APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2015

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

Civil Misc. Impleadment Application No. 88868 of 2003
and Objection to the order of the Court below dated 08.05.2003
In First Appeal No. 486 of 1980

Smt. Jamila Khatoon by L.Rs. ...Appellant
Versus
Sri Ram Niwas Gupta ...Respondent

Counsel for the Appellant:
Sri H.S.Nigam, Sri Chetan Chatterjee , Sri Ram Niwas Singh , Sri S.S. Nigam , Suman Jaiswal , Sri V.P.Varshney and Sri Vinay Kr.Singh Chandel

Counsel for the Respondent:
Sri Ratnakar Bharti, Sri A.P.Srivastava, Sri Avinash Pandey, Sri Ksitij Shailendra, Sri Murlidhar, Sri P.M. Saxena, Sri P.N.Saxena, Sri P.P. Srivastava, Sri Pradeep Kumar, Sri Ran Vijai Bharti, Sri Ran Vijay, Sri Ratnakar, Sri Ravi Kant, Sri S.K.Jauhary, Sri Sunil Kumar Srivastava and Sri Virendra Kumar

Transfer of Property Act-Section 52-doctrine of 'Lis Pendens'-suit for specific performance-applicability-whether subsequent transferee are necessary party?-held-'No' but proper party-to avoid collusion with others side-having no interest-may not contest the suit properly-hence are proper party-impleadment can not be rejected without proper consideration.

Held: Para-36 & 37

36. What emerge from the aforesaid decisions of the Supreme Court are: (i) a subsequent purchaser is a necessary and proper party; (ii) after sale, the owner can lose interest in litigation, thus it can adversely affect the right of the subsequent purchaser; (iii) Section 52 of the Transfer of Property Act does not prohibit the bonafide transfer of the property, it only puts a rider that the subsequent purchaser shall abide the result of the suit; and, (iv) the Court has to be prima facie satisfied while exercising its discretion to allow the application, and the other aspects can be considered at the time of hearing.

37. In view of the above principles, I am of the view that the trial Court without considering the law on the subject has summarily rejected the application of the applicants for impleadment without due application of mind.

Case Law discussed:
AIR 1987 SC 2328; JT 1997 (2) SC 375; AIR 2001 SC 2783; 2001 (Suppl.) R.D. 342; JT 2005 (5) SC 20; (2013) 5 SCC 397; 1994 AWC 848; AIR 1997 SC 3720; 2003 (Suppl.) RD 686; (2012) 8 SCC 384; 2014 (122) RD 395; (1973) 1 SCC 179: AIR 1973 SC 655; AIR 1954 SC 75:1954 SCR 360; AIR 1931 Cal 67; (1846) 6 Hare 1 :67 ER 1057: (1970) 3 SCC 140:AIR 1971 SC 1238; AIR 1954 SC 75:1954 SCR 360; (1973) 1 SCC 179:AIR 1973 SC 655.

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

1. The present impleadment application and the objection to the order of the Court below dated 08th May, 2003 have been filed by the subsequent purchasers of the property in dispute, namely, Smt. Seema Makkar, Smt. Geeta Goel, Smt. Laxmi Devi and Smt. Poonam, who are hereinafter referred to as the "applicants".

2. Heard Sri V.P. Varshney and Ms. Suman Jaiswal, learned counsel for the applicants in support of the aforesaid impleadment application and the objection filed by the applicants, and Sri A.P. Srivastava, learned counsel appearing for the plaintiff-respondent.

3. The essential facts, insofar as they are relevant for the purpose of the present impleadment application and objection, are that the plaintiff-respondent instituted an original suit in the Court of the Civil Judge, Saharanpur for specific performance of an agreement to sell dated 10th January, 1975. The said suit was registered as Original Suit No. 123 of 1978 (Sri Ram Niwas Gupta v. Smt. Jamila Khatoon). The defendant-appellant Smt. Jamila Khatoon, since deceased, was owner of the property in dispute, being Khasra No. 163, admeasuring about 825 square yard, situated at Pathanpura, Ahmad Bag, Saharanpur. The plaintiff-respondent's case was that an agreement to sell was executed on 10th January, 1975 by the defendant-appellant Smt. Jamila Khatoon in favour of the plaintiff-respondent to sell the aforesaid plot in dispute for a sale-consideration of Rs.31,350/-. Apart from the plaintiff, his four cousins Rajendra Kumar, Chandra Prakash, Devendra Kumar and Suresh Chandra were also shown to be beneficiaries of the said agreement. The plaintiff-respondent had advanced a sum of Rs.5000/- to the defendant-appellant. When the sale-deed was not executed in terms of the said agreement, the plaintiff-respondent instituted the above-mentioned suit, which came to be decreed vide judgment and decree dated 06th August, 1980 by the Ist Additional District & Sessions Judge, Saharanpur1.

4. Aggrieved by the judgment and decree of the Court below, the defendant-Jamila Khatoon filed the instant first appeal, i.e. First Appeal No. 486 of 19802, before this Court.

5. During the pendency of the first appeal, defendant Jamila Khatoon died and was substituted by her heirs and legal representatives.

6. The first appeal was allowed by this Court vide judgment and order dated 09th September, 1997, whereby the judgment and decree of the Court below was set aside, suit for specific performance was dismissed and a direction was issued to the defendant to refund the earnest money of Rs.5000/- to the plaintiff with interest @ 9% per annum.

7. Dissatisfied with the judgment of this Court dated 09th September, 1997, the plaintiff-respondent approached the Supreme Court by filing Civil Appeal No. 2246 of 1998, Ram Niwas Gupta v. Mumtaz Hasan and others. The Supreme Court was satisfied that there was a long unexplained delay in filing the suit and the said issue was not adverted to by the High Court. Therefore, the Supreme Court vide its order dated 16th January, 2002 allowed the civil appeal, set aside the judgment and order of the High Court and after framing two issues, remitted the matter to the High Court to decide afresh. The direction of the Supreme Court is extracted herein-below:

"Then the question arises what is the relief which can appropriately be granted to the appellant in this appeal. It is our considered view that the High Court should frame an issue whether there has been unexplained delay on the part of the plaintiff in taking recourse to law in filing suit (though it is filed within the prescribed period of limitation) and whether on facts and in the circumstances of the case such delay defeats the relief of specific performance of the contract for sale of the suit property and call for the

finding of the trial court on the issue and on receipt of the same decide the first appeal afresh after giving opportunity of hearing to the parties. It goes without saying that the trial court will give opportunity to the parties to adduce further evidence in the case on the newly framed issue and record its finding on the question.

Accordingly the appeal is allowed, the judgment of the High Court which is under challenge is set aside and the matter is remanded to the High Court for disposal on the terms afore-stated. No costs."

8. In compliance with the judgment of the Supreme Court, this Court on 24th April, 2002 remitted the two issues, as framed by the Supreme Court, to the Court below to return the findings thereon.

9. In the meantime, the legal heirs of Jamila Khatoon and four cousins of plaintiff-respondent, who are beneficiaries of the agreement to sell and who claimed to have 4/5 share in the property in dispute, executed a sale-deed dated 27th March, 2003 for a sale-consideration of Rs.12,00,000/- in favour of the applicants i.e. Smt. Seema Makkar, Smt. Geeta Goel, Smt. Laxmi Devi and Smt. Poonam, in respect of a major portion of the property in dispute and also executed another sale-deed dated 27th March, 2003 for the remaining part of the property in dispute in favour of some other person. The photocopies of the sale-deeds are on the record.

10. From the record it transpires that after transferring the property in dispute in favour of Smt. Seema Makkar and others, the applicants, the heirs of late Smt. Jamila Khatoon did not participate in the proceedings, therefore, the Court below vide order dated 02nd April, 2003 passed an order to proceed exparte against them. On 07th April, 2003 the vendees Smt. Seema Makkar and three others, the applicants, filed an application before the trial Court seeking their impleadment in the suit and for recalling the order dated 02nd April, 2003. The said application of the applicants was rejected by the trial Court vide its order dated 23rd April, 2003.

11. Against the aforesaid order of the Court below dated 23rd April, 2003, the applicants preferred First Appeal From Order No. 1286 of 2003 (Smt. Seema Makkar and others v. Sri Ram Niwas Gupta and others), which is pending before this Court and is listed with the present first appeal for hearing.

12. On 08th May, 2003 the trial Court vide an exparte order returned its finding on the two issues which were framed by this Court and were remitted to it for recording the findings.

13. It is against this background that the applicants have filed the present impleadment application for being impleaded as appellants in the first appeal and have also filed an objection to the aforesaid order of the trial Court dated 08th May, 2003, whereby the trial Court has returned its findings on two issues.

14. At the time of hearing, learned counsel appearing for both the parties in their submissions admitted that in view of the fact that the trial Court has returned the findings on the two issues on 08th May, 2003, the First Appeal From Order No. 1286 of 2003 filed by the applicants against the order dated 23rd April, 2003 has become infructuous. It

is relevant to note that as the applicants have filed the present impleadment application and the objection against the findings recorded by the trial Court on the two issues, therefore, learned counsel for the parties have addressed this Court in the first appeal.

15. The Court below has rejected the impleadment application of the applicants primarily on the ground that the legal heirs of the defendant-appellant have executed the sale-deed during the pendency of the appeal, therefore, it was hit by the provisions of Section 52 of the Transfer of Property Act.

16. Sri V.P. Varshney and Ms. Suman Jaiswal, learned counsel for the applicants, submit that the applicants were assured by the legal heirs of the defendant-appellant that they would contest the pending legal proceedings, however, subsequently the applicants realized that after transferring the property in dispute in favour of the applicants and others, the heirs of late Smt. Jamila Khatoon lost interest and they did not participate in the proceedings. The trial Court vide its order dated 02nd April, 2003 passed an order to proceed with the matter exparte against them. Immediately thereafter, on 07th April, 2003 the applicants moved an application before the trial Court seeking their impleadment in the suit and for recalling the order dated 02nd April, 2003 to proceed exparte, but the said application of the applicants have been rejected by the trial Court vide order dated 23rd April, 2003.

17. They further urged that on 05th July, 2002 Dr. Mumtaz Hasan, legal heir and power of attorney holder of Jamila Khatoon, had appeared before the trial Court and had moved an application for amendment in the case and thereafter he abstained from appearing in the trial Court. In view of the said facts, the applicants were necessary party to protect their interest as they are the bonafide purchasers for a valuable sale consideration. In fact, the applicants had no knowledge earlier about the pendency of the litigation. In their application under Order XXII Rule 10 C.P.C. moved before the trial Court it was stated that all the legal heirs of late Jamila Khatoon had assured the applicants that they will contest the suit. However, on 05th April, 2003 when they enquired from Imtiyaz Ali, he did not have any knowledge about the case. However, the enquiry made by the applicants revealed that the Court below has already passed an order on 02nd April, 2003 to proceed exparte and has closed the evidence of the plaintiff-respondent and has fixed 04th April, 2003 as the next date. On 04th April, 2003 the plaintiff had filed the affidavits of his two witnesses. Thus, without any loss of time, the applicants had moved an application for their impleadment, which has been rejected by the Court below.

18. It is further urged by the learned counsel for the applicants that a transferee pendente lite of an interest in an immovable property is a representative in interest of the party, from whom he had acquired that interest, and he is entitled to be impleaded in the suit or other proceedings and he is entitled to be heard in the matter on the merits of the case. In case he is not heard, there will be no one to prosecute the suit on account of the owner having left with no interest in the property.

19. In support of their submissions, learned counsel for the applicants have placed reliance on the judgments of the Supreme Court in the cases of Parakunnan

Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and others3, K.S. Vidyanadam & ors. v. Vairavan4, A.C. Arulappan v. Smt. Ahalya Naik5, Dhurandhar Prasad Singh v. Jai Prakash University and others6, Amit Kumar Shaw and anr. v. Farida Khatoon and anr.7, and, Thomson Press (India) Limited v. Nanak Builders and Investors Private Limited and others8, and of this Court in Lal Chandra and others v. District Judge, Jaunpur and others9.

20. Learned counsel for the respondent has submitted that the applicants have no right to interfere in the proceedings of the first appeal. Since they are not parties to the contract, they are not necessary party or proper party to the litigation. It was urged that the agreement to sell is an executory contract, whereas sale is an executed contract. The trial Court has rightly rejected their application as they have no right in the suit property and the sale-deed dated 27th March, 2003 having been executed by incompetent persons is a nullity in the eyes of law and void ab-initio. It was further submitted that by implication of doctrine of lis pendens the transferee cannot deprive the successful plaintiff of the fruit of the decree. It was urged that alienation will in no manner affect the right of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

21. Learned counsel for the respondent has placed reliance on the judgments of the Supreme Court in the cases of Dhanna Singh and others v. Baljinder Kaur and others10, Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead) through L.Rs.11, Vidur Impex and Traders Private Limited and others v. Tosh Apartments Private Limited and others12, and, K.N. Aswathnarayana Setty (D) through L.Rs. and others v. State of Karnataka and others13.

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

23. The plaintiff-respondent's suit for specific performance was decreed by the trial Court on 06th August, 1980, against which the defendant-appellant late Smt. Jamila Khatoon filed the present first appeal before this Court. The first appeal of the defendant was allowed by this Court 09th September, 1997 and the judgment and decree of the trial Court was set aside. Aggrieved by the said order of this Court, the plaintiff filed a civil appeal before the Supreme Court. The Supreme Court on 16th January, 2002 set aside the order of the High Court and remanded the matter to the High Court to decide afresh. In its order, the Supreme Court has directed the High Court to frame fresh issues to the effect whether there has been unexplained delay on the part of the plaintiff in taking recourse to law in filing the suit and whether on facts of the case the delay defeats the relief of specific performance of the contract for sale of the suit property. The Supreme Court has also directed that the trial Court will give opportunity to the parties to adduce further evidence in the case on the newly framed issues and record its findings on the aforesaid questions.

24. In compliance with the aforesaid order of the Supreme Court, the High Court on 24th April, 2002 has framed two specific issues and remanded the matter to the trial Court to return the findings thereon.

25. After the matter was remanded by the Supreme Court, a major portion of the suit property was transferred in favour of the applicants by a registered sale-deed dated 27th March, 2003. In the said sale-deed, four cousins of the plaintiff had also joined.

26. From the record it emerges that after alienating the property in dispute, the erstwhile owner of the property lost interest in the suit property and they stopped attending the case which led the trial Court to proceed exparte on 02nd April, 2003. Thereafter, the applicants within a week i.e. on 07th April, 2003 had moved an application to recall the order dated 02nd April, 2003 and also for their impleadment in the case. Their application was rejected by the trial Court vide order dated 23rd April, 2003 on the ground that the sale-deed was barred by the provisions of Section 52 of the Transfer of Property Act. Thereafter, the Court below vide order dated 08th May, 2003 in an exparte manner proceeded to record the findings on the issues remitted by this Court.

27. In Thomson Press (India) Limited (supra) the Supreme Court has considered the same issue. The learned counsel for the applicants has heavily relied on this judgment. The said case has a chequered history, therefore, brief facts of the case are necessary for proper appreciation of the law laid down in the case. In the said case, one Mrs. Lakhbir Sawhney and her son14 were owner of a building known as "Ojha House"/ "Sawhney Mansion", F-Block, Connaught Place, New Delhi. One M/s. Nanak Builders and Investors (P) Ltd. filed a suit in the High Court of Delhi against Sawhneys for a decree for specific performance of agreement dated 29th May, 1980. It was their case that the owners of the property-defendants had entered into an agreement with the plaintiff for the sale of first floor of the said property on a consideration of Rs.50 lakhs, out of which Rs.1 Lakh was paid by the plaintiff to the defendants.

28. The said property was in the tenancy of M/s. Peerless General Finance Company Ltd. In 1991, M/s. Peerless General Finance Company Ltd. vacated the premises. Immediately after the premises was vacated, the plaintiff requested the owners to receive the balance consideration but the same was avoided by the owners. The plaintiff thereafter got published a public notice in the newspapers The Hindustan Times, New Delhi, so that the defendants-owners/Sawhneys do not sell, transfer or alienate the property to any other person.

29. In the meantime, one Living Media India Ltd. (LMI), a group company of M/s. Thomson Press (India) Ltd., offered the owners to take the suit property on lease and they had paid earnest money in respect of the said lease. The owners of the property-Sawhneys when resiled from the agreed terms with LMI, the LMI filed a suit against Sawhneys in the High Court of Delhi for perpetual injunction restraining the Sawhneys from transferring the possession of the property to any third party and an interim order was granted by the High Court on 19th September, 1990 in respect of the suit property. In the said suit, a compromise was arrived at between LMI and Sawhneys and consequently the suit property was leased out by the defendants-Sawhneys in favour of the LMI.

30. Sawhneys had taken a loan from a bank and an equitable mortgage was created in respect of the suit property. The bank had filed a suit in 1977 in the High Court of Delhi for recovery and redemption of the mortgaged property. The said suit was decreed on 14th October, 1998 and recovery certificate was issued by the Debts Recovery Tribunal (DRT). The LMI moved an impleadment application and settled the decree by agreeing to deposit the loan amount of Rs.1.48 crores and the LMI cleared all the dues of Sawhneys for sale of the property in their favour. Consequently, five sale-deeds were executed by Sawhneys in favour of M/s. Thomson Press India Limited, a group of LMI. On the basis of those sale-deeds, M/s. Thomson Press moved an application under Order I Rule 10 CPC for impleadment as defendants in the suit for specific performance filed by M/s. Nanak Builders and Investors (P) Ltd..

31. The High Court of Delhi dismissed the application of Thomson Press on the ground that since there was an injunction order passed way back on 04th November, 1991 in the suit for specific performance restraining Sawhneys from transferring or alienating the suit property and since the appellants have purchased the property in violation of the undertaking given by Sawhneys which was in the nature of injunction, they were not proper party. The view taken by the learned Single Judge of the Delhi High Court was affirmed in appeal by a Division Bench of the Delhi High Court. Aggrieved by the said orders, the Thomson Press approached the Supreme Court.

32. Before the Supreme Court, in the said case, a submission was made on behalf of the purchaser/the appellant therein that the appellant being purchaser of the suit property is a necessary and proper party for complete and effective adjudication of the suit. Rejection of the impleadment application of the subsequent purchaser was contrary to the principles governing Order I Rule 10(2) CPC. It was also urged that where a subsequent purchaser has purchased a suit property and is deriving its title through the same vendor then he would be a necessary party provided it has purchased with or without notice of the prior contract. It was also urged before the Supreme Court that Section 52 of the Transfer of Property Act does not prohibit the subsequent transaction of transfer of property nor even declares the same to be null and void.

33. The Supreme Court held that a decree for specific performance may be enforced against a person who claimed under the defendant, and title acquired subsequent to the contract. Such a sale or transfer is subject to the rider provided under Section 52 of the Transfer of Property Act. In the said case, the Supreme Court followed its earlier decision in Dwarka Prasad Singh v. Harikant Prasad Singh15. The Supreme Court in paragraphs - 41 to 44 of the judgment, held thus:

"41. The Supreme Court in Durga Prasad v. Deep Chand16 referred to the aforementioned decision of the Calcutta High Court in Kafiladdin case17 and finally held: (Durga Prasad case, AIR p. 81, para 42)

"42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any

special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin, and appears to be the English practice. (See Fry on Specific Performance, 6th Edn., p. 90, para 207 and also Potter v. Sanders18.) We direct accordingly."

42. Again in R.C. Chandiok v. Chuni Lal Sabharwal19 this Court referred to their earlier decision and observed: (SCC p. 146, para 9)

"9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at SCR p. 369 in Durga Prasad v. Deep Chand20 viz.

'to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff'. (AIR p. 81, para 42)

We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court."

43. This Court again in Dwarka Prasad Singh v. Harikant Prasad Singh21 subscribed to its earlier view and held that in a suit for specific performance against a person with notice of a prior agreement of sale is a necessary party.

44. Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the appellant is to be added as party-defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside."

34. The facts of Thomson Press (India) Limited (supra) are somewhat similar to the facts of the present case. In Thomson Press (India) Limited (supra) also, the property was purchased even after the restraint order passed by the High Court of Delhi. The Supreme Court held that subsequent purchaser is a necessary party.

35. In Amit Kumar Shaw (supra) the Supreme Court held that the Court has a discretion to make the subsequent purchaser as a party, if his interest in the subject matter of the suit is substantial and not just peripheral. A subsequent purchaser who acquires interest from the owner is vitally interested in the litigation, whether the transfer is of the entire interest, as in some cases owner having no more interest in the property may not properly defend the suit and he may collude with the contesting party. The Supreme Court has also considered the scope of Order XXII Rule 10 CPC and held that under the said provision there is no detailed enquiry contemplated at the stage of granting leave. The Court has only to be prima facie satisfied for exercising its discretion in granting leave. The question about existence and validity of the transfer can be considered at the final hearing of the proceedings. At the initial stage, the only requirement is prima facie satisfaction. The Supreme Court held as under:

"16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can

be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

36. What emerge from the aforesaid decisions of the Supreme Court are: (i) a subsequent purchaser is a necessary and proper party; (ii) after sale, the owner can lose interest in litigation, thus it can adversely affect the right of the subsequent purchaser; (iii) Section 52 of the Transfer of Property Act does not prohibit the bonafide transfer of the property, it only puts a rider that the subsequent purchaser shall abide the result of the suit; and, (iv) the Court has to be prima facie satisfied while exercising its discretion to allow the application, and the other aspects can be considered at the time of hearing.

37. In view of the above principles, I am of the view that the trial Court without considering the law on the subject has summarily rejected the application of the applicants for impleadment without due application of mind.

38. The finding of the trial Court that the subsequent transfer was hit by Section 52 of the Transfer of Property Act, is contrary to the law. Thus, the trial Court has misconstrued the scope of Section 52 of the Transfer of Property Act. The trial Court has also failed to notice that the Supreme Court has directed to decide the relevant issues after hearing both the parties and after permitting them to lead the evidence, therefore, the trial Court was not justified in passing the order to proceed with the suit exparte on 02nd April, 2003. The application of the applicants for their impleadment and recall of the order dated 02nd April, 2003 was moved within five days i.e. 07th April, 2003.

39. The proper course for the trial Court was to recall the order dated 02nd April, 2003, to allow the impleadment of the applicants as party in the case, as in absence of both the plaintiff as well as the applicants the issues framed by the High Court could not have been effectively adjudicated upon, and thereafter to proceed to return the findings after hearing both the sides. From the plain reading of the issues framed by the High Court, on the direction of the Supreme Court, it is evident that the issues need proper determination of fact with regard to the delay in filing the suit. The said issues cannot be determined without proper evidence by both the sides.

40. Now I will deal with the judgments cited by the learned counsel for the respondent--the plaintiff.

41. In the case of Vidur Impex and Traders Private Limited (supra) M/s. Tosh Apartments Private Limited filed a suit in the High Court of Delhi. In the said case it was found that the application for impleadment filed by the subsequent purchasers lack bonafide because they purchased the suit property from the party despite the order of injunction passed by the High Court and there was no tangible explanation for filing the application after a long time-gap of 7 years. The respondent therein could not satisfy the Court about the long time-gap of 7 years and their knowledge about the injunction order issued by the High Court. Moreover, in their favour only an agreement to sell and thereafter sale-deeds were executed and the said sale-deeds were found to be nullity as it was executed after the injunction granted by the Delhi High Court. In view of the said fact, the said case, as relied upon by the respondent, has no application in the present matter. In the case of Rambhau Namdeo Gajre (supra) a suit was filed for the possession of the suit land on the allegation that the owner was wrongfully dispossessed from it. The plaintiff had alleged that he was owner of the suit land, which was his self-acquired property, and his brother has filed a suit for partition and possession of the ancestral property, the suit land along with other lands was left to his share. The issue raised in the said case was in respect of doctrine of part performance enshrined under Section 53-A of the Transfer of Property Act. The issue of doctrine of part performance as contemplated under Section 53-A of the Transfer of Property Act is not involved in the present case, therefore, the facts of the said case are distinguishable.

42. In Dhanna Singh (supra) the defendant had contested the case and pending the suit several opportunities were given but no evidence was adduced by the defendant therein. The Court thereafter passed an order foreclosing the evidence of the defendant on the statement of the counsel that the first defendant was not willing to lead any evidence. At that stage, the subsequent purchaser moved an application for adduction of evidence. In the facts of the said case, the trial Court has rejected the application. The facts of the said case clearly show that several opportunities were given to the defendant and a statement was made that they will not lead any evidence. In the present case, the trial Court has passed an order to proceed exparte on 02nd April, 2003 when owner did not appear, but the application was moved by the applicants within five days which has been rejected. Thus, the said case does not help the respondent-plaintiff.

43. Insofar as K.N. Aswathnarayana Setty (supra) is concerned, the said case was in respect of a land of the Land Acquisition Act, 1894. In the said case the land was acquired under the provisions of the Land Acquisition Act and the owner had transferred the property after the acquisition proceeding. The preliminary notification under Section 4(1) of the Land Acquisition Act was issued in respect of a huge chunk of land admeasuring 15 acres on 06th August, 1991 for the benefit of the State Government Houseless Harijan Employees Association (Regd.). On 15th May, 1992 a declaration under Section 6 of the Land Acquisition Act was issued. The Government denotified the land from acquisition on 05th August, 1993 by issuing notification under Section 48(1) of the Land Acquisition Act. The decision of the State Government to denotify the land

was challenged by the beneficiaries and the matter was carried upto the Supreme Court. In the meantime, during pendency of the civil appeal in the Supreme Court, the property was transferred. In that context, the Supreme Court held that at the time of purchasing of the suit land by the petitioners, the matter was subjudice before the Supreme Court and if the order of denotification was quashed, it would automatically revive the land acquisition proceedings. In the said facts, the Supreme Court applied the doctrine of lis pendens and the Court held that the transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite. For the said reason, the said case also does not come to the aid of the respondent-plaintiff.

44. In view of the discussions made above, I am of the considered view that the order of the trial Court dated 23rd April, 2003 rejecting the application of the applicants for their impleadment and recall of the order dated 02nd April, 2003 to proceed exparte is illegal and is liable to be set aside. Accordingly, it is set aside. The impleadment application filed by the applicants before the trial Court needs to be allowed and is allowed for proper adjudication of the issues in the interest of justice.

45. Consequently, the order dated 08th May, 2003 recording findings in compliance with the order of this Court, as directed by the Supreme Court, is required to be set aside on account of the same having been recorded exparte, which is against the direction of the Supreme Court given in the order dated 16th January, 2002 for giving opportunity to the parties to lead the evidence. Hence, the order dated 08th May, 2003 passed by the trial Court is set aside. The matter is remitted to the trial Court to give opportunity to the applicants to lead the evidence, if they desire so, and after giving opportunity to both the parties, and to return its findings on both the issues, as framed by this Court, afresh, expeditiously preferably within four months from the date of receipt of the record.

46. Accordingly, the impleadment application and the objection filed by the applicants are allowed. No order as to costs.

47. Let the lower court record be sent to the concerned court. 3

48. List the appeal after receipt of the findings of the trial Court along with the record.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.11.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE ANANT KUMAR, J.

Special Appeal No. 528 of 2015

Kamla Prasad Chaurasia 7866 (S/S) 2005 ...Appellant

Versus

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

Counsel for the Appellant:
Pradeep Shukla

Counsel for the Respondents:
C.S.C., Pramendra Kumar Singh, Ravi Kishore Joshi

High Court Rules, 1956-Chapter VIII Rules-5-Special Appeal-Single Judge dismissed writ petition-finding that the

day on which vacancy of lecturer occurs-petitioner already got requisite qualification-held misconceived-vacancy notified on 02.07.01-teaching experience of as lecturer-not there-5 years experience completed only on 08.10.01-Appeal dismissed.

Held: Para-13
In view of the above observations and applying the illustration of Malik Mazhar Sultan (supra), the inescapable conclusion is that the relevant date of first July for the recruitment in question would be of the calendar year of 2001 i.e., 01.07.2001. The petitioner-appellant was admittedly not having the requisite qualification on the said date of reckoning as he had completed 5 years of service only on 08.10.2001.

Case Law discussed:
2006 (2) ESC 171

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

1. By way of this intra-Court appeal, the petitioner of Service Single No.7866 of 2005, seeks to question the order dated 01.09.2015 whereby the learned Single Judge has rejected the writ petition that was preferred on his claim for promotion on the post of Lecturer (English) after holding that the petitioner-appellant was not possessed of the requisite qualification of 5 years' regular service as LT Grade Teacher on the relevant date.

2. This appeal is reportedly time barred by 28 days. Having regard to the circumstances, while ignoring the delay, we have heard the learned counsel for the petitioner-appellant on merits.

3. After having heard the learned counsel and having perused the material placed on record, we are unable to find any reason to consider interference in the order impugned.

4. The factual aspects of the matter are not much in controversy. The petitioner-appellant was appointed on the post of LT Grade Teacher on 09.10.1996 and hence, he completed 5 years of continuous service on 08.10.2001. The case of the appellant had been that upon retirement of one incumbent holding the post of Lecturer (English), this post fell vacant on 30.06.2001. According to the appellant, the Committee of Management of his employer Sri Shankaracharya Inter College Baldirai, Sultanpur, commenced the process of selection for the post of Lecturer (English) on 06.01.2002, and on this date, he alone was eligible for the post in question. The petitioner-appellant has averred that the necessary formalities were not completed by the Management for about 2 years until the District Inspector of Schools directed the Management to submit the documents relating to the post in question by his letter dated 22.01.2003 which was followed by other communications dated 21.02.2004 and 24.06.2004. The petitioner-appellant has further submitted that the Committee of Management was dissolved on 30.07.2004 whereafter, the District Inspector of Schools became the Authorized Controller who took necessary steps and forwarded the document for approval to the Joint Director Education Faizabad Region, Faizabad who, in turn, rejected the proposal for promotion of the petitioner-appellant on the ground that he had not completed 5 years of continuous service on 01.07.2001, the date on which the post of Lecturer (English) fell vacant.

5. With reference to the U.P. Secondary Education Services Selection Board Rules, 1998 ('the Rules'/ 'the Rules of 1998) the petitioner-appellant submitted that as per the Rules and

interpretation thereof by the Court, the candidate should be eligible for promotion on the first date of the year of recruitment or commencement of process of recruitment; and, as the process was initiated in this case admittedly in the month of January, 2002, he was clearly possessed of the requisite qualification on the relevant date. The petitioner-appellant also referred to the Larger Bench decision dated 14.05.2015 of this Court in the case of Raeesul Hasan. Vs. State of U.P. and others (Writ Petition No.1593 (S/S) of 2001 and other connected matters).

6. The learned Single Judge found the said Larger Bench decision being not of any help to the petitioner-appellant and, rather the ratio thereof operating against his claim. The learned Single Judge, therefore, proceeded to decline the claim as made by the petitioner-appellant but left it open for consideration if the vacancy in question was referable to promotion quota or was being filled up by way of promotion. The learned Single Judge proceeded to dispose of the writ petition while observing as under:-

"On a close scrutiny of the aforesaid Full Bench judgement, it is evident that a candidate in the zone of eligibility is bound to fulfill requisite qualification as on the date 1st July of the recruitment year in which the vacancy is filled up. The selection process in the present case initiated on 6.1.2002 would necessarily require completion of five years' of regular service as on 1.7.2001, therefore, the submission of the learned counsel for the petitioner does not appear to be well-founded on the strength of case law referred by him. On the contrary the proposition laid down by the Full Bench proceeds to his disadvantage.

The impugned order thus, stands in consonance with the Full Bench judgement and needs no interference by this Court under Article 226 of the Constitution.

However, it is provided that in case the vacancy in question falls in promotional quota or is to be filled in by way of promotion and has not yet been filled in, the candidature of the petitioner for promotion against the said post shall be considered by the respondents strictly in accordance with rules.

The writ petition is disposed of accordingly."

7. Seeking to question the order aforesaid, learned counsel for the appellant has strenuously argued that the learned Single Judge has erred in assuming that for the selection process in question, the requirement of completion of 5 years of regular service would be referable to the date 01.07.2001. Learned counsel for the petitioner-appellant would argue that in view of the Larger Bench Decision of this Court, the year of recruitment would be the year 2004 when the Authorized Controller and the Principal of the College sent the proposal for promotion. The learned counsel has further attempted to argue that as per Section 2 (1) of the U.P. Secondary Education (Services Selection Board) Act, 1982 ['the Act of 1982'] the year of recruitment is the period of 12 months commencing from the first day of July of a calendar year and hence in the present case, even if we assume that the process of selection was commenced on 06.01.2002, the year of recruitment would only be a period of 12 years commencing from the first day of July of the calendar year 2002 and by that date, the petitioner-appellant had already completed 5 years

service. The submissions made on behalf of the petitioner-appellant fall short of merit and remain untenable.

8. The vacancy in question arose on 01.07.2001. Indisputably, the process of selection was initiated by the Committee of Management on 06.01.2002. Any other but subsequent dealings for completion of process cannot alter the basic date of its initiation, i.e., 06.01.2002.

9. This much of the controversy has already been settled with the above referred decision of this Court in Raeesul Hasan (supra) that for the purpose of the Rules in question, it is not the date of occurrence of vacancy but it is the year of recruitment which is relevant for determination of eligibility for promotion. The Larger Bench of this Court has answered the reference in the following terms:-

"For these reasons, we answer the reference by holding that it is not the date on which the vacancy has occurred, but the year of recruitment which is relevant for the determination of eligibility for promotion to the Lecturers' grade under the Rules of 1998. The reference is answered in the aforesaid terms. All the writ petitions shall now be placed before the regular Bench according to roster for disposal in the light of the present judgment."

10. It is noticed that although, in the earlier Rules of the year 1983, in the process of recruitment by promotion, the requirement spelt out in Rule 9 thereof had been of 5 years of continuous service as a Teacher on the date of occurrence of vacancy but in the subsequent Rules of 1995, a significant departure was made and the requirement was provided as 5 years of continuous service as on the first day of the year of recruitment that has been maintained in the Rules of 1998 but with further modulation as being that of 5 years of continuous regular service. These changes have been noticed by the Larger bench in Raeesul Hasan (supra) in the following:-

"In Rule 14 of the Rules of 1998, a change has been brought about from the corresponding provision of Rule 14 (1) of the Rules of 1995, inter alia, by requiring the completion of five years' continuous regular service instead of five years' continuous service. The provisions contained in Rule 9 of the Rules of 1983 stipulated that where a vacancy was required to be filled in by promotion, teachers in the L.T. or C.T. Grade, who possessed the minimum qualifications and had at least five years' continuous service as teachers were to be considered for promotion. The norm of five years' continuous service as teacher was under Rule 9 to be considered on the date of the occurrence of vacancy. In the Rules of 1995, a conscious departure was made while formulating Rule 14 which dealt with the procedure for recruitment by promotion. Rule 14 stipulated that all teachers working in the trained graduates/L.T. Grade or Certificate of Teaching grade, who possess the minimum qualifications prescribed and have completed five years' continuous service on the first day of the year of recruitment, would be considered for promotion. Similarly, in Rule 14 of the Rules of 1998, all teachers working in trained graduates grade or Certificate of Teaching grade, who possess the qualification prescribed and have completed five years' continuous regular service on the first day of the year of recruitment are to be considered for promotion to the lecturer's grade. Hence, both in the Rules of 1995 and in the Rules of 1998, the norm of five years' continuous

service or, as the case may be, five years' continuous regular service has to be assessed on the first day of the year of recruitment. The year of recruitment is, as we have noted, defined in Section 2 (1) of the Act to be a period of twelve months commencing from the first day of July of a calendar year."

11. The year of recruitment year has, of course, been defined in Section 2 (1) of the Act of 1982 in the following terms:-

"(l) 'Year of recruitment' means a period of twelve months commencing from first day of July of a calendar year".

12. The question is, as to what would be the "year of recruitment" for the present purpose. The petitioner-appellant claims that such year of recruitment ought to be the first day of July of the year 2002. The argument is not tenable for the simple reason that the term "year of recruitment" for the present purpose shall only be the year commencing on 01.07.2001 and ending on 30.06.2002; and not that commencing on the first day of the July of the year 2002 so as to end on 30.06.2003 because, if the process of recruitment is initiated in the month of January, 2002, the corresponding 'year of recruitment' would be the year of recruitment in currency and not the year subsequent. The relevant current year for the present purpose shall remain the year that had commenced on the first day of July, 2001. This aspect of the matter stands beyond a pale of doubt when seen in the light of the observations of the Hon'ble Supreme Court in the case of Malik Mazhar Sultan & Anr. vs. U P Public Service Commission & Ors.: 2006 (2) ESC 171, which have been noticed by the Larger Bench in the Raeesul Hasan (supra) while observing as under:-

" Similarly, in Malik Mazhar Sultan & Anr. vs. U P Public Service Commission & Ors.9, the Supreme Court considered the expression 'year of recruitment' in Rule 4 (m) of the Uttar Pradesh Judicial Services Rules, 2001, which defined the expression to mean a period of twelve months commencing from the first day of July of the calendar year in which the process of recruitment is initiated by the appointing authority. The Supreme Court held that where the process of recruitment was initiated by the appointing authority on 23 November 2002, the year of recruitment had rightly been determined as 1 July 2002 to 30 June 2003, having regard to Rule 4 (m)."

13. In view of the above observations and applying the illustration of Malik Mazhar Sultan (supra), the inescapable conclusion is that the relevant date of first July for the recruitment in question would be of the calendar year of 2001 i.e., 01.07.2001. The petitioner-appellant was admittedly not having the requisite qualification on the said date of reckoning as he had completed 5 years of service only on 08.10.2001.

14. Thus, the claim of the petitioner-appellant has rightly been rejected and the learned Single Judge has rightly declined to interfere. The learned Single Judge has yet been considerate in providing that if the vacancy fell in promotional quota and was yet to be filled in by way of promotion, the candidature of the petitioner-appellant would be considered by the respondents in accordance with the Rules. The petitioner-appellant is not entitled to any other relief.

15. Thus, this appeal, being devoid of substance, stands dismissed.

APPELATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.11.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE ANANT KUMAR, J.

First Appeal From Order No. 761 of 2013

Janka & Ors. ...Appellants
Versus
Akhilesh Kumar Gupta & Ors. Respondents

Counsel for the Appellants:
Santosh Kumar Kanaujia

Counsel for the Respondents:
Vaibhav Raj

Motor Vehicle Act-1988-Section-173-claim petition-dismissal due to want of evidence-all the claimants either minor or blind-fully dependent upon deceased-Tribunal acted very haste manner-as without appointing guardian ad litem after having affidavit of next friend next very date closed evidence-held-if the next friend not prosecuting the case-Tribunal ought to have appoint guardian ad litem - but dismissed of claim petition-illegal-set-a-side-consequential direction given.

Held: Para-10
It appears that in its haste for disposal, the Tribunal altogether failed to consider that the matter related to the claimants who were shown to be the persons under disabilities including minors; and if at all their next friend was found not doing his duties for prosecution of the matter, the next friend could have been removed and guardian ad-litem could have been appointed for the claimants on the principles referable to Order XXXII of the Code of Civil Procedure. The manner of disposal of the present claim application by the Tribunal without regard to all the facts and circumstances has only resulted in failure of justice and this manner of disposal cannot be endorsed.

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

1. This appeal by the claimants-appellants is directed against the judgment and Award dated 24.05.2013 as made by the Motor Accident Claims Tribunal (Additional District Judge, Court No.3), Lakhimpur-Kheri ['the Tribunal'] in Motor Accident Claim Petition No.124 of 2012 whereby the Tribunal has proceeded to determine the relevant issue No.1 on the factum of accident against the claimants-appellants for want of evidence; and on that basis, has dismissed the claim application.

2. The relevant background aspects of the matter are that the appellant No.1, said to be a blind lady in 66 years of age and the appellant Nos.2 and 3, said to be the minors in about 12 and 9 years of age, preferred the claim application aforesaid through their next friend/guardian Shri Sanjay Kumar, who is son of the appellant No.1 and uncle of the appellant Nos.2 and 3. It was submitted that the victim Arvind Kumar died due to the injuries sustained in the vehicular accident caused by the vehicle belonging to the respondent No.1, which was being driven by the respondent No. 2 and was insured with the respondent No.3. While stating that the deceased was a skilled mason and was also engaged in agriculture, it was submitted that the claimant-appellant No.1 was the blind mother of the victim, whereas the claimant nos.2 and 3 were his minor sons, whose mother had already expired; and all the claimants were dependent solely on the victim. The other factual aspects relating to the accident and the basis of claim need not be dilated for the short point involved in this appeal.

3. The relevant aspects of the matter are that the claim application was filed on 03.04.2012 by Sanjay Kumar as the next

friend/guardian of the claimants. In the claim application, issues were framed on 30.03.2013 with reference to the pleadings of the parties. Issue No.1 was framed on the question if the victim Arvind Kumar sustained injuries due to the accident caused by the vehicle belonging to the respondents and died because of such injuries. The Tribunal posted the matter for evidence on 04.04.2013 and then, adjourned the same to 16.04.2013.

4. On 16.04.2013, an affidavit of the aforementioned Sanjay Kumar, the guardian/next friend of claimants, was filed in evidence; and after filing of this affidavit, the non-applicants sought time for cross-examination that was given on costs of Rs.100/- and the matter was adjourned to 27.04.2013.

5. However, on 27.04.2013, nobody appeared for the claimants and their witness was also not present and therefore, the Tribunal proceeded to close down the evidence of claimants-appellants and then, heard the matter on 09.05.2013 in the absence of the counsel for the claimants-appellants; and thereafter, pronounced its judgment and Award on 24.05.2013. Obviously, for want of evidence, the Tribunal proceeded to decide issue No.1 against the appellants. Although the Tribunal decided other issues on the liability of the insurer in favour of the appellants, but in view of the finding on issue No.1, held that the claimants-appellants had failed to establish that the victim expired due to the alleged accident from the vehicle of the non-applicants; and therefore, proceeded to dismiss the claim application.

6. The learned counsel for the appellants has strenuously argued that the Tribunal has proceeded rather in an unnecessary haste and rejected the claim application without extending reasonable opportunity to the appellants and without considering that the claim application was being maintained by the guardian and next friend of the claimants-appellants, who were suffering from physical as also legal disability. It is submitted that the claim application deserves to be examined on merits while extending reasonable opportunity of evidence to the claimants-appellants. The learned counsel appearing for the respondent-insurer has duly supported the Award impugned with the submissions that the claimants-appellants having failed to establish the basic facts, the Tribunal has not committed any error in rejecting the claim application.

7. Having given thoughtful consideration to the entire matter, we are clearly of the view that on the facts and in the circumstances of this case, the impugned Award cannot be sustained and the matter deserves to be remanded to the Tribunal for consideration afresh.

8. A perusal of the record makes out that the Tribunal has obviously proceeded with an extra haste in the matter. The affidavit in evidence was filed on 16.04.2013 and on the next date, the evidence was closed for nobody having appeared for the claimants-appellants. Thereafter, the matter was heard (in the absence of claimants) on 09.05.2013 and was decided on 24.05.2013. In the process, the Tribunal omitted to consider that it were a matter of claim for compensation because of the death of the victim of a vehicular accident; and the claimants were said to be the persons suffering from physical as also legal disabilities inasmuch as the claimant No.1 was said to be the blind mother of the victim whereas claimant Nos.2 and 3

were said to be the minor sons of the victim.

9. Although affidavit in evidence was indeed filed by the guardian/next friend of the claimants on 16.04.2013 and hence he cannot be considered totally negligent in prosecuting the matter but, if at all the Tribunal found him wanting in attending on his duties and in prosecuting the matter, alternative arrangements could have been always ordered, rather ought to have been ordered, by the Tribunal for protection of the rights of the claimants who are shown to be the persons with disabilities.

10. It appears that in its haste for disposal, the Tribunal altogether failed to consider that the matter related to the claimants who were shown to be the persons under disabilities including minors; and if at all their next friend was found not doing his duties for prosecution of the matter, the next friend could have been removed and guardian ad-litem could have been appointed for the claimants on the principles referable to Order XXXII of the Code of Civil Procedure. The manner of disposal of the present claim application by the Tribunal without regard to all the facts and circumstances has only resulted in failure of justice and this manner of disposal cannot be endorsed.

11. In the totality of circumstances of the present case, we are clearly of the view that the interest of justice demands a merit hearing of the claim application, after reasonable opportunity of evidence to the claimants.

12. Accordingly and in view of the above, this appeal is allowed in the manner and to the extent that the impugned Award dated 24.05.2013 as passed in M.A.C.P. No.124 of 2012 is set aside. M.A.C.P. No.124 of 2012 shall stand restored for consideration by the Tribunal afresh.

13. The parties through their counsel shall stand at notice to appear before the Tribunal concerned on 21.12.2015. It shall also be required of the next friend/guardian of claimants, who has filed affidavit in evidence to remain present before the Tribunal concerned on the date of appearance. The Tribunal shall thereafter proceed with the matter in accordance with law keeping in view the observations foregoing.

14. The record of the Tribunal concerned be sent back immediately with a copy of this order. No costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2015

BEFORE
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Second Appeal No. 918 of 2015

Smt. Tarawati Appellant
Versus
Ram Murti Lal Gangwar ...Respondent

Counsel for the Appellant:
Sri Ram Krishna Koli

Counsel for the Respondent:
Sri Ajay Kumar

Specific Relief Act-Section 16 (1)-Suit for specific performance-decreed by Courts below-ground of non pleading of readiness and willingness in plaint-not taken before first appellate court-can not be heard in Second Appeal-otherwise specific issue framed and concurrent

findings of court below about readiness and willingness-already there-no substantial question of law involved-Second Appeal dismissed.

Held: Para-14

As discussed above, in non-payment of requisite mandatory legal court fees the pleading of defendant could not be accepted as formal counter-claim. In his written statement and counter-claim the defendant had sought relief of cancellation of registered agreement to sell dated 12.2.2009 in light of relief sought by plaint and in alleged counter-claim several issues were framed including the issue no. 1 to the effect that whether registered agreement dated 12.2.2009 between the parties was legally executed, and issue no. 2 that whether plaintiff has always been ready and willing to perform his part of contract. These two issues cover the pleadings and relief sought in alleged counter-claim of defendant-appellant. Therefore, contention of learned counsel for the appellant on this point is non-acceptable.

Case Law discussed:

AIR 1967 SC 868; (2014) 11 SCC 605.

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

1. Original Suit No. 79 of 2010, Rammurti Lal v. Smt. Tarawati, was filed for the relief of specific performance of contract. The plaint case in brief was that parties had executed registered agreement to sell dated 12.2.2009 for sale of property of defendant to plaintiff for consideration of Rs. 1 lakh; and at the time of execution of this contract defendant had received Rs. 50,000/- as advance consideration and promised to execute sale deed within one year. But in spite of repeated reminders and legal notices of plaintiff, she had not executed sale deed. Therefore, plaintiff had filed suit for specific performance of said contract.

2. Defendant (present appellant) had filed written-statement in original suit with pleading that she was in need of money, so on the persuasion of plaintiff for executing the documents of loan she had gone to Tehsil Pilibhit, where she was persuaded to place thumb impressions on several documents, after which she was given Rs. 5,000/- as loan. She was not read and explained the document, therefore, the registered agreement to sell in question was result of fraud played upon her by plaintiff. Defendant (present appellant) had also filed counter-claim alongwith her written-statement with prayer that the registered agreement to sell dated 12.2.2009 executed on her behalf in favour of plaintiff be cancelled. But during proceedings of the case defendant-appellant had not deposited requisite court-fees for relief sought by her as counter-claim, so her pleading was not accepted as counter-claim.

3. After affording opportunity of hearing to parties and accepting their evidences the court of Civil Judge (Senior Division), Pilibhit had passed judgment dated 6.3.2014, by which suit of plaintiff for specific performance of contract was decreed with direction to defendant to receive Rs. 50,000/- as remaining consideration and execute sale deed of property agreed between the parties through registered deed as above. Aggrieved by this, defendant had preferred civil appeal no. 10/ 2014, which was heard and dismissed by the court of Additional District Judge, Court No. 1, Pilibhit on 7.8.2015 with specific finding that registered agreement to sell dated 12.2.2009 was properly executed by the parties, and defendant-appellant had failed to prove that there was any fraud or deception in its execution, and also that

plaintiff had been ready and willing to perform his part of contract. Against the judgment of the two courts below, present second appeal has been preferred by defendant of the original suit.

4. The first argument of learned counsel for the appellant side was that the counter-claim of defendant-appellant was not considered by the two courts below. This argument is unacceptable. A counter-claim is accepted as plaint with all the formalities of a plaint. Since defendant-appellant had not paid required court fees for counter-claim, therefore, it could not be accepted as a formal counter-claim. There is no illegality or impropriety in it.

5. Learned counsel for the appellant contended that no evidence was furnished by plaintiff-respondent to prove that he had amount of Rs. 50,000/- in his account for being paid as consideration of sale deed to be executed in specific performance of contract. This argument is also not acceptable in light of evidences available before the two courts below. Firstly, there is specific evidence on part of plaintiff-respondent before trial court that amount of Rs. 50,000/- is deposited in account in lieu of consideration for proposed sale deed. Secondly, there is concurrent finding of fact of the two courts below that plaintiff-respondent had been ready and willing to perform his part of contract. These findings are based on available evidences and passed after application of mind. This finding is apparently acceptable. Such finding of fact cannot be interfered in second appeal.

6. The main contention of learned counsel for the appellant was that there is no mention of plaintiff's readiness and willingness to perform his part of contract in plaint. He contended that in absence of such specific averment of readiness and willingness for performance of contract, the suit is barred by Section 16 (c) of Specific Relief Act.

7. In Gomathinayagam Pillai and others v. Palaniswami Nadar, AIR 1967 SC 868 the Hon'ble Apex Court had held as under:

"Before he could be awarded a decree for specific performance, the respondent had to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit and if he failed in that, his suit was liable to fail."

8. In N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr), (1995) 5 SCC 115 the Apex Court had held:

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short "the Act"). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance

is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

9. In Biswanath Ghosh v. Gobinda Ghosh, (2014) 11 SCC 605 the Supreme Court had held:

"22. It is a well-settled proposition of law that in a suit for specific performance the plaintiff must be able to show that he is ready and willing to carry out those obligations which are in fact part of the consideration for the undertaking of the defendant. For the compliance with Section 16(c) of the Act it is not necessary for the plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract. Absence of the specific words in the plaint would not result in dismissal of the suit if sufficient fact and evidence are brought on record to satisfy the court the readiness and willingness to perform his part of the contract. --"

28. In sum and substance, in our considered opinion, the readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfil his obligation and accept the performance when the time for performance arrives."

10. A perusal of pleadings reveal that although this specific words of plaintiff being always ready and willing to perform his part of contract in question is not mentioned in specific words but after considering the total averment of plaint, it is explicitly clear that such intention is evident from plaint when plaintiff has mentioned that on his insistence defendant had agreed to execute sale deed, and when he reached to office of Sub Registrar, then defendant absented herself so he had again reminded her and then sent registered legal notice through counsel for execution of sale deed in compliance of said registered contract. The over all reading of plaint makes it clear that plaintiff had all along being ready and willing to perform his part of contract in question. On the basis of pleadings of the parties, trial court had framed specific issue no. 1 regarding registered agreement to sell being legally executed, and issue no. 2 that whether plaintiff had always being ready and willing to perform his part of contract. Parties had given evidences on these points, therefore, there is likelihood of any infringement of legal right of defendant-appellant as no prejudice has been caused to her. It is also pertinent to mention here that the defence case of

written statement about registered agreement to sell or its pleading for cancellation of registered agreement to sell dated 12.2.2009 had not been proved by defendant-appellant side. It is also pertinent to mention that even first appellate court had given specific finding of fact that plaintiff had been ready and willing to perform his part of contract dated 12.2.2009 for which he had gone to office of Sub Registrar, Pilibhit and got his presence noted in said office but defendant-appellant absented, due to which sale deed could not be executed. There is specific finding of fact by first appellate court about continuous readiness and willingness of plaintiff-respondent to perform his part of registered agreement to sell in question.

11. From the aforementioned sequence of facts and events, it can be safely inferred that the respondent-plaintiff was always ready and willing to discharge his obligation and perform his part of the agreement. In my considered opinion, the undisputed facts and events referred to hereinabove shall amount to sufficient compliance with the requirements of Section 16(c) of the Specific Relief Act. Taking into consideration the entire facts and circumstances of the case and the law discussed hereinabove, in my considered opinion the impugned judgments passed by the trial Court as well as the first appellate Court are not erroneous on this point of law.

12. The judgment of trial court for decreeing the plaintiff's suit was challenged in first appeal no. 10 of 2014, Smt. Tarawati V. Rammurti Lal Gangwar. This appeal was dismissed by first appellate court on 7.8.2015, against which present second appeal has been preferred. Thus, this appeal is preferred against judgment passed in first civil appeal no. 10 of 2014 before first appellate court under Order XLI C.P.C. The provisions of Rule 2 of Order XLI reads as under:-

"2. Grounds which may be taken in appeal.- The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

13. The Rule 2 as above is mandatory in nature for any appellant, who except the permission of the Court, shall not be heard on any ground of objection not set forth in his memo of appeal. In present case the memo of first appeal makes it clear that no ground was taken on behalf of appellant that defendant-respondent was not always ready and willing to perform this part of contract. Since this ground had not been taken in first appeal, therefore, it is inappropriate for appellant to raise this ground in second appeal, especially when first appellate court had given specific finding of fact that plaintiff had always been ready and willing to perform his part of contract in question. Therefore, argument of learned counsel for the appellant on this point in light of Section 16(c) of the Specific Relief Act is non sustainable. One important argument on

behalf of appellant was that issues were not framed on counter-claim, therefore, in such circumstance judgment and decree of trial court is not sustainable in eye of law.

14. As discussed above, in non-payment of requisite mandatory legal court fees the pleading of defendant could not be accepted as formal counter-claim. In his written statement and counter-claim the defendant had sought relief of cancellation of registered agreement to sell dated 12.2.2009 in light of relief sought by plaint and in alleged counter-claim several issues were framed including the issue no. 1 to the effect that whether registered agreement dated 12.2.2009 between the parties was legally executed, and issue no. 2 that whether plaintiff has always been ready and willing to perform his part of contract. These two issues cover the pleadings and relief sought in alleged counter-claim of defendant-appellant. Therefore, contention of learned counsel for the appellant on this point is non-acceptable.

15. So far as decision on point of substantial question of law is concerned, there appears none in this matter. The only dispute between the parties is as to whether registered deed of agreement to sell dated 12.2.2009 between the parties is executable or not and whether plaintiff has been ready and willing to perform his part of contract or not. The trial court had framed specific issues on these points and the two courts below have given concurrent finding of fact on these points.

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

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.11.2015

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Service Single No. 4366 of 2009

Badri Prasad Yadav [Objection Filed]
...Petitioner
Versus
Director Rajya Sabha Utpadan Mandi Parishad UP Lko. .....Respondent

Counsel for the Petitioner:
RBS Rathore

Counsel for the Respondents:
N C Mehrotra, Brijesh Kr. Chaudhary

Constitution of India, Art.-226-Principle of Natural Justice-non compliance-order not sustainable-consequential direction given.

Held: Para-12
Fundamental requirement of law is that the doctrine of natural justice should be complied with and has, as a matter of fact, turned out to be an integral part of

administrative jurisprudence. It was also held in this case that at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence on which he is charged and to lead his defence.

Case Law discussed:
AIR 1961 SC 1623; (1998) 6 SCC 651; (2008) 8 SCC 236; [2003] (21) LCD 610; AIR 1968 SC 158; AIR 1963 SC 1719; (1986) 3 SCC 229

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

1. Heard Sri R.B.S. Rathore, learned Counsel for the petitioner and Sri N.C.Mehrotra, learned Counsel for the opposite parties.

2. By means of the present writ petition, petitioner is challenging the order dated 15.9.2008 passed by Dy. Director (Administration/Marketing), Rajya Krishi Utpadan Mandi Parishad, U.P. Lucknow, whereby on reconsideration, the earlier removal order dated 22.11.2004 has been reiterated. The petitioner has also challenged the order dated 16.9.2008 whereby petitioner has been shown to be retired on 31.1.2005 whereas the petitioner was allowed to continue in service till 31.1.2007.

3. The sole ground of challenge of the impugned order dated 15.9.2008 is that it has been passed in utter violation of the Principles of natural justice as this Court while quashing the order of termination dated 22.11.2004 has granted liberty to the respondents to proceed with inquiry afresh from the stage of the reply of the charge sheet submitted by the petitioner and conclude the same after providing opportunity of hearing including oral hearing to the petitioner. From the record, it also comes out that the petitioner has filed writ petition no. 1400 (SS) of 2007 challenging his date of superannuation on the ground that his actual date of birth is 15.11.1947, however in the Service Book it has been changed as 15.1.1947. The said writ petition was dismissed vide judgment and order dated 29.3.2007. It appears from the record that against the aforesaid order dated 29.2.2007, petitioner filed a special appeal no. 411 of 2007, wherein the Division Bench of this Court directed the opposite parties to pay admitted amount of post retiral benefit dues of the appellant.

4. According to the petitioner, petitioner through supplementary affidavit filed in the contempt petition came to know about the impugned order dated 15.9.2008, whereby earlier order dated 22.11.2004 has been upheld at the back of the petitioner. Learned Counsel for the petitioner has contended that the Inquiry Officer did not inform the petitioner regarding the date, time and place of the enquiry and the enquiry was concluded at the back of the petitioner, therefore, the impugned order dated 15.9.2008 is per se bad and unreasonable.

5. As the matter pertains to no observance of principles of natural justice, it would be useful to refer some of the cases in which the Apex Court and this Court has laid down the procedure to be followed during the disciplinary proceedings against a delinquent employee.

6. In State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan; AIR 1961 SC 1623; State of U.P. vs. Shatrughan Lal and another; (1998) 6 SCC 651 and State of uttaranchal and others vs. Kharak Singh (2008) 8 SCC

236, the Apex Court has emphasized that a proper opportunity must be afforded to a government servant at the stage of the enquiry, after the charge sheet is supplied to the delinquent as well as at the second stage when punishment is about to be imposed on him. In State of Uttaranchal & ors. V. Kharak Singh (supra) the Apex Court has enumerated some of the basic principles to be observed in the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

(a) The inquiries must be conducted bona fide and care must be taken to see that the inquiries do not become empty formalities.

(b) If an officer is a witness to any of the incident which is the subject matter of the enquiry or if the enquiry was initiated on the report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(c) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him. [emphasis supplied]

7. On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

8. A Division Bench of this Court in Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation ltd. [2003](21) LCD 610 held that after a charge-sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date so fixed the oral and documentary evidence against the employee should first be led in his presence. Thereafter the employer must adduce his evidence first. The reason for this principle is that the charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. The person who is required to answer the charge must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination, as he desires. Then he must be given a chance to rebut the evidence led against him.

9. In State of U.P. v. C.S. Sharma, AIR 1968 SC 158 the Supreme Court held that omission to give opportunity to an employee to produce his witnesses and lead evidence in his defence vitiates the proceedings.

10. In Meenglas Tea Estate v. Their Workmen AIR 1963 SC 1719 the Supreme Court observed "it is an elementary principle that a person who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the

charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled, if the result of the enquiry is to be accepted.

11. It would be useful to mention that In Kashinath Dikshita versus Union of India and others; (1986)3 SCC 229 the Hon'ble Supreme Court emphasized that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity have been held to be an essential ingredient in disciplinary proceedings and following these principles, the Apex Court set-aside the order of removal.

12. Fundamental requirement of law is that the doctrine of natural justice should be complied with and has, as a matter of fact, turned out to be an integral part of administrative jurisprudence. It was also held in this case that at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence on which he is charged and to lead his defence.

13. In Kashinath Dikshita versus Union of India and others; (1986)3 SCC 229 the Hon'ble Supreme Court emphasized that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity has been held to be an essential ingredient in disciplinary proceedings.

14. Sri N.C.Mehrotra, learned Counsel for the opposite parties after going through the orginal record of the enquiry fairly submitted that the before the Inquiry Officer the department has not lead any evidence to prove the charges and the Inquiry Officer has concluded and submitted its report on the basis of charge and the reply submitted by the petitioner. The disciplinary authority/punishing authority has also not examined this aspect of the matter.

15. Appreciating the submission of the learned Counsel for the parties and fair submission of the Sri N.C.Mehrotra, learned Counsel for the opposite parties, this Court feels that the impugned order dated 15.9.2008 is not sustainable as the same has been passed in total breach of Principles of natural justice and the due procedure has not been followed during the inquiry.

16. Accordingly the impugned order dated 15.9.2008 suffers from legal infirmity and cannot be sustained and is hereby quashed. However, it is open for the department to proceed afresh, if they so desires.

17. As far as issue with respect to the payment of salary up to the petitioner's superannuation is concerned,

if the same has not been paid, the competent authority will examine the same and pass appropriate orders within a period of two months keeping in mind that the petitioner has already attained the age of superannuation and is at the fag end of his life.

18. With the aforesaid directions, writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Matters Under Article 227 No. 6401 of 2015

Kedar Nath ...Petitioner
Versus
Waqf Sheikh Abdullah Charitable Madursa, Allahabad & Ors. .Respondents

Counsel for the Petitioner:
Sri Atul Dayal

Counsel for the Respondents:
Sri Anand Mohan Lal

Constitution of India, Art.-227-read with C.P.C. Order XV Rule-5-Striking out defence-petitioner on first date of hearing-e.g. 13.10.08 filed WS-on same date deposited entire amount of rent-withdrawn by land lord-according sub Rule (2) defendant has right to make representation-the word used in sub section (1) 'may' obliged the Court to give positive consideration-rather to strike out defence in every case-not a penal clause to the tenant but sole purpose to ensure payment of entire amount of rent-not disputed by respondent/land lord held-defence can not be strike off-both court below committed-illegality quashed.

Held: Para-18

In the facts and circumstances of this case, the court below have not recorded a finding regarding the date of hearing of the suit and proceeded to strike off the defence taking into account the intermittent delay in depositing the subsequent sums by the applicant. It is not disputed by learned counsel for the respondent that the entire sum due has already been deposited. In these circumstances, I am of the view that the impugned orders cannot be sustained, accordingly, the petition is allowed.

Case Law discussed:
(1981) 3 SCC 486; [2013 (100) ALR 210]; [2007 (3) ARC 77]; 1998 (1) ARC 545; [2010 (2) ARC 260]; 1999 (1) AWC 715; 1996 (1) ARC 62; 1996 (2) ARC 406; 2015 (2) ABR 406; [2012 (1) ARC 691]; [2008 (2) ARC 621].

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

1. Heard learned counsel for the parties.

2. On the request of the learned counsel for the parties, the petition is being decided at the admission stage without calling for counter affidavit.

3. The tenant/applicant has approached the Court assailing order dated 22 September 2015 passed by the revisional court/Additional District Judge, Court No. 12, Allahabad in Civil Revision No. 101 of 2012 (Kedar Nath and others Versus Waqf Sheikh Abdulla and others) arising from order dated 31 January 2012 passed by the Judge Small Causes Court, Allahabad in Original Suit No. 22 of 1999, whereby, the application under Order XV Rule 5 C.P.C. filed by the first respondent has been allowed.

4. The premises No. 205/46, Minhajpur, Dr. Katju Road, Allahabad belongs to the frist respondent, a suit for

eviction, arrears of rent and damages was instituted. During the pendency of the suit, an application under Order XV Rule 5 C.P.C. was filed with the allegation that the suit is of 1999 but no amount was deposited on the first date of hearing nor regular deposit was made, thereafter. The applicant contested stating that the entire amount was deposited on the first date of hearing. The trial court allowed the application, struck off the defence of the applicant. The revisional court affirmed the order passed by the trial court.

5. The learned counsel for the applicant would submit that the courts below have failed to record the first date of hearing, written statement was filed on 13 October 2008 and on the said date a sum of Rs. 4000/- was deposited which included the rent from January 1996 to September 2008, interest and expenses, further, it is sought to be urged that even presuming that there was some delay in depositing the subsequent sums, even then the application under Order XV Rule 5 could not have been allowed, admittedly the respondent-landlord received the entire sum. It is, therefore, submitted that the purpose of Order XV Rule 5 is to ensure the payment of the rent and not being a penal provision to punish the defendant.

6. Learned counsel appearing for the respondents, in rebuttal would not dispute that the entire sum was deposited but would submit that the deposit was inadequate and irregular, therefore, courts below were justified in allowing the application.

7. Rival submission fall for consideration.

8. The Supreme Court in Bimal Chand Jain Versus Sri Gopal Agarwal1, on considering the provisions of Order XV Rule 5, as applicable to U.P., observed that the sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest, thereon, at the rate of nine per cent per annum, whether or not he admits any amount to be due. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off.

9. Sub-rule (1) obliges the court to strike off the defence which is in the nature of a penalty. A serious responsibility, therefore, rests on the court in the matter, the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so.

10. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. If on the facts and circumstances already existing on the record it finds good reason for not doing so, the court is not obliged to strike off the defence, merely in the absence of such representation under sub-section(2).

11. This Court in Shiv Balak Singh Versus A.D.J., XI, Lucknow2, held that the provision of Order XV Rule 5 is discretionary.

"7. Even though technically at the time of arguments also, plea of Order XV, Rule 5, C.P.C. could be raised, however

in normal course such an application should have been filed (and is normally filed) before the start of the evidence."

12. In Pramod Mehrotra and others Versus Ram Shankar Chaurasia and others3 where the amount was deposited with some delay, this Court relying upon Bimal Chand Jain (supra), held that discretion should be exercised not to strike off the defence where the entire amount has been paid with some delay.

13. Again in Sudhir Kumar Gupta Versus Dr. S.K. Raj and another4, the Court observed that the purpose of enacting the provision Rule 5 Order XV was not to give a lever to the landlord to get a tenant punished for insignificant lapses. The purpose was merely to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue.

14. In Pyare Lal Versus Distrit Judge, Lucknow and others5 wherein, the Court allowed the deposit of rent upon imposing cost.

15. In Dr. Ram Prakash Mishra Versus Additional District Judge, Etah and another6, it was observed that the question whether the deposit is valid or not is relevant for determining the question whether the tenant could be held to be defaulter or not in the eye of law, but so far as Order XV, Rule 5 C.P.C. is concerned, the only requirement is that the tenant has to deposit the entire amount on or before the first hearing of the suit. If the deposit has been made under section 30 of Act 13 of 1972 then it will ensure to the benefit of the tenant.

16. The provisions of Order XV Rule 5 is discretionary, the court is not bound to strike off the defence in every case of mere technical or bonafide default. The provision should not be interpreted in such a way that the tenant should be trapped to be evicted. (Refer-Vinod Chandra Kala Versus Premier Precisions Tools Manufacturing (P). Ltd.7; Bhawani Vastrya Bhandan Versus Smt. Sahodra Devi8).

17. Sri Anand Mohan Lal, learned counsel for the respondent, placed reliance upon the decision rendered by the Supreme Court in Yusufbhai Noormohammed Jodhpurwala Versus Mohamed Sabir Ibrahim Byavarwala9, wherein, it is contended that the provisions of Order XV Rule 5 is mandatory, any default, consequence would follow. The facts of the case are not applicable in the present case as therein the Court was dealing with the provisions of Section 12(3)(b) of the Bombay Rent Act. Similarly, in Saroj Tripathi (Smt.) and another Versus Guru Prasad and others10, the facts are entirely different, the scope of Order XV Rule V was not considered. In Mohd. Sayeed and others Versus Shahanshah Alam (Sri and another11, the facts of the case is distinguishable.

18. In the facts and circumstances of this case, the court below have not recorded a finding regarding the date of hearing of the suit and proceeded to strike off the defence taking into account the intermittent delay in depositing the subsequent sums by the applicant. It is not disputed by learned counsel for the respondent that the entire sum due has already been deposited. In these circumstances, I am of the view that the impugned orders cannot be sustained, accordingly, the petition is allowed.

19. The impugned orders are set aside.

20. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.11.2015

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.
THE HON'BLE D.K. UPADHYAYA, J.

W.P. No. 8210 (M/B) of 2015

'A' through her Father "F" ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohsin Iqbal

Counsel for the Respondents:
C.S.C.

(A) Guardian & Wards Act 1956, Section-21-Hindu Adoption & Maintenance Act 1956-Section 9-A-minor girl-adoption-minor girl subjected to rape-considering scope of rehabilitation of new born issue-whether such minor mother capable to give her newly born illegitimate issue ? held-'yes'.

Held: Para-67 & 68

67. Thus the minor mother is competent to act as guardian of her child. She has the capacity to give the child in adoption.

68. In the present case the petitioner by means of the affidavits expressed her willingness that the child may be given in adoption and neither she nor her parents are ready to take care of the child for the reasons disclosed in the affidavits.

(B)The Juvenile Justice (Care & Protection of Children) Act 2000-Section 41(1)-newly born child-consideration of welfare and rehabilitation of -guide lines framed-to be followed strictly- 10th point program given.

Held: Para-98

(1)We direct and allow the Child Welfare Committee of District Lucknow to take over the cause of adoption of the child born to "A" on 26th October, 2015, who is presently in the care of Paediatrics Department of King George's Medical University, Lucknow. The Department shall handover the child as and when the doctors find that the child is medically fit to be handed over to the committee. The committee shall, thereafter, act in the manner provided in the judgment. The Member Secretary of the State Legal Services Authority in consultation with the amicus curiae shall supervise the process of adoption.

(2)As soon as "A" regains her mental balance and equilibrium, she will be allowed admission in a proper class in an appropriate school. The first and foremost preference should be given to any Kasturba Gandhi Girls' School. These are residential schools in which girls are allowed to stay and taken care of completely. They are given food, shelter, books, uniforms and matterial for recreation also. If "A" or her parents approach the authorities of Kasturba Gandhi Residential School of her choice, admission should be allowed to her. If an application is made to the Basic Shiksha Adhikari of the District it shall be his duty to ensure admission of "A" in one of the best run schools of Kasturba Gandhi Residential Schools of the District.

(3)If "A" chooses not to go to residential school then a Government Girls' Inter College of her choice will allow her admission without insisting on any entrance examination or the criteria of selection on merit basis. The State Government should ensure that education is provided free of costs to "A". She will be allowed full freeship of fees and other charges whatsoever.

(4)It shall be the duty of the Principal of the college concerned to ensure that the

teachers of the college, staff and the students do not discriminate her in any manner. All possible mental, moral and psychological help should be given by the teachers to help her gain strength to face the challenges of life. The principal should also ensure that the past life of "A" is not propagated and she is treated as another normal student of the school.

(5)If "A" wants to continue her studies after 10+2 Standard (Intermediate), admission should be given to her in any government degree college with full free ship of fee. This will continue till graduation.

(6)In addition to payment of Rs.3,00,000/- as compensation under Rani Lakshmi Bai Mahila Samman Kosh Rules, 2015, the State Government shall make a fixed deposit of a sum of Rs.10,00,000/- (Rupees Ten lacs) in favour of "A" in any nationalized bank which will be given to her only when she reaches the age of 21 years. The District Magistrate of the District where the family of "A" chooses to live henceforth will ensure that bank account is opened in the name of "A" in any nationalized bank, chosen by her father. It is made clear that at the maturity of the aforesaid fixed deposit, only "A" will be entitled to get the money.

(7)Superintendent of Police of the District where "A" and her family choose to reside will ensure the safety, security and dignity of the family. No one from the society should be allowed to degrade, discriminate or excommunicate the victim or her family on the ground of unfortunate incident of rape.

(8)If "A" applies for any apprenticeship in any available scheme or in any vocational course of any Government department or any other instrumentality of the State, preference should be given to her in such matters.

(9)After attaining the age of majority, some suitable job be also provided to her according to her ability / qualifications. Such security of job is the surest way of bringing her up in the main stream once again. When occasion arises the petitioner shall have the liberty of moving an application to the Chief Secretary of the State to ensure that a suitable job is provided to her.

(10)The N.G.O.s or any other agency which wants to help the victim and her family in any manner, will be welcome to do so and earn the appreciation of this Court as well as of the society in general.

Case Law discussed:
(1983) 4 SCC 141; (2002) 2 SCC 465; 2015 (2) SCC 227; Uttar Pradesh Rani Lakshmi Bai Mahila Samman Kosh Rules 2015; 1994 (2) SCC 244; AIR 1999 SC 1149; 1994 (2) SCC 244; 2014 (4) SCC 1.

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Considering the nature of issue engaging attention of this Court in this matter, the cause title of this case will now be read as under:-

"A" through her father "F"

Vs.

State of U.P. through Secretary, Medical and Health Services and other.

Office to make necessary amendments.

2. This matter arises out of a petition filed by a minor rape victim through her father, who has been named "A" by this Court. Originally, she had prayed that his Court may direct the opposite parties to terminate the pregnancy of the petitioner forthwith. She had also prayed that the opposite parties be directed to conduct DNA test of the foetus for the purpose of evidence and the trial.

3. It is necessary to give factual matrix of the case and subsequent

developments in brief to understand the matter in proper perspective. A named F. I. R. was lodged by the father of the victim against the accused (hereinafter they will be known as "F" for father and "M" for the accused. These names are being given by the Court to keep the identity of the victim, her family and the accused under cover). It is mentioned in the F.I.R. that "A" was raped on 17.2.2015. The age of the victim was about 13 years. The First Information Report was registered under Sections 376, 506 IPC and Section 3/4 of Prevention of Children from Sexual Offenses Act, 2012 on 8.7.2015 (case crime No., district and the location is not being given in the interest of justice). The F.I.R. was lodged with delay due to the reason that the poor child did not tell about the incident to her parents under threat extended by "M" that in case the matter is reported to the father they will both be killed. The matter came to light when "A" complained of pain in the abdomen and was taken to the medical hospital by her sister.

4. After registration of the F.I.R., medical examination of the petitioner was conducted by the Doctor on 8.7.2015 itself. She was found to be pregnant for 21 weeks and two days. Her age was found to be 12 years. The statement of the victim was recorded under Section 161 and 164 Cr.P.C. She corroborated the version of the first information report. She narrated that on 17.2.2015 at about 11.30 p.m. when she was returning from Tilak ceremony, "M" caught hold of her and dragged her to the back of a temple and forcibly committed rape upon her, as a result of which she became pregnant. She has narrated that force was used and she was stopped from shouting by "M". After investigation the police submitted charge sheet against "M" before the Magistrate on 18.3.2015 and "M" was sent to jail.

5. According to the mark-sheet of class V issued by a local school, her date of birth is 15.10.2001 which makes her 13 years of age on the date of occurrence. According to the radiological examination her age was found to be about 12 years on the date of the occurrence.

6. In paragraph 13 of the petition, it has been averred that application was moved for termination of pregnancy medically by competent authority i.e. Chief Medical Officer of the District. It is further mentioned that the application was moved before the Juvenile Justice Board of the District with the prayer to accord necessary permission. It has been categorically stated that permission was refused but we do not have any document to substantiate this statement. However, postal receipts have been attached wherein applications have been found to be sent to the Juvenile Justice Board as well as Chief Medical Officer of the District. We are not sure whether such application ever reached the authorities concerned and were on record or not? However, since no relief could be obtained by the petitioner, she approached this Court through the present petition on 3.9.2015.

7. The matter came up before this Court on 7.9.2015. The matter was argued passionately and it was submitted that unfortunately a minor girl has been subjected to horrendous and despicable act against her will. It was pleaded that on social, moral, physical and psychological basis it will be most appropriate that permission may be granted to the petitioner to abort the child scientifically. It was forcefully argued that if the pregnancy is continued and child is to be

born it would be a continued reminder of horrible incident in the life of a minor girl whose entire life is before her. If the pregnancy is allowed to be terminated it might be possible for the girl to forget the unfortunate incident by the passage of time otherwise instead of one, two lives will be spoiled.

8. Reliance was placed on a recent decision of Supreme Court in the matter of Chandra Kant Jayanti Lal Suther and another Vs. State of Gujrat passed on 28.7.2015 in Special Leave to Appeal (Crl.) No.(s) 6013/2015. Since the victim belongs to a small District adjoining Lucknow where medical facilities are not upto mark, this Court decided that the victim should be treated at Lucknow. So we directed King George's Medical University, Lucknow to constitute a team of three senior most teachers/ doctors of the concerning department to examine the petitioner. They were required to evaluate the seriousness as to the threat to her life and also about the impact of continued pregnancy on the mental health of the victim. It was directed that in case the aforesaid doctors form an opinion that termination of pregnancy is safely possible, they will perform necessary surgery/operation. This was to be done with the consent of victim's father for the same. In case of abortion, the authorities of the medical university were required to preserve the tissue from the foetus. It was further directed that Medical University shall take care of her stay as indoor patient and medical expenses shall be borne by the medical university to be reimbursed later by the State Government. The case was ordered to be listed on 15th September, 2015.

9. When the case was taken up on 15th September, 2015, a report from the medical university dated 10.9.2015 was placed before the Court which was sent in a sealed envelop. The relevant portion of the report sent by the medical university is being reproduced for appreciating the matter. The names of doctors etc. and other details are not being given for the purpose of maintaining secrecy about the identity of the girl.

"Committee members examined, evaluated and discussed the case thoroughly. Relevant investigations and Ultra Sonographic examinations were done and report is being sent on the basis of clinical and Sonographic examination and other investigations. She is a case of 7 and ½ months(30-32 weeks) pregnancy and is due for delivery in approximately 3rd week of November, 2015. At present apart from being a teenage pregnancy, which even though itself is a higher risk factor but there is no other factor which may endanger the physical health of the girl. There is no threat to her life at the moment.

The team of doctors is of the opinion that pregnancy should be continued as the termination/discontinuation of pregnancy at this point of time will lead to delivery of life preterm baby. At the moment there is no indication of any surgery for delivery.

Patient should be provided ante-natal care for well being of the mother as well as fetus. No decision about time and mode of delivery would be taken at the appropriate time.

The patient is being advised and provided following treatment;

Inj Tet boxoid 1 AMP/1ML stat

Tab Iron 1x daily

calcium supplementation 500 mg. 1X BD for supplementation

As discussed above, the girl is being admitted in Queen Marry's Hospital pending the direction and decision of the court for further action."

10. On 15.9.2015 the medical report was taken on record. After the report of the medical university nothing remained to be adjudicated or decided by this Court. However, counsel for the petitioner made a fervent plea that the case may not be dismissed as infructuous on that date and he may be given a chance to study the report as well. It was submitted that he would like to address the Court further after going through the communication by the medical university. The Court fixed 23.9.2015 for this purpose.

11. On 23.9.2015 counsel for the petitioner submitted that the victim and her family members are devastated by the medical report. He submitted that the victim/would be mother, being minor, was not capable of looking after herself, what to say of the child to be born. At the same time, father of the victim is not willing to keep the would be born child with them at any cost. If forced they might abandon not only the would be born child but also the victim to her fate. The counsel also appealed to the Court to look into this matter from the point of view of Article 21 of the Constitution of India. He pleaded that not only the minor rape victim but also "would be born child" had a right to live a life of dignity and liberty. Right of the victim to live with dignity can never be doubted, at the same time, the "child to be born" would also become natural citizen of this country from the moment of his or her birth.

12. Article 5 of the Constitution of India reads as under:-

"5. Citizenship at the commencement of the Constitution:- At the commencement of this Constitution every person who has his domicile in the territory of India and

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years preceding such commencement, shall be a citizen of India."

13. The counsel argued that even this child needs the protection of the Court. It was argued that the guarantees given in Article 21 of the Constitution of India should be procured for the victim and her child if not by the State then by the courts. It was pleaded that such hapless, helpless and innocent victim of brutality, abject poverty and insensitive attitude of the society deserves attention and consideration by the highest Court of the State. The court cannot shut its eyes towards the tragedy which has befallen upon a citizen of this country and is likely to fall on a would be citizen of this country on her/his arrival in this world. After hearing the arguments of the petitioner counsel this Court passed following order on 23.9.2015:-

"Medical report sent by the doctors of Medical College is taken on record.

Considering the facts and circumstances of the case and its ramification for the Society at large, we feel that this matter needs further consideration by this Court. Accordingly, the Court appoints Sri Jaideep Narain Mathur, Senior Advocate, to be assisted by counsel of his choice, to assist us in this matter so that proper order can be passed for the future of unfortunate girl. Further, let notice be issued to Avadh Bar Association through its President to allow any other Advocate, who wants to assist sincerely, earnestly and honestly in this

matter. Issue notice to Member Secretary, State Legal Services Authority, Lucknow, also to assist in the matter.

List this case on 7.10.2015 as fresh.

It is further directed that the victim-petitioner shall not be relieved from the Medical College and shall be taken care of by them until further orders of this Court.

Order Date :- 23.9.2015 "

14. On 7.10.2015 the matter was heard for quite some time and following orders were passed:-

Heard Sri J. N. Mathur, Senior Advocate assisted by Sri Ravi Tilhari and Sri Madhav as amicus curiae at great length, Sri Mohsin Iqbal, learned counsel for the petitioner and Mrs. Bulbul Godiyal, learned Additional Advocate General for the State.

Mr. Mathur has submitted that so far as compensation is concerned, the State Government has formulated a scheme known as Uttar Pradesh Victim Compensation Scheme. Section 2 (d) of the said scheme defines a victim as under:

"(d) "victim" means a person who himself has suffered a loss or injury as a result of crime and requires rehabilitation, and includes his dependent family members."

The Court expressed its anxiety as to whether this definition will also cover the 'would be born child' whose mother is refusing to bring him/her up in future. The father of the petitioner has already stated that he does not want anything to do with the child who is likely to be born. In this case the child becomes the 'second victim' in itself.

After arguments were heard the Court has formulated few questions and has sought assistance on these issues:-

What is the status of a would be born child out of a relationship which is based on denial from both the parties ? There was no consent between the biological father and mother of the child for his/her birth. There was no marriage and even live-in relations was not existing. In such a situation, what rights will accrue to a child who will be a citizen of this country from the moment of its birth in the State of India. Does he not have a right to live a life of liberty with dignity as guaranteed under Article 21 of the Constitution of India.

Can he claim legitimacy in society ? How is the society expected to treat the child ? Is the society not bound to respect the child simply as a citizen of this country and not a product of shame ? Can he claim rights through inheritance in the property of his rapist father ? Most important aspect is the responsibility of the State viz.-a.-viz. the unfortunate victim and the most unfortunate child. Is it not the responsibility of the State to protect the life and liberty of a girl who has been put to this trauma and hardship because the State failed to protect her ?

The Court showed its anxiety as to how this child has to be brought-up in view of the fact that the mother is denying to keep him/her with herself ? Can the child be given in valid adoption through legal methods ? Can the government be required to pay for the education and rehabilitation/well being of the child till he attains the age of majority independent of his/her mother's companionship ? Sri Mathur submitted that by a harmonious reading of Section 21 of the Guardians and Wards Act, Section 6 of Hindu Adoption and Maintenance Act, 1956 along with other legal and statutory provisions, a method can be put in place for a valid legal adoption of the would be

born child. Mr. Mathur assured the Court that he will come back tomorrow with all the queries raised by the Court.

Mrs. Bulbul Godiyal, learned Additional Advocate General submitted that the State Government is not taking this case as an adversarial litigation. She assured that the government will come out with all possible help for the victim mother as well as would be born child.

List/put up this case tomorrow at 2 'O' clock for further hearing.

Order Date :- 7.10.2015"

15. On 8.10.2015 an amendment application along with an impleadment application were filed. By the impleadment application the following parties were added:-

"5. Principal Secretary, Women and Child Welfare, Civil Secretariat, Lucknow.

6.State Legal Services Authority

7.Child Welfare Committee, Lucknow."

By the amendment application following prayers were added:-

"b(i). issue a writ, order or direction in the nature of mandamus commanding the opposite parties to grant compensation to the petitioner in the light of Section 357-A Cr.P.C. read with the Uttar Pradesh Victim Compensation Scheme, 2014, framed under section 357-A Cr.P.C."

b(ii). issue a writ, order or direction in the nature of mandamus commanding the opposite parties to provide rehabilitation to the petitioner and to the petitioner's child to be born in the best interest of both the petitioner and child to be born.

b(iii). issue a writ, order or direction in the nature of mandamus commanding the opposite party no.7 i.e. Child Welfare Committee, Lucknow to take such steps for the care and protection of the child to be born to the petitioner and to allow the child to remain in a Children Home till he/she is taken in adoption by suitable person in accordance with law."

16. Supplementary affidavit by the counsel for the petitioner and counter affidavit by the Chief Standing counsel were filed on 9.10.2015. Both these documents were taken on record. By the supplementary affidavit two facts were brought on record by way of paragraph No.s 3 and 4 of the supplementary affidavit which are reproduced as under:-

"3. That on 8.10.2015 at about 4.30 p.m., a penal of Lawyers, consisting with Mr. J. N. Mathur, Senior Advocate Mr. Madhav Chaturvedi, Advocate, Mr. R. N. Tilhari, Advocate, Mr. Kazim Ibrahim, Advocate and petitioner's counsel Mr. Mohsin Iqbal, Advocate, had gone to meet with the petitioner at King George Medical University, Lucknow, to know about her willingness about the adoption of child, who is likely to be born within a month.

4.That before the aforesaid Advocates, the petitioner has given her consent, saying that she is not mentally and physically capable to take the responsibility of upcoming child, as such she has no objection, if the child is given in adoption."

17. The matter was finally heard in great detail on 9.10.2015 and the the judgment was reserved.

18. Before the judgment could be pronounced, an application was moved on 28th October, 2015 by the amicus curiae

informing the fact that contrary to the expectations of the medical doctors, who attended the victim, a girl child was delivered on 26th October, 2015. On the said application this Court, under the orders of Senior Judge, assembled on 28th October, 2015 and passed the following order:-

"This Bench has been constituted on the application moved by the Amicus Curie, Sri Jaideep Narain Mathur, Senior Advocate on account of some developments which have taken place since the date judgement was reserved in this matter. The application has been moved along with an affidavit informing the Court that though the expected date of delivery as declared by the doctor attending the victim was last week of November, 2015, however, the same was preponed and through surgical operation a girl child was born on 26.10.2015.

There is an affidavit by the Amicus Curie earlier making a statement to the effect that the victim and her parents had informed him personally that they do not want to keep with them the child born on account of the unfortunate incident. They have consented that provision for adoption may be resorted to for giving the child in adoption. This fact has been reiterated by learned counsel for petitioner as well.

It has been informed that the girl child born on 26.10.2015 was not well and has been kept in Neonatal Intensive Care Unit of the Pediatrics Department of K.G.M.U. She is likely to remain there till the doctors declare her fit to be moved out of the hospital.

The Court directs that till doctors feel that the child as well as the mother need medical care, the Medical College will take the responsibility of their welfare, feeding, medicines and other facilities as has been done earlier.

List this case on 03.11.2015 at 3.00 p.m for pronouncement of judgement.

Order Date :- 28.10.2015"

19. At the very outset, we may record our appreciation that the State Government did not contest this matter as an adversarial litigation. Mrs. Bulbul Godiyal, Additional Advocate General, on behalf and on the instructions of the State Government, informed the Court that the State Government will cooperate in the discussions as well as implementation of the directions given to the State Government. It is a remarkable departure in the history of such litigations as we have seen that in the judgments right from Rudal Sah Vs. State of Bihar (1983) 4 SCC 141 upto the recent days the State has contested paying any compensation. It is further appreciated that a sum of Rs.3,00,000/- has already been released in favour of the victim by State Government though the judgment was still pending. Since there is no adversarial litigation, therefore, no argument and counter argument are required to be placed on record. Both the sides tried to place the laws, facts and possible solutions before the Court.

20. We may hasten to add that the observations, opinions and conclusions drawn in the following discussion will be only for the purpose of welfare of the victim and her child. It will not be used for affecting the trial of the accused which is an independent judicial exercise of a criminal court. We are only going by the facts that a minor has been forced into sexual intercourse. Since she is minor, her consent, if any, is meaningless. Further, her pregnancy cannot be denied and the birth of a child is also a fact not denied by any one. Since State has filed charge sheet for rape, they cannot take a stand otherwise. The trial court shall not be

influenced by this judgment at all and decide the case on its own merit.

21. We will like to go about relevant aspects of this case in following manner:-

(A) What are the social and legal ways to help the victim of rape in re-rehabilitating her psychologically, socially, economically and culturally ? What monetary help/compensation can be provided on a short term and long term basis ?

(B) How can the second victim i.e. the child born out of this unfortunate biological relationship be given its due on her becoming natural citizen of this country by birth; How the rights under the constitution be procured for it?

(C)Is there a valid legal system wherein the child can be adopted by a suitable family through various government agencies or N.G.O.s ?

(D) Does the child have any right of inheritance in the property of the accused ?

(E) What are the rights of a rape victim viz-a-viz article 21 of the Constitution of India and what is the responsibility of the State in protecting the life and liberty of its citizens in general and women and children in particular ?

(F) What is the responsibility of the society towards rape victims and their children ?

22. The concept of rehabilitation emanates from the concept of right to life. Hon'ble Supreme Court in number of cases has declared that right to life does not merely mean animal existence but means some thing more, namely, the right to live with human dignity. Rehabilitation in common parlance will mean to ensure all those facilities of life which were being enjoyed by the person who has been uprooted from a particular environment. Right to life has to be understood in its full import.

23. In the matter of Chairman, Railway Board Vs. Chandrima Das, (2002) 2 SCC 465, the Supreme Court has observed:-

"32. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. [See: Article 3 quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz vs. Union of India & Ors. (1990) 1 SCC 568 = AIR 1990 SC 605. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country.

33. Let us now consider the meaning of the word "LIFE" interpreted by this Court from time to time. In Kharak Singh vs. State of U.P., AIR 1963 SC 1295 = 1964 (1) SCR 332, it was held that the term "life" indicates something more than mere animal existence. [See also : State of Maharashtra vs. Chandrabhan Tale, AIR

1983 SC 803 = 1983 (3) SCR 337 = (1983) 3 SCC 387]. The inhibitions contained in Article 21 against its deprivation extends even to those faculties by which life is enjoyed. In Bandhua Mukti Morcha vs. U.O.O., AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161, it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. [See also: Maneka Gandhi vs. U.O.O., AIR 1978 SC 597 = 1978 (2) SCR 621 = (1978) 1 SCC 248 and Board of Trustees of the Port of Bombay vs. Dilip Kumar Raghvendranath Nadkarni, AIR 1983 SC 109 = 1983 (1) SCR 828 = (1983) 1 SCC 124].

24. The right to life has been explained in Fancies Coralie Vs. Union Territory of India (1981) 1 SCC 608 by the statement (Any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21.

25. In the same case, Hon'ble P. N. Bhagwati, J. held as under:

"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

26. In the present case, the Court emphasizes on damages or injuries to the "faculty of a person."

27. The amicus curie has informed this Court about his personal experience when he visited the hospital on the direction of this Court. He has made a statement at Bar that the condition of the girl was so bad that it brought tears in the eyes of Senior Advocate along with other persons in the hospital. She is barely 30 kilograms of weight, totally unable to understand what was happening around her, inconsolable and suffering of typically "Rape Trauma Syndrome". This syndrome has been medically defined in a journal and we quote:-

"No person exposed to severe trauma is immune to suffering and the signs of that suffering are referred to as symptoms. When these symptoms can be grouped as a pattern over time, they are referred to as a syndrome. Once the pattern becomes entrenched or unlikely to change, and affect a person's functioning in a permanent way it is referred to as a disorder and is regarded as a mental illness.

Rape Trauma Syndrome "RTS" is the medical term given to the response that survivors have to rape. It is very important to note that RTS is the natural response of a psychologically healthy person to the trauma of rape so these symptoms do not constitute a mental disorder or illness.

The most powerful factor in determining psychological suffering or damage is the character of the traumatic event itself. Individual personality characteristics count for little in the face of overwhelming events. Physical harm or injuries are also not as great a factor since individuals with little or no physical harm may yet be severely affected by their exposure to a traumatic situation. Before looking at the effects of rape it is therefore important to first examine the character of the trauma that is rape.

Not only is there the element of surprise, the threat of death and the threat of injury, there is also the violation of the

person that is synonymous with rape. This violation is physical, emotional and moral and associated with the closest human intimacy of sexual contact. The intention of the rapist is to profane this most private aspect of the person and render his victim utterly helpless. The character of the event is thus connected to the perpetrator's apparent need to terrorise, dominate and humiliate the victim. The victim is therefore most likely to see his actions as motivated by deliberate malice, a malice impossible for her to understand. Rape by its very nature is intentionally designed to produce psychological trauma. It is form of organised social violence comparable only to the combat of war, being but the private expression of the same force. We get nowhere in our understanding of Rape Trauma Syndrome if we think of rape as simply being unwanted sex. Where combat veterans suffer Post Traumatic Stress Disorder, rape survivors experience similar symptoms on a physical, behavioural and psychological level. Some of the symptoms are present immediately after the rape while other only appear at a later stage."

28. This Court along with the amicus curie and his team can only wish that the minor girl may come out of this trauma and lead a normal life. The Court will try whatever is legally possible to help a citizen; rather two citizens, both females, namely, mother and child live a life as envisaged by the framers of the constitution by enacting Article 14 and 21 of the Constitution of India.

29. In Collins Dictionary of the English Language, the meaning or the word "rehabilitate' is given as under:-

" to help a person (who is physically or mentally disabled or has just been released from prison) to readapt to society or a new job as by vocational guidance, retraining or therapy...."

By rehabilitation what is meant is not to provide shelter alone. The real purpose of rehabilitation can be achieved only if those who are sought to be rehabilitated are provided with shelter, food and other necessary amenities of life. It would be too much to contend, much less to accept, that providing medical facilities would not come within the concept of the word "rehabilitation." [Collectors of 24 Pargana and ors ..Vs..Lalit Mohan (1986) 2 SCC 138 Para 13]

30. While dealing with the matter of rehabilitation monetary compensation comes as the first and foremost requirement. Of course, it is not 'be all and end all' of the matter but it is still a very important requirement. We will, therefore, first explore what monetary benefits can be given to the victim under existing laws. Other requirements can be discussed subsequently.

31. Right of a Victim to be compensated for the sufferings of the Offence is also recognized under the Code of Criminal Procedure. Section 357 Cri.P.C. provides for payment to any person of compensation for any loss or injury caused by the offence, out of the amount of fine where a Court imposes a sentence of fine or a sentence including the sentence of death of which fine forms a part and where a Court imposes a sentence of which fine does not form a part, the court may ,when passing the judgment, order the accused person to pay by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

32. The Legislature by means of the Code of Criminal Procedure (Amendment) Act 5 of 2009 inserted new section 357-A which inter alia provides that every State Government in coordination with the Central Government shall prepare a Scheme, called "Victim Compensation Scheme" for providing funds for the purpose of compensation to the victim or his dependents who has suffered loss and injury as the result of crime and who require rehabilitation.

33. Section 357-A (3) provides that if the trial court at the conclusion of the trial is satisfied that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. Sub-Section 2 provides that whenever a recommendation has been made by the court for compensation, the District Legal Services Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the Victim Compensation Scheme. Sub-Section (4) further provides that where the offender is not traced or identified but the victim is identified and where no trial takes place, the victim or his dependent may make an application to the State or the District Legal Service Authority for award of compensation. Under sub-section 5, the State and the District Legal Service Authority shall on receipt of recommendation on an application received under sub-section (1) after due enquiry, award adequate compensation by completing the enquiry within two months. Sub-section (6) further provides that the State or the District Legal Service Authority may, to alleviate the suffering of the victim, order for immediate first-aid facility or medical benefits to be made available to the victim free of cost or any other interim relief as such authority may deem fit.

34. In Suresh Vs. State of Hariyana 2015 (2) SCC 227, Hon'ble Supreme Court has held that the object and purpose of the provision of Section 357-A, is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. It recognizes compensation as one of the methods of protection of the victim. Relying upon previous judgment in Abdul Rashid Vs. Odisha, reported in 2013 SCC OnLine Ori 493, it was held that punishment of guilty is not the only step in providing justice to the victim. Victim expects a mechanism or rehabilitative measures including monetary compensation. Such compensation has to be directed to be paid in public law remedy with reference to Article 21. In numerous cases, to do justice to the Victim, payment of monetary compensation as well as rehabilitation has been directed. It has also been held that expanding scope of Article 21 is not limited only to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by individual without any role of the State or its functionary.

35. These provisions of Sections 357 & 357-A received attention of the Hon'ble Supreme Court in many decisions including Ankush Shivaji Gaikwad Vs. State of Maharastra (2013) 6 SCC 770, Gang rape ordered by Village Kangaroopur in West Bengal in re (2014) 4 SCC 786; Mohd. Haroon Vs. Union of India (2014) 5 SCC 252 and Laxmi Vs. Union of India (2014) 4 SCC 427. All

these judgments recognize compensation as one of the most effective protections for the victims as held in the case of Suresh (supra).

36. In exercise of its powers under Section 357-A Cr. P.C. the State of U.P. has framed "The Uttar Pradesh Victim Compensation Scheme 2014" for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of crime and who require rehabilitation.

37. Para 2 (d) of the Scheme defines Victim as follows:

"victim means a person who himself has suffered loss or injury as a result of crime and requires rehabilitation and includes his dependent family members."

38. We may add here that this definition of victim should also include the child born out of illegal act of sexual abuse with minor. The new born child is a victim in the sense that she/he is forced to live a life of shame and stigma without his/her fault. She/he is brought in this world destined to suffer because while the father refuses to lend his name to the child, the mother abandons her/him for social reasons. Injury to reputation is a violation of right to live with dignity. The child is the victim of circumstances. She/he definitely suffers injury of being left in this world to fend for himself without any support. She/he requires rehabilitation, therefore, we have termed the child born on 26.10.2015 as a second victim in our discussion.

39. Para 4 of the Scheme provides for the eligibility of a victim for the grant of compensation. Para 5 lays down the procedure for grant of compensation. Sub para (5), provides that the quantum of compensation to be awarded to the Victim or his dependent shall not exceed the maximum limit as per schedule 1. Sub-para (6) provides that the amount of compensation decided under the Scheme shall be disbursed to the victim or his dependents as the case may be from the funds namely "victim compensation fund' established under Para 3. It also makes provision for interim and final assistance. Such financial assistance shall be remitted in the Bank Account of the applicant i.e. Victim or the dependent as the case may be. However, in cases where the person affected is a minor, the amount shall be remitted to the bank account of the parent or guardian after the concerned authority i.e. District Legal Services Authority is satisfied about proper utilization of the compensation amount. Para 6 lays down the principles governing the determination of assistance to the affected person.

40. Under the aforesaid Scheme of 2014, as per schedule 1, the maximum limit of compensation which may be provided to the victim of rape is Rs. 2 Lac. Besides, for loss or injury causing severe mental agony to the victim of the crime, maximum of Rs. 1 lac can also be awarded under this head. Further, in view of paragraph 5(4) of the scheme keeping in view the particular vulnerability and special need of the affected person in certain cases the State/ District Legal Services Authority, as the case may be will have the power to provide additional assistance of Rs.25,000/- subject to a maximum of Rs. 1,00,000/- in the case where (a) the affected person is a minor girl requiring specialized treatment and care.

41. Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 framed under Protection of Children

from Sexual Offences Act, 2012 also provides for grant of compensation, interim and final, to the victims on the recommendation of the special courts constituted under the Act under the circumstances mentioned therein.

42. Any useful discussion on the issue of life and liberty and the responsibility of the State will not be complete without referring to some more paragraphs from the case of Chairman, Railway Board Vs. Chandrima Das (supra) wherein Hon'ble Supreme Court while dealing with the matter of human rights has referred to the domestic as well as international concept of human rights as under:-

"20. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10th December, 1948. The preamble, inter alia, sets out as under:

"Whereas recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom. Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."

21. Thereafter, the Declaration sets out, inter alia, in various Articles, the following:

"Article 1--All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2--Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 3--Everyone has the right to life, liberty and security of person.

Article 5--No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7--All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9--No one shall be subjected to arbitrary arrest, detention or exile."

22. Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20th December, 1993, observed in Article 1 that, "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." In Article 2, it was specified that, "violence against women shall be understood to encompass, but not be limited to:

(a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

23. In Article 3, it was specified that "women are entitlted to the equal enjoyment and protection of all human rights, which would include, inter alia,:

(a) the right to life, (b) the right to equality, and

(c) the right to liberty and security of person.

24.The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

25.Lord Diplock in Salomon v. Commissioners of Customs and Excise [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specfic treaty obligations. So also, Lord Bridge in Brind v. Secretary of State for the Home Department [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

26.The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in

1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated :

"Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

But this situation may not really arise in our country.

27.Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State."

43. The power to grant compensation to the victim for violation of fundamental rights especially right to life and personal liberty under Article 226 of the Constitution of India is well recognized and independent of the provisions of Sections 357 and 357-A Cri. P.C. or/and any scheme framed in pursuance to or independent thereof. These provisions and the Victim Compensation Scheme may at best be considered as the State recognizing its duty to compensate the victim of offence to some extent, as the cases like the present one no compensation would be adequate to compensate the victim. It may also be considered as the State recognizing its liability to pay the victim, for its fault in protecting the rights of the individual by providing safety and security against commission of crime. Commission of offence, even where it is only against an individual, has its effect on the society. The offence of rape, like many other offences, is against the society. The State has the responsibility to punish the wrong doer/the guilty and on its failure, also to see that the victim of offence is not only compensated by the State for the loss and injury suffered but also for rehabilitation of the Victim irrespective of the fact whether the offender is convicted or acquitted and also in those cases where the offender could not be identified and no trial takes place but the victim is identified.

44. Amount of compensation is to be determined by the court depending upon the facts and circumstances of the case; the nature of the crime and the justness of the claim. It must be reasonable depending upon the relevant factors. In Suresh Vs. State of Hariyana (supra) it was held that the gravity of offence and need of the victim are some of the guiding factors apart from such other factors as may be found relevant in the facts and circumstances of individual cases.

45. Thus we see that there is a statutory right of compensation available to the petitioner and she may avail of the same. But we sadly observe that such compensation may be too little and come too late in the life of a victim and thus be of no immediate use for her. We need not give any direction in this regard. The mechanism will take its own course.

46. Additional Advocate General Mrs. Bulbul Godiyal has submitted that apart form victim compensation scheme, as discussed above, the State Government has notified Uttar Pradesh Rani Lakshami Bai Mahila Samman Kosh Rules, 2015 (hereinafter referred to as Samman Kosh Rules). This has been notified on 6.2.2015. She has also informed that Rs.3 lakhs have been issued and the petitioner has been given this amount under this Samman Kosh Rules itself.

47. The Court appreciates the notification of these Rules which are quite exhaustive. Under this scheme "U.P. State Women's Empowerment Mission" has been constituted vide a G.O.dated January 7, 2015. Under this mission, a "State Monitoring Committee" has been constituted which is to be chaired by the Chief Secretary through a Government Order dated 7.1.2015. Further a "District Steering Committee" under the Chairmanship of the District Magistrate has also been established as per the G.O.dated 16.1.2015. Three annexures have been appended to these Rules.

Annexure-1 : Facilities provided under the fund for victims of
Crimes against women.
Annexure-2 : Deals with eligibility.
Annexure-3 : Public contributions to the fund.

48. Clause 10 of these Rules speaks of a 'Sanctioning Authority', powers of which are quoted below

(a) The District Steering Committee is the Sanctioning Authority for reliefs from the Fund which are mentioned in Annexure-1 & 2, upto a limit of Rs.10 lakhs only. For reliefs amounting to more than Rs.10 lakhs, the recommendations would be submitted online, for approval of the State Monitoring Committee.

(b) The Sanctioning Authority for projects listed in Annexure-3 is the State Monitoring Committee.

49. Clause 12 of these Rules reads as under :

Process flow with respect to cases defined in Annexure-1:

For funding under Annexure 1, no application is required to be made.

(a) Process for payment of compensation :

(1)Authorised District Police Officer will feed online the FIR and other details of the Victim and digitally sign the record.

(2)Such signed record will then be automatically displayed, both in the inbox of the Designated Signatory of the District Steering Committee, as well as in the inbox of the Authorised Medical Officer.

(3)The Authorised Medical Officer will then feed the medical report online and digitally sign the record. Such completed record will be forwarded online to the District Steering Committee for approval.

(4)The Designated signatory will obtain the approval of the Chairman of the District Steering Committee in the prescribed format, downloadable from the website, along with signatures of the District Superintendent of Police.

(5)The same would be scanned, uploaded on the website and forwarded with the recommendation for payment, under the digital signatures of the Designated Signatory, to the FMU.

(6)On the basis of records recommended by the District Steering Committee, the demand will be generated through Web Portal by FMU.

Accordingly, the fund will be transferred through PFMS Systems directly to the account of the beneficiaries, information of which would also be given to the District Steering Committee and S.P.of the district.

(b) Process for availing of medical facilities :

(1) Victims of violence (as per part A list in Annexure-1) may approach any Government Hospital/Government Medical College/State Medical Autonomus bodies/State Medical Universities for initial treatment. To facilitate such treatment, wherever investigations are not available in the Government Hospitals/Government Medical Colleges but available in the Private Sector, procedures laid down in Annexure-1 will be followed.

(2) Referral medical treatment, if required, can only be availed on specific recommendation of treating Doctor, certified by Chief Medical Superintendent of District Hospital/Medical Superintendent of Government Medical College/Institution.

(3) If a beneficiary is required to be treated at any identified Government. Referral Hospital (as in Annexure-1)/accredited Private Hospital under these Rules, then the details of the Referral Form, containing clear recommendation regarding requirement of such treatment, will be entered in the Web Portal by the 1lk0 efgyk ,oa cky fodkl -3 Authorised Medical Officer of the District Hospital/District Medical College (format of Referral Form for Annexure-1, will be issued by the Department of Medical Health/Medical Education.) A copy of Referral Form will be given to the beneficiary to facilitate identification.

(4) The digitally signed medical report along with the Referral Form, will be displayed in the inbox of the Referral Hospital/Institution, along with details of the beneficiary.

(5) When the beneficiary approaches the Referral Centre, the copy of Referral Form should be produced for easy identification.

(6) To ensure cashless treatment to the beneficiary, the Referral Centre would raise a bill in her name for those medical treatments which are not available free in the Centre, on the basis of the treatment given to her.

(7) The Authorised Medical Officer of the Referral Central will digitally sign the medical reports of the beneficiary and forward it online to the FMU.

(8) On receipt of records from Referral Hospital, the demand will be generated through Web Portal by FMU. Accordingly, the fund will be transferred through PFMS System directly to the account of the Referral Hospitals.

(9) Alternatively, as cashless treatment is to be provided to the beneficiaries, Imprest Money, if required, would be provided, on the basis of specific requirement raised by the Department of Medical Health and Department of Medical Education.

(10) In such case, the details of beneficiaries treated and the expenditure against treatment of each would be mandatorily displayed in the Fund web portal, by the Referral Centre.

(11) Detailed procedures for payment would be drawn up by Department of Women's Welfare, in consultation with Department of Medical Health and Department of Medical Education.

(12) The responsibility of submitting the names of Authorised Medical Officers, for each identified Referral Medical Institution/Hospital/Medical College, as

well as the District Government Hospitals and their contact details will lie with the Department of Medical Health and the Department of Medical Education. This information is essential to provide login and digital signatures for Authorised Medical Officers to enable their access to the Web Portal of the Fund.

c) Process for availing of educational facilities :

(1) In case the victims/minor children of victims require educational assistance, which is not available free under any Government programme, online application would be made to the District Steering Committee, which upon satisfaction of the genuineness of the case, will recommend the case to the FMU, in prescribed format, for payment of the required assistance. Accordingly, the demand will be generated through Web Portal by FMU and the fund will be transferred through PFMS System directly to the account of the Educational Institutions.

50. Clause 13 of these Rules reads as under :

Process flow with respect to cases defined in Annexure-2:

For funding related to Annexure 2,eligible persons under this category may avail of Medical/ Educational assistance from the Fund with ID proof, bearing photograph, of being a Social Pensioner/any other approved category:

(a) Process for availing of medical facilities the process :

To avail of the facilities, the beneficiary would first show the ID proof, bearing photograph, of being a social pensioner/any other approved category, at the time of registration in the Registration counter of the hospital. The rest of the process would be the same as in 12 b above.

(b) Process for availing of educational facilities:

Applications will be made online in prescribed format in instances where beneficiaries require educational assistance, which is not available free under any Government Programme. Process will be the same as in '12-c' above.

51. Thus we see that the 'Victim Compensation Scheme 2014' as well as 'Rani Laxmi Bai Mahila Samman Kosh Rules, 2015' are two systems where some monetary respite to the victim is available. We, however, feel that the question of Rehabilitation of the minor victim and her baby girl still remains to be answered satisfactorily. We will now consider the laws, guidelines and the process for adoption as a first measure.

52. In Lakshmi Kant Pandey Vs. Union of India, 1994 (2) SCC 244 the Hon'ble Supreme Court held that every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.

53. Before proceeding further, it is relevant to mention that the petitioner (a

minor girl of 13 years) in the affidavits filed in the writ petition has stated that she is not mentally and physically capable to take the responsibility of the upcoming child and she has no objection if the child is given in adoption. In paragraphs5,7and 8 it has been stated that the petitioner's father, due to financial constraints and social issues on account of the unfortunate incident which occurred to the petitioner, is also not ready to take the responsibility of the newly born child. It has also been stated that the child after birth, may be handed over to such person/NGO, social Institution, who are interested to adopt the child for her welfare. The same stand was taken by the petitioner and her parents when the Amicus Curie personally met the petitioner with her parents. The petitioner has given birth to the child on 26.10.2015. The stand of the petitioner and her parents is still the same as informed by the learned Counsel for the petitioner.

54. In view of the above it is relevant to refer to certain legal provisions and the Schemes relating to adoption.

The Hindu Adoption and Maintenance Act 1956:

55. Section 5 provides that the adoption shall be regulated by Chapter 2 of the Act. It provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in that chapter and any adoption made in contravention of such provisions shall be void.

56. Section 5 (2) provides that an adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

57. Section 6 provides for the requisites of a valid adoption. Those requisites are (1) the person adopted has the capacity and also the right, to take in adoption; (2) the person giving in adoption has the capacity to do so; (3) the person adopted is capable of being taken in adoption; and (4) the adoption is made in compliance with the other conditions mentioned in chapter II.

58. Section 9 provides about the persons capable of giving in adoption. Sub-Section (1) provides that "No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption". Sub-Section (2) provides that "subject to the provisions of sub-section (4) the father or the mother if alive shall have equal right to give a son or daughter in adoption, provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Sub-Section (4) provides for the circumstances under which guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself. Those circumstances are where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known.

59. Section 9 (5) Explanation (ia) defines "guardian' to mean a person

having the care of the person of a child or of both his person and property and includes (a) a guardian appointed by the Will of the child's father or mother and (b) a guardian appointed or declared by a court.

60. Section 10 provides for the persons who may be adopted. It provides that "No person shall be capable of being taken in adoption unless the following conditions are fulfilled namely (i) he or she is a Hindu (ii) he or she has not already been adopted (iii) he or she has not been married, unless there is a custom or usage, applicable to the parties which permits persons who are married being taken in adoption; and (iv) he or she has not completed the age of 15 years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of 15 years being taken in adoption.

61. Section 11 lays down certain conditions which must be complied with in every adoption for a valid adoption. Section 12 provides for the adoption and Section 15 provides that No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth. Section 16 (1) raises presumption as to registered document relating to adoption and it is relevant to mention that sub-section (2) inserted in the State of Uttar Pradesh provides that in case of an adoption made on or after 1.1.1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of child in adoption, except through a document recording an adoption made and signed by the person giving and the person taking the child in adoption and registered under any law for the time being in force.

62. Thus the child may be given in adoption by the father or the mother, with the consent of the other, where taking of such consent is possible. A guardian, having the care of the child, is also competent to give the child in adoption under the circumstances mentioned under section 9 (4), one of which is that the child has been abandoned by the father or/and mother.

63. A question that arises is as to whether a minor mother has the capacity to give her child in adoption. For this purpose it is relevant to refer to the provisions of The Hindu Minority and Guardianship Act, 1956

Section-4: Definitions:

In this Act,-

(a) "minor" means a person who has not completed the age of eighteen years.

(b) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property, and includes -

(i). a natural guardian,

(ii). a guardian appointed by the will of the minor's father or

mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

(c). "natural guardian" means any of the guardians mentioned in Section6.

Section-6:Natural guardians of a Hindu minor:-

The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his

or her undivided interest in joint family property), are -

(a) in the case of a boy or an unmarried girl- the father, and after him the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b). in the case of an illegitimate boy or an illegitimate unmarried girl the mother, and after her, the father;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section-

(a). if he has ceased to be a Hindu, or

(b). if he has completely and finally renounced the world by becoming a hermit (vanaparastha) or ascetic (yati or sanyasi)

Explanation:- In this section, the expression "father" and "mother" do not include a step-father and a step-mother.

64. In view of the above provisions, it has been submitted by the amicus curiae that in the case of an illegitimate boy or an illegitimate unmarried girl the mother is the natural guardian. Expression 'Illegitimate' refers to a child born not out of a marriage wed-lock.

65. Thus, the petitioner is the natural guardian of her child under section 6 (ia). She may also be covered under clause (a) in view of the fact that it provides "mother to be the natural guardian after father. The expression "after' as interpreted in the case of Githa Hariharan Vs. Reserve Bank of India AIR, 1999 SC 1149 means "in the absence of' and the word "absence' refers to father's absence from the care of minor's person or property for any reason whatsoever. Otherwise if "after' is read to mean a disqualification of a mother to act as guardian during life time of the father the same would violate one of the basic principles of the our Constitution i.e. gender equality.

66. Section 21 of the Guardian and Wards Act also provides as under:-

Section-21 Capacity of minors to act as guardians:

"A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family."

67. Thus the minor mother is competent to act as guardian of her child. She has the capacity to give the child in adoption.

68. In the present case the petitioner by means of the affidavits expressed her willingness that the child may be given in adoption and neither she nor her parents are ready to take care of the child for the reasons disclosed in the affidavits.

69. The Juvenile Justice (Care and Protection of the Children) Act, 2000 has been enacted for Juveniles in conflict with law and children in need of care and protection.

70. Section 2 (aa) defines "adoption" to mean the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship;

71. Clause (j) defines "guardian in relation to a child" to mean his natural

guardian or any other person having the actual charge or control over the child and recognized by the competent authority as a guardian in course of proceedings before that authority;

72. Chapter III deals with "child in need of care and protection".

73. Section 2(d) defines "Child in need of care and protection." Section 2(d) is quoted below:

Section-2(d) "child in need of care and protection" means a child, -

(i) who is found without any home or settled place or abode and without any ostensible means of subsistence,

[(ia) who is found begging, or who is either a street child or a working child]

(ii) who resides with a person (whether a guardian of the child or not) and such person -

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in que3stion being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned [or surrendered] him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natyural calamity;

74. The newly born child of the victim is clearly a child in need of care and protection as per Section 2(d) (iv) and Section 2(d) (v).

75. Section 29 provides for Child Welfare Committee, which reads as under:-

(1) The State Government may, (within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette constitute for every district), one or more child Welfare Committees for exercising the powers and discharge the duties conferred on such Committee in relation to child in need of care and protection under this Act.

(2). The Committee shall consist of a chairperson and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on matters concerning children.

(3). The qualifications of the chairperson and the members, and the tenure for which they may be appointed shall be such as may be prescribed.

(4). The appointment of any member of the Committee may be terminated after holding inquiry, by the State Government, if-

(i). he has been found guilty of misuse of power vested under this Act;

(ii). he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii). he fails to attend the proceedings of the Committee for consecutive three months without any valid reason or he fails to attend less than three fourth of the sitting in a year.

(5) The Committee shall function as a bench of magistrates and shall have the powers conferred by the Code of Criminal procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a judicial Magistrate of the first class.

Chapter IV deals with rehabilitation and Social Reintegration

76. Section 40 provides for the Process of rehabilitation and social reintegration which reads as under:-

77. The rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship, and (iv) sending the child to an after-care organization.

78. Section 41(2) provides that the adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

79. Section 42 provides that foster care may be used for temporary placement of those infants who are ultimately to be given for adoption.

80. The Central Government, Ministry of Child & Women Development, in pursuance of the powers conferred by Section 41 (3) of the Juvenile Justice (Care & Protection of Children) Act, 2000, has notified the "Guidelines Governing Adoption of Children, 2015", to provide for the Regulation of adoption of orphan, abandoned or surrendered children.

81. The expressions orphan, abandoned and surrendered have been defined under the Guidelines 2015 which are as under:-

Para 2 (2) defines abandoned as under:-

"abandoned' means an unaccompanied and deserted child as declared abandoned by the Child Welfare Committee after due inquiry;

Para 2 (23) defines of Orphan as under:

"Orphan" means a child (i) who is without parents or legal guardian; or (ii) whose parents or legal guardian is not willing to take, or capable of taking care of the child;

Para 2 (33) defines surrenders child as follows:-

"Surrendered child" means a child who in the opinion of the child welfare committee is relinquished on account of physical emotional and social factors beyond the control of the parent or legal guardian;

82. The newly born child is a "child in need of care and protection' and falls within the expression "Surrendered or orphan child'. The necessary directions for her rehabilitation including adoption are

thus required to be issued to the competent authority under the JJ Act read with the Guidelines 2015 in the welfare of the child.

83. It is relevant to note that after the judgment in the case of Lakshmi Kant Pandey Vs. Union of India, 1994 (2) SCC 244 law relating to adoption has been remarkably developed which has been elaborately discussed in a latest pronouncement of the Hon'ble Supreme Court in Shabnam Hashmi Vs. Union of India and others, 2014 (4) SCC 1, which is quoted hereunder:

"4. The decision of this Court in Lakshmi Kant Pandey is a high watermark in the development of the law relating to adoption. Dealing with inter country adoptions, elaborate guidelines had been laid down by this Court to protect and further the interest of the child. A regulatory body i.e. Central Adoption Resource Agency (For short "CARA") was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as intra country adoptions. The said norms have received statutory recognition on being notified by the Central Government under Rule 33 (2) of the Juvenile Justice (Care and protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several States under the Rules framed by the States in exercise of the rule making power under Section 68 of the JJ Act, 2000.

5. A brief outline of the statutory developments in the sphere concerned may now be sketched. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short the JJ Act, 1986) deal with only neglected and delinquent juveniles while the provision of the 1986 Act dealing with delinquent juveniles are relevant for the present, all that was contemplated for a "neglected juvenile" is custody in a Javenile Home or an order placing such a juvenile under the care of a parent guardian or other person who was willing to ensure his good board . The JJ Act, 20000 introduced a separate chapter i.e. Chapter IV under the head "Rehabilitation and Social reintegration": for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after care organization Section 41 contemplates adoption through it makes it clear that the primary responsibility for providing care and JJ Act, 2000, deals with alternative methods of rehabilitation, namely, foster care sponsorship and being looked after by an after care organization.

6. The JJ Act, 2000, however, did not define "adoption" and it is only by the Amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2, (aa) "adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship."

7. In fact Section 41 of the JJ Act 2000 was substantially amended in 2006 and for the first time the responsibility of

giving in adoption was cast upon the court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the Court of the District Judge, Family Courts and the City Civil Court (Rule 33(5). Substantial charges were made in the other sub sections of Section 41 of the JJ Act, 200. CARA as an institution received statutory recognition and so did the guidelines framed by it and notified by the Central Government (Section 41(3).

8. In exercise of the rule-making power vested by Section 68 of the JJ Act, 2000, The JJ Rules 2007 have been enacted. Chapter V of the said Rules deals with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000 were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules 20007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the State have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the State concerned.

9.Rule 33(3) and 33(4) of the JJ Rules contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption the Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption and lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an after care organization. Whatever the Rules do not provide for, are supplemented by the CARA Guidelines of 2011 which additionally provide measures for post-adoption follow up and maintenance of date of adoptions."

84. It will be useful to quote Article 19, 20, 21(a) and 39 of the Convention on the Rights of the Child, 1989 adopted by Resolution 44/25 of the General Assembly of the United Nations on 20th November, 1989:-.

*"**Article 19***

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic

law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;....

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

85. With this discussion the Court is satisfied that a valid legal system is available to allow the girl child to be given in adoption and we propose to direct accordingly.

86. One of the questions which this Court was also proposing to consider is the question relating to rights of inheritance of the newly born child in the property of her father. It may be noted here that no meaningful argument was put forward in this regard. Reference was however made to the definition clause of Hindu Succession Act, 1956, but that is not enough to deal with the subject.

87. We may observe here that in the matter relating to inheritance, the manner of birth of a person is irrelevant; the rights of inheritance of a person are governed by the Personal law to which the person is subject irrespective of the manner of birth of the person. It is irrelevant as to whether the newly born child of a rape victim is born out of consexual sex or otherwise. It is thus noted that the rights of inheritance of the newly born child would be governed by her Personal Law and for that purpose she would be treated as an illegitimate child of her biological father.

88. Notwithstanding the aforesaid observations, it is relevant to note that firstly this question does not really need a judicial pronouncement in the present case for the reason that if the newly born child is given in adoption, she will not have any rights of inheritance in the property of her biological father. Secondly, even if the child is not taken in adoption by any one, no directions of the Court would be required and she would inherit the property of her biological father by operation of the personal law by which she is governed. Thirdly, any direction to inherit property of her father would be fraught with grave consequences in the event the father starts claiming some special reproach privileges over the minor like rights of visitation or custody. In the present circumstances, we feel that this is not desirable. Further, since the criminal trial is

yet to commence against the alleged biological father, there is a possibility that a direction relating to inheritance in his property may be used by the accused in some form as his defence or even otherwise during his trial.

89. There is yet another aspect of this matter The rights of inheritance in the property of a biological parent is a complex Personal Law right which is guided by either legislation or custom It may not be possible to judicially lay down any norm or principle for inheritance by a minor who is born as a result of rape. Such attempt by the Court would amount to legislation by judicial pronouncement and would operate as precedent in times to come. It would not therefore be desirable to venture into this field and accordingly we leave it open for the appropriate legislature to deal with this complex social issue.

90. This view is supported by the observations of the Hon'ble Supreme Court in the matter of Shabnam Hashmi v. Union of India and others.

"16..... While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental, in our considered view, will have to await a dissipation of the conflicting thought processes in this of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view.....We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable."

91. Amicus curiae Sri Jaideep Narain Mathur has also informed that a number of N.G.Os, which are dealing with welfare of women and children in general, have approached him to offer help and assistance in this matter. Though they have not been able to move formal impleadment applications in the petition but they have assured all assistance of counselling to the victim from time to time, taking her to their organization for a change of scene from the home, making friendly gestures towards the girl to help her, overcome the shock and the rejection of the society in general. They have also offered that they will help in adoption process wherever the need be. They have submitted that they are the organizations which have done a lot of work for the benefit of women who have been rendered homeless by their in-laws or husbands, the women who have suffered domestic violence along with their children. They have also worked in riot affected areas and have sufficient experience in understanding the psyche of such victims. If the Court permits they are willing to lend their help to the best of their ability. The Court welcomes the offer of such organizations.

92. We will request the amicus curiae Sri Jaideep Narain Mathur to remain in touch with the family of the victim and in case of need, be their friend, philosopher and guide. He may also guide these N.G.Os in helping the victim and the family in a manner which is suitable, appropriate and permissible in the interest

of the mother and the child. He will ensure that the N.G.Os will not use the victim or the child for publicity purpose. The amicus curiae is not only a designated Senior Advocate, a former Additional Advocate General of this Court and respected member of the Bar but also a 3rd generation lawyer and a prominent citizen of this city. We can trust his wisdom and intention to ensure the welfare of the child and mother.

93. In the peculiar circumstances of this case, Sri Mathur may move appropriate application for any direction if he so feels. We permit him in the interest of justice, to ensure that commitment of Article 21 of the Constitution towards these two helpless and hapless citizen of this country, is fulfilled. We thus allow that an application will be permissible in this case despite the fact that this matter is being finally decided by this judgment. In routine matters decision of Sri Mathur will be final. He will act as an officer of the Court even after judgment is pronounced.

94. It will not be out of place to ponder why, despite innumerable pronouncements of the Indian judiciary regarding rape, as well as scheme for compensation, do we find that upto mark legislation has not come forward on the question of rehabilitation. One reason for this lack of legislation is perhaps the fact that no study has ever been undertaken by any study group or research centre. Cases of rape and sexual violence against women and children are increasing throughout India inspite of post 'Nirbhaya' amendments in criminal law in 2013 and enactments of other legal statutes, we feel that law fixing only an amount of compensation is not enough. Perhaps, whole picture has never been comprehended by the legislative machineries. There is no data bank on various aspects of rape, rape victims, behaviors of children born out of rape, choice of victim to live with the child or to abandon it, the number of abandoned children and so on and so forth. It would help the legislature in bringing up proper legislation for rehabilitation of children born out of rape as well as the rape victims. We find that in developed countries, studies are and have been made on the basis of data collected throughout the length and breadth of their countries. These things have become fairly simple with the advent of computers and electronic instruments. This data can also bring a complete and a clearer picture before the society. The society may then rise to the need for proper legislation for rehabilitation.

95. One, Shauna R. Prewitt in her Article 'Giving Birth to a "Rapist's Child" : A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape' published in Georgetown Law Journal 'Vol.98:827, has made the following observations which we find very relevant in the present context and we quote :

"Pregnancy from rape occurs with "significant frequency". Of the estimated 12% of adult women in the United States that have experienced at least one rape in their lifetime, 4.7% of these rapes result in pregnancy. Therefore, based on a 1990 study estimating that 683,000 women over the age of eighteen were raped in that year, conceivably 32,000 rape-related pregnancies occur annually. A separate study conducted in 2000 estimated that,given the decline in the incidence of rape, 25,000 pregnancies following the rape of adult women occur annually.

It is difficult to determine with certainty the outcome of the approximately 25,000 to 32,000 rape-related pregnancies that occur in the United States each year. One study found that 50% placed their infants for adoptions, and 32.3% of raped women kept their infants. Another study, conducted in a separate year, found markedly different results, concluding that 26% of women pregnant through rape underwent abortions. Of the 73% of women who carried their pregnancies to term, 36% placed their infants for adoption, and 64% of women raised the children they conceived through rape."

96. We do not claim that Indian society can be compared to any other society in the world. The reactions of rape victims, children born out of rape and the society in general is definitely going to be different from one country to another because of its cultural, educational, economic and other factors. At the same time, data can help in making the picture clearer to the citizens of the country like India.

97. Awareness about such social evils is also right of the people of India. We, therefore, put on record our anxiety and request that the government may conduct or cause to be conducted a socio-psychological study based on appropriate survey on the number of rapes, number of children born out of rape, number of abandoned children, reactions of the victims, ways and means to counter the trauma of rape and the choice of the rape victims as to what are their expectations for rehabilitation and other related and ancillary issues.

98. In view of the discussions made above, the scheme of compensation and various provisions available in different Statutes for adoption and the arguments of amicus curiae along with a number of other public spirited lawyers, we feel that the ends of justice will be met by issuing following directions to the opposite parties:-

(1)We direct and allow the Child Welfare Committee of District Lucknow to take over the cause of adoption of the child born to "A" on 26th October, 2015, who is presently in the care of Paediatrics Department of King George's Medical University, Lucknow. The Department shall handover the child as and when the doctors find that the child is medically fit to be handed over to the committee. The committee shall, thereafter, act in the manner provided in the judgment. The Member Secretary of the State Legal Services Authority in consultation with the amicus curiae shall supervise the process of adoption.

(2)As soon as "A" regains her mental balance and equilibrium, she will be allowed admission in a proper class in an appropriate school. The first and foremost preference should be given to any Kasturba Gandhi Girls' School. These are residential schools in which girls are allowed to stay and taken care of completely. They are given food, shelter, books, uniforms and matterial for recreation also. If "A" or her parents approach the authorities of Kasturba Gandhi Residential School of her choice, admission should be allowed to her. If an application is made to the Basic Shiksha Adhikari of the District it shall be his duty to ensure admission of "A" in one of the best run schools of Kasturba Gandhi Residential Schools of the District.

(3)If "A" chooses not to go to residential school then a Government Girls' Inter College of her choice will allow her admission without insisting on any entrance examination or the criteria of

selection on merit basis. The State Government should ensure that education is provided free of costs to "A". She will be allowed full freeship of fees and other charges whatsoever.

(4)It shall be the duty of the Principal of the college concerned to ensure that the teachers of the college, staff and the students do not discriminate her in any manner. All possible mental, moral and psychological help should be given by the teachers to help her gain strength to face the challenges of life. The principal should also ensure that the past life of "A" is not propagated and she is treated as another normal student of the school.

(5)If "A" wants to continue her studies after 10+2 Standard (Intermediate), admission should be given to her in any government degree college with full free ship of fee. This will continue till graduation.

(6)In addition to payment of Rs.3,00,000/- as compensation under Rani Lakshmi Bai Mahila Samman Kosh Rules, 2015, the State Government shall make a fixed deposit of a sum of Rs.10,00,000/- (Rupees Ten lacs) in favour of "A" in any nationalized bank which will be given to her only when she reaches the age of 21 years. The District Magistrate of the District where the family of "A" chooses to live henceforth will ensure that bank account is opened in the name of "A" in any nationalized bank, chosen by her father. It is made clear that at the maturity of the aforesaid fixed deposit, only "A" will be entitled to get the money.

(7)Superintendent of Police of the District where "A" and her family choose to reside will ensure the safety, security and dignity of the family. No one from the society should be allowed to degrade, discriminate or excommunicate the victim or her family on the ground of unfortunate incident of rape.

(8)If "A" applies for any apprenticeship in any available scheme or in any vocational course of any Government department or any other instrumentality of the State, preference should be given to her in such matters.

(9)After attaining the age of majority, some suitable job be also provided to her according to her ability / qualifications. Such security of job is the surest way of bringing her up in the main stream once again. When occasion arises the petitioner shall have the liberty of moving an application to the Chief Secretary of the State to ensure that a suitable job is provided to her.

(10)The N.G.O.s or any other agency which wants to help the victim and her family in any manner, will be welcome to do so and earn the appreciation of this Court as well as of the society in general.

99. Before parting we would like to observe that there are questions and solutions which are not in the realm of the Courts. The Courts have their own limitations. All solutions and answers cannot be given by the courts. There are certain social problems and issues which have to be answered by the society itself. It is for the society to decide as to how it wants to treat a rape victim. We should remember that rape is a crime beyond the control of a victim. This tragedy can strike any family. It is not something for which the victim has to be blamed. The whole society should come forward in defence and help of the poor traumatized victim of rape. The society will have to learn to manage their response towards a victim without forgetting that tragedy can befall on one's own head. When women are respected and promoted by the society as a whole only then a society can be called truly free and liberated. The question of rehabilitation of a rape victim can best be answered by the

people and the masses and not by the courts alone. We, therefore, leave this question of rehabilitation of "A" open to the masses whose love and affection can save two normal lives from becoming two negative characters of the society in future. They should be accepted; not haunted by the society. The Court has played its role within the parameters of law. Now it is the turn of the seekers of justice from the courts i.e. people of India to see and show their response to the victims of their society.

100. Lastly, we record our deep appreciation for the assistance provided by amicus curiae Sri Jaideep Narain Mathur, Senior Advocate and Sri Ravi Nath Tilhari, who have put in a lot of work in this regard. We also record our appreciation to his other colleague Sri Madhav Chaturvedi. President of the Oudh Bar Association Sri H.G.S.Parihar, Senior Advocate and Sri Gaurav Mehrotra, have also addressed the Court and placed number of judgments before it. None of these counsel have accepted any remuneration for this work. The Court is pleased to note that at least this section of the society has started feeling its responsibility towards good cause of helping people in need. Sri Mohsin Iqbal, counsel for petitioner and Mrs. Bulbul Godiyal, Additional Advocate General have also worked very hard and deserve appreciation from the Court, which we hereby accord.

101. Let a copy of this judgment and order be placed before the Chief Secretary, State of U.P. for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE BHARAT BHUSHAN, J.

C.M.W.P. No. 21511 of 2012

Anil Kumar Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Trivedi, Meena Singh, Sri Ram Prakash Upadhyay, Sri Kamlesh Shukla

Counsel for the Respondents:
C.S.C., Sri Nripendra Mishra, Sri Pankaj Kumar Shukla

Constitution of India, Art.-226-Pension benefits-petitioner after 20 years service-tendered resignation-before acceptance by another letter request to treat voluntarily retired-rejection not proper-view taken by authority based upon clause 6 (2) of circular 01.05.03-held-hyper technical-entitled for pension.

Held: Para-13 & 14

13. In our opinion, there is hardly any difference on the basis whereof an employee after 20 years of service resigns or submits a voluntarily retirement application. In that sense, resignation and voluntarily retirement only bring about the break of employment between the employee and employer. Both modes bring an end to the contract of service.

14. In our opinion, applicability of clause (b) can not be confined to application which technicality use the words voluntary retirement in the letter of the employee concerned for excluding its applicability if the letter says that the employee is resigning.

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

1. Petitioner before this Court seeks quashing of the order dated 26.5.2011,

Annexure-5 to the writ petition, whereby Under Secretary of U.P. Power Corporation Limited (hereinafter referred to as the Power Corporation) has informed the petitioner that since he had submitted resignation vide letter dated 10.12.2010 with the request that he wishes to resign from the service of Corporation and the period of notice may be adjusted against the leave encashment, his request had been accepted by the Corporation and intimation in this regard was supplied to the petitioner on 30.3.2011, therefore, in view of such acceptance of resignation, the petitioner is not entitled to pension in view of clause (6) of Corporation's circular dated 1.5.2003 as any employee resigning from the services of Power Corporation is not entitled to pension.

2. On behalf of the petitioner, initially it was contended that before his resignation could be accepted, he had submitted another letter dated 15.9.2010 for treating his resignation as a request for voluntarily retirement. He submitted that in view of clause (6) of Corporation's circular dated 1.5.2003, he is entitled to post retiral benefits including pension.

3. On behalf of the Power Corporation, Sri Shashi Nandan, learned Senior Advocate, assisted by Sri Nipendra Misra, submitted before us that under the letter of Managing Director of the Corporation dated 21.5.2003, the mode and procedure in the matter of pension, as enforced under letter of Principal Secretary (Finance) dated 24.6.1996 had been adopted for the Power Corporation employees. Clause (6) of the letter of Principal Secretary (Finance) dated 24.6.1996 permits payment of pension to only such employees who seek voluntarily retirement. The petitioner had resigned from the services of the Corporation and therefore, his case is not covered by clause (6) of the letter of Principal Secretary (Finance). The claim of the petitioner for post retiral benefits including pension is not justified.

4. Heard learned counsel for the parties and examined the material on record.

5. Facts which are not disputed are as follows :-

6. Petitioner was appointed in the employment of Power Corporation on 1.8.1980. He submitted an application for resignation on 14.5.2008, which is alleged to have been accepted on 30.7.2009 and information of the same was communicated to the petitioner under letter dated 30.7.2009. The petitioner claims to have submitted a letter for his resignation being converted into that of voluntarily retirement on 19.9.2010. The facts noted above clearly demonstrate that the petitioner had completed more-than 20 years of active service in the employment of Corporation.

7. Clause (6) of the order issued by Principal Secretary (Finance) applicable in the matter of payment of pension to the employees of the Corporation has been brought on record before us along with counter affidavit as Annexure11. Clause(6) reads as follows :-

"6- पेंशन का मामला निम्नलिखित में से किसी एक प्रकार की सेवानिवृत्ति के संबंध में हो सकता है,

1. अद्धतन संशोधित उ0प्र0 रा0 वि0 प्रा0 कर्मचारियों की सेवानिवृत्ति नियमावली 1975:–

`क. अधिवर्षता परः– यह दिनांक 5 नवम्बर 1985 से पूर्व नियुक्ति समूह घ इन्फीरियर सर्विस के कर्मचारियों के मामले में 60 वर्ष पर तथा अन्य सभी मामलों में 58 वर्ष की आयु पर होगी।

ख. स्वेच्छाः––20 वर्ष की अर्हकारी सेवा या 45 वर्ष की आयु के बाद कर्मचारियों द्वारा ली गई स्वेच्छा सेवानिवृत्ति।

ग. अनिवार्य––50 वर्ष की आयु के बाद नियुक्ति अधिकारी द्वरा नोटिस देकर की गई सेवानिवृत्ति।"

8. On simple reading of the aforesaid clause, it will be seen that all those employees i.e. (1) who attained the age of superannuation and retire thereafter; (b) who relinquished the service of the Corporation voluntarily after completing 20 years of services; and (c) all those who voluntarily retire after attaining the age of 50 years, would be entitled to pension.

9. The dispute between the parties before us is not with regard to qualifying service of 20 years. The dispute is as to whether a person who had resigned would be covered by clause (b) or not.

10. According to Corporation, the right to resignation is an inherent right of an employee to give up his engagement at any time. While in the case of voluntarily retirement, such power can be exercised only after 20 years of service.

11. This Court, therefore, required the counsel for the Corporation to demonstrate as to whether under any service rule applicable the mode and manner of resignation/submission of an application for voluntary retirement is regulated.

12. Counsel for the Corporation conceded that there is no violation of rules in submitting of the application in the matter of resignation/voluntary retirement.

13. In our opinion, there is hardly any difference on the basis whereof an employee after 20 years of service resigns or submits a voluntarily retirement application. In that sense, resignation and voluntarily retirement only bring about the break of employment between the employee and employer. Both modes bring an end to the contract of service.

14. In our opinion, applicability of clause (b) can not be confined to application which technicality use the words voluntary retirement in the letter of the employee concerned for excluding its applicability if the letter says that the employee is resigning.

15. The Power Corporation is not justified in refusing the claim of the petitioner for the purpose of payment of pension etc. even after he has completed more-than 20 years of qualifying service with the Corporation on the ground that he has used the words resignation in place of voluntarily retirement in his letter of dated 14.05.2008. The subsequent letter of petitioner is not of much significant it is superfluous.

16. We, therefore, hold that petitioner application for retirement from the employment of the respondent Power Corporation dated 14.5.2008 squarely falls within sub-clause (b) of clause (6) of circular dated 24.6.1996. He is held entitled to the post retiral benefits including pension which may be computed by the respondent Corporation strictly in accordance with law within eight weeks and actual payment may be made immediately thereafter.

17. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2015

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-A No. 22323 of 1996

Prabhakar Rai ...Petitioner
Versus
Union of India & Ors. ...Opp. Parties

Counsel for the Petitioner:
Sri D.S.P. Singh, Sri Awadhesh Rai, Sri S.P. Singh, Sri S.R. Singhal

Counsel for the Opp. Parties:
S.C., Sri K.C. Sinha, Sri R. Sinha, Sri Rajiv Joshi, Sri S.R. , Sri U.N. Sharma, Sri Ashish Singh

Central Civil Services (Temporary Services) Rules, 1965-Rule-5 read with Central Reserve Police Force Rules 1955-Rule 16- dismissal of probationer on one month notice-on allegation of false declaration-regarding criminal case-contention after acquittal entitled to back in service-held-not available-termination without stigma-being simpliciter authorities committed no illegality-petition dismissed.

Held: Para-15
The factum of petitioner having been subsequently acquitted in the criminal case is not of much relevance in the facts of the present case, inasmuch as the limited scrutiny, which was available on part of the employer, was to examine the continuance of petitioner for employment in a public office. The fact that he had submitted a false declaration about no criminal case pending against him, was itself a material circumstance. As already observed above, no stigma was attached. Protection of Article 311 of the Constitution of India or the ratio laid down by the Hon'ble Supreme Court in the case of Ram Kumar (supra) and other judgments relied upon, taking similar view, have thus no applicability to the facts of the present case. There is no illegality in the orders impugned passed by the authorities, which may require any interference.

Case Law discussed:
Civil Appeal No. 7106 of 2011; Civil Appeal No. 5671 of 2012; [1999 (1) SCC 246]; [2010 (2) SCC 169]; [2011 (4) SCC 644]; [2013 (9) SCC 363][(2003) 3 SCC 437]

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

1. This writ petition is directed against the orders dated 29.4.1994, 17.1.1995 and 27.3.1996, whereby petitioner has been terminated from employment, by giving one month's notice, and has been affirmed in appeal and in departmental revision.

2. Petitioner contends that he had participated in open competition, and was selected for appointment as a Constable (General Duty) in C.R.P.F. on 6.10.1993. Pursuant to such selection, petitioner was appointed, and he joined and worked for about 8 months. A notice was thereafter issued to the petitioner invoking the powers under sub-rule 1 of Rule 5 of The Central Civil Services (Temporary Service) Rules, 1965, readwith Rule 16 of The Central Reserve Police Force Rules, 1955, terminating his services by giving him a month's notice. It is in pursuance to the said notice that the services of petitioner were actually discharged w.e.f. 3.6.1994. Petitioner thereafter claims to have submitted a representation stating that on account of a family dispute, he had been falsely implicated in a criminal case, in which he has already been discharged, and therefore, no occasion has arisen for the authorities to have terminated his services. A departmental appeal was also preferred by the petitioner against the order, which has been rejected. Aggrieved by such orders, petitioner approached this Court by filing Writ Petition No.7946 of 1995, which was dismissed after noticing that petitioner has a remedy of filing revision against the orders impugned. Petitioner, consequently, preferred a revision before the Director General, annexing therewith the order passed by the criminal court in Sessions Trial No.472 of 1993, conducted under Sections 395, 397 and 307 I.P.C., in which the petitioner had been acquitted in the absence of evidence. The

revisional authority noticed the contentions of the petitioner, and it was recorded that the petitioner had in fact suppressed the pendency of criminal case against him, while seeking employment in the C.R.P.F. A false disclosure had been made before the authorities that there was no criminal case pending against him. Since the petitioner had obtained appointment on the strength of suppression of material facts, therefore, the revisional authority also found no infirmity in action of the respondents in discharging him from services. Aggrieved by the aforesaid orders, petitioner has filed the present writ petition.

3. Learned counsel for the petitioner, with reference to the judgment passed in sessions trial, submits that petitioner had been falsely implicated, inasmuch as there was a dispute of landed property within the family, and it was only for ulterior reasons that he had been implicated in a criminal case in the year 1988. It is stated that there was neither any injury caused to anyone nor any evidence was led, and it appears that better sense prevailed upon the family members, and as such, the criminal proceedings were not pursued any further, resulting in acquittal of the petitioner. Learned counsel also submits that Senior Superintendent of Police had also issued a certificate to the petitioner clearly stating that implication of petitioner was in a cross case, which apparently was for settling the inter se disputed within the family, in which the petitioner has already been acquitted, and therefore, no further complaint against the conduct of petitioner had been noticed.

4. Learned counsel for the petitioner relies upon a decision of the Hon'ble Supreme Court in the case of Ram Kumar Vs. State of U.P. and others, passed in Civil Appeal No.7106 of 2011, dated 19th August, 2011, as well as the judgment passed by the Hon'ble Supreme Court in the case of Jainendra Singh Vs. State of Uttar Pradesh Tr. Prinl. Sec. Home, in Civil Appeal No.5671 of 2012, dated 30th July, 2012, wherein the matter had been referred to a Larger Bench, after noticing conflict in the decisions rendered by the Hon'ble Supreme Court. Reference has been made to the decisions in Commissioner of Police, Delhi Vs. Dhaval Singh [1999 (1) SCC 246], Kamal Nayan Mishra Vs. State of Madhya Pradesh and others [2010 (2) SCC 169] and Commissioner of Police and others Vs. Sandeep Kumar [2011 (4) SCC 644]. Learned counsel, with reference to the aforesaid decisions, contend that the authorities were under an obligation to independently examine as to whether on the basis of materials brought on record, petitioner was found unfit for employment, and as no such exercise had been undertaken, the order of discharge from services is bad in law.

5. Sri Ashok Singh, learned counsel appearing for the respondents, on the other hand, submits that the judgments, which have been relied upon by the learned counsel for the petitioner do not apply in the facts of the present case, inasmuch as the petitioner in the instant case was merely a probationer, and was yet to be confirmed. Learned counsel refers to the provisions of Rule 16 of the C.R.P.F. Rules, 1955, which prescribes a period of three years, as being the period of probation. It is submitted that petitioner was within the period of probation when an order of discharge simpliciter had been passed against him, and as such, the ratio laid down in the judgment of Ram Kumar (supra) had no applicability.

6. Learned counsel for the respondents, on the other hand, relies upon a Division Bench judgment of the Gujarat High Court in the case of Dilbag Singh Marashi Vs. Commandant and others, passed in Special Civil Application No.850 of 2013, dated 2nd February, 2015, to contend that in the case of a probationer, it is always open for the employer to consider the suitability of the candidate, and if it is found that he had suppressed material facts at the time of seeking appointment, then such fact would be sufficient to form an opinion with regard to non-suitability of the candidate for the post in question, and discharge simpliciter in such circumstances cannot be faulted. Learned counsel has also placed reliance upon para 14 of the judgment of the Supreme Court in the case of Kamal Nayan Mishra Vs. State of Madhya Pradesh and others (supra), wherein it has been clearly observed that in the case of a probationer, his services could be terminated without holding any enquiry in such circumstances. Reliance has also been placed upon the judgment of the Hon'ble Supreme Court in the case of Devendra Kumar Vs. State of Uttaranchal [2013 (9) SCC 363].

7. Having heard learned counsel for the parties at length, and after perusing the materials brought on record, this Court finds that petitioner was selected as a Constable (General Duty) in C.R.P.F. Rule 14 of the C.R.P.F. Rules of 1955 requires a verification roll to be filled by the candidate, which is retained in the service record of the employee concerned. Clauses 12(a) of the roll specifically requires a disclosure to be made by the employee as to whether he is involved/implicated in a criminal case. Clause 12(a), which is part of the standard format required under statutory rule to be filled by the employee, reads as under:-

"12(a) Have you ever been arrested, prosecuted, kept under detention or bound down/find convicted, by a court of law for any offence or debarred/disqualified by any public service commission from appearing at its examination/selections, or debarred from taking any examination/rusticated by an University or any other education authority/institution."

8. Learned counsel for the petitioner does not dispute that in fact such a declaration was made by the petitioner, in which the factum of any criminal proceedings being pending against the petitioner was not disclosed. Acting upon the declaration made by the petitioner to the employer, an offer of appointment was issued in favour of the petitioner.

9. It transpires from the record that the respondents, having subsequently come to know about the false disclosure made in verification roll by the petitioner, exercised their power under Rule 5(1) of The C.C.S. (Temporary Service) Rules, 1965, readwith Rule 16 of the C.R.P.F. Rules, 1955, to pass an order of discharge simpliciter against the petitioner, after giving him a month's notice. The discharge of petitioner from services is a discharge simpliciter, and no stigma is cast. There is no reference of any specific reason or imposition of penalty in the order of termination. It is further undisputed that petitioner was a probationer, and the three year period of probation was not over yet. It is during the period of probation that the order of discharge from service has been passed against the petitioner by serving him a month's notice. Record further shows that the petitioner while challenging the order of discharge simplicter has stated that his implication in the criminal case was unfounded, and he has already been

acquitted therein. This plea of the petitioner has been noticed in the revisional order dated 27th March, 1996. The revisional authority, having noticed the facts brought on record by the petitioner in this regard, observed that there was no charge against the petitioner, which had led to passing of order of termination against him. It has, however, been observed that petitioner was involved in a criminal case at the time of enlistment with C.R.P.F., which fact had been suppressed, and having noticed such suppression, the revisional authority went on to observe that in such facts, the termination of services is in accordance with law.

10. The petitioner admittedly was on probation, and the respondents were well within their rights to terminate the temporary services of petitioner, in accordance with law. The fact that petitioner had submitted a declaration incorrectly mentioning that no criminal case is pending against him, is not in dispute. Once that be so, the respondents were well within their right to have formed an opinion regarding petitioner's continuance as an employee, who was yet to be confirmed. The order, which has been passed in the present case, does not inflict any penalty nor any stigma has been attached. In the opinion of the Court, the action of respondents in forming an opinion with regard to petitioner's continuance in service, having noticed his act of suppression, cannot be said to be arbitrary in the facts of the present case.

11. Turning to the decisions, which have been relied upon by learned counsel for the parties, it is to be noticed that the judgment of the Hon'ble Supreme Court in the case of Ram Kumar Vs. State of U.P. and others (supra), on which heavy reliance has been placed by learned counsel for the petitioner, was delivered in an entirely different factual scenario. In Ram Kumar (supra), the employee had been acquitted much prior to his consideration for appointment. Para 3 of the judgment in Ram Kumar (supra) is reproduced:-

"3. The facts very briefly are that pursuant to an advertisement issued by the State Government of U.P. on 19.11.2006, the appellant applied for the post of constable and he submitted an affidavit dated 12.06.2006 to the recruiting authority in the proforma of verification roll. In the affidavit dated 12.06.2006, he made various statements required for the purpose of recruitment and in para 4 of the affidavit he stated that no criminal case was registered against him. He was selected and appointed as a male constable and deputed for training. Thereafter, the Jaswant Nagar Police Station, District Etawah, submitted a report dated 15.01.2007 stating that Criminal Case No.275/2001 under Sections 324/323/504 IPC was registered against the appellant and thereafter the criminal case was disposed of by the Additional Chief Judicial Magistrate, Etawah, on 18.07.2002 and the appellant was acquitted by the Court. Along with this report, a copy of the order dated 18.07.2002 of the Additional Chief Judicial Magistrate was also enclosed. The report dated 15.01.2007 of the Jaswant Nagar Police Station, District Etawah, was sent to the Senior Superintendent of Police, Ghaziabad. By order dated 08.08.2007, the Senior Superintendent of Police, Ghaziabad, cancelled the order of selection of the appellant on the ground that he had submitted an affidavit stating wrong facts and concealing correct facts and his selection was irregular and illegal."

It was in these facts that the Apex Court observed as under in Para 9 of the judgment:-

"9. The order dated 18.07.2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15.01.2007 of the Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the appellant was illegal and irregular because he did not furnish in his affidavit in the proforma of verification roll that a criminal case has been registered against him. As has been stated in the instructions in the Government Order dated 28.04.1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment."

12. The judgment of Apex Court in Ram Kumar (supra) came to be noticed in a subsequent order of the Supreme Court in Jainendra Singh Vs. State of Uttar Pradesh (supra), and the question was referred to a Larger Bench for resolving the conflict noticed in various decisions. Decisions in Commissioner of Police, Delhi Vs. Dhaval Singh (supra), Kamal Nayan Mishra Vs. State of Madhya Pradesh and others (supra) and Commissioner of Police and others Vs. Sandeep Kumar (supra) were noticed. Para 13 of the referring order, which refers to Para 14 of the judgment in Kendriya Vidyalaya Sangathan and Others Vs. Ram Ratan Yadav [(2003) 3 SCC 437], is reproduced:-

"13. In the decision in, Kamal Nayan Mishra Vs. State of Madhra Pradesh & Ors.(supra), the ratio decidendi in Kendriya Vidyalaya Sangathan Vs. Ram Ratan Yadav(supra) has been set out in para 14:

"14. Therefore, the ratio decidendi of Ram Ratan Yadav is, where an employee (probationer) is required to give his personal data in an attestation form in connection with his appointment (either at the time of or thereafter), if it is found that the employee had suppressed or given false information in regard to matters which had a bearing on his fitness or suitability to the post, he could be terminated from service during the period of probation without holding any inquiry. The decision dealt with a probationer and not a holder of a civil post, and nowhere laid down a proposition that a confirmed employee holding a civil post under the State, could be terminated from service for furnishing false information in an attestation form, without giving an opportunity to meet the charges against him."

Subsequently, Civil Appeal No.5671 of 2012 (Jainendra Singh Vs. State of Uttar Pradesh Tr. Prinl. Sec. Home), in which the aforesaid referring order was passed, was withdrawn, vide order dated 13th April, 2015, which is reproduced:-

"Learned counsel for the applicant-appellant prays for withdrawal of this appeal.

This civil appeal is accordingly dismissed as withdrawn. I.A. No. 4 of 2015 is accordingly allowed and disposed off."

13. Law on the question of suppression came to be discussed in a subsequent decision in Devendra Kumar Vs. State of Uttaranchal (supra). Apex Court, having noticed the series of judgments delivered on the issue, went on to hold that where the applicant gets office by misrepresenting the facts, or by playing fraud upon the competent authority, such an appointment is not liable to be protected. Para 7 of the judgment is reproduced:-

"7. So far as the issue of obtaining the appointment by misrepresentation is concerned, it is no more res integra. The question is not whether the applicant is suitable for the post. The pendency of a criminal case/proceeding is different from suppressing the information of such pendency. The case pending against a person might not involve moral turpitude but suppressing of this information itself amounts to moral turpitude. In fact, the information sought by the employer if not disclosed as required, would definitely amount to suppression of material information. In that eventuality, the service becomes liable to be terminated, even if there had been no further trial or the person concerned stood acquitted/discharged."

14. The Division Bench judgment of the Gujarat High Court, which has been relied by learned counsel for the respondents, is closer on facts to the present case, as it was also in respect of a similarly placed employee of C.R.P.F., who had been discharged during probation on the ground that he had suppressed facts with regard to pendency of criminal case against him. Paragraph 6 of the Division Bench judgment of Gujarat High Court is reproduced:-

"6. We may record that this application form contains all columns in English as well as in Hindi. Applicant had filled up the form in Hindi language. It is not his case that this form was not filled up by him or that he did not understand any of the questions which he had answered. At no stage, either during his service or after his termination, he had ever put up in defence that the declarations made in the said form were correct and the belief of the department that the said criminal cases were not pending when he filled up such form was inaccurate. In fact, as is apparent, he did not controvert that the details supplied by him to the questions 12 {a} & {b} were inaccurate and false to his knowledge.

6.1 Thus, the fact that at the time when the petitioner filled-up the application form for recruitment to the post of a constable in CRPF, he was facing two criminal cases is not in dispute. The fact that he was asked specifically whether he was ever prosecuted and if any criminal case was pending to give detail thereof, his answer was in the negative. It was under these circumstances that the employer exercised powers under Rule 5 (1) of the CCS (Temporary Service) Rules. Rule 5 (1) of the said rules read as under :-

"5. Termination of temporary service -

(1)(a) The service of a temporary Government Servant shall be liable to termination at any time by a notice in writing given either by the Government

Servant to the appointing authority or by the appointing authority to the Government servant;

(b) the period of such notice shall be one month :

Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his service, or, as the case may be, for the period by which such notice falls short of one month."

6.2 This rule authorizes the Government to terminate service of a temporary Government servant at any time by one month notice in writing. Proviso to sub-rule (1) authorizes the employer to waive such notice and terminate the service forthwith by payment of a sum equivalent to the amount of the notice period or to an extent it falls short of one month of the pay and allowances.

6.3 It is undisputed that at the time such order was passed, the petitioner was not yet confirmed in Government service. It may be that he had completed his probation period. His confirmation would not be automatic upon mere completion of the period of probation. The employer had yet to judge his suitability and confirm him in service by allowing successful completion of the probation. It was at that time while verifying his character and antecedents, that it was noticed from the report received from the Commissioner of Police, Ahmedabad that the petitioner was facing two criminal cases. Thus, the respondents issued the impugned order when the petitioner was still a temporary Government servant. The authorities had the power to do so is not disputable in view of Rule 5 (1) of the CCS (Temporary Service) Rules. In fact, the sole ground pressed in service by the counsel for the petitioner in challenge to his termination was that such power could not have been exercised without giving a notice to the petitioner and by giving him a reasonable opportunity of being heard on the proposed order of termination.

6.4 By now, it is well-settled that the principles of natural justice cannot be put in straight-jacket and must vary with facts and circumstances of each case. The order of termination was one of simpliciter termination of service and not an order of penalty. It is not even the case of the petitioner that his services were terminated by way of penalty or that the termination was a stigmatic order. The plain language of the order itself would reveal that the services of the petitioner were terminated in exercise of power under Rule 5 (1) of the CCS (Temporary Service) Rules without casting any stigma on the petitioner. If the petitioner was being denied the benefit of confirmation on the ground of unsuitability of his service, the question of the allegations being foundation or motive for the action could arise. Further, had the petitioner been already confirmed in Government service, his right to hold the lien, unless the post is abolished or his service is brought to an end through legal process, would certainly arise.

6.5 In absence of confirmation, as a temporary servant, the petitioner had limited right to continue in service. Particularly when it was found that his very entry in Government service was through doubtful means, his termination by the authorities after considering facts and circumstances would call for no interference. It cannot be disputed that had the petitioner made full disclosure about pending criminal cases, his

candidature would have been rejected. He was applying for a member of armed force who would, upon recruitment, be posted as a constable. As a member of CRPF, he would be entrusted with responsible duties and would be inducted in armed forces. The employer thus had every right to enquire about his full antecedents and be informed about any criminal case pending against such a candidate. Quite apart from his action of not making true and full disclosure, holding back most material information from the prospective employer of his involvement in such criminal case would have debarred him from securing the employment."

15. The factum of petitioner having been subsequently acquitted in the criminal case is not of much relevance in the facts of the present case, inasmuch as the limited scrutiny, which was available on part of the employer, was to examine the continuance of petitioner for employment in a public office. The fact that he had submitted a false declaration about no criminal case pending against him, was itself a material circumstance. As already observed above, no stigma was attached. Protection of Article 311 of the Constitution of India or the ratio laid down by the Hon'ble Supreme Court in the case of Ram Kumar (supra) and other judgments relied upon, taking similar view, have thus no applicability to the facts of the present case. There is no illegality in the orders impugned passed by the authorities, which may require any interference.

16. The writ petition, consequently, fails, and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Writ-C No. 26033 of 2015

IIMT College of Polytechnic, G.B. Nagar & Anr. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh, Sri Ritesh Upadhyay

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-affiliation-refusal by Technical Education Board-putting condition contrary to recognition granted by AICTE-held-totally unfair, arbitrary-quashed.

Held: Para-26
The aforesaid affiliation was granted by the Board without ascertaining or adjudging the quality of its education as at that time no student had been admitted or had passed out. Therefore, when the Board had granted affiliation for running the above diploma courses without examining the quality of education imparted by the institute, any condition to adjudge its quality on the basis of passed out students at the time of extension of affiliation is totally unfair, arbitrary and is in contradiction to its own method of granting affiliation at the initial stage.

Case Law discussed:
(2013) 3 SCC 385

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

1. Under challenge is basically the order dated 13.5.2015 of the Secretary of the Pravidhik Shiksha Parishad (Technical Education Board), U.P., Lucknow (in short 'Board') and the resolution No.7 dated 22.8.2012 of the Board and consequently one of the prayer is for a direction to consider the application of the petitioners for granting affiliation to three years full

time diploma course in Civil Engineering and Mechanical Engineering (Production) in the second shift.

2. The Secretary of the Board by the impugned order has refused to grant affiliation to the second shift of the above two courses to the petitioner-institute due to the resolution No.7 dated 22.8.2012 of the Board by which it was resolved that before considering the grant of affiliation to the second shift diploma courses of the technical institutes it must be ensured that the institute has completed three years of affiliation and that its first batch has passed out.

3. The IIMT College of Polytechnic, Greater NOIDA (hereinafter referred to as the petitioner-institute) is a private unaided polytechnic imparting three years diploma courses in Civil Engineering, Mechanical Engineering (Maintenance), Mechanical Engineering (Production), Electrical Engineering and Electronics & Communication Engineering with effect from the session 2012-13.

4. The petitioner-institute has the approval for imparting education in the above diploma courses from All India Council for Technical Education (in short "AICTE") vide letter dated 10.7.2012. The Board also accorded affiliation to the above institute vide office order dated 14.9.2012 from the session 2012-13 to the extent of 60 students per discipline in first shift.

5. The petitioner-institute sought for approval of AICTE for enhancement of 60 seats each from the session 2013-14 in Civil Engineering and Mechanical Engineering (Production) in the second shift. AICTE accorded its approval for the session 2013 - 14 vide letter dated 15.5.2013, for the session 2014 - 15 vide order dated 28.3.2014 and for the session 2015 - 16 vide letter dated 7.4.2015. However, the Board failed to process the papers for grant of affiliation on its basis for the session 2013 - 14; for the session 2014 - 15 the affiliation was refused at the fag end on 15.4.2014 and finally for the session 2015 - 16 vide the impugned order dated 13.5.2015 on the basis of the resolution of the Board dated 22.8.2012.

6. I have heard Sri G. K. Singh, Senior Counsel assisted by Sri Ritesh Upadhyay, learned counsel for the petitioner and learned Standing Counsel for the respondents. Both of them agreed for final disposal of the petition on the pleadings on record.

7. The one and the only one submission of the counsel for the petitioner is that once AICTE has granted approval to the petitioner-institute for running the second shift in the above two diploma courses with the intake of 60 students each, the Board has no authority of law to refuse affiliation. The Board cannot impose condition inconsistent with the AICTE norms and any condition in conflict of it would be ineffective and bad.

8. Learned Standing Counsel on the other hand, contends that the decision to refuse affiliation by the Board has been taken on the basis of the earlier resolution of the Board for the reason that no batch of the petitioner-institute had passed out as yet on account of which it is not possible to assess the quality of teaching and of students of the said institute which is sine qua non for grant of affiliation. The affiliation is not a matter of right to any institute.

9. The controversy in short is whether the petitioner-institute has been rightly refused affiliation for the session 2014-15 for the second shift of the above two diploma courses.

10. The All India Counsel for Technical Education Act, 1987 ('Act' for short) was enacted and AICTE was established with the view to co-ordinate the development of the technical education throughout the country and for maintenance of norms and standards in technical education system and the matters connected thereto. The Act vide Section 10 provides for functions of the AICTE and one of the functions enumerated therein vide sub-section (k) is grant of approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned. The relevant part of Section 10 of the AICTE, 1987 reads as under:

"10. Functions of the Council. - It shall be the duty of the Counsel to take all such steps as it may think fit for ensuring co-ordinated and integrated development of technical education and maintenance of standards and for the purposes of performing its functions under this Act, the Counsel may -

(a).....

.....

.....

(j).....

(k) grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned."

11. In view of the above provision, the AICTE is vested with the power to grant approval for starting technical institutions and for the introduction of new courses therein. It means that no technical institute can start functioning or commence education in new courses or programmes without the approval of AICTE. The approval of AICTE for starting new technical institutions or for introducing new courses or programmes is in a way like granting recognition to the technical institutions and to courses run by such institutions. This is in order to have a uniform standard of the technical education system in the country.

12. In the State of U.P. there is a State enactment known as the Pravidhik Shiksha Adhiniyam, 1962 (in short 'Adhiniyam') which provides for establishment of Board of Technical Education for dealing with the matters connected with technical education. The functioning of the said Board is enumerated in Section 12 of the Adhiniyam and, inter alia, includes to affiliate institutions and prescribe courses of study and instructions leading to examinations conducted by it and to conduct examinations for awarding certificates and diplomas. In other words, the Board of Technical Education, U.P. is an examining body like a University, for the diploma courses connected with technical education.

13. It may be pertinent to note that the AICTE under the Act is not vested with any power to hold and conduct the examinations of such courses and for imparting certificates thereof. The said function has been conferred upon the University or to special authorities such as the Board.

14. The aforesaid Adhiniyam vide Section 2 (a) defines 'affiliated institution' to mean the institution affiliated to the Board in respect of any course or courses

of study in accordance with the provisions of the Adhiniyam or the regulations made thereunder.

15. A plain reading of the provisions of the Act and Adhiniyam would reveal that both the Central and the State enactments operate in a different field. The primary function of the Act is to bring about co-ordinated & integrated development and promotion of quality improvement in a planned manner in the technical education system and matter connected therewith by setting and regulating norms and standards thereof. At the same time, the Adhiniyam aims to establish examining body for the technical education and do provide method and norms of conducting examinations and awarding certificates thereof for which purpose the Board has been empowered to affiliate institutions and to prescribe courses and programmes of studies and instructions.

16. In view of the above, an institute interested in imparting education in technical field is first required to seek recognition/ approval of AICTE for starting a technical institute and for introduction of new courses and programmes therein. It is only after an institution is granted approval to start a technical institute or to introduce a new course or programme that it becomes mandatory upon it to seek affiliation with an examining body such as Board. Therefore, recognition by the AICTE and affiliation by the Board are both sine qua non for running a technical institution.

17. In Parashvanath Charitable Trust and others Vs. All India Counsel for Technical Education and others (2013) 3 SCC 385 the Apex Court considered the object of the Act, functioning of the AICTE and role of the AICTE viz-a-viz the Universities and the State Government. It was observed that the University (examining body) could not impose any condition inconsistent with the Act or its regulations or the conditions prescribed by AICTE. Therefore, there is no requirement for obtaining the approval of the State Government and any condition of the State Government or the University requiring such approval would be repugnant to the Act. The department concerned of the State Government and the affiliating University (in the present case the Board) cannot lay down any guideline or policy in conflict with the Central statute or the standards laid down by the Central body i.e. AICTE.

18. There is no controversy with regard to the legal preposition as laid down by the Supreme Court in the above decision but the controversy in the present case is slightly different i.e. whether the Board/State has rightly refused to grant affiliation to the petitioner-institute in the above two courses of technical education in the second shift.

19. No law or any authoritative decision of the Court lays down that once recognition/approval has been granted to an institute to commence any diploma course, then the affiliation to the examining body/University would be automatic or is a natural consequence. The affiliation follows the approval/recognition of the AICTE and for affiliation there may be different set of norms and unless the same are fulfilled the affiliation may not be possible but such norms could not run contrary to the ones set out by the AICTE.

20. Learned counsel for the petitioner is at a loss to demonstrate that

the above resolution of the Board is in conflict with any guideline or norm laid down by the AICTE.

21. In the instant case, one of the norm for affiliation laid down by the Board which is coming in the way of the petitioner-institute is the resolution No.7 of the Board dated 22.8.2012 which provides that before granting affiliation to the second shift of any diploma course of technical education to an institute it must be ensured that the institute has completed three years of affiliation and that one batch has passed out the said diploma course.

22. The aforesaid resolution of the Board is simply a resolution which has been adopted in one of its meeting. It has not been made public. It has not been published. It has not been notified. There is nothing on record to establish that it has been notified in any manner and made known to the public. The people and the public at large cannot be said to be aware of it.

23. In view of the above, such a resolution which remains within the four corners of the meeting room of the Board cannot have any public application.

24. The aforesaid resolution imposes the condition that the institution seeking affiliation to any course for the second shift must have completed at least three years of affiliation and that a batch of students must have passed out from the institute so as to adjudge its quality.

25. The petitioner-institute was granted affiliation in all the five diploma courses with the intake of 60 students each in the first shift w.e.f. 2012-13 session vide letter dated 14.9.2012. The said affiliation is intact and is continuing. The petitioner-institute has not violated any norm which may give an occasion to de-affiliate it.

26. The aforesaid affiliation was granted by the Board without ascertaining or adjudging the quality of its education as at that time no student had been admitted or had passed out. Therefore, when the Board had granted affiliation for running the above diploma courses without examining the quality of education imparted by the institute, any condition to adjudge its quality on the basis of passed out students at the time of extension of affiliation is totally unfair, arbitrary and is in contradiction to its own method of granting affiliation at the initial stage.

27. The availability of proper infrastructure, good faculty and the capacity of the institute to impart technical education to additional students and to run the second shift per see are relevant factors for the grant of affiliation to additional seat or second shift in above two diploma courses but the past performance is not material and a relevant criteria for the purpose. The petitioner institute is not said to be lacking in any of above aspects.

28. It is not the case of anyone that the petitioner-institute failed to fulfil any other condition of affiliation or that it is lacking any infrastructure or otherwise on account of which affiliation cannot be granted.

29. In view of the aforesaid facts and circumstances, in my opinion, the Board is not justified in refusing affiliation to the petitioner-institute in the above two diploma courses in the second shift for the session 2015-16 onwards on

the basis of the resolution dated 22.8.2012 which is held to be arbitrary having no legal sanctity attached to it.

30. Accordingly, the impugned order dated 13.5.2015 (Annexure 12-A) is quashed and the respondent No.2 is directed to reconsider the matter of grant of affiliation to the second shifts in the above two diploma courses to the petitioner-institute for the additional 60 seats each from the session 2015-16 onwards as expeditiously as possible, preferably within a period of six weeks from the date of production of a certified copy of this order before it.

31. The writ petition is allowed as above.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2015

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No. 29670 of 2015

Smt. Saroj ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri M.L. Rai

Counsel for the Respondent:
A.G.A., Sri Surendra Tiwari

Cr.P.C-Section 439-Bail-offence u/s 498-A, 306 IPC-applicant being mother in law of deceased-no allegation of ill treatment or dowry demand-the deceased in her statement-never complained any sort of ill treatment against her-burn injury explained to be accidental-considering detention period already undergone-no possibility of early hearing-application allowed with condition to cooperate in Trail with personal appearance on every dates-without any attempt to alter the prosecution witness.

Held: Para-6
After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Sri Surendra Tiwari Advocate has filed Parcha on behalf of the complainant which is taken on record.

2. Heard learned counsel for the applicant, Sri Surendra Tiwari counsel for the complainant and learned A.G.A.

3. Perused the record.

4. Submission of the counsel is that the applicant is the mother in law of the deceased and she never indulged in any kind of ill treatment and demand of dowry. What has been emphasized by the counsel is that there is a statement of the deceased also which was recorded in her injured condition and has been also recorded in the mobile video by the Investigating Officer. The attention was drawn to the statement of deceased Smt. Anshika Garg alias Manju which has been annexed as Annexure-2 to the application. It was stated therein by the deceased that accidentally the kerosene bottle which was placed in the kitchen fell down and

kerosene got sprinkled on her clothes and also on the Gas which was burning. It was because of this reason that she caught fire. It was further stated by her that her sister in law rushed on hearing the shrieks and tried to extinguish the fire and also called her mother i.e. the present applicant. It has also been submitted that thereafter she was taken to Yashoda hospital and then to Safdarganj hospital,New Delhi. It was further categorically stated by the girl that she got burnt only as a result of an unfortunate accident that took place. On a specific question of I.O. she also denied the allegation that she was ever harassed by the in laws. To the contrary the deceased had stated that every body liked her. In fact the Investigating Officer tried to drill her and put specific questions in order to rule out the possibility that she might have been attempting to save the applicant and the accused persons for the sake of and in order to secure the future of her children. But the deceased took the same stand and did not raise any incriminating accusations against her in laws. Counsel has further drawn the attention of the court to the summary of the history of the patient in which also the burns have been recorded as accidental burns by kerosene oil and it was also mentioned therein that allegedly the deceased was cooking on gas and she accidentally caught fire which resulted into her burns. Further submission of the counsel is that even if the details of the merit of the case are not gone into at least on a prima facie basis there is sufficient material to make out a case for bail in favour of the applicant as she is also a woman being the mother in law of the deceased. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 14.7.2015 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

5. Learned A.G.A. as well as learned counsel for the complainant opposed the prayer for bail and have submitted that no dying declaration has been recorded by the Magistrate and on spot examination there are some such features found which indicate that it is not the case of the accidental but burnt by the accused persons and the children of the deceased have also stated that before the incident the treatment of the applicant towards the deceased was not good and she used to ill treat.

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant-Smt. Saroj, involved in Case Crime No.65 of 2015 u/s 498A 306 IPC P.S. Sihani Gate District Ghaziabad be released on bail on her executing a personal bond and two sureties each in the like amount to the

satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2015

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. 2nd Bail Application No. 29890 of 2014

Anil Kumar ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Kuldeep Johri

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

Cr.P.C. Section 439-Bail application-offence u/s 376 (2-G), 506, 411 IPC-read with Section 3 (1) a SC/ST Act-second bail-after rejection 4 years gone-from ordersheet-not single witness produced by prosecution-accused ought to be prosecuted and not persecuted-considering overall circumstance without considering merit of case-entitled for bail-application allowed.

Held: Para-6
Looking to the overall nature of facts & circumstances of the case, the long period of detention and the fact that the trial has not made any progress at all, and in fact has not even begun, I feel that accused has made out a case of bail.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. Perused the record.

3. This is second bail application. The Criminal Misc. First Bail Application No. 11066 of 2012 has been rejected by this court on 18.09.2013 by Hon'ble Mrs. Jayashree Tiwari, J.

4. Submission of counsel is that since the rejection of the bail by another Bench on 18.09.2013, two years have elapsed but not even a single witness has been examined in court so far. It is pointed out by learned counsel for the applicant that the applicant is languishing behind the bars since 30.12.2011 and almost four years he has already spent in jail. It is further pointed out that while rejecting the bail application of the applicant also, this court had observed that it was 'at that stage' that the court did not find it to be a fit case for bail. The submission is that ordinarily apart from the merits of the case, the period of detention of an accused also remains a relevant consideration to release or for

refusing to release the accused on bail. As is reflected by the observation of court, it appears that the detention of the applicant was not considered to be so long that applicant could have been released on bail on that basis at that stage. The submission is that though it is true that after rejection of bail earlier on the merits of the case there is not much scope to revisit the facts of the case but it is not an irrelevant fact that four years have already been spent by the accused languishing in jail and the trial has not yet begun. Ordersheets of the court have also been annexed along with supplementary affidavit which has been taken on record and it is apparent from the perusal of the same that the trial has not at all made any progress so far. Counsel has also emphasized upon the fact that the accused has not been responsible for delaying the trial at all in any manner whatsoever.

5. Learned A.G.A. opposed the prayer for bail.

6. After perusing the record in the light of the submissions made at the bar and after taking an over all view of all the facts and circumstances of this case, it is apparent from the perusal of the earlier rejection order that the bail was refused 'at that stage' and this expression very much finds its place in the order itself. This is also apparent that the accused is not responsible for delaying the trial and period of four years has elapsed. The trial can not be procrastinated for an unlimited period of time and the prosecution can not be allowed to act as an engine of oppression. The accused ought to be prosecuted and not presecuted. If even after keeping the accused for four years in jail, the prosecution has not produced even a single witness it has to bear the brunt of blame itself. Though it is true that the long period of detention can not entitle the accused of all cases to bail regardless of the merit of their case and the long period of incarceration can not universally be applied in a streight-Jacket manner as a cut & dried formulla for bail without keeping in perspective the gravity of offence and the nature of evidence in its support, but this case does not appear to fall in the category of such exceptions. Looking to the overall nature of facts & circumstances of the case, the long period of detention and the fact that the trial has not made any progress at all, and in fact has not even begun, I feel that accused has made out a case of bail.

7. Let the applicant Anil Kumar involved in Case Crime No. 342 of 2011, u/s 376(2G), 506, 341 IPC and section 3(1)12 SC/ST Act, P.S.-Nigohi, District-Shahjahanpur be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall personally appear once in the first week of every month in the concerned Police Station. In case of any default, the In-charge, Police Station shall forthwith inform the concerned court about this breach.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II, J.

Writ-A No. 34284 of 2015
with Writ-A No. 34289 of 2015

Dr. (Smt.) Rama Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S.P. Shukla

Counsel for the Respondents:
C.S.C.

(A) Constitution of India, Art.-311(2)- Dismissal on ground of unauthorized absent from duty-12.09.02 to 23.06.2005-without recording reason for not practicable to hold enquiry-held-illegal, nullity.

Held: Para-16 & 17

16. Unauthorized absence, no doubt, is a mis-conduct and, if proved in departmental inquiry conducted in accordance with the rules, appropriate punishment can be imposed upon the concerned government servant by appointing authority. Dispensation of departmental inquiry is an exception and cannot be resorted to in a cursory, casual and whimsical manner. The authority, if resorted to this exception, owe a heavy responsibility to show that all circumstances and conditions justifying such recourse are strictly followed and adhered to.

17. In view of the aforesaid exposition of law and considering the fact that the impugned order of dismissal nowhere suggests or even touches on the satisfaction of competent authority that disciplinary inquiry is not reasonable practicable, we have no hesitation in holding that it is a nullity and void ab initio, being unconstitutional and violative of Article 311(2) Second Proviso, clause (b) of Constitution.

(B) Constitution of India, Art.-226-Service law-petitioner due to long sickness-on 07.12.06 applied for voluntarily retirement-without accepting or refusing disciplinary proceeding initiated-clearly illegal without jurisdiction.

Held: Para-26-

In the present case, at the time when petitioner applied for voluntary retirement, neither any disciplinary inquiry was pending nor contemplated. Therefore, without taking decision on petitioner's application for voluntary retirement initiation of disciplinary inquiry by respondents was clearly illegal and without jurisdiction.

Case Law discussed:

(1985) 3 SCC 398; (1991) 1 SCC 362; AIR 2014 SC 2922; (1978) 2 SCC 202; (1997) 4 SCC 441; (1995) 1 UPLBEC 146 (SC); Spl. Appeal No. 649 of 1994 decided on 31st January 1995; 2007(2) UPLBEC 69; (2010) ILR 3 All. 1199=(2011) 2 UPLBEC 992.

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

1. The petitioner after being selected through U.P. Public Service Commission against the post of Medical Officer in Public, Medical and Heath Services (hereinafter referred to as the "PMHS"), was appointed as "Women Medical Officer" vide letter of appointment dated 09.11.1999. She was posted at Primary Health Center, Dalmau, District Rai Bareilly where she joined on 21.02.1991. She was transferred to Silver Jubilee

Maternity Home,Lucknow, where she joined on 14.07.1992 and thereafter continued to work thereat. While working at Lucknow she fell ill and proceeded on casual leave on 12.09.2002. She actually suffered cervical disc prolapse and was under treatment of Dr. Sanjay Jha, Neurophysiology in the Department of Neurology, Sanjay Gandhi Post Graduate Institution, Lucknow. Since her illness continued, she applied for medical leave w.e.f. 16.09.2002. Competent authority, however, compelled the petitioner to join her duty on 30.12.2002 and thereafter she was transferred to Hardoi, in public interest, vide transfer order dated 17.06.2003. On 22.06.2005 petitioner submitted her joining in the office of Chief Medical Officer but since her ailment had continued, she proceeded on leave on medical ground w.e.f. 23.06.2005. It is alleged that petitioner went to join her duty from Lucknow to Hardoi by Car and during road travel her ailment of cervical disc prolapse revived causing petitioner bed ridden and hence she proceeded on leave on medical ground. Thereafter she continued to send applications seeking leave on medical ground but was not communicated any decision by competent authority. Ultimately, she submitted application seeking retirement voluntarily on 07.12.2006 under Fundamental Rule 56, since she had completed minimum required service, and, was eligible therefor. Neither any decision was taken in respect of her leave applications nor on application dated 07.12.2006 seeking retirement voluntarily, compelling petitioner to file Writ Petition No. 1785(SB) of 2008 (renumbered as W.P. No. 34289 of 2015) (hereinafter referred to as "First Petition") seeking a mandamus to respondents to accept her voluntary retirement application. Prayer in this writ petition reads as under:

"a. ISSUE, a writ order or direction in the nature of MANDAMUS commanding the respondents to accept the voluntary retirement application of the petitioner and grant her voluntary retirement w.e.f. 01.07.2005 and further command them to settle the dues of the petitioner including the terminal dues, salary and medical claims and also fix her pension as admissible under Rules along with interest at the rate of 18% per annum as the Authorities are to blame themselves for such a long delay in taking the decision in the matter."

2. The petitioner in the meantime also sent application, requesting respondents to settle her outstanding dues towards unpaid salary and other terminal dues, like medical reimbursement etc. Instead of taking any action on petitioner's applications, respondents initiated disciplinary inquiry vide office memo dated 27.02.2009. Thereafter it appears that dispensing with disciplinary inquiry the State Government in purported exercise of power under Article 311(2) and (3) passed an order dated 03.05.2010 dismissing/removing petitioner alongwith 41 other women Medical Officers, on the ground of their continuous and long absence, dispensing disciplinary inquiry. It is also interesting to note that inquiry report was submitted on 10/11.11.2010 by Inquiry Officer pursuant to disciplinary inquiry initiated upon letter dated 17.03.2009 of Additional Director, Health to C.M.O., Hardoi. Even before submission of inquiry report, petitioner was dismissed/removed from service, vide order dated 03.05.2010, by dispensing with disciplinary inquiry. Consequently, the application of petitioner seeking voluntary retirement was rejected vide order dated 10.05.2011, which has been challenged in the W.P. No. 34284/2015 (hereinafter referred to as "Second Petition").

3. In the Second Petition, the petitioner has prayed for following reliefs:-

"a. ISSUE a writ, order or direction in the nature of CERTIORARI quashing the impugned uncommunicated termination order said to be dated 03.05.2010 and also the impugned order dated 10.05.2011 as contained in Annexure No.1.

b. ISSUE a writ, order or direction in the nature of MANDAMUS commanding the respondent No.2 to sanction/consider the leave application of the petitioner and then grant Voluntary Retirement to the petitioner with effect from 01.07.2005 and settle her terminal dues and salary etc., in accordance with law without any further delay along with interest at the rate of 18% per annum."

4. On behalf of respondents, a counter affidavit has been filed annexing a copy of dismissal order dated 03.05.2010 as annexure CA-1, wherein it is mentioned that despite public notice published in daily newspapers "Amar Ujala", "Hindustan Times" and "Dainik Jagran" and also placing information on the website of uphealth.nic.in, petitioner and other Medical Officers did not submit their joining on duty. Their absence since long shows that they are not willing to serve Government service. On account of their unauthorized absence, maintenance of health service in State was in difficulty and new appointments also could not be made. Since absentee Medical Officers, despite notice, had failed to join and are absent unauthorizedly from place of their posting since long, they are being dismissed from service. Name of petitioner is at serial no. 11 in the said order. It is further stated that on account of continuous unauthorized absence, petitioner was issued charge sheet dated 27.02.2009 (Annexure-2 to the counter affidavit in the first petition), which contains a single charge that she has been unauthorizedly absent for the last two years and has not complied with the orders of competent authority for joining her service, hence she is guilty of dereliction of duty. The Inquiry Officer, i.e., Additional Director, Medical, Health and Family Welfare, Lucknow Region, Lucknow submitted his report dated 10/11.11.2010, stating that since petitioner has not submitted reply to charge sheet, therefore, after perusing documents he is submitting report holding petitioner guilty.

5. It is said that the charge sheet was duly received by petitioner whereafter she sent letter dated 22.03.2009 requiring the respondents to take a decision on her application for voluntary retirement. In para 4 it is said that inquiry report held petitioner guilty and petitioner was dismissed from service. The relevant averment in the counter affidavit contained in para 4, reads as under:

"4. The the contents of paragraph 2 of the writ petition are misconceived, hence denied. It is submitted that the petitioner was already dismissed from service; therefore, she was not eligible for Voluntary Retirement. The order dated 10.05.2011 was passed in compliance of the order dated 30.11.2010 passed by this Hon'ble Court in writ petition no. 1721 of 2010. It is respectfully submitted that it is a clever move of the petitioner that she is making use of order dated 10.05.2011 to rake up the issue of her dismissal which is already a dead matter as she was dismissed from service by means of order dated 03.05.2010. The petitioner remained quiet for such a long period and suddenly woke up to raise the issue of dismissal in the grab of this order dated 10.05.2011."

6. Challenging the charge sheet the petitioner submitted letter dated 27.02.2009 on the ground that her application for voluntary retirement has been submitted which is still pending and without taking a decision, charge sheet has been issued. The petitioner then filed writ petition 1721 (SB) of 2010, which was disposed of finally by Division Bench on 30.11.2010 passing the following order:

"Heard learned counsel for the petitioner, learned standing counsel and perused the record.

Present petition has been preferred under Article 226 of the Constitution of India for issuance of a writ in the nature of certiorari, quashing the impugned letter dated 27.2.2009, along with chargesheet and also the disciplinary proceedings with consequential benefits. The impugned Office memo has been issued against the petitioner for her indulgence in private practice. Prior to issuance of the Office memo, the petitioner has submitted her representation for voluntary retirement but the same is pending.

Accordingly, we direct that before proceeding with the disciplinary proceeding to its logical end, the respondents shall decide petitioner's representation for voluntary retirement by passing a speaking and reasoned order in accordance with law expeditiously and preferably say, within three month from the date of receipt of a certified copy of this order and communicate decision.

The writ petition is finally disposed of."

7. A supplementary counter affidavit has been filed by respondents, stating that dismissal order dated 03.05.2010 was passed after approval by U.P. Public Service Commission, who advised that the State Government is competent enough to take action under Article 311(2) and (3) and thereafter dismissal order was passed.

8. Petitioner has filed rejoinder and supplementary rejoinder affidavit reiterating the basic facts stated in writ petition.

9. Sri Umesh Chandra, learned Senior Advocate advanced, in substance, the following submissions:

I. Once departmental inquiry was already initiated, without holding and completing the same in accordance with U.P. Government Service (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the "Rules, 1999"), the respondents have dismissed the petitioner illegally.

II. Dismissal/removal of petitioner, under Article 311(2) second proviso by dispensing with disciplinary inquiry, particularly when the same was already pending, is clearly illegal, void ab initio and not only it violates the pre-conditions of attracting Article 311(2) proviso, clause (b), but also a pretext on the part of respondents to deny constitutional protection available to petitioner under Article 311(2), i.e. adequate opportunity of defence.

III. Once an application under Fundamental Rule 56(c) and (d) was submitted seeking voluntary retirement it was incumbent upon respondents to take decision thereon first but keeping such application pending for years together and thereafter rejecting the same on the ground that petitioner has been dismissed/ removed from service by order dated 03.05.2010 is nothing but a camouflage to deny legally vested rights to petitioner if she would have been allowed voluntary retirement.

10. Learned Standing Counsel, on the contrary, submitted that petitioner was

absent for years together, unauthorizedly and illegally, hence her request for voluntary retirement could not have been accepted. Her application, therefore, had rightly been rejected and she has been dismissed from service after dispensing with disciplinary inquiry, since she was absent for a long period.

11. The first question which has to be considered by this Court is whether dismissal of petitioner by dispensation of disciplinary inquiry, while it was pending, and charge sheet was already served, by exercising power under Article 311(2) second proviso is justified or not.

12. Article 311(2) reads as under:

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

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

Provided further that this clause shall not apply

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

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

13. Learned Standing Counsel at the outset, submitted that clauses (a) and (c) of Second Proviso to Article 311 (2) are not attracted in case in hand and the impugned order of dismissal dated 3.10.2011 has to be tested on the anvil of Article 311(2) second proviso, clause (b). It provides that a disciplinary inquiry would not be necessary if competent authority empowered to dismiss or remove or reduce in rank a public servant, is satisfied that for some reason to be recorded by that authority in writing, it is not "reasonably practicable" to hold such inquiry. Therefore, in order to justify exercise of power under Article Article 311(2) second proviso, clause (b), competent authority is obliged to record a finding with reasons that disciplinary inquiry is not "reasonably practicable" in the entire order of dismissal dated 3.5.2010. There is not even a whisper that the disciplinary enquiry is not reasonably practicable what to say, mention of reasons therefor. The only thing which has been repeated in the entire order is that Medical Officers including petitioner were absent from duty since long and did not join duty which is an act or omission, constituting misconduct on the part of holders of civil post. This action or inaction showing 'misconduct' on the part of petitioner and other Medical Officers covered by impugned dismissal order dated 3.5.2010 would have justified disciplinary enquiry against them as contemplated under Article 311(2) read with procedure prescribed in Rules, 1999, but this cannot be construed so as to satisfy the requirement of Article 311(2) second proviso, clause (b). We have no hesitation in holding that the impugned order in this writ

petition nowhere even suggests that disciplinary inquiry is not reasonably practicable. The reason for it is also conspicuously missing.

14. Holding of departmental inquiry before dismissal or removal, is mandatory under Article 311(2) read with procedure prescribed under Rules, 1999. A heavy onus lay upon respondent to show that from all the angles, the case is covered by one of the grounds on which departmental inquiry may not be held or dispensed with i.e. when it is not "reasonably practicable". Article 311 (2)(b) was considered by a Constitution Bench in Union of India and another Vs. Tulsiram Patel, (1985) 3 SCC 398, and the Court said:
"130. The condition precedent for the application of Clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by Clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by Clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation." (Emphasis added.)

15. Again the Court explained circumstances in which departmental inquiry can be dispensed with by resorting to Article 311(2) Second Proviso, Clause (b) in Jaswant Singh Vs. State of Punjab and Ors. (1991) 1 SCC 362. This decision has been followed very recently in Risal Singh Vs. State of Haryana and others AIR 2014 SC 2922. Therein following a sting operation by a Television channel in which appellant Police Officer was found indulged in an act of corruption, he was dismissed from service without any inquiry by resorting to Article 311 (2) second proviso (b). The Court held that before resorting to Article 311(2) second proviso (b), appropriate and valid reasons have to be recorded, as contemplated in the Constitution. Dispensation of departmental inquiry, a constitutional protection available to civil servant, cannot be taken away or denied on whims and caprices of appointing authority or the disciplinary authority.

16. Unauthorized absence, no doubt, is a mis-conduct and, if proved in departmental inquiry conducted in accordance with the rules, appropriate punishment can be imposed upon the concerned government servant by appointing authority. Dispensation of departmental inquiry is an exception and cannot be resorted to in a cursory, casual and whimsical manner. The authority, if resorted to this exception, owe a heavy responsibility to show that all circumstances and conditions justifying such recourse are strictly followed and adhered to.

17. In view of the aforesaid exposition of law and considering the fact that the impugned order of dismissal nowhere

suggests or even touches on the satisfaction of competent authority that disciplinary inquiry is not reasonable practicable, we have no hesitation in holding that it is a nullity and void ab initio, being unconstitutional and violative of Article 311(2) Second Proviso, clause (b) of Constitution.

18. Then comes the second question, whether respondents could have proceeded to initiate departmental enquiry when an application seeking voluntary retirement was already pending with the respondents. In the present case, admittedly, application seeking voluntary retirement was submitted by petitioner on 7.12.2006. Charge sheet was issued to petitioner vide office memo dated 27.2.2009 and inquiry report was submitted by Enquiry Officer on 10/11.11.2010 which was received by State Government on 1.12.2010 as stated in the order dated 10.05.2011 passed on application seeking voluntary retirement.

19. It is also admitted that no final order in the said enquiry has been passed by respondent no.1 at any point of time. The question is whether initiation of disciplinary enquiry after three years of receiving application for voluntary retirement is permissible or not. It would be appropriate for the said purpose to have a perusal of Fundamental Rule 56(c) and (d) which read as under:

"56 (c) Notwithstanding anything contained in clause (a) or clause (b) the appointing authority may at any time by notice to any Government servant (whether permanent or temporary) without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority, voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service for twenty years."

(d) The period of such notice shall be three months: Provided that:

(i) any such Government servant may, by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of 50 years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or, as the case may be, for the period by which such notice falls short of three months, at the rates at which he was drawing them immediately before his retirement;

(ii) It shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:

Provided further that such notice given by the Government servant against whom a disciplinary proceeding in pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted;

Provided also that the notice once given by a Government servant under Clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority;

(emphasis added)

20. Fundamental Rule 56(d) prevents a Government Servant from withdrawing a notice given seeking voluntary retirement

without permission of appointing authority meaning thereby once such notice is given , so far as a Government Servant is concerned, his part is over. He/she cannot withdraw the same without permission of appointing authority.

21. It may also be noticed hereat that Fundamental Rule 56 itself, though termed as "Rule", but has come on the statute book by virtue of an Act of U.P. Legislature i.e. UP Act U.P. Act No. 33 of 1976 U.P. Fundamental Rule 56 (Amendment and Validation) Act, 1976] and therefore, is a principal legislation.

22. A careful reading of FR-56(c) further shows that a Government Servant can be retired by employer prematurely without assigning any reason after he attains the age of fifty years by giving three months notice at any time. The said Government Servant can also voluntarily retire at any time after attaining the age of forty five years giving a similar three months notice. The proviso of FR-56 (c) further provides that the Government Servant may be retired by the employer giving a shorter notice or without any notice but in such a contingency, he may be entitled to claim such amount for the period of notice by which such notice falls short of three months. Similarly, where the Government Servant tenders notice, it is open to appointing authority to allow him to retire without any notice or for a shorter period of notice without incurring any liability to pay any penalty on account of such permission. It further provides, where a disciplinary proceeding is pending or contemplated, the notice shall be effective only if it is accepted by appointing authority, provided that in a case of contemplated enquiry, the government Servant is informed before expiry of period of notice that the same has not been accepted. Therefore, the proviso restrict the right of Government Servant to retire by tendering three months notice, where a departmental enquiry is pending and in such a case, voluntary retirement would be effective only after the said notice is accepted by appointing authority, even if the period of notice is expired, but where enquiry is only contemplated, in such a case, acceptance of notice would be necessary provided the Government Servant is informed by the employer before expiry of period of his notice that it has not been accepted.

23. A somewhat similar provision contained in Rule 161 of Bombay Civil Service Rules came up for consideration before Apex Court in B.J. Shelat Vs. State of Gujrat and others, (1978) 2 SCC 202. Rule 161 of Bombay Civil Service Rules empowered the Government Servant to retire by giving a three months notice in writing after attaining the age of 55 years. However, proviso under Rule 161(2)(ii) restricted such right of Government Servant where departmental enquiry is pending or contemplated or the Government Servant is under suspension and the said proviso reads as under :

"Provided that it shall be open to the appointing authority to withhold permission to retire to a Government Servant who is under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-section."

24. It was held that but for the proviso, a Government Servant would be at liberty to retire by giving not less then three months notice to the appointing authority after attaining the prescribed age. However, proviso empowered the appointing authority to withhold permission to retire. The Court

took the view that the proviso which empowered the appointing authority to withhold such permission contemplated a positive action by appointing authority. It has to communicate its intention of withholding of permission to the Government Servant. Where no such decision is taken and communicated to the Government Servant and the period of notice is allowed to expire, then it would result in allowing the Government Servant to retire without taking any action. In order to operate the proviso, it was necessary that the Government should not only take a decision but communicate it to the Government Servant. It also held, where no such decision is taken and communicated to the Government Servant, after expiry of the period of notice, no disciplinary action can be taken against such Government Servant. The Court relied on an earlier three Judges Judgment in Dinesh Chandra Sangma Vs. State of Assam and others, (1997) 4 SCC 441, where it was held that for retiring voluntarily under FR-56(c), a Government Servant does not require any positive order of appointing authority unless required by the Rules otherwise. Both the aforesaid judgments have been followed in Union of India & others Vs. Sayed Muzaffar Mir, (1995) 1 UPLBEC 146 (SC), while considering a pari materia provision under Article 1801(d) of Railways Establishment Code and in para-4 and 5 of the judgment, it was held :

"4. There are two answers to this submission. The first is that both the provisions relied upon by the learned counsel would require, according to us, passing of appropriate order, when the Government servant is under suspension (as was the respondent), either of withholding permission to retire or retaining of the incumbent in service. It is an admitted fact that no such order had been passed in the present case. So, despite the right given to the appropriate/competent authority in this regard, the same is of no avail in the present case as the right had not come to be exercised. We do not know the reason(s) thereof. May be, for some reason the concerned authority thought that it would be better to see off the respondent by allowing him to retire.

5.The second aspect of the matter is that it has been held by a three Judges Bench of this Court in Dinesh Chandra Sangma V. State of Assam, 1977 (4) SCC 441, which has dealt with a pari materia provision finding place in Rule 56(c) of the Fundamental Rules, that where the Government servant seeks premature retirement the same does not require any acceptance and comes into effect on the completion of the notice period. This decision was followed by another three Judges Bench in B.J. Shelat V. State of Gujrat, 1978 (2) SCC 202." (emphasis added)

25. The aforesaid decisions have been followed in Surendra Narain Singh Vs. D.I.G., Special Appeal No. 649 of 1994 decided on 31st January 1995 and State of U.P. vs. Krishna Chandra Agarwal 2007(2) UPLBEC 69 and by learned Single Judge in Chandra Bahadur Pandey Vs. State of U.P. and others (2010) ILR 3 All.1199=(2011)2 UPLBEC 992.

26. In the present case, at the time when petitioner applied for voluntary retirement, neither any disciplinary inquiry was pending nor contemplated. Therefore, without taking decision on petitioner's application for voluntary retirement initiation of disciplinary inquiry by respondents was clearly illegal and without jurisdiction.

27. In view of the above discussion, both the writ petitions are hereby allowed.

Dismissal order dated 3.5.2010 and the order dated 10.05.2011 are hereby quashed. Respondent no.1 is further directed to take appropriate decision on petitioner's application seeking voluntary retirement in the light of discussion made above and in accordance with law, within three months.

28. So far as question of consequential relief is concerned, petitioner's continuous absence from duty without sanction of leave is admitted. We, therefore, leave it to competent authority to take appropriate decision in accordance with Rules; whether period of absence of petitioner is to be regularized against leave admissible and whether petitioner would be entitled to salary for such period. It would pass an appropriate reasoned order after it takes decision on petitioner's application seeking voluntary retirement but not beyond three months from the date the decision is taken on the application for voluntary retirement.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2015

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ- A No. 40235 of 2015

Smt. Abha Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.N. Tiwari, Sri Venu Gopal

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act, 1921- Regulation 21 Chapter-III-benefit of academic session-G. O.- 15.06.2015 clarifying the situation-those teachers working beyond their age of superannuation-on 31.03.2015-not entitled for further benefits of extension-argument regarding discrimination with those retiring prior 31st March 2015 and retiring after April 15-misconceived-petition dismissed.

Held: Para-13
In view of the above discussion, the petitioner cannot be allowed to continue till 31st March, 2016 for the reason that she had attained the age of superannuation during the Academic Session 2014-15 and had continued till 30th June, 2015 i.e. end of that academic session 2014-15.

Case Law discussed:
Special Appeal Defective 492 of 2015

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Venu Gopal, learned counsel for the petitioner and learned Standing Counsel.

2. The petitioner seeks mandamus to continue till 30th March, 2016 on the basis of the Government order dated 15.10.2014 which provides for the change of Academic Session to 1st April to 31st March instead and in place of 1st July to 30th June.

3. By means of the subsequent Government order dated 15th June, 2015, it has been clarified that the change of academic session to 1st April to 31st March would not have any effect on providing session benefit to those teachers who had retired and were continuing till 30th June 2015 on Session benefit. The teachers who had continued beyond their age of superannuation would not be allowed to continue till the end of Academic Session 2015-16 i.e. till 31st March, 2016 in view of the change of Academic Session vide Government order dated 9th September, 2014.

4. The submissions is that the benefit has not been provided to those teachers who had attained the age of superannuation till 31st March, 2015 and the teachers who had retired between 1st April, 2015 till 30th June, 2015 have been allowed to continue till 31st March, 2016 in view of the change in the Academic Session 2015-16, otherwise they would have retired on 30th June, 2015. This classification between the same class of teachers has no reasonable nexus with the object not to disrupt the teaching of the students in the midst of the Academic Session due to retirement of the teachers.

5. Further submissions is that the teachers who were continuing on Session benefit till 30th June, 2015 were actually in service and their date of retirement is treated as 30th June, 2015 for all pensionary benefits. They are even entitled to continue to hold the position of responsibility such as the post of officiating Principal by virtue of being Senior most teacher in the institution concerned. On the date of coming into operation of the provision for change of session i.e. the date of commencement of Academic Session 2015-16 on 2nd April 2015, these teachers were in service and as such they are entitled to continue till 31st March 2016.

6. The challenge to the Government order dated 15.06.2015 on the above grounds by the petitioner is not sustainable for two simple reasons:-

7. The first reason is that by means of the Government order dated 9th September, 2014, which is applicable for the Primary/Upper Primary institution run by Basic Siksha Parishad, the period of Academic Session from the Session 2015-16 onwards has been changed and now it commences on 1st April and would not end on 31st March.

8. So far as the Academic Session 2015-16 is concerned, admittedly, the same had commenced from 1st April, 2015 and would end on 31st March, 2016. The provision to continue till the end of the Academic Session is with the object to continue the teaching work uninterrupted for the benefit of the students.

9. The teachers who had attained the age of superannuation on or before 1st April, 2015 during the Academic Session 2014-15 have been allowed to continue till the end of that academic session which had ended on 30th June, 2015.

10. By means of the Government order dated 9th September, 2014, there was no change in the Academic Session 2014-15 which was ensuing till 30th June, 2015. The teachers who had retired during the Academic Session 2014-15 cannot be allowed to continue till the end of next Academic Session 2015-16 which is 31st March 2016. The extension in service is only till the end of Academic Session in which the teacher had attained the age of superannuation.

11. The second reason is that the continuance of the teachers till 30th June, 2015 is an extension in service till the date of effective retirement. The original date of retirement is not extended.

12. Once they had duly availed the benefit of extension, no further benefit can be provided to them. A Division Bench of this Court in Bhajan Lal Diwakar Vs. Bani Singh Thakurela and 4 others reported in Special Appeal Defective No. 492 of 2015 considering the effect of amendment in Regulation 21

as contained in Chapter III of the Regulations framed under the U.P. Intermediate Education Act, 1921 has held that the benefit of change of academic session cannot be provided to those teachers who were continuing on session benefit on the date of commencement of the Academic session 2015-16.

13. In view of the above discussion, the petitioner cannot be allowed to continue till 31st March, 2016 for the reason that she had attained the age of superannuation during the Academic Session 2014-15 and had continued till 30th June, 2015 i.e. end of that academic session 2014-15.

14. There is no merits in the writ petition. The writ petition is dismissed. .

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2015

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

Writ-C No. 41005 of 2009

Smt. Suman & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajeev Kumar Pandey, Sri N.K. Dwivedi

Counsel for the Respondents:
C.S.C., Sri Sanjay Singh Jatav, Sri Shiv Nath Singh, Sri Vivek Varma

Constitution of India, Art.-226-Demand notice-without adjusting amounts already paid-in spite of specific direction-no statement of accounts placed-petitioner belongs to economically weaker section of society-in absence of specific denial in counter affidavit-development authority to execute sale deed in favor of petitioner.

Held: Para-12
In the facts and circumstances, respondent authority since has failed to bring on record the details of outstanding balance against the petitioners though specifically required to do so vide order dated 11.8.2009, we are left with no option but to believe the averments made by the petitioners in the writ petition that all outstanding dues against them was deposited, the receipts whereof are on the record of the case as annexures 10 & 12 to the writ petition.

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

1. The petitioners, 19 in numbers , have approached this Court seeking a writ of Certiorari to quash the notices dated 09.04.2009, 25.04.2009, 26.05.2009 and 25.06.2009 (Annexure-14 to the writ petition) for payment of outstanding dues of EWS Flats allotted to them by the respondent no. 2 Kanpur Development Authority (hereinafter referred to as the 'Development Authority'). The notices further specified that the calculation mentioned has been made on the basis of One time Settlement (OTS) and if the petitioners intended to take advantage of the said scheme they may deposit Rs.200/- with the prescribed bank and produce the receipt, failing which this benefit of the scheme will not be extended. Further a writ of mandamus has been claimed commanding the respondents to execute sale deed in favour of the petitioners as all the petitioners have deposited entire amount and interest furnished by the respondents vide statement of account/letter dated 13.12.2007.

2. Aforesaid reliefs have been claimed in the background of the following facts :

3. The petitioners, who belong to the economically weaker section of the society, have applied for flats in pursuance of the advertisement published by the Development Authority in Hindi Daily newspaper 'Dainik Jagran' on 14.09.1987 in respect of Yojna No. 40, Barra Bhag-2, Azad Kutiya, Kanpur Nagar. In accordance with the provisions of the Scheme, the petitioners alleged to have deposited 1/4th of the cost in the UCo Bank and accordingly all the petitioners were issued allotment letters on different dates in the year 1988 and 1989 on a price ranging between 25,500/- to 30,000/-. The allotment letter stipulated a condition that after adjustment of 7600/-, the balance amount would be payable within 20 years in quarterly instalment with 15% interest. The petitioners and various other allottees defaulted in making payment of instalment resulting in a public notice published in 'Dainik Jagran' dated 18.8.2007 requiring all the allottees in arrears of instalment to deposit the balance payable by 22.08.2007, failing which allotment would be cancelled after 23.08.2007. Subsequently, another public notice dated 25.08.2007 was again published in Hindi daily 'Dainik Jagran' stating that 400 allotments of such persons who are defaulters have been cancelled pursuant to the earlier notice dated 18.8.2007. Aggrieved by the aforesaid, the petitioners along with certain other similarly situated allottees had approached this Court by filing writ petition no. 43533 of 2007. A Division Bench of this Court dismissed the writ petition by passing the following orders :

"Heard counsel for the petitioners and Sri M.C. Tripathi Advocate on behalf of the Kanpur Development Authority, Kanpur. The petitioners had been allotted flats by the Kanpur Development Authority on a meager prices of Rs.24,000/- to 30,000/-. The allotment letters issued incorporated all the terms and conditions qua such allotment.

So far as the petitioner No.1 is concerned, his allotment letter dated 16th June, 1988 Annexure-2 to the writ petition clearly reveals that the flat allotted to him was for a price of Rs.30,000/- and he had deposited a sum of Rs. 7,600/- on the date of allotment, the balance amount had to be paid by him in three monthly equal installments over a span of twenty years. After adjusting the payment of Rs.7,600/- against the total price of 30,000/-, the balance amount Rs.22,400/- had to be paid by the petitioner with 15% interest as indicated above. Admittedly, the petitioner has not deposited a single installment in last 19 years.

Under challenge is a show cause notice issued to the petitioners to deposit the entire payment or to vacate the premises. Hence this writ petition.

Learned counsel for the petitioner has not replied to the simple question as to under what circumstances, after the allotment, the payment has not been made. Similar is the position of the respondent Kanpur Development Authority. It has no explanation as to under what circumstances it could not show the courage too throw out the petitioners from their possession over the flat in question and could not auction the same to some other persons in case petitioners had not deposited any of the installments whatsoever.

Even today the only contention raised is that in one case in similar situation the flat has been allotted at cheaper rate. Therefore, the balance amount of 22,400/- cannot be recovered from the petitioner with interest.

Article 14 is for a positive discrimination, it does not envisage in negative equality qua an order passed illegally and for ulterior consideration, there arise no plea of discrimination nor gives a cause to the petitioners to agitate the issue before the Court. Therefore, we not only dismiss this writ petition but also direct the Vice Chairman, Kanpur Development Authority to make the recovery of entire balance amount with interest treating the petitioners to be defaulters from the very beginning and, in case they do not make the entire payment within four weeks, to take possession of the flat forcibly. In such a situation compensation for use and occupation of the flat for all these years must also be determined and recovered. The Kanpur Development Authority to make fresh allotment of the flats in question to some other persons by auction, in case deposit of outstanding amount is not made as indicated above.

With the aforesaid observations/ directions the present writ petition is dismissed."

4. Specific case set up by the petitioners in the present writ petition is that after order dated 17.09.2007 passed by this Court they approached the respondents with the request to furnish the account so that they may deposit the entire balance within the stipulated time alloted by this Court. However, when no statement of account was furnished till September, 2007, some of the petitioners deposited some amount in respect of the dues as per their own calculation in the month of October, 2007 on different dates. Photocopy of receipt of deposit is on record as annexure-10 to the writ petition. Respondent no. 2 issued letter dated 13.12.2007 to all the petitioners mentioning the amount due against them and requiring them to make payment within 30 days from the date of receipt of the said letter.

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5. It is categorically stated in paragraph 33 of the writ petition that thereafter some of the petitioners who had made certain deposit in October, 2008 deposited the balance after adjusting the said deposit and those petitioners who had not deposited anything, they deposited entire amount mentioned in the letter issued to them and the photocopy of the deposit made by them is on record as Annexure - 12 to the writ petition. In paragraph 34 of the writ petition, it has been categorically stated as under :

"That it is specifically stated here that all the petitioners have deposited entire amount and interest as mentioned in the letters dated 13.12.2007 issued to the petitioners within the stipulated period from the date of receiving of the aforesaid letters. It is further stated here that no amount is due against the petitioners regarding the E.W.S. Quarters allotted by the respondents."

6. The respondent authority issued fresh notices to the petitioners on different dates (collectively filed as annexure-14 to the writ petition). It has been mentioned therein the amount due against them and for the said purpose they have been asked to take benefit of O.T.S. and to deposit Rs.200/- for availing the said benefit of O.T.S.

7. Alleging that they have already deposited the entire amount due as per notice/letter dated 13.12.2007 issued to them in pursuance of the earlier order dated 17.09.2007, the instant writ petition

was preferred. A Division bench of this Court vide order dated 11.08.2009 while calling for a counter affidavit passed the following order :

" Sri Sanjay Singh Jatav has accepted notice on respondent no. 2.

It is stated by the petitioners that immediately after judgement dated 17.09.2009 by which this court directed that the petitioners have to pay interest treating the petitioners to be defaulters from the very beginning, the petitioners had immediately deposited the amounts due against them. Fresh notices were issued on 13.12.2007 working out the balance of payment without adjusting the amount deposited on 01.10.2007 (all other petitioenrs also deposited same amounts in October 2007).

It is stated that the petitioners made good the shortfall in December 2007. The respondents however have not adjusted the amounts depostied by them in October 2007 and have given fresh notice for depositing the entire amount all over again.

Learned counsel for the Kanpur Development Authority will seek instructions and give the calculation after adjusting the payments of each of the petitioners, in tabular form.

List on 26.08.2009.

As an interim measure, we provide that until 26.08.2009, no coercive action would be taken against the petitioners."

8. Even though the case has been called out in the revised list but no one has appeared on behalf of the Kanpur Development Authority though the name of S/Sri Sanjay Singh Jatav, Shiv Nath Singh and Vivek Varma is shown in the cause list.

9. Counter affidavit of respondent no. 2 filed through Sri Sanjay Singh Jatav is on record, which has been perused by us.

10. At the outset, it may be mentioned that though a counter affidavit has been filed by the respondent no. 2 but as desired by the Court vide order dated 11.8.2009 to give calculation after adjusting the payment of each of the petitioners in tabular form has not been provided. The counter affidavit is also very sketchy and there is no specific denial of the allegation made in the writ petition that entire outstanding amount as shown in the letter dated 13.12.2007 issued by the respondent in respect of the outstanding dues against the petitioners stands deposited by them. In paragraph 31, 32 & 33, specific averments have been made that when no statement of account was furnished till the month of September, 2007, some of the petitioners have deposited some amount against their dues in the month of October, 2007 on different dates and thereafter, the respondents have issued statement of account vide letter dated 13.12.2007 to all the petitioners mentioning the amount due against them and required them to make payment within 30 days from the date of receipt of the letter. A categorical averment has been made in paragraph 33 that thereafter all the petitioners have deposited entire balance amount mentioned in the letter dated 13.12.2007 on different dates within stipulated time. The reply to the said paragraph of the writ petition in the counter affidavit is reproduced hereunder :

"28. That the contents of paragraph no. 31 of the writ petition, refers deposit of part of cost price of the flats by some of the petitioners on different dates and is correct and is admitted but this will not serve the desired purpose.

29. That the contents of paragraph no. 32 of the writ petition, issuance of

statement of account to allottees/petitioners on 13.12.2007 by the respondents is mentioned and is admitted being the matter of record.

30. That the contents of paragraph no. 33 and 34 are not correct and it is denied that the petitioners have deposited their balance/entire amount as mentioned in the letter dated 13.12.2007 within the stipulated period. As such, there paragraphs are not admitted."

11. It is to be taken note of that though paragraph 30 of the counter affidavit to the reply of the averments made in paragraphs 33 & 34 of the writ petition with respect to entire demand having been deposited is denied but the respondent authority has failed to deny that the deposit alleged by the petitioners has been made. It has also failed to specify in the counter affidavit the outstanding balance against the petitioners. Specific case set up by the petitioners is that when the statement of account was not furnished some of the petitioners deposited certain amount on different dates in October, 2007 and after notice dated 13.12.2007 entire amount has been deposited by all the petitioners of course after making adjustment by those petitioners who had deposited some amount in October, 2007 and for this reasons, the Court vide order dated 11.8.2009 required the Kanpur Development Authority to give calculation of outstanding in respect of each of the petitioners after adjusting the payment in a tabular form. Despite specific directions, the respondent has not come up giving calculation much less in a tabular form. Specific averments made in the writ petition regarding entire payment has been made in response to the notice and there was no outstanding dues does not stand categorically denied in the counter affidavit nor any material has been produced to demonstrate any outstanding balance against any of the petitioners.

12. In the facts and circumstances, respondent authority since has failed to bring on record the details of outstanding balance against the petitioners though specifically required to do so vide order dated 11.8.2009, we are left with no option but to believe the averments made by the petitioners in the writ petition that all outstanding dues against them was deposited, the receipts whereof are on the record of the case as annexures 10 & 12 to the writ petition.

13. From a perusal of the counter affidavit filed on behalf of respondent no. 2, we have not been able to find out any justifiable ground on the part of the respondent authority to have issued impugned notice to the petitioners requiring them to deposit the amount calculated under One Time Settlement Scheme.

14. In view of of the aforesaid facts and discussions, the impugned notices dated 09.04.2009, 25.04.2009, 26.05.2009 and 25.06.2009 (Annexure-14 to the writ petition) are not liable to be sustained and are hereby quashed.

15. Writ Petition stands allowed.

16. A writ of mandamus is issued to the respondent Development Authority to execute sale deed/lease deed in favour of the petitioners in accordance with law after following the formalities and the prescribed procedure within a period of two months from the date of production of a certified copy of this order before it.

17. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2015

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

Writ-A No. 44397 of 2015

Satish Chandra Yadav ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Singh

Counsel for the Respondents:
C.S.C., Sri B.N. Singh Rathore

U.P. Public premises (Eviction of unauthorized Occupants) Act-1972-Section 11-read with Indian Penal code-Section 441-unauthorized occupant in public premises-authorities to follow the procedure given in S.D. Bandi case-in view of guide lines of Apex Court-no relief can be granted-petition dismissed.

Held: Para-12
Therefore, the authority concerned shall adopt an uniform policy for granting extension to retain the government accommodation beyond prescribed limit. The State functionaries would follow the law laid down by the Supreme Court in the case of S.D. Bandi (supra) in letter and spirit.

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

1. The petitioner is a Sub Inspector in Civil Police. He was allotted a government accommodation being Quarter No.B-11, Police Colony, Atarsuiya Compound, District Allahabad when he was posted at Allahabad.

2. From the record, it transpires that the petitioner was transferred from Allahabad to Sitapur on 5.11.2013 and the accommodation of the petitioner was allotted to the respondent no.8 on 13.2.2014. The respondent no.8 had filed several representations before the Police Officers for taking possession of the said accommodation but no action was taken, whereupon, he preferred Writ Petition No.9900 of 2015 for a direction upon the respondents to take appropriate action. The said writ petition was disposed of on 16.2.2015 by issuing a direction upon the fourth respondent to consider the cause of the petitioner therein.

3. It appears that in compliance of the order of this Court dated 19.2.2015, the fourth respondent has passed the impugned order against the petitioner to vacate the premises in question within five days.

4. Aggrieved by the said order, the petitioner has preferred this writ petition.

5. The experience reveals that several writ petitions have been filed in this Court for the similar relief. In the case in hand, for the same accommodation, two writ petitions have been filed, one by the allottee and another by the person, who is occupying the accommodation.

6. The Supreme Court in the case of S.D. Bandi v. Divisional Traffic Officer, Karnataka State Road Transport Corporation and others, (2013) 12 SCC 631, has laid down the law that an employee should not overstay after his retirement or transfer. The Court has noticed that the States of Uttar Pradesh and Orissa have amended Section 441 of the Penal Code, 1860 (in short "IPC"). The Supreme Court has observed that the Government in two States are in a position to file criminal proceedings in the

case of unauthorised occupation of government accommodation. Section 441 as amended in Uttar Pradesh as quoted in S.D. Bandi (supra) reads as under:

'441. ... or, having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice,

is said to commit "criminal trespass".' (Uttar Pradesh)

7. After considering the response from all the States, the Supreme Court has made certain suggestions inter alia that: a notice should be sent to the allottee/officer/employee; the principles of natural justice have to be followed while serving the notice; show cause notice should be sent within 7 working days; order of eviction should be passed as expeditiously as possible preferably within a period of 15 days; if the occupant's case is genuine then, in the first instance, an extension of not more than 30 days should be granted.

8. The Supreme Court further held that the same procedure must be followed for damages also; the arrears/damages should be collected as arrears of land revenue; to make it more stringent, there must be some provision for stoppage or reduction in the monthly pension till the date of vacation of the premises.

9. The State of Uttar Pradesh has informed the Supreme Court that in the State of Uttar Pradesh, there is already a provision in respect of arrears of rent and damages and the rules enable the State to recover the same as arrears of land revenue. The Supreme Court was also informed by the State of Uttar Pradesh that the stringent provision viz. Section 11 of the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 is in force.

10. In spite of the said judgement, it appears that the employees who are transferred in the State of Uttar Pradesh retain their accommodation on lame excuses and the authorities concerned without application of their mind grant extension of time to retain the accommodation.

11. In a large number of cases, the petitioners cite the example of discrimination with them that other similarly placed employees have been allowed to retain the accommodation by the official concerned while in his case, his application has been rejected.

12. Therefore, the authority concerned shall adopt an uniform policy for granting extension to retain the government accommodation beyond prescribed limit. The State functionaries would follow the law laid down by the Supreme Court in the case of S.D. Bandi (supra) in letter and spirit.

13. For the reasons mentioned herein above, I do not find any ground for interference under Article 226 of the Constitution. The writ petition fails and it is accordingly dismissed.

14. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SHASHI KANT, J.

Writ-A No. 49158 of 2015

Vivek Dubey ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Sanjay Mishra, Sri Durgesh Kumar Dubey

Counsel for the Respondents:
C.S.C., Sri G.K. Singh, Sri Ajay Kumar

(A) Constitution of India, Art.-226-Combined State examination-petitioner kept the column 20 blank-relating to post of designated officer-after qualifying written examination-participated in interview-when result declared-came to know-lesser marks candidate selected as designated officer but petitioner ignored-because not marked column 20-even interview committee not aware about this bifurcation-whether can be ignored?-question referred to full bench.

(B) Constitution of India-Art.-226-Writ petition-laches & delay-when fetal-question referred to full bench.

Held: Para-26
We find it difficult to agree with the judgment in in the case of Vinay Kumar Pal (supra) which has been rendered on practically identical facts. We deem it fit to refer the following questions of law to be answered by a Larger Bench of this Court :

(a) Once the Writ Court, in respect of same examination and in respect of same column no. 20 of the form having been left blank, had declared that such candidates are also to be considered for the post of 'Designated Officer', is it open to the Commission to have two sets of norms, one for the candidates who approached the High Court and the other for the candidates who did not approached the High Court? Why such judgements be not read as judgements in rem?

(b) Can a writ petition be dismissed on the ground of latches only because the result of Preliminary Examination had been known to the petitioner, when, there had been a judgment of this Court for ignoring the blank Coloumn No. 20, in the matter of consideration of candidature of the candidate against the post of "Designated Officer"?

(c) Whether the Division Bench in the case of Vinay Kumar Pal (supra) was right in the facts of the case, in recording that there has been inordinate delay in filing the writ petition with reference to the date on which the final result was declared?

Case Law discussed:
W.P. No. 31864 of 2014 decided on 13th June 2014; Writ A No. 617 of 2015 decided on 15.01.2015; [2011 AIR SCW 3033].

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

1. Heard Sri Radha Kant Ojha, Senior Advocate assisted by Sri Durgesh Kumar Dubey, Advocate for petitioner and Sri G.K. Singh, Senior Advocate assisted by Sri Ajay Kumar, Advocate for respondent nos. 1 and 2.

2. Uttar Pradesh Public Service Commission, Allahabad (hereinafter referred to as 'the Commission'), published an advertisement dated 23.03.2013, inviting applications for various posts for appointment on the posts of Combined State/Upper Subordinate Services (General Recruitment) Examination, 2013.

3. Petitioner before this Court is stated to have submitted his application in response to the advertisement so published by the Commission. Some of the posts published by way of said advertisement were named "Designated Officer". Dispute giving rise to the present writ petition is with respect to the posts of Designated Officer for which special qualifications were also prescribed.

4. It is not disputed that petitioner does satisfies special qualifications prescribed for the said post. The application form contained amongst others Coloumn no. 20, which provided for other essential qualifications. The petitioner had admittedly left Coloumn No. 20 blank in his application form. Because of Coloumn No. 20 having not been filled by the petitioner, it was decided by the Commission that he has not opted for the post of Designated Officer and therefore, in the results of Preliminary Examination, which were declared on 27.05.2014, Roll Number of the petitioner was shown only in the list prepared for the posts covered by "Executive" only and not for the posts covered by "Designated Officer". The Mains Examination, took place on 01.07.2015, the result of the Mains Examination was declared on 13th January, 2015. According to the Commission, result of main examination was again preapred on the basis of the options given by the candidates, namely "Executive" and/or "Designated Officer", separately. Name of petitioner was shown in the list prepared for the post categorised under the heading "Executive" and not against the posts covered by "Designated Officer".

5. Interview is stated to have taken place and final result had been declarted category wise, which has been up loaded on the website of the Commission.

6. Petitioner before this Court seeks a writ of mandamus, directing the Commission to consider his candidature against the posts of "Designated Officer" on the basis of over all marks received by him in the said examination within the category to which he belongs. It is also stated before us that persons who are lower in merit than petitioner have been offered the posts under the heading "Designated Officer", while petitioner has been nonsuited for the said posts, only because he had left Coloumn No. 20 of the application form, blank.

7. Sri R.K. Ojha, Senior Advocate on behalf of petitioner, with reference to the Division Bench judgment of this Court in the case of Ajay Pratap Singh and Others Vs. State of U.P. and Others, being Writ Petition No. 31864 of 2014, decided on 13th June, 2014, submits that the issue with regard to Coloumn No. 20, having been left blank and therefore candidature of the candidate concerned being excluded from consideration against the posts of "Designated Officers", has been examined and it has been laid down that since petitioners in that case were eligible for the post of "Designated Officer" and had obtained more marks than cut-off marks, he was entitled to appear in the Main Examination, against the posts of "Designated Officer" also.

8. Applying the same principle, Sri R.K. Ojha, Senior Advocate submitted that since, the petitioner had secured minimum qualifying marks required for appearing in the Mains Examination, it was not necessary for him to approach this Court earlier and it is only when final

result has been declared, that he came to know that his candidature against the posts "Designated Officer" has been non suited because of Coloumn No. 20 of application form having been left blank.

9. Sri G.K. Singh, Senior Advocate on behalf of the Commission, on the contrary pointed out that after the judgment in the case of Ajay Pratap Singh (supra), as many as 50 writ petitions were filed before this High Court by the candidates who were not invited for participation in the Mains Examination. In all these 50 writ petitions the order of the Division Bench rendered in the case of Ajay Pratap Singh (supra) has been followed. Petitioners of these 50 writ petitions, who were nearly 80 in number, have been invited for participation in the Mains Examination, under the orders of the High Court. Their candidature for the posts of "Designated Officer" has also been considered, even though coloumn no. 20 of their applications was left blank. It is stated that all those petitioners who have been successful in the Mains Examination and Interview have been selected against the posts of "Designated Officer".

10. Sri G.K. Singh, Senior Advocate however submits that this practice which has been undertaken by the Commission, because of the orders of the High Court, may not be applied in the case of the petitioner herein, inasmuch as in the result of Priliminary Examination his roll number was disclosed against the post covered under the heading "Executive" only. Similarly, in the result of Mains Examination, his roll number was disclosed against the posts within the heading "Executive" only, consequently, after Interview, his candidature has been confined to the post within the heading "Executive". It is explained that Division Bench of this Court in the cae of Vinay Kumar Pal Vs. State of U.P. and Others, Writ A No. 617 of 2015, decided on 15.01.2015 has held that persons who had been selected for the posts within the heading "Executive" cannot be permitted to challenge the selections at the stage when the final results have been declared and the writ petition is liable to be dismissed on the ground of latches/inordinate delay.

11. Sri G.K. Singh, Senior Advocate submits that this writ petition must also meet the same fate.

12. Sri R.K. Ojha, Senior Advocate in his rejoinder affidavit submits that the selection procedure, held for the posts covered under the heading "Executive" and for the post covered under the heading "Designated Officer" was one and the same, right from the stage of Priliminary Examination till the stage of Interview. No separate question paper was prepared nor any separate Inverview Board was constituted vis a vis, category of post. It is also stated that candidates who appeared before the Inverview Board were allotted code numbers without their identity being disclosed to the Members of the Board and without the Members being informed as to whether candidate is to be considered only for the posts under heading "Executive" or for the posts under the heading "Designated Officer". He submits that only at the time of preparation of final results, that Commission has again reopened the controversy with regard to Coloumn No. 20 and has declared that candidates leaving the Coloumn No. 20 blank as unsuitable for the posts under the heading "Designated Officer". Persons lower in merit have been selected against the posts of "Designated Officer", only on the ground that they had disclosed required information in Coloumn No. 20.

13. There is also an issue between the parties as to whether, in the application form, it was required to be submitted at the time of interview by the respective candidates, the petitioner had been asked to submit his application for category of various posts. According to the petitioner he was asked to fill option against the post under the heading "Designated Officer" by the officers of the Commission.

14. Issue with regard to the effect of the form submitted by the petitioner and at the time of interview and the correctness of the stand that he was asked to give his options by the officers of the Commission, at the time of Interview, is a controversial fact and may be examined by the Commission at the first instance.

15. But this Court is required to examine as to whether this writ petition is liable to be dismissed on the ground of latches as has been held in the case of Vinay Kumar Pal (Supra).

16. We at the outset record that for writ petition being filed under Article 226 of the Constitution of India, no limitation is prescribed either under the Constitution of India or in the Allahabad High Court Rules.

17. The issue has been settled by the Apex Court repeatedly it has been explained that High Court has to examine for itself in each case as to whether the petitioner had been vigilent in pursuing his remedies or not and has approached the writ Court within reasonable time. It has to be seen as to because of time period taken in approaching the Court, the petitioner has created a situation where High Court may refuse to entertain the writ petition on the ground of latches. Legal principles applicable in the matter of entertainment of writ petitions, on the plea of delay/latches has been stated by the Apex Court in the case of Shankara Co-Op. Housing Society Ltd. Vs. M. Prabhakar and Others [2011 AIR SCW 3033].

18. We find it difficult to follow the Division Bench of this Court in the case of Vinay Kumar Pal (Supra), on facts. We may record that no binding precedent has been laid down in the said judgment.

19. In our opinion, for a writ petition to be dismissed on the ground of laches/delay, it has to be examined as to whether the particular petitioner has been sleeping over his rights or there have been inordinate delay creating a situation which cannot be rectified at such later stage or the petitioner has created a right in another person which may cause injustice, if the writ Court is to entertain the writ jurisdiction and it grant relief to the petitioner.

20. We in the facts of the case, find that Preliminary examination pursuant to the advertisement, had taken place in the month of May, 2014, the result of the said examination was declared on 27.05.2014, which, according to the Commission was category wise and it is at this stage itself that writ petition was filed by Ajay Pratap Singh and others (supra), with the plea that even if Coloumn No. 20 has been left blank their candidature has to be considered for the post of "Executive" as well as "Designated Officer. Which plea was upheld by the Court. We fail to understand that when a judgmnet had been delivered by this Court as early as on 13th June, 2014, permitting all such applicants who had disclosed their qualifications but had left coloumn no. 20 blank for their candidature being considered for the post of "Designated Officer" by the Commission why the said legal principal was not applied by the Commission in uniform

manner. Why should Commission insist on separate writ petitions being filed by the individual candidate, when the legal position with regard to Coloumn No. 20 having been left blank and the consequences which follow had already been laid down by the Division Bench of this Court.

21. The Commission in the present case should had ultimately applied the law explained by this Court, more so when date of Mains Examination had not been announced when the judgment was made by the Division Bench. This practice of creating a situation for compelling the individual candidates to approach this Court again and again for practically same reliefs, must be avoided by the Commission. Once this Court declares consequence of a particularly Coloumn having been left blank, the Commission is duty bound to act uniformly for all such similarly situate candidates, even if they do not approach the Writ Court. Commission must not become an agency for generating litigation.

22. We therefore, have no hesitation in recording that after the Division Bench Judgment of this Court dated 13th June, 2014, the Commission had no business to treat the candidates who had left Coloumn No. 20 blank, as excluded from consideration for the post of "Designated Officer".

23. We had specifically asked learned counsel for the Commission as well as learned counsel for the petitioner as to whether there was any difference in the examination papers for both Preliminary Examination and Mains Examination as well as with regard to constitution of the Interview Board and the method of evaluation by the Interview Board of a particular candidate, the answer given is in negative. It has been explained to the Court that Interview Board was not aware as to whether particular candidate was to be considered only for the post of "Designated Officer" or for the post of "Executive Officer" or vice-versa.

24. We are also of the opinion that in the facts of the case, petitioners have approached this Court promptly after the declaration of the result seeking consideration of their case against the post of "Designated Officer". It is stated before us that final result was declared on 26th March, 2015, marks received by the candidates were disclosed only in the last week of June, 2015 and it is at this stage that petitioner came to know that he even after having received more marks then the last candidate selected for the post "Designated Officer" has been non suited because of Coloumn No. 20 having been left blank.

25. The finding recorded in the order of the Division Bench of this Court in the case of Vinay Kumar Pal (supra) that the petition was filed after a period of six months from the date the result of Mains Examination was declared, is incorrect inasmuch as from the record we find that result of Mains Examination was declared on 13th January, 2015 i.e. two days prior to the order of the Court in Vinay Kumar Pal (supra) case dated 15th January, 2015.

26. We find it difficult to agree with the judgment in in the case of Vinay Kumar Pal (supra) which has been rendered on practically identical facts. We deem it fit to refer the following questions of law to be answered by a Larger Bench of this Court :

(a) Once the Writ Court, in respect of same examination and in respect of same column no. 20 of the form having been left

blank, had declared that such candidates are also to be considered for the post of 'Designated Officer', is it open to the Commission to have two sets of norms, one for the candidates who approached the High Court and the other for the candidates who did not approached the High Court? Why such judgements be not read as judgements in rem?

(b) Can a writ petition be dismissed on the ground of latches only because the result of Preliminary Examination had been known to the petitioner, when, there had been a judgment of this Court for ignoring the blank Coloumn No. 20, in the matter of consideration of candidature of the candidate against the post of "Designated Officer"?

(c) Whether the Division Bench in the case of Vinay Kumar Pal (supra) was right in the facts of the case, in recording that there has been inordinate delay in filing the writ petition with reference to the date on which the final result was declared?

27. Let this order be placed before Hon'ble the Chief Justice for constituting a Larger Bench for answering the aforesaid questions at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2015

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-B No. 56524 of 2015
connected with
Writ-B No. 59549 of 2015

Raj Nath ...Petitioner
Versus
D.D.C. Jaunpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.C. Tripathi

Counsel for the Respondents:
C.S.C., Sri Bedi Lal Verma, Sri S.N. Tripathi

U.P. Consolidation of Holdings Act-Section 48-Revision-Chak allotment matter-decided without summoning record-without spot inspection-while exercising revisional power-the D.D.C. To ensure and be satisfied-whether the provisions contained under Rule 21(3), 24-D and 26 (5) complied with or not? In absence of consideration, order not sustainable, quashed.

Held: Para-25
Accordingly and in view of the above discussion, the impugned order passed by the Deputy Director of Consolidation which has admittedly been passed without summoning or perusing the record of the proceedings before the Consolidation Officer as the Settlement Officer, Consolidation, cannot be sustained and is, therefore, set aside. The writ petition is accordingly allowed and the impugned order dated 28.05.2015 is set aside. The matter is remanded back to the Deputy Director of Consolidation, respondent no. 1 to decide the revisions no. 1686 and 1688 afresh.

Case Law discussed:
AIR 1975 (Allahabad) 126; 2015 (127) RD 675; (2005) 98 RD 593.

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

1. Heard Shri S.C. Tripathi, learned counsel for the petitioner and Shri S.N. Tripathi and Shri B.L Verma, for the caveator.

2. With the consent of the parties, the matter has been heard and is being decided finally at the admission stage itself without calling for a counter affidavit.

3. The writ petition arises out of proceedings for allotment of chaks and seeks for quashing of the order dated

25.08.2015 passed by the Deputy Director of Consolidation whereby he has allowed the revisions no. 1686 and 1688 while a third revision being revision no. 1687 has been dismissed.

4. The submission of the learned counsel for the petitioner is that revisional court has passed the order impugned without summoning the record of the courts below. The lower court record was neither summoned nor was before the Deputy Director of Consolidation when the impugned order was passed. He, therefore, submits that the impugned order is vitiated in view of the law laid down in the Full Bench decision of this Court in Rama Kant Vs. DDC AIR 1975 (Allahabad) 126.

5. The contention of the learned counsel for the respondents is that there was no necessity by summoning the lower court records. The village map and also the relevant CH Form-23 were before the Deputy Director of Consolidation. He further submits that the orders passed by the subordinate consolidation authorities, namely, the Consolidation Officer, and the Settlement Officer, Consolidation had been annexed along with the memo of revision. All these documents have been duly considered before passing the impugned order. In any case, it was only these documents which were relevant for decision of the revision itself.

6. His contention is that even if the lower court record had been summoned and had been produced before the Deputy Director of Consolidation the only other document that would have been before him would be the copy of the objection and the memo of appeal. He has placed reliance upon a decision of this Court in the case of Ram Bachan vs. DDC 2015 (127) RD 675 in support of his contention that only the village map and the CH Form-23 of the parties is relevant for deciding the revision arising out of proceedings for allotment of chaks. He has further tried to draw a distinction between title proceedings under Section 9 and Section 12 of the Act and the instant proceedings for allotment of chaks which arise from an objection under Section 21 of the Act. He submits that the position in the case of the title proceedings may be different.

7. However, as far as chak allotment matters are concerned, all the relevant documents were before the Deputy Director of Consolidation and, therefore, the order impugned cannot be interfered with on the ground raised by learned counsel for the petitioner.

8. On the basis of the submissions made by the learned counsel for the parties, the only question that arises for consideration in the instant writ petition is as to whether the Deputy Director of Consolidation while exercising the revisional powers under Section 48 of the UP Consolidation of Holdings Act is competent to decide a revision without summoning and perusing the lower court record.

9. Section 48 of the Act which is central for deciding the controversy in the instant writ petition is quoted herein below:-

"[48. Revision and reference.- (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety or any order [other

than an interlocutory order] passed by such authority in in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being hear, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).]

[Explanation.- [(1)] For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officer,s Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation].

Explanation (2)- For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceedings.

[Explanation (3).-The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to reappreciate any oral or documentary evidence.]"

10. From a bare perusal of this provision, it is clear that while exercising powers under Section 48 of the Act, the Deputy Director of Consolidation is required to examine the record of any case decided by any subordinate authority for satisfying himself as to the regularity of the proceedings or the correctness, legality or propriety of any order passed by the subordinate authorities. This power can be exercised as regards all orders of subordinate authorities, except interlocutory orders.

11. For deciding the controversy involved in the writ petition, it would also be relevant to refer to various other provisions of the Act itself.

12. Section 21 (3) of the Act provides that before deciding an objection against the provisional consolidation scheme the authorities is mandatorily required to make a spot inspection. An analogous provision is to be found in sub-section (4) of Section 9-B. In this provision the requirement of a local spot inspection is mandatory both for the Consolidation Officer as also the Settlement Officer, Consolidation.

13. Rule 24-D of the Rules under the Act, provides that when the Consolidation Officer or the Settlement Officer, Consolidation make a local inspection, they are required to prepare inspection memos and place such memos on the record of the proceedings.

14. Rule 26 (5) makes it mandatory for the Consolidation Officer to make a local inspection of the plot concerned while deciding a dispute relating to determination of exchange ratio or for determining the valuation of trees, well or other improvement existing on a plot. Even this inspection memo is required to be necessarily placed on the record of the case.

15. Apart from the provisions quoted above, it goes without saying that

there might be other relevant evidence available on record of proceedings that may have been filed by the parties, therein, including the oral testimony of the parties.

16. This Court in the case of Hari Das and another vs. DDC (2005) 98 RD 593 has held that the Deputy Director of Consolidation while setting aside a judgement of an inferior court, is required to consider the entire evidence available on record.

17. Explanation 3 which has been added to Section 48 w.e.f 10.11.1980, empowers the Deputy Director of Consolidation to appraise the evidence available on record and to record findings both on facts and on law, contrary to those returned by the subordinate authorities.

18. From the provisions noted above, as also in view of the judgement in the case of Hari Das (supra) it is clear that the Deputy Director of Consolidation while deciding a revision has to also consider the evidence that is available on record of the proceedings before the courts below. This cannot be done till such time the record of the proceedings before the subordinate consolidation authorities is before him.

19. Sub-section (1) of Section 48 mandates that the Deputy Director of Consolidation while deciding a revision has to satisfy himself about the correctness legality or propriety of any order passed by such subordinate authorities.

20. A conjoint reading of the various provisions as also the case law referred to above, necessarily leads to the conclusion that the record of the subordinate courts is required to be before the Deputy Director of Consolidation while deciding a revision.

21. In the case of Ram Bechan (supra) cited by the respondent, it has been held that while deciding a revision arising out of a chak allotment proceedings, the village record and map are essential records. In that case, these records were before the Deputy Director of Consolidation and had been examined prior to passing an order. The court has further observed that the purpose of local inspection is to properly appreciate arguments of the parties. The object of such spot or local inspection is not to collect fresh evidence.

22. The judgement cited does not appear to have considered the Full Bench decision in the case of Rama Kant (supra). The Full Bench has observed as follows while answering the questions referred to it:-

"After the record has been called for by the Deputy Director of Consolidation under Section 48 of the UP Consolidation of Holdings Act he should examine the record to decide whether it was a fit case for exercise of the revisional jurisdiction suo motu. Such opinion shall have to be formed even where the application in revision moved by a party is defective having been made beyond the prescribed period of limitation or all the necessary parties have not been impleaded.

If the Deputy Director of Consolidation finds that the case requires further hearing he shall give notice to all the necessary parties irrespective of whether they were or were not impleaded in the application and after giving them reasonable opportunity of hearing pass such orders as he thinks fit. Where the

application in revision is not defective and is maintainable the exercise of revisional jurisdiction shall be at the instance of the Parties and not suo motu."

23. From the judgement of the Full Bench it necessarily follows that the Deputy Director of Consolidation has to examine the record of the proceedings before the subordinate authorities to decide whether it is a fit case for interference at the revisional stage. It, therefore, necessarily follows that such an opinion cannot be formed without examining the record of the proceedings before the courts below and, therefore, the submission of the learned counsel for the petitioner must necessarily be accepted.

24. Since it has been admitted by the learned counsel for the petitioner that the record of the proceedings of the subordinate consolidation authorities had neither been summoned nor was available before the Deputy Director of Consolidation when he passed the impugned order of the reversal, the writ petition merits interference.

25. Accordingly and in view of the above discussion, the impugned order passed by the Deputy Director of Consolidation which has admittedly been passed without summoning or perusing the record of the proceedings before the Consolidation Officer as the Settlement Officer, Consolidation, cannot be sustained and is, therefore, set aside. The writ petition is accordingly allowed and the impugned order dated 28.05.2015 is set aside. The matter is remanded back to the Deputy Director of Consolidation, respondent no. 1 to decide the revisions no. 1686 and 1688 afresh.

26. Insofar as the revision no. 1687, the third revision decided by the impugned order is concerned, the same has been dismissed but the revisionists, namely, Vinod has not challenged the order of dismissal. The impugned order, therefore, insofar as it relates to revision no. 1687 is not being interfered with.

27. The writ petition no. 59549 of 2015 involves an identical issue.

28. Shri S.C. Tripathi is counsel for the petitioner in this petition as well while Shri Rama Kant Tiwari appears for the respondents 2 and 5. Shri Manoj Kumar Yadav, appears for the respondent no. 8.

29. Although some of the respondents, namely, respondents no. 3, 4, 6, 7, 9 and 10 are not represented, yet as a purely legal issue has been raised in this petition which has already been decided in the connected writ petition, this writ petition is also being decided in the same terms without calling for any counter affidavit or issuing notices to the unrepresented respondents.

30. In this writ petition No. 59549 of 2015, the Revisional Courts record was summoned and was produced by learned Standing Counsel for perusal by this Court. Upon such perusal, the allegation in the writ petition that the lower court record was not before the Deputy Director of Consolidation when he decided the revision was found to be correct. The record was thereafter returned to learned Standing Counsel.

31. The contention of learned counsel for the respondents is that no injustice has been caused to the petitioner merely by the fact that the lower court record was not before the Deputy Director of Consolidation while he decided the revision exercising powers under Section 48 of the U.P. Consolidation of Holdings Act.

32. This contention is repelled in view of the foregoing discussion in Writ Petition No. 56524 of 2015.

33. This writ petition is also liable to be allowed and the order dated 05.10.2015 passed by the respondent no. 1 is liable to be quashed and the matter deserves to be remanded back for a fresh decision, to be passed after summoning and perusing the lower court record and after hearing all concerned.

34. The writ petition no. 56524 of 2015 is allowed in part. The order dated 05.10.2015 insofar as it relates to Revision Nos. 1686 and 1688 is set aside. This order will not apply to revision no. 1687 which has been dismissed vide the order impugned.

35. The writ petition no. 59549 of 2015 is also allowed and the order dated 05.10.2015 is set aside.

36. Both the matters are accordingly remanded back for passing fresh orders after summoning and perusing the respective lower court records and after hearing all concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2015

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

C.M.W.P. (PIL) No. 58620 of 2015

Anurag Misra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Yogesh Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-(PIL)-Manufacture, sale and use of Chinese Manjha-a metallic/nylon yarn-coat of crushed glass-makes it rajor sharp-harmonious to human being animal and birds-Principal Secretary to pass necessary direction-imposing ban-petition disposed of.

Held: Para-8
We clarify that by this order we are not imposing any ban on the flying of kites but are issuing necessary directions so that such material which causes grave danger to human beings, animals and birds as the petitioner has highlighted is not used. The danger and problem is not confined to Allahabad. Apart from the district of Allahabad, if the Principal Secretary (Home) shall issue a communication to the Collectors of each district containing directions in implementation of this order. The directions contained in this order are not intended to be an exhaustive catalogue. The State Government shall adopt all appropriate steps for enforcement in accordance with law, including necessary steps to prohibit manufacture, use and sale of "Chinese Manjha" in any form whatsoever.

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

1. The petition has been instituted as a public interest litigation to highlight the serious dangers to public safety that are being caused by the use of "Chinese Manjha" as an appendage to kites. The string or Manjha, it is stated, is made of metallic/nylon yarn with an abrasive coat of crushed glass gummed on it which makes it razor sharp. As a result, serious injuries are liable to be caused and are being caused. The petitioner initially relied upon a report published in the daily newspaper 'Hindustan' dated 25 September 2015 which indicated that a death had been

caused as a result of an accident due to the kite string. The kite string is also known to cause grievous injuries to birds.

2. The petitioner has, broadly, sought three reliefs:

(i) A prohibition on the manufacture or sale of the string;

(ii) Designation of areas for the flying of kites which would obviate dangers to public safety; and

(iii) Treatment of persons who are injured.

3. By the order of this Court dated 14 October 2014, the Collector and District Magistrate was directed to look into the matter and formulate steps to be taken to curb incidents such as those which are highlighted in the petition. In the meantime, a direction was issued to initiate steps to spread awareness among of the inherent danger involved, to prevent the use of Chinese Manjha and to adopt suitable measures to prevent accidents. In response, the Collector and District Magistrate states that the Commissioner, Allahabad Division, in pursuance of a representation which was received by him, directed the District Magistrate by a letter dated 29 September 2015 to take necessary action. After taking a legal opinion from the Joint Director of Prosecution on 9 October 2015, the Additional District Magistrate (City) issued an order on 5 November 2015 under Section 144 of the Code of Criminal Procedure Code, 1973 prohibiting the sale and use of "Chinese Manjha" in the entire city of Allahabad. Moreover, it has been stated that a joint team of executive magistrates and police officers have made surprise raids on various shops where such material is being sold and the material found in such raids has been confiscated. The District Administration, the Court has been informed, is taking all possible steps to prevent the sale and use of "Chinese Manjha" to prevent any such incident in future.

4. The seriousness of the problem is apparent from the fact that even after passing of the order of this Court dated 14 October 2015, incidents have been reported in the print media about deaths and injuries which have been sustained as a result of contact with the offending Manjha strings. For instance, the learned counsel appearing on behalf of the petitioner has placed on the record a copy of a report dated 20 October 2015 contained in the daily edition of 'Hindustan' which indicates that a man aged about 44 years sustained grievous injuries on the neck near the Iskon Temple as a result of an accident was caused due to injuries sustained from the Manjha string. Similarly, there is a report in the daily newspaper 'Dainik Jagran' dated 15 November 2015 stating that a young child has sustained serious injuries on the nose due to an accident sustained through contact with "Chinese Manjha". Various other news items have been placed for the perusal of the Court. These include a report published in 'Amar Ujala' dated 28 October 2015 in its Allahabad edition. There is also a subsequent report dated 21 October 2015 in the daily 'Hindustan'.

5. We are conscious of the limitations on the evidentiary value of such newspaper reports. However, having due regard to the element of public interest involved, we are of the view that the matter is serious enough to warrant appropriate action by the District Administration as we shall now indicate, at a wider state level, since the problem

may not be only confined to the city of Allahabad. The affidavit which has been relied upon by the District Administration contains a complaint which was submitted to the Commissioner, Allahabad Division. The complaint contains a summary of other incidents which have taken place in the past involving deaths of human beings and grievous injuries to birds as well. The representation indicates that in the preparation of the "Chinese Manjha", the use of iron and glass pieces is resorted to on plastic (instead of the use of conventional thread) which renders the Manjha extremely potent and capable of causing serious injuries.

6. In our view, the issue must be tackled not only by making sporadic raids, as has been done by the District Administration but first and and foremost, steps must be taken by the authorities to ensure that there is a complete prohibition on the manufacture of "Chinese Manjha" at a statewide level. Where any such activities are found to be carried out illegally, necessary enforcement action should be taken in respect of such establishments and for seizing all material. Secondly, a sustained awareness and publicity campaign should be carried out so as to ensure that members of the public, particularly the younger generation which indulges in the sport of flying kites particularly in and around the 'Makar Sankranti' festival is made conscious of the dangers involved. This should be ensured by carrying out a sustained publicity campaign, in the print and electronic media and by utilizing the social media to propagate public service messages.

7. The petitioner prays that wherever possible, it would be appropriate to designate specified places for flying kites so as to reduce the possibility of the danger involved. We are conscious of the fact that the sport of flying kites takes place across localities and even on the terraces of residential houses and there may be limitations on the power of the District administration to enforce such a regulation as sought, however desirable. The District administration may look into this aspect about designating one or more places during the Sankranti festival. We leave this to the District Magistrate to decide. Hence, we are of the view that basically the issue which needs to be addressed is in regard to prohibiting the manufacture, sale and use of material which is liable to pose a danger to human health and to birds and animals by the use of the "Chinese Manjha".

8. We clarify that by this order we are not imposing any ban on the flying of kites but are issuing necessary directions so that such material which causes grave danger to human beings, animals and birds as the petitioner has highlighted is not used. The danger and problem is not confined to Allahabad. Apart from the district of Allahabad, if the Principal Secretary (Home) shall issue a communication to the Collectors of each district containing directions in implementation of this order. The directions contained in this order are not intended to be an exhaustive catalogue. The State Government shall adopt all appropriate steps for enforcement in accordance with law, including necessary steps to prohibit manufacture, use and sale of "Chinese Manjha" in any form whatsoever.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ-A No. 59355 of 2012
connected with
Writ-A No. 60075 of 2012 and Writ-A No. 66199 of 2012

Dilip Kumar Shukla & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare, Sri Nisheeth Yadav

Counsel for the Respondents:
C.S.C.

Group 'D' Employees Service Rules 1985-Rule 19 (2), (3) and (4)-Dismissal of class 4th employee-non payment of salary-on ground select list bears signature of chairman of committee-other two members not signed-held-in absence of such requirement in absence of corrupt practices or selection made under influence of money-entire selection can not be canceled-the other ground regarding direction of High Court to absorb the retrenched employee of State Cement Corporation-not available as almost every petitioner the petitions in that writ petition have been already accommodate any where else and getting salary-held-dismissal order illegal-direction for salary given.

Held: Para-27
In the matter, the marks were awarded by all the three members separately. The respondents have not brought on record to indicate or suggest that there is any provision of signing final select list by all the members of the Selection Committee. Neither at the time of enquiry nor in the counter affidavit any irregularity or infirmity has been indicated by the respondents to suggest that the members of the Selection Committee had not awarded the marks independently. The final list was prepared by the Appointing Authority based upon the marks awarded by the Selection Committee and as such it does not contravene any clause of the Rules of 1985. While passing the impugned order, nothing has been averred to indicate that while finalising the select list by the Chairman, the marks awarded by two other members, have been manoeuvred or marks have been increased or decreased and as per her own whims and fancies the final select list had been prepared.

Case Law discussed:
[2009 (3) ADJ 42]; AIR 1970 SC 1269; 1992 AIR SC 952; AIR 1994 SC 2166; AIR 2001 SC 2196; 2002 AIR SC, 1119; (2005) 6 SCC 149; AIR 2006 SC 2571; AIR 2002 SC 1119

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

1. Heard Shri Ashok Khare, learned Senior Counsel assisted by Shri Siddharth Khare and Shri Nisheeth Yadav, learned counsel for the petitioners. Shri H.C. Pathak, learned Standing Counsel appears for the respondents.

2. As the controversy involved in all the writ petitions are similar, they are being decided by this common judgment.

3. The facts of Writ Petition No.59355 of 2012 are being taken as leading case for deciding the writ petitions.

4. By means of present writ petition, the petitioners have prayed for following reliefs:-

"(a) a writ, order or direction in the nature of certiorari quashing the

impugned order dated 12.10.2012 passed by Director of Education (Secondary), U.P., Lucknow (Annexure No.10) as also the order dated 20.10.12 issued by the District Inspector of Schools, Sonbhadra (Annexure No.11);

(b) a writ, order or direction of a suitable nature commanding the respondents not to cause any interference in the working of the petitioners as Class-IV employees under them and to pay the petitioners their regular monthly salary on the said post regularly every month;

(c) a writ, order or direction of a suitable nature commanding the respondents to disburse to the petitioners the arrears of their salary from the date of their appointment till date, within a period to be specified by this Hon'ble Court."

5. It appears from the record that the District Inspector of Schools, Sonbhadra issued an advertisement, which was published in the news paper 'Dainik Jagran' dated 27.05.2008 inviting applications for making appointments of 23 Class-IV employees in the district. The advertisement specified that the selection proceedings would be conducted on 18.6.2008 in the office of the District Inspector of Schools, Sonbhadra. All the petitioners being fully qualified and eligible had applied in pursuance to the aforesaid advertisement. Even though the advertisement had notified 18.6.2008 as the date of interview, the said interview stood adjourned and a notice to such effect was published by the District Inspector of Schools, Sonbhadra in the local newspaper. Thereafter, the selection proceedings were scheduled on 10.09.2008 and intimation thereof was given to the applicants by post.

6. All the petitioners participated in the selection proceedings. In the select list finalized by the District Inspector of Schools, Sonbhadra, the petitioners were included amongst the selected candidates for appointment. Based upon the aforesaid selection, appointment orders were issued to each of the petitioners in different colleges. The names of the petitioners were forwarded by the District Inspector of Schools, Sonbhadra to Principals of different institutions for issuance of appointment letters and ensuring joining of the selected candidates. Thereafter, appointment orders were issued to the petitioners either at the level of District Inspector of Schools, Sonbhadra himself or at the level of the Principal of the concerned Government Inter College in the year 2008. Pursuant to the appointment orders so issued, each of the petitioners joined at their respective place of posting and since then they have been continuously functioning and discharging duties. It is averred that the work and conduct of each of the petitioners has been fully satisfactory. Even though the petitioners have been appointed on the basis of regular selection and have been continuously working, no payment of salary has been made to the petitioners due to erroneous and misconceived objections.

7. The appointment orders issued to the petitioners by the District Inspector of Schools were referred to in the Writ Petition No.28398 of 2008 by the persons, who were displaced employees of U.P. State Cement Corporation and whose services stood terminated on account of winding up of U.P. State Cement Corporation. The writ petition filed by them was with regard to claim of their absorption. On 13.6.2008 an interim order was passed in the aforesaid writ petition, which reads as under:-

"Heard learned counsel for the parties.

Let counter affidavit be filed by the respondents within a period of six weeks. Rejoinder affidavit, if any, may be filed within two weeks, thereafter.

List in the 3rd week of August, 2008.

As per learned counsel for the petitioners, the petitioners be accommodated in government institutions. In District Mrizapur as their services were terminated in institution run by U.P. Cement Corporation because of winding up of U.P. Cement Corporation. The posts have now been advertised for taking up candidates from open market by ignoring the cases of existing Class-IV workers, who had lost their jobs because of winding up of U.P. Cement Corporation. It would not be appropriate to recruit fresh hands after terminating the services of existing personnel, who have put in substantial period of service in the institution.

Accordingly as an interim measure, it is provided that the petitioners services shall not be dispensed with and in direct recruitment process the posts held by them shall not be filled."

8. Learned counsel for the petitioner submits that there exist no prohibition under the said stay order against the selection proceedings being held with regard to vacant post. It is specifically stated that the posts against which the petitioners have been appointed were never held by the petitioners of the aforesaid writ petition. Even otherwise the aforesaid controversy involved in writ petition no.28398 of 2008 no longer survives in view of the fact that all the eight petitioners of the said writ petition have been granted absorption against different Class-IV posts and they are presently working and drawing salary. The absorption of such persons are made on the different posts other than the posts held by the petitioners. There exist no rational justification for not making payment of salary to the petitioners. Such inaction is despite repeated representations having been filed by the petitioners.

9. The payment of salary stood withheld on the objections contained in reference made by the Finance & Accounts Officer, Office of District Inspector of Schools, Sonbhadra by communication dated 9.6.2009 to the Director of Education (Secondary) seeking guidance with regard to releasing payment of salary to the petitioners. When nothing has been done with regard to release of salary of the petitioners, they were compelled to file a writ petition before this Court being Writ Petition No.23869 of 2011 (Dilip Kumar Shukla & Ors. v. State of U.P. & Ors.), which was finally disposed of on 20.1.2012 with following observations:-

"1. The only relief sought in the writ petition is that the responders be restrained from causing any interference in the functioning of petitioners as Class IV employee and to ensure payment of salary to them month to month.

2. Heard Sri Ashok Khare, Senior Advocate assisted by Sri Siddharth Khare for the petitioners and learned Standing Counsel for the respondents.

3. The petitioners' claim that an advertisement was published on 27.5.2008 by the District Inspector of Schools, Sonbhadra (hereinafter referred to as "DIOS") advertising 23 vacancies in Class IV. The last date of submission of application form was 12.06.2008 and the date of interview was notified as 18.06.2008. The petitioners appeared in the aforesaid selection and ultimately were appointed in various Government colleges by the letter of appointment issued by appointing authority. The names of selected candidates were recommended by DIOS to various Principals of Government colleges in Distric

Sonbhadra for appointment whereafter the Principals issues appointment letters. All the petitioners were appointed in November, 2008 and pursuant thereto they have joined and are working. There is no reason entitling respondents not to pay salary to the petitioners yet their salary has been withheld pursuant to reference made by Finance and Accounts Officer (in the office of DIOS) by letter dated 9.6.2009 to the Director of Education (Secondary) and thereafter nothing has been done.

4. A counter affidavit has been filed by respondents stating that the then DIOS sought permission of Joint Director of Education, Vindhyachal Mandal, Mirzapur vide letter dated 20.05.2008 for making 26 appointments of Class IV posts under general quota. The permission, as sought, was granted by Joint Director of Education vide letter dated 22.5.2008. Thereafter advertisement was issued and it is claimed that 3194 applications were received by the last date i.e. 18.6.2008. During this period 8 employees of Cement Factory Inter College, Churk, Sonbhadra preferred writ petition No.28398 of 2008 before this Court seeking their absorption as Class IV employees in Government colleges in which an interim order was passed by this Court on 13.6.2008 directing that 8 posts out of 23 shall not be filled up.

5. The selection thus proceeded, as claimed by DIOS but departmental received information that several malpractice and illegality were committed whereupon an enquiry was ordered to be conducted by Joint Director of Education, Jhansi Region Jhansi. It is said that enquiry officer has submitted report regarding selection proceedings and the matter is pending for final decision before Director of Secondary Education/State level.

6. Learned Standing Counsel submitted that enquiry officer found several irregularities and illegalities in the selection and therefore, respondents are not paying salary to the petitioners.

7. This Court has no reservation in observing that if there is any apprehension of malpractice in a selection, State is well within its right to proceed to conduct an enquiry but in the garb of such enquiry it cannot keep the matter pending sine die without any positive but quick decision. At least in a reasonable time the enquiry and the decision must have accomplished.

8. In the present case it is admitted by respondents that enquiry officer has submitted his report but final decision is yet to be taken by Director of Education (Secondary) and the State Government.

9. In view of the above, in my view, it would be appropriate to dispose of the writ petition in the following manner:

(i) The competent authority namely Director of Education (Secondary) and/or the State Government, as the case may be, shall take final decision in the matter of enquiry conducted in the selection and appointments of petitioners expeditiously but in any case not later than six weeks from the date of production of a certified copy of this order.

(ii) In case competent authority find that there was no irregularity in the selection and petitioners are entitled for payment of salary, their salary shall be released forthwith thereafter and entire arrears of salary shall be paid to them within a month from the date of taking such a decision.

(iii). In case competent authority takes decision otherwise, which is likely to cause prejudice to the petitioners in the matter of their appointment and continuance on the post, it shall take appropriate action in accordance with law after giving due opportunity of

hearing to all the petitioners and other similarly situated persons.

10. I order accordingly.
11. No order as to costs."

10. In compliance of the aforesaid order, an order dated 12.10.2012 has been passed by the Director of Education (Secondary) holding that there exist no justification for payment of salary to the petitioners after treating the appointments of the petitioners to be irregular. The sole reason was recorded in the aforesaid order that after the conclusion of the selection proceedings, the Chairman of the selection committee prepared the final consolidated select list under her own signature alone and such final select list did not contain the signatures of the remaining two members of the selection committee. The orders impugned further records that the aforesaid amounts to a contravention of Group-D Employees Service Rules, 1985 and the Group-D Employees Service Rules, 2008. A disciplinary action was also recommended against Dr. Richa Gupta, the appointing authority. Pursuant to the order dated 12.10.2012, the District Inspector of Schools, Sonbhadra has proceeded to issue an order dated 20.10.2012 whereby the appointments of 26 persons mentioned therein have been cancelled.

11. Learned counsel for the petitioners submits that the orders impugned have been passed in an arbitrary and discriminatory manner and also in violation of the principles of natural justice. It is specifically stated that in the hearing fixed for 23.4.2012, no actual hearing took place apart from recording the presence of the petitioners. No hearing was accorded by the Director of Education. The order impugned relies upon the reports of the Joint Director of Education and the District Inspector of Schools and copies of enquiry reports submitted by the different authorities. Reliance so placed is totally exparte to the petitioners as no copy thereof was supplied to the petitioners with opportunity to object the same.

12. The impugned order refers to Group-D Employees Service Rules, 1985 (in short "the Rules of 1985"), which has been annexed as Annexure No.12 to the writ petition. The procedure for selection is specified under Rule 19 of the Rules of 1985. Rule 19 (4) of the Rules of 1985 provides that the names in the select list shall be arranged according to the marks awarded at the interview. Under Rule 19 (2) and (3) thereof it has been provided that the members of the selection committee shall award their marks. There exists nothing under the Rules of 1985 either by way of explicit requirement or even by way of necessary intendment, which may require the final select list to be prepared under the joint signatures of all members of the selection committee. The preparation of the final select list by the appointing authority based upon the marks awarded by the members of the selection committee in no way contravenes any clause of the Rules of 1985. The entire selection has been conducted strictly in accordance with law and there is no infirmity in it.

13. Shri Ashok Khare, learned Senior Counsel submits that in the present matter the selection committee was constituted strictly in accordance with the Rules of 1985. The marks were awarded by all the three members separately. It is submitted that there is no provision of signing final select list by all the members of the Selection Committee. Neither at the

time of enquiry nor through the counter affidavit any irregularity or infirmity has been indicated by the respondents to indicate that the members of the Selection Committee had not awarded the marks independently. Only infirmity has been indicated in the selection process that the final list-tabulation was signed only by the Chairman of the Selection Committee. Therefore, no inference can be drawn that the entire selection was vitiated only on this ground alone.

14. Learned counsel for the petitioners, in support of his submissions, has placed reliance in Ram Prakash Singh & Ors. v. State of U.P. & Ors., [2009 (3) ADJ 42, the relevant portion of the judgment is reproduced as under:-

"On these facts the counsels appearing for the petitioners contend that quality point marks in descending order were given strictly in accordance with Rule 5 (3) of the Rules of 2002. The number of marks to be awarded on sports are provided for in the rules itself, and that there was no necessity to advert to the Government orders in that regard. Rule 5 (3) (c) provide for 5 marks, if a candidate had participated in international level sports : four marks for participating in national level sports ; three marks in State level sports and two marks in participating in University/College/School level sports. The selection committee was constituted strictly in accordance with Rule 6, which does not provide for signatures of all the members of selection committee on the final results, and for drawing category wise list for vertical and horizontal reservation. They would further submit that secrecy adopted by the District Panchayat Raj Officer in preparing the final select list and keeping it in safe custody and in getting appointment letter typed and dispatched could not be taken to be irregularities, which may vitiate the selection. The Rule 5 of the Rules of 2002 provides for complete procedure of selections. There is no complaint that advertisement was not carried out in daily newspaper having wide circulation and that vacancies were notified on the notice board and was not notified to the employment exchange. The marks of academic qualifications were correctly added and that wherever there was a mistake, the selection committee immediately corrected it. The marks for sports were awarded strictly in accordance with the Rule 5(3)(c) of the Rules of 2002, which provide for three marks for sportsman of State level as against 4 by the earlier Government order. Each member of the selection committee and the appointing authority was entitled to give the marks for interviews. There is nothing on record to show that any common basis or criteria was adopted by the selection committee in awarding minimum or maximum marks to any candidates. There is no provision of signing the final select list by all the members of the selection committee and that they had no grievance with regard to marks awarded by them to the candidates. Learned Counsel for the petitioner would further submit and were supported by Shri Ashok Khare, senior advocate appearing for Shri R. B. Sahu, the then Panchayat Raj Officer arrayed as respondent No. 6 that the adherence to secrecy and the typing of the appointment letters on the computer of the Deputy Director of the same department and their dispatch, which were entered in the dispatch register was not a doubtful act at all. The attempt to maintain secrecy and transparency was wrongly taken to be an attempt to vitiate the selections. The entire approach of the enquiry committee as well as the State Government was illegal. The arrest of the respondent No. 6 and other two clerks have been stayed by this Court in Writ

Petition No. 3303 of 2008. It is contended that the completely ex parte mala fide and baseless report was prepared on the dictate of the Private Secretary of the Hon'ble Minister, Director, Deputy Director and the District Magistrate, who were interested in selections of some persons. They could not lay their hands on the final select list and that the issuance of the appointment letters before they could influence the selections annoyed them."

15. Per contra learned Standing Counsel has defended the impugned orders and stated that they had been passed strictly in accordance with law and there is no infirmity in them. He further submits that the subject selection was conducted by the three member committee nominated by the District Magistrate by order dated 14.08.2008. The aforesaid Selection Committee had proceeded with the selection proceedings from 8.9.2008 to 10.10.2008. Each members awarded marks on separate sheets and after keeping the sheets in envelope, the envelope of each members was kept in the safe custody of the then District Inspector of Schools-Chairman of the Selection Committee on each date and the almirah was sealed with the signature of the three members. The Chairman of the Selection Committee behind the back of the two members of the Selection Committee has broken the seal of the almirah and opened the envelope kept in the safe custody and after perusing the marks awarded by each members, she has prepared a final select list, which bears only the signature of the Chairman of the Selection Committee and the final select list bears no signature of other two members of the Selection Committee nominated by the District Magistrate.

16. Learned Standing Counsel also submits that the District Inspector of Schools has not complied the order dated 13.6.2008 passed by this Hon'ble Court in Writ Petition No.28398 of 2008 in which the Court has directed that out of advertised posts eight seats will not be filled up by the recruiting authority, which is held by the petitioners in the aforesaid writ petition.

17. Heard rival submissions and perused the record.

18. The District Inspector of Schools, Sonbhadra had issued an advertisement, which was published in Hindi newspaper "Dainik Jagaran" on 27.5.2008 inviting applications for making appointment of 23 Class-IV employees in the district. Even though the advertisement notified 18.6.2008 as the date for interview, the said interview stood adjourned and a notice to such effect was published by the District Inspector of Schools, Sonebhadra in the local newspaper. Thereafter, the selection proceedings were scheduled on 10.9.2008 and the intimation thereof was given to the applicants by post. Admittedly all the petitioners participated in the selection process. The select list was finalised by the District Inspector of Schools and the names of petitioners were found in the select list. Based upon the selection, the appointment orders were issued to each of the petitioners for different Colleges and accordingly the name of the petitioners were forwarded by the District Inspector of Schools to the Principal of different institutions for issuing appointment letters and ensuring joining of the selected candidates.

19. It has also been brought on record to indicate that in pursuance of the appointment orders so issued each of the petitioners joined at their respective place of posting and since then they have been

continuously functioning and discharging their dues. In compliance of the order passed by this Court in Writ Petition No.23869 of 2011 (Dilip Kumar Shukla & ors vs. State of UP & ors), the present impugned order has been passed by the Director of Education (Secondary) holding that there exists no justification for payment of salary to the petitioners after treating the appointment of petitioners to be irregular.

20. A bare perusal of the impugned order as well as the record, it clearly gives an impression to the Court that the sole reason was recorded in the order dated 12.10.2012 that after the conclusion of selection process, the Chairman of the Selection Committee prepared the final consolidated select list under her own signature alone and said final select list did not contain the signature of remaining two members of the Selection Committee. The order impugned further records that the same was in contravention of Group 'D' Service Rules, 1985 and Group 'D' Service Rules, 2008 and as such the disciplinary proceedings were recommended against Dr. Richa Gupta, the then District Inspector of Schools, Sonebhadra-the appointing authority. Pursuant to the order dated 12.10.2012 the District Inspector of Schools, Sonebhadra had proceeded to issue an order dated 20.10.2012 whereby the appointments of 26 persons mentioned therein have been cancelled.

21. The Court had examined the records. Except the aforesaid allegation, no other illegality, favourtism or nepotism has been alleged by the respondents and further no allegation has been levelled that the recruitment was manoeuvred for any extraneous consideration including monetary consideration. This is not the case that the recruitment were made without following the due procedures prescribed under the Rules, such as, the recruitment have been made without the mandatory advertisement or by overlooking the mandatory eligibility requirement. In other words the illegality to enable cancellation of the entire recruitment was only to the extent that the final select list was not prepared with the signatures of two other members whereas only the District Inspector of Schools, Sonebhadra had signed the same.

22. In the present matter, there was an open invitation through advertisement. Admittedly, the petitioners appeared in the selection process and finally, they were selected and accordingly appointment letters had also been issued in their favour. No plausible reasons were assigned by the respondents except the aforesaid infirmity, which has been alleged to suggest that at any point of time any extraneous considerations were there in the matter or the petitioners did not have the minimum eligibility for giving an appointment. Even no full fledged enquiry has been initiated in the matter. It is not the case of the respondents that the infirmities were so widespread and interwoven that it was impossible to segregate the tainted and untainted despite of conscious and bonafide efforts. A bare perusal of the record, it is apparent that in the present matter, no sincere efforts were made to find out whether the entire selection process was unfair, not transparent and was not held in accordance with law. It is not the case of the respondents that there were large scale and pervasive irregularities and illegalities in the matter and as such the respondents had decided as a policy matter to cancel the entire selection process. In pursuance of the advertisement, large scale of candidates had participated and finally the petitioners were selected, even in such situation the individual notices were

also required to be issued to the petitioners prior to the cancellation of their appointments.

23. Learned Standing Counsel has placed reliance on the judgements reported in AIR 1970 SC 1269, Bihar School Examination Board Vs. Subhas Chandra and others, 1992 AIR SC 952, Karnataka Public Services Commission Vs. B.M. Vijay Shankar, AIR 1994 SC 2166, Krishana Yadav Vs. State of U.P. and others, AIR 2001 SC 2196, Union of India Vs. Tarun Kumar Singh & others, 2002 AIR SC, 1119, Union of India Vs. O. Chakradhar, (2005) 6 SCC 149, State of A.P. Vs. V.T. Sury Chandra Rao and AIR 2006 SC 2571 Inderpreet Singh Kahlon Vs. State of Punjab and others.

24. A bare perusal of these judgements reveal that in cases where the entire selection was found to be vitiated/tainted and was cancelled, in such cases, it was not necessary to give individual notices. In cases where majority of examinees had adopted unfair means, the whole examination could be cancelled, as the law laid down by Hon'ble Supreme Court in Union of India v. O. Chakradhar AIR 2002 SC 1119. Even in that case no individual notice is required.

25. However, in the present case, the Court is of the view that the respondents could make every endeavour to scrutinize the records and it was expected from the respondents to provide an opportunity of hearing to the affected persons. But in the present matter, no detailed scrutiny has been made and at no point of time any allegation has been levelled against the petitioners that they were found unfit, ineligible and unsuitable for their appointment.

26. While passing the impugned order, a reliance has been placed on the judgment of this Court passed in Writ Petition No.28398 of 2008, which no longer survives. In view of the facts enumerated as above in detail that all the eight petitioners of the said writ petitions have been absorbed against different Class-IV posts and the absorption of such persons are made on different posts other than the posts held by the petitioners and as such, there was no rational or justification for not making payment of salary to the petitioners. It is also apparent from the pleading that some disciplinary action has been initiated against Dr. Richa Gupta, the then District Inspector of Schools, Sonebhadra but nothing has been indicated either in the counter affidavit or by learned Standing Counsel regarding the outcome of the said disciplinary action against the erring officer, whereas learned counsel for the petitioner has vehemently submitted that nothing has happened against the said officer and at the cost of some infirmity or illegality made by the then District Inspector of Schools, Sonebhadra the entire selection cannot be cancelled.

27. In the matter, the marks were awarded by all the three members separately. The respondents have not brought on record to indicate or suggest that there is any provision of signing final select list by all the members of the Selection Committee. Neither at the time of enquiry nor in the counter affidavit any irregularity or infirmity has been indicated by the respondents to suggest that the members of the Selection Committee had not awarded the marks independently. The final list was prepared by the Appointing Authority based upon the marks awarded by the Selection Committee and as such it does not contravene any clause of the Rules of 1985. While passing the impugned order, nothing has been averred to indicate that while finalising the select list by the Chairman, the marks awarded by two

other members, have been manoeuvred or marks have been increased or decreased and as per her own whims and fancies the final select list had been prepared.

28. In view of the above, the impugned orders cannot sustain and are hereby set aside. The writ petitions are accordingly allowed. The petitioners are entitled to be reinstated forthwith.

29. So far as Shri Dilip Kumar Shukla (since deceased)-petitioner no.1 in Writ-A No.59355 of 2012 is concerned, he has been substituted by his wife Smt. Seema Devi by order dated 6.10.2015 and at this stage there is no occasion for reinstatement of petitioner no.1, as such Smt. Seema Devi wife of Shri Dilip Kumar Shukla will be entitled for all the consequential benefits as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2015

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

Writ-A No. 59582 of 2009

Moti Lal Nehru Medical College Teachers Asso. Allahabad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh, Sri Chandreshwar Prasad, Sri G.K. Malviya, Sri R.D. Tiwari, Sri V.K. Singh.

Counsel for the Respondents:
C.S.C., Sri Ashok Khare, Sri C.S. Singh, Sri Kapil Rathore, Sri R.K. Upadhya, Sri S.D. Kautilya, Sri Siddharth Khare, Sri Vikas Budhwar, Sri Yogesh Agarwal.

(A)Constitution of India, Art.-226-Writ Petition-maintainability-petitioner being teacher governed by U.P. State Medical College Teachers Service Rules 1990-objecting induction of Doctors working on deputation basis governed by Provincial Medical Health Services Rules 2004-after commencement of Central University-petition by individual as well as on behalf of Association (Registered) during pendency of writ petition-whether maintainable?-held-'Yes'.

Held: Para-12
So far as the issue of maintainability of the present writ petition is concerned we may record that the petitioner no.1 which was an unregistered society has since been registered during the pendency of writ petition on 16.11.2009. The writ petition as on date is on behalf of a registered Association, and therefore, the objection of Sri Khare is, therefore, more technical than substantive in nature. We are further of the opinion that both the Association as well as the petitioner no.2 have every right to see that persons who are not Members of the Cadre of U.P. State Medical College Teachers Rules, 1990 are not inducted through back door into the said Cadre of Teachers. They have locus to challenge the action of the State Government which leads to such illegal induction inasmuch as every Member of the Cadre has a right to ensure that the Cadre contains only those persons who are legally appointed into the Cadre and not strangers having no right to enter the Cadre under the relevant service rules. For all the said reasons, the first objection raised on behalf of Sri Khare stands rejected

(B) Constitution of India, Art.-226-Right of Depunist-Explained Teacher working in Swaroop Rani Medical College being governed by Provincial Medical Service-after end of deputation period-could claim their absorption as Associate Profession in Central University Allahabad?-held-'No'-reasons explained.

Held:Para-29

Considering the provisions of the applicable Service Rules of 1990, referred to above, as well as the ratio of law laid down by the Apex Court, we have no doubt that respondent nos.5 to 8 and 10, who were members of P.M.S. Cadre and had been sent on deputation to the Medical College, could not have been absorbed as Associate Professors in the Cadre of Teachers of U.P. State Medical Colleges, and their absorption in the Medical Colleges as well as subsequent promotions etc. are wholly without an authority of law.

Case Law discussed:
2007 (5) SCC 580; 2014 (1) ADJ 578; (1980) 1 SCC 149; 1994 SCC Supl. (1) 44

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

1. This writ petition has been filed by the Moti Lal Nehru Medical College Teachers Association through its Secretary and by Dr. Dileep Chaurasiya, who is working as Professor in the same Moti Lal Nehru Medical College and is alleged to be Secretary of the Association. The petitioners before this Court seeks quashing of the orders dated 29.10.2009, 15.06.2009, 31.01.2009 and dated 29.10.2009.

2. Facts, in short, leading to the present writ petition are as follows:-

(a). Moti Lal Nehru Medical College, Allahabad (hereinafter referred to as "Medical College") was originally the Faculty of Medicines of the University of Allahabad (when it was a State University), but subsequently it was converted into a Government Medical College. The University of Allahabad continued to be the examining body only.

(b). In the State of Uttar Pradesh, Medical Officers to be appointed for various District Hospitals and other Government dispensaries are selected by the U.P. Public Service Commission in accordance with U.P. Medical and Health Service Rules, 1945, as amended and substituted by Medical and Health (Group B) Services Rules, 1995 and now known as U.P. Medical and Health Services Rules, 2004 (hereinafter referred to as "Rules, 2004"), which have been enforced w.e.f. 11.08.2004. The Doctors appointed under the said Rules are commonly known as Members of Provincial Medical Health Services (hereinafter referred to as "P.M.S. Cadre").

(c). So far as the teaching Faculty to be appointed in Government Medical Colleges are concerned, their appointment and service conditions are regulated by U.P. State Medical Colleges Teachers Service Rules, 1990 (hereinafter referred to as "Rules, 1990").

(d). It is not in dispute that the minimum qualifications prescribed for the post covered under the P.M.S. Cadre Rules and those applicable to the Teachers of Medical Colleges are different. The petitioner no.1 before us is the Association of Cadre Members covered by the Rules, 1990.

(e). The respondent nos.5 to 8 and 10 are persons who were selected by the U.P. Public Service Commission for the P.M.S. Cadre and these persons were sent on deputation to Moti Lal Nehru Medical College at Allahabad on various dates prior to the year 2005.

(f). The records reflect that the sending of these respondent nos.5 to 8 and 10 was for a fixed term, which was extended from time to time.

(g). On 19.07.2005, the University of Allahabad was declared to be a Central University by an Act of Parliament being Act No. 26 of 2005.

(h). The respondent nos.5 to 8 and 10 are stated to have submitted their option for being absorbed as the Teachers of the

Central University and because of the pendency of their applications in the matter of such absorption the State Government permitted them to continue at the Moti Lal Nehru Medical College, Allahabad.

(i). We may record that this exercise of option by respondent nos.5 to 8 and 10 was in pursuance of an interim order dated 23.03.2007 passed in Public Interest Litigation No.32844 of 1997. The petition is stated to have been decided under the judgment and order dated 16.12.2011. The relevant part of the interim order dated 23.3.2007, which deals with the exercise of option, is being reproduced herein below:-

"The MD Eye Hospital matter has attracted the attention of the Court to many such deputationist of the State Government, who are still working in the Medical College and its Associated Hospitals. They have no lien on the post and that their deputation should not have exceeded beyond the date, when the MLN Medical College and its associated hospitals became a part of the University. Their options for absorption have to be considered by the University in consultation with the State Government. In the circumstances, all those doctors and employees of the State Government on deputation to MLN Medical College and its Associated Hospitals, will be allowed to continue and will draw their salaries for the University only if they have given their option to accept the terms and service conditions of the University and are relieved by the State Government to be absorbed in the service of the University by the University in accordance with the ordinances to be made by the University in this regard. Any teacher, officer or employee, who do not opt to do so may be relieved by the University to join back in the State Government."

(j). No finding was returned by the High Court in the said P.I.L. with regards to the right of respondent nos.5 to 8 and 10 to be absorbed as the Teachers of the Central University or otherwise nor any issue in that respect was examined in the final judgment. We may also record that the interim order, which referred to the exercise of option by persons like the respondents for being absorbed as Teachers of the Central University, itself records that the absorption was to be considered as per the Ordinances to be made by the University and in consultation with the State Government.

(k). With reference to Act No. 26 of 2005, it may be noticed that Moti Lal Nehru Medical College, Allahabad was included as a University College under Statute 30 sub-clause 4 of the First Statute of Allahabad University, which were framed by the Central Government, and were made part of the Act itself as Schedule 1. Relevant Statute 30 sub-clause 4 is being quoted herein below:-

"30(4) The following shall be the University Colleges, namely:-

The Motilal Nehru Medical College and Swarup Rani Nehru Hospital, Allahabad."

(l). The State Government was not satisfied with the said institution being declared to be a University College of the Central University. The matter in that regard was taken to the Apex Court in Civil Appeal No. 1812 of 2007, wherein it was directed that the issue as to whether the college and the associated Hospital should continue as a State Government College or should be a University College belonging to the University must be settled between the University, the State and the Union at the earliest having regard to the statutory provisions, and till then status quo was directed to be maintained. The oder of the

Apex Court relevant for our purposes is being quoted herein below:-

"The issue as to whether the College and the associated Hospital should continue merely as a constituent State Government College affiliated to the University, or should be a University College belonging to the University, as also questions relating to its administrative control, financing and other related issues shall be settled by the University, the State and the Union of India at the earliest having regard to the relevant statutory provisions. Till then, status quo, as on today, shall continue.

The Appeal is disposed of accordingly."

(m). The matter was examined between the University, the State Government and the Central Government, and ultimately Notification dated 16.07.2008 was issued whereby Statute 14.1(iv), Statute 14(6) and Statute 30(4) of the First Statutes of Allahbad University were repealed. For ready reference, the Notification dated 16.07.2008 is reproduced herein below:-

"The Government of India, Ministry of Human Resource Development, Department of Higher Education, Shastri Bhawan, New Delhi, has communicated, vide letter No.3214/2007-Desk(U) dated: the 9th July, 2008 (which has been received on 15th July, 2008), that H.E. The President, in her capacity as the Visitor of University of Allahabad, in exercise of the powers vested in her under Section 28(5) of the University of Allahabad Act, 2005, has been pleased to repeal the following Statues of the University:

(i) Statute 14(1)(iv) relating to the Faculty of Medicine.

(ii) Statute 14(6) relating to the Departments under the Faculty of Medicine.

(iii)Statute 30(4) relating to the Motilal Nehru Medical College and Swarup Rani Nehru Hospital. Allahabad being a University College of the University.

Accordingly the "Motilal Nehru Medical College and Swarup Rani Nehru Hospital Allahabad" ceases to be a University College of the University, with immediate effect."

(n). It is not in dispute that subsequent to 16.07.2008 the Moti Lal Nehru Medical College and Swarup Rani Nehru Medical Hospital are under the administrative and supervisory control of the State Government. The University of Allahabad has even ceased to be the examining body. The college is now affiliated to Shahuji Maharaj Medical University, Lucknow. It is also not in dispute that all Teachers and Staff of Moti Lal Nehru Medical College and Swarup Rani Nehru Medical Hospital including respondent nos.5 to 10 are being paid salary by the State Exchequer.

(o). It is admitted to the respondents nos.5 to 10 that they are drawing salary from the State Exchequer subsequent to the Notification dated 16.07.2008.

(p). The petitioners in view of the aforesaid facts contend that since the respondent nos.5 to 8 and 10 are Members of the P.M.S. Cadre and were working on deputation at the Medical College at Allahabad and further since the maximum period of deputation has expired with reference to the order of State Government itself, they must be repatriated to their parent department, and they can no longer be permitted to continue at Medical College at Allahabad. They seek quashing of the orders referred to above, wherein directions were issued for the continuance of respondent nos.5 to 8 and 10 at Medical College at Allahabad till the issue of absorption was

finally determined upon and ultimately under the impugned order dated 29.01.2009 the State Government has directed that respondent nos.5 to 8 and 10 stand absorbed in the service of the Medical College, their lien in P.M.S. Cadre ceases, and they would be treated as Teachers of Medical College.

3. Sri G.K. Singh, learned Senior Advocate assisted by Sri G.K. Malviya, Advocate on behalf of the petitioner, has submitted before us that the only mode and manner of appointment for Teachers in Medical College, as has been provided for, is by direct recruitment on the recommendations of the U.P. Public Service Commission under the U.P. State Medical Colleges Teachers Service Rules, 1990. There is no provision for appointment by way of deputation under the Rules, therefore, the respondent nos.5 to 8 and 10 must be repatriated to their parent department. Submission is that the order of the State Government dated 29.01.2009 cannot be legally sustained. In support of his contention Sri G.K. Singh has relied upon the judgment of the Apex Court in the case of Arun Kumar and Others Vs. Union of India and Others1, particularly paragraph 11 thereof.

4. The stand taken on behalf of the petitioner is contested by Sri Ashok Khare, learned Senior Advocate assisted by Sri Vikas Budhwar, Advocate on behalf of the respondent nos.5 to 8 and 10 as well as on behalf of respondent no.9. Sri Ashok Khare submitted before us that once the respondent nos.5 to 8 and 10 had exercised their option in terms of the order of the High Court and they had been paid salary by the Central University of Allahabad between the period 2006-2008, they shall be deemed to have been recognized as University Teachers/declared as Teachers of the University, within the meaning of Section 7 sub clause (vi) and (vii) respectively of Act No. 26 of 2005. It is explained that once the respondents are recognized as University Teachers/declared as Teachers of the University, they would be treated to be as the Teachers of the Medical College which was declared to be a University College under Statute 30(4) of the First Statute of the University and even if vide Notification dated 16.07.2008 the Statute 14.1(iv), and Statute 14 (vi) as well as Statute 30(iv) have been repealed, their rights as Teachers of the Medical College would be saved in view of Section 6 of the General Clauses Act.

5. It is his case that the rights of the respondents as Teachers of the Medical College stands established/crystallized with the payment of salary from the Central University, subsequent to the exercise of their option for being treated/declared as Teachers of the Central University. Sri Khare has also referred to the definition of the University recognized Teachers as contained in Section 3 sub clause (z) as well as to the definition of University College as contained in Section 3 sub clause (x). For ready reference, the sections relied upon i.e. 3(x), 3(z), 7(vi) and 7(vii) are being quoted herein below:-

"3(x) "University College" means a college or an institution maintained by the University or admitted to the privileges of the University as a Faculty;

3(z) "University recognized teacher" means a teacher recognized by the University for imparting instruction and conducting research in a college or institution admitted to the privileges of the University;

7.The university shall have the following powers, namely:-

7(vi) to recognize persons as University recognized teachers;

7(vii) to declare persons working in any other University or organization, a teachers of the University;"

6. It is also the case of Sri Khare that even otherwise the rights of the respondents are protected under Section 5 sub clause (d) of the Act No. 26 of 2005. The State Government is, therefore, justified in passing the order dated 29.01.2009 wherein it has been held that the respondents stand absorbed as Teachers of the Medical College and they have lost their lien in the P.M.S. Cadre.

7. Sri Ashok Khare also submitted before us that petitioner no. 1 was an unregistered society at the time the writ petition was filed, therefore, it is not maintainable. So far as the petitioner no. 2 is concerned, it is stated that he is working in a different department and can have no objection to the continuance of respondent nos.5 to 8 and 10, as they are working in different department. Therefore, the writ petition at their behest be dismissed.

8. Sri Khare also referred to the judgment passed in writ petition no. 53934 of 2013 in the case of Dr. Sidharth (respondent no. 10 before us) Vs. State of U.P. and Another2 wherein a Division Bench of this Court has provided parity in the matter of absorption, at par with Dr. D. C. Srivastava, who is respondent no.5 to the present petition. It is, therefore, submitted that the right of absorption which has been recognized by the Division Bench in favour of Dr. Sidharth cannot be undone by this Court while hearing collateral proceedings.

9. The Standing Counsel on behalf of the State Authorities has supported the order of the State Government dated 29.01.2009, for the reasons which have been recorded therein.

10. The court has been informed that a set of written submissions has been filed but these written submissions were not asked for by this Court nor were placed before the Court, till the judgment was delivered in the open Court. We are, therefore, confining ourselves to whatever has been argued before us only.

11. Having heard counsel for the parties and examined the records available, we are of the opinion that following issues require determination by this Court in the present petition:-

a) Whether the writ petition, as presented before us, is maintainable or not?

b) Whether under the Act No.26 of 2005 any option from any Teacher of the College mentioned in the Act or Statute was required to be called for or not?

c) Can the High Court, by means of an order passed in writ, create a right for the Members of P.M.S. Cadre for opting for the service of the Central University, without their being any Statutory provision in that regard, and what would be the effect of such an interim order once the writ petition is finally decided ?

d) Whether in the facts of the case there has been any order by the University accepting the option, if any, exercised, and whether the alleged right of respondent nos.5 to 8 and 10 was inchoate on the date the Notification for 16.07.2008 for repealing of the Statute has been enforced ?

e) Whether Section 6 of the General Clauses Act would save such inchoate rights, and whether the intention, which follows from the repeal of the Statutes 14.1(iv), 14(vi) and 30 (iv) of the First Statutes of the Allahabad University necessarily, lead to a situation that respondent nos.5 to 8 and 10 must be deemed to have been continued on deputation in the Medical College at Allahabad, and that no rights of absorption have been granted in their favour ?

12. So far as the issue of maintainability of the present writ petition is

concerned we may record that the petitioner no.1 which was an unregistered society has since been registered during the pendency of writ petition on 16.11.2009. The writ petition as on date is on behalf of a registered Association, and therefore, the objection of Sri Khare is, therefore, more technical than substantive in nature. We are further of the opinion that both the Association as well as the petitioner no.2 have every right to see that persons who are not Members of the Cadre of U.P. State Medical College Teachers Rules, 1990 are not inducted through back door into the said Cadre of Teachers. They have locus to challenge the action of the State Government which leads to such illegal induction inasmuch as every Member of the Cadre has a right to ensure that the Cadre contains only those persons who are legally appointed into the Cadre and not strangers having no right to enter the Cadre under the relevant service rules. For all the said reasons, the first objection raised on behalf of Sri Khare stands rejected.

13. So far as issue nos. (b) to (e) are concerned, they are inextricably interwoven with each other and are therefore being taken up together. We have perused Act No. 26 of 2005, as well as Statutes framed therein, which were included as Appendix 1 to the Act itself. We find that there is no provision in the Act or the statute asking for any option from any Teacher working in any College covered by Statute 30 for being absorbed in the employment of Central University.

14. In our opinion the High Court can not create a new source for being inducted as Teacher of the Central University, by permitting those who were working on deputation in the Medical College at Allahabad to submit their option for such absorption as Members of the Central University. But we may not dilate any further on the said aspect in the matter, inasmuch as even if such option could have been exercised or has been exercised under orders of this Court, we are of the opinion that no indefeasible right was created for absorption of respondent nos.5 to 8 and 10, merely by exercise of such option, and by mere payment of salary to them, during the period the issue with regard to continuance of Swarup Rani Nehru Hospital and Moti Lal Nehru Medical College being University Colleges was being agitated and contested by the State Government. The matter was engaging the attention of the Supreme Court. At best, in our opinion, inchoate right in respondent nos.5 to 8 and 10 was created only for the purpose of making an application for consideration of their claim for being treated as Teachers of the University, on the Medical College being declared to be a University College, and nothing beyond it. Such inchoate right in the petitioner lost life with the issuance of Notification dated 16.07.2008, when Statute 14 and Statute 30(iv) were amended and declared to have been repealed.

15. We may also note that the option as was exercised by respondent nos.5 to 8 and 10 was with reference to the interim order of this Court dated 23.03.2007 passed in Public Interest Litigation No. 32844 of 1997 as noticed above. The order of the High Court itself records that the issue of absorption shall be considered by the Central University and State Government in accordance with the Ordinances to be framed by the University in this regard. It is, thus, clear that the consideration of option exercised by respondent nos.5 to 8 and 10 was dependent upon the Ordinances to be framed by the University.

16. It is nobody's case that any Ordinance had been framed by the Allahabad

University in the matter of absorption of Teachers of Moti Lal Nehru Medical College/respondent nos.5 to 8 and 10 at any point of time either before the notification dated 16th July, 2008 or subsequent thereto. It is, thus, clear that absolutely no right was created in the respondent nos.5 to 8 and 10 merely because submission of options under the order of High Court, what to talk of crystallized right.

17. We may record that Section 6 of the General Clauses Act only saves such rights, which get crystallized in favour of a person, under the old provision, prior to its repeal. Section 6 of the General Clauses Act does not save inchoate rights. The legal position in that regard has been settled by the Apex Court in the case of M.S. Shivananda Vs. Karnataka State Road Transport Corporation and others3. Relevant paragraph nos. 13 to 16 of the judgment are reproduced:-

"13. It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advantage of the provisions of the repealed ordinance, is not a right accrued. Sub-section (2) of Section 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance. The legislature has the competence to so re-structure the Ordinance as to meet the exigencies of the situation obtaining after the taking over of the contract carriage services. It could re-enact the Ordinance according to its original terms, or amend or alter its provisions.

14. What were the 'things done' or 'action taken' under the repealed Ordinance ? The High Court rightly observes that there was neither anything done nor action taken and, therefore, the petitioners did not acquire any right to absorption under sub-clause (3) to Clause. 20. The employees of the former contract carriage operators in normal course filled in the proforma giving their service particulars and reported to duty. This was in the mere 'hope or expectation' of acquiring a right. The submission of these 'call reports' by the employees did not subject the Corporation to a corresponding statutory obligation to absorb them in service. As a matter of fact, nothing was done while the ordinance was in force. The Act was published on March 12, 1976. On May 29, 1976, the Corporation sent up proposals for equation of posts to be filled in by the employees of the former contract carriage operators. The meeting of the Committee set up by the Government for laying down the principles for equation of posts and for determination of inter-se seniority, met on June 2, 1976. The Committee decided that even in the case of helpers-cleaners, there should be a 'trade test' and' the staff cleared by the Committee for the posts of helper 'B', helper 'A' and assistant artisans should be on the basis of their technical competence, experience, ability etc. The Committee also decided that all other employees of contract carriage operators, who were eligible for absorption, should be interviewed by that Committee for the purpose of absorption on the basis of experience, ability, duties and responsibilities. These norms were not laid down till June 2, 1976. Till their actual absorption, the employees of the erstwhile contract carriage operators had only an inchoate right.

15. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere 'hope or expectation of', or liberty to apply for, acquiring a right. In Director of Public Works v. Ho Po Sang (1961)2 ALL ER 721, 731 (PC) Lord Morris speaking for the Privy Council, observed:

"It may be, therefore, that under some repealed enactment, a right has been given, but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not." (Emphasis supplied)

It must be mentioned that the object of Section 31(2) (i) is to preserve only the things done and action taken under the repealed Ordinance, and not the rights and privileges acquired and accrued on the one side, and the corresponding obligation or liability incurred on the other side, so that if no right acquired under the repealed ordinance was preserved, there is no question of any liability being enforced.

16. Further, it is significant to notice that the saving clause that we are considering in Section 31(2)(i) of the Act, saves things done while the ordinance was in force; it does not purport to preserve a right acquired under the repealed ordinance. It is unlike the usual saving clauses which preserve unaffected by the repeal, not only things done under the repealed enactment but also the rights acquired thereunder. It is also clear that even Section 6 of the General Clauses Act, the applicability of which is excluded, is not intended to preserve the abstract rights conferred by the repealed Ordinance. It only applies to specific rights given to an individual upon the happening of one or other of the events specified in the statute."

18. We may also examine the claim of respondent nos.5 to 8 and 10 under Act No.26 of 2005 viz-a-viz Teachers of the University, as well as the Teachers of the Degree Colleges and other Colleges, which were earlier affiliated college of the University of Allahabad, prior to it being declared a Central University. We find that Statute 14 provides for the faculties of the University, Statute 14 (1) and (iv) talks of the Faculty of Medicines while Statute 14(vi) talks of the Departments which are to be part of the Faculty of Medicines. Statute 14 (iv) and 14 (vi) has since been deleted. Similarly, we find that the Statute 30 declares the Institute of Inter-Disciplinary Studies, Institute of Professional Studies and the National Centre of Experimental Mineralogy and Petrology to continue as University Institutions. The Centre of Behavioural and Cognitive Sciences has been declared to be an independent Centre of the University. The Institute of Correspondence Courses and Continuing Education has been declared as a temporary self-financing University Institute. The Moti Lal Nehru Medical College and Swarup Rani Nehru Hospital were declared to be a University College under Statute 30 (iv) while the Govind Ballabh Pant Social Science Institute, Allahabad, the Harish Chandra Research Institute of Mathematics and Mathematical Physics, Allahabad and the Kamla Nehru Postgraduate Medical Institute, Allahabad was declared to be the constituent institutions of the University, while 11 Degree Colleges were declared as constituent colleges.

19. We may further record that Statute 30 (iv), which declares the Moti Lal Nehru Medical College and Swarup Rani Nehru Hospital, as University College, has since been repealed. From the definition of University College quoted above, it is clear that only such College or Institution maintained by the University, are entitled to the privileges of the University.

20. Once Moti Lal Nehru Medical College and Swarup Rani Nehru Hospital have been taken away from the Statute, they

cease to be covered by the definition of University College, as University of Allahabad neither maintains it nor has admitted it to the privileges of the University.

21. It may be noted that University recognized Teachers are defined under Section 3(z). A power has been conferred upon the University of Allahabad (Central University) to recognize persons as University recognized Teachers under Section 7(vi) and to declare persons working in any other University or Organization as Teachers of the University under Section 7(vii). It will be seen that the Acts and the Statutes do not confer any power upon the University to recognize a person as a Teacher of any of the constituent Institutions of the University or of the constituent Colleges of the University as well as of the University College itself. The power is confined to recognition of a person as a University recognized Teacher only.

22. Similarly, Section 7(vii) confers a power upon the University to declare a person who is working in any other University or any other Institution as University Teacher. We may record that this Section also does not confer power upon the University to recognize any person as a Teacher of a constituent college, as the recognition can only be as a Teacher of the University.

23. We are recording this only for the purpose that even if the entire case as set up by respondent nos. 5 to 8 and 10 is accepted on the face value that they be absorbed as the Teachers of the University of Allahabad, then such absorption would mean that they become Teachers of the University and not Teachers of the Medical College as is claimed by them. The finding is in addition to the basic finding that so far as respondent nos.5 to 8 and 10 are concerned, they were never recognized as Teachers of the University, nor they were declared as Teachers of the University College. There has been no recognition or declaration as Teachers of the University in respect of respondent nos.5 to 8 and 10 at any point of time.

24. Mere payment of salary by Central University for some period when the matter was under consideration with regard to the status of Medical College before the High Court/Apex Court will not mean that respondent nos.5 to 8 and 10 stand declared/recognized as Teachers of the University or there has been a declaration in their favour, as Teacher of the University.

25. The State Government appears to have been completely misread and misconstrued the provisions of Act No. 26 of 2005 and the First Statute framed thereunder while dealing with exercise of option by respondent no.5 to 8 and 10, for the conclusion that they had lost lien under P.M.S. Cadre, as they stood merged as the Teachers of the Medical College at Allahabad. There has been complete non-application of mind at the hands of the State Government viz-a-viz the provisions of the Allahabad University Act, 2005 and the First Statute framed therein.

26. So far as the judgment in the case of Dr. Sidharth is concerned, it proceeds on the ground of parity to be provided to Dr. Sidharth viz-a-viz Dr. D.C. Srivastava. Once we have come to the conclusion that Dr. D.C. Srivastava himself never got declared as a Teacher of the University under Section 7(vii) of the Act No.26 of 1995, the question of Dr. Sidharth being treated as a Teacher of the University of Allahabad on account of parity also does not survive. Even otherwise the said judgment does not deal with the issues, which have been raised before us on

behalf of the petitioner. The judgment is binding only in respect of the issues raised, contested and decided.

27. This Court made pointed query from the learned counsel for the petitioner as to under which cadre respondent nos.5 to 8 and 10 would stand absorbed in terms of the plea as set up before this Court. Sri Vikas Budhwar, learned counsel for the respondents made a specific statement before us that the respondents would become member of the cadre covered by Rules, 1990. In our opinion such stand on behalf of respondent nos.5 to 8 and 10 is wholly misconceived. It will mean that a separate Cadre of Teachers of the Medical College at Allahabad has been created for respondent nos.5 to 8 and 10 which Cadre would be different from the Cadre of U.P. State Medical Colleges Teachers Service Rules, 1990. This is not the intention of the provisions of the Act No. 26 of 2005 or any other statutory provisions.

28. We further find force in the submission advanced by counsel for the petitioner that in view of provisions of the U.P. State Medical Colleges Teachers Service Rules, 1990, the respondents, who were sent on deputation, could not be absorbed in the service under any provision of Rules, 1990. Undisputedly, the service conditions of the State Medical Colleges are governed by the Uttar Pradesh Medical Colleges Teachers Service Rules, 1990 framed under Article 309 of the Constitution of India. Definition clause, as contained in Rule 3 of 1990 Rules, defines members of the service, service, and substantive appointment. Part 3 of the Rules of 1990 provides for recruitment. Rule 5 provides for source of the recruitment. Under the Rules of 1990, all posts of Assistant Professor are to be filled by direct recruitment, whereas posts of Associate Professor and Professor are to be filled by direct recruitment and by promotion. Rules of 1990 do not provide for absorption/deputation as a source of recruitment to the Cadre of Teachers of the U.P. State Medical Colleges Teachers.

29. It has been settled that deputation is one of the method of recruitment by the Apex Court in the case of K. Narayanan Vs. State Of Karnataka4. It is equally settled that unless service rules specifically provide for recruitment to be made by way of deputation, it could not be resorted to for the purpose of making recruitment to the service. Paragraph 11 of the judgment of the Apex Court in the case of Arun Kumar (supra) is reproduced:-

"11. Before we proceed further, we may make it clear that, in our judgment, we have observed earlier that we do not find any infirmity in the action of the State Government in absorbing respondent no. 4 as Deputy Superintendent of Police in Punjab Police Service. However, there is a caveat. According to us, strictly on interpretation of the said 1959 Rules, there is no scope for opening of a third mode of recruitment. Deputation is not the source of recruitment under the said 1959 Rules. It is only as an exceptional case that respondent no. 4 was given the benefit of absorption in Punjab Police Service as Deputy Superintendent of Police and we do not find any fault with that exercise. It is the genuine exercise. However, when her services are regularized by the State not from 16.8.1993/17.8.1993, when she stood appointed as a deputationist, but from 9.6.1989, when she was appointed as Assistant Commandant in CRPF, then infirmity in the action of the State Government crept in. CRPF functions cannot be compared with Punjab Police Service. Apart from policing, an officer of Punjab Police Service has to do the work of

investigation of crime detection, which is not within the purview of CRPF. A Deputy Superintendent of Police in CRPF need not have the knowledge of CrPC, IPC etc., which an officer in Punjab Police Service needs to possess. The Service Rules governing CRPF are different from the Service Rules which governed Punjab Police Service. Therefore, even functionally, the two cadres are different. In fact, respondent no. 4, Ms. Amrit Brar, has not undergone training as contemplated under the Punjab Police Service Rules. However, she has put in 5 years' service as Deputy Superintendent of Police in Punjab Police Service between 16.8.1993/17.8.1993 and 11.9.1998. That experience should be given due weightage. In our view, having examined the above Punjab Police Service Rules, 1959, it is clear that deputation is not the source of recruitment. Direct recruitment is the source. Promotion is the source. However, deputation is not the source for recruitment. Moreover, in the present case, we are concerned with the rights of the appellants. We are concerned with the inter se seniority in the said post of Deputy Superintendent of Police since that seniority ultimately counts for promotion to the next higher cadre. The post of Deputy Superintendent of Police is a feeder post in that sense and when the post is a feeder post, the inter se seniority has the role to play. In the circumstances, if deputation is not the source of recruitment, then even in exceptional cases of this nature, weightage cannot be given, in the absence of the rules, to the services rendered by Ms. Amrit Brar in CRPF. Rule 14 talks of relaxation. However, Rule 14 is not applicable to the rules which do not provide for recruitment through deputation. Rule 14 would have applied if the said 1959 Rules had a third source of recruitment, namely, deputation. There is no such third source of recruitment. Hence, Rule 14 has no application. Rule 14 refers to relaxation of rules. Rule 14 contemplates existence of a rule of recruitment. If there is no such rule providing for third source of recruitment, the Government cannot relax a non-existent rule. Therefore, the High Court had erred in treating deputation as a third source of recruitment. There is a difference between direct appointment as a source of recruitment and deputation/ transfer as a source of recruitment. In certain cases, cited before us, weightage has been given to the service put in by the transferee. However, in all those cases, the third source of recruitment was transfer/deputation. In the present case, there is no such rule to that extent. There is an error in the impugned judgment of the High Court. As state above, Ms. Amrit Brar has put in 5 years' service as a deputationist in Punjab Police Service between 16.8.1993/17.8.1993 and 11.9.1998. She is certainly entitled to the weightage for the services rendered by her during these 5 years. However, she is not entitled to weightage of service between 9.6.1989 and 16.8.1993/17.8.1993, as held by the High Court, for the fixation of inter se seniority."

Considering the provisions of the applicable Service Rules of 1990, referred to above, as well as the ratio of law laid down by the Apex Court, we have no doubt that respondent nos.5 to 8 and 10, who were members of P.M.S. Cadre and had been sent on deputation to the Medical College, could not have been absorbed as Associate Professors in the Cadre of Teachers of U.P. State Medical Colleges, and their absorption in the Medical Colleges as well as subsequent promotions etc. are wholly without an authority of law.

30. From the records, we further find that respondent nos.5 to 8 and 10 had been sent on deputation for a limited period, which period was extended from time to time. The tenure of a deputationist in a different Cadre

than the Cadre from which he is appointed would have to be governed by the applicable provisions of Fundamental Rules as well as relevant Government Orders. It has been submitted that maximum period for which a deputationist can continue in the lending department is prescribed. Reference has been made to the provisions of Government Order No.4379/2-Ka-661-1957 dated 19.11.1959, according to which ordinarily the period of deputation is to subsist for three years, and even in exceptional circumstances, such period of deputation can be extended upto four years. We have not been shown any contrary provision, whereunder a deputationist could continue beyond the aforesaid period. The continuance of respondent nos.5 to 8 and 10, therefore, on deputation cannot continue at Moti Lal Nehru Medical College, Allahabad as the maximum period prescribed for working of the deputationist has come to an end. We may reiterate that Rules of 1990 do not admit of recruitment to be made by deputation, and therefore, the continuance of respondent nos.5 to 8 and 10 was otherwise de hors the Rule. In such view of the matter, we are of the opinion that the respondent nos.5 to 8 and 10 are not entitled to continue in the Moti Lal Nehru Medical College, Allahabad any further.

31. In view of the discussions, aforesaid, we answer the question nos.(b) to (e) by holding that no right of absorption was created in favour of respondent nos.5 to 8 and 10, on the basis of provisions of Act No.26 of 2005, which remained applicable upon Moti Lal Nehru Medical College and Swarup Rani Nehru Medical Hospital till 16.7.2008.

32. For all the aforesaid reasons, the writ petition is allowed. The orders of the State Government dated 29th January, 2009, 29.10.2009, 15.6.2009, 28th January, 2009, in respect of respondent nos.5 to 8 and 10 are hereby set aside. The respondent nos.5 to 8 and 10 are declared to have continued as Members of the P.M.S. Cadre. The State Government must revisit the matter in respect of continuance of respondent nos.5 to 8 and 10 at Medical College, Allahabad in light of the provisions of 1990 Rules as well as the provisions relating to deputation as contained in Fundamental Rule 15(b) of Financial Handbook part (ii) to (iv), as well as Government Order No.4379/2-Ka-661-1957 dated 19.11.1959, as well as any subsequent Government Order applicable.

33. So far as respondent no.9 is concerned, we find that he does not claim absorption in the University of Allahabad. He only seeks absorption in the Cadre of Medical College Teachers under the Rules of 1990 from the P.M.S. Cadre. In view of the provisions of the applicable Rules of 1990 and in light of the provisions of law, as noticed above, we are of the opinion that respondent no.9, being a Doctor from P.M.S. Cadre, cannot be absorbed in the Cadre of Medical College Teachers. The continuance of respondent no.9, as Associate Professor in the Cadre of Medical College Teachers, is thus contrary to the Rules of 1990. Therefore, the same is set-aside. The State Government may revisit the matter and pass a fresh order in respect of continuance of respondent no.9 also in the light of the observations made above.

34. Writ petition is allowed subject to the observations made.
