). The regional panel shall remain valid for three years but the Directors may add to or remove any person from the panel even during the above period. Name of one person may be included in more than one panel where necessary."

11. It will be seen from a simple reading of the aforesaid provisions that the Act,1921 contemplated that persons not below the rank of Principal of Degree college, training college, agriculture college and gazetted officer of the education department not below the rank of additional director, professor of any university or a Reader, Lecturer (with 10 years experience) of any degree college recognised by or affiliated to such University, or any other person having made valuable contribution in the field of education and considered suitable by the Director could be included in the panel for the post of Principal/ Head of the institution.

12. In the case of teachers such persons could be empanelled who had to be a principal of an Intermediate institution, Gazetted Officer or Lecturer of Degree College. Clause-4 authorised the Director to induct any other person as considered suitable by him.

13. Section 4 of the U.P. Act No. 5 of 1982, which lays down the qualification for the Chairman and Members of the Selection Commission, has been quoted above. The qualification for appointment as Chairman under Sub Section (2) of Section 4 are that he (i) is or has been a Vice-Chancellor of any University established by law; (ii) an outstanding officer of administrative service not below the rank of Secretary to the State or Director of Education U.P.; (iii) an eminent person having made valuable contribution in the field of education.

14. Similarly, for the office of Member, qualifications prescribed ; (a) educationists having made significant contribution in the field of education; (b) an outstanding officer of the State Education Service not below the rank of

Additional Director; (c) Professor of a University established by law or a Reader of a degree college recognised by or affiliated to a University for not less than ten years; Principal of any Intermediate institution recognised under the Act of 1921 for not less than ten years; (d) an eminent educationists having made valuable contribution in the field of education, and lastly (e) a graduate having interest in education, as provided in Clause-iv.

15. This clause according to State constitutes a separate class in itself and the other clauses providing qualification would have no bearing.

16. We are, prima-facie, not inclined to accept this argument, as it would run counter to the scheme of the Act itself.

17. Provisions contained in Sub-sections (2) and (3) of Section 4 provide for the qualifications required to be possessed by a person before being appointed as Chairman and Member of the Board. We are of the view that principles of 'Ejusdem Generis' would clearly be attracted in the instant situation and Sub-clause (iv) would have to be read as being of the same kind or nature, and for same class or category which apply to the previous clauses. The Apex Court in Nirma Industries Vs. SEBI [2013 (8)SCC 20] in Paras 63 to 66 has held as follows:-

"63. The term "ejusdem generis" has been defined in Black's Law Dictionary, 9th Edn. as follows :

"A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."

64. The meaning of the expression ejusdem generis was considered by this Court on a number of occasions and has been reiterated in Maharashtra University of Health Sciences and Ors. Vs. Satchikitsa Prasarak Mandal & Ors. [9] The principle is defined thus : "The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context". It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication [see Glanville Williams, The Origins and Logical Implications of the Ejusdem Generis Rule, 7 Conv (NS) 119]."

65. Earlier also a Constitution Bench of this Court in Kavalappara Kottarathil Kochuni vs. State of Madras[10] construed the principle of ejusdem generis wherein it was observed as follows : " ..... The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary."

66. Again this Court in another Constitution Bench decision in the case of Amar Chandra Chakraborty Vs. Collector of Excise[11] observed as follows :

". ... The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent."

18. We are, prima-facie, of the opinion that the requirement of eminence in the field of education as provided in sub clauses (i), (ii) and (iii) would have to be read in clause (iv) of Section 4 (3) (c) of the Act also. Only a person having eminence in the field of education, as illustrated by various sub sections of Section 4 could be appointed as Chairman and Member of the Board. The contrary interpretation suggested by the Chief Standing Counsel would be detrimental to the system of education in the State.

19. In our opinion the phrases "made valuable contribution in the field of education" and "interested in filed of education" must mean some contribution in the field of education which is tangible and which can be evaluated by experts in the filed of education to see as to whether that particular man satisfied the requirement of the said phrases or not. It cannot be based on complete subjective satisfaction. Some objective material for the purpose has to be seen.

20. The qualifications for the office of member has been whittled down by the State Government under the 2008 amendment as a result whereof we are faced with a situation in which respondent nos.4 to 6 are functioning as the officiating Chairman and Members of the Board.

21. It is relevant to note that the respondent no.4, Smt. Anita Yadav, who was only a LT grade teacher in K.K. Inter college, is now acting as Chairman of the Selection Board for selecting Principals of recognised inter colleges i.e. a post, for which she herself is prima-facie not eligible to even apply. She is stated to be double M.A. She is untrained nor she has passed TET examination.

22. The other members of the Commission i.e. Smt. Ashalata Singh was initially appointed as subject expert and thereafter Lecturer in Intermediate College, for which selection was made by the committee of Management of a private college. Meaning thereby that she has not faced any selection conducted by the Service Selection Board or by the Public Service Commission. She is stated to have been regularised as Lecturer in the year 2007 and she has now been appointed as Member for holding selection for the Post of Principal of a recognised Intermediate College, a post she has never held nor is qualified to hold.

23. So far as respondent no. 6, Lalit Kumar Srivastava, is concerned, he worked as Clerk in the office of District Inspector of School upto the year 2003, where after he is stated to be appointed as L.T. Grade Teacher, before being appointed as Member of the Board in the year 2013. Even he is to select Principals and Lecturers, although he himself is not qualified for the posts. His period of appointment has been extended again on

12.6.2015 for further two years. Sri Lalit Kumar Srivastava who is stated to be post graduate, is not even trained, and thus, prima-facie, ineligible to be appointed even as L.T. Grade Teacher.

24. None of these three (Chairman and two members), as on date, prima-facie can be selected for the post of Principal in a recognised Intermediate college for want of qualification, but the irony is that they have been authorised to select Principals and Lecturers for recognised Intermediate Colleges.

25. The Court, in the facts of the present case, is constrained to inquire as to whether considerations other than the interest of education pervial in the mind of the concerned officials of the department of education in the State, while appointing Respondent Nos. 4 to 6. Response is required from the Principal Secretary / Chief Secretary of the State. We regret to observe that the entire education in State is being ruined because of incompetent persons being appointed to hold selection for the post of Principals/ Lecturers and L.T. Grade Teachers of the recognised intermediate college. The Court will not be a mute spectator. The State cannot be permitted to break the backbone of education system on which our democratic polity professes to thrive. We are compelled to interfere not only in law but for wider cause of education in the State itself.

26. Has the State of U.P. become so bankrupt in the matter of academias/administrative officers that it has to appoint persons as Chairman/ Members of the Selection Board who have made absolutely no contribution in the field of education, is the other question which was to be answered.

27. Learned Chief Standing Counsel submitted that this petition may not be entertained, as a previous PIL Petition No.11684 of 2014 had been dismissed on 26.11.2014, vide following orders:-

"This petition lacks bona fide. It appears that it is a proxy petition at the instance of ex-secretary of Education Board as on her papers enquiry has been asked for.

In view of the above, PIL is dismissed."

28. Another PIL Petition No.12548 of 2014 was filed and following orders were passed on 18.12.2014:-

"Shri Ankit Srivastava, Advocate, appearing for respondent nos.2 and 3, prays for and is allowed three weeks' time to seek instructions in the matter, particularly in respect of proceedings, if any drawn, against the respondent nos.4 and 5 by the State Government. Learned Standing Counsel, representing State respondents, may also seek instructions within same period.

List in the 3rd week of January, 2015.

Prayer for interim relief is rejected."

29. An SLP was preferred against the order dated 18.12.2014, which was rejected on 22.1.2015. It is submitted by the Chief Standing Counsel that in view of the aforesaid orders, present petition be not entertained.

30. We would like to observe that consideration for entertaining a PIL and grant of interim orders therein proceed on different footing. The present writ petition has been filed by a candidate, who is to face interview, for issuing a writ of quo warranto, this petition has no concern with the earlier petitions filed, as this is

for a different relief. We further find that issues raised in the petition have important significance for the cause of education in the State, the writ petition must, therefore, be entertained. The objection of the State, in this regard, stands rejected.

31. We may also record that a response to the facts as stated in the writ petition and the prima-facie findings which have been recorded by this Court, shall be made by means of a personal affidavit by the Chief Secretary of the State of U.P.. The original records on the basis of which these three persons were appointed as Chairman and Members of the Selection Board, shall be produced before this Court by an officer, not below the rank of Joint Secretary on the next date.

32. Learned Chief Standing Counsel prays for and is allowed 3 weeks' time to file Counter Affidavit. Issue notice to respondent nos.4 to 6, who may also file counter affidavit within the same period. Steps be taken within five days. Petitioner will have one week thereafter to file Rejoinder Affidavit.

List this petition on 10.8.2015.

In the meantime, respondent Nos.4, 5 & 6 are restrained from holding any selection in their capacity as Chairman and Members of the Board. However, their salary is not being interfered with, at this Stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2015

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

WRIT-C No. 38663 of 2008

Rameshwar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishnu Sahai, Sri B. Dayal, Sri Mahendra Bahadur Singh, Sri C.K. Parekh

Counsel for the Respondents:
C.S.C., Sri Pradeep Kumar, Sri R.P. Singh

U.P. Land Acquisition Act-Section 18-Reference-maintainability-on allegation of fraud-even-if compensation received-reference can not be rejected-order quashed-with consequential direction given.

Held: Para-9
We are of the considered opinion that in cases where execution of agreement under the Rules, 1997 is questioned on allegations of fraud, the application for reference need be entertained and referred to the Court concerned for examined at the first instance as to whether the agreement is vitiated by fraud or not. It is only when the first issue is answered in affirmative that the other questions namely adequacy of compensation to the petitioners can be gone into.

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

1. Land holdings of the petitioners before this Court was admittedly acquired under the provisions of the Land Acquisition Act, 1894 (herein after referred to as the 'Act, 1894') on 31.10.2001 issued under Section 4 of the Act, 1894 followed by notification dated 31.01.2002 under Section 6 of the Act, 1894. Possession of the acquired land was taken on 23.03.2002.

2. From the records of the present petition it is apparent that before the

Award could be made in respect of the acquired land, the petitioner is stated to have entered into an Agreement with the respondent authority under the U.P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 (herein after referred to as the 'Rules, 1997'). In terms of the Agreement entered into between the parties, a compensation of Rs.69,32,848/- was paid to the petitioner on 22.03.2002. This money is stated to have been accepted by the petitioner under protest.

3. The Award was made on 21.07.2002. Within one month of the said Award, the petitioners made an application wherein it was stated that they had been asked to sign/put thumb impression on certain blank papers by respondent authorities on the assurance that the money which is to be paid to them is only 80% of the total compensation as and when the Award is made, the remaining 20% shall also be paid to them. But after publication of the Award, the petitioners found that such assurance was false and that the money which has been received by them is being taken as the entire compensation. This according to the petitioner amounts to fraud and poor farmers like the petitioners have been deceived by the respondents in the matter of compensation.

4. The petitioners, therefore, made an application before the Special Land Acquisition Officer on 23.08.2003 for a reference being made under Section 18 of the Act, 1894. This application of the petitioners has been rejected under the impugned order dated 23.06.2008.

5. Counsel for the petitioners at the very outset stated that it is no doubt true that the persons who accept compensation in terms of the Rules, 1997 have no right to make any application under Section 18 of the Act, 1894 for a reference but where the payment of compensation is vitiated on the ground of fraud then such restriction in the making of the application for reference would not be applicable. It is his case that the Reference Application had to be granted by the officer concerned and it was for the competent court to decide the correctness or otherwise of the allegations made by the petitioner qua the amount paid under the Rules, 1997 being vitiated because of fraud or not. Therefore, the order impugned is bad.

6. Shri Ramendra Pratap Singh, counsel for the respondents disputes the correctness of the stand so taken. He submits that the petitioners had accepted the money in terms of the Agreement as early as on 22.03.2002. For fifteen months they kept silent and there was no protest in the matter of compensation so paid. It is only when the Award was made on 21.07.2003 that the petitioners have grown wiser and started claiming additional amount on a concocted story. He has placed reliance upon a Division Bench judgment of this Court in the case of Ram Chander and others vs. Collector/Special Land Acquisition Officer, Varanasi reported in 2003 (6) AWC, 5222 for the proposition no application for reference under Section 18 of the Act, 1894 could be maintained by a person who had accepted the compensation under the Rules, 1997 without protest. He, therefore, submits that, in the facts of the case, there is no error in the order refusing to make the reference.

7. In support of the proposition he had also referred to the judgment of the Apex Court in the case of State of

Karnataka vs. Sangappa Dyavappa Biradar and Others reported in 2005 (4) SCC, 264.

8. Having heard learned counsel for the parties and having gone through the records of the present writ petition, we are of the considered opinion that the legal position with regards to the person accepting compensation in terms of the Agreement under Rules, 1997 having no right to maintain a reference application under Section 18 of the Act, 1894 is well settled from the judgment relied upon by the counsel for the respondent. But at the same time if there are allegation of fraud, what is the remedy available to the tenure holders?

9. We are of the considered opinion that in cases where execution of agreement under the Rules, 1997 is questioned on allegations of fraud, the application for reference need be entertained and referred to the Court concerned for examined at the first instance as to whether the agreement is vitiated by fraud or not. It is only when the first issue is answered in affirmative that the other questions namely adequacy of compensation to the petitioners can be gone into. If the first issue is answered in negative, the amount of compensation paid in terms of the agreement would be final and binding between the parties.

10. For the reasons recorded above, the order passed by the authority dated 23.06.2008 (Annexure-4 to the petition) cannot be legally sustained and is hereby quashed. Let the petitioners make a reference application under Section 18 of the Act, 1894 within one month from today along with a certified copy of this order. The authority competent to hear the reference shall first adjudicate the issue as to whether the alleged agreement entered into between the parties under the Rules, 1997 is vitiated because of fraud or not. In case the answer to the said issue is in affirmative then the authority concern would proceed to hear the reference on merits. If the answer is in negative the chapter shall stand close and the application under Section 18 of the Act, 1894 shall stand rejected accordingly.

11. So far as the number of plots is concerned, we are not expressing any opinion. The parties are at liberty to agitate their claim in the reference application.

12. Writ petition is allowed subject to the observations/direction made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2015

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

C.M.W.P. No. 57528 of 2013

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

Counsel for the Petitioner:
Sri Upendra Upadhyay

Counsel for the Respondents:
C.S.C., Sri Brij Kumar Yadav, Sri Munna Babu, Sri Ram Murat Singh

Constitution of India, Art.-226-Allotment of fair price shop-clause 10 of G.O. 31.10.2002-allotment in favor of respondent-4-challenged-she being illiterate and without proposal of open meeting of Gram Sabha-

ignoring compassionate ground-held-even on individual consideration-without open meeting allotment not sustainable-necessary direction issued.

Held: Para-13 & 14

13. Therefore, even in the matter of an individual consideration of compassionate grant of license under clause 10 of G.O. Of 2002, it is necessary to hold an open meeting of the Gaon Sabha. It is only after such a resolution is passed that the same has to be considered by the Tehsil Level Committee and then a decision to be taken by the Sub Divisional Magistrate.

14. Thus, in view of the aforesaid factual aspects and also the law and settled legal propositions discussed above, we are of the view that the order impugned dated 31.8.2013 passed by the Sub Divisional Magistrate, Kayamganj, District Farrukhabad, respondent no. 4 is not sustainable in nature and the present writ petition deserves to be allowed.

Case Law discussed:

[2014 (8) ADJ 593 (DB) 693].

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

1. This writ petition has been filed for the quashing of the order dated 31.8.2013 passed by the Sub Divisional Magistrate, Kayamganj, District Farrukhabad, whereby respondent no. 4, Smt. Ramwati widow of late Saudan Singh, resident of village Kadiuli, Block Nawabganj, District Farrukhabad was selected as New Fair Price Shop dealer of Gram Sabha Kadiuli, Block Nawabganju, District Farrukhabad.

2. Shorn of details, the facts of the matter are that vacancy of fair price shop dealer in village Kadiuli, Block Nawabganj, District Farrukhabad arose after the death of fair price shop dealer Sri Saudan Singh on 17.8.2013. The petitioner alongwith some other resident of the village were interested in getting the license of fair price shop and they approached the Gram Sabha for sending a proposal for allotment of a fresh dealer. The Gaon Sabha sent a fresh proposal to U.P. Zila Adhikari seeking permission for appointing a new fair price dealer on 23.8.2013, duly forwarded by the concerned B.D.O. On the same date.

3. The S.D.M./U.P. Zila Adhikari, Kayamganj, District Farrukhabad, vide order dated 31.8.2013 selected respondent No. 4, Smt. Ramwati widow of late Saudan Singh, a new fair price shop dealer of Gram Sabha Kadiuli, Nawabganj, Farrukhabad.

4. By means of this writ petition the impugned order has been challenged on two grounds, firstly because respondent no. 4 is an illiterate lady and has got no required educational qualification, provided by the Government order dated 31.10.2002. Secondly, the Gram Sabha has not passed any resolution in favour of the respondent no. 4, Smt. Ramwati widow of Saudan Singh who died on 17.8.2013. Under the Government order dated 31.10.2002, there is provision for allotting the fair price shop to the heir of the deceased licensed dealer provided his reputation was otherwise not suspect.-

5. It is argued by the learned counsel for the petitioner that the reputation of deceased dealer is disputed as is clear from the proposal proceedings of Gram Sabha which is marked as Annexure-1. In this respect, we do not agree with the proposal as it mentions only the reputation of the family members of fair price shop dealer whereas reputation of dealer is to be taken into account as per

Government order dated 17.8.2002 which has not been done.

6. Sri Upendra Upadhyaya, learned counsel for the petitioner contended that the impugned order is unjust, illegal, improper and against the provisions of Government order, because respondent No. 4, Smt. Ramwati is an illiterate lady and is not eligible in any manner for getting the fair price shop license. In support of his argument, he has placed reliance on the certified copy of Pariwar register, as well as certificate of Gram Pradhan and certificate of education department, in which Smt. Ram Wati has been shown as illiterate.

7. Sri Ram Murat Singh, the learned counsel appearing for respondent no. 3 and the learned Standing counsel, submitted that as per provisions of Government order of 2002:

"GRAMEEN KSHETRON MAI RATION KI DUKANO KA CHAYAN NIMMANLIKHIT ARHATAYA EVAM SHARTON KO DRASHTIGAT RAKHTE HUYE KIYA JAYEGA:

(Ka).....

(Kha).....

(Ga) SHIKSHIT HO TAAKI who DUKAN KA HISAB KITAB SAHI ROOP SE RAKH SAKE."

8. On the basis of the above provision, it has been argued on behalf of respondent no. 3 that Smt. Ramwati is a literate lady as she has made her signatures on the papers and affidavit submitted by her before the S.D.M. Thereafter the then U.P. Zila Adhikari considering the fact that she is a literate lady, appointed Smt. Ramwati as fair price shop dealer on 31.8.2013. In our opinion word 'SHIKSHIT' has been used in the provision with a view that the person concern so appointed as dealer can maintain the accounts properly.

9. Secondly, the learned counsel for the petitioner has laid much emphasis on the point that the Gram Sabha has not passed any resolution in favour of the respondent no. 4, Smt. Ramwati till date and the respondent no. 3 has suo moto appointed the respondent no. 4 as fair price shop dealer of the Gram Sabha. Therefore, there is violation of provision of meeting of Gram Sabha. He has therefore, argued that the respondent no. 2 is not justified in bypassing the Gram Sabha and directly appointing the respondent no. 4 as new fair price shop dealer of Gram Sabha.

10. As per record the Gaon Sabha sent a proposal to U.P. Zila Adhikari seeking permission for appointing a new fair price shop dealer on 23.8.2013, but on record there does not appear to be any open meeting of the Gaon Sabha having been held. The learned counsel for the respondent no. 3 has submitted that the inquiry has been conducted on the complaint of the Gaon Sabha and it was found that the conduct of the dealer was otherwise not suspect. Therefore, after completing the formalities by Smt. Ramawati, heir/widow of dealer Saudan Singh, she was appointed as new fair price shop dealer. He further submits that there is no requirement of any open meeting of the Gaon Sabha for the said purpose as the respondent no. 4 falls within a different category of compassionate claim, hence there is no requirement of the formalities of the meeting of the Gaon Sabha. In this connection case law of Shiv Kumar Vs.

U.P. Zila Adhikari Chakiya [2014 (8) ADJ 593 (DB) 693] has been cited.

11. So far as the second issue of taking a decision in the open meeting of the Gaon Sabha is concerned, we are unable to agree with the proposition of the learned Standing counsel and the counsel for the contesting respondent that no such meeting is necessary.

12. It has been observed by the Division Bench of this Court in the case of Shiv Kumar VS. U.P. Zila Adhikari Chandauli that;

"A bare perusal of Clause 4.4. of the Govt. order dated 3.7.1990, it is evident that any fair price shop license would be opened only after a resolution is passed in the open meeting of the Gaon Sabha. It is only on the collective opinion of such a meeting that such allotment can be made. After such a resolution is passed, the same has to be processed through the Tehsil Level Committee for rural area ..... as defined in Clause 5 of the G.O. Dated 17.8.2002.... The allotment has to be made as per the terms and conditions contained in Clause 10 of the said G.O. which also envisages the grant of license on compassionate basis."

13. Therefore, even in the matter of an individual consideration of compassionate grant of license under clause 10 of G.O. Of 2002, it is necessary to hold an open meeting of the Gaon Sabha. It is only after such a resolution is passed that the same has to be considered by the Tehsil Level Committee and then a decision to be taken by the Sub Divisional Magistrate.

14. Thus, in view of the aforesaid factual aspects and also the law and settled legal propositions discussed above, we are of the view that the order impugned dated 31.8.2013 passed by the Sub Divisional Magistrate, Kayamganj, District Farrukhabad, respondent no. 4 is not sustainable in nature and the present writ petition deserves to be allowed.

15. Hence, the writ petition succeeds and is allowed and the order dated 31.8.2013 is hereby quashed. It is directed that an open meeting of the Gram Sabha be convened and the proposal given by the Gram Sabha be considered by the Tehsil Level Committee whereafter considering the reputation of the deceased license holder as desirable and also the disqualification, the S.D.M. shall proceed to get the matter processed in accordance with the law. It is also directed that the aforesaid exercise be completed expeditiously, preferably within a period of one month from today so that the villagers may not be put to any inconvenience for distribution of fair price ration.

16. No order is passed as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2015

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

Writ-A No. 58341 of 2010

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

Counsel for the Petitioner:
Sri Bhola Nath Yadav, Sri Raj Kumar Yadav, Sri Santosh Yadav, Sri Tarun Agarwal, Sri Vinod Kumar Yadav.

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-14-Compassionate appointment-claimed for post of S.I. Excise-rejected on ground once accepted on post of Junior Clerk-appointment can not be claimed as matter of right-secondly misinterpreting the G.O. treating ban on fresh appointment-be fulfilled through 100% promotion from constable-held-as ban relied by authorities-merely a request of department to the government-and when similarly situated dependents given appointment on post of S.I.-no jurisdiction for different treatment to petitioner-order quashed-necessary direction given.

Held: Para-9 & 11
9. From the material on the record I am satisfied that the State Government has not issued any order imposing the ban on compassionate appointment on the post of Sub-Inspector Excise. In fact, it was a request of the Excise Commissioner to the State Government for imposing such ban and the Excise Commissioner himself, as stated in paragraph-6 of the supplementary affidavit, took a decision to make the compassionate appointment on the said post.

11. From the aforesaid facts it is manifest that the petitioner has been treated differently and the action of the respondent authorities violates Article 14 of the Constitution. In the result, the impugned order dated 11th February, 2011, annexed as Annexure-CA-3 to the counter affidavit, is set aside and the matter is remitted to the second respondent to consider the cause of the petitioner and pass the appropriate order in accordance with law expeditiously.

Case Law discussed:
(2002)9 SCC 445

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

1. The petitioner's father late Khem Raj Yadav was working as a Stenographer in the Excise Department. He died in harness on 31st January, 2008. The petitioner made an application for compassionate appointment on the post of Sub-Inspector Excise. However, his request for the said post was denied on the ground that there is a ban on compassionate appointment on the said post and he was offered the post of Junior Clerk vide order dated 27th March, 2008. A copy of the said order is on the record as Annexure-5 to the writ petition.

2. It is stated that in the compelling circumstances the petitioner gave his consent for appointment on the post of Junior Clerk. However, he found that in the case of late Shailendra Kumar Singh, Sub-Inspector Excise, who died in harness, his wife Smt. Jyoti Singh was appointed on the post of Sub-Inspector Excise under the U.P. Recruitment of Dependant of Government Servants Dying in Harness Rules, 1974.

3. The petitioner initially preferred this writ petition for a direction upon the respondents to appoint him on the post of Sub-Inspector Excise. Later on, by the amendment in the writ petition, a relief has been sought to quash the order dated 11th February, 2011, which was passed pending consideration of this writ petition, whereby his representation has been rejected on the ground that once the petitioner has accepted the offer to be appointed on the post of Junior Clerk, he cannot claim higher post of Sub-Inspector Excise. It is also mentioned in the order that the petitioner has no right to claim the post as a matter of right.

4. A counter affidavit has been filed on behalf of the respondent authorities

wherein it is stated that the Excise Commissioner, Uttar Pradesh vide his communication dated 21st November, 1997 recommended the State Government not to make compassionate appointment on the post of Sub-Inspector Excise because the said post is a sensitive post and further promotions to the posts of Excise Inspector, Assistant Excise Commissioner and Deputy Excise Commissioner are also made from the Sub-Inspectors Excise. The same request was reiterated vide a Demi- Official letter dated 28th August, 1999. It is further submitted that in view of the recommendation of the Excise Commissioner no compassionate appointment was made on the post of Sub-Inspector Excise till 15th September, 2010 when the Excise Commissioner took a decision to make compassionate appointment on the said post and accordingly, the sixth respondent was given the compassionate appointment on the post of Sub-Inspector Excise.

5. Learned Standing Counsel has drawn the attention of the Court to the Government Orders dated 05th August, 2011 and 21st December, 2011 issued in pursuance of the recommendations of the VIth Pay Commission that the post of the Sub-Inspector Excise is now out of the category of posts, on which compassionate appointment can be made. Paragraph-5 of the Government Order dated 05th August, 2011 reads as under:

"(5) उप आबकारी निरीक्षक के पदों पर 10 वर्ष की सेवा वाले हाईस्कूल उत्तीर्ण आबकारी सिपाहियों एवं ताड़ी पर्यवेक्षकों में से शत–प्रतिशत पदोन्नति की व्यवस्था रखी जाय।"

6. I have heard learned counsel appearing for the parties and perused the material on record.

7. The petitioner has claimed the appointment on the post of Sub-Inspector Excise on compassionate ground as his father died in harness while working in the said department. The petitioner was offered the appointment on the post of Junior Clerk on the ground that on the post of Sub-Inspector Excise no appointment on compassionate ground can be made as a restriction has been imposed on compassionate appointment on the said post. The petitioner claims that in view of the said direction, under the compelling circumstances he joined the post of the Junior Clerk. It is a trite law that once a person accepts the appointment on compassionate ground, he cannot claim the appointment on higher post because the appointment on compassionate ground cannot be claimed as a matter of right.

8. In the case in hand, the grievance of the petitioner is that the respondent authorities have violated the fundamental right of the petitioner guaranteed under Article 14 of the Constitution as a discriminatory treatment has been meted out to him by denying the appointment on the post of Sub-Inspector Excise on the ground of a ban imposed by the State Government, but a similarly placed person has been offered appointment on the same post in spite of the said ban. The fact of discrimination has been elaborately pleaded by the petitioner in the writ petition. In paragraph-6 of the supplementary affidavit sworn by the Deputy Excise Commissioner in the office of the Excise Commissioner, U.P. at Allahabad the respondent authorities have admitted the fact that the sixth respondent has been appointed on the post of Sub-Inspector Excise. The said appointment has been justified on the ground that the ban, which was imposed on the request of the Excise

Commissioner, was operative only till 15th September, 2010 when the Excise Commissioner took a decision to make compassionate appointment on the said post and accordingly, the sixth respondent was appointed.

9. From the material on the record I am satisfied that the State Government has not issued any order imposing the ban on compassionate appointment on the post of Sub-Inspector Excise. In fact, it was a request of the Excise Commissioner to the State Government for imposing such ban and the Excise Commissioner himself, as stated in paragraph-6 of the supplementary affidavit, took a decision to make the compassionate appointment on the said post.

10. Reliance has been placed by the learned counsel for the petitioner on a judgment of the Supreme Court in the case of Surya Kant Kadam Vs. State of Karnataka and others, (2002) 9 SCC 445, wherein the Supreme Court directed the respondents to consider the case of the persons for appointment on the post of Sub-Inspector (Excise) even though they had been offered appointment on compassionate appointment on the lower post of Clerk. The Supreme Court observed as under:

"The learned counsel for the appellant contended that even though Respondents 3 and 4's appointment could not be assailed on the ground of belated approach by the appellant but the prayer with regard to consideration of the appellant for the post of Sub-Inspector of Excise could not have been rejected by the Tribunal. The learned counsel appearing for the State Government, on the other hand, contended that against the earlier order when the Tribunal denied the relief of considering the case of the appellant for the post of Sub-Inspector of Excise, the appellant having not moved this Court, the same has become final and therefore should not be interfered with by this Court. There is some force in the aforesaid contention of the learned counsel for the State. But having considered the facts and circumstances of the present case and admittedly Respondents 3 and 4, who were similarly situated like the appellant and who were given compassionate appointment later than the appellant, having been appointed as Sub-Inspector of Excise, the appellant has a justifiable grievance. It is true that the appointment on compassionate ground in the State of Karnataka is not governed by any statutory rules but by a set of administrative instructions and as such is not enforceable in a court of law. But the grounds on which the appellant makes out the case for consideration of his case, is the violation of Article 14 and discriminatory treatment meted out to the appellant. It is undisputed that the date on which the appellant was given a compassionate appointment as Second Division Assistant/ Clerk he had the necessary qualification for being appointed as Sub-Inspector of Excise. It is also undisputed that Respondents 3 and 4 were given appointment initially as Second Division Assistant/Clerk but later than the appellant. When the State, therefore, thought it fit to change the post of Respondents 3 and 4 and appointed them to the post of Sub-Inspector of Excise, unless there is any justifiable reason existing, there is no reason as to why the appellant should be treated with hostile discrimination. In the aforesaid circumstances, we set aside the impugned order of the Tribunal rejecting the prayer

of the appellant for being considered for the post of Sub-Inspector of Excise and we direct that the State Government may consider the case of appointment of the appellant as Sub-Inspector of Excise. Be it stated, in the event he is appointed it would be prospective and he will not be entitled to any retrospective benefit. The appeals are allowed accordingly."

11. From the aforesaid facts it is manifest that the petitioner has been treated differently and the action of the respondent authorities violates Article 14 of the Constitution. In the result, the impugned order dated 11th February, 2011, annexed as Annexure-CA-3 to the counter affidavit, is set aside and the matter is remitted to the second respondent to consider the cause of the petitioner and pass the appropriate order in accordance with law expeditiously.

12. The writ petition is, accordingly, allowed.

13. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2015

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

C.M.W.P. No. 66919 of 2014

Chandrika ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.P. Mishra, Sri Manvendra Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Tarik Maqbool Khan

Constitution of India, Art.-226- Settlement of fisheries rights-petitioner participated in auction bid-being declared highest bidder for Rs. 60,900/- deposited on 16.07.2014-subsequent action by entertaining application from stranger and cancellation of highest bid-without jurisdiction-when cancellation itself illegal entire subsequent exercise itself illegal-quashed.

Held: Para-8
The matter may be examined from another angle also, once the auction proceeding was over, it was not open for the revenue authorities to accept the application, requiring the person to deposit the money in order to earn more venue. The settlement of fishery right has to held strictly in accordance with the terms and conditions of the advertisement and the government order dated 17.10.1995. The action of the revenue authorities in entertaining the applications after the auction was over is beyond their jurisdiction and contrary to the aim and object of the Government Order dated 17.10.1995 and the Full Bench decision of this Court in the case of Ram Kumar (supra) and conditions of the advertisement.

Case Law discussed:
(2005(99) RD 823

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri B.P. Mishra, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents and learned counsel for the Gaon Sabha.

2. By means of the present writ petition, the petitioner has prayed for issuing a writ of mandamus directing the respondent no. 1 to decide the petitioner's application dated 11.8.2014 and approve the bid of the petitioner for the pond in dispute.

3. The facts giving rise to this case are that with respect to pond over Khasra Nos. 304 and 305 measuring about 0.267 hectare and 0.3240 hectares respectively situated in Village Khairahva Jangal, Nautanwa, District Maharajganj, an advertisement was made in the news paper Rashtriya Sahara dated 25.6.2014, fixing 11.7.2014 for settlement of fishery lease. Pursuant thereto, two persons participated, out of which, the petitioner's bid was Rs. 60,900/-. The petitioner was required to deposit 1/4th amount, which he deposited, but no lease was executed. Thereafter, the petitioner filed an application on 11.8.2014 requesting the authority concerned to execute the lease pursuant to the auction held on 11.7.2014. When nothing was done, the petitioner has approached this Court through the present writ petition.

4. In this writ petition, on 10.12.2014, learned standing counsel was directed to seek instructions. Pursuant thereto, after number of dates, instruction was obtained and considering the same, on 1.4.2015 this Court has passed the following order:

"Pursuant to the earlier order of this Court, learned standing counsel has sought instructions informing the Court that after the bid was over, one Sri Bibhuti Yadav and Sri Ram Milan had approached the auction officer and offered some more amount for the performance of the lease. On this, petitioner's bid has been cancelled.

Learned standing counsel is directed to get the personal affidavit of Sub Divisional Officer concerned, swearing the contents of the instructions on affidavit within a period of 10 days.

As prayed, put up this case on 17.4.2015 in the additional cause list.

By that date, learned standing counsel shall file the required personal affidavit and on next date of listing, the concerned Sub Divisional Officer shall remain present before this Court along with complete records of the auction proceedings in order to assist the learned standing counsel. "

5. Pursuant to the aforesaid order, Sri Jay Chandra Pandey, Sub Divisional Officer, Nautanwa, Maharajganj has filed his personal affidavit. For the purpose of this case, perusal of paragraphs 5, 6 and 7 of the aforesaid affidavit would be necessary to be looked into, which are reproduced, herein, under :-

"5. That it may be submitted here that Sri Mangru son of Rupai and Sri Chandrika son of Jokhu have taken part in the auction, and the petitioner was the highest bidder for Rs. 60,900/-.

6. That after the auction, Sri Vibhuti Yadav and Sri Ram Milan moved their applications on 15.7.2014 and 16.7.2014 before the then Sub Divisional Officer, mentioning that the auction has been done in low money and without giving information, which caused loss to gaon sabha. It is further submitted that Sri Ram Milan wished to lease the land at Rs. 80,000/-, on the basis of which, the then Tehsildar on 18.7.2014 produced a report that Rs. 20,000/- may be deposited by Sri Ram Milan son of Santu as security amount and the auction may again be initiated by cancelling the auction dated 11.7.2014, upon which thet then Sub Divisional Officer agreed on 28.7.2014, and directed to proceed in furtherance. A true copy of the applications dated

15.7.2014 and 16.7.2014, and a true copy of the letter dated 18.7.2014, is being filed herewith and marked as ANNEXURE NOS. 1, 2 & 3 to this personal affidavit.

7. That subsequent to above, Sri Ram Milan on 28.7.2014 deposited the amount of Rs. 20,000/- in the Naib Nazir Register No. 4, as such, the auction dated 11.7.2014 has been cancelled vide order dated 28.7.2014 of the Sub Divisional Officer."

6. From the perusal of the aforesaid paragraphs, it is apparent that pursuant to the advertisement made in Rashtriya Sahara on 25.6.2014, the petitioner participated in the auction proceeding and offered Rs. 60,900/- on 11.7.2014 and deposited the required amount. After the auction was over Sri Vibhuti Yadav and Sri Ram Milan moved applications on 15.7.2014 and 16.7.2014 respectively stating therein that they are ready to pay Rs. 80,000/-. The Tehsildar as well as the Sub Divisional Officer, instead of proceeding with the auction held on 11.7.2014, entertained the applications submitted by Vibhuti Yadav and Ram Milan and required them to deposit Rs. 20,000/- for initiating fresh proceeding. It is thereafter, the auction, held on 11.7.2014, was cancelled 28.7.2014. It would also appear from the record that Ram Milan had deposited Rs. 20,000/- on 28.7.2014.

7. It is not in dispute that the fishery leases are settled in accordance with the provisions contained in the Government Order dated 17.10.1995 and the law laid down by the Full Bench of this Court in the case of Ram Kumar and Others Vs. State of U.P. and Others (2005 (99) RD 823). In the Government Order dated 17.10.1995, preferences have been given for execution of fishery lease, according to which first priority is to be given to Kewat, Mallha, Nishad, etc. The petitioner belongs to Kewat by caste and he has participated in the proceeding on 11.7.2014. Once the proceeding was over, it was not open for the revenue authorities to entertain any application of third person on the ground that some more amount has been offered. The object of the Government Order dated 17.10.1995 is the upliftment of the poorest person belonging to the Machhua community and not to earn more revenue otherwise there would have been provision for open auction. The State Government itself knowingly and willingly has issued the Government Order dated 17.10.1995 for such purpose negating the open auction for improving the economic condition of a particular community which has been approved by the Full Bench of this Court in the case of Ram Kumar (supra). Therefore, if the lease is allowed to be executed in favour of persons belonging to other castes or of the same caste falling under higher income group that will defeat the object of the Government Order dated 17.10.1995 and that will be against the law laid down by the Full Bench of this Court in the case of Ram Kumar (supra).

8. The matter may be examined from another angle also, once the auction proceeding was over, it was not open for the revenue authorities to accept the application, requiring the person to deposit the money in order to earn more venue. The settlement of fishery right has to held strictly in accordance with the terms and conditions of the advertisement and the government order dated 17.10.1995. The action of the revenue authorities in entertaining the applications

after the auction was over is beyond their jurisdiction and contrary to the aim and object of the Government Order dated 17.10.1995 and the Full Bench decision of this Court in the case of Ram Kumar (supra) and conditions of the advertisement.

9. In view of the foregoing discussions although the petitioner has not sought quashing of the subsequent auction of the revenue authorities, but under the facts and circumstances of the case, the order dated 28.7.2014 passed by the Sub Divisional Officer, Nautanwa, Maharajganj, cancelling the earlier auction held for settlement of fishery lease (in which the petitioner has offered Rs. 60,900/-) and the subsequent proceeding, if any being illegal and arbitrary, deserves to be quashed.

10. In the result, the writ petition succeeds and is allowed. The impugned order dated 28.7.2014 and the consequential proceeding, if any, is hereby quashed. The Sub Divisional Officer, Nautanwa, Maharajganj is directed to proceed in accordance with law and pass an appropriate order regarding approval /disapproval of the proceeding dated 11.7.2014 within a period of two weeks from the date of production of certified copy of the order of this Court. In case, it is approved, it is well and good and in case, it is disapproved reason for the same may be recorded in the form of order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2015

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

C.M.W.P. No. 68402 of 2014

Ganesh Prasad ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Shri U.K. Singh, Advocate, Sri Chandra Bhan Gupta, Advocate

Counsel for the Respondents:
C.S.C., ASGI/2014/11256

Consumer Protection Act 1986-Section 10(2)-Superannuation age of member of District forum 60 years-while upper age of consumer forum 67 years likewise national forum 70 years-being discriminatory-ultravires held-sole wisdom of legislature-state forum presided by Judge High Court-and national forum by Supreme Court Judge-member of district forum-can not claim treatment of other state or national forum-petition dismissed.

Held: Para-8
These are all matters which are in the realm of policy for the legislative body in considering as to whether there should be a uniform age of retirement for all members of the District Fora at par with what has been prescribed for the National Commission or otherwise, whether there should be a distinction. We find no ground to hold that the provision is ultra vires or violative of Article 14 of the Constitution.

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

1. The petitioner was appointed as a member of the Consumer Disputes Redressal Forum1 of Kanpur under the Consumer Protection Act, 19862 on 4 March 2011 for a period of five years or until the age of sixty-five years, whichever is earlier. The petitioner

attained the age of sixty years on 31 December 2014, following which his term came to an end. These proceedings were initiated on 17 December 2014 for seeking a declaration that Section 10 (2) of the Act is ultra vires and for a mandamus determining the maximum age for a member of the District Forum to hold office until the age of seventy. The petitioner incidentally has also challenged the provisions for the tenure and the age of retirement of members of the Consumer Disputes Redressal Commission3 under Section 16 (3) and has similarly sought a mandamus for continuance until the age of seventy.

2. Section 10 (1) of the Act provides for the composition of the District Forum and, insofar as is material, provides as follows:

"10. Composition of the District Forum.- (1) Each District Forum shall consist of--

(a) a person who is, or has been, or is qualified to be a District Judge, who shall be its President;

(b) two other members, one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age,

(ii) possess a bachelor's degree from a recognised university,

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:"

3. Section 10(2) provides that every member of the District Forum shall hold office for a term of five years or until the age of sixty-five years, whichever is earlier. However, a member would be eligible for re-appointment for another term of five years or until the age of sixty-five years, whichever is earlier. The provisions in regard to the State Commission are contained in Section 16. Section 16 (1), insofar as is material, provides as follows:

"16. Composition of the State Commission.- (1) Each State Commission shall consist of -

(a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President;

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) not less than two, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age;

(ii) possess a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty percent of the members shall be from amongst persons having a judicial background."

4. Under Section 16(3), every member of the State Commission holds office for a term of five years or until the age of sixty seven years, whichever is

earlier but a member is eligible for re-appointment for another term of five years or until the age of sixty seven years, whichever is earlier. The composition of the National Consumer Disputes Redressal Commission4 is governed by Section 20 which, inter alia, provides as follows:

"20. Composition of the National Commission.- (1) The National Commission shall consist of -

(a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President;

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India.

(b) not less than four, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely: -

(i) be not less than thirty-five years of age;

(ii) possess a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty percent of the members shall be from amongst the persons having a judicial background."

5. Section 20(3) provides that every member of the National Commission shall hold office for a term of five years or until the age of seventy years, whichever is earlier, but a member is eligible for re-appointment for another term of five years or until the age of seventy, whichever is earlier.

6. The Presiding Officer of the District Forum is a person who is or has been or is qualified to be a District Judge. The Presiding Officer of the State Commission is a person who is or has been a Judge of the High Court. The Presiding Officer of the National Commission is a person who is or has been a Judge of the Supreme Court. Having due regard to the fact that District Judges are to be Presiding Officers of the District Fora, the maximum age for the Presiding Officer has been fixed as sixty-five. Correspondingly, the maximum age in respect of the State Commission is sixty-seven since the Presiding Officer of the State Commission is a Judge of the High Court who would retire from the High Court at sixty-two. Corresponding provisions have been made in respect of the members of the National Commission in Section 20.

7. The submission which has been urged on behalf of the petitioner is that the qualifications for membership of the District Forum, the State Commission and the National Commission are similar and, hence, there is no justification to make a distinction in the age of retirement for the members of those bodies. The petitioner seeks a mandamus of this Court that all members of the District Fora should retire at the age of seventy.

8. A mandamus cannot be issued by the High Court directing Parliament or a legislating body to frame law in a particular way. Consequently, it would not be open to the Court to mandate that a member of the District Fora under the Act

or, for that matter, of any other judicial body, should retire on the attainment of a particular age of superannuation. This is clearly a matter of legislative policy. The issue before the Court is really narrower as to whether there is any discrimination, which is violative of Article 14, in the provisions of Section 10 when compared to those of Section 20. The Act contemplates that the District Fora be presided over by a District Judge or by a person who is qualified to be a District Judge. The corresponding provisions of Section 16 for the State Commission require the President to be a person who is or has been a Judge of the High Court and of Section 20, a person who is or has been a Judge of the Supreme Court. In the case of the appointment of the President of the State Commission, consultation is required with the Chief Justice of the High Court, whereas in the case of the President of the National Commission, consultation is required with the Chief Justice of India. In making provisions for the age of superannuation of the members of the District Forum, Parliament was entitled to make such provisions as would dovetail with the provision made in regard to the Presiding Officer of the District Forum. Sixty-five years has been fixed uniformly for all the members of the District Fora or a term of five years, whichever is earlier, having due regard to the fact that a District Judge would demit office from the State judicial service at the age of sixty. Parliament, in its legislative wisdom, is entitled to make a distinction between the age of superannuation and the term of office for the members of Tribunals within a hierarchy of Tribunals. Again, whether such a distinction should be made or whether there should be uniformity of all conditions of service, is a matter of legislative policy and prescription. The High Court cannot hold that fixing the term of the members of the District Fora as five years or until a member attains the age of sixty-five, whichever is earlier, is discriminatory or is violative of Article 14 of the Constitution. Though, in a broad sense, the members of the District Forum, State Commission and the National Commission discharge judicial functions, the nature of their responsibilities varies. The jurisdiction of the District Forum under Section 11, the jurisdiction of the State Commission under Section 17 and the jurisdiction of the National Commission under Section 21 are different. The pecuniary limits of the jurisdiction of the District Fora in Section 11 is where the value of the goods or services and the compensation, if any, claimed does not exceed rupees twenty lakhs. The corresponding provision for the State Commission in Section 17 is between rupees twenty lakhs and rupees one crore, whereas that of the National Commission in Section 21 is where the claim exceeds rupees one crore. Moreover, the State Commission exercises appellate jurisdiction over the District Forum, whereas the National Commission exercises appellate jurisdiction over the State Commission. These are all matters which are in the realm of policy for the legislative body in considering as to whether there should be a uniform age of retirement for all members of the District Fora at par with what has been prescribed for the National Commission or otherwise, whether there should be a distinction. We find no ground to hold that the provision is ultra vires or violative of Article 14 of the Constitution.

9. For these reasons, we find no merit in the writ petition which is accordingly dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2015

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

C.M.W.P. No. 74060 of 2010

Rishi Deo Pandey & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nitya Prakash Tiwari, Sri D.K. Singh, Sri Indrasen Singh Tomar, Sri Vivek Kumar Birla, Sri V.K. Singh

Counsel for the Respondents:
C.S.C., Sri Uma Nath Pandey

U.P. Secondary Education Services Selection Board Act 1982-appointment on post of L.T. Grade teacher-after publication of vacancy in two newspapers-duly approved by DIOS-subsequently confirmed by Regional Committee-appointment made in 1991-getting salary thereafter-can not be disturbed-as Division Bench classification about applicability of requirement of Radha Raizada case prospectively.

Held: Para-23
After careful consideration of the matter, I find that the submission of the learned counsel for the petitioners merits acceptance. Accordingly, I am of the view that the petitioners, who were working continuously since 1991 with the approval of the DIOS and the Regional Level Committee, no interference is called for in their continuance. With regard to the case of Gajraj Singh, the DIOS has rightly held that he has raised his claim after 15 years.

Case Law discussed:
[(1983) 3 U.P.L.B.E.C 1722];(1994)3 U.P.L.B.E.C 1551.

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

1. Three petitioners, who are working as Assistant Teachers, have joined this writ petition seeking issuance of writ of certiorari quashing the orders dated 14.6.2010 and 3.12.2010 respectively, whereby the District Inspector of Schools1 had stopped the salary of the petitioners and later on found that their appointment was illegal.

2. Essential facts are that the National Inter College, Harraiya, District Basti2 is a recognized and aided institution. The said institution is imparting education upto the level of Intermediate classes. It receives financial aid from the State funds. The institution is governed by the provisions the U.P. Act No. II of 19213 as well as U.P. Act No. 5 of 19824

3. It is averred in the writ petition that six posts of the LT Grade Assistant Teacher fell vacant. The Committee of Management sent requisition to the U.P. Secondary Education Services Selection Board5 through DIOS on 5.6.1989, 2.5.1990 and 27.4.1991 to fill up the said vacancies. When no select list was sent by the Board, the Committee of Management initiated the recruitment process for the appointment on adhoc basis in terms of the provisions of the Commission Act, 1982.

4. The vacancies were advertised on 6.6.1991 in a newspaper 'Dainik Gramdoot' in addition to the advertisement on the notice board. A copy of the newspaper is on record as Annexure-3. The petitioners claim that they were found suitable on the basis of

their qualification and quality point marks. The Committee of Management sent papers to the DIOS for financial approval. When no communication was received, it issued the appointment letter. It is stated that the petitioners have sent repeatedly representations for their salary on the ground that there is a deemed approval of their appointment as there was no communication from the office of the DIOS turning down the resolution of the Committee of Management for the appointment of the petitioners.

5. The petitioners having no other option, preferred a writ petition no. 36189 of 2002 before this Court which was disposed of on 23.2.2005 issuing a direction upon the DIOS to consider the representation of the petitioners. The DIOS after affording an opportunity to the concerned parties, accorded the approval vide his order dated 29.4.2006 till the regular selected candidates join the post. In compliance of the order of the DIOS, it is stated that the petitioners are continuously receiving their salary regularly.

6. It appears that one Dhirendra Kumar Singh has also claimed that he was also appointed as adhoc teacher in the same institution, preferred a writ petition no. 27015 of 2002.This Court dismissed his writ petition vide order dated 19.3.2009. The Court directed the Regional Committee constituted under Government Order dated 19.12.2000, to look into the matter of payment of salary to other seven persons who along with the petitioners were alleged to have been appointed by the Committee of Management on 7.7.1991 and were getting salary under the orders of the DIOS.

7. In compliance thereof, the Regional Level Committee passed an order on 22.3.2010 and it found that the petitioners are receiving their salary and their appointment was approved by the DIOS who had also affirmed the said order vide his communication dated 11.2.2010 to the Regional Level Committee.

8. In pursuance of the order of the Regional Level Committee, the petitioners continued to work uninterruptedly and they were also paid their salary regularly. It appears that one Sri Gajraj Singh preferred a writ petition in 2005 claiming that he was also appointed as adhoc teacher since 1992. The said writ petition was dismissed by this Court vide its order dated 3.3.2007. Dissatisfied with the order of this Court, he preferred a Special Appeal, which was withdrawn by him with a liberty to approach the DIOS. After withdrawal of the Special Appeal, Gajraj Singh preferred a representation before the DIOS, who rejected his claim on 3.11.2009 on the ground that his claim is barred by laches as his appointment was made in 1982 but first time he approached the Hon'ble Court and the appropriate authority after a lapse of more than 15 years.

9. Sri Gajraj Singh being aggrieved with the order dated 3.11.2009, preferred a writ petition no. 26178 of 2010 before this Court that one Yashwant Singh, who is similarly placed person, is receiving salary but the petitioner's case has been rejected. This Court vide order dated 10.5.2010 directed the petitioner therein to implead Sri Yashwant Singh. The Court has also issued a direction to the DIOS to appear before the Court on

19.5.2010 along with all relevant records pertaining to the payment of the petitioner and Yashwant Singh along with his affidavit explaining how the salary is being paid to Yashwant Singh.

10. Against the said order, Sri Yashwant Singh preferred a Special Appeal No. 928 of 2010 but the said appeal was dismissed on the ground that no interim order has been passed by the learned Single Judge stopping his salary, therefore, there is no final order. It appears that in pursuance to the order passed by this Court on 10.5.2010 whereby the DIOS was directed to produce the record and file his personal affidavit, the DIOS passed the impugned order dated 14.6.2010 stopping the salary of all the petitioners.

11. From the record, it appears that the petitioners have preferred a Special Appeal Defective No. 921 of 2010 before this Court challenging the order of the DIOS. This Court observed that it will be open to the appellants to move before the learned Single Judge for impleading them as parties for varying the orders by proper application or to challenge the order dated 14.6.2010 by filing a fresh writ petition. With the said observation the said appeal was disposed of on 8.10.2010. In the meantime, the DIOS by the impugned order has held that the entire selection process held in the year 1991 was vitiated on the ground that no advertisement was made in the newspaper. There is no document indicating the constitution of the Selection Committee and thus, the appointment of the petitioners was contrary to law. A counter affidavit has been filed wherein the reasons mentioned in the impugned order has been reiterated.

12. Heard Sri H.P. Sahi, Advocate holding brief of Sri V.K. Singh, learned counsel for the petitioner, learned Standing Counsel and perused the record.

13. Learned counsel for the petitioners submits that the petitioners' appointment was made in the year 1991 following the procedure for appointment on adhoc basis after issuing an advertisement in a local newspaper and the notice on the board. He further submits that the appointment of the petitioners was approved by the DIOS and the Regional Level Committee. Thus, it was not open to the DIOS to cancel their appointment.

14. Learned Standing Counsel submits that the order of the DIOS is void as advertisements were not published in the newspaper and the procedure was not followed. He has also invited the attention of the Court to the various paragraphs of the counter affidavit.

15. Undisputedly, in the institution six vacancies of the Assistant Teachers arose. The Committee of Management sent their requisition to the Board for appointment. This fact has not been denied in the counter affidavit. When no candidate was made available from the Board, the Committee of Management appointed the petitioners on adhoc basis after issuing an advertisement in a single newspaper and on notice board. The papers relating to their appointment were sent to the DIOS, who has accorded approval on 26.4.2006, which is on record as Annexure-7 to the writ petition.

16. It is also not disputed that since 29.4.2006, all the petitioners are receiving their salary from the Salary Payment Account and they are continuously working in the institution. Two other

teachers also approached this Court and in one of the petitions, this Court had directed the Regional Level Committee to consider their case. This Court has also taken a note of the fact that the petitioners were also appointed in the same selection.

17. The Regional Level Committee considered the entire matter and came to hold that the petitioners' appointment have been made with the approval of the DIOS. The Regional Level Committee has got verification from the then DIOS, who was working at that time as a Joint Director. The then DIOS has verified the fact that the petitioners' appointment were approved by him, thus, the Regional Level Committee accepted their appointments as valid.

18. As regards the case of Gyanendra Kumar, his matter was sent to the DIOS, who had found that he has claimed his salary after 15 years, therefore, on the ground of delay, Gyanendra Kumar's case was rejected by the DIOS. Later on the DIOS, in compliance of the interim order has stopped the salary of the petitioners vide its order dated 10.5.2010. This Court has only asked the DIOS to explain the fact and did not issue any direction to stop the salary of the petitioners. It appears that the DIOS has passed an order stopping the salary of the petitioners to save his neck. In my view, the DIOS has transgressed his jurisdiction by entering into validity of the appointment of the petitioners, which could not have been reopened by him in view of the fact that in compliance of the order of this Court, the Regional Level Committee has found that the appointments of the petitioners are valid and legal.

19. It would be relevant to mention that DIOS was one of the members of Committee in the Regional Level Committee which has been constituted under the Government Order dated 22.12.2000, therefore, the DIOS could not have upturned the order of the Regional Level Committee in which he was a member.

20. Regard being had to the fact that the Regional Level Committee had also earlier passed an order in compliance of the order of this Court, the proper course before the DIOS was to send the matter to the Regional Level Committee to consider the matter afresh. Moreover, this Court vide its order dated 10.5.2010 did not issue any direction to the DIOS to go into the validity of the order passed by the Regional Level Committee.

21. The petitioners are working since 1991 with the approval of the DIOS. In-so-far the finding of the DIOS that there was no evidence that advertisement was issued in the two newspapers, the petitioners have relied upon a judgment rendered in the case of Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another [(1998) 3 U.P.L.B.E.C. 1722]. A Division Bench of this Court took the view that the statutory provision provides only the advertisement on the notice board. However, the Full Bench in the case of Radha Raizada Vs. Committee of Management (1994) 3 U.P.L.B.E.C. 1551 had laid-down the law that for fair and proper selection, it is incumbent upon the Committee of Management to issue advertisement in two newspapers although there is no statutory requirement for publication of the advertisement in two newspapers.

22. In view of the said law which was laid-down for the first time in the

year 1994 and later on a Division Bench in 1998 has explained the law that the requirement held in the case of Radha Raizada (Supra) would be prospective in nature.

23. After careful consideration of the matter, I find that the submission of the learned counsel for the petitioners merits acceptance. Accordingly, I am of the view that the petitioners, who were working continuously since 1991 with the approval of the DIOS and the Regional Level Committee, no interference is called for in their continuance. With regard to the case of Gajraj Singh, the DIOS has rightly held that he has raised his claim after 15 years.

24. For the foregoing reasons, the writ petition deserves to be allowed and,accordingly, it is allowed. The impugned orders dated 14.6.2010 and 3.12.201 are set aside.

25. However, the matter is remitted back to the DIOS to verify whether the petitioners are continuously working in the institution. If it is found that they are continuously working and they have been paid their salary, no interference would be made in their working.
