ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.09.2015

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

Habeas Corpus No. 5 of 2015

Manoj Jaiswal ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
B.K. Shukla, P.K. Rai

Counsel for the Respondents:
Govt. Advocate, A.S.G., Vimal Kumar Srivastava

Constitution of India, Art.-226-Habeas Corpus Petition-challenging detention order-on ground causing death in open market-can not be disturb to public order-held-such act caused terror and panic in busy locality-certainly effects public order, the second ground-solitary incident sufficient to form opinion to disturb the public order-detention held-proper.

Held: Para-12 & 20
12-The daring act of the petitioner in a busy market, in our opinion, affected public order and not merely law and order. The said act, certainly, caused terror and panic in the locality and affected those who watched the whole thing in fear as helpless spectators. The act in question adversely affected the even tempo of life of the community and caused a general disturbance of public tranquility

20-This leads us to the third contention made on behalf of the petitioner. The question as to whether a person who is in jail can be detained under detention law has been the subject-matter of consideration before the Apex Court time and again, and it has been consistently held in such cases that there was no law in passing a detention order even against a person under custody, however, at the time of passing the detention order, the detaining authority should be aware that the detenu was already in custody and was likely to be released on bail. The conclusion that the detenu could be released on bail cannot be ipse dixit of the detaining authority and once it is established that the detaining authority was conscious of the said fact, its subjective satisfaction based on materials, normally, should not be interfered with.

Case Law discussed:
(1990) 2 SCC 456; (2012) 7 SCC 181; (2012) 2 SCC 176; (1970) 1 SCC 98; (1983) 4 SCC 301; (1989) 4 SCC 509; (1994) 5 SCC 54; (2004) 8 SCC 106; W.P. No. 2690 OF 2015.

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

1. This is a petition through jail under Section 226 of the Constitution for issuance of a writ of Habeas Corpus by Manoj Jaiswal, who has been detained by an order of detention dated 11.10.2014 passed by the District Magistrate, Barabanki, under sub-section (2) of section 3 of the National Security Act, 1980 (for brevity 'Act') with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

2. The grounds of detention, as communicated to the detenue by the District Magistrate on the basis of which the detention order was passed, are as follows:

कार्यालय जिला मजिस्ट्रेट, बाराबंकी
निरुद्धि के आधार

चूंकि आदेश संख्या 06/........ दिनांक 11–10–2014 के अन्तर्गत आप मनोज जायसवाल उम्र लगभग 33 वर्ष, पुत्र विनोद जायसवाल, निवासी दक्षिण टोला बंकी, थाना कोतवाली नगर, जनपद बाराबंकी को राष्ट्रीय सुरक्षा अधिनियम, 1980 (अधिनियम संख्या

65/1980) की धारा 3 उप धारा (2) के अधीन निरुद्ध किया गया है।

अतएव, उक्त अधिनियम की धारा–8 के उपबन्धों के अनुसरण में एतद्द्वारा आपको सूचित किया जाता है कि आपको निरुद्ध करने के आधार अनुवर्ती प्रस्तर में दिये गये हैः–

दिनांक 15–01–2014 को दोपहर 02 बजे आपने अपने अन्य साथियों के साथ बंकी बाजार, थाना कोतवाली नगर, जनपद बाराबंकी में अरविन्द यादव को तमचं` से फायर करके नृशंस हत्या कर दी। इस घटना की प्रथम सूचना रिपोर्ट मृतक अरविन्द यादव के भाई पुरूषोत्तम लाल यादव ने अपराध संख्या–40/14, धारा–147/148/149/307/302 भारतीय दण्ड विधान, थाना कोतवाली नगर, जनपद बाराबंकी में पंजीकृत की गयी। मृतक अरविन्द यादव का पोस्ट मार्टम दिनांक 15–01–2014 को हुआ। पोस्टमार्टम में मृतक अरविन्द यादव की मृत्यु आग्नेयास्त्र की चोटों से होना पाया गया।

इस अपराध के गवाह पुरूषोत्तम लाल यादव, अशूं यादव, सोनू यादव एवं प्रदीप यादव ने अपने–अपने बयानों में उक्त नृशंस हत्या की घटना का समर्थन किया है। गवाहों ने जहां एक साथ उक्त कारित घटना का समर्थन किया है वहीं दूसरी ओर यह भी साक्ष्य है कि आप द्वारा कारित उक्त नृशंस हत्याकाण्ड से लोक काफी भयभीत हो गये हैं, डर के कारण अपने घरों के दरवाजे व खिड़कियां बन्द कर ली, लोग घरों से नहीं निकले। दुकानें बन्द हो गयी लोग आवश्यक वस्तुएं खरीदने से वंचित हो गये। स्थानीय लोक व्यवस्था छिन्न–भिन्न हो गयी और जनमानस का अमन चैन अस्त व्यस्त हो गया। आप द्वारा कारित उक्त नृशंस हत्याकाण्ड का समाचार विभिन्न समाचार पत्रों में प्रमुखता से प्रकाशित हुआ। जिसको पढ़कर जनजीवन में भय व्याप्त हो गया और व्यापक रूप से जनमानस का अमन चैन विपरीत रूप से प्रभावित हुआ। आप द्वारा कारित उक्त हत्याकाण्ड में अभी भी लोग दुकान, घर व कारोबारी डरे व सहमें है।

आप दिनांक 27–01–2014 से जिला कारागार, बाराबंकी में निरुद्ध है। आप जमानत पर छूटने का प्रयास कर रहे हैं तथा माननीय उच्च न्यायालय में जमानत प्रार्थना पत्र प्रस्तुत कर दिया है। आपके जमानत पर छूटने की पूर्ण सम्भावना है। यदि आप जमानत पर छूटकर जेल से बाहर आ गये तो पुनः गंभीर अपराध घटित करके लोक व्यवस्था को भंग करेंगें एवं जनमानस के अमन चैन को बिगाड़ेंगें।

उपर्युक्त आधारों से मेरा यह समाधान हो गया है कि आपके द्वारा ऐसी किसी भी रीति में कार्यवाही किये जाने की सम्भावना है, जो लोक व्यवस्था बनाये रखने के प्रतिकूल है, और आपको ऐसी रीति में कार्यवाही करने से, जो लोक व्सवस्था बनाये रखने में प्रतिकूल है, को रोकने के उद्देश्य से, यह आवश्यक है कि आपको निरुद्ध किया जाये।

आपको उक्त अधिनियम की धारा–8 के अनुसरण में एतद्द्वारा सूचित किया जाता है कि आपको ऐसे आदेश, जिसके अधीन आप निरुद्ध किये गये हैं, के विरुद्ध निरोधक अधिकारी (जिला मजिस्ट्रेट) तथा राज्य सरकार को प्रत्यावेदन देने का अधिकार हैं। यदि आप निरोधक अधिकारी (जिला मजिस्ट्रेट) को प्रत्यावेदन देने के अपने अधिकार प्रयोग करना चाहें तो उसे, उस कारागार, जहॉ आप निरुद्ध हैं, के अधीक्षक के माध्यम से यथाशीघ्र प्रस्तुत करे। ऐसे प्रत्यावेदन पर, यदि वह निरोधादेश जारी होने के 12 दिवस अथवा राज्य सरकार द्वारा निरोधादेश का अनुमोदन होने, जो भी पहले हो के बाद प्राप्त होगा तो निरोधक अधिकारी (जिला मजिस्ट्रेट) द्वारा उस पर विचार नहीं किया जा सकेगा। यदि आप राज्य सरकार को ऐसा प्रत्यावेदन देने के अपने अधिकार का प्रयोग करना चाहें तो आप उसे सचिव, गृह विभाग, उत्तर प्रदेश सरकार, लखनऊ को सम्बोधित करके उस कारागार, जहॉ आप निरुद्ध हैं, के अधीक्षक के माध्यम से प्रस्तुत करें।

आपको उक्त अधिनियम की धारा 9 एवं 10 के सन्दर्भ में एतद्द्वारा सूचित किया जाता है कि आपको ऐसे आदेश, जिसके अधीन आप निरुद्ध किये गये हैं, के विरुद्ध यदि आप उत्तर प्रदेश राज्य सलाहकार बोर्ड, लखनऊ को भी अपना प्रत्यावेदन देना चाहें तो उसे अध्यक्ष उत्तर प्रदेश राज्य सलाहकार बोर्ड, लखनऊ को सम्बोधित करके कारागार, जहॉ आप निरुद्ध हैं, के अधीक्षक के माध्यम से यथाशीघ्र प्रस्तुत करें। आपको यह भी सूचित किया जाता है कि आपका मामला उक्त अधिनियम की धारा–10 के अधीन आपकी निरुद्धि की वास्तविक तिथि के तीन सप्ताह के अन्दर उत्तर प्रदेश राज्य सलाहकार बोर्ड, लखनऊ को संदर्भित किया जायेगा और आपके प्रत्यावेदन पर, यदि वह विलम्ब से प्राप्त होगा तो उक्त बोर्ड द्वारा उस पर विचार नहीं किया जायेगा।

आपको यह भी सूचित किया जाता है कि उक्त अधिनियम की धारा–11 की उपधारा (1) के अनुसार उत्तर प्रदेश राज्य सलाहकार बोर्ड, यदि आवश्यक समझे अथवा यदि आप चाहे तो आपको उक्त बोर्ड द्वारा सुना जायेगा। यदि आप उक्त बोर्ड द्वारा अपनी व्यक्तिगत सुनवाई करना चाहे तो यह बात आप अपने प्रत्यावेदन में विशिष्ट रूप से लिखे तथा कारागार,

जहां आप निरुद्ध हैं, के अधीक्षक के माध्यम से राज्य सरकार को प्रस्तुत करें।

आपको उक्त अधिनियम की धारा–14 के अनुसरण में एतद्द्वारा यह सूचित किया जाता है कि आपको ऐसे आदेश, जिसके अधीन आप निरुद्ध किये गये हैं, के विरुद्ध केन्द्रीय सरकार को भी प्रत्यावेदन देने को अधिकार प्राप्त है। यदि आप केन्द्रीय सरकार को प्रत्यावेदन देने के अपने अधिकार का प्रयोग करना चाहे तो आप उसे सचिव, भारत सरकार, गृह मंत्रालय (आन्तरिक सुरक्षा विभाग), नार्थ ब्लाक, नई दिल्ली को सम्बोधित करके उस कारागार, जहॉ आप निरुद्ध हैं, के अधीक्षक के माध्यम से प्रस्तुत करें।

(योगेश्वर राम मिश्र)
जिला मजिस्ट्रेट
बाराबंकी।

3. The detention order as well as grounds of detention was served upon the petitioner. The District Magistrate sent a report to the State Government about the passing of detention order together with the grounds of the detention and all the particulars bearing on the same. The said report and the particulars were considered by the State Government and it approved of the detention order under sub-section (4) of section 3 of the Act and sent a report to the Central Government under section 3 (5) of the Act. The State Government forwarded the case of the petitioner to the Advisory Board in due course under section 10 of the Act along with detention order together with the grounds of detention. The representation made by the petitioner to the State Government was also placed before the Advisory Board. The Board considered the material placed before it, including the representation of the petitioner and after hearing the petitioner in person, sent its report to the State Government under subsection (1) of section 11 of the Act. According to the Board there was sufficient cause for detention of the petitioner. In pursuance of the opinion expressed by the Advisory Board the State Government, in exercise of its powers under subsection (1) of section 12 of the Act, confirmed the order for detention of the petitioner and the same was communicated to the petitioner.

4. In response to the rule nisi, Sri Yogeshwar Ram Mishra the District Magistrate, Barabanki, who had passed the impugned order, has filed a counter affidavit to which the petitioner has filed his rejoinder affidavit. In his counter affidavit, the District Magistrate has explained the circumstances which led to the issuance of the detention order. In the counter affidavit, the allegations made by the detenu have been controverted and it has been unequivocally stated that the Constitution safeguards of Article 22 (5) and that of section 8 of the Act, have been strictly complied with.

5. The detention order was passed by the District Magistrate on 11.10.2014 and at that point of time the petitioner was under detention in District Jail Barabanki on the basis of an FIR dated 15.01.2014 lodged by Purushottam Lal Yadav - the brother of the deceased in Case Crime No. 40 of 2014, under Sections 147, 148, 149, 307, 302 IPC lodged at Police Station Kotwali Nagar, District Barabanki. It may be mentioned, at this stage, that the detenu has since been granted bail on 23.07.2015, but in view of the order of detention, he has not been released.

6. The contentions raised by Sri P.K. Rai, learned counsel for the petitioner are three-fold:

a. The grounds, at the worst, do no more than to suggest a possible 'law and order' situation and not a 'public order' situation and therefore the detention on the ostensible ground of preventing him from

acting in a manner prejudicial to public order was not justified.

b. In the absence of any past history, the detention of the petitioner on the solitary incident, referred to in the ground of detention, was totally unwarranted.

c. The petitioner, who was in jail when the detention order was passed, had not moved any bail application and as such there was no apprehension of breach of public order from him.

In support of his submissions, the learned counsel has placed reliance upon the cases reported in (1990) 2 SCC 456, Devaki v. Government of Tamil Nadu & Ors., (2012) 7 SCC 181, Huidrom Konungjao Singh v. State of Manipur & Ors. and (2012) 2 SCC 176, Yumman Ongbi Lenbi & Ors. v.. State of Manipur & Ors.

7. Sri R.K. Diwedi, however, relying upon the records of the proceedings and the affidavit filed by the detaining authority, has supported the order of detention.

8. We have heard Sri P. K. Rai, learned counsel for the petitioner and Sri R.K. Dwivedi, learned Government Advocate and perused the record.

9. The distinction between the concept of public order and that of law and order has been adverted to by the Apex Court in a catena of decisions. The question whether a man has only committed a breach of law and order or acted in a manner leading to disturbance of public order is a question of degree of the reach of the act upon society is no more res integra. In the case reported in AIR 1966 SC 740, Dr Ram Manohar Lohia v. State of Bihar it was observed that the contravention 'of law' always affects 'order' but before it could be said to affect 'public order', it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order" and the smallest representing "security of State". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of the State".

10. In paragraph 3 of the case reported in (1970) 1 SCC 98, Arun Ghosh v. State of West Bengal. it was held as follows:

"Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large Sections of the

community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different."

In the same paragraph the Apex Court has held as follows:

"It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr Ram Manohar Lohia's case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

11. The principle enunciated above has been followed by the Apex Court in all subsequent cases. It is, therefore, necessary in each case to examine the facts to determine as to whether the act referred to in the grounds of detention falls in the realm of 'law and order' problem or it had the reach and potentiality so deep, so as to disturb the society, to the extent of causing a general disturbance of public tranquillity.

12. It would appear from the ground of detention that the petitioner and his associates attacked Arvind Yadav and his associate with firearms in the open market in broad daylight which resulted in the death of Arvind Yadav. It has been further stated that the above act of the petitioner and his associates created terror and panic amongst the people of the locality and thereby disturbed public order. The daring act of the petitioner in a busy market, in our opinion, affected public order and not merely law and order. The said act, certainly, caused terror and panic in the locality and affected those who watched the whole thing in fear as helpless spectators. The act in question adversely affected the even tempo of life of the community and caused a general disturbance of public tranquility

13. On behalf of the petitioner, a reference has been made to T. Devaki's case (supra). The petitioner in that case had attacked the Minister in a seminar. He

threw a knife towards the minister with an intention to kill him but he missed the target and fell down at the stage. The police caught hold him and those who accompanied him were also overpowered by the police and consequent to the conduct of the petitioner the proceeding of the seminar was interrupted for "only a while" and since the proceedings of the seminar were interrupted for a while it was held that the petitioner's activity in that case did not and could not affect public peace and tranquility. The decision is thus of no help to the petitioner.

14. We now come to the second submission made by the learned counsel for the petitioner that detention on a solitary incident, referred to in the ground of detention, was totally unwarranted.

15. It is also settled that a solitary act of omission or commission can be taken into consideration, by the detaining authority to pass an order of detention if the reach, effect and potentiality of the act is such that it disturbs public tranquillity by creating terror and panic in the society or a considerable number of people in the specified locality where the act is alleged to have been committed.

16. In paragraph 14 of the case reported in (1983) 4 SCC 301, Alijan Mian v. Distt. Magistrate the Apex Court has held as follows:

"14. Now the question arises whether the two incidents were sufficient for the detaining authority to initiate proceedings for preventive detention. It is for the detaining authority to have the subjective satisfaction about the apprehension of the breach of the public order from the incidents mentioned above. Even one incident may be sufficient to satisfy the detaining authority. It all depends upon the nature of the incident. In the case in hand the detaining authority was fully satisfied that there was apprehension of breach of public order from the petitioners in case they were bailed out, of which there was every likelihood. This contention in our opinion has no force."

17. In the case reported in (1989) 4 SCC 509, Bimla Rani v. Union of India the Apex Court opined as follows:

"8. It is true that the incident on 13-4-1989 was a solitary one so far as the detenu was concerned, but the question is whether the incident had prejudicially affected the public order. In other words, whether it had affected the even tempo of life of the community. As observed in Alijan Mian case, it is for the detaining authority to have the subjective satisfaction about the apprehension of the breach of the public order and that even one incident may be sufficient to satisfy the detaining authority in that regard depending upon the nature of the incident. It is not disputed by Mr Lalit that a single incident may disturb the tranquillity and the even tempo of life of the community.

18. In the case reported in (1994) 5 SCC 54, Attorney General for India & Others Vs. Amratlal Prajivandas & Others, though the matter related to the COFEPOSA, a nine judges Bench of the Apex Court has inter alia held as under:-

"Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The

gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. "

19. In the ground of detention, the detaining authority on the basis of relevant and cogent material, has elaborately stated the effect of the incident. The detaining authority has categorically stated that on account of the incident fear and terror was spread in the hearts of the public in the market. In our opinion, even though it was solitary incident but in the circumstances, it was sufficient for the detaining authority to arrive at a finding that the even tempo of life had been disturbed which had prejudicially affected the public order. In view of the above the second submission made on behalf of the petitioner also cannot be upheld.

20. This leads us to the third contention made on behalf of the petitioner. The question as to whether a person who is in jail can be detained under detention law has been the subject-matter of consideration before the Apex Court time and again, and it has been consistently held in such cases that there was no law in passing a detention order even against a person under custody, however, at the time of passing the detention order, the detaining authority should be aware that the detenu was already in custody and was likely to be released on bail. The conclusion that the detenu could be released on bail cannot be ipse dixit of the detaining authority and once it is established that the detaining authority was conscious of the said fact, its subjective satisfaction based on materials, normally, should not be interfered with.

21. In (2004) 8 SCC 106, at page 118, T.P. Moideen Koya v. Govt. of Kerala the Apex Court held as follows:

"19. The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods, etc., normally therewould be no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him that a detention order should be passed. A Constitution Bench in Rameshwar Shaw v. District Magistrate held as under: (SCR p. 929)

"As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail."

20. In Vijay Kumar v. State of J&K it was held: (SCC p. 48, para 10) "If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made."

22. A perusal of the grounds of detention would show that the detaining authority was fully aware of the fact that the detenu was actually in jail custody and there was material before him to believe that there was real possibility of his release on bail. The learned counsel for the petitioner has strenuously contended that the petitioner had not moved any bail application before this Court as alleged in the grounds of detention and has thereby questioned the observations made by the detaining authority that the detenue was likely to be released on bail. The learned counsel for the petitioner has, however, candidly accepted that a notice for filing bail application on behalf of the petitioner had been given in the office of the Government Advocate.

23. For filing a bail application under Chapter XVIII Rule 8 of the Allahabad High Court Rules, at least 10 days notice is required to be given. As soon as notice is given, the intention to move the bail application is clear and the State cannot presume negative that despite giving the notice bail application would not be moved. Therefore, the authorities concerned cannot be faulted in presuming that the petitioner was making attempt to get himself released on bail.

24. In habeas corpus writ petition no. 2690 of 2015, Robin Tyagi versus Union of India & Ors. a Division Bench of this court had the occasion to consider this aspect of the matter. The Division Bench held as follows:

"Sri Sudhir Mehrotra, learned counsel for the petitioner, contends that the grounds of detention reply nonapplication of mind in as much as the bail was granted in case Case Crime. No. 200 of 2014 by the High Court on 1.8 .2014, but grounds of detention could not have proceeded on such a presumption. This has been countered by the learned A.G.A. clearly contending that a bail application is moved under ChapterXVIII Rule 8 of the Allahabad High Court Rules wherein at least 10 days notice is required to be given. The notice was given and then the bail application was filed on 30.7 .2014. Thus, the State will be presumed to have knowledge about the said bail application having been filed an attempt being made by the petitioner to get himself released on bail. The aforesaid contention of the learned A.G.A. appears to be correct, and therefore has to be accepted."

25. In support of the third contention learned counsel for the petitioner has placed reliance upon the case of Huidrom Konungjao Singh (supra). In the said case the detention order passed against the petitoner of that case, who was in jail, was set aside. In that case no bail application, whatsoever, was moved on behalf of the petitioner and as such there was no possibility of the accused being released from jail custody accordingly the detention order was set aside. That is not the case here. Thus, the petitioner does not derive any benefit from the case of Huidrom Konungjao Singh (supra). The case of Yumman Ongbi Lenbi (supra) on which reliance has been placed is also of no help to the petitioner. In the said case the detention order was passed after almost 12 years after the last FIR was filed against the petitioner of that case and it was held that there was no live link of the earlier incident and incident in respect of which the detention was passed.

26. In view of the above, the third contention raised in behalf of the petitioner also fails.

27. For the foregoing discussion, we find no force in any of the contentions

raised on behalf of the petitioner. The petition is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2015

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

Special Appeal No. 21 of 2009

Vijay Kumar Yadav ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Akhilanand Mishra, Sri A.K. Singh, Sri Manish Kumar Nigam, Sri Vijay Kumar Yadav (I/P)

Counsel for the Opp. Parties:
C.S.C.

Constitution of India-Art.-226-Service law-dismissed on allegation-appointed as class 4th employee on compassionate ground-as per date of birth in school certificate-minor below than 18 years-Single Judge ignored the fact-when not required to produce age proof but asked to produce medical certificate-can not be held guilty for suppression of material facts-appeal allowed.

Held: Para-11
But in the present case, the appellant had not given any false information or suppressed any relevant or material information. This is not a case where a wrong date was given to have a longer period of service and thereafter an attempt to justify it. The date of birth was recorded in the service book on the basis of age determined by CMO on the basis of medical examination.

Case Law discussed:
AIR 2012 SC 1608; (1991) 1 SCC 588; (1993) 4 SCC 727; (2010) 11 SCC 702.

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

1. Heard Sri Vijay Kumar Yadav, appellant in person, learned Standing Counsel for the State respondents and perused the material on record.

2. This intra court appeal is directed against the order dated 24.11.2008, whereby the learned Single Judge dismissed the Civil Misc. Writ Petition No. 23090 of 2008, (Vijay Kumar Yadav vs. State of U.P. & others) on the ground that the petitioner was not major and he was aged about 14 years at the time of appointment. Therefore, prima facie, his appointment was illegal on the post of Runner in Tubewell Construction Division, Gonda.

3. Brief facts of this case are that the petitioner-appellant was appointed on the post of Runner (DHAWAK) in Tubewell Construction Division, Gonda under the Dying in Harness Rules, 1974. Thereafter the petitioner-appellant was transferred to Tubewell Division-I, Gorakhpur where he joined on 10.9.1992. In this regard, a confirmation letter dated 29.1.1999 of respondent no. 5 is annexed at page 33 as Annexure-1 to the writ petition. At the time of appointment, the petitioner-appellant was asked to prove his date of birth. The Chief Medical Officer, Gonda has determined the age of the appellant as 18 years and on the basis of which the date of birth of the appellant was recorded as 11.12.1969 in his service book. On 27.10.2006, a complaint was made by Sri Raj Kumar Yadav to the Executive Engineer Tubewell Division-I, Gorakhpur that on the basis of forged medical certificate, the appellant namely Vijay Kumar Yadav has obtained appointment. On the basis of the complaint, a

Committee was constituted by the Executive Engineer, Tubewell Division-I, Gorakhpur asking for report regarding the complaint and verification of age of the petitioner. The Committee submitted its report on 28.4.2007 mentioning that the certificate which was issued by the Principal of the institution namely Cooperative Inter College, Pipraich, Gorakhpur dated 28.2.2003, the date of birth of the petitioner was 1.7.1974. Therefore, on the date of the appointment, the appellant was only 14 years of age and on the basis of the forged medical certificate, he has obtained appointment. It is recommended by the Committee that major punishment be awarded to the petitioner. On these facts, the appellant was given charge sheet on 31.10.2007, which is Annexure-2 to the writ petition. Thereafter, the appellant submitted his reply of the charge sheet on 3.11.2007, which is Annexure-3 to the writ petition. The reply submitted by the petitioner-appellant reveals that allegation made in the charge sheet about the certificate issued by the Cooperative Inter College and the date of birth mentioned in the College record has not been denied. Having regard to the reply of the charge sheet filed by the petitioner-appellant and the enquiry report, the appellant has been removed from service by the impugned order dated 24.11.2008 and the appointment was declared as illegal.

4. Submission of the appellant is that Raj Kumar Yadav was inimical to the petitioner and manipulated the record of the school and filed a character certificate which was believed by the Committee whereas Medical Board has given the age of 18 years. He was not aware of his date of birth and the finding given by the Chief Medical Officer should be believed. At the time of the appointment, petitioner-appellant was asked to get his age determined by the CMO. His age was determined as 18 years and, accordingly, CMO issued the age certificate on the basis of which date of birth was recorded as 11.12.1969 in service book. He had studied in Cooperative Inter College, Pipraich, Gorakhpur up to the 9th class and failed in Class IX in the year 1987 since he had not appeared at all or passed High School Examination. Order dated 23.4.2008 shows that it was passed on the basis of the inquiry report dated 22.1.2008, according to which, the appellant appeared in High School Examination without permission of the Department to justify his date of birth recorded in his service book. Therefore, the report dated 22.1.2008 was submitted without holding enquiry proceeding and appellant was not called upon to appear before the Enquiry Officer. The inquiry report was also not supplied to him. Order of removal from service has been passed without providing opportunity of hearing inasmuch as he was not asked to participate in the inquiry proceeding. Enquiry report was submitted behind his back without holding the inquiry. The order of removal is violative of Article 311 of the Constitution and also violative to principle of natural justice.

5. Per contrary learned Standing Counsel submitted that the petitioner has obtained the compassionate appointment after the death of his father namely Ram Sunder Yadav at the age of 14 years. As such, at the time of appointment, he was minor and has obtained appointment on the basis of the forged certificate alleged to be issued by CMO, Gonda. The date of birth as entered in service book on the basis of certificate issued by CMO, Gonda, is 11.12.1969 whereas, as per complaint, which was sent by Raj Kumar Yadav accompanied by the character certificate issued by the

Principal, Cooperative Inter College, Pipraich, Gorakhpur, the age of the appellant is 1.7.1974. The Enquiry Committee submitted its report holding that the age of the petitioner was 14 years. He has concealed his age at the time of initial appointment in the Department and recommended for major punishment.

6. In the case, in hand, petitioner-appellant was appointed on the post of Runner (DHAWAK) which falls under Class-IV category in the Tubewell Construction Division, Gonda on 24.3.1988 on compassionate ground under the Dying in Harness Rules, 1974. The appellant was asked to get his age determined by the Chief Medical Officer. His date of birth, on the basis of the service book and the certificate issued by CMO Gonda, is 11.12.1969. The complaint was received accompanied by character certificate issued by the Principal, Cooperative Inter College, Pipraich, Gorakhpur in which date of birth of petitioner-appellant was shown as 1.7.1974. On the basis of the complaint, an enquiry was initiated. The Enquiry Committee, instead of relying the service book entry in which age of the petitioner on the basis of the certificate issued by the CMO, Gonda was entered as 11.12.1969, had relied on the letter of the Principal/Character Certificate whereas in the eye of law character certificate is not admissible as proof of age. The medical evidence is based on scientific investigation such as X-ray, ossification test which will have to be given due weight and precedence over the shaky evidence based on school administration record which give rise to hypothesis and speculation about the age.

7. It is well known fact that parents have a tendency to show lesser age of the child for High School Examination. The Hon'ble Supreme Court in Om Prakash vs. State of Rajasthan and another, AIR 2012 SC 1608 held that in such a situation when the school record itself is not free from ambiguity and conclusively prove the minority of the accused the opinion of the medical experts based on X-ray and ossification test will have to be given precedence over the shaky evidence based on school records.

8. The appellant was not asked to supply proof of age from the school where he had studied but he was asked to give medical certificate of CMO in proof of age. In these circumstances, the medical certificate issued by the CMO, based on ossification test or X-ray cannot be belied by saying that it is fake and forged. The Enquiry Committee submitted his report without giving opportunity of hearing to the appellant and no show cause notice was given nor copy of the enquiry report was supplied to the appellant. Under Rule 9(4) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the "rules of 1999") which governs the service condition of the appellant, it was incumbent upon the disciplinary authority to supply a copy of the enquiry report to the charged Government servant giving him opportunity to submit his representation if he so desires, within a reasonable specified time and thereafter proceed to pass a reasoned order in respect of the penalty. Relevant Rule 9(4) reads as under:

"9. Action on Inquiry Report.--(1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as

directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2)The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own finding thereon for reasons to be recorded.

(3)In case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly.

(4)If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing on or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

9. The Apex Court in the case of Union of India Vs. Mohd. Ramzan Khan (1991) 1 SCC 588 and in the case of Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others (1993) 4 SCC 727 has held that where the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report in Court before the disciplinary authority arrives at its conclusions with regard to guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of principles of natural justice. In the case in hand, admittedly non supply of the enquiry report to the petitioner-appellant giving him an opportunity to make a representation is not only violative of Section 9(4) of the rules, 1999 but also in violation of the principles of natural justice in view of the law laid down by the Hon'ble Apex Court.

10. Moreover, Rule 8 of U.P. Government (Discipline and Appeal), Rules 1999 provides that the Enquiry Officer shall not make any recommendation about the penalty whereas the recommendation has been made by the Enquiry Officer for major punishment cannot be said to be fair rather unjustified and unwarranted and is against the provisions of Rule 8 of Rules of 1999.

11. The Hon'ble Apex Court in Manoj Kumar vs. Government of NCT of Delhi and others, (2010) 11 SCC 702, observed that if any candidate furnishes false or incomplete information or withholds or conceals any material information in his application, he will be debarred from securing employment. Even if such an applicant is already appointed, his services are liable to be terminated for furnishing false information. But in the present case, the appellant had not given any false information or suppressed any relevant or material information. This is not a case where a wrong date was given to have a longer period of service and thereafter an attempt to justify it. The date of birth was recorded in the service book on the basis of

age determined by CMO on the basis of medical examination.

12. Thus, in view of the aforesaid discussion, the law and settled legal proposition, we are of the view that the order dated 24.11.2008, passed by learned Single Judge is not sustainable in nature and the inquiry report is liable to be set aside.

13. Hence, the order dated 24.11.2008 is quashed and the enquiry report is hereby set aside. The special appeal succeeds and is allowed.

14. Respondents no. 2 to 5 are directed to hold an inquiry afresh in the light of the aforesaid discussion according to law. There shall be no order as to cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Contempt Appeal Defective No. 26 of 2003

Satyawan ...Appellant
Versus
Krishna BahadurUpadhyay ..Respondents

Counsel for the Appellant:
Sri K.P. Shukla

Counsel for the Respondents:
A.G.A.

Contempt of Court Act 1971-Section 12-Civil contempt punishment of Rs. 5000/- fine with direction of deduction from salary-except fine of Rs. 2000/- and 6 month maximum of punishment-realization of damage without finding of guilt-held-unsustainable.

Held: Para-8
In the wake of the aforesaid facts, we do not find any justification for imposition of damages to be deducted from the salary of the appellant without holding the appellant to be guilty of having committed the contempt. A prima facie opinion is not an order of conviction on satisfaction that the charge was proved.

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

1. This contempt appeal has come up after 12 years of its filing.

2. The appellant was the then Regional Joint Director of Education, who was directed to decide a rival dispute of a Committee of Management vide judgment of this Court dated 10th April, 2003.

3. The officer appears to have completed the hearing on 25th June, 2003 but orders were not delivered. When Contempt Application No. 2970 of 2003 was filed, upon issuance of notices, the order was passed by the officer on 4th November, 2003. When the contempt application came up for final hearing, a learned Single Judge after having noticed the above facts, observed that prima facie a contempt has been committed by not strictly obeying with the order dated 10th April, 2003. However, the court instead of punishing the appellant under section 12 of the 1971 Act disposed of the contempt petition by directing that he will deposit Rs. 5,000/- as damages, and the Director of Education was further directed to deduct the aforesaid amount from the salary of the appellant.

4. The said judgment of the learned Single Judge dated 13.11.2003 is under appeal before us.

5. The Division Bench that entertained this appeal, admitted the same and stayed the operation of the judgment of the learned Single Judge.

6. Section 12 of the Contempt of Courts Act, 1971 read with the other provisions thereof makes a provision for punishment after holding a contemnor guilty of charges and provides for a maximum punishment by way of imprisonment for six months and in addition thereto a fine of Rs. 2,000/-. There is no other mode of punishment or statutory power conferred on the court so as to impose damages on a prima facie finding of guilt.

7. The learned Single Judge did not finally hold the appellant to be guilty nor was the appellant punished, as is evident from a perusal of the judgment itself.

8. In the wake of the aforesaid facts, we do not find any justification for imposition of damages to be deducted from the salary of the appellant without holding the appellant to be guilty of having committed the contempt. A prima facie opinion is not an order of conviction on satisfaction that the charge was proved.

9. Consequently, we set aside the said direction of imposition of Rs. 5,000/- damages and deduction of salary as directed by the learned Single Judge.

10. The appeal is allowed on the aforesaid terms.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2015
BEFORE

THE HON'BLE SUDHIR KUMAR SAXENA, J.

Criminal Revision No. 55 of 2015

Furkan ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ishwar Chandra Tyagi, Sri Nirvikar Gupta

Counsel for the Opp. Parties:
A.G.A., Sri Sushil Kumar Pandey

Cr.P.C.-Section 397/401-Criminal Revision-given custody of Muslim girl to her father-medical certificate as well as statement recorded before magistrate shows 18 years-according to school certificate minor-magistrate given preference to school certificate with a view of variation of age about 2 years on medical certificate custody to her father-held-when Nikahnama not disputed-girl willing to join company of her husband-husband entitled for custody-revision allowed.

Held: Para-15 & 16

15. In view of the above, it is apparent that opinion of the Doctor in respect of age should have been given preference. Moreover when girl was expressing apprehension, Magistrate should have been careful in sending her with father. As stated above, marriage i.e. nikahnama is not disputed. Consequently, as wife, she is ready to live with her husband, husband is entitled to have her custody.

16. It is settled law that against the wishes, even minor cannot be sent to Nari Niketan and husband being natural guardian is entitled to custody of wife.

Case Law discussed:
[2005 Law Suit (SC) 1541]; Habeas Corpus Writ Petition No. 10180 of 2012; AIR 1982 SC 1297; [2014 (2) All. Cr.J. 664]

(Delivered by Hon'ble Sudhir Kumar Saxena, J.)

1. This revision under Section 397/401 Cr.P.C. is directed against the order dated 23.12.2014 passed by Chief Judicial Magistrate, Muzaffarnagar, ordering custody of victim in favour of her father.

2. Heard Sri Nirvikar Gupta, learned counsel for the revisionist and learned AGA for the State.

3. Briefly stated facts of this case are that an FIR was lodged under Sections 363/366 IPC (crime no. 230 of 2014, P.S.- Sikheda, District Muzaffarnagar) arising out of kidnapping of Kumari Sitara. Aforesaid FIR was challenged by revisionist and others in W.P. No. 22776 of 2014 before Allahabad High Court, which was finally disposed of on 26.11.2014. Division Bench of this Court directed petitioners to produce the girl before Chief Judicial Magistrate, Muzaffarnagar, who will get her medically examined for determination of her age. Her statement will also be recorded under Section 164 Cr.P.C.

4. Sitara in her statement recorded under Section 164 Cr.P.C. stated that she had left her house alone in the morning of 30.10.2014. She went to Sikheda, Muzaffarnagar, Roorkee and Ambala. After reaching Ambala, she called Furkan and both went to Doraha on her own volition. It was clearly stated that she wants to live with Furkan and report has been wrongly lodged. Furkan has not kidnapped her and both are innocent. This statement was recorded on 17.12.2014.

5. Report of Medical Officer shows that victim was found to be about eighteen years old.

6. In the statement recorded under Section 161 Cr.P.C., it was stated that she was enticed by Furkan and he married her by extending threats. She made allegation of rape against Sabu as well.

7. An application was given by Firozuddin, father of the girl seeking her custody on the ground that her daughter is minor as her date of birth is 10.07.1999. Furkan's brother had also moved an application claiming her custody, who filed copy of the Pariwar register to show that she is major. Concerned Investigating Officer moved an application for passing appropriate order in respect of custody.

8. Learned Magistrate came to the conclusion that Educational Certificate was preferable over medical report. Moreover, application was not supported with affidavit and age opined by Doctor can be reduced by two years. Treating her to be minor, he directed the custody of the girl in favour of her father. This very order has been assailed by Sri Nirvikar Gupta on various grounds.

9. It was submitted that even according to transfer certificate, which shows that victim has passed class- 2 in the year 2010 and left the school was above fifteen years. According to medical report, she is about eighteen years. In her statement recorded under Section 164 Cr.P.C. before Magistrate she categorically stated that she wants to live with Furkan with whom she had married. She along with Furkan had come to High Court to file writ petition. It is thus evident that victim is not willing to go with her father. Affidavit filed by her shows that in the village in a similar case, a girl was murdered by the members of her family. Thus, she expressed threat to her life if she was sent with father.

10. A muslim girl having attained the age of puberty can enter into a

marriage contract. It is settled law that husband is the natural guardian of wife. Even in the case of minor, marriage does not become ipso facto void as such, custody should have been in consonance with the will of the victim-wife. As a proof of marriage nikahnama was filed, which has not been denied by the victim. Respondents have not set up a case of divorce. Consequently, custody of the girl should have been given to husband or the members of the family or her in-laws. She cannot be sent to a place against her wishes.

11. Hon'ble Apex Court in the case of Juhi Devi vs. State of Bihar [2005 Law Suit (SC) 1541] was considering similar controversy where medical board has found the age of the victim between 16-17 years while educational certificates were showing her minor. Hon'ble Apex Court ordered that she should be allowed to live with her husband. Relevant extract of the judgment is being reproduced hereinbelow:-

"The Medical Board opined that as on 17.05.2003, the petitioner must have been aged between 16 and 17 years. However, the father of the petitioner produced two certificates before the Revisional Court and contended that her date of birth is 12.10.1985 and she has not attained majority. However, the medical report shows that she must have been aged more than 16 years, even on 17.05.2003. Having regard to these facts, we are of the view that she must have attained majority and her stay at the remand home would not be in the interest of justice and we think that her continued stay at the remand home would be detrimental and she would be in a better environment by living with the person whom she had allegedly married."

12. Division Bench of this Court in the case of Smt. Reena vs. State of U.P and Ors. decided on 24.05.2012 (Habeas Corpus Writ Petition no. 10180 of 2012) has considered the similar controversy where there was conflict between medical certificate and educational certificate. Hon'ble Court has opined that court should lean towards acting upon the opinion of the doctor furnished after carrying out scientific tests to assess the age of a victim. Relevant paragraphs of the judgment is being reproduced below:-

"There was some dispute in respect of the age of the girl but we find from argument appearing at page 20 of the present petition that the Chief Medical Officer, Maharajganj had assessed her 18 years of age. Thus, the lady was undisputedly above 18 years of age, if we add three years to the medically assessed age. In our considered view in case of being a conflict between the age recorded in any school document and that assessed by the doctor then only for the present purposes, the court should lean towards acting upon the opinion of the doctor furnished after carrying out scientific tests to assess the age of a victim. This is necessary as liberty of a person has to be protected. No person could be deprived of his liberty unless reasonable procedure has been adopted. Medical opinion on age may not be exact, but it is generally acceptance and it is based on scientific method of assessing the age. As such, inspite of there being some sort of margin in assessing the age and actual age, there could be chances that the assessed age is almost exact.

We have already noted that the personal liberty of a person should be paramount consideration in such cases and keeping that in view and for protecting the personal liberty of a person, the court should lean towards considering the medical age than to consider the age which is recorded in school documents."

13. Relying upon the case of Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir [AIR 1982 SC 1297], another Division Bench of this Court in the case of Smt. Saroj vs. State of U.P. and Others vide judgment and order dated 08.05.2012 (Habeas Corpus Writ Petition No. 19037 of 2011) has taken a similar view i.e. medical report has to be believed.

14. Learned Single Judge of this Court in the case of Asmat Jahan and Another vs. State of U.P. [2014 (2) All. Cr. J. 664] has taken a similar view. Relevant extract of the judgment is being reproduced hereinbelow:-

"Learned Magistrate has not kept in mind the situation that he was not determining the age of a juvenile in conflict with law but was determining the age of prosecutrix who admittedly had eloped with her lover and had married him."

15. In view of the above, it is apparent that opinion of the Doctor in respect of age should have been given preference. Moreover when girl was expressing apprehension, Magistrate should have been careful in sending her with father. As stated above, marriage i.e. nikahnama is not disputed. Consequently, as wife, she is ready to live with her husband, husband is entitled to have her custody.

16. It is settled law that against the wishes, even minor cannot be sent to Nari Niketan and husband being natural guardian is entitled to custody of wife.

17. In view of the discussion made above, this criminal revision is allowed. Order dated 23.12.2014 passed by Chief Judicial Magistrate, Muzaffarnagar is set aside.

18. Learned Magistrate, Muzaffarnagar is directed to pass fresh order regarding the custody of the victim within a week from the date of production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.09.2015

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

Habeas Corpus No. 156 of 2015

Smt. Poonam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pawan Kumar Dubey

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-21-Habeas Corpus-detention in Nari Niketan-on pertext in her statement under Section 164 Cr.P.C. Different stand taken-in occification test found more than 18 years-petitioner detained in Nari Niketan ignoring her will-held-illegal-none

wanted in any criminal case-detention order quashed.

Held: Para-29

While considering a petition filed for issuance of a writ in the nature of Habeas Corpus, the writ court is not required to go into the complexities of law, once it is made evident to the Court that personal liberty of a citizen has been curtailed. A writ court cannot contemplate any limitation on its power to deliver substantial justice. Equity justifies bending the Rules, where fair play is not violated, with a view to promote substantial justice.

Case Law discussed:

(2015) 13 SCC 376; W.P. No. 10180 of 2012 decided on 24.05.2015; 3519 (MB) 2015.

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

1- This petition seeks issuance of a writ in the nature of CERTIORARI quashing order dated 7.1.2015 passed by Additional Chief Judicial Magistrate IIIrd, bearing Case Crime No.-510 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Kasimpur, district Hardoi.

2- This petition also seeks issuance of a writin the nature of Habeas Corpus directing respondent no.-4 (Superintendent, Nari Niketan, Parag Narain Road, Lucknow) to release the petitioner.

3- Mother of the petitioner (respondent no.-3) has been served twice, however, has not put in appearance, either in person or through her Counsel.

4- The facts of the case, as they emerge from the available record, are required to be noticed. Allegedly, the petitioner got married to Bauwa alias Suneel Kumar Singh son of Kallu of her own free will and accord. The marriage, however, has not been accepted by respondent no.-3 (mother of the petitioner). Criminal proceedings have been initiated, bearing Case Crime No.-510 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Kasimpur, District Hardoi (Annexure No.-2).

5- It appears that the petitioner and her husband had earlier approached this Court for quashing of the First Information Report (Supra) by way of filing Writ Petition No.-10460 of 2014. The petition was disposed of vide order dated 17th October 2014.

6- A perusal of order dated 17th October 2014 indicates that the petitioner claimed that she has attained age of majority, and of her free will entered into matrimonial alliance with Suneel Kumar Singh. No offence under Section 363/366 of the Indian Penal Code, accordingly is made out.

7- The State Counsel opposed the contention of the petitioner on the ground that as per the F.I.R. the girl was a minor.

8- The Court directed that statement of the girl be recorded under Section 164 Cr.P.C. Magistrate was directed to satisfy himself as to whether the girl has attained age of majority or not. It has been further observed that in case the girl is found to be major and does not support the F.I.R. version, the petitioner be not arrested till filing of report by the police under Section 173 (2) Cr.P.C. In case the girl appears to be a minor, it shall be open to police to arrest the accused. It was directed that custody of the alleged kidnapped girl shall be decided by the Magistrate concerned , in accordance with law.

9- Evidently, in deference to order of the Court referred to above, the petitioner was produced before the Magistrate concerned. The Magistrate, vide order dated 7.1.2015 (Annexure No.-1) issued a direction to confine the petitioner in Nari Niketan, Parag Narain Road, Lucknow (respondent no.-4).

10- Perusal of the order passed by the Magistrate dated 7.1.2015 (Annexure No.-1) indicates that at one place, the petitioner has said that she had passed IVth class , at another place, she has said that she had passed Vth Class. Date of birth of the petitioner, as given at various stages, is also different viz. 12.12.1997, 6.6.1999 and 6.6.2000.

11- It appears that in the course of investigation, the petitioner was also subjected to ossification test, in which her age has been determined as 18 years.

12- The plea of mother of the petitioner, before the Magistrate, as is recorded in Annexure No.-1 is that the petitioner is 13-14 years of age.

13- The Magistrate, for considering the age of the petitioner has relied on the date of birth of the petitioner recorded in High School certificate, which is 6.6.2000. It has been concluded that the petitioner was a minor on the date of incident i.e. 30.11.2013. No legally tenable reason has been given to disregard the date of birth recorded in other school certificate or the ossification test report.

14- In the course of investigation, statement of the petitioner has been recorded under Section 164 Cr.P.C. which has been placed on record as Annexure No.-7. The petitioner gave her statement to the effect that she has studied up to IVth class. On 12.8.2014 in the afternoon, she went of her free will with Bauwa alias Suneel Kumar Singh and she stayed with him for 3-4 months happily in Lucknow and got married to Suneel Kumar Singh. She was not induced to get married and wants to go with Suneel Kumar. She has clearly stated that she did not want to go with her mother. The petitioner claimed that she is 22 years of age.

15- Considering the discrepancy in age, this Court had directed that medical/ossification test of the petitioner be conducted by the Doctors of King Georges Medical University, Lucknow. Ossification test report has been received, according to which age of the petitioner is more than 18 years and less that 19 years.

16- In deference to the direction of the Court, the petitioner has been produced before the Court.

17- The petitioner apparently has attained the age of discretion, as also age of majority. On questioning by this Court, the petitioner has reiterated the stand taken in her statement recorded under Section 164 Cr.P.C. The petitioner refuses to go with her mother while saying that she feels threatened.

18- We are faced with a situation wherein there are various inputs in regard to the age of the petitioner, as noticed above. Somewhat similar facts came up for consideration before the Hon'ble Supreme Court of India in (2015) 13 SCC 376, Juhi Devi Versus State of Bihar and Others. In the judgment , the following has been held in paragraph nos.-2 and 3 :-

"2.The petitioner herein is alleged to have married another person of her age and

the 5th respondent herein, the father of the petitioner, objected to the said marriage. It seems that the petitioner had eloped with that person and the father of the petitioner-5th respondent, has filed a complaint and the petitioner was produced before the C.J.M.,Patna. The petitioner claims that she was major and voluntarily left with her husband. The father of petitioner alleged that the petitioner was a minor and the question of age was referred to a Medical Board. The Medical Board opined that as on 17.05.2003, the petitioner must have been aged between 16 and 17 years. However,the father of the petitioner produced two certificates before the Revisional Court and contended that her date of birth is 12.10.1985 and she has not attained majority. However, the medical report shows that she must have been aged more than 16 years,even on 17.05.2003. Having regard to these facts,we are of the view that she must have attained majority and her stay at the remand home would not be in the interest of justice and we think that her continued stay at the remand home would be detrimental and she would be in a better environment by living with the person whom she had allegedly married.

3. In the circumstances, we direct that the Respondent 3 Superintendent, Rajkiya Nari Uttar Raksha Sansthan, Gaighat, Patna to release the petitioner from the remand home forthwith. The petitioner would be at liberty to produce a copy of this order before the third respondent for appropriate action."

[Emphasised by us]

19- A Division Bench of this Court has also considered facts and circumstances, that are similar to the case under consideration, in Smt. Reena Versus State of U.P. and Others (Habeas Corpus Writ Petition No.-10180 of 2012) decided on 24.5.2012. The following has been held in relevant portion of the judgment:-

"It appears that the lady, petitioner was apprehended by the police and was produced before the Sub Division Magistrate, Sadar, Maharajganj. The father of the lady was also present in the court. He filed a petition seeking custody of his daughter. The statement of the petitioner was recorded and that of her father was also recorded by the Sub Divisional Magistrate, Sadar, Maharajganj. In her statement the petitioner, Smt. Reena stated that she was major and she had eloped with accused Rabdullah and had gone into his house to reside there. The father of the petitioner, Hari Lal, in his statement also stated that his daughter had eloped with Rabdullah on 3-3-2011 and refused to take the petitioner with him. The learned Sub Divisional Magistrate found that the date of birth of the petitioner, Smt. Reena, as recorded in the certificate was 3-4-1998. As such, she was only 13 years of age when her father was not ready to take her back who was desirous that her custody be authorised to the Nari Niketan Jaitpura, District - Varanasi.

We find from facts of the case that it was a pure and simple case of elopement of petitioner, Smt. Reena with Rabdullah and the petitioner, thereafter went straight away to his house from where she appears recovered. There was some dispute in respect of the age of the girl but we find from argument appearing at page 20 of the present petition that the Chief Medical Officer, Maharajganj had assessed her 18 years of age. Thus, the lady was undisputedly above 18 years of age, if we add three years to the medically assessed age. In our considered view in case of being a conflict between the age recorded in any school document and that assessed by the doctor then only for the present purposes, the court should lean

towards acting upon the opinion of the doctor furnished after carrying out scientific tests to assess the age of a victim. This is necessary as liberty of a person has to be protected. No person could be deprived of his liberty unless reasonable procedure has been adopted. Medical opinion on age may not be exact, but it is generally acceptance and it is based on scientific method of assessing the age. As such, inspite of there being some sort of margin in assessing the age and actual age, there could be chances that the assessed age is almost exact.

We have already noted that the personal liberty of a person should be paramount consideration in such cases and keeping that in view and for protecting the personal liberty of a person, the court should lean towards considering the medical age than to consider the age which is recorded in school documents. Besides, there is no dispute in the fact that the petitioner, Smt. Reena had eloped with Rabdullah on 3-3-2011 and had wet into his house and was living there. We very often refer to S. Varadarajan vs. State of Madras reported in AIR 1965 SC 942 to point out the distinction between an act of elopement and act of taking or enticing away a woman below 18 years of age from her lawful guardianship. Under the present set of facts, there could not be any doubt that it is a simple and pure case of elopement and as such no offence or offences could be said to be constituted under the admitted facts.

It is true that the lady was not ready to go with her father and her father for some unknown reasons, was not ready to take her back, but for that reason the lady ought not have been confined in the Nari Niketan as was directed by the learned Sub Divisional Magistrate Sadar, Maharajganj. There is no age, as regards the personal liberty of a person. Anyone who is born as a human being and who is found living in India even if he is not an Indian, has a right to enjoy his or her liberties by virtue of the constitutional guarantees. Any order which curtails or encroaches upon the liberties of such a person and has always to be held falling short of the constitution requirements and safeguards and, as such, we have to struck down the same in exercise of the powers Under Article 226 of the Constitution of India.

In the result, we quash the order dated 6-6-2011 passed by the Sub Divisional Magistrate, Sadar, Maharajganj and direct that the petitioner Smt. Reena be immediately released from custody of respondent no. 4, so that she enjoys her liberties and goes to what ever place she likes."

[Emphasised by us]

20- Related issue is as to whether husband of the petitioner namely Bauwa alias Suneel Kumar Singh has committed offence in context of the victim (petitioner) or not. Circumstances similar to the case in hand have been considered by this Court (this Bench) while dealing with Writ Petition no.- 3519(MB) of 2015 Shaheen Parveen and Another Versus State of U.P. through Principal Secretary, Home Department, and Others. The following has been held in paragraph nos.-18 to 30 :-

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

would be in futility because the victim has declared that she was not victimised or kidnapped.

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

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

21. We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial life of petitioner No.1/the alleged victim would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.

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

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

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

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

India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).

26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.

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

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

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

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

[Emphasised by us]

21- We are coming across a large number of cases in which parent/ parents of a

girl do not accept marriage of choice of their daughter, on account of different reasons, be it the caste , financial conditions, social status or religion. Although, the girl elopes with the boy voluntarily, however, criminal proceedings are initiated with allegation of abduction, kidnapping or inducing the girl to get married. In most of such cases the complainant takes a ground that his daughter is a minor. For showing that his or her daughter is a minor, school certificates are relied upon .

22- The facts and circumstances of the present case are required to be considered in context of the law , as noticed above. While considering the same, the Court is required to take into account the most Cherished Right of a citizen of the country, which is personal liberty.

23- As noticed above, various documents have come on record indicating different dates of birth/age of the petitioner. Be that as it may, there is a conflict between the age of the petitioner determined on the basis of school documents, and the age assessed through ossification test. The Court is required to lean towards the report furnished by the Doctor, on the basis of scientific tests. This is particularly so because liberty of the petitioner is required to be protected, it being most precious Constitutional Right of the petitioner.

24- Considering the law laid down by this Court in Shaheen Parveen's case (Supra), as noticed above, it becomes prima-facie evident that the petitioner had neither been abducted nor kidnapped or induced by Suneel Kumar Singh. Rather statement of the petitioner recorded under Section 164 Cr.P.C. indicates that the petitioner had gone with Bauwa alias Suneel Kumar of her free will and voluntarily. Prima-facie, therefore, this Court concludes that offence has not been committed in context of the petitioner. Surely, the petitioner is not an accused. Under the circumstances, we are faced with a situation wherein liberty of an alleged victim has been curtailed under the direction of the Magistrate.

25- Considering the law laid down by Hon'ble Supreme Court of India in Juhi Devi's case (Supra) as extracted above, it becomes evident that in such cases reliance can safely be placed on the opinion of the Doctors in context of age of the girl, when the age recorded in school certificate(s) is at variance.

26- We have considered that there is consistency in the results of medical/ossification test reports, whereas the basis of making entry in school record in regard to date of birth, is generally not brought on record. In the circumstances, so as to consider whether a person has attained age of majority/ age of discretion in cases such as the present one, it is safer to rely on medical /scientific / ossification test reports.

27- Perusal of the judgment rendered in Smt. Reena's case (Supra), as extracted above, shows that age cannot be held to be a relevant consideration, while considering Personal Liberty of a person. A person living in India has a Right to enjoy his or her liberty, as guaranteed by the Constitution of India. Any order which curtails or encroaches upon the liberty of such a person is required to be struck down, if it is not in accordance with procedure established by law.

28- Article 21 of the Constitution of India promises every citizen that he shall

not be deprived of his life or personal liberty except according to procedure established by law. Petitioner not being an accused , it cannot be held that her personal liberty has been curtailed as per procedure prescribed by law. This is particularly so because she apparently has attained age of discretion and has asserted her right to get married of her own choice.

29- While considering a petition filed for issuance of a writ in the nature of Habeas Corpus, the writ court is not required to go into the complexities of law, once it is made evident to the Court that personal liberty of a citizen has been curtailed. A writ court cannot contemplate any limitation on its power to deliver substantial justice. Equity justifies bending the Rules, where fair play is not violated , with a view to promote substantial justice.

30- On questioning the petitioner, we find that the petitioner is capable of taking decision in regard to her future.

31- Allegation against Suneel Kumar Singh is that the petitioner had been induced, kidnapped or abducted. From the statement of the alleged victim recorded under Section 164 Cr.P.C., it becomes evident that the petitioner was neither induced nor abducted or kidnapped.

32- The entire sequence of events, from initiation of criminal proceedings by the parent of the petitioner, to confining the petitioner in a protection home by the Magistrate, has resulted in subverting the right of the petitioner to choose a life partner of her choice. The order passed by the Magistrate directing detention of the petitioner in a protection home is a clear violation of right to liberty of the petitioner. The impugned order Annexure No.-1, passed by the Magistrate, under the circumstances is illegal, and dehors the relevant considerations.

33- We have taken note of the fact that the petitioner has been housed in Nari Niketan, Parag Narain Road, Lucknow since more than eight months. Surely, the conditions in Nari Niketan, are not conducive and healthy for housing young girls. Under the circumstances, a Court or authority should detain a person in Nari Niketan, only as a last option. In this case, the deponent (husband of the petitioner) is seeking custody of the petitioner. The choice of the petitioner is also to live with the deponent.

34- We have also taken note of the fact that the petitioner is a Hindu and even if it is concluded that at the point in time when the petitioner was married, she was a minor, the marriage would not be void under Hindu Marriage Act, 1955.

35- When the facts are cumulatively considered, we find that liberty of the petitioner is being curtailed without any legal cause. Order Annexure No.-1 has been passed by the Magistrate without giving due importance to the personal liberty of the petitioner. The desire of the petitioner has been ignored without any legally tenable reason. The age determined through Medical/ossification test has been overlooked for the wrong reasons.

36- Consequently, we allow this petition. Impugned order dated 7.1.2015 passed by Additional Chief Judicial Magistrate IIIrd, Hardoi, is hereby quashed.

37- A writ in the nature of Habeas Corpus is issued directing respondent no.-

4 (Superintendent, Nari Niketan, Parag Narain Road, Lucknow) to release the petitioner, forthwith.

38- Let copy of the order be supplied under the signature of Bench Secretary.

39- Let a copy of the order be sent to the concerned Magistrate. Senior Registrar of the Court is directed to ensure compliance.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.09.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 168 of 1987

Nathoo ...Revisionist
Versus
State of U.P. ...Opp. Party

Counsel for the Revisionist:
Sri M.W. Siddiqui, Sri Neeraj Kumar Srivastava

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

Cr.P.C.-Section 397/401-Criminal Revision-against conviction u/s 7/16 prevention of Food Adulteration Act-sole ground non complinace of provisions Section 10 (7)-held-when no people come forward to witness the incident-proceeding would not vitiate-trail court taken very lenient view intervene by Revisional court-unwarranted-revision dismissed.

Held: Para-19
In the present case, the prosecution has clearly proved that an attempt was made to get independent witness at the time of taking sample and seizure but since none came forward, hence, the Food Inspector proceeded further. Hence the mere fact that independent witness is not there, proceedings would not vitiate.

Case Law discussed:
1991 Cri.L.J. 2174; 1974 (4) SCC 491; 1993 All Criminal Cases 47; 1993 (1) FAC 93; AIR 1992 SC 1121; Criminal Revision No. 976 of 1989; 2009 (7) SCC 254; 2010 (12) SCC 532; 2012 (8) SCC 734; 2013 (3) JT 444; 2013 (9) SCC 516; AIR 1951 SC 196; AIR 1962 SC 1788; AIR 1968 SC 707; AIR 1970 SC 272; AIR 1975 SC 580; 2008 Cr.L.J. 1627 (S.C.); 1986 (2) SCC 585; 2001 (9) SCC 631; 2004 (7) SCC 665.

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

1. Heard Sri Neeraj Kumar Srivastava, learned counsel for revisionist, learned A.G.A. of State-respondent; and, perused the record.

2. The prosecution story, inter alia, is that on 11.11.1979 at about 10.00 AM the accused-revisionist, Nathoo, was found selling milk at Ardali Bazaar, Police Station Cantt., District Varanasi. There was 10 KG of milk in a container with him. Milk was checked by Chief Food Inspector, Sri J.P. Dhuria, who purchased 60 ML of Cow milk as sample on payment of Rs. 75/- after duly serving a notice in Form-6. Thereafter at the spot the milk was divided into three parts, kept in three bottles which were duly sealed. One of the sealed bottle was sent to Public Analyst for analysis and remaining two bottles of sample were kept in reserve in the office of local Health Officer. According to report of Public Analyst, sample was found adulterated. After sending a copy of the said report to the accused-revisionist and obtaining requisite sanction from Chief Medical Officer, Varanasi for instituting complaint, State filed complaint Case No. 5410 of 1984 submitting charge-sheet against the accused revisionist under Section 7/16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "Act, 1954").

3. To prove the offence levelled against revisionist-accused, prosecution examined PW 1, Sri Ram Srivastava, Food Inspector; and, PW 2, Sri Rajendra Prasad, Food Clerk.

4. The accused-revisionist pleaded not guilty and stated that he was implicated on account of enmity with Food Inspector. In his defence, he examined DW 1, Sri Sharda Prasad, and, DW 2, Sri Purushottam.

5. Placing reliance on the statements of the prosecution witnesses, the learned Magistrate convicted accused for the offence under Section 7/16 of Act, 1954 and sentenced him to six months' rigorous imprisonment and a fine of Rs. 1000/- vide judgment dated 14.10.1986. Being aggrieved, the revisionist preferred appeal, but concurring with the judgment of Trial Court, Sri S.N. Pandey, 8th Additional Sessions Judge, Varanasi dismissed revisionist's appeal vide judgment and order dated 12.01.1987.

6. Learned counsel for revisionist contended that there is no compliance of Section 10(7) of Act, 1954 as there was no independent witness who has signed sample taken by Food Inspector and, therefore, entire prosecution is bad and liable to be set aside.

7. Trial Court has considered this aspect and has given two reasons to discard it. One that Food Inspector has proved that at the time of collecting sample, a large number of people collected but none was ready to witness the proceedings and, therefore, signature of independent witness at the time of collection of sample could not be obtained. This fact was duly mentioned in the report as well as charge-sheet and further proved in oral evidence by PW-1, Sri Ram Srivastava.

8. Secondly, the accused himself had admitted that sample was collected by Food Inspector from the accused, but he has tried to explain the fact that he was not carrying milk for sale but there was a religious ceremony at his residence and he was taking milk thereat. Before this Court, the contention has been advanced but the fact that the members of public who gathered at the time of taking sample were not agreeable to become witness could not be shown otherwise. In absence of any person being ready to witness the procedure of taking sample and seizure, the factum that no independent witness has signed collection of sample and seizure does not vitiate the proceedings, particularly, when collection of sample from accused is admitted by him.

9. Section 10 (7) of Act, 1954 reads as under:

"Section 10(7)- Where the Food Inspector takes any action under clause (1) of sub-section (1), sub-section (2), sub-section (4), or sub-section (6), he shall call one or more persons to be present at the time when such action is taken and take his or their signatures."

10. The objective of Section 10 (7) of Act, 1954 is to ensure that actual or genuine transaction of sale of sample and its formalities have been observed. The provision is mandatory in so much so that Food Inspector must make genuine efforts to get the corroboration of one or more persons present on the spot to witness his act of taking sample and completion of other formalities. Once such an effort has

been made, but in vain, it cannot be said that there is any non-compliance of Section 10(7) of Act, 1954.

11. Section 10(7) was amended in 1964 and prior thereto there were words "as far as possible call not less than two persons". The words "as far as possible" were deleted by amendment of 1964. It was sought to be argued, therefore, that deletion means that if the independent witnesses do not corroborate the action of Food Inspector in taking sample etc., it shall vitiate the Trial.

12. A learned Single Judge of Kerala High Court in The Food Inspector, Palakkad Vs. M.V. Alu and another, 1991 Cri.L.J. 2174 considered it and in para 2 of the judgment said that sub-section (7) of Section 10 is only intended as a safeguard to ensure fairness of action taken by Food Inspector. What he is obliged to do is only to call one or more independent persons to be present and attest when he takes action. If independent persons were available and even then the Food Inspector did not want their presence or attestation, it could be said that he violated Section 10(7). If independent persons available did not care to oblige him in spite of his 'call', he cannot be said to have violated Section 10(7). The duty is only to make an earnest attempt in getting independent witnesses. If that earnest attempt did not succeed on account of refusal of independent persons, it cannot be said that Section 10(7) is violated. In such a contingency, nothing prevents the uncorroborated evidence of the Food Inspector being accepted, if found acceptable.

13. In another matter arisen from State of Uttar Pradesh itself, a three Judges Bench of Apex Court had occasion to consider this aspect in Shri Ram Labhaya Vs. Municipal Corporation of Delhi and another, 1974(4) SCC 491 and in paras 5 and 6 thereof the Court said:

"5. We are of the opinion, particularly in view of the legislative history of Section 10(7), that while taking action under any of the provisions mentioned in the Sub-section, the Food Inspector must call one or more independent persons to be present at the time when such action is taken. We are, however, unable to agree that regardless of all circumstances, the non-presence of one or more independent persons at the relevant time would vitiate the trial or conviction. The obligation which Section 10(7) casts on the Food Inspector is to 'call' one or more persons to be present when he takes action. The facts in the instant case show that the Food Inspector did call the neighbouring shopkeepers to witness the taking of the sample but none was willing to co-operate. He could not certainly compel their presence. In such circumstances, the prosecution was relieved of its obligation to cite independent witnesses. In Babu Lal Hargovindas v. State of Gujarat, AIR 1971 SC 1277 it was held by this Court after noticing that Section 10(7) was amended in 1964, that non-compliance with it would not vitiate the trial and since the Food Inspector was not in the position of an accomplice his evidence alone, if believed, can sustain the conviction. The Court observed that this ought not to be understood as minimizing the need to comply with the salutary provision in Section 10(7) which was enacted as a safeguard against possible allegations of excesses or unfair practices by the Food Inspector.

6. As stated earlier the Food Inspector was unable to secure the presence of independent persons and was therefore driven to take the sample in the presence of the members of his staff only. It is easy enough to understand that shopkeepers may feel bound by fraternal ties but no court can countenance a conspiracy to keep out independent witnesses in a bid to defeat the working of laws."

14. From the above it is clear that Apex Court also took the view that what is important to attract Section 10(7) is that the Food Inspector at least should try to secure presence of one or more independent witness when he takes action under any of the provisions mentioned in Section 10(7). Once that has been done, evidence of Food Inspector himself, even if not corroborated by independent witnesses, can be relied if the Trial Court finds it otherwise acceptable. It is not to be discarded only for the reason that independent witnesses have not signed the sample and seizure documents.

15. This Court also considered this aspect in Nagar Swasthya Adhikari Nagar Mahapalika Vs. Mohammad Wasim, 1993 All Criminal Cases 47. Here the Court further said that object of indicating Section 10(7) is to ensure that particular sample is taken from the accused. The object is to keep the act of taking sample above suspicion. Compliance of sub-section (7) of Section 10 is necessary only for satisfying the Court that requisite sample was taken as alleged. Court's scrutiny of such compliance becomes unnecessary when the accused admits taking of such sample.

16. Once the efforts have been made by Food Inspector to call for one or more independent witnesses but none agreed or cooperated, then it cannot be said that there is any breach of requirement of Section 10(7) and it will not vitiate the prosecution at all. Here I am fortified by a decision of Madras High Court in Public Prosecutor Vs. Ramachandran, 1993(1) FAC 93.

17. The Apex Court in State of U.P. Vs. Hanif, AIR 1992 SC 1121 said that there is no such law that the evidence of Food Inspector must necessarily need corroboration from independent witnesses. His evidence is to be tested on its own merits and if found acceptable the Court would be entitled to accept and rely on to prove prosecution case.

18. Following the above authorities and taking similar view, this Court in Criminal Revision No. 976 of 1989 (Ramesh Chandra Vs. State of U.P.) decided on 11.12.2014 in para 18 of judgment said as under:

"18. It is the duty of Food Inspector to call one or more independent persons to be present at the time of taking sample and once that is done by him it is sufficient but if the witnesses are not ready to come forward and sign the documents the Food Inspector cannot compel them and, therefore, where the attempt has been made but failed, lack of signature by independent witness would not vitiate the trial."

19. In the present case, the prosecution has clearly proved that an attempt was made to get independent witness at the time of taking sample and seizure but since none came forward, hence, the Food Inspector proceeded further. Hence the mere fact that independent witness is not there, proceedings would not vitiate.

20. Next it is contended that incident is of 1979 and more than 35 years have passed, therefore, punishment may be reduced to the period already undergone or only fine.

21. Here also I find myself difficult to accept the submission. It is a case where the revisionist has been found making adulteration in the food article. Adulteration in food article has a direct adverse consequence to the health of public. Many a times such adulteration with food causes such serious loss to the consumer, which is unrecoverable and create permanent disability or loss etc. It cannot be ascertained as to whether the milk sold by accused-revisionist would have been used by a healthy person or a patient facing serious disease in the Hospital or otherwise. The adulterated item is bound to cause such loss as it could be and the consumer would suffer without having any knowledge therefor. The people who are indulged in adulteration are more serious enemy of humanity than those who commit crime by killing a person in a straight manner. Here the hidden crime cause injury to a person who has no idea as to how he has suffered. He believed that food articles contain substance as naturally are supposed to be present there, but adulteration has changed its nature in a bad way. Consumer suffers in ignorance but with an obvious confidence that whatever he is intaking is alright. The adulterators, therefore, do commit a much henious and serious crime to the Society as a whole and deserve no sympathy.

22. In fact, in our Country, we deal with adulteration with lot of sympathy which is encouraging continuous indulgence in such activities and the reason is that adulteration is not being treated with such seriousness as it ought to be. This treatment to adulteration is anti-human and anti-society. The act of adulteration need be viewed with absolute strictness and stringent measures must be taken to prevent it, else Society in general would continue to suffer in the hands of adulterators, who are minting money playing with health of public at large without taking care whether suffering consumer would be an innocent child, a pregnant lady, a patient in Hospital fighting for his life or any such other needy person.

23. In the present case, the prosecution has proved the case beyond doubt. Accused has been found guilty of adulteration of milk. Court below has already taken a lenient view by imposing punishment of only six months' rigorous imprisonment and fine of Rs. 1000/-. Attempt to grant any indulgence in such a matter, when the Court below has already taken a lenient view in awarding punishment, would be nothing but making mockery of justice. Society had a confidence in the system of justice and is waiting that persons found guilty of committing henious crimes are punished appropriately and suitably, even if punishment is executed with lot of delay since Society has no control over delay occurring in Court but it has a faith in the system of justice and, therefore, not deterred from delay but is satisfied even when justice comes highly belated, provided it is not diluted and lean in favour of accused so as to treat him like a victim ignoring the loss suffered by actual victim.

24. Even otherwise, punishment imposed by Court below after finding charge proved beyond doubt is not to be interfered lightly unless the Court finds adequate and appropriate reason therefor.

25. In the matter of awarding punishment multiple factors have to be considered by this Court. The law regulates social interests, arbitrates conflicting claims

and demands. Security of individuals as well as property of individuals is one of the essential functions of the State. The administration of criminal law justice is a mode to achieve this goal. The inherent cardinal principle of criminal administration of justice is that the punishment imposed on an offender should be adequate so as to serve the purpose of deterrence as well as reformation. It should reflect the crime, the offender has committed and should be proportionate to the gravity of the offence. Sentencing process should be sterned so as to give a message to the offender as well as the person like him roaming free in the society not to indulge in criminal activities but also to give a message to society that an offence if committed, would not go unpunished. The offender should be suitably punished so that society also get a message that if something wrong has been done, one will have to pay for it in proper manner irrespective of time lag.

26. Further sentencing process should be sterned but tampered with mercy where-ever it is so warranted. How and in what manner element of leniency shall prevail, will depend upon multifarious reasons including the facts and circumstances of individual case, nature of crime, the matter in which it was committed, whether preplanned or otherwise, the motive, conduct, nature of weapon used etc. But one cannot be lost sight of the fact that undue sympathy to impose inadequate sentence would do more harm to justice system as it is bound to undermine public confidence in the efficacy of law. The society cannot long endure such serious threats. It is duty of the court to give adequate, proper and suitable sentence having regard to various aspects, some of which, are noticed above.

27. In Ahmed Hussein Vali Mohammed Saiyed and another Vs. State of Gujrat, 2009 (7) SCC 254, the Court confirmed that:

"any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system". (Emphasis added)

28. In Jameel Vs. State of Uttar Pradesh, 2010 (12) SCC 532, the Court held that:

"It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

29. In Guru Basavaraj @ Benne Settapa Vs. State of Karnataka, 2012 (8) SCC 734, the Court said that:

"The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

30. In Gopal Singh Vs. State of Uttarakhand, 2013 (3) JT 444, the court said that:

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of

proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence"

31. In Hazara Singh Vs. Raj Kumar and another, 2013 (9) SCC 516, the Court observed that:

"We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment". (Emphasis added)

32. The revisionist has not shown that punishment, awarded by court below, is unjust, arbitrary or otherwise illegal. However, what it is trying to take advantage is that the act of the Court should come to his rescue inasmuch as it is this Court which has taken two and half decades and more in taking up this revision and this should come to rescue of the revisionist for making reduction in punishment drastically though otherwise what has been done by the court below cannot be said per-se illegal, unjust or improper. It is well settled that the act of the court prejudice none. The failure of this court in taking up these matters within the reasonable time should not become a hand to the offender like present one to claim reduction in the punishment as a matter of right ignoring the fact that the society requires that an offender should be punished adequately and over the above the victim, who has suffered, is waiting for its own rights in having the offender punished suitably, even if the system of justice takes a long time. The delay in Courts cannot become a factor to convert and accused as a victim ignoring all the rights of the actual victim, who has suffered, his family and the society in shown. Moreover, when the finding of guilty and punishment imposed by the court below is not found erroneous in any manner, I am of the view that such an order of the courts below cannot be interfered in exercise of revisional jurisdiction of this Court.

33. The judicial review in exercise of revisional jurisdiction is not like an appeal. It is a supervisory jurisdiction which is exercised by the Court to correct the manifest error in the orders of subordinate courts but should not be exercised in a manner so as to turn the Revisional court in a Court of Appeal. The legislature has differently made provisions for appeal and revision and the distinction of two jurisdictions has to be maintained.

34. Construing old Section 439 of Criminal Procedure Code, 1898, pertaining to revisional jurisdiction, the Court in D. Stephens Vs. Nosibolla, AIR 1951 SC 196 said that revisional jurisdiction under Section 439 of the Code ought not to be exercised lightly particularly when it is invoked by private complainant against an order of acquittal which could have been appealed against by the Government under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. In other words, the revisional jurisdiction of the

High Court cannot be invoked merely because the lower court has taken a wrong view of law or misappreciated the evidence on record.

35. In K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1788 it was held that revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice. However, this was also a case in which revisional jurisdiction was invoked against an order of acquittal. If the Court lacks jurisdiction or has excluded evidence which was admissible or relied on inadmissible evidence or material evidence has been overlooked etc., then only this Court would be justified in exercising revisional power and not otherwise.

36. The above view has been reiterated in Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707; Khetrabasi Samal Vs. State of Orissa, AIR 1970 SC 272; Satyendra Nath Dutta and another Vs. Ram Narain, AIR 1975 SC 580; Jagannath Choudhary and others Vs. Ramayan Singh and another, 2002(5) SCC 659; and, Johar and others Vs. Mandal Prasad and another, 2008 Cr.L.J. 1627 (S.C.).

37. In Duli Chand Vs. Delhi Administration, 1975(4) SCC 649 the Court reminded that jurisdiction of High Court in criminal revision is severely restricted and it cannot embark upon a re-appreciation of evidence. While exercising supervisory jurisdiction in revision the Court would be justified in refusing to re-appreciate evidence for determining whether the concurrent findings of fact reached by learned Magistrate and Sessions Judge was correct.

38. In Pathumma and another Vs. Muhammad, 1986(2) SCC 585 reiterating the above view the Court said that in revisional jurisdiction the High Court would not be justified in substituting its own view for that of a Magistrate on a question of fact.

39. In Munna Devi Vs. State of Rajasthan and another, 2001(9) SCC 631 the Court said:

"The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

40. In Ram Briksh Singh and others Vs. Ambika Yadav and another, 2004(7) SCC 665, in a matter again arising from the judgment of acquittal, the revisional power of High Court was examined and the Court said:

"4. Sections 397 to 401 of the Code are group of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to

be exercised sparingly. Though the jurisdiction under Section 401 cannot be invoked to only correct wrong appreciation of evidence and the High Court is not required to act as a court of appeal but at the same time, it is the duty of the court to correct manifest illegality resulting in gross miscarriage of justice."

41. In view of above exposition of law and considering the facts and circumstances of this case, this Court finds no merit in any of the submissions advanced on behalf of revisionist.

42. The revision is, accordingly, dismissed.

43. Interim order, if any, stands vacated.

44. The revisionist Nathoo is on bail. His bail bonds and surety bonds are cancelled. The Chief Judicial Magistrate, Varanasi shall cause him to be arrested and lodged in jail to serve out the sentence passed against him. The compliance shall be reported at the earliest.

45. Certify this judgment to the lower Court immediately.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.09.2015

BEFORE
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision Defective No. 335 of 2010

Smt. Rubina & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Ali Hasan, Sri O.P. Maurya

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

Cr.P.C.-Section 397/401-Criminal Revision-Magistrate rejected application for maintenance-on ground Civil Court decree about restitution of Conjugal rights running-against applicant-proceeding u/s 125 Cr.P.C.-not maintainable-as summoning Court can not sit over regular court-Revision-dismissed.

Held: Para-5
The judgment and decree of competent civil court has to be followed in any case. As against it the proceeding under section 125 CrPC is a summary proceeding which has no legal sanctity against the judgment of formal decree of competent civil court. Unless reversed or set aside, the decree and findings of competent civil court is binding on its parties, irrespective of the pendency or findings of any summary proceeding like petition u/s 125 CrPC.

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

1. This revision has been filed against the order dated 21-10-2009 passed by Principal Judge, Family Court, Jhansi, in case no. 102/ 2006 Smt. Rubina & another v. Mohd. Javed under section 125 Cr.P.C., p.s. Prem Nagar, Jhansi.

2. Admitted facts relating to this revision are that wife (/revisionist Rubina) had filed a petition u/s 125 CrPC with averment that her husband had treated with cruelty and deserted her without sufficient reasons, therefore she should be awarded maintenance u/s 125 CrPC. Husband (present Respondent No.-2 Mohd. Javed) had filed petition for restitution of conjugal rights against his wife (present revisionists) which was

decreed by the court of Civil Judge, Ist Class, Tikamgarh, M.P. That decree is still in effect. But wife (/revisionist Rubina) had not obeyed the decree of the court, and kept herself away from her husband. During hearing of this petition of maintenance Family Court had dismissed the petition for maintenance u/s 125 CrPC by impugned order on the ground that case of restitution of conjugal rights of husband had been decreed, which is proof of the fact that wife Rubina Bano had deserted her husband without any sufficient reason, therefore her petition u/s 125 CrPC is not maintainable. Aggrieved by this impugned revisionists have preferred present revision.

3. I have heard the learned counsel for the revisionists and A.G.A. and perused the records.

4. Learned counsel for the revisionist contended that in spite of decree of restitution of conjugal rights petition u/s 125 CrPC is maintainable; and secondly that petition maintenance should have been decided on merits irrespective of judgment of Family Court. Therefore impugned order is erroneous and revision should be allowed.

5. The judgment and decree of competent civil court has to be followed in any case. As against it the proceeding under section 125 CrPC is a summary proceeding which has no legal sanctity against the judgment of formal decree of competent civil court. Unless reversed or set aside, the decree and findings of competent civil court is binding on its parties, irrespective of the pendency or findings of any summary proceeding like petition u/s 125 CrPC.

6. In present matter competent civil court (Civil Judge, Ist Class, Tikamgarh, M.P. had decreed civil case no. 6-A/ 2007 Mohd. Javed v. Smt. Rubina Bano), for restitution of conjugal rights, by judgment dated 17-12-2008, with finding that Smt. Rubina Bano had not been treated with cruelty by her husband Javed, and that she is living separately without any sufficient reason. Any contrary finding of judgment of summary proceeding in case u/s 125 CrPC cannot overrule the final decree of competent civil court. Therefore learned Principal Judge, family Court had committed illegality by passing impugned order and dismissing the petition u/s 125 CrPC by impugned order. There appears no error or impropriety in impugned judgment that may require interference in impugned order by exercise of revisional jurisdiction. Therefore the revision is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SHASHI KANT, J.

Special Appeal No. 638 of 2015

The Committee of Management A.N.I.C. Gorakhpur & Anr. ...Appellants
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Radha Kant Ojha, Sri Akhilesh Kumar Singh, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri A.B. Singh

Constitution of India, Art.-226-Salary-teacher in aided institution if management-decides not to take work-liability of salary-upon management should not be fastened such liability upon state-exchequer-order by Single Judge modified to the extent.

Held: Para-15

We are, therefore, of the opinion that the order of the Hon'ble Single Judge, in so far as it directs the payment of salary to respondent nos. 3 and 4 through State exchequer even when the management decides not to take work from the said respondents, cannot be legally sustained. Therefore, we provide that if the management still insists upon to not to take work from the respondent nos. 3 and 4, then it must also bear the consequences of payment of salary to the employee/teacher concerned from its own resources. The payment shall not be made from the State exchequer so long as the respondent nos. 3 and 4 are not permitted to discharge their official duty in the institution.

Case Law discussed:

1999 (1) UPLBEC 1

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

1. This special appeal is directed against the judgment and order of the Hon'ble Single Judge dated 21.08.2015.

2. The facts giving rise to the present special appeal are as follows:

Abhay Nandan Inter College, Vishnu Mandir, Medical College Road, Gorakhpur is a recognized and aided Intermediate College, which claims to be a minority institution. The institution is stated to have passed an order for terminating the services of respondent nos. 3 and 4, who were employed as Assistant Teacher on ad hoc basis. This order, according to the committee of management, was made in compliance to the order of the Hon'ble High Court passed in Writ Petition No. 36165 of 1995. The decision so taken by the committee of management was annulled by the District Inspector of Schools, Gorakhpur vide order dated 14.08.2015. The District Inspector of Schools also went on to cancel the advertisement which had been published for making fresh ad hoc appointment against the posts held by the aforesaid two respondents.

3. The committee of management not being satisfied with the order of the District Inspector of Schools, file Writ Petition No. 47407 of 2015. The Hon'ble Single Judge under the order impugned dated 21.08.2015 has recorded that the matter requires consideration and thereafter, on the statement made by the Senior Advocate appearing on behalf of the committee of management, it has been recorded that it shall be open to the committee of management i.e. the petitioner to take work or not to take work from the private respondents, but they shall be entitled to their salary, which shall not be stopped. The committee of management has also been restrained from making any fresh selection on the post held by respondent nos. 3 and 4.

4. On behalf of respondent nos. 3 and 4 it is stated that the order has been passed on a statement made by counsel for the petitioner himself and therefore it does not lie in the mouth of the petitioner to challenge the direction for payment of salary even if the management decides not to take work from the teachers concerned and because there cannot be double payment of salary against the same post, there can be no valid objection to the further restrain on fresh appointments on the posts held by respondent nos. 3 and 4.

5. In our opinion a very serious issue reflecting upon public money has arisen in the present appeal.

6. The right of the employer to take work or not to take work from his employee and to continue to make payment of salary without taking work is well recognized. But this general principle

may not be applicable in respect of recognized and aided intermediate colleges and other such aided institutions where the liability of payment of salary is taken over by the State Government.

7. As a matter of fact in recognized and aided intermediate colleges and other such institutions, where liability of payment of salary is taken over by the State Government, namely, private aided degree colleges etc., there is a tripartite arrangement. The first party i.e. the employer is the management which has a right to appoint the employee after due procedure and to take work. Second party in the agreement is the teacher/employee, who works in such an institution, who has right to be paid his salary if his appointment is in accordance with law and there is no legal justification for withholding his payment even if the management does not take work from him, and there is a third party i.e. the State Government, which takes over the liability of payment of salary to the staff and teachers of such recognized and aided institutions. In the case of intermediate colleges such liability of payment of salary has been taken over by the State Government vide U.P. Act No. 24 of 1971.

8. We may record that the liability of payment of salary, which has been taken over by the State Government, is only in respect of teachers and staff who are appointed against sanctioned posts. The issue in that regard has been settled by the Full Bench of this Court in the case of Gopal Dubey vs. District Inspector of Schools, Maharajganj, reported in 1999 (1) UPLBEC 1.

9. There is another aspect to this liability, namely, such responsibility to release the payment of salary to the teacher/employee concerned would only arise if such teacher/employee actually discharges his duties in the institution unless he is sanctioned leave permissible under the rules.

10. If the management of the institution decides on its own not to take work from such teacher/employee, then there cannot be a corresponding obligation upon the State Government to make payment of salary to the teacher/employee concerned when he is actually not discharge his duties in the institution.

11. If the decision to not to take work from the employee concerned is of the management of the institution in its own discretion, then the liability of payment of salary to such person shall also be upon the management alone, inasmuch the management of the institution while exercising its power of the employer to not to take work cannot transfer the financial obligation upon the State Government.

12. Teachers and employees of aided institutions are paid salary from public exchequer which is public money. It cannot be permitted to be paid without actual discharge of duties by the person/employee concerned.

13. We have, therefore, no hesitation to record that even if the Hon'ble Single Judge has proceeded on the statement made by the counsel for the management, the High Court cannot in exercise of its power under Article 226 of the Constitution of India issue a direction to the State Government to make payment of salary to an employee/teacher who does not discharge his duties in the institution.

If the restrain on the discharge of duties and responsibility by the teacher has been put by the management of the institution, then the management also must suffer the consequences.

14. We have no hesitation to record that the High Court, while passing the order permits the management of an aided recognized institution to take or not to take work from the teacher/employee concerned, must couple the said direction with a further direction that it shall be responsibility of the management to make payment of salary to such teacher/employee from whom it decides not to take work. The State Government may not be fastened with the responsibility to make payment of such employee, who actually does not work because of the order of the management.

15. We are, therefore, of the opinion that the order of the Hon'ble Single Judge in so far as it directs the payment of salary to respondent nos. 3 and 4 through State exchequer even when the management decides not to take work from the said respondents, cannot be legally sustained. Therefore, we provide that if the management still insists upon to not to take work from the respondent nos. 3 and 4, then it must also bear the consequences of payment of salary to the employee/teacher concerned from its own resources. The payment shall not be made from the State exchequer so long as the respondent nos. 3 and 4 are not permitted to discharge their official duty in the institution.

16. This order shall not prejudice the right of the petitioner to make an application before the Hon'ble Single Judge or for modification of the order under appeal, as may be necessary, inasmuch as the Hon'ble Single Judge has proceeded on the concession of the counsel for the petitioner. In view of what has been recorded above, the counsel may like to withdraw the concession so made. Petitioner is also at liberty to file such further application as may be necessary.

17. With the aforesaid direction, this appeal is disposed of. The order of the Hon'ble Single Judge stands modified to the extent indicated above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2015

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

Special Appeal No. 1140 of 2008
with
Special Appeal No. 1137 of 2008, Special Appeal No. 1099 of 2008 and Special Appeal No. 1145 of 2008

Ashutosh Shrotriya & Ors. ...Appellants
Versus
Vice-Chancellor, Dr. B.R. Ambedkar University Agra & Ors. ...Opp. Parties

Counsel for the Appellants:
Sri V.D. Dubey

Counsel for the Respondents:
Sri C.B. Yadav, Add. Advocate General, Sri Shashank Shekhar, Addl. C.S.C., Sri Sanjay Kumar Singh, Sri Manish Goyal, Sri Rahul Agarwal, Amicus Curiae.

Constitution of India. Art.-226-Writ Petition-inviting counter affidavit without interim order-whether amenable under Special Appeal?-held-'No'.

Held: Para-45
In view of the aforesaid discussions, we answer the question of law referred to

the Full Bench by holding that, an order of a learned Single Judge upon a petition under Articles 226 or 227 of the Constitution only calling for counter and rejoinder affidavits is merely a procedural order in aid of the progression of the case. An order of this nature which is purely of a procedural nature in aid of the progression of the case and to enable the Court to form a considered view after a counter affidavit and a rejoinder are filed would not be amenable to a special appeal under Chapter VIII Rule 5. Such an order does not decide anything nor does it have the trappings of finality. If a party to the proceedings seeks to press an application for ad interim relief of a protective nature even before a counter affidavit is filed, on the ground that a situation of irretrievable injustice may result or that its substantive rights would be adversely affected in the meantime, such an argument must be addressed before the Single Judge. If such an argument is urged, it should be dealt with however briefly, consistent with the stage of the case, by the Single Judge. It is for the Division Bench hearing the special appeal to consider whether the order decides mattes of moment or is of such a nature that would affect the vital and valuable rights of the parties and causes serious injustice to the concerned party.

Case Law discussed:
AIR 1970 Alld 561; [(2003) 1 UPLBEC 496]; AIR 1953 SC 198; (1981) 4 SCC 8; (2001) 2 SCC 588; (2006) 5 SCC 399; 2008 (73) ALR 3; [2009 (1) ADJ 144 (DB)]; [2014 (10) ADJ 211 (DB)(LB)]; 1994 (1) AWC 55; [2007 (3) ADJ 85 (DB)].

(Delivered by Hon'ble D.Y. Chandrachud, C.J.)

The issue

1. The reference to the Full Bench has been occasioned by a referring order of a Division Bench dated 15 September 2008. The following questions have been formulated for decision:

"(1) Where a learned Single Judge while hearing a writ petition calls for counter and rejoinder affidavits, but does not pass any order on the stay application either granting or refusing a stay, will the order amount to a refusal of interim relief to the petitioner either temporarily or impliedly and a 'judgment' within the meaning of Chapter VIII Rule 5 of the Rules of the Court, 1952;

(2) Does an order which adversely affects the valuable rights of a party by a temporary or implied refusal of interim relief have the trappings of a judgment."

2. The appellants sought a writ in the nature of mandamus directing the University to permit them to appear for counselling for admission to the Master of Social Work Diploma Course for 2008-09. A part of the relief sought was a direction calling for the answer sheets of the entrance test which was held on 28 June 2008.

3. The appellants averred in the writ petition that counselling was to be held on 31 August 2008. The learned Single Judge while entertaining the writ petition, passed the following order on 1 September 2008:

"Sri S K Singh has accepted notice on behalf of respondents. He prays for and is granted two weeks' time to file counter affidavit.

List on 16 September 2008."

4. A special appeal1 was filed against the order of the learned Single Judge. The Division Bench, while considering the special appeal noted that the issue is whether there is a judgment within the meaning of Chapter VIII Rule 5 of the Allahabad High Court Rules, 19522 when a Single Judge while hearing a writ petition calls for counter

and rejoinder affidavits but does not pass any order on the application for stay, either granting or refusing stay. In other words, would this amount to a refusal of an interim order temporarily or impliedly, thereby amounting to a judgment within the meaning of Chapter VIII Rule 5.

History: Clause 10 of the Letters Patent and Chapter VIII Rule 5 of the Rules of Court

5. Before we deal with the body of precedent on the subject, it would be worthwhile to briefly trace the history of the incorporation of Chapter VIII Rule 5. In understanding the ambit of the expression "judgment" it is necessary to bear in mind the evolution of the Letters Patent and its association with the Amalgamation Order of 1948 and the Rules of Court. Both have to be analysed together.

(i) Chapter VIII Rule 5

6. Rule 5 of Chapter VIII, as it stands at present, reads as follows:

"5. Special appeal.- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award-(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

7. In tracing its history, we must, at the outset, acknowledge the contribution made by two judgments of this Court, the first by a Bench of four Judges in Notified Area Committee Vs Sri Ram Singhasan Prasad Kalwar3 and the other by a Division Bench in Vajara Yojna Seed Farm, Kalyanpur Vs Presiding Officer, Labour Court II, U P, Kanpur4.

(ii) Letters Patent

8. The Letters Patent of 17 March 1866 provided for the constitution of the High Court of Judicature at Allahabad, the civil jurisdiction of the High Court and, among other things, for intra court appeals from judgments of the Judges of the Court. Clause 10 of the Letters Patent provided as follows:

"10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of Criminal Jurisdiction) of one Judge of the said High Court or one Judge of any

Division Court, pursuant to Section 105 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February one thousand nine hundred and twenty nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of the Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors or Our on Their Privy Council, as hereinafter provided."

(iii) Amalgamation Order

9. In exercise of the powers conferred by Section 229 of the Government of India Act, 1935, the United Provinces High Courts (Amalgamation) Order, 19485 was issued and published by the Government of India in the Gazette Extraordinary on 19 July 1948. On 26 July 1948, the High Court of Judicature at Allahabad and the Chief Court of Oudh were amalgamated resulting in the creation of a new High Court. Clause 7 of the Amalgamation Order provided that the new High Court shall have, in respect of the whole of the United Provinces, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, was exercisable in respect of any part in that Province by either of the existing High Courts. Clause 15 of the Amalgamation Order provided that the law in force immediately before the appointed day relating to appeals of His Majesty in Council or to the Federal Court from the High Court in Allahabad and the Judges and Division Courts thereof shall, with necessary modifications apply in relation to the new High Court. Though the Letters Patent ceased to have effect as a result of Clause 17(a) of the Amalgamation Order, the jurisdiction of the High Court to hear special appeals from judgments of Single Judges was continued by virtue of Clauses 7 and 15 of the Amalgamation Order. Clause 13 of the Amalgamation Order provided that the law in force on the date 25 July 1948 relating to the powers of the Division Courts of the former High Court would apply in relation to the new High Court.

(iv) Article 225

10. After the Constitution came into force, Article 225, which dealt with the jurisdiction of the existing High Courts, provided as follows:

"225. Jurisdiction of existing High Courts.- Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make Rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the

collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

11. Article 225 had the effect of keeping alive the Amalgamation Order and, in consequence, the applicability of Clause 10 of the Letters Patent. The effect of Article 225 was that the jurisdiction of, and the law administered in any existing High Court would be the same as immediately before the commencement of the Constitution, subject to the provisions of the Constitution and the provisions of any law of the appropriate legislature by virtue of powers conferred on that legislature by the Constitution.

12. Chapter VIII Rule 5 of the Rules of Court, as it was originally framed, provided for a special appeal in the following terms:

"5. An appeal shall lie to the Court from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the Court, and not being an order made in the exercise of revisional jurisdiction, and not being an order passed or made in the exercise of its power of superintendence, or in the exercise of Criminal Jurisdiction of one Judge, and an appeal shall lie to the Court from a judgment of one Judge made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the Court, where the Judge who passed the judgment declares that the case is a fit one for appeal."

(v) Abolition of Letters Patent

13. In 1962, the state legislature enacted the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 19626. By virtue of the provisions of Section 3, the legislature enacted the abolition of special appeals from a judgment or order of one Judge of the High Court made in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court. Section 3 provided as follows:

"3.(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court, subject to the superintendence of the High Court, anything to the contrary contained in Clause 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866, read with Clause 17 of the U.P. High Courts (Amalgamation) Order; 1948, or in any other law, notwithstanding.

(2) Notwithstanding anything contained in sub-section (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as heretobefore, as if this Act had not been brought into force."

14. Following the provisions of U P Act 14 of 1962, the Rules of Court were also amended by a notification dated 6 November 1963. Further amendments were made in 1972 and 1975 to U P Act 14 of 1962. In 1981 the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981 was enacted with a view to abolishing Letters Patent appeals against the judgments or orders of a Single Judge under Article 226 or Article 227 in

respect of any judgment, order or award of the subordinate courts, tribunals, or statutory arbitrators made in exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act relating to any of the matters enumerated in the State List or the Concurrent List to the Seventh Schedule of the Constitution or in respect of any order made in exercise of the appellate or revisional jurisdiction under any such Act, by the State Government or by any officer or authority. Section 5 of U P Act 14 of 1962 was substituted by the following provisions by Amending Act 12 of 1981:

"5. Abolition of Letters Patent Appeals in certain other cases.- (1) Notwithstanding anything to the contrary contained in Clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866 read with Clauses 7 and 17 of the U.P. High Courts (Amalgamation) Order, 1948, or in any other law, no appeal arising from an application or proceeding, instituted or commenced whether prior or subsequent to the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution, in respect of any judgment, order or awards -

(a) of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or

(b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act.

(2) Notwithstanding anything contained in sub-section (1), all appeals of the nature referred to in that sub-section pending before the High Court immediately before the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, shall be heard and disposed of as if that sub-section had not been enacted."

15. In consequence, Chapter VIII Rule 5 of the Rules of Court was amended by a notification dated 27 July 1983 which was published in the Gazettee on 13 August 1983 to make the provision for special appeals under Chapter VIII Rule 5 accord with the provisions of Section 5 of the Amending Act of 1981.

The meaning of 'judgment'

16. The essence of the reference which has been made by the Division Bench in the present case, turns upon the meaning of the expression 'judgment' in Chapter VIII Rule 5. An appeal lies, first and foremost, from a judgment. Rule 5 then proceeds to lay down the excepted categories or exclusions where a special appeal will not be maintainable. The exclusions, which have been specified in Rule 5, are:

(i) A judgment passed in the exercise of the appellate jurisdiction in respect of a decree or order made by a court subject to the superintendence of the Court;

(ii) An order made in the exercise of revisional jurisdiction;

(iii) An order made in the exercise of the power of superintendence;

(iv) An order made in the exercise of criminal jurisdiction;

(v) An order made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution in respect of any judgment, order or award :

(a) of a tribunal, court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or Central Act, with respect to a matter contained in the State List or the Concurrent List to the Seventh Schedule of the Constitution; or

(b) of the government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act.

17. The issue before the Court is whether an order of a Single Judge on a petition under Articles 226 or 227 of the Constitution, merely directing the filing of a counter affidavit within a stipulated period and a rejoinder thereafter, would constitute a judgment within the meaning of Chapter VIII Rule 5 of the Rules of the Court.

18. The issue as to what constitutes a judgment within the meaning of the Letters Patent of the High Courts came up initially before the Supreme Court in Asrumati Debi Vs Kumar Rupendra Deb Raikot7. That was a case where an application had been presented by the plaintiff in a suit instituted before the Court of the Subordinate Judge, on the Original side of the High Court of Calcutta under Clause 13 of the Letters Patent, praying for the transfer of the suit to the High Court to be tried in its extraordinary jurisdiction. A Single Judge of the High Court allowed the application. In appeal, a Division Bench of the High Court held that the order appealed against was not a judgment within the meaning of Clause 15 of the Letters Patent. The Bench of four learned Judges of the Supreme Court held that there was a wide divergence of judicial opinion on the subject and the scope of the word 'judgment' as it occurred in Clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of other High Courts, which may warrant a determination in an appropriate case. However, it was held that in none of the cases was an order of the character which the Supreme Court had before it, been regarded as a 'judgment' within the meaning of Clause 15 of the Letters Patent. The appeal was accordingly dismissed.

19. Eventually, it was in the 1981 decision in Shah Babulal Khimji Vs Jayaben D Kania8, that the issue as to when a decision of a Single Judge could be regarded as a 'judgment' within the meaning of Clause 15 of the Letters Patent of the Bombay High Court came to be considered and resolved. A considerable body of law has emerged in following and interpreting the decision. Since we would have to advert to those decisions, we begin by stating the principles which emerge from Shah Babulal Khimji.

20. The first principle which has been laid down by the Supreme Court is that though the Letters Patent did not make an attempt to define what is meant by the expression 'judgment', since the Letters Patent was a special law, it was not appropriate to project the definition of the expression 'judgment' appearing in Section 2(9) of the Code of Civil Procedure, 19089 into the meaning of that expression for the purposes of the Letters Patent. Under Section 2 (9), the expression 'judgment' is defined to mean 'a statement given by the Judge on the grounds of a decree or order.' In the view of the Supreme Court, the concept of a 'judgment' as defined in the CPC was rather

narrow and the limitations which are contained in sub-section (9) of Section 2 while defining the expression 'decree' cannot be physically imported into the definition of the expression 'judgment' for the purposes of Clause 15 of the Letters Patent which has advisedly not used the term 'order' or 'decree'. Consequently, it was held that the word 'judgment' for the purposes of Clause 15 should receive a wider and more liberal interpretation than the expression 'judgment' in the CPC.

21. The second important principle which emerges from the judgment in Shah Babulal Khimji is that a 'judgment' imports a concept of finality in a broader and not in a narrower sense. A judgment can be of three kinds:

(i) a final judgment;
(ii) a preliminary judgment; and
(iii) an intermediary or interlocutory judgment.

22. The reference in the present case, essentially turns on what categories of interlocutory judgments would fall within the ambit of the expression 'judgment' for the purpose of Chapter VIII Rule 5. Interlocutory orders governed by Clauses (a) to (w) of Order XLIII Rule 1 CPC contain a quality of finality and would hence be judgments which would be appealable under the Letters Patent. But, in addition, there may be interlocutory orders which are not covered by Order XLIII Rule 1 but may also possess a characteristic of finality. Dealing with this aspect, the Supreme Court observed that :

"(3) Intermediary or Interlocutory judgment.- Most of the interlocutory orders which contain the quality of finality are clearly specified in clause (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote."

23. The third principle which was laid down in Shah Babulal Khimji is that in the course of a trial, the trial Judge may pass a number of orders of a procedural or routine nature. Some of these orders may even cause a degree of inconvenience to one party or the other, such as an order refusing an adjournment or an order refusing to summon a witness or document. Such orders, the Supreme Court held, are purely interlocutory and are not judgments because it would always be open to a party aggrieved to make a grievance against the order passed, in an appeal arising out of the final judgment of the trial Judge.

24. The fourth principle which emerges from the judgment of the Supreme Court in Shah Babulal Khimji is that every 'interlocutory order' is not a 'judgment'. Only certain categories of interlocutory orders can be regarded as judgments:

"...every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned." (emphasis supplied)

25. The Supreme Court ruled that an interlocutory order to be a judgment must contain traits and trappings of finality, either when it decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

26. The next important decision to which a reference has to be made, is a judgment of two learned Judges of the Supreme Court in Central Mine Planning and Design Institute Ltd Vs Union of India10. That was a case where a learned Single Judge, on an application under Section 17-B of the Industrial Disputes Act, 1947, directed the employer to pay to the workmen the full wages last drawn by them on the date on which they were terminated from service. The Supreme Court observed that the Division Bench of the High Court erred in coming to the conclusion that the directions of the learned Single Judge did not constitute a 'judgment' within the meaning of Clause 10 of the Letters Patent of the Patna High Court. After following the earlier decision in Shah Babulal Khimji, the Supreme Court formulated the following test:

"...to determine the question whether an interlocutory order passed by one Judge of a High Court falls within the meaning of "judgment" for purposes of Letters Patent the test is: Whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case."

27. The order of the learned Single Judge was held to have determined the entitlement of the workmen to receive benefits and imposed an obligation on the employer to pay those benefits under section 17-B and was held to be a judgment within the meaning of Clause 10 of the Letters Patent.

28. In Midnapore Peoples' Coop Bank Ltd Vs Chunilal Nanda11, the issues, which among others, came up before the Supreme Court were :

(i) Where the High Court in a contempt proceedings renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether that would be appealable under Section 19 of the Contempt of Courts Act, 1971 and if not, what would be the remedy to the person aggrieved; and

(ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal would be maintainable under Clause 15 of the Letters Patent of the High Court of Calcutta.

29. The Supreme Court observed that interlocutory or interim orders which are passed during the pendency of a case would fall under one or the other of the following categories:

"(i) Orders which finally decide a question or issue in controversy in the main case;

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case;

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case;

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment;

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties."

30. The Supreme Court held that the expression 'judgment' in Clause 15 of the Letters Patent will, besides covering judgments as defined in Section 2(9) of CPC and orders enumerated under Order XLIII Rule 1, also cover other orders which though they may not finally and conclusively determine the rights of parties with regard to all or any of the matters in controversy, may finally decide some collateral matters which affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fell under categories (i) to (iii) above were held to be 'judgments' whereas, orders falling under categories (iv) and (v) were held not to be 'judgments' for the purpose of filing appeals provided under the Letters Patent.

31. We now formulate the governing principles :

(i) The expression 'judgment' was advisedly not defined in the Letters Patents of various High Courts which conferred a right of appeal against a judgment of a Single Judge to a Division Bench of that Court;

(ii) The expression 'judgment' is not to be construed in the narrower sense in which the expression 'judgment', 'decree' or 'order' is defined in the CPC, but must receive a broad and liberal construction;

(iii) Every order passed by a trial Judge on the Original side of a High Court exercising original jurisdiction or, for that matter, by a learned Single Judge exercising the writ jurisdiction, would not amount to a judgment. If every order were construed to be a judgment, that would result in opening a flood of appeals and there would be no end to the number of orders which could be appealable under the Letters Patent;

(iv) Any interlocutory order to constitute a judgment, must possess the characteristic of finality in the sense that it must adversely affect a valuable right of a party or decide an important aspect of the trial in an ancillary proceeding. In order to constitute a 'judgment', the adverse effect on a party must be direct and immediate and not indirect or remote;

(v) In order to constitute a judgment, an interlocutory order must: (a) decide a matter of moment; or (b) affect vital and valuable rights of the parties and must also work serious injustice to the party concerned:

(vi) On the other hand, orders passed in the course of the proceedings of a routine nature, would not constitute a judgment even if they result in some element of inconvenience or hardship to one party or the other. Routine orders which are passed by a Single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a 'judgment' because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments.

32. Now, it is in the background of these principles that we need to deal with the issue as to whether an order of a Single Judge, in the exercise of writ jurisdiction, calling for the filing of a counter affidavit and a rejoinder, must in all circumstances without exception be treated as orders merely facilitating the progress of the case and not constituting a judgment. Where a judge requires the filing of a counter affidavit by the respondent and a rejoinder by the petitioner in response, this is in the nature of a procedural direction to enable the Court to have a full disclosure of the underlying facts and issues so as to facilitate a decision. The object of such a direction is to enable the Single Judge to be apprised of facts relevant

and material to arriving at a considered view. Such a direction is in aid of the progression of the case. It does not decide the matter or issue in controversy. The lis continues to remain pending before the Single Judge. The Court would apply its mind to the merits of the controversy, for the purpose of deciding an application for interim relief and eventually for the final disposal of the writ proceedings after affidavits are filed. This is a procedural order and not a judgment.

33. At least three judgments of the Division Benches of this Court have construed directions of this nature not to constitute 'judgment' for the purpose of Chapter VIII Rule 5 of the Rules of the Court. The first decision was of a Division Bench of this Court in Mohd Hashim Vs Board of Madarsa Education12. In the writ proceedings, a learned Single Judge issued directions for the filing of a counter affidavit and rejoinder affidavit and the case was directed to be listed after the expiry of the period mentioned in the order. No order appears to have been passed on the stay application filed together with the writ petition. The grievance of the original petitioner, who was in a special appeal, was that the order of the learned Single Judge amounted to a rejection of the prayer for stay rendering the writ petition infructuous. From the judgment of the Division Bench, it appears that the case related to examinations which were scheduled to be held with effect from 31 May 2008. When the writ petition was filed before the learned Single Judge who passed an order on 13 May 2008, it was stated that the examinations were expected to be held in the last week of May 2008. Before the Division Bench, it was stated that the examinations were now scheduled from 31 May 2008 and the fate of nearly two hundred students who had submitted their examination forms would be adversely affected. The Division Bench held that there was no judgment by which the appellant had been aggrieved and hence the special appeal was not maintainable. It was left open to the appellant to move an application before the learned Single Judge and the special appeal was dismissed.

34. The second judgment of a Division Bench in Committee of Management of National Integrated Medical Association Vs State of U P13 arose out of an order which was passed by the Prescribed Authority in the exercise of jurisdiction under Section 25 of the Societies Registration Act, 1860. The learned Single Judge directed, while issuing notice, that the case be listed after six weeks. The Division Bench, in special appeal, noted that the stay application had neither been allowed nor rejected. The Division Bench held that since the Prescribed Authority was a Tribunal while exercising jurisdiction under Section 25, a special appeal was barred under Chapter VIII Rule 5. The Division Bench also held that the order which was passed by the learned Single Judge was not an order deciding an interim application nor was any issue decided which may adversely affect a valuable right of the parties and hence, the special appeal would not be maintainable. The Division Bench held as follows:

"...routine orders which are passed to facilitate the progress of the case are not "judgment" which are appealable under the Letters Patent. The impugned order dated 17.9.2008 as extracted above clearly indicates that the said order is not an order deciding the interim application of the appellants nor any issue has been decided by the said order which may adversely affect the valuable right of the parties..."

35. The Division Bench rejected the submission that the application for interim relief must be deemed to have been rejected on the basis of the provisions of Explanation V to Section 11 of the CPC. In the view of the Division Bench, the order impugned was a 'normal routine order' passed during the progress of the case and did not affect the valuable right of any party and was hence not appealable.

36. The third judgment of the Division Bench is in Ghisai Ram Krishak Vidyalaya Samiti Vs State of U P14. In this case, a challenge was addressed to an order passed by the Deputy Registrar, Firms, Societies & Chits on 8 July 2014. The learned Single Judge, by an order dated 24 July 2014 directed that the petition be listed in the following week when the prayer for interim relief would be considered. Subsequently, when the petition came up, a consequential order had been passed by the District Basic Education Officer on 21 July 2014 and in order to challenge that order the writ petition was sought to be amended. On 15 October 2014, the learned Single Judge merely directed that a counter affidavit and rejoinder be filed. It was this order dated 15 October 2014 that was sought to be challenged on the ground that it effectively amounted to the denial of interim relief since the tenure of the appellant Committee was to expire on 31 October 2014. The Division Bench held that the order of the learned Single Judge, as it stood, did not contain any decision. In order to be an order which was appealable under Chapter VIII Rule 5 of the Rules of the Court, there had to be an order adversely affecting the rights of a party touching the quality of finality or adversity. The Division Bench observed as follows:

"...There is however another category of situations which is very common as in the present case where it is routine in procedure and is otherwise compulsory or expedient in the interest of justice to postpone or defer passing of an order for having a grip of facts and law, dependant upon cross-pleadings of the adversaries. The elements of observance of the principles of natural justice are attracted and have to be adhered. The court, therefore, has to decipher the exact situation prevailing in a particular matter before it proceeds to apply the principles attracted as each case may have different facts. However, in such types of cases, ordinarily, it would be not wrong to presume that there is no decision amounting to a judgement."

37. In the view of the Division Bench, all that had happened was that the case was adjourned for the filing of affidavits. The order of the learned Single Judge dated 15 October 2014 was held not to be a judgement.

38. A close analysis of the facts of each of the three cases, which have been adverted to above, would indicate that at least in the first two cases, the Division Bench, while holding that special appeal was not maintainable, had due regard to the nature of the order and the facts of the case out of which the order of the learned Single Judge had arisen. In the first decision in Mohd Hashim (supra), the Division Bench noted that when the learned Single Judge had initially been moved on 13 May 2008, it was stated that the examinations were to commence in the last week of May. It was subsequently and before the Division Bench in appeal, that it was sought to be stated that the examinations were scheduled on 31 May 2008 (thereby making out a case of urgency). This was evidently not a fact of which the learned Single Judge was apprised since it appears from a reading of the judgement that it was the Division Bench which was sought to be moved on the ground that there was a

pressing urgency warranting the grant of interim relief. The Division Bench in this set of facts held that the proper remedy for the appellant was to move the learned Single Judge and hence the appeal was held not to be maintainable. The second judgement of the Division Bench in Committee of Management of National Integrated Medical Association (supra) involved plain and simple an order passed under Section 25 of the Societies Registration Act 1860 by the Prescribed Authority which was in question before the learned Singe Judge. The Division Bench observed that the order of the learned Single Judge calling for the filing of pleadings in response to the petition had not decided any issue which may adversely affect a valuable right of the parties and was hence not appealable. The finding that the appeal was not maintainable in both these cases would, on a proper appreciation of the nature of the two decisions of the Division Bench, indicate that it was in the facts of each individual case that the appeal was held not to be maintainable. What was in issue in both the cases was purely a procedural order against which no special appeal would be maintainable under Chapter VIII Rule 5.

39. In the third decision in Ghisai Ram Krishak Vidyalaya Samiti, the Division Bench has held that an order which merely calls for the filing of a counter and a rejoinder would, in no circumstances, be regarded as an appealable order. The Division Bench held that merely because this would delay the disposal of the application for interim relief - the hearing of the application being deferred until after a reply of rejoinder is filed - does not constitute the order appealed against a judgment. This line of reasoning of the Division Bench appears from the following observations in paragraphs 48 and 49 of the judgment:

"...The case being adjourned with a direction to exchange affidavits causing a delay on account of this processual compulsory requirement, cannot be inferred to mean a refusal to pass an order. There is nothing hidden or undecipherable so as to construe it as a decision amounting to a judgment. There is, therefore, no mystery that requires any probe or discovery to unravel more than what is actually written and clearly intended. It is not possible to read between the lines when there is not even a remote exercise of discretion to make out a ground of appeal. Thus, in our considered opinion, the impugned order dated 15.10.2014 does not fall within the meaning of the word 'judgment' or an order as contemplated in Chapter VIII Rule 5 of the 1952 Rules so as to make this appeal competent against such an order.

...

...To put it simple, the proceedings before the learned Single Judge where it is alleged that the passing of an interim order has been withheld by itself in view of the terminology of the impugned order, may not be a ground for maintaining an appeal, but at the same time it may be a ground for pressing for an interim relief or disposal of the entire dispute on issues of jurisdiction or violation of principles of natural justice before the learned Single Judge in the background of the case where the appellant was ousted and was deprived from functioning till the end of his tenure."

40. In the earlier part of the decision, the Division Bench observed that an order which is merely of a procedural nature calling for the filing of a reply to enable the Court to have a proper factual basis for considering the controversy, would not be amenable to an appeal under Chapter VIII Rule 5 of the Rules of Court.

This statement of law is consistent with the law laid down by the Supreme Court in Shah Babulal Khinji which indicates that orders passed by the Court of a routine nature in a proceeding would not be a judgement even if they cause some inconvenience to a party. In Midnapore Peoples' Coop Bank Ltd, the Supreme Court once again emphasised that orders which are passed to facilitate the progress of the case till the culmination of the matter in a final judgement are not amenable to being called 'a judgement'. Similarly, orders which may cause some inconvenience or prejudice but do not finally determine rights or obligations of parties would not amount to a judgment.

41. There is another vital principle which is involved here. The High Court is a court of record. The Court in its judicial proceedings speaks through its orders. The order of a court reflects the position of what was urged and what was decided. Where a Single Judge has passed only a procedural direction calling for a reply or counter, it would be correct and fair to proceed on the basis that the hearing of the prayer for interim relief has been deferred until a counter has been filed. A party cannot be permitted to urge a submission contrary to the record in appeal. If the grievance of a party is that the Single Judge has not considered a submission which was urged and an argument is not reflected in the record, the remedy is to apply to that very judge who is passing or has passed the order to record a submission urged. Not having done so, a party cannot be allowed to ordinarily urge in appeal that what is a procedural direction also involves a failure to consider an application for interim relief or to deal with a submission raised. A party may rest content with a mere deferment of a hearing so as to allow a counter to be filed. The party cannot be allowed to turn around and maintain an appeal on the specious ground that the procedural direction of the Single Judge amounts to a denial of interim relief. This would destroy the sanctity of the judicial process. Chapter VIII Rule 5 is a provision for an intra court appeal from one judge of the High Court to a Division Bench of the same Court. Single judges are judges of the Court and not Courts subordinate to the High Court. They control the procedure of the courts over which they preside though consistent with judicial objectivity and fairness. That is the rationale why a procedural direction in the progress of a petition is not appealable under Chapter VIII Rule 5. It decides no issue of fact or law and is not a judgment.

42. The area which both the judgements in Shah Babulal Khinji and Midnapore Peoples' Coop Bank Ltd leave open to be considered is whether the order which is sought to be placed in issue in appeal, though passed at an interlocutory stage, is of a nature that would affect the vital and valuable rights of parties and work serious injustice to the party concerned. An order, which has the consequence of adversely affecting the valuable rights of a party has the characteristics or trappings of finality and has, therefore, been held to be a 'judgement' which is amenable to the appellate jurisdiction. For the purpose of this proceeding, it would not be appropriate for the Court to draw an exhaustive catalogue of the circumstances in which an order of the learned Single Judge declining to even take note of a prayer for interim relief may result in an irreversible situation or irretrievable injustice that would affect valuable and substantive rights of a party to the lis. Ultimately, as the Supreme Court held in the decision in Central Mine Planning and Design Institute, whether the order is a final

determination affecting vital and valuable rights and obligations of the parties concerned has to be ascertained on the facts of each case. Evidently, there is a clear category of cases where an order is purely of a processual nature in aid of the final progression of a case and which neither determines nor has the effect of determining vital and substantive rights as between the contesting parties. The test to be applied is whether the order of the learned Single Judge has trappings of finality in the sense that the consequence of the order is to affect vital and valuable rights of the parties and to cause or work serious injustice to the party concerned. The judgements of the Supreme Court leave it open to the appellate court to determine in the facts of each case whether these tests which have been laid down consistently for defining the ambit of the expression 'judgement' are fulfilled in the facts of each case. The judgement in Ghisai Ram Krishak Vidyalaya Samiti cannot be read as taking away the discretion of the appellate court and its unquestioned jurisdiction to enquire into the maintainability of an appeal on the tests which have been laid down by the Supreme Court.

43. We may also note a judgement of a Division Bench of this Court in Society Madarsa Mazahir Uloom Mubarak Shah Saharanpur Vs Muzaffar Hussain15 In that case, an application was made for the registration of a society under the Societies Registration Act, 1860. An objection was filed by the respondent before the Assistant Registrar, alleging that a waqf had been created in the name of the Madarsa and was registered with the U P Sunni Central Waqf Board. This objection was repelled and the society was directed to be registered. In a writ petition, the High Court directed the Assistant Registrar to refer the question of registration to the State Government which, in turn, rejected the objection of the respondent and, hence, the appellant was held entitled to registration. This order was challenged by the respondent in a writ petition on which only notice was issued but no interim stay was granted. The appellant was granted registration thereafter, after which an application for renewal was submitted. The Deputy Registrar allowed the application for renewal of the certificate of registration. This order was challenged in a writ petition and the learned Single Judge stayed the operation of the order. The Division Bench held that the appeal was not maintainable. The Division Bench also held that in certain cases at the time when writ petitions are entertained, the valuable rights of the other side may be affected by passing what is called 'a pre-hearing judgement.' However, if after furnishing an opportunity to the respondents, the Court passes an order making an arrangement till the dispute is decided so as to preserve the status quo, such an order will not have the quality of finality. There are certain observations in the judgement of the Division Bench which appear to be of an excessively broad nature. For instance, the Division Bench held that "mere" grant of an order of stay or vacating an order of stay does not decide any controversy on which parties are at issue. The Division Bench also adverted to an earlier unreported decision in support of the principle that an order granting or refusing to grant stay does not constitute a 'judgment'. These observations of the Division Bench would, in our view, be rather broadly stated and may not be in accord with the judgments of the Supreme Court which we have referred to above. Ultimately, however, the Division Bench observed

that in each case, the nature of the order will have to be examined and the effect of the order passed would have to be considered on whether it determines a right or liability of the parties so as to be treated as a 'judgment'. This judgment was followed subsequently by another Division Bench in Chhatra Dhari Prasad Vs Anil Kumar Gautam16. Both these decisions, it must be clarified, cannot be held to lay down a principle of law that though an interlocutory order of the learned Single Judge is of such a nature that would adversely affect the right of a party or decide an important aspect of the trial in an ancillary proceeding, that it would yet not be amenable to a special appeal. On the contrary, the law as laid down by the Supreme Court in Shah Babulal Khimji is that an interlocutory order which decides matters of moment or affects the valuable rights of the parties and works serious prejudice to the parties concerned would constitute a 'judgment' and would be amenable to a special appeal.

44. We, accordingly, are of the view that a direction issued by the learned Single Judge in the course of the hearing of a writ petition, calling for the filing of a counter and a rejoinder or, in other words, for the completion of pleadings is a direction of a procedural nature, in aid of the ultimate progression of the case. The object and purpose of such a direction is to enable the Single Judge to have the considered benefit of a response to the petition so as to enable the Court to deal with an application of an interlocutory nature upon a fair consideration of the rival perspectives and eventually for the purpose of the disposal of the case at the final stage. A purely procedural direction of this nature would ordinarily not be amenable to the remedy of a special appeal even if the consequence of the issuance of such a direction is to cause some inconvenience or prejudice to one or other party. The Court, in order to decide a lis, either at the interlocutory or at a final stage, would generally require the benefit of a response filed by a party which would be affected by the order which is sought and the reliefs which are claimed. Compliance with the principles of natural justice is as much a safeguard for the parties as it is for the Court of having considered the matter in all its perspectives before rendering a final decision. If a party to the proceeding seeks to press an application for ad interim relief even before a reply is filed on grounds of extreme urgency or on the ground that the situation would be irreversibly altered or that irretrievable injustice would result unless a protective order is passed, such a submission must be urged before the Single Judge. If such a submission is urged, it must be recorded and dealt with however briefly to obviate a grievance that an application for ad interim relief was pressed but not dealt with. A purely procedural direction of calling for a counter affidavit and rejoinder would not be amenable to a special appeal since it decides no rights and does not affect the vital and substantive rights of parties. However, the appellate court has the unquestioned jurisdiction to decide whether the direction is of a procedural nature against which a special appeal is not maintainable or whether the interlocutory order decides matters of moment or affects vital and valuable rights of parties and works serious injustice to the party concerned. Where the Division Bench in a special appeal is of the view that the order of the learned Single Judge is not just a procedural direction but would result in a grave detriment to substantive rights of an irreversible nature, the jurisdiction of the Court is wide enough to intervene at the behest of an aggrieved litigant. The Rules of Court are in aid of justice. We, therefore, affirm the principle that a purely processual

order of the nature upon which the reference is made would not be amenable to a special appeal not being a judgement. The Division Bench will have to decide in the facts of each case, the nature of the order passed by a Single Judge while determining whether the appeal is maintainable.

45. In view of the aforesaid discussions, we answer the question of law referred to the Full Bench by holding that, an order of a learned Single Judge upon a petition under Articles 226 or 227 of the Constitution only calling for counter and rejoinder affidavits is merely a procedural order in aid of the progression of the case. An order of this nature which is purely of a procedural nature in aid of the progression of the case and to enable the Court to form a considered view after a counter affidavit and a rejoinder are filed would not be amenable to a special appeal under Chapter VIII Rule 5. Such an order does not decide anything nor does it have the trappings of finality. If a party to the proceedings seeks to press an application for ad interim relief of a protective nature even before a counter affidavit is filed, on the ground that a situation of irretrievable injustice may result or that its substantive rights would be adversely affected in the meantime, such an argument must be addressed before the Single Judge. If such an argument is urged, it should be dealt with however briefly, consistent with the stage of the case, by the Single Judge. It is for the Division Bench hearing the special appeal to consider whether the order decides mattes of moment or is of such a nature that would affect the vital and valuable rights of the parties and causes serious injustice to the concerned party.

46. The reference to the Full Bench shall accordingly stand answered in the aforesaid terms. All these special appeals shall now be placed before the appropriate Bench according to the roster of work for final disposal in the light of this judgment.

47. Before we conclude, the Court would like to express its appreciation of the able assistance rendered to the Court by the learned counsel appearing for the appellants, the learned Additional Advocate General appearing for the State, and by Shri Manish Goel and Shri Rahul Agarwal who were appointed by the Court as amicus curiae.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2015

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No. 1372 of 2014

Sonu ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri R.P. Mishra, Sri Manoj Kumar Srivastava, Sri Omvir Babu, Sri Ratan Singh

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 439-Bail application-offence under Section 302-considering allegation of honor killing -applicant being real brother of deceased-brutally done to death-considering post crime conduct, gravity of offence-no case for bail-rejected.

Held: Para-8
Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for

bail. Therefore, the prayer for bail of the applicant is rejected.

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

1. This application has been filed seeking the release of the applicant on bail in Case Crime No.136 of 2013, u/s 302 I.P.C., Police Station-Palimukimpur, District- Aligarh.

2. Counter affidavit filed, taken on record.

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

4. Perused the record.

5. Submission of counsel for the applicant is that this is a case of circumstantial evidence and there is no eye witness account of murder available in this case and the charge sheet against the applicant is nothing except a conjectural inference of the investigating Officer without any sure basis. The applicant himself had lodged the first information report about the occurrence which according to the counsel speaks about the clean conscience of the applicant. The submission of the counsel is that actually the deceased had committed suicide out of shame and fear of social humiliation.

6. Learned A.G.A. has opposed the prayer for bail and has submitted that this is a case of honour killing. The deceased was sister of the first informant and as she had been seen along with one Subhash in some objectionable position or compromising position, she was taken back home by her brother and then she was strangulated to death. Further submission is that the most incriminating circumstance against the applicant is that though it was a case of murder, but while giving the information to the police station the applicant reported the incident showing it to be a case of suicide. Learned A.G.A. has drawn the attention of the Court to the post mortem examination report of the deceased which shows that not only the froth was coming out from the nostrils and the eyes as well as the face were found congested, the hyoid bone was also found fractured. In the opinion of the doctor also the death was the result of strangulation and not hanging. The submission is that it was not a case of suicide at all as was shown or projected by the applicant and the same misinformation has been completely disproved by the medical evidence. The deceased had died within the precincts of her home and how and under what circumstances she met with her homicidal death are matters certainly within the 'especial knowledge' of the applicant as contemplated u/s 106 Evidence Act. It was the onus of the applicant to explain the circumstances as to how did she meet with her end. The explanation offered by the applicant with regard to her death is not only inadequate but has been exposed to be false. The submission is that whatever might have been the conservative social values of the applicant and however much objection the applicant might have had against the relationship or the meeting of the deceased with any other boy, the extreme punitive step taken by the family members of the deceased is absolutely unpardonable. A helpless girl who aught to have been protected by the applicant being his sister was brutally done to death and then in order to preserve his ownself from the accusation of murder an entirely false suicide story was reported to the police department as a camouflage but which got exploded completely by the investigation. The mischievously calculating

attempt to bluff the authorities and misleading the police with the aim to make it draw wrong conclusions is an additional incriminating circumstance to be reckoned with against the applicant. This post-crime conduct of the applicant bears an eloquent testimony to his guilty mind. A.G.A. has also drawn the attention of the court to certain statements which were given by certain witnesses in which extra judicial confession is said to have been made by the applicant admitting his guilt.

7. After adverting to the record of the case in the light of the rival submissions made at the bar the court is once again reminded of the old saying that "The living do not speak the truth with the candour of the dead." However much the applicant might have tried to suppress the truth, the deceased, who spoke from her death through the autopsy of her cadaver was candid enough to spill the beans and unveil the truth.The accused has lied but the deceased did not, nor did the circumstances of the case. But what adds to the poignancy of the murder is to see that the blood has taken the blood of its own and that too for a reason which was so unreasonable, so irrational and so unjustifiable. To speak the least, the indefensible and morbid conservatism of the applicant who treated the adolescent love as a culpable offence and that too punishable with death, makes the murder all the more foul and despicable. The courts of law can not brook with such crimes which have all the trappings of primitive orthodox savagery.

8. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail. Therefore, the prayer for bail of the applicant is rejected.

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 24.09.2015

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 3025 of 2015
Connected with
Matters Under Article 227 No. 3897 of 2015

Jagdish Chand Kashyap ...Petitioner
Versus
Smt. Malti Agarwal ...Respondents

Counsel for the Petitioner:
Sri Om Prakash Lohia, Sri Noor Sabaa

Counsel for the Respondents:
C.S.C., Sri Arvind Srivastava, Sri Pushkar Srivastava

U.P. Urban Building (Regulation of letting and rent) Act 1972-Section 2(2) explanation-New construction-on same plaint after complete demolition utilizing one old wall-new construction completed-in the year 1987-deposit of rent under Section 30 without protest of inapplicability of Act 1972-exemption from applicability held proper-reliance placed upon of Gopal Das case-misconceived-in that case question referred was apart protection of tenant and not applicability-against concurrent findings of Court below-High Court not to interfere-petition dismissed.

Held: Para-26
As regards absence of fresh assessment, it may be noted that under clause (a) Explanation-1 section 2(2), in case where fresh assessment has not been

made, nor the completion thereof reported to or otherwise recorded by the local authorities, the date of construction of the building shall be the date on which it was actually occupied. Concededly, the shop in dispute after substantial demolition of the existing construction and reconstruction, was first occupied by the petitioner in the year 1987. It is also not in dispute that a fresh contract of tenancy was entered into between the parties, though oral, whereunder, the rent of the shop was also enhanced. In such view of the matter, this Court does not find any illegality in the view taken by the courts below in holding that the provisions of the Act would not apply to the shop in dispute.

Case Law discussed:
2012 (2) ARC 408; 2008 (3) ARC 841; 2001 (2) ARC 226; 1980 ALL.L.J. 229; 1995 (2) ARC 549; (2001) 1 SCC 564; Laws (All) 1991-5-112; Laws (All) 2013-1-206.

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

1. The petitioner is a tenant of a shop in building no. 343-A (private no. 343-A/10 and present no.917) Jokhan Bagh, Civil Lines, Jhansi (hereinafter referred to as 'the shop in dispute'). The landlord of the shop is Smt. Malti Agarwal (the respondent herein).

2. Before the petitioner was inducted as the tenant of the shop in dispute, he was occupying another smaller shop in the same building, in pursuance of a lease agreement dated 27.5.1981 whereunder, the rent was Rs.500/- per month and the tenancy was for a period of 15 years with an option of renewal for a further period of five years. It is admitted case of the parties that in the year 1986-87, an adjoining shop in the tenancy of one Mohd. Qamar was got vacated and the said shop alongwith the shop in the tenancy of the petitioner, were merged together by undertaking extensive modifications and constructions. Whereas, the shop earlier in the tenancy of the petitioner measured 12.6' x 14.6', the new shop i.e., the disputed shop, now measures 30' x 20'. In pursuance of an oral agreement between the parties, the rent of the disputed shop was enhanced to Rs.750/- per month, out of which Rs.250/- was to be adjusted in the expenses incurred by the petitioner in remodelling the structure.

3. The respondent-landlord filed SCC Suit no. 8 of 1991 for recovery of arrears of rent and ejectment. In the said suit, the respondent-landlord took a specific plea that the disputed shop now in the tenancy of the petitioner since 1.2.1987, is a new construction within the meaning of U. P. Act no. 13 of 19721 and is exempt from the provisions thereof. The suit was contested by the petitioner by filing written statement in which it was admitted that during the year 1986-87, after getting the adjoining shop vacated from Mohd. Qamar, the two shops were merged together. However, it was pleaded that there was no default in payment of rent and tenancy of the petitioner was of a permanent nature and thus, he could not be evicted.

4. The Judge Small Causes Court, by judgement dated 3.9.2003 dismissed the suit holding that under the registered lease deed dated 27.5.1981, the tenancy being for a duration of 15 years, the petitioner could not be evicted before expiry of the said period. The suit for eviction was found to be bad in law. However, while deciding the question whether the provisions of the Act are applicable or not, it was specifically held

that the new constructions undertaken during the year 1986-87, were so extensive in nature that the new structure now in the tenancy of the petitioner, would be deemed to be constructed on the date of completion thereof, and thus exempt from the provisions of the Act.

5. The respondent-landlord, aggrieved by the judgement of the Judge Small Causes Court dated 3.9.2003 dismissing the suit, preferred Civil Revision No.831 of 2003 before this Court. During the pendency of the revision, the respondent-landlord served a fresh notice dated 7.4.2011 upon the petitioner seeking to terminate his tenancy. Consequently, Civil Revision No.831 of 2003 pending before this Court was got dismissed as withdrawn on 11.5.2011, followed by filing of SCC suit no. 17 of 2011. It was pleaded therein that the remodelled shop in the tenancy of the petitioner was held to be a new construction in SCC Suit no. 8 of 1991 and the tenancy of the petitioner having been terminated by notice dated 7.4.2011, he is liable to ejectment.

6. The suit was contested by the petitioner admitting the relationship of landlord and tenant between the parties. It was admitted that extensive constructions and modification were undertaken in the year 1986-87 and the remodelled shop was let out to the petitioner. However, it was claimed that the petitioner had deposited rent in proceeding under section 30 of the Act being Misc. Case no. 25 of 2004. The same was duly allowed and thus, the respondent-landlord is now estopped from contending that the provisions of the Act are not applicable. It was further pleaded that the shop in dispute being used for manufacturing purposes and thus, in the absence of notice of six month, the tenancy cannot be validly terminated. It was further pleaded that the lease in favour of the petitioner was of perpetual nature and thus, the suit instituted for his ejectment deserves to be dismissed.

7. The trial court by judgment dated 1.4.2014 decreed the suit for eviction of the petitioner while it was dismissed for the relief of recovery of arrears of rent. The trial court held that the shop in dispute would be deemed to be a 'new construction' within the meaning of explanation 1 of section 2(2) of the Act and thus, the provisions of the Act would not apply; that the notice dated 7.4.2011 terminating the tenancy is legal and valid; that there was no default in payment of rent as the entire amount stood deposited in the court and thus, the respondent-landlord is not entitled for the relief of recovery of arrears of rent, but in view of the finding that the Act does not apply and the notice determining the tenancy was duly served, the respondent was held entitled to a decree for eviction of the petitioner.

8. Aggrieved by the judgement and decree by the Judge Small Causes Court dated 1.4.2014, the petitioner preferred SCC revision No.47 of 2014, which has been dismissed by the District Judge, Jhansi by judgement dated 29.4.2015. The petitioner has now assailed the judgement passed by the Judge Small Causes Court dated 1.4.2014 and the judgement dated 29.4.2015 passed in SCC revision no. 47 of 2014, by filing Petition No. 3025 of 2015 before this Court invoking the supervisory jurisdiction under Article 227 of the Constitution of India.

9. The petitioner also filed an application for review of the judgement passed by the District Judge, Jhansi dated

29.4.2015, which was rejected by order dated 1.7.2015. Against the same, the petitioner preferred a separate petition bearing no. 3897 of 2015. Both the petitions were clubbed and heard together and are being decided by this common judgment.

10. Sri Om Prakash Lohiya, learned counsel appearing for the petitioner challenged the impugned judgements by raising the following contentions :-

(a) The shop in dispute was only remodelled in the year 1986-87 and since the existing construction, i.e., the shop in dispute was built on the same foundation and thus, it could not be treated to be a new construction and provisions of the Act would apply. Accordingly, the petitioner was entitled to protection under the Act.

(b) The tenancy of the petitioner being for manufacturing purposes, the notice dated 7.4.2011 seeking to terminate the tenancy on expiry of 30 days, was thus, invalid.

11. On the other hand, learned counsel for the respondent-landlord submitted that the shop in dispute was newly built in the year 1986-87 and provisions of the Act are not applicable to it. It is urged that in previous proceedings, a categorical finding was returned to the effect that the provisions of the Act are not applicable to the shop in dispute. He further submitted that the findings recorded by the Judge Small Causes Court in the judgement dated 1.4.2014 that the shop earlier in the tenancy of the petitioner was substantially demolished and thereafter, the shop in dispute was constructed, is a finding based on the appreciation of evidence and does not call for any interference by this Court. It is further urged that the petitioner failed to prove that the tenancy was for manufacturing purposes and thus, there was no illegality in the view taken by the courts below in upholding the validity and legality of the notice dated 7.4.2011.

12. The main issue is the date on which the shop in dispute would be deemed to have been constructed and whether the provisions of the Act would apply to it or not.

13. It is now no more res integra as to whether the provisions of the Act would apply to a case where under an agreement, tenant voluntarily vacates the tenanted accommodation for demolition and new construction, and after demolition and new construction, the newly constructed premises is let out to the tenant. Earlier, there were divergent views and the issue was resolved by a Larger Bench in the case of Gopal Dass vs. Bal Kishan Dass2. The Larger Bench disapproved the view taken by a learned Single Judge in the case of Shri Prakash Chandra Mehta vs. III Additional District Judge,3 wherein, it was held that where the tenant voluntarily vacates the tenanted accommodation for purposes of demolition and new construction and subsequently inducted as a tenant in the new constructed building, the provisions of the Act would continue to apply. On the other hand, this court approved the decision in the case of Naseem Ahmed Vs. IV Additional District Judge4 wherein contrary view was taken. The larger Bench concluded by answering the reference as under :-

"It is, therefore, difficult for us to agree with the judgment delivered in the case of Shri Prakash Chand Mehta (supra). It is not a good law. The said case was decided more on equitable considerations than legal.

For the reasons given above, we answer the question referred to us by holding that the provisions of the U.P. Act No.13 of 1972 will not apply to new construction where under the agreement, a tenant voluntarily vacates the tenanted accommodation for demolition and new cons-truction and after demolition and new construction, newly constructed premises is let out to the tenant. To put it differently, a new construction after demolition shall be exempt from the operation of provisions of the U.P. Act No.13 of 1972 as provided under Section 2(2) of the Act notwithstanding the fact that the tenant who was earlier in occupation of the existing building voluntarily agreed to vacate it and in lieu thereof the landlord agreed to let the new construction out to such tenant after reconstruction."

14. The aforesaid proposition of law was also not disputed by learned counsel for the petitioner. Rather, he himself cited the decision in the case of Gopal Dass (supra) in submitting that the new structure should have been constructed after complete demolition of the existing structure. In other words, it was urged that where the old structure was not completely demolished as in the instant case, it would be treated to be an old construction and would not be exempt from the provisions of the Act.

15. In previous proceedings in SCC suit no. 8 of 1991, the trial court in the judgement dated 3.9.2003, while deciding issue no. 4, returned the following finding :-

"रिमाडलिंग में पूरी छत पड़ी, आगे की दीवाल छोड़कर तीन दीवाले जमीन से नई बनाई गई थी, चौथी दीवाल कुछ ऊँची की गई इस प्रकार देखा जाय तो वास्तव में दुकान संख्या–343ए/10 वर्ष 1986–87 में पूरी तरह नई बनाई गई थी। पहले दुकान की कुल नाप 12.6 ग 14.6 फीट थी वही पुनः निर्माण बाद इसकी नाप 30 ग 20 फीट हो गई।"

16. In the instant suit, the Judge Small Causes Court, while deciding issue no.1, regarding applicability of the Act, has held as under :-

"प्रस्तुत मामले में यह साक्ष्य से स्वीकृत है कि दोनों दुकानों को मिलाकर के नवनिर्मित हॉल बनाया गया, जैसा कि पूर्व व पश्चिम स्थित दीवाल गिरा दी गयी तथा दक्षिण की दीवाल ऊँची की गयी और पूरी छत नये सिरे से डाली गयी। उत्तर तरफ 4 शटर व शटरों के मध्य पिलर बनाया गया और मध्य पार्टीशन की दीवाल हटा दी गयी। इस प्रकार से नव–निर्मित हॉल की पैमाईश 30 ग 20 फीट हो गयी। उपरोक्त विधिक निर्णय के आलोक में प्रस्तुत निर्माण नव–निर्माण की श्रेणी में है और उस पर यू0पी0 एक्ट संख्या 13/72 के प्राविधान प्रभावी नहीं होते है।"

17. Learned counsel for the petitioner has not challenged the findings recorded by the trial court in relation to the extent of the constructions undertaken in constructing the shop in dispute. The findings returned by the courts below clearly reveals that two shops were merged and in their place, a new hall measuring 30' x 20' now in the tenancy of the petitioner was constructed. Whereas, the area of the structure earlier in the tenancy of the petitioner was 12.6' x 14.6', the shop in dispute now measures 30' x 20'. In constructing the existing structure, the eastern and western wall were completely demolished, the height of southern wall was raised and the roof was laid afresh. In the northern wall, four shutters were installed and between them, pillars were constructed. The partition wall was removed. The question, thus for consideration before this Court is whether these construction indisputably made, would amount to a new construction within the meaning of the Act or not.

18. Section 2 (2) of the Act stipulates that the provisions of the Act would not apply to a building for a period of 10 years from the date on which its construction is completed. Since 26.4.1985, in relation to a building, the construction whereof is completed on or after April 26, 1985, the period of exemption was initially enhanced to 20 years and thereafter to 40 years by U.P. Act No. 11 of 1988. The Explanation 1 to section 2(2) of the Act which is material for deciding the controversy is as under :-

"Explanation 1. (a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time :

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants;

(b) "construction" includes any new construction in place of an existing building which has been wholly or substantially demolished;

(c) where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building the existing building shall be deemed to be constructed on the date of completion of the said addition;

19. In Jagdish Prasad vs. District Judge, Ghaziabad and others5, this Court laid down certain tests for determining whether "substantial addition" within the meaning of clause (c) of the Explanation have been undertaken or not by holding thus :-

"It is contended that since an old Baithaka was used to carve out the shops, the said shops cannot be treated to be a new building unless the additional constructions made can be found to be the major part of the building after the alterations. This is said to be not so in the instant case because the roof and at least three outer walls are the same and only partition walls and front shutters have been installed. I am inclined to agree with the contention that the words 'substantial addition' in Clause (c) take within their ambit not merely the addition of wholly new construction increasing the area of the building but also the alteration of the existing building into a new accommodation by remodelling it which may include the use of some parts of the old structure. The test for determining whether the altered construction should be regarded as old or new under Clause (c) would be whether after considering the area added the alteration effected and the cost incurred in alterations vis-a-vis the presumptive cost of the old building utilised and the form and structure of the building after the alterations it can be said that the parts utilised remained a major part of the altered structure. The purpose of the landlord before and after alterations may also be relevant for appreciating the change in form and structure. No single factor can be decisive. Looked at from this point of view, I

cannot find any infirmity in the view that where a long room used as a Baithak has been converted into four shops approximately 8' x 4 ½' each by making changes as above the shops do not remain parts of an old construction so as to be governed by the Act."

(Emphasis supplied)

20. In Phool Chand vs. III Additional District Judge6, this Court held that even if the some portion of old construction had been used to carve out the new shops, it would not bring the same within the purview of the Act. It has been held that Explanation 1 to section 2(2) of the Act shall "take within their ambit not merely the addition of wholly new construction, but also the alteration of the existing building into a new accommodation by remodelling it which may include the use of some parts of the old structure". In that case, wall of the building were changed and a double storey new roof was laid while utilising some part of the old existing constructions. In taking such view, the decision in the case of Jagdish Prasad (supra) was relied upon.

21. Applying these tests, it can safely be held that the shop in dispute would be covered by both clauses (b) and (c) of Explanation 1 of section 2(2) of the Act. The mere fact that the disputed shop was built over old foundation or by partially utilising one of the walls, will not make it an old construction. Concededly, partition wall between two shops was demolished, two walls were built anew, the level of one of the walls was raised and in the northern wall, four shutters were installed and new pillars were constructed. In making these constructions, the existing building was substantially demolished. The additions are substantial in extent so much so that the existing building becomes only a minor part of the shop in dispute. Consequently, the shop in dispute shall be deemed to be completed on the date of completion of the new addition, i.e, in the year 1987 as concurrently held by the courts below.

22. Learned counsel for the petitioner placed reliance on certain observations made in the case of Gopal Dass (supra), in contending that the new construction should have come into existence after completely demolishing the old building. However, this Court is unable to find any such proposition of law laid down in the said judgement. Infact, in that case, it was not in issue as to when the building would be deemed to be a new construction within the meaning of section 2(2) of the Act. On the other hand, as noted above, the question referred was as to whether in case new constructions have been made after demolition of existing constructions, a tenant would still be entitled to protection under the Act or not. Thus, this Court is unable to accept the contention made by learned counsel for the petitioner by placing reliance on the judgement in the case of Gopal Dass (supra).

23. The next decision relied upon by learned counsel for the petitioner is in the case of Vannattankandy Ibrayi vs. Kunhabdulla Hajee7. In that case, the question was whether in a case where the tenanted shop got completely destroyed by natural calamities and in its place, new constructions were made by the tenant himself, would the old tenancy continue. The Supreme Court held that such plea is not acceptable as after destruction of the existing shop, tenancy comes to an end automatically. It was observed as under :-

"On destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a

property in existence and there cannot be subsisting tenancy where the property is not in existence. Thus when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject matter and if the same is no longer in existence, there is an end of the tenancy and therefore : Section 108(B)(e) of the Act has no application in case of premises governed by the State Rent Act when it is completely destroyed by natural calamities."

The said decision is also of no help to the petitioner as therein, it was not in issue as to when a remodelled shop would be deemed to be a new construction as in the case at hand.

24. The other two decisions cited by learned counsel for the petitioner are in the case of Ajit Kumar Tandon vs. District Judge8 and Surendra Nath Rai vs. Arjun Kukreja9. In both these cases, the Court found that as a result of alteration and modification, the new structure stood exempted from the provisions of the Act. Thus, they are also of no help to the petitioner.

25. Learned counsel for the petitioner also made an attempt to suggest that in the absence of any building plan being sanctioned by the Development Authority and fresh assessment having been made, the shop in dispute cannot be said to be a new construction. However, the argument does not have any force. In case, constructions have been undertaken without getting the building plan sanctioned, it may be matter for consideration by the Development Authority, but the same would not make the shop in dispute an old construction for the purposes of determining the applicability of the Act. The same has to be adjudged by applying the test laid down in Explanation-1 to section 2(2) of the Act.

26. As regards absence of fresh assessment, it may be noted that under clause (a) Explanation-1 section 2(2), in case where fresh assessment has not been made, nor the completion thereof reported to or otherwise recorded by the local authorities, the date of construction of the building shall be the date on which it was actually occupied. Concededly, the shop in dispute after substantial demolition of the existing construction and reconstruction, was first occupied by the petitioner in the year 1987. It is also not in dispute that a fresh contract of tenancy was entered into between the parties, though oral, whereunder, the rent of the shop was also enhanced. In such view of the matter, this Court does not find any illegality in the view taken by the courts below in holding that the provisions of the Act would not apply to the shop in dispute.

27. The next contention of learned counsel for the petitioner is that the demised premises was being used for manufacturing purposes and thus six months' notice was required to determine the tenancy.

28. The finding returned by the Judge Small Causes Court is that the petitioner could not prove that he was engaged in manufacturing from the demised premises. It has further been noted that in the previous suit, no such pleading was made. The petitioner, though contended that he was utilising the shop in dispute for manufacturing purposes but in his statement as DW-1, he admitted that he had not filed any evidence to prove that the shop in dispute was being used for manufacturing purposes. Even before this

Court, except for contending that the petitioner had taken loan from U.P. F.C., which is only extended by U.P.F.C. to an undertaking engaged in manufacturing, no evidence could be produced to prove that there had been any registration with the Industries department or any manufacturing activity was being done from the demised premises. In such view of the matter, this Court does not find any reason to interfere with the concurrent findings of fact recorded by the courts below to the effect that the demised premises was not being used for manufacturing purposes.

29. No other submission was made by learned counsel for the petitioner.

30. The order passed by the revisional court rejecting the review application was not subjected to attack at the time of hearing.

31. In view of the foregoing discussion, both the petitions are devoid of merit and are dismissed. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.09.2015

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

U/S 482/378/407 No. 4246 of 2015

Barsati & Ors. ...Applicant
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Amarnath Dubey

Counsel for the Opp. Parties:
Govt. Advocate

Cr.P.C. Section 482-Quashing of Criminal Proceeding-offence under section 323/504/506/308 IPC -when such power can be exercised explained-from perusal of record-cognizable offence made out-no interference called for-with direction of expeditious disposal application-disposed of.

Held: Para-7
However, in this matter, after investigation, Police has found a prima facie case against accused and submitted charge-sheet in the Court below. After investigation the police has found a prima facie case of commission of a cognizable offence by accused which should have tried in a Court of Law. At this stage there is no occasion to look into the question, whether the charge ultimately can be substantiated or not since that would be a subject matter of trial. No substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C.

Case Law discussed:
1992 Supp (1) SCC 335; (2006) 7 SCC 296; (2008) 1 SCC 474; (2008) 8 SCC 781; (2009) 9 SCC 682; JT 2010 (6) SC 588; 2011 (1) SCC 74; JT 2012 (2) SC 237.

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

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

2. This petition has been filed with the prayer to quash the criminal proceeding of Criminal Miscellaneous Case No. 1319 of 2015, Case Crime No.306 of 2014, under Sections 323, 504, 506, 308 I.P.C. Police Station- Aaspur Devsara, District Pratapgarh as well as the charge-sheet No.172 of 2014 dated 30.12.2014.

3. Learned counsel for the petitioners has submitted that the First Information Report has been lodged on the basis of false and fabricated story against the petitioners and the petitioners have falsely been

implicated in this case. Lastly, learned counsel for the petitioners has submitted that petitioners are ready to surrender before the court below and some protection may be granted to them.

4. Learned Additional Government Advocate has opposed the petition.

5. The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Apex Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.

6. In Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

7. However, in this matter, after investigation, Police has found a prima facie case against accused and submitted charge-sheet in the Court below. After investigation the police has found a prima facie case of commission of a cognizable offence by accused which should have tried in a Court

of Law. At this stage there is no occasion to look into the question, whether the charge ultimately can be substantiated or not since that would be a subject matter of trial. No substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C.

8. From perusal of the record, it cannot be said that the cognizable offence is not made out against the petitioner. I do not find any sufficient ground to quash the charge-sheet as well as the proceedings of the aforesaid criminal case.

9. However, it is provided that if the petitioners Barsati, Judawan, Shyam Lal Harijan and Babu Lal appear or surrender before the court below within two weeks from today and moves an application for bail, the same shall be considered and disposed of expeditiously in accordance with law. Till then no coercive steps shall be taken against the petitioners.

10. With the above observations, the petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2015

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 5171 of 2015
(Matters under Article 227)

Chandrabali Yadav ...Petitioner
Versus
Nand Bahadur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajeshwar Yadav, Sri Vijay Bahadur Yadav

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav

C.P.C.-Order I Rule 10-Impleadment application-suit for permanent prohibitory injunction-petitioner claimed impleadment as in PIL-same direction has been issued at his instance-land in question being Bheeta certainly Gaon Sabha is necessary party-allowed by Trail Court-set-a-side by Revisional Court-held-proper.

Held: Para-14
The suit in question is not a representative suit. Although, indirectly, the decision therein may affect the whole village community, but it does not mean that any member of the public can seek his impleadment therein. If this is permitted, there may be several public spirited citizens coming forth, seeking their impleadment. The process would go on ad infinitum, making it impossible for the suit to proceed. Concededly, the petitioner has no personal interest in the matter. In such view of the matter, this Court is in full agreement with the view taken by the revisional court in holding that the petitioner is not required to be impleaded in the suit.

Case Law discussed:
AIR 2011 SC 1123; 2012 (11) ADJ 404; [2001 (6) SCC 496]; [2015 (109) ALR 680]

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

1. The petitioner has assailed the validity of the order dated 19.8.2015 passed by Additional District Judge/Special Judge, EC Act, Jaunpur in Civil Revision No. 176 of 2013, whereby the revision has been allowed and the order of the trial court dated 4.9.2013 permitting impleadment of the petitioner as a party defendant in Original Suit No. 168 of 2008, has been set aside.

2. The plaintiff-respondents have instituted Original Suit No. 168 of 2008 against the the defendant-respondents for

permanent prohibitory injunction restraining contesting defendants no. 1 to 4 from interfering in the possession of the plaintiffs and proforma defendants and their constructions existing over the suit property. The suit property has been shown with letters A, B, C, D, E, F, A in the plaint map and according to the plaintiff-respondents, its new number is 52, measuring 0.80 decimals. The plaint case is that the suit property had vested in the plaintiff-respondents under Section 9 of U.P. Act No. 1 of 19511.

3. In the suit, the State of U.P. through Collector, Jaunpur, Collector Jaunpur and Gram Panchayat, Brahmanpur and one Rajmani Yadav have been arrayed as contesting defendants. The State of U.P. and the Collector, Jaunpur have filed a written statement on 22.10.2010, contending that the suit property belongs to the State Government and the Gram Panchayat and is recorded as 'Bheeta' in the revenue records. The claim of the plaintiff-respondents that the suit property had vested in them, was thus categorically denied.

4. During the pendency of the suit, the petitioner, who claims himself to be an Ex-Pradhan of the Village, filed an application seeking his impleadment in the proceedings. In the application, it was stated that the petitioner had filed writ petition no. 40811 of 2008 in the shape of a Public Interest Litigation before this Court and wherein, he was given liberty to make a representation before the Sub-Divisional Magistrate and the Sub-Divisional Magistrate was required to examine the matter and take appropriate decision. It was pointed out that in pursuance of the liberty granted by this Court, the petitioner had moved representation before the Sub-Divisional Magistrate, but the Sub-Divisional Magistrate, by order dated 3.12.2008, expressed his inability to take any decision in the matter, unless the interim order granted in Original Suit No. 168 of 2008 preferred by the plaintiff-respondents, is in existence. The Sub-Divisional Magistrate in its order has observed that it shall be open to the petitioner to file the order of this Court in the suit proceedings, so that the stay order passed in the suit is vacated. It was on the strength of the said order that the petitioner sought his impleadment in the suit proceedings.

5. The application was opposed, but the trial court, by order dated 4.9.2013, allowed the impleadment of the petitioner as a party defendant to the suit by observing that unless the petitioner is impleaded in the suit, the true spirit of the order passed by this Court would not be achieved.

6. It seems that after the passing of the order by the trial court dated 4.9.2013, the petitioner preferred another Public Interest Litigation No. 13236 of 2014 before this Court in respect of the same cause of action i.e. his grievance regarding unauthorised possession of plot no. 52 by the private respondents. The aforesaid petition was disposed of by order dated 4.3.2014, by a division Bench, placing reliance on the decision of the Supreme Court in the case of Jagpal Singh and others Vs State of Punjab and others2 and on an order passed in Public Interest Litigation in the case of Prem Singh Vs State of U.P. and others3. Liberty was granted to the petitioner to approach the concerned respondents with a certified copy of the order so that the appropriate inquiry can be initiated and action taken in accordance with law.

7. The plaintiff-respondents in Original Suit No. 168 of 2008, being aggrieved by the order of the trial court dated 4.9.2013 allowing impleadment of the petitioner in the suit, preferred a revision, which has been allowed by impugned order dated 19.8.2015. The revisional court has held that even assuming that the suit land is Bheeta land, as is also the case set up by the state respondent in the suit, the petitioner, who claims himself to be an Ex-Pradhan, is neither a necessary nor a proper party to the litigation. It has been observed that the main contesting party in the suit are the State Government through Collector as well as Gram Sabha, both of whom have duly filed their written statement and are contesting the proceedings. It has further been observed that Gaon Sabha which is the custodian of the land reserved for public purposes is taking all interest in the suit and is contesting the proceedings. The revisional court further noted that in the order of this Hon'ble Court passed in the Public Interest Litigation, there was no direction to implead the petitioner as a party defendant. It has been observed that since the petitioner is neither a necessary nor a proper party for deciding the issues involved in the suit and as such, his presence is not necessary and accordingly, the order passed by the trial court has been set aside.

8. Learned counsel for the petitioner placing reliance on the decision of the Supreme Court in the case of Hinch Lal Tiwari Vs Kamala Devi & Others4, submitted that bhumidhari rights can not accrue in favour of a person in respect of a land covered by Section 132 of the Act, even if he is in possession thereof. It is urged that in such circumstances, the petitioner, who is Ex-Pradhan and had approached this Court twice by way of the Public Interest Litigation is entitled to be heard in the suit. Learned counsel for the petitioner has also placed reliance on a recent judgment of the Supreme Court in the case of Balu Ram Vs. P. Chellathangam and others5.

9. The basic issue before the Court is whether the petitioner, who is an Ex-Pradhan, is a necessary and a proper party to be impleaded as a party defendant to Original Suit No. 168 of 2008.

10. Indisputably, in case the suit land is Bheeta land, then in view of the provisions of Section 132 of the Act, bhumidhari rights can not accrue in respect thereof in favour of any person. The question whether the suit land is Bheeta land or not and whether it could vest in favour of the plaintiff-respondents are to be decided in the presence of the State of U.P., the Collector and the Gram Sabha. This is in view of the fact that such land vests in the State and remains under the management of Gaon Sabha. Thus, it can not be disputed that the only necessary parties to the suit are the State of U.P., Collector, Jaunpur and the Gram Sabha.

11. The law in respect of Public Interest Litigation is not circumscribed by the technicalities of the Civil Procedure Code. Any person, raising an issue of public importance can approach a court for setting the law in motion, so long as the petition is not motivated or based on malafide considerations. Thus, the petitioner in his capacity as an Ex-Pradhan had approached this Court twice by way of Public Interest Litigation, complaining that the private respondents are in possession of the Bheeta land and no action had been taken by the State respondents to dispossess the private respondent therefrom. Undoubtedly, Public Interest Litigation at his instance, being a member of the Gaon Sabha and an Ex-Pradhan, was maintainable and was

entertained by this Court. The fact that the Public Interest Litigations, at his instance, were entertained by this Court, however, is not sufficient to make the petitioner a necessary or a proper party to the suit instituted by the plaintiff-respondents wherein, as observed above, the State of U.P., Collector Jaunpur and the Gram Panchayat are already contesting the proceedings. For becoming a party to a suit, governed by the provisions of Civil Procedure Code, one has to meet the test prescribed by Order 1, rule 10 CPC.

12. By virtue of the order of this Court dated 14.9.2015, the records of Public Interest Litigation No. 13236 of 2014 have been placed before this Court. A perusal thereof reveals that in the said petition, the petitioner had not disclosed about filing of the earlier Public Interest Litigation by him, being Civil Misc Writ Petition No.40811 of 2008. The petitioner had also suppressed the fact about pendency of the civil suit and regarding an injunction order operating therein.

13. In the opinion of the Court, these facts were essential to be disclosed in the second Public Interest Litigation No. 13237 of 2014, which the petitioner had filed before this Court. Even the filing of the earlier petition by him, was not disclosed. Rather, the petition was filed by making an incorrect declaration that it was the first petition on his behalf for the relief claimed therein. It was on the basis of the pleadings made in the said petition that this Court disposed of the petition by order dated 4.3.2014 granting liberty to the petitioner to move before the Appropriate Authority.

14. The suit in question is not a representative suit. Although, indirectly, the decision therein may affect the whole village community, but it does not mean that any member of the public can seek his impleadment therein. If this is permitted, there may be several public spirited citizens coming forth, seeking their impleadment. The process would go on ad infinitum, making it impossible for the suit to proceed. Concededly, the petitioner has no personal interest in the matter. In such view of the matter, this Court is in full agreement with the view taken by the revisional court in holding that the petitioner is not required to be impleaded in the suit.

15. In the case of Balu Ram (Supra), an agreement for sale was allegedly executed by a trust. In a suit for specific performance for enforcement of the agreement for sale, one Balu Ram applied for impleadment as a party defendant, which was allowed by the trial court, but the order passed by the trial court was set aside in revision. The Supreme Court held that the petitioner before it, is not alien to the subject matter of litigation, as he is a beneficiary of the trust and thus, if the sale is made at a throw away price, his interest would be adversely affected. However, it is not in dispute in the instant matter, that the petitioner does not have any personal interest in the litigation. Twice, he had moved this Court claiming himself to be a public spirited citizen and not for redressal of any personal cause. The State-respondents are already contesting the proceedings.

16. In such view of the matter, the revisional court was fully justified in setting aside the order passed by the trial court permitting impleadment of the petitioner.

17. In view of above discussion, this Court does not find any illegality in the impugned order passed by revisional

court so as to warrant interference in exercise of supervisory power under Article 227 of the Constitution.

18. The petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2015

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 5224 of 2015
(Matter under Article 227)

Musheer Alam ...Petitioner
Versus
Ramesh & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.P. Srivastava, Sri Rakesh Pande

Counsel for the Respondents:
Jokhan Prasad

C.P.C. Section-47-Execution of Decree-suit for declaration of entitlement of possession-judgment debts objected-being declaratory decree-can not be executed-judgment debtor-being tenant -notice validity terminated-concurrent finding not entitle to remain in possession-execution court rightly rejected-petition dismissed.

Held: Para-11
The decision cited, would not apply to the facts of the instant case, which as noted above, are clearly distinguishable. The specious argument made by the learned counsel for the petitioner is, thus, not acceptable. The petition lacks merit and is dismissed.

Case Law discussed:
2013 All. C.J. 739

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

1. The petitioner, who is a judgment debtor in Original Suit No.21 of 1985, preferred objections under Section 47 C.P.C. against execution of the decree, inter alia, on the ground that the decree passed by the trial court is declaratory in nature and is incapable of being executed.

2. The objection filed by the petitioner was rejected by the executing court by an order dated 8.4.2015 and the revision filed against the said order has also been dismissed by order dated 31.8.2015. These orders are under challenge in the instant petition.

3. The only submission made by learned counsel for the petitioner is that the decree passed in the suit is a declaratory decree, thus incapable of being executed by delivering actual physical possession to the plaintiffs as sought for in the execution proceedings.

4. The suit in question was instituted by the plaintiff-respondents for grant of a decree of possession in respect of House No.719, Ward No.6, Mohalla Malitola, Gandhi Nagar, Basti. Arrears of rent to the extent of Rs.1800 for the period September, 1983 to February, 1984 and mesne profits and damages were also claimed. According to the plaint assertions, the petitioner, who is defendant therein, was tenant of the demised premises on a rent of Rs.300 per month, on behalf of the plaintiff-respondents. The provisions of U.P. Act No.13 of 1972 are not applicable, as the demised premises is a construction of the year 1980 and 10 years have not passed since the date of its construction. The tenancy of the petitioner was allegedly terminated by a notice dated 24.1.1984 but when he failed to vacate within a period of one month, the suit in question was instituted.

5. The trial court framed several issues and issue no.6 is in regard to the relief to be granted to the plaintiff. While deciding the said issue, the trial court held that since provisions of U.P. Act No.13 of 1972 are not applicable and the tenancy of the petitioner has been lawfully terminated and consequently, the plaintiff is entitled to possession and decree for arrears of rent and damages. The operative part of the decree passed by the trial court is to the following effect:-

वादी का वाद सव्यय इस प्रकार डिक्री किया जाता है कि वह विवादित मकान 719 जो वाद पत्र के नक्शा नजरी में सीडी ईएफ से दिखायी गयी है पर क्ब्जा दखल प्राप्त करने का अधिकारी है और वह प्रतिवादी से सितम्बर सन् 1983 से फरवरी सन् 1984 तक का किराया मु0 1800/– रुपया प्राप्त करने का अधिकारी है तथा वादी प्रतिवादी से मार्च 1984 से दखल याबी तक केवल 300/– प्रतिमाह की दर से ही किराया पाने का अधिकारी है।

6. It seems that the decree passed by the trial court was subjected to challenge in appeal. The appellate court framed several points for determination and point no.8 framed by it was as regards the relief to which the plaintiff was entitled to. While deciding the said issue, the appellate court again held that the plaintiff is entitled to possession of the demised premises and consequently, dismissed the appeal.

7. The executing court as well as the revisional court, while interpreting the decree passed in the suit, have held that the decree is, in pith and substance, a decree for possession and the plaintiff is entitled to execute the decree by evicting the petitioner.

8. Learned counsel for the petitioner in support of his contention has placed reliance on a judgment of this Court in the case of Roman Catholic Diocese of Agra Ltd. Vs. Rajendra Singh and others1. In that case, the Rent Control and Eviction Officer (for short RCEO), in proceedings held under Section 29-A (5) of U.P. Act No.13 of 1972, had determined the enhanced rent payable for the demised land by the petitioner-tenant therein. On the basis of the determination so made, the RCEO issued a recovery certificate for realisation of enhanced rent. It was subjected to challenge in writ petition and therein, the Court held that the proceedings under Section 29-A (5), are declaratory in nature and on the basis of an order passed therein, the RCEO was not authorised to issue a recovery certificate.

9. Concededly, the suit instituted by the plaintiff-respondent was for grant of a decree of possession against the petitioner-tenant, as his tenancy was duly terminated and for recovery of arrears of rent and mesne profits. The trial court as well as the appellate court, while deciding the suit, have categorically held that the tenancy of the petitioner was lawfully terminated and he having failed to vacate within the statutory period, is liable to be evicted. Thus, from a perusal of the findings rendered in the body of the judgment of the trial court, there is no iota of doubt that the decree which the trial court intended to pass, was a decree of possession, as prayed for in the plaint.

10. Under Section 2 (2) 'decree' means the formal expression of adjudication which, so far as regards the court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit. Thus, in the opinion of the Court, in case there is any confusion in the operative part of the judgment, the same is to be interpreted by referring to the adjudication made in the judgment. A perusal of the judgment, as noted above, clearly reveals that the plaintiff

was held entitled to eject the tenant, as the tenancy of the petitioner was lawfully terminated. In such view of the matter, this Court does not find any illegality in the interpretation regarding the scope and extent of the decree made by the executing court and the revisional court.

11. The decision cited, would not apply to the facts of the instant case, which as noted above, are clearly distinguishable. The specious argument made by the learned counsel for the petitioner is, thus, not acceptable. The petition lacks merit and is dismissed.

12. In the end, learned counsel for the petitioner prayed for reasonable time being granted to vacate the demised premises to which Sri Jokhan Prasad, learned counsel appearing on behalf of the decree holder has no objection.

13. Accordingly, with consent of parties, it is further provided that the petitioner shall be permitted to remain in possession of the demised premises until 31.12.2015, provided the petitioner furnishes an undertaking in form of an affidavit before the executing court, within three weeks from today, that he will hand over peaceful vacant possession of the demised premises to the decree holder, without any let or hindrance on or before 31.12.2015. Within the aforesaid period, the petitioner shall also deposit the entire arrears of rent and damages, as decreed by the trial court. In case of default in compliance of any of these conditions, the decree shall become executable forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.09.2015

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Misc. Single No. 5377 of 2015

Darshan Singh & Ors. ...Petitioner
Versus
Addl. Commissioner & Ors. ..Respondents

Counsel for the Petitioner:
Anil Kumar Mishra

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

(A) U.P.Z.A & L.R. Act-Section 341- Applicability of provisions of Civil Procedure code-partition suit-whether interim injunction can be granted?-held-'yes' court empowered either to grant or refuse temporary injunction.

Held: Para-18
As such, I am of the considered view that in the proceedings under Section 176 of U.P.Z.A. & L.R. Act the Court concerned is fully empowered to grant temporary injunction/stay.

C.P.C.-Order XLIII Rule 1(r)-Partition suit-refusal or grant of interim order-Appeal maintainable-dismissal of revision-saying interlocutory order-held-illegal.

Held: Para-22
In view of above, it is held that an appeal shall lie against an order granting or refusing temporary injunction/stay in the proceedings under Section 176 of U.P.Z.A. & L.R. Act.

Case Law discussed:
[1999 (17) LCD-201]

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

1. Heard learned counsel for the petitioners as well as learned Additional Chief Standing Counsel Mr.M.E. Khan and perused the records.

2. Since the writ petition involves purely legal questions of law which can be considered without issuing notice to private respondents and without calling for any counter affidavit, the writ petition is being decided at the admission stage with the consent of parties counsel.

3. The questions which has cropped up in this writ petition are (i) whether in the proceedings under Section 176 of U.P.Z.A. & L.R. Act the concerning court is competent to grant temporary injunction/stay and; (ii) whether the order refusing or granting temporary injunction is appellable or revisable.

4. The instant writ petition has been filed challenging the order dated 10.08.2015, passed by opposite party no.2/Sub-Divisional Officer, Palia Kalan, Lakhimpur Kheri as well as order dated 26.08.2015 whereby in the suit filed under Section 176 U.P.Z.A. & L.R. Act by petitioners the opposite party no.1 has come to conclusion that there is no provision for grant of stay in the proceedings under Section 176 of U.P.Z.A. & L.R. Act. The temporary injunction order dated 9.2.2015 was therefore vacated. The revision preferred against the said order under Section 333 of U.P.Z.A. & L.R. Act by the petitioners has been dismissed as being not maintainable.

5. The facts of the case in brevity are that the land in dispute bearing Gata No.176 (Mi)/0.109, 184 (M.)/6.272, 197 (M.)/0.012, 174/0.348, 246/0.518 and 247/0.077 hectare situated at Village Murur Khaida, Pargana & Tehsil Palia Kalan, District Lakhimpur Kheri were recorded in the name of Nahar son of Hari Singh as tenure holder. After the death of original tenure holder the land in question was jointly recorded in the name of petitioners along with opposite parties no.3 to 15 being legal heirs of original tenure holder. As per petitioners opposite parties had started interfering in the peaceful possession of the petitioners, as such, petitioners had filed a suit for partition under Section 176 of U.P.Z.A. & L.R. Act which is registered as Suit No.375 (Darshan Singh and others Vs. Malkeet Singh and others). The petitioners in the said suit had filed an application dated 7.2.2015 for grant of stay. The said application was allowed vide order dated 9.2.2015 and the parties were directed to maintain status-quo till further orders in respect to the land in dispute. The opposite parties no.7 to 11 had filed an application dated 13.7.2015 for vacation of stay order. On the said application the opposite party no.2 vide impugned order dated 10.8.2015 has vacated stay order dated 9.2.2015. The petitioners feeling aggrieved had filed revision under Section 333 of U.P.Z.A. & L.R. Act which has been dismissed holding that the revision since has been filed against an interlocutory order, as such is not maintainable.

6. Learned counsel for the petitioners submit that opposite party no.2 without properly considering the submissions made by the petitioners had vacated the stay order dated 9.2.2015. It is wrong to say that in the proceedings under Section 176 of U.P.Z.A. & L.R. Act the concerning Court does not posses the power of granting stay.

7. Submission is that under Section 341 of of U.P.Z.A. & L.R. Act the applicability of Code of Civil Procedure has been made, as such, once a suit is filed the concerning Court is fully empowered to grant ad-interim injunction/stay.

8. It is further submitted that since there is no specific provision of appeal in such proceedings, as such, in view of Section 333 of U.P.Z.A. & L.R. Act an order passed in the proceedings where no appeal lies or where an appeal lies but has not been preferred the revision is maintainable.

9. Mr. M.E. Khan, learned Additional Chief Standing Counsel, on the other hand, submits that under Section 341 of U.P.Z.A. & L.R. Act it has been specifically provided that provisions of Indian Court Feel Act, Code of Civil Procedure, 1908 and Limitation Act shall apply to the proceedings of this Act except expressly barred.

10. As such, in the proceedings under Section 176 of U.P.Z.A. & L.R. Act the procedure prescribed in Code of Civil Procedure shall be fully applicable. Under Order XLIII Rule 1 of C.P.C. an appeal shall lie from an order passed in the proceedings under Order XXXIX Rules 1 and 2 C.P.C. Order XXXIX Rules 1 and 2 C.P.C. empowers the Court to grant temporary injunction. As such, the Court dealing with the proceedings under Section 176 of U.P.Z.A. & L.R. Act shall be empowered to grant ad-interim injunction/stay and any order passed in this regard is appellable. In support of his submissions he has relied on a Division Bench judgment of this Court in the case of Smt. Urmila Devi Vs. Pooran Chand Dabar and others, [1999 (17) LCD-201] wherein the Court has come to conclusion that in a suit for partition the Court can grant temporary injunction.

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

12. So far as the question as to whether the concerning competent Court dealing with the proceedings under Section 176 of U.P.Z.A. & L.R. Act is empowered to grant temporary injunction/stay is concerned, it is to be noted that Section 341 of U.P.Z.A. & L.R. Act clearly provides that unless otherwise expressly provided by or under this Act provisions of Code of Civil Procedure, 1908 would be fully applicable.

13. Section 341 of U.P.Z.A. & L.R. Act on reproduction reads as under:-

"341. Application of certain Acts to the proceeding of this Act.-Unless otherwise expressly provided by or under this Act, the provisions of the Indian Court Fees Act, 1870 (VII of 1870), the Code of Civil Procedure, 1908 (V of 1908), and the [Limitation Act, 1963 (XXXVI of 1963)] [including Section 5 thereof] shall apply to the proceedings under this Act.

1. Purpose of.-Section 341 of the U.P.Z.A. and L.R. Act makes applicable the provisions of the Code of Civil Procedure to the proceedings under the U.P.Z.A. and L.R. Act unless otherwise expressly provided by or under the Act. If a different procedure is contemplated under the U.P.Z.A. and L.R. Rules, the procedure under the CPC would not be applicable.

Section 341 of the U.P.Z.A. and L.R. Act makes applicable the provisions of the Civil Procedure Code also to the second appeals in the Board of Revenue. The substantial questions of law have, therefore, also to be framed by the Board of Revenue.

2. Application of provisions of CPC.-Section 341 of the U.P.Z.A. and L.R. Act applies the provisions of the CPC to

proceedings under the U.P.Z.A. and L.R. Act unless otherwise expressly provided. The Z.A. Act has made provisions for suits, appeals, second appeals revisions etc. The IPC thus has been made applicable to them unless otherwise expressly provided.

3. Second appeal.- By virtue of Section 341 of the U.P.Z.A. and L.R. Act, the provisions of the Code of Civil Procedure are applicable to second appeals under the U.P.Z.A. and L.R. Act."

14. Section 176 of U.P.Z.A. & L.R. Act does not expressly bar the applicability of the Code of Civil Procedure. As such, it can be easily concluded that the provisions of the Code of Civil Procedure are fully applicable in the proceedings under Section 176 of U.P.Z.A. & L.R. Act.

15. Order XXXIX of C.P.C. deals with temporary injunction and interlocutory orders. Order XXXIX Rule 1 of C.P.C. relates to the case in which temporary injunction may be granted whereas sub-Section (2) deals with injunction to restrain repetition or continuance of breach.

16. Order XXXIX Rules 1 and 2 of C.P.C. provides that wherein any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or the defendant threatens or intends to remove or dispose of his property which may cause injury to the plaintiff, the Court may by order grant a temporary injunction to restrain such act.

17. Order XXXIX Rules 1 and 2 C.P.C. for convenience are reproduced hereinbelow:-

"1. Cases in which temporary injunction may be granted.- Where in any Suit it is proved by affidavit or otherwise?

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,the court may by Order grant a temporary injunction to restrain such act, or make such other Order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach.- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by Order grant such injunction, on such terms, as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit."

18. As such, I am of the considered view that in the proceedings under Section 176 of U.P.Z.A. & L.R. Act the Court concerned is fully empowered to grant temporary injunction/stay.

19. So far as the question as to whether the order granting or refusing the interim stay in the proceedings under Section 176 of U.P.Z.A. & L.R. Act is concerned, it is to be noted that the order XLIII Rule 1 C.P.C. deals with the orders which are appeallable. Order XLIII Rule 1 (r) C.P.C. provides that an appeal shall lie from an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX.

20. Order XLIII of C.P.C. on reproduction reads as under:-

"1. Appeals from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely:?

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court except where the procedure specified in rule 10A of Order VII has been followed;

(b) Omitted by Act 104 of 1976, w.e.f. 1-2-1977

(c) an order under rule 9 of Order IX rejecting an appiication (in a case open to appeal) for an order to set aside the dismissal of a Suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed e parte;

(e) [* *]*

(f) an order under rule 21 of Order XI;

(g) [* *]*

(h) [* *]*

(i) an order under rule 34 of order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

(ja) an order rejecting an application made under sub-rule (1) of rule 106 of order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that order is appealable;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(I) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) [* *]*

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under rule 5 or rule 7 or Order XXXIII rejecting an application for permission to sue as an indigent person;

(o) [* *]*

(p) order in interpleader suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;

(r) an order under Rule 1, Rule 2, Rule 2A Rule 4 or Rule 10 of Order XXXIX;

(s) an order under Rule 1 or Rule 4 of Order XL;

(t) an order of refusal under Rule 19 of Order XLI to re-admit, or under Rule 21 of Order XLI to re-hear, an appeal;

(u) an order under Rule 23 or Rule 23A or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

(v) Omitted by Act 104 of 1976, w.e.f. 1-2-1977

(w) an order under Rule 4 of Order XLVII granting an application for review."

21. As such, it is very much clear that an appeal shall be filed against an order passed in exercise of powers under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX.

22. In view of above, it is held that an appeal shall lie against an order granting or refusing temporary injunction/stay in the proceedings under Section 176 of U.P.Z.A. & L.R. Act.

23. It is also to be noted that the appeal shall lie before the authority as provided under Schedule II which is to be read with Section 331 of U.P.Z.A. & L.R. Act. As such, an appeal shall lie before the Commissioner concerned in such circumstances.

24. This Court in the case of Smt. Urmila Devi Vs. Pooran Chand Dabar and others (supra) has held that in the proceedings with respect to Section 176 of U.P.Z.A. & L.R. Act the provisions of Code of Civil Procedure would be applicable including Order XXXIX C.P.C. The relevant paragraphs 7 and 8 of the judgment on reproduction reads as under:-

"7. The learned counsel for appellant contended that in a suit for division of holding, no injunction can be issued under Order 39 of Code of Civil Procedure in respect of grant of temporary injunction. We are not inclined to accept the said contention in view of Section 341 of the Act, which reads as follows :

"341. Application of certain Acts to the proceedings of this Act.-- Unless otherwise expressly provided by or under this Act, the provisions of the Indian Court Fees Act, 1870 (VII of 1870), the Code of Civil Procedure, 1908 (V of 1908), and the [Limitation Act. 1963 (XXXVI of 1963)], [Including Section 5 thereof] shall apply to the proceedings under this Act."

As there is no express provision by or under the Act providing for exclusion of Order 39 of Code of Civil Procedure in respect of grant of temporary injunction during pendency of a suit, the said provision is applicable to a suit for division of holding and the Court in which suit under Section 176 of Code of Civil Procedure is pending could have given the relief to the appellant which is being sought in present proceedings. At one stage, the learned counsel for appellant tried to argue that as Section 229-D of the Act provides for grant of temporary injunction only in respect of suit for declaration filed under Sections 229-B and 229-C, the provisions of Order 39 of Code of Civil Procedure for temporary injunction impliedly extends excluded. We are not inclined to accept the said contention. The provision under Section 229-D is only supplemental to Order 39 which permits grant of temporary injunction. By incorporating Section 229-D, a temporary Injunction can be granted in a suit for declaration though no permanent injunction is being sought which would not have been possible ha'a the specific provision been not there. Thus, the argument that Order 39 of Code of Civil Procedure stands excluded in view of Section 229-D of the Act is unacceptable to us.

8. It is argued by learned counsel for the plaintiff/appellant that there was no Justification for the Court to vacate the interim Injunction which was continuing from 28.4.1998 as an appeal was preferred which was dismissed as withdrawn and order of Court below stood merged in it. The contention has no force. Order 39, Rule 4 of Code of Civil Procedure comes into play in case conditions mentioned therein come into existence. The power of a trial court to vacate its earlier order passed under Order

39, Rule 2 does not come to an end merely because an appeal against it stands dismissed. It is in different circumstances that the power is to be exercised and if conditions mentioned therein arise, the Court can vacate a temporary injunction granted by it. even if it has been subject-matter of appeal provided it is satisfied that the conditions are such that Us continuance is not possible and It is giving rise to undue hardship to party. In the instant case, the shares of Smt. Urmila Devl and Smt. Kanak Lata are admittedly 1/2 each. Smt. Kanak Lata has transferred a specific portion (western portion) to respondent Nos. 1, 2 and 3. If it is assumed for the sake of argument that Smt. Kanak Lata could not have transferred any particular portion of land yet 1/2 share of Smt. Kanak Lata has certainly passed to the vendees. It makes no difference if the half share is specified by area. The parties can always get the land partitioned and under the circumstances of this case, when preliminary decree for division of holding has already been passed, the parties should get the land partitioned by metes and bounds."

25. In view of above, the order impugned dated 10.8.2015, passed by opposite party no.2 is not sustainable in the eyes of law. It is hereby set aside. Since this Court has held that against the order dated 10.8.2015 the appeal shall lie before the Commissioner, as such, the proceedings under Section 333 of of U.P.Z.A. & L.R. Act by the petitioners were nullity in the eyes of law.

26. The writ petition, as such, stands allowed. The opposite party no.2 shall consider and pass appropriate orders on the application for stay as well as on application for vacation of stay moved by the petitioners and opposite parties respectively.

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.09.2015

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Jail Appeal No. 7742 of 2009

Durga Singh ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
Smt. Kavita Tomar, Amicus Curiae

Counsel for the Respondents:
A.G.A.

Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act 1989-Section 3(2)(iv)-Conviction without considering the aspect-fire was put on consequent to enmity of civil litigation and not for being sc/st-held-conviction-not sustainable.

Held: Para-16

On the basis of above discussion it is explicitly clear that charged offence of mischief by fire had not been committed because victim was a member of SC/ST community. This offence appears to have been committed only because of dispute of title and possession of land over which victim's house is standing. In such a case offence punishable under section 3(2)(iv) of Scheduled Castes or Schedule Tribes Act is not been committed. Therefore the finding of of trial Court holding the appellant guilty for the offence under SC/ST Act is erroneous and is liable to be set aside.

Cr.P.C.-Section 235-Offence u/s 436 and 3(2)(iv) SC/ST Act-conviction by Trail Court without opportunity to hear the accused-mainly on offence of sc/st Act-while no case under SC/ST made out-conviction reduced.

Held: Para-19

In present case after the verdict of conviction the accused-appellant had, at

the time of hearing on point of quantum of sentence, all relevant factors available and presented, should have been considered for determining the appropriate amount of sentence. But the trial Court had not considered them because the Sessions Judge had erroneously connected punishment of charge under section 436 IPC with that of section3(2)(iv) SC/ST Act and awarded minimum prescribed punishment for said offence. Thus the Additional Sessions Judge, in the instant case, had not complied with the obligation which Section 235(2) imposes. As discussed above, in this case offence of section 3(2)(iv) SC/ST Act is not made out, therefore punishment should have been for charge u/s 436 IPC only and that too after affording opportunity of pre-punishment hearing as discussed above. Such hearing was made during appeal.

Case Law discussed:
AIR 2006 SC 1267; (2007) 2 SCC 170

(Delivered by Hon'ble Pramod Kumar Srivastava)

1. This appeal has been preferred against the judgment passed by Additional Sessions Judge/ F.T.C. No. 3, Basti in Special Session Trial No. 61 of 1996 (State v. Durga Singh) under Section 436 IPC and Section 3(2)(iv) The Scheduled Castes or Schedule Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as "SC/ST Act"] in case crime no. 25/1995, p.s.- Dubaulia, Basti, by which, sole accused Durga Singh was convicted on 05.12.2008 for the charges u/s 436 IPC and Section 3(2)(iv) of the SC/ST Act; and punished on 06.12.2008 for the charge u/s 336 IPC with rigorous imprisonment of 10 years and fine of Rs. 500/- (in default of payment one month's additional imprisonment) and for the charge u/s 3(2)(iv) of the SC/ST Act with imprisonment for life and fine of Rs. 500/- (in default of payment one month's additional imprisonment), with direction that both the sentences would run concurrently.

2. The prosecution case in brief was that informant Raghuwar and accused Durga Singh are the resident of same village. Informant belongs to the S/C (scheduled caste) community and accused is non- SC/ST person. On 17.03.1995 at about 8:00 p.m. in night informant Raghuwar (PW1) while cooking inside his house saw the flames in backside of his house. Then he rushed out of his house and saw that Neebar Singh and his son Durga Singh of his village put on fire his house from the backside and were running away. On his alarm his brother Shivraj (PW-2) and son Dinai (PW-3) had seen the Neebar Singh and Durga Singh fleeing away from his house after putting his house on fire. The informant had given a written report (Ex-A-1) of this incident in police station after about three days on 20.03.1995 at 7:00 p.m., on the basis of which case crime no. 25/1995 was registered. After completion of the investigation, charge-sheet for the offences u/s 436 IPC and Section 3(2)(iv) of the SC/ST Act were filed against two accused persons, namely, Neebar Singh and and his son Durga Singh (present appellant), on the basis of which Special S.T. No. 61/1996 was registered, in which both the accused were charged for the aforesaid offences. They denied the charges, pleaded not guilty and claimed to be tried. But during trial, accused Neebar Singh had died and his trial was abated; so trial proceeded against Durga Singh only.

3. During trial, prosecution side had examined PW-1 Raghuwar, (informant), PW-2 Shivraj, PW-3 Dinai, PW-4 H.C. Harikrishna Singh and PW-5 S.I. Ali Raza

(IO). These witnesses had proved documents of prosecution side.

4. After conclusion of the prosecution evidence, statement of accused Durga Singh u/s 313 Cr.P.C. was recorded in which he had denied the prosecution evidence and said that those evidences are false, erroneous investigation had been done and he is innocent. Defence side had not adduced any defence evidence.

5. After affording opportunity of hearing to the prosecution and defence side, the trial court had passed the judgment dated 05.12.2008, by which accused Durga Singh was convicted as above. Then after affording opportunity of hearing on the point of the quantum of the sentence, the trial court had sentenced the appellant on 06.12.2008 as above. Aggrieved by which, present appeal has been preferred by the accused.

6. Smt. Kavita Tomar, learned Amicus Curiae appeared on behalf of the appellant, and learned AGA appeared for the State respondent. We have heard their arguments and perused the original records.

7. Learned counsel for the appellant contended that there is no eye witness of the incident and accused persons were only seen going away from the spot. There is no evidence that they had committed any mischief by fire. She contended that the appellant was falsely implicated in this matter due to enmity as accepted by PW-1 during his examination-in-chief. She further contended that the FIR is much delayed without any explanation, so appeal should be allowed. Her alternative argument was that even if prosecution case is accepted to be true for some time, in that case also there appears no commission of offence under SC/ST Act because according to the prosecution evidence alleged arsoning was not committed for the reason of informant being member of SC/ST community. The informant and appellant had been litigating for the land over which house of the informant is situated and Neebar Singh had intention to dispossessing the informant from that land, and due to this enmity charged incident of arsoning was committed. Therefore, no charge u/s 3(2)(iv) of the SC/ST Act was made out and conviction of appellant for the said offence should be quashed. Her alternative argument on the point of the quantum of sentence was that the appellant was young at the time of the incident having no criminal history. He is only an earning member of his house and his father had expired during the trial and no one else is there to look after his family members. These facts were placed before the trial court for taking into account on the point of quantum of sentence, but were not considered. The appellant is a poor person having no means to contest his case and is in jail for about 7 years, and in any case his sentence should be mitigated.

8. Learned AGA has contended that the appellant had put on fire the house of the informant due to enmity. The delay in lodging of the FIR has been explained through the evidences adduced. AGA had fairly accepted that the court has power to pass appropriate sentences. We have considered these arguments.

9. Section 436 IPC speaks about the punishment for mischief by fire as under :

"436. Mischief by fire or explosive substance with intent to destroy house, etc.--Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is

ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

10. So far conviction of the appellant for the charge u/s 436 IPC is concerned, we have meticulously gone through adduced evidences. It is a fact that none has seen the appellant or his father late Neebar Singh igniting the flame, but after seeing the flame by informant they were identified in the light of flames. PW-1 (informant) had seen the flames in back portion of his house and rushed out and seen the appellant and his father fleeing away from the spot. On his raising alarm, his brother Shivraj (PW-2) and son Dinai (PW-3) had rushed on spot. These facts were proved by PW-1 Raghuwar, PW-2 Shivraj and PW-3 Dinai, who had also stated that at the time of the incident at about 8:00 p.m. they heard the alarm of Raghuwar and rushed to spot and found that the house of Raghuwar was in flames from the backside and they also saw that Durga Singh and his father Neebar Singh were running from the spot after arsoning. Due to this fire, rice, flour and house hold articles was destroyed. After this incident, the reconciliation in panchyat was attempted but that could not be materialized, then informant Raghuwar had lodged the report in police station. From the evidence of three witnesses of fact, it is proved that Neebar Singh and his son Durga Singh (appellant) were involved in arsoning in the backside of house of the informant Raghuwar. It was not proved from the evidence as to how much loss was in fact occurred, but it is proved that the appellant was involved in this charged incident of mischief by fire on instruction of his father Neebar Singh. Therefore the trial court had committed no error when it had convicted appellant Durga Singh for the charge u/s 436 IPC. Therefore, the conviction for the charge u/s 436 IPC is found correct and should be confirmed.

11. But so far as conviction of the appellant for the charge u/s 3 (2)(iv) of the SC/ST Act is concerned, the argument of Amicus Curiae is correct. The informant PW-1 Raghuwar had admitted that he had old and long dispute of land and for that reason enmity with Neebar Singh and Durga Singh for ownership and possession of the land over which his house is situated. The said land initially belonged to Neebar Singh, but after consolidation the Neebar Singh was given compensation for the same and said land was converted into abadi land and portion of land relating to the house of appellant was given to him after survey by Lekhpal with the help of police. From the prosecution evidence, it is proved that the alleged act of mischief by arsoning was committed by the appellant on instruction of his father only because they had old property dispute for the land over which informant's house existed. The charged incident was not committed because informant was member of the scheduled community, but it was committed because of other reason of enmity relating to land.

12. Section 3(2)(iv) and (v) of the Scheduled Castes or Schedule Tribes (Prevention and Atrocities) Act, 1989 reads as under:

"3(2) whoever, not being a member of Scheduled Caste or Schedule Tribe-

(iv) commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause destruction of any building which is ordinarily used as a place of worship or

as a place for human dwelling or as a place for custody of the property by a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for life and with fine;

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

13. The provision of Section 3(2)(iv) or (v) of the SC/ST Act, as noted above provides that a person can be punished under these provisions only when he commit such offence against person of SC/ST community on the ground that such a person/victim is a member of SC/ST. From the evidence in present case, it is proved that charged incident of mischief had been committed by accused-appellant only due to property dispute and enmity relating to land, and not for any other reason. There is no evidence from prosecution case that offence was committed because victim belongs to scheduled-caste community. At least there is no evidence in this regard. Therefore, we are of well thought-out opinion that accused-appellant cannot be punished for offence punishable under Section 3(2)(iv) of SC/ST Act.

14. Hon'ble Supreme Court in Dinesh @ Buddha v. State of Rajasthan, AIR 2006 SC 1267 has held as under:

"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

16. In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f), IPC does not per se become life sentence."

15. Hon'ble Supreme Court in Ramdas v. State of Maharashtra, (2007) 2 SCC 170 has held as under:

13."11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

16. On the basis of above discussion it is explicitly clear that charged offence

of mischief by fire had not been committed because victim was a member of SC/ST community. This offence appears to have been committed only because of dispute of title and possession of land over which victim's house is standing. In such a case offence punishable under section 3(2)(iv) of Scheduled Castes or Schedule Tribes Act is not been committed. Therefore the finding of of trial Court holding the appellant guilty for the offence under SC/ST Act is erroneous and is liable to be set aside.

17. In view of the submission on behalf of appellant on quantum of sentence, the only question to be considered is whether the sentence of life for charge u/s 436 IPC in present case is reasonable or excessive?

18. The Section 235 of the Criminal Procedure Code, 1973 reads :

"(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law".

19. In present case after the verdict of conviction the accused-appellant had, at the time of hearing on point of quantum of sentence, all relevant factors available and presented, should have been considered for determining the appropriate amount of sentence. But the trial Court had not considered them because the Sessions Judge had erroneously connected punishment of charge under section 436 IPC with that of section3(2)(iv) SC/ST Act and awarded minimum prescribed punishment for said offence. Thus the Additional Sessions Judge, in the instant case, had not complied with the obligation which Section 235(2) imposes. As discussed above, in this case offence of section 3(2)(iv) SC/ST Act is not made out, therefore punishment should have been for charge u/s 436 IPC only and that too after affording opportunity of pre-punishment hearing as discussed above. Such hearing was made during appeal.

20. The sentencing procedure is given in the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges. In the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and which to ignore. From various judgments of Hon'ble Apex Court it has been established that at the time of sentencing the Courts should consider the aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal.A balance sheet cannot be drawn up for comparing the two.The considerations for both are distinct and unrelated. It is erroneous for the court to mechanically proceed to impose any sentence without taking into account all aggravating and mitigating circumstances.

21. Now the matter is limited to the proper punishment for the offence u/s 436 IPC, and we have to consider about the appropriate sentence for the appellant in this case. For it aggravating circumstances relating to the crime while mitigating circumstances relating to the criminal has to be considered. From facts and circumstances of the case before us, as regards aggravating circumstance is concerned it is clear that appellant had acted according to wishes of his father Neebar Singh, without using his mind and had helped his father in putting fire the house of victim/ informant, which resulted in the loss of shelter to victim. So far as mitigating

circumstances are concerned, taking note of various factors including the age of the young appellant-accused being a rustic poor villager of about 22-23 years at the time of the incident (his age being 36 years at time of his statement u/s 313 CrPC in year 2008) which cannot be treated as very mature, he is the only bread winner of his house, it is his first guilt. Apart from it he hails from such poor family that he cannot afford expenses of a lawyer, so he was provided help of Amicus Curie at the expenses of State, the award of 10 years R.I. is excessive. These points were not considered at the time of awarding the punishment; and the said sentence was awarded, which should be mitigated. This contention of learned Amicus Curie for the appellant cannot be ignored that during trial and then after conviction appellant had suffered sufficient time in incarceration (more than six years) which would have taught him appropriate lesson to refrain from such overt acts.

22. While we see no reason to differ with the findings recorded by the trial court regarding charged offence of section 436 IPC, we do see substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the above mentioned aggravating and mitigating attendant circumstances, the age of the accused and the fact that they have already been in jail for a considerable period, the Court should take lenient view as far as the quantum of sentence is concerned. Keeping in view the attending circumstances, we are of the considered view that ends of justice would be met if the punishment awarded to the appellant is reduced. So, it appears appropriate that in present case the sentence should not exceed more than seven years' imprisonment.

23. In view of above facts and discussion, the order of conviction u/s 3(2)(iv) Schedule Tribes (Prevention of Atrocities) Act, 1989 is set aside; but the conviction u/s 436 IPC imposed on the appellant is hereby confirmed. For the charge u/s 436 IPC the punishment of sentence of imprisonment of 10 years is modified to rigorous imprisonment of 7 years. With this modification of sentence, the appeal stands disposed off.

24. Let the copy of this judgment be sent to Sessions Judge, Basti of ensuring compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2015

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

C.M.W.P. No. 34833 of 2014
with
Writ-C No. 32572 of 2014, W.P. No. 46000 of 2014, W.P. No. 46363 of 2015, W.P. No. 50574 of 2014, W.P. No. 53568 of 2014, W.P. No. 21180 of 2015, W.P. No. 23902 of 2015, W.P. No. 29674 of 2015, W.P. No. 44625 of 2015, W.P. No. 49108 of 2015, W.P. No. 49118 of 2015, W.P. No. 49123 of 2015, W.P. No. 49132 of 2015, W.P. No. 49136 of 2015, W.P. No. 49140 of 2015, W.P. No. 49143 of 2015, W.P. No. 49147 of 2015, W.P. No. 49151 of 2015, W.P. No. 34931 of 2014, W.P. No. 35050 of 2014, W.P. No. 35407 of 2014, W.P. No. 35824 of 2014 and W.P. No. 36537 of 2014

Anand Kumar Yadav & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
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Tomar, Sri Tarun Agarwal, Sri Ananad Nandan, Sri Man Bahadur Singh, Sri Navin Kumar Sharma, Sri Neeraj Tiwari

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U.P. Rights of Children to Free & Compulsory Education (first amendments Rules 2014-by state government degenerating into poor quality education-providing absorption of Shiksha Mitra-who completed BTC distance course-without TET could be appointed-such attempt-arbitrary, violation of Art. 14-ultra virus-quashed.

Held: Para-120
In assuming to itself a power to relax the minimum qualification and thereafter by diluting the minimum qualifications in the case of Shiksha Mitras, the State Government has patently acted in a manner which is arbitrary, ultra vires the governing central legislation and in breach of the restraint on the limits of its own statutory powers. By this exercise, the State Government has sought to grant regularization to persons who failed to fulfil the minimum qualifications and who were never appointed against sanctioned posts. In these circumstances, the grant of largesse by the State Government to Shiksha Mitras cannot be upheld and the amendment to the Rules is ultra vires and unconstitutional.

(B)Constitution of India, Art.-226-Service law-regularization-Shiksha Mitra working on contractual basis-without any sanction post-in absence of essential qualification-can not be regularized.

Held: Para-122
In the present case, it is evident that the Shiksha Mitras do not fulfil any of the norms laid down by the Supreme Court for regular absorption into the service of the State. They were at all material times appointed as and continued to be engaged as contractual appointees. Their appointments were not against sanctioned posts. They did not fulfil the minimum qualifications required for appointment as Assistant Teachers.

Case Law discussed:
(2006) 4 SCC 1; Writ-A No. 26189 of 2012 decided on 8th August 2013; Special Appeal No. 305 decided on 3rd March 2008; (2008) 3 SCC 432; 2010 (1) ESC 42 (SC); (2006) 1 SCC 667; (2004) 7 SCC 112; (2005) 1 SCC 639; (1998) 6 SCC 165; [2013 (6) ADJ 310 (FB)]; (2010) 9 SCC 247; (2014) 4 SCC 583; (2003) 3 SCC 548; AIR 2008 SC 1817; (2015) 6 SCC 247

(Delivered by Hon'ble Dr. D.Y. Chandrachud, C.J.)

I Constitution of the Full Bench

1. This Full Bench has been constituted in pursuance of an order dated 27 July 2015 of the Hon'ble Supreme Court in State of Uttar Pradesh Vs Shiv Kumar Pathak1 and connected cases. The Supreme Court directed that all matters before the High Court of Judicature at Allahabad, both at Allahabad and Lucknow, relating to Shiksha Mitras shall be heard by a Full Bench at Allahabad. In pursuance of the order passed by the Supreme Court, the writ petitions relating to Shiksha Mitras which were pending before the Lucknow Bench have been transferred to Allahabad in pursuance of the provisions of Clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948.

II Scope of the challenge

2. In the leading writ petition2, the relief which has been sought, is for setting aside two notifications which were issued on 30 May 2014 by the Government of

Uttar Pradesh for notifying the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules, 20143 and the Uttar Pradesh Basic Education (Teachers) Services (Nineteenth Amendment) Rules, 20144. By and as a result of the amendment , Rule 16-A was introduced into the Rules framed by the State Government under the Right of Children to Free and Compulsory Education Act, 20095, called the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 20116 to reserve to the State Government the power to relax the minimum qualifications prescribed for the appointment of Assistant Teachers in junior basic schools in the case of Shiksha Mitras for the purpose of their appointment in regular service. The second amendment which has been made by the State Government has the effect of amending the Uttar Pradesh Basic Education (Teachers) Services Rules, 19817. By the amendment, the State Government has enabled the appointment of Shiksha Mitras who were working on the date of commencement of the amended Rules into regular service as Assistant Teachers of junior basic schools. The reliefs which have been sought also include a challenge to a Government Order dated 7 February 2013 issued by the Principal Secretary, contemplating the absorption into service, of Shiksha Mitras working in junior basic schools in phases covering a total of 1,24,000 graduate Shiksha Mitras and 46,000 Shiksha Mitras who have completed the intermediate qualification. There is also a challenge to a further Government Order dated 19 June 2014 implementing the decision of the State Government to absorb Shiksha Mitras into regular service.

III For convenience of exposition, the judgment has been divided into the following parts:

(i) PART A : The legislative, regulatory and administrative framework
(ii) PART B : Submissions
(iii) PART C : Analysis
(iv) PART D : Operative orders

PART A : The legislative, regulatory and administrative framework

3. The resolution of the controversy before the Court turns upon the relevant legislation, both Central and State, holding the field and the rules and notifications. It is upon the interpretation of the regulatory framework that the dispute would turn.

A1 Uttar Pradesh Basic Education Act, 1972

4. The Uttar Pradesh Basic Education Act, 19728 was enacted by the state legislature for the purpose of re-organising, reforming and expanding elementary education and, with that purpose in view, to enable the State Government to rest control over elementary education from Zila Parishads in rural areas and Municipal Boards and Mahapalikas in urban areas while vesting it in the Board of Basic Education. The expression 'basic education' is defined in Section 2(b) to mean education upto the eighth class, imparted in schools other than high schools or intermediate colleges. By Section 4(1), the Board is vested with the function of organising, coordinating and controlling the imparting of basic education and teachers' training for the purpose of basic education in the

State. Among the powers which are conferred by sub-section (2) upon the Board, is the power in clause (a) to prescribe courses of instruction and teachers' training in basic education and in clause (b) to conduct basic training certificate examinations.

5. The Act was amended by U P Act No 18 of 2000 to introduce the provisions of Sections 9-A and 10-A and for the substitution of Section 10. As a result of the introduction of Section 9-A, control over teachers and properties of basic schools at the administrative level is entrusted to the gram panchayats or, as the case may be, municipalities within whose territorial limits each basic school is situated. Substituted Section 10, which defines the functions of Zila Panchayats and Section 10-A, as inserted, confers upon the Municipalities, certain statutory duties and functions in regard to basic education in the district or, as the case may be, the municipal area. Under Section 11, for each village or group of villages for which a gram panchayat is established under the U P Panchayat Raj Act, 1947, a Village Education Committee is contemplated to be established consisting of the Pradhan of the Gram Panchayat as its Chairperson. The Village Education Committee is conferred with the statutory function under sub-section (2)(a) to establish, administer, control and manage basic schools in the panchayat area and under clause (g) such other functions pertaining to basic education as may be entrusted by the Government. Section 19 vests a rule-making power in the State Government which comprehends, among other things, in clause (c) of sub-section (2) the power to frame rules in respect of the recruitment and conditions of service of persons appointed to posts of teachers and other employees of basic schools recognised by the Board.

A2 Uttar Pradesh Basic Education (Teachers) Service Rules, 1981

6. In exercise of the powers conferred by Section 19 (1) of the Act of 1972, the Service Rules of 1981 were published on 3 January 1981. Under Rule 2(1)(b), the appointing authority in relation to teachers referred to in Rule 3 is defined to mean the District Basic Education Officer. A junior basic school under Rule 2(1)(h) is defined to mean 'a basic school where instructions from classes I to V are imparted'. A senior basic school under Rule 2(1)(m) is a basic school where instructions from classes VI to VIII are imparted. Basic school comprehends a school imparting instructions from classes I to VIII. The expression 'teacher' has been defined in Rule 2(1)(o) to mean ' a person employed for imparting instructions in nursery schools, basic schools, junior basic schools or senior basic schools. The Rules incorporate a definition of 'training institution' under Rule 2(1)(p) 'as an institution imparting training for recognized certificate courses of teaching.

7. Part II of the Rules of 1981 makes provisions for cadre strength. Rule 4(1) contemplates that there shall be separate cadres of service under the Rules for each local area which is defined under clause (i) of sub-section (1) of Section 2 to mean 'the area over which a local body exercises jurisdiction. Under sub-rule (2) of Rule 4, the strength of the cadre of the teaching staff pertaining to a local area and the number of posts in the cadre are to be such, as may be determined by the Board from time to time with the previous approval of the State Government. The Board of Basic Education is empowered, with the previous approval of the State Government, to create temporary posts.

8. Part III of the Rules of 1981 relates to recruitment. Rule 5 provides for the sources of recruitment and mode of recruitment to various categories of posts.

Insofar as the present controversy is concerned, Rule 5(a)(ii) provides for recruitment of Assistant Masters and Assistant Mistresses of junior basic schools by direct recruitment as provided in Rules 14 and 15.

9. Qualifications for teachers of basic schools are defined in Part IV which, in Rule 6, provides for age. Provisions exist for the extent of relaxation in the case of candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters and ex-servicemen. Rule 8 deals with academic qualifications and is in the following terms:

"8. Academic qualifications.-(1) The essential qualifications of candidates for appointment to a post referred to in clause (a) of Rule 5 shall be as shown below against each:

Post

"...

(ii) Assistant Master and Assistant Mistress of Junior Basic Schools

Academic qualifications

A Bachelor's Degree from a University established by law in India or a Degree recognised by the State Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate, Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training course recognised by the Government as equivalent thereto: Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course."

10. Rule 8(1), as it was originally framed, provided that for appointment of an Assistant Teacher in a junior basic school, the required academic qualification was the intermediate of the Board of High School and Intermediate Education or a qualification recognised by the Government as equivalent and a training qualification consisting of a basic teacher's certificate or any other training course recognised by the government as equivalent (including Hindustani Teacher's Certificate, Junior Teacher's Certificate and Certificate of Training). The provisions of Rule 8(1) were modified by the State Government by an amendment to the Rules which came into force with effect from 9 July 1998. As modified, the intermediate qualification was substituted by a Bachelor's degree.

11. Rule 9 provides for reservations for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters, ex-servicemen and other categories in accordance with legislation in Uttar Pradesh and orders issued by the State Government issued from time to time. Under Rule 10, a provision for relaxation in the maximum age limit, educational qualifications and procedural requirements of recruitment are contemplated in the following terms:

"10. Relaxation for ex-servicemen and certain other categories.- Relaxation, if any, from the maximum age-limit, educational qualifications or/and any procedural requirements of recruitment in favour of the ex-servicemen, disabled military personnel, dependents of military personnel dying in action, dependents of Board's servants dying in harness and sportsmen shall be in accordance with the general rules or order of the Government in this behalf in force at the time of recruitment."

12. The Rules of 1981 make elaborate provisions in regard to the

procedure for recruitment. Rule 14 requires the appointing authority, while making appointments by direct recruitment to posts of Assistant Teachers in junior basic schools, to determine the number of vacancies, vacancies set apart for reserved categories under Rule 9 and to notify the vacancies to the employment exchange, besides publication in at least two newspapers with an adequate circulation in the State and in the district concerned inviting applications from candidates possessing the prescribed training qualification from the district. Under sub-rule (2), the appointing authority is required to prepare a list of such persons who appear to possess the prescribed academic qualification and are eligible for appointment, from the applications received in pursuance of the advertisement or from the Employment Exchange. Under sub-rule (3), names of candidates are required to be arranged in such manner that a candidate who has passed the required training course earlier in point of time shall be placed higher, candidates having passed the training course in a particular year being required to be arranged in accordance with the quality points. Under Rule 16, a Selection Committee is constituted consisting of the Principal of the District Institute of Education and Training9 as Chairperson and other members including the District Basic Education Officer. A separate procedure for recruitment to a teaching post in respect of a language is provided in Rule 17(1) where a written examination is contemplated. Under Rule 19, the appointing authority is required to make appointment to any post referred to in Rule 5 by taking the names of candidates in the order in which they stand in the list prepared under Rule 17. Hence, no appointment can be made except on the recommendation of the Selection Committee and in the case of direct recruitment only upon the production of a residence certificate. Rule 22 envisages the seniority of a teacher in a cadre as determined by the date of appointment in a substantive capacity. Rule 23 contemplates the appointment of all persons in a substantive vacancy on probation for a period of one year and a confirmation in service under Rule 24 subject to fitness and certification of integrity. Rule 25 provides for scales of pay in respect of persons appointed in a substantive or officiating capacity or as a temporary measure as may be determined by the government from time to time. The manner in which quality points are to be computed is laid down in the Appendix to the Rules. Hence, in the Rules of 1981, comprehensive provisions were made by the rule-making authority while framing the subordinate legislation for prescribing the appointing authority, the unit of appointment, qualifications, determination of vacancies, extent of reservation, the procedure for recruitment and scales of pay, among other things.

A3 National Council for Teacher Education, 1993

13. On 29 December 1993, the National Council for Teacher Education Act, 199310 enacted by Parliament, received the assent of the President and was published in the Gazette of India on the following day. For the purpose of these proceedings, it would be necessary to understand the ambit of the NCTE Act of 1993 and RTE Act of 2009 which was enacted sixteen years later by Parliament. The scope of the NCTE Act, as its preamble indicates, is to establish a National Council for Teacher Education11 with a view to achieving planned and coordinated development for

the teacher education system throughout the country and the regulation and proper maintenance of norms and standards. The ambit of teacher education covers pre-primary, primary, secondary and senior secondary stages in schools and has been comprehensively defined to include non-formal education, part-time education, adult education and correspondence education in Section 2(l).

14. Chapter II provides for the establishment of a Council (NCTE), while Chapter III provides for its functions. Among the functions of the Council in clause (e) of Section 12 is to lay down norms for any specified category of courses or training in teacher education including the minimum eligibility criteria for admission, the method of selection of candidates, duration, contents and mode of curriculum. Under clause (g), the Council is empowered to lay down standards in respect of examinations leading to teacher education qualifications, criteria for admission to such examinations and schemes of courses or training.

15. Chapter IV provides for the recognition of teacher education institutions. A rule-making power is conferred upon the Central Government by Section 31(1). Section 32 empowers the Council to frame regulations to carry out the provisions of the Act. Under clause (d) of sub-section (2) of Section 32, the Council is empowered to frame regulations, inter alia, on:

"(d) the norms, guidelines and standards in respect of -

(i) the minimum qualifications for a person to be employed as a teacher under clause (d) of Section 12;

(ii) the specified category of courses or training in teacher education under clause (e) of Section 12."

A4 Contractual engagement of Shiksha Mitras

16. On 26 May 1999, a Government Order was issued by the State Government of Uttar Pradesh for engagement of Shiksha Mitras. The Government Order stated that the Shiksha Mitra scheme was being implemented so as to provide for universal primary education and for the maintenance of the teacher-student ratio in primary schools. The salient aspects of the Shiksha Mitra scheme were as follows:

(i) The appointment of Shiksha Mitras was to be against the payment of an honorarium;

(ii) The appointment was to be for a period of eleven months renewable for satisfactory performance;

(iii) The educational qualifications would be of the intermediate level;

(iv) The unit of selection would be the village where the school is situated and in the event that a qualified candidate was not available in the village, the unit could be extended to the jurisdiction of the Nyay Panchayat;

(v) The services of a Shiksha Mitra could be terminated for want of satisfactory performance;

(vi) Selection was to be made at the village level by the Village Education Committee; and

(vii) The scheme envisaged the constitution, at the district level, of a Committee presided over by the District Magistrate and consisting, inter alia, of the Panchayat Raj Officer and the District

Basic Education Officer among other members to oversee implementation;

17. Subsequently, Government Orders were issued by the State Government to amplify the nature and ambit of the Shiksha Mitra Scheme. Among them was a Government Order dated 1 July 2001 by which it was clarified that the scheme was not a scheme for employment in regular service since its object was to provide to educated rural youth an opportunity to render community service at the level of primary education. The Government Order also contemplated that persons would be selected on the basis of marks obtained in the high school, intermediate, Bed/LT.

A5 Sarva Shiksha Abhiyan

18. On 31 July 2001, the Union Government formulated the policy called the Sarva Shiksha Abhiyan12 to universalize elementary education through the provision of community owned quality education in a mission mode. SSA was intended to provide useful and relevant elementary education for all children in the age group of 6 to 14 by 2010. Among the interventions contemplated by SSA, was the provision of one teacher for every forty children in primary and upper primary schools. Para 6.2 acknowledged that States possessed their own norms for recruitment of teachers. States were left free to follow their own norms as long as they were consistent with the norms established by NCTE.

A6 NCTE Regulations, 2001

19. On 4 September 2001, NCTE, while exercising its power to frame Regulations, notified and issued the National Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001. The Regulations provided for qualifications for teachers from the pre-school to the senior secondary stages including for teachers of elementary schools imparting instruction at the primary and upper primary/middle school stages. The qualifications for recruitment under Rule 3 read with the First Schedule in respect of teachers of elementary schools were defined in the following terms:

"III. Elementary
(a) Primary

(b) Upper Primary (Middle school section)
(i) Senior Secondary School certificate of Intermediate or its equivalent; and
(ii) Diploma or certificate in basic teachers training of a duration of not less than two years. OR

Bachelor of Elementary Education (B EI Ed)

(i) Senior Secondary School certificate or Intermediate or its equivalent; and
(ii) Diploma or certificate in elementary teachers training of a duration of not less than two years.
OR
Bachelor of Elementary Education (B EI Ed) OR Graduate with Bachelor of Education (B Ed) or its equivalent."

20. The Note appended to the First Schedule stipulated that for appointment

of teachers for primary classes, a basic teachers' training programme of two years duration was required and that the BEd was not a substitute.

A7 Articles 21-A and 45 : The Eighty-sixty Amendment

21. The Eighty-sixth Constitutional Amendment substituted Article 45, which forms a part of the Directive Principles of State Policy. Article 45 lays down that the State shall endeavour to provide for early childhood care and education to children below the age of six years. Article 21-A of the Constitution was also inserted by the Eighty-sixth Amendment into the Chapter on fundamental rights to stipulate that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as it may, by law, determine.

A8 Right of Children to Free and Compulsory Education Act, 2009

22. Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009. The Act received the assent of the President on 26 August 2009 and came into force on 1 April 2010. The long title to the Act provides that it is an Act 'for free and compulsory education to all children of the age of six to fourteen years.' Consistent with this ambit, 'child' in Section 2(c) is defined to mean 'a male or female child of the age of six to fourteen years'. Chapter II of the Act makes a provision for the right to free and compulsory education; Chapter III for the duties of the appropriate government, local authority and parents; Chapter IV for the responsibilities of schools and teachers; Chapter V for the curriculum and completion of elementary education; Chapter VI for the protection of rights of children; and Chapter VII for miscellaneous provisions. Section 23, which is a part of Chapter IV, provides as follows:-

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

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

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

(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed."

A9 NCTE Regulations, 2009 : Open and Distance Learning

23. On 31 August 2009, NCTE issued the National Council for Teacher Education (Recognition norms and Procedure) Regulations, 200913. Regulation 3 provides that the Regulations shall be applicable to all

matters relating to teacher education programmes covering norms and standards and procedures for recognition of institutions, commencement of new programmes and addition to sanctioned intake in existing programmes and other matters incidental thereto. Rule 5 provided for the manner in which an institution eligible and desirous of conducting a teacher education programme could apply to the Regional Committee of NCTE for recognition. Provisions have been made in the Regulations for the manner in which applications would be processed, in regard to the conditions for the grant of recognition and allied matters. Among the Appendices to the Regulations, Appendix-9 provides for the norms and standards for a diploma programme in elementary education through open and distance learning, leading to a Diploma in Elementary Education (D El Ed). Para 1 of Appendix-9 provides the Preamble and the rationale underlying the adoption of open and distance learning, thus:

"Preamble.-(i) The elementary teacher education programme through Open and Distance Learning System is intended primarily for upgrading the professional competence of working teachers in the elementary schools (primary and upper primary/middle). It also envisages bringing into its fold those teachers who have entered the profession without formal teacher training.

(ii) The NCTE accepts open and distance learning (ODL) system as a useful and viable mode for the training of teachers presently serving in the elementary schools. This mode is useful for providing additional education support to the teachers and several other educational functionaries working in the school system."

24. Clause 2 of Para 5 provides for eligibility of teachers entitled to be sent for training in the following terms:

"(2) Eligibility

(i) Senior Secondary (Class XII) or equivalent examination passed with fifty percent marks.

(ii) Two years teaching experience in a Government or Government recognized primary/elementary school."

A10 NCTE Notification dated 23 August 2010

25. On 31 March 2010, NCTE was designated as the authority under Section 23(1) of the Act for laying down the minimum qualifications for appointment as a teacher. On 6 July 2010, a Government Order was issued by the State Government taking note of a judgment rendered by a Division Bench of this Court in Devi Prasad Vs State of U P14 to the effect that Shiksha Mitras could not be accorded leave for the purpose of acquiring higher qualifications. The Government Order provided that the Shiksha Mitras, if they so desire, may obtain a higher qualification by pursuing correspondence courses.

26. On 23 August 2010, NCTE issued a notification in exercise of powers conferred upon it, pursuant to the authorisation of the Central Government under Section 23(1), laying down the minimum educational qualifications for a person to be eligible for appointment as a teacher for Classes I to VIII. The minimum qualifications are as follows:

"1. Minimum Qualification.-

(i) Classes I-V

(a) Senior Secondary (or its equivalent) with at least 50 % marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

(ii) Classes VI-VIII

(a) BA/BSc and 2-year Diploma in Elementary Education (by whatever name known)

OR

BA/BSc with at least 50% marks and 1-year Bachelor in Education (BEd)

OR

BA/BSc with at least 45% marks and 1-year Bachelor in Education (BEd), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B El Ed)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year BA/BSc, Ed or BA, Ed/BSc, Ed

OR

BA/BSc with at least 50% marks and 1-year BEd (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose." (emphasis supplied)

27. Clause 4 of the notification dealt with the teachers who had been appointed prior to the date of the notification and provided as follows:

"4. Teacher appointed before the date of this Notification.- The following categories of teachers appointed for classes I to VIII prior to date of this Notification need not acquire the minimum qualifications specified in Para (1) above:

(a) A teacher appointed on or after the 3rd September, 2001 i.e. the date on which the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time) came into force, in accordance with that Regulation.

Provided that a teacher of class I to V possessing BEd qualification, or a teacher possessing BEd (Special Education) or DEd (Special Education) qualification shall undergo an NCTE recognized 6-month special programme on elementary education.

(b) A teacher of class I to V with BEd qualification who has completed a 6-

month Special Basic Teacher Course (Special BTC) approved by the NCTE;

(c) A teacher appointed before the 3rd September, 2001, in accordance with the prevalent Recruitment Rules."

28. Clause 5 stipulates that where an appropriate government, local authority or school had issued an advertisement for initiating the process of appointment prior to the date of the notification, appointments could be made in accordance with the Regulations of 2001.

29. The notification dated 23 August 2010 basically stipulated two sets of minimum qualifications. The first is an educational qualification and the second a training qualification. Apart from these, the notification has made the passing of the Teacher Eligibility Test15 mandatory; the test being required to be conducted by the appropriate government in accordance with the guidelines framed by NCTE. For classes I to V, the minimum educational qualification prescribed is senior secondary (with a stipulated percentage of marks). The training qualification is a diploma in elementary education. For classes VI to VIII, the minimum educational qualification is a bachelor's degree in arts or, as the case may be, science (with a stipulated percentage) coupled with a diploma in elementary education or a bachelor's degree in education. For classes VI to VIII, a senior secondary is also treated as one of the permissible qualifications, provided a candidate has a four year's bachelor's degree in elementary education. Both for teaching students of classes I to V and for imparting instruction to students of classes VI to VIII, the passing of the TET is made mandatory. The notification dated 23 August 2010 was subsequently amended by a notification dated 29 July 2011. The minimum qualifications for a person to be eligible for appointment as an Assistant Teacher contained in sub-paras (i) and (ii) of Para (I) of the principal notification were substituted.

30. Clause 4 of the notification provides for the categories of teachers appointed prior to the date of the notification who were not required to acquire the minimum qualifications specified in Clause 1. Clause 4 basically deals with three categories. The first category consists of teachers appointed after 3 September 2001 which is the date on which the Regulations of 2001 came into force. Teachers who were appointed prior to 23 August 2010 but "in accordance with that Regulation" (meaning thereby the Regulations of 2001) were exempted from the acquisition of the minimum qualifications prescribed by Clause 1. The second category comprises of teachers of classes I to V with a BEd qualification who had completed a six months Special BTC course approved by NCTE. The third category comprises of teachers appointed prior to 3 September 2001; such of them who were appointed in accordance with the prevalent recruitment rules, that is to say, the rules in existence on the date of the appointment of the teacher, were exempted from the requirement of complying with the minimum qualifications prescribed in the notification. After the date of the notification, the minimum qualifications became mandatory, save and except for the exceptions which were carved out. Clause 5 is to the effect that where an advertisement had been issued prior to the date of the notification, the appointment process could be completed on the basis

of the Regulations of 2001 which had held the field until then.

A11 Relaxation of minimum qualifications

31. On 8 November 2010, the Union Government called upon the States to submit proposals, if any, for relaxation of the norms fixed by NCTE. The power of relaxation, it must be noted, was vested in the Central Government alone by virtue of the provisions of sub-section (2) of Section 23. The Union Government, by its communication to the State Governments, clarified that the requirement of holding the TET would not be relaxed. In order to enable the Union Government to exercise its powers in a considered manner, information was specifically sought from the States on the following aspects in the communication:

"(a) Quantitative information as per the format prescribed in the Annexure to this Guideline;

(b) Nature of relaxation sought, separately for classes I to V and VI to VIII, along with justification;

(c) The time period for which relaxation is sought;

(d) The manner in which and the time period within which the State Government would enable teachers, appointed with relaxed qualification, to acquire the prescribed qualification;

(e) The manner in which and the time period within which the State Government would enable existing teachers, not possessing the prescribed qualification, to acquire the prescribed qualification. Reference in this regard is invited to para 4 of the aforementioned Notification of the NCTE.

(f) Any other information the State Government may like to furnish in support of its request for seeking relaxation under Section 23(2)."

A12 Proposal of State Government for distance learning

32. On 24 December 2010, the State Government addressed a communication to the Union Government in the Ministry of Human Resource Development, by which it disclosed that 1,78,000 Shiksha Mitras were working in the State, of which 1,24,000 held graduate degrees. The State Government noted that these Shiksha Mitras had been appointed on a contractual basis with an intermediate qualification as the prescribed norm, whereas the required qualification for teachers engaged in primary schools in the State was a graduate degree. The State Government proposed a schedule for imparting training to 1,24,000 graduate Shiksha Mitras and, for that purpose, sought the grant of permission so as to enable training to be commenced from 2010-11.

A 13 Section 23(2) relaxation

33. On 10 September 2012, the Union Government issued an order under Section 23(2) of the RTE Act of 2009, by which it granted a relaxation to the categories of persons falling in Para 3 of NCTE's notification dated 23 August 2010. The categories of persons covered by this category comprised of persons with BA/BSc degrees with at least 50% marks and BEd qualifications and persons with DEd (Special Education) or BEd (Special Education). The period for obtaining the minimum qualifications was

extended by the Central Government from 1 January 2012 until 31 March 2014.

A14 Open and Distance Learning proposal: NCTE permission

34. On 3 January 2011, a revised proposal was submitted by the State Government for the training of Shiksha Mitras to NCTE. The proposal envisaged that there were 1,78,000 untrained teachers (graduate Shiksha Mitras) engaged on a contract basis by Village Education Committees, working in primary schools. Of these, it was stated that 1,24,000 Shiksha Mitras were graduates and if the untrained graduate Shiksha Mitras were given teacher training, the shortage of qualified teachers in schools would be met. The operational plan which was envisaged by the State, provided that 62,300 untrained graduate Shiksha Mitras would be imparted a two year BTC training during 2011-12 and 2012-13, while the remaining 62,000 would be trained in 2013-14 and 2014-15. The proposal envisaged that the training would be imparted at seventy District Institutes of Education and Training (DIETs) and at twenty Block Resources Centres (BRCs).

35. On 14 January 2011, the NCTE specifically on the basis of the permission which was sought by the State Government in terms of its letter dated 3 January 2011, acceded to the proposal for training of untrained graduate Shiksha Mitras and, for that purpose, for conducting a two year diploma in elementary education through the open and distance learning mode. NCTE, however, clarified in Clause 13 of its letter that the State Government shall ensure that no appointment of untrained teachers is made in whatsoever manner. On 11 July 2011, details of the training programme were issued by the State Government.

A15 Central Rules under RTE Act, 2009

36. The Union Government had issued the Right of Children to Free and Compulsory Education Rules, 201016, under the RTE Act 2009. The RTE Rules of 2010 dealt with the acquisition of minimum qualifications in Part VI. Rule 17 empowered the Central Government to notify an academic authority for laying down the academic qualifications for a person to be eligible as a teacher. Once the minimum qualifications were prescribed, they would mandatorily apply to every school governed by Section 2(n) of the RTE Act of 2009. Rule 18 governs a relaxation of the minimum qualification, under which the State Government was required to estimate its teachers' requirement in accordance with the norms prescribed in the Schedule for all schools covered by Section 2(n). Under sub-rule (2) of Rule 18, it is contemplated that the State Government could request the Union Government for a relaxation of the prescribed minimum qualifications in either of two eventualities, namely: (i) where the State did not have adequate institutions offering courses of training in teacher education; or (ii) the State did not have adequate persons possessing the minimum qualifications notified under Rule 17(2) by the authority authorised by the Central Government. On receiving such a request, the Central Government was empowered to specify the nature of the relaxation and the period of time, not exceeding three years but not beyond five years from the commencement of the Act

within which the minimum qualifications would have to be acquired. Sub-rule (5) of Rule 18 stipulated that after six months from the commencement of the Act, no appointment of a teacher for any school can be made in respect of a person not possessing the minimum qualifications notified in sub-rule (2) of Rule 17 without a relaxation of qualifications under sub-rule (3). Rule 19 made it mandatory for the State Government to provide adequate training facilities to ensure that all teachers in schools acquired the minimum qualifications within a period of five years from the commencement of the Act.

A16 State Rules under RTE Act 2009

37. On 27 July 2011, the UPRTE Rules, 2011 were issued. The UPRTE Rules of 2011 which were framed by the State of Uttar Pradesh under the RTE Act of 2009 were in accordance with the provisions which were contained in the Central Rules. The salient provisions of the UPRTE Rules of 2011 were as follows :

(i) Under Rule 15, the minimum educational qualifications for teachers laid down by an authority authorised by the Central Government were to be applicable to every school under Section 2(n);

(ii) For the purpose of applying for a relaxation of the minimum qualifications under Section 23(2), Rule 16 envisaged the same procedure as was contemplated by Rule 18 of the Central Rules of 2010;

(iii) Rule 16 contemplated that the State Government could move the Union Government for the grant of a relaxation of the minimum qualifications and provides that no appointment of a teacher to any school could be made of a person not possessing the minimum educational qualifications without the issuance of a notification of relaxation by the Central Government.

A17 State amendment to Service Rules

38. The State Government by a notification dated 9 November 2011 amended the Services Rules which were framed in 1981 under the Basic Education Act. By the Rules as amended, which were called the Uttar Pradesh Basic Education (Teachers) Service (Twelfth Amendment) Rules, 2011, the qualifications which were prescribed in Rule 8 were modified so as to make the passing of the TET compulsory. This was as mandated by the notification dated 23 August 2010 issued by NCTE. The notification of the State Government dated 9 November 2011 provided the following academic qualifications for appointment of an Assistant Teacher in a junior basic school:

"(ii) Assistant Master and Assistant Mistresses of Junior Basic Schools

Bachelors degree from a University established by law in India or a degree recognised by the Government as equivalent thereto together with any other training course recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC and have passed teacher eligibility test conducted by the Government of Uttar Pradesh."

39. These amendments which were made by the State Government were

intended to ensure that the qualifications which were prescribed in the Service Rules of 1981 accord with the mandatory requirement of passing the TET which was stipulated by NCTE from 23 August 2010.

A18 Amendments to NCTE Act

40. On 12 October 201117, the provisions of the NCTE Act were amended by Parliament by Amending Act 18 of 2011 which was brought into force with effect from 1 June 2012. The amendments, inter-alia, included an amendment to Section 1(3) to make the Act applicable to the following categories:

"(a) Institutions;

(b)students and teachers of the institutions;

(c) schools imparting pre-primary, primary, upper primary, secondary or senior secondary education and colleges providing senior secondary or intermediate education irrespective of the fact, by whatever names they may be called; and

(d) teachers for schools and colleges referred to in Clause (c)."

41. A definition was inserted in Section 2(ka) of the expression 'school' in the following terms:

"(ka) "school" means any recognized school imparting pre-primary, primary, upper primary, secondary or senior secondary education or a college imparting senior secondary education, and includes-

(i) a school established, owned and controlled by the Central Government, or the State Government or a local authority;

(ii) a school receiving aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority;

(iii) a school not receiving any aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority."

42. These amendments to the NCTE Act were intended to clarify the intent of Parliament that the Act would apply to schools from the stage of pre-primary education through to the senior secondary or intermediate education covering also all stages between. Section 12-A was introduced into the NCTE Act to provide as follows:

"12-A. Power of Council to determine minimum standards of education of school teachers.- For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority;

Provided that nothing in this section shall adversely affect the continuance of any person recruited in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or colleges, under any rule, regulation or order made by the Central Government, a State Government, a local or other authority, immediately before the commencement of the National Council for Teacher Education (Amendment) Act,

2011 solely on the ground of non-fulfilment of such qualifications as may be specified by the Council:

Provided further that the minimum qualifications of a teacher referred to in the first proviso shall be acquired within the period specified in this Act or under the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009)."

43. An amendment was also made to Section 32(2) so as to empower NCTE to frame regulations in regard to the qualifications of teachers under Section 12-A, by the introduction of clause (dd) in sub-section (2) of Section 32.

A19 ODL Training and absorption

44. On 14 July 2012, a Government Order was issued by the State of Uttar Pradesh recognising that various Shiksha Mitras had obtained graduate degrees during the course of their employment. The Government Order contemplated that such persons would be imparted training through the mode of distance education. This was to apply to those candidates who had obtained their graduate degrees by 25 July 2012. On 7 February 2013, the State Government issued a training schedule for 64,000 Shiksha Mitras. The Government Order recorded that 60,000 Shiksha Mitras had already received their training. The Government Order further referred to the existence of an additional 46,000 Shiksha Mitras who had passed the intermediate stage. The Government Order provided for the absorption of 1,70,000 Shiksha Mitras (comprised of 1,24,000 who had completed their graduate degrees and 46,000 who were expected to complete their graduation by September 2015).

A20 Amendment to State RTE Rules

45. On 30 May 2014, the State Government amended the UP RTE Rules of 2011 by the First Amendment Rules, 2014. By the amendment, the State Government introduced a definition of the expression 'Shiksha Mitra' to cover those Shiksha Mitras who had been selected and were working in accordance with the Government Orders in junior basic schools conducted by the Basic Education Board. Rule 16-A as introduced into the UP RTE Rules of 2011 by way of amendment, is in the following terms:

"16-A. Notwithstanding anything contained in rules 15 and 16, the State Government may, in order to implement the provisions of the Act, by order make provisions for relaxation of minimum educational qualification for appointment of such Shiksha Mitras as Assistant Teachers in Junior Basic Schools as are considered otherwise eligible."

46. Rules 16-A contains a non obstante provision. Under it, the State Government assumed the power to relax the minimum educational qualifications prescribed in the case of those Shiksha Mitras who were considered to be otherwise eligible so as to facilitate their appointment as Assistant Teachers in junior basic schools.

A21 Amendment to State Service Rules

47. On 30 May 2014, the State Government notified the amended Service Rules of 1981. The amended Rules retain the definition of the expression "teacher" in Rule 2(o) of the original Rules. The

expression 'teacher' is defined to mean 'a person employed for imparting instructions in nursery schools, basic schools, junior basic schools or senior basic schools'. The expression 'Shiksha Mitra' is defined in Rule 2(v) as follows:

"(v) "Shiksha Mitra" means a person working as such in junior basic schools run by Basic Shiksha Parishad under the Government Orders prior to the commencement of Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011."

48. In the sources of recruitment in Rule 5, a provision is now made in the Rules, as amended, for the appointment of Shiksha Mitras. Rule 5, as amended, reads as follows:

"5. Sources of recruitment- The mode of recruitment to the various categories of posts mentioned below shall be as follows:

(a) (i) Mistresses of Nursery School

(ii)Assistant Masters and Assistant Mistresses of Junior Basic Schools

By direct recruitment as provided in rules 14 and 15;

By direct recruitment as provided in rules 14 and 15;

or

By appointment of such Shiksha Mitras as are engaged as Shiksha Mitra and working as such on the date of commencement of the Uttar Pradesh Basic Education (Teachers) (Nineteenth Amendment) Rules, 2014."

49. In Rule 6, the upper age limit in the case of a Shiksha Mitra is provided as sixty years. Rule 8, which defines the qualifications for eligibility for appointment of an Assistant Teacher in a junior basic school, has been amended so as to provide as follows:

"(ii)Assistant Master and Assistant Mistresses of Junior Basic Schools

(ii) (a) Bachelors degree from a University established by law in India or a degree recognized by the Government equivalent thereto together with any other training course recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu), Vishisht BTC and teacher eligibility test passed, conducted by the Government or by the Government of India;

(b) a Trainee Teacher who has completed successfully six months special training programme in elementary education recognized by NCTE;

(c) A Shiksha Mitra who possessed Bachelors degree from a University established by law in India or a degree recognized by the Government equivalent thereto and has completed successfully two years distant learning BTC course or Basic Teacher's Certificate (BTC), Basic Teacher's Certificate (BTC) (Urdu) or Vishist BTC conducted by the State Council of Educational Research and Training (SCERT)." (emphasis supplied)

50. The striking aspect is the absence of a requirement for a Shiksha Mitra to hold a TET certificate. This requirement is made mandatory by NCTE. In fact in the State Service Rules of 1981, it has been applied in clause (a) to other teachers holding a bachelor's degree and a basic teacher's certificate but has been consciously omitted in the case of Shiksha Mitras.

51. Rule 14(6)(a) envisages the appointment of Shiksha Mitras against substantive posts of Assistant Teachers. Rule 14(6)(a) contemplates that all Shiksha Mitras shall be appointed against substantive posts of Assistant Teachers in junior basic schools after obtaining a certificate of the successful completion of the two years' distance education BTC course, or other equivalent courses stipulated therein. Rule 14(6)(a) provides as follows:

"14(6)(a)-The Shiksha Mitra after obtaining the certificate of successful completion of two years distant BTC course or Basic Teacher's Certificate (BTC), Basic Teacher's Certificate (BTC) (Urdu) or Vishisht BTC conducted by State Council of Educational Research and Training (SCERT) shall be appointed as assistant teachers in junior basic schools against substantive post. To appoint the Shiksha Mitras as assistant teachers in junior basic schools, the appointing authority shall determine the number of vacancies including the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes and other categories under rule 9."

52. Rule 14(6)(b) provides that the appointing authority shall draw a list of Shiksha Mitras possessing the prescribed qualification in Rule 8. Under Rule 14(6)(c), the names of Shiksha Mitras are to be drawn up in an ascending order according to their dates of birth. The system of providing for quality point marks, which is mandatory for other categories, has not been prescribed for Shiksha Mitras.

A22 NCTE Regulations, 2014

53. On 12 November 2014, NCTE issued the National Council for Teacher Education (Determination of Minimum Qualification for Persons to be recruited as Education Teachers and Physical Education Teachers in Pre-primary, Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools and Colleges) Regulations, 2014. The Regulations of 2014 provide that for primary classes (classes I to VIII), the minimum qualifications shall be those as have been laid down by NCTE by its notification dated 23 August 2010, as amended from time to time. Regulation 5 empowers NCTE, on receipt of a reference from the State Government, to relax the provisions of the Regulations subject to satisfaction of the existence of special circumstances. However, the proviso to Regulation 5 stipulates that no relaxation shall be granted with regard to the minimum qualifications for appointment of teachers for classes I to VIII as specified in the Schedule.

54. Now, it is in this background that we would have to consider the nature of the challenge in these proceedings.

PART B : Submissions

B1 Area of challenge

55. Broadly, the area of challenge in these proceedings has traversed four areas, which are:

(i) The nature of the appointment of Shiksha Mitras and the object and purpose of the selection;

(ii) The validity of the notification which has been issued by NCTE on 14 January 2011 accepting the request of the State Government for the grant of training

through the open and distance learning mode to graduate Shiksha Mitras;

(iii) The process of relaxation and absorption of Shiksha Mitras which is stated to have commenced on 14 January 2011; and

(iv) The exemption which has been granted from the passing of the TET by the State Government by amending the Service Rules of 1981.

56. The submissions which have been urged on behalf of the petitioners can now be summarised:

B2 Submissions for the petitioners

(I) The Service Rules framed by the State Government in 1981 to govern teachers employed in schools conducted by the Basic Education Board contain statutory requirements in regard to the creation of the cadre, possession of qualifications, applicability of reservations, pay scales, and conditions for relaxation of the requirement contemplated in the Rules. These Rules uniformly govern the services of all teachers who were employed in junior basic schools;

(II) The object and purpose of the Shiksha Mitra Scheme which was adopted by a Government Order dated 26 May 1999 would indicate that these were essentially contractual appointments which were not made against sanctioned posts. In the case of Shiksha Mitras: (a) there was no requirement of obtaining a teacher's training certificate and the qualification prescribed was only intermediate in comparison with a graduate qualification required for regularly appointed teachers; (b) appointments were made at the village level, failing which at the unit of the Nyay Panchayat; and (c) the appointments were envisaged to be for a contractual term of eleven months with a renewal contemplated in the event of satisfactory service. Every person appointed as Shiksha Mitra was placed on notice of the fact that the appointment was not in the nature of a regular employment in the service of the State but was an appointment of a stipulated duration for the purpose of enabling the person engaged to render community service;

(III) The appointments of Shiksha Mitras were clearly de hors the statutory Service Rules of 1981 which have held the field at all material times;

(IV) After the enforcement of the Regulations by NCTE on 3 September 2001 under the provisions of the NCTE Act, minimum qualifications required for appointment as a primary school teacher were to be stipulated. Between 3 September 2001 and 23 August 2010, when NCTE issued its notification under the RTE Act of 2009, no Shiksha Mitra fulfilled the training qualification prescribed under the central regulations. Upon the enforcement of the notification dated 23 August 2010, every primary school teacher was required to comply with the minimum qualifications prescribed by NCTE. Shiksha Mitras did not fall within the purview of the exemption granted either by clause (4) or by clause (5) of the notification dated 23 August 2010;

(V) The Regulations framed in 2009 by NCTE permitting the grant of a training qualification through the open and distance learning mode, properly construed, apply to a person who is validly appointed as a teacher. A 'working teacher' as defined in Appendix-9 to the Regulations of 2009 would govern a person whose appointment has been

validly made under the applicable recruitment rules. In the context of the 1981 Service Rules which have held the field in the State of U P, this would cover only those teachers who were appointed after relaxing the norms governing eligibility and qualifications under Rule 10;

(VI) The proposal which was submitted by the State Government to NCTE for training of untrained Shiksha Mitras was for the provision of training to 1,24,000 graduate Shiksha Mitras. NCTE's approval dated 14 January 2011 was in response to this proposal of the State Government of 3 January 2011 for the training of graduate Shiksha Mitras. Yet, when the Government issued a Government Order dated 27 July 2012, it incorporated, in addition, training for 46,000 Shiksha Mitras who were only intermediate passed persons and were not covered by the permission which was granted by NCTE. The State violated the permission which was granted by NCTE which did not cover training through the open and distance learning mode to Shiksha Mitras;

(VII) The guidelines which have been framed by the Central Government under Section 35(1) of the RTE Act of 2009 on 8 September 2010 specifically provide that there can be no exemption from the acquisition of a TET as a minimum qualification for eligibility as a primary school teacher. The notification issued by NCTE on 23 August 2010 makes the holding of a TET certificate a mandatory requirement. Initially, when the State Government framed RTE Rules in 2011 under the RTE Act of 2009, the Rules followed the Central Rules of 2010. The Central Rules as well as the original Rules of 2011 framed by the State Government were made in view of the provisions of Section 23(2) of the RTE Act of 2009 which vests the power to grant a relaxation only in the Central Government. Initially, the State Government also amended the Service Rules of 1981 to bring them into conformity with the notification dated 23 August 2010 issued by NCTE by making the holding of a TET qualification mandatory. However, as a result of successive amendments which have been made to the Service Rules of 1981 as well as to the UP RTE Rules of 2011, the State Government has arrogated to itself the power to grant an exemption from the holding of minimum qualifications. This is a power which can be exclusively exercised by the Central Government and by the Central Government alone. The assumption of such a power by the State Government under Rule 16-A, as newly inserted, is ultra vires the provisions of Section 23(2) of the NCTE Act;

(VIII) The State Government has simultaneously purported to amend the Service Rules of 1981 so as to provide for the absorption of all Shiksha Mitras. The absorption of Shiksha Mitras is in violation of the principles which have been laid down by the Hon'ble Supreme Court in Secretary, State of Karnataka Vs Umadevi (3)18 and by a long line of precedents which has emerged thereafter. The State Government has purported to absorb 1,70,000 Shiksha Mitras in the face of the fact that these appointments were (i) made contrary to and de hors the Service Rules of 1981 which govern the services of teachers in junior basic schools; (ii) not made against sanctioned posts; (iii) in breach of the normal rule of recruitment and selection which apply to regularly appointed teachers; (iii) made without following norms of reservations in regard to the Schedule Castes,

Scheduled Tribes and Other Backward Classes and other categories including horizontal reservation. The grant of regularisation or, as the case may be, absorption is fundamentally violative of Articles 14 and 16 of the Constitution; and

(IX) The Union Government in its counter affidavit which has been filed in these proceedings has indicated that there can be no exemption from passing the TET. NCTE has in its counter affidavit specifically made a grievance of the fact that the State Government had not informed it as to whether Shiksha Mitras were regularly appointed teachers or were appointed only for a specified duration.

B3 Submissions for the State Government

57. The learned Additional Advocate General, who has addressed arguments on behalf of the State, has urged the following submissions:

(I) The Scheme which was envisaged by the State Government of appointing Shiksha Mitras was in order to implement the provisions of Article 45 of the Constitution and in pursuance of the policy of SSA which was implemented by the Union Government. This will not fall within the mischief of the back door entry principle which has been laid down by the Supreme Court;

(II) Shiksha Mitras are teachers like other teachers in the service of the State and are engaged for imparting teaching in institutions conducted by the Basic Education Board since 1999. All Shiksha Mitras fall within the definition of the expression 'teacher' as provided in the Service Rules of 1981. Hence, they would be beneficiaries of clauses (4) and (5) of the notification issued by NCTE on 23 August 2010. As against a sanctioned strength of 3,28,220 teachers, there is a working strength of 2,32,136 Assistant Teachers including 1,70,000 Shiksha Mitras. There are 96,084 vacancies at present of which 87,825 vacancies have been advertised;

(III) Appointments of Shiksha Mitras were made in pursuance of the recommendations of Village Education Committees which have a statutory status under the provisions of Section 11 of the Basic Education Act of 1972;

(IV) Appendix-9 to the Regulations framed by NCTE in 2009 for open and distance learning courses provided for the imparting of training to 'working teachers'. Working teachers would mean not only teachers regularly employed by the State in pursuance of the Service Rules of 1981 but would also cover Shiksha Mitras. The eligibility as specified in Appendix-9 is a senior secondary certificate. Consequently, there was no infraction on the part of the State Government in mooting a proposal before NCTE for the training of Shiksha Mitras. The correspondence on the record would indicate that before the NCTE granted its approval on 14 January 2011, the State Government had mooted a proposal on 10 August 2010 which was followed up on 24 December 2010 and 3 January 2011 and by discussions with the officials of the Ministry of Human Resource Development of the Union Government. In seeking permission for the grant of training to Shiksha Mitras through the open and distance learning mode, the State Government duly disclosed that these were contractual appointments of persons who did not, at the relevant time, hold the qualifications prescribed in the Service Rules of 1981. There was no

suppression of fact from the Union Government;

(V) The main objective of undertaking the training course was to deal with a shortage of teachers in the State of Uttar Pradesh which was remedied by training 1,70,000 Shiksha Mitras;

(VI) Shiksha Mitras engaged by the State Government, albeit on a contractual basis, were persons who fulfilled the qualifications prescribed in the Regulations of 2001 and in Appendix-9 of the Regulations of 2009 framed by NCTE, save and except for the training requirement which they did not possess. Subsequently, the training requirement has been duly completed in accordance with the permission granted by NCTE on 14 January 2011;

(VII) Approval and relaxation having been granted by a body competent to do so, there is no illegality in their absorption;

(VIII) The purpose of the guidelines issued by the Union Government on 2 February 2011 for conducting the TET under Section 35 has been fulfilled by the State Government by imparting training qualifications and hence, there is no illegality in the deviation made by the State Government from the norm of passing the TET;

(IX) Shiksha Mitras have worked for nearly 16 years and there was nothing arbitrary in the decision of the State Government seeking to absorb them into regular service. The mode of recruitment has been amended in the Rules so as to bring Shiksha Mitras into regular service of the State in pursuance of its Scheme; and

(X) The amendments made to the Service Rules of 1981 are not ultra vires.

B4 Submissions of NCTE

58. The learned counsel appearing for the NCTE has submitted that:

(I) NCTE was not apprised of the true nature and character of the appointment of Shiksha Mitras. Shiksha Mitras had evidently been appointed in violation of the Service Rules of 1981 and therefore their absorption was clearly unjustified;

(II) NCTE is the body/academic authority enjoined to prescribe the minimum qualifications required of teachers working in schools covered by the RTE Act. NCTE did not and never intended to exempt teachers in primary schools from obtaining the TET certification;

(III) The Central Government by its order dated 10 September 2012 has clarified that TET as a qualification has not been relaxed;

(IV) The amendments made in the Service Rules of 1981 are clearly beyond the domain of the state authorities as the power of relaxation stands reserved exclusively in favour of the Central Government under the provisions of the RTE Act;

(V) Admittedly the appointment of Shiksha Mitras was contractual for a period of 11 months and therefore it was incorrect to describe them as untrained teachers. Acquiring the TET qualification is essential with reference to the aims and objects of the RTE Act and the need for adherence to a national standard and benchmark liable to be possessed by all persons aspiring to be appointed as teachers of primary schools; and

(VI) There is no challenge to the inclusion of TET as a qualification either by the State or by the Shiksha Mitras.

B5 Submissions of Shiksha Mitras

59. The submissions which have been urged before the Court by the learned Additional Advocate General have been followed and adopted by learned counsel appearing on behalf of the respondent Shiksha Mitras.

60. The submissions urged by the supporting learned counsel are summarised hereafter:

(1) The proviso to Section 12-A would cover persons, such as the Shiksha Mitras in the State of Uttar Pradesh. The effect of Section 12-A is that their services should not be adversely affected by the introduction of a statutory provision empowering NCTE to lay down minimum qualifications for appointment of teachers of primary schools;

(2) NCTE obtained the power to frame Regulations under Section 12-A by the amendment of 2011 and actually exercised that power by notifying Regulations on 16 December 2014. Section 12-A contemplates that there must be a Regulation under the substantive provision. The proviso to Section 12-A protects the continuance of any person recruited under an order of the State Government whose services would not be adversely affected solely on the ground of non fulfillment of qualifications specified by NCTE. However, the qualifications would have to be acquired within the period specified in the RTE Act of 2009. Before NCTE notified its Regulations on 16 December 2014, the Shiksha Mitras had obtained their bachelor's degrees, and the training qualifications with permission of NCTE;

(3) There was no imbalance in the principle of reservation in the recruitment of Shiksha Mitras since, broadly, the appointments of Shiksha Mitras followed the same category for which the post of Gram Pradhan was reserved in the case of each Gaon Sabha; 3

(4) Shiksha Mitras were not recruited through the back door but by the procedure prescribed by the State itself; and

(5) Clause (4) of the notification issued by NCTE contemplates the grant of an exemption to persons with a BEd (Special Education) and DEd (Special Education) qualification. These are not qualifications maintained in the Regulations of 2001. Since such persons were basically untrained and have yet been given an exemption from the requirement of passing the TET, Shiksha Mitras should, by parity of reasoning, be entitled for the same benefit.

61. Moreover, it has also been urged that, as a part of the exercise which has been conducted by the Court in these proceedings, the following issues would require determination:

(1) Whether the appointment of Shiksha Mitras in pursuance of the Government Order dated 26 May 1999 was of a statutory character;

(2) Whether the State Government did have the power, by virtue of Section 13(1) of the Basic Education Act 1972 and having due regard to the provisions of Entry 25 of the Concurrent List to the Seventh Schedule, to issue the Government Order dated 26 May 1999;

(3) Whether the Government Order dated 26 May 1999 can be regarded as a

valid exercise of power under Article 162 of the Constitution, where the Service Rules of 1981 were silent in regard to the appointment of untrained teachers;

(4) Whether the Village Education Committees had a statutory character by virtue of Section 11 of the U P Basic Education Act, 1972;

(5) Whether the appointment of Shiksha Mitras can be regarded as being made against substantive posts, since the number was determined in the ratio of students to teachers in the proportion of 1:40;

(6) Whether the permission granted by NCTE on 14 January 2011 is a valid permission under Section 16(3)(d) of the NCTE Act;

(7) Whether the petitioners could be regarded as being persons aggrieved to challenge the permission granted by NCTE;

(8) Whether the effort on the part of the State to grant training to untrained teachers can be regarded as a reasonable effort and not mala fide;

(9) Whether the appointment of Shiksha Mitras has been duly protected by the proviso to Section 12-A and could be validly brought into the regular cadre of Assistant Teachers by amendment of the Service Rules of 1981;

(10) Whether the power of NCTE to lay down minimum qualifications could only be exercised by framing Regulations under Section 32 of the NCTE Act; and

(11) Would the effect of the insertion of Section 12-A suspend the effect and operation of the notification dated 23 August 2010.

PART C : ANALYSIS

62. The submissions now fall for consideration.

C1 Nature of appointment of Shiksha Mitras

63. The Uttar Pradesh Basic Education Act was enacted in 1972 to regulate the imparting of education up to the eighth standard. The Board of Basic Education was constituted by the Act to regulate the imparting of basic education teachers' training and the conduct of basic training certificate examinations. When it was enacted, the Act envisaged transfer of control over basic schools from Zila Parishads in the rural areas and the Municipal Boards and Mahapalikas in the urban areas to the Basic Education Board. Subsequently, as we have noted, by the amendment which the state legislature brought about in 2000, statutory duties in regard to the conduct of basic education including control over basic schools was transferred to gram panchayats and municipalities subject to the over all control of the State Government. When the State Government formulated the Uttar Pradesh Basic Education (Teachers) Service Rules 1981, specific provisions were made in regard to the services of teachers to be engaged for imparting instruction in basic schools, junior basic schools or senior basic schools. The junior and senior basic schools covered the entire canvas of primary education from classes I to VIII. The Service Rules of 1981 contemplate the creation of a separate cadre of service for each local area under Section 4. Consistent with the norm of government control over basic education, the strength of the cadre of the teaching staff for each local area and the number of posts in the cadre are required to be determined by the Board of Basic Education with the previous approval of the State Government. Recruitment to the posts of Assistant Teachers in junior basic

schools is to take place by direct recruitment as provided in Rule 5(a)(2). Rule 8 spells out the academic qualifications required for appointment of Assistant Teachers in a junior basic school. As it was originally framed, the requirement was of an intermediate qualification and a basic teacher's certificate or a qualification equivalent. Since under the Rules, cadres to govern the service of teachers of basic schools were created, a provision is made in Rule 9 for reservation for the Scheduled Castes, Scheduled Tribes, Other Backward Classes as well as for other categories provided in governmental orders including dependents of freedom fighters and ex-servicemen. Rule 10 stipulates the grant of a relaxation in favour of certain specified categories from the age and qualification norms laid down in the rules as well as in regard to the procedural requirements for recruitment. The Rules contain specific provisions in regard to the manner in which the appointing authority would determine the number of vacancies, the extent of vacancies reserved, the manner in which vacancies would be advertised, the placement of candidates for the purpose of selection, the constitution of Selection Committees and the manner of appointment. Provisions are also made in regard to other consequential matters of an essential nature associated with the constitution of a service including seniority, placement on probation, confirmation, scales of pay and superannuation. In the case of teachers recruited through direct recruitment for teaching a language, the Rules make a provision for a written examination and the evaluation of candidates on the basis of marks obtained in the examination and quality points. This is the statutory framework which has consistently held the field in the State of Uttar Pradesh at all material times after the Service Rules came to be framed in 1981.

64. The Shiksha Mitra Scheme was introduced by the Government Order dated 26 May 1999. Clause 1 deals with the concept of Shiksha Mitra. It provides that a person possessing educational qualifications upto intermediate level be engaged by the Village Education Committee constituted under the Act of 1972 Act on a contractual basis and on the payment of honorarium taking into consideration the local requirement at the Gram Sabha level. Such a person shall be called a Shiksha Mitra. Clause 7 provides that the engagement of a Shiksha Mitra would be only for an academic year on a contractual basis and the engagement shall automatically come to an end on 31 May.

65. The subsequent Government Order dated 1 July 2001, however, provides that the term of a Shiksha Mitra can be extended provided the teaching work and conduct are found to be suitable. This Government Order also contains two proformas. The first is in regard to the application to be submitted by a Shiksha Mitra for seeking engagement, while the second is in connection with the acceptance letter to be submitted by a Shiksha Mitra. The application to be submitted requires applicants to mention that they are applying for seeking engagement in community service. The acceptance letter requires the applicant to specifically state that he/she would perform teaching work as a social worker and will not consider himself or herself to be in the employment of the State

Government/Board. The applicant has also to state that for this social service, he/her would not claim any wages and would be entitled only to payment of honorarium.

66. The essential characteristics of the Shiksha Mitra Scheme envisaged, firstly, that each appointment was made on a contractual basis for a stipulated term of eleven months, renewable subject to satisfactory performance and on an honorarium. Secondly, the Scheme, as notified, contemplated that the engagement of Shiksha Mitras was not in the regular service of the State, as indeed it could not have been, having due regard to the provisions of the Service Rules of 1981 which held the field in regard to the constitution of a cadre of teachers imparting basic education and regularly engaged for that purpose. Thirdly, each of the persons appointed as Shiksha Mitras was placed on notice of the fact that this was a Scheme envisaging service by the unemployed youth for the benefit of the community against the payment of an honorarium. Shiksha Mitras were not entitled to the payment of a salary in the regular pay scale but would only receive a Mandeya (honorarium). The application form which every prospective candidate was required to fill up in terms of the Government Order dated 1 July 2001, envisaged a statement of acceptance that the candidate would be bound by the terms and conditions governing the Scheme. The consent form required to be filled in by every candidate envisaged that he/she would not be treated as a regular employee of the State Government and would only be entitled to the payment of honorarium. Moreover, Clause 3 of Form-II appended to the Government Order stipulated that the training which was imparted to a candidate was only to enable him or her to render community service in the capacity of a Shiksha Mitra. Fourthly, appointments as Shiksha Mitras were not against sanctioned posts as determined by the Board of Basic Education with the previous approval of the State Government under Rule 4 of the Service Rules of 1981. Fifthly, the manner of making appointments and the procedure for recruitment was not in conformity with the provisions contained in Rules 14, 15, 16 and 17 of the Service Rules of 1981. Instead, what the Shiksha Mitra Scheme envisaged, was that appointments should be made by Village Education Committees at the village level. At the district level, there was a Committee chaired by the District Collector and consisting, inter alia, of the District Panchayat Raj Officer and the Basic Education Officer. The District Level Committee was constituted to oversee the implementation of the Scheme in the district. Sixthly, the qualification which was prescribed for appointment as a Shiksha Mitra under the Government Order dated 26 May 1999 was the possessing of an intermediate qualification. Prior thereto, an amendment was made in the Service Rules on 9 July 1998 by which Rule 8 was amended to prescribe the holding of a graduate degree for appointment as a regular teacher. Under the Service Rules of 1981, a regular teacher was required to also possess a basic teacher's certificate. This was not a requirement for Shiksha Mitras under the Government Order. Shiksha Mitras did not fulfill the qualifications for a regular teacher under the Service Rules of 1981. Seventhly, the manner in which reservations were to be worked out under the Rules of 1981 was evidently not the manner in which reservations in the

recruitment of Shiksha Mitras would operate. At the highest, what has been urged before the Court by the Additional Advocate General and supporting counsel is that the selection of Shiksha Mitras at the village level envisaged that a Shiksha Mitra to be appointed should belong to the same category as the Gram Pradhan, thereby resulting in a rough and ready adoption of the norm of reservation. This is certainly not the manner in which the policy of reservation as envisaged by the State is implemented in the case of regularly selected candidates, including by the application of the roster and implementing horizontal and vertical reservations. Rule 9, it must be noted, envisages reservation not only for the Scheduled Castes, Scheduled Tribes and Other Backward Classes, but other categories also including the dependents of freedom fighters and ex-servicemen. Moreover, the orders of the State Government also contemplate horizontal reservation across various classes. These aspects leave no manner of doubt that the engagement of Shiksha Mitras was envisaged under an administrative scheme by the State Government on a contractual basis with a specified purpose and object and de hors the governing provisions of the applicable Service Rules of 1981.

67. The object and purpose of engaging Shiksha Mitras, the learned Additional Advocate General stated before the Court, was to implement the Sarva Shiksha Abhiyan in relation to the State of Uttar Pradesh. While notifying the SSA policy, the Union Government, in fact, envisaged a mission mode for the provision of community owned modalities for propagating universal elementary education. SSA acknowledged that States had their own norms for recruitment of teachers and would consequently be free to follow their own norms so long as they were consistent with the norms established by NCTE.

68. The fact that the number of persons engaged as Shiksha Mitras may have been determined on an application of a teacher-student ratio of 1:40, is not an indicator that the Shiksha Mitras were appointed to sanctioned posts. They did not belong to the regular cadre and were contractual appointees. They were not appointed against sanctioned posts. The Union Government, in formulating SSA, envisaged the application of the Gujarat model of recruitment of fully trained teachers on fixed pay, as an interim strategy in states with large scale teacher vacancies. The policy was envisaged to improve the accountability of teachers vis-a-vis the local community without diluting the standards for selection of teachers as laid down from time to time by NCTE. Persons who were engaged as Shiksha Mitras in the State of Uttar Pradesh were engaged on the basis of their possessing only the intermediate qualification, without possessing a certificate of training as prescribed by Rule 8 of the Service Rules of 1981. By the time Sarva Shiksha Abhiyan was circulated as a policy for implementation by the Union Ministry of Human Resource Development on 31 July 2001, the Regulations of 3 September 2001 had also been notified by NCTE. The SSA policy document, therefore, clearly envisaged that there would be no dilution of the standard for selection of teachers as laid down from time to time by NCTE.

69. The nature of the appointment of Shiksha Mitras in the State of Uttar Pradesh came up for consideration before

a Full Bench of this Court in Km Sandhya Singh Vs State of Uttar Pradesh19. The Full Bench held as follows:

"It could not be disputed by the petitioners that the scheme for appointment of Shiksha Mitra came into being through the government orders i.e. executive instructions. To put it differently, the petitioners' appointment/selection is contractual appointment as Shiksha Mitra. Meaning thereby, there is no statutory backing to the petitioners' claim. The petitioners' argument proceeds on the footing that the post of Shiksha Mitra is a civil post and is governed by the principle of statutory service rules. The scheme itself provides that a person shall be allowed to function as Shiksha Mitra under a contract for a fixed period which will come to an end on 31st of May of the next year. No honorarium shall be payable for the month of June. The scheme shows that it will commence in the month of July of each year and will end on 31st of May i.e. for eleven months. By modification it has been provided that if nothing is there against a person he may continue as Shiksha Mitra for the next academic session, subject to receiving a short refresher training. All this cumulatively shows that the tenure of Shiksha Mitra is a fixed term tenure, maximum up to the period of eleven months which, of course, in view of the subsequent amendments by the Government Order can be renewed for subsequent academic sessions."

70. The Full Bench cited with approval the observations contained in a judgment of a Division Bench of this Court presided over by Chief Justice H L Gokhale (as His Lordship then was) in Sanjay Kumar Singh Vs State of U P20, where it was held as follows:

"Everybody is forgetting that the scheme of Shiksha Mitra is to spread education and it is not a scheme for employment. What is being given is an honorarium to the concerned teacher. The appointment comes to an end at the end of the academic year, with right to continue if the performance is good."

71. These observations of the Division Bench in Sanjay Kumar Singh's case and of the Full Bench in Km Sandhya Singh are we say with respect, a correct assessment of the Shiksha Mitra Scheme.

The submission which has been urged on behalf of the State and by some of the supporting counsel, is that Section 11 of the U P Basic Education Act, 1972 contemplates the constitution of Village Education Committees. This does not render the Shiksha Mitra Scheme a statutory scheme. The function of Village Education Committees as defined in sub-section (2) of Section 11 is to establish, administer, control and manage basic schools in the Panchayat area and to discharge such other functions pertaining to basic education as may be entrusted by the State Government. This, in our opinion, does not render the Scheme of appointing Shiksha Mitras of a statutory nature or character. If such a Scheme was to be intended to have a statutory flavour, there could have been no escape from the requirement of complying with the norms which govern the regular teachers of basic schools as prescribed in the Service Rules of 1981. On the contrary, compliance with the Service Rules of 1981 was sought to be obviated by engaging barefoot volunteers across the State on a contractual basis for which an administrative scheme was envisaged

under the Government Order dated 26 May 1999. Similarly, the power of the State Government to issue directions to the Board of Basic Education in Section 13 was not the power which the State Government wielded while issuing diverse Government Orders that govern the Shiksha Mitra Scheme. The power to issue directions under Section 13 could not have been exercised contrary to the provisions of the Service Rules of 1981 which were made by the State Government in exercise of the subordinate law-making power. Even if it is held that Village Education Committees were entrusted with the duty of selecting Shiksha Mitras in pursuance of the provisions of Section 11(2)(g), the fact remains that appointments of Shiksha Mitras were independent of and not subject to the discipline of the provisions of the Service Rules of 1981. Neither was the engagement against sanctioned posts nor were the provisions for recruitment envisaged in the Service Rules of 1981 followed. They were not qualified candidates. Understanding the true nature and purpose of Shiksha Mitras lies at the heart of the dispute in the present case.

72. Having elaborated on this aspect, it would now be necessary to deal with the regulatory provisions contained, firstly in the NCTE Act and the later enactment of the RTE Act of 2009.

C2 NCTE Act 1993 and RTE Act 2009: The effect of Section 23

73. The NCTE Act, 1993 was enacted by Parliament in order to achieve planned and coordinated developed of teacher education. The expression 'teacher education' in Section 2(l) covers programmes of education, research or training in order to equip individuals to teach at the pre-primary, primary, secondary and senior secondary stages, and to include non-formal education, part-time education, adult education and correspondence education. NCTE, as a statutory body, is constituted in accordance with the provisions of Chapter II of the Act to ensure planned and coordinated development of teachers and for maintenance of norms and standards of teacher education. The functions of NCTE under Section 12 are not confined to primary education alone and this would assume significance having due regard to the ambit and sweep of the NCTE Act when it is considered in juxtaposition to the RTE Act of 2009 which was made specifically in the context of providing the right of free and compulsory elementary education. The powers of NCTE under the NCTE Act, 1993 include the grant of recognition to teacher education institutions for which provisions are made under Chapter IV. By the Act, NCTE is given a substantive power to frame Regulations in Section 32. Included in the range of its regulatory powers in clause (d) of sub-section (2) of Section 32 is the power to lay down norms, guidelines and standards in respect of the minimum qualifications for a person to be appointed as a teacher and in respect of specified categories of courses or training in teacher education under clause (e) of Section 12. A broad range of statutory powers is entrusted to NCTE in the legislation enacted by Parliament in 1993. The range of its functions is evident from the nature of the subjects brought within the control of NCTE by Section 12.

74. NCTE framed, on 3 September 2001, Regulations in the exercise of its statutory powers. In the Regulations

which were notified and published in the Gazette of India on 4 September 2001, NCTE laid down qualifications for the recruitment of teachers including at the elementary level. The elementary level included primary school teachers where the prescribed qualification was (i) a senior secondary school certificate or intermediate or its equivalent and (ii) a diploma or certificate in basic teacher's training of a duration of not less than two years or a bachelor's degree in elementary education. For the upper primary sections, the prescribed educational qualification is the same as for the primary level and a diploma or certificate in elementary teachers training of a duration of not less than two years or a graduate degree with a Bachelor of education or its equivalent. In a Note which is appended to the First Schedule, NCTE clarified that for teaching in primary schools, a basic teachers training programme of two years' duration is required and that the BEd is not a substitute. The striking aspect, insofar as the present case is concerned, is that Shiksha Mitras who were engaged after 1999 did not when they were appointed fulfill the requirement which was spelt out in the NCTE Regulations of 3 September 2001. None of them fulfilled the requirement of a two year basic teachers training certificate.

75. Parliament enacted the RTE Act of 2009 to implement the provisions of Article 21-A of the Constitution which mandates the State to provide free and compulsory education to all children between the ages of six and fourteen. The definition of the expression 'child' in Section 2(c) covers children in this age group and the expression 'elementary education' in Section 2(f) makes it abundantly clear that education from classes I to VIII forms the subject matter of the enactment of 2009.

76. Section 23 of the RTE Act of 2009 provides in sub-section (1) for eligibility for appointment as a teacher. Under sub-section (1) of Section 23, to be eligible for appointment as a teacher, a person has to possess such minimum qualifications as are "laid down" by an academic authority authorised by the Central Government by a notification. NCTE was designated as the authority under sub-section (1) on 31 March 2010. Sub-section (2) of Section 23 recognises that a state may not have adequate institutions offering courses or training in teacher education. Sub-section (2) also constitutes an acknowledgement by Parliament of a situation where teachers possessing the minimum qualifications laid down under sub-section (1) may not be available in sufficient numbers in a state. Having due regard to this eventuality, the Central Government was statutorily vested with the authority under sub-section (2) to relax the minimum qualifications laid down under sub-section (1) for appointment as a teacher. The Central Government was left with the discretion to define the period over which the relaxation is to remain operative subject to the stipulation that this would operate for a period not exceeding five years. The proviso to sub-section (2) of Section 23 envisages that a teacher who, at the commencement of the Act, does not possess the minimum qualifications as laid down in sub-section (1) would acquire them within a period of five years. The provisions contained in sub-section (1) and those in the substantive part of sub-section (2) and the proviso comprise of a composite statutory scheme. By sub-section (1), an authority which is notified

by the Central Government is to prescribe qualifications defining the conditions of eligibility for appointment as a teacher. Under sub-section (2), the Central Government is permitted to grant a relaxation of those qualifications for a period of not more than five years. While the laying down of qualifications is entrusted to the authority under sub-section (1), the power to grant a relaxation is conferred upon the Central Government under sub-section (2). The proviso deals with those teachers who, on the date of the commencement of the Act, did not possess minimum qualifications prescribed under sub-section (1) and to such teachers a window of five years was granted to acquire the minimum qualifications.

77. The Central Government authorised the NCTE as the academic authority to lay down the minimum qualifications for a person to be eligible for appointment as a teacher by a notification dated 31 March 2010 issued in exercise of the powers conferred by Section 23 (1) of the RTE Act of 2009. NCTE notified the minimum qualifications required for appointment as a teacher in terms of sub-section (1) of Section 23 by its notification on 23 August 2010 defining eligibility for appointment as a teacher to classes I to VIII in a school covered by Section 2(n) of the RTE Act of 2009. The minimum qualifications prescribed by NCTE envisaged broadly (i) a senior secondary certificate; (ii) a diploma in elementary education; and (iii) passing of the TET to be conducted by the appropriate government in accordance with NCTE guidelines. These were the qualifications prescribed for teachers of classes I to V and corresponding qualifications were also prescribed in the notification dated 23 August 2010 in relation to teachers of classes VI to VIII. Both for teachers of classes I to V and for those of classes VI to VIII, NCTE made the passing of the TET mandatory. Clause 3 of the notification provided for a post-appointment training under an NCTE recognized six month special programme in elementary education in the case of two categories: the first being for those with a BA/BSc degree and BEd qualification, and the second for those with a BEd (Special Education) or DEd (Special Education).

78. While laying down the minimum qualifications in clause (1) of the notification, NCTE dealt in Para 4 with the issue of those teachers appointed for classes I to VIII prior to the date of the notification. In their case, it was mandated that acquisition of minimum qualifications in Para 1 would not be necessary in three categories. The first category was of teachers appointed on or after 3 September 2001 when the Regulations of 2001 had come into force, in accordance with those Regulations. The expression 'in accordance with that Regulation' meant that in order to avail of the benefit of clause (a) of Para 4, a teacher had to be appointed in accordance with the Regulations of 3 September 2001 and after the date of enforcement of the Regulations. To be a teacher appointed "in accordance with that Regulation", a person had to have both the educational qualifications prescribed (senior secondary school certificate or intermediate or an equivalent) and a diploma or certificate in basic teachers training (for primary classes from standard I to V.) Similarly, in the case of a teacher of the upper primary classes for

standards VI to VIII, the teacher was required to possess both a senior secondary school certificate or intermediate or its equivalent and either a diploma or certificate in elementary teachers' training of two years or a graduation with BEd or its equivalent. In other words, in order to avail of the benefit of clause (a) of Para 4 of the notification dated 23 August 2010, the mandatory condition was that the appointment had to be made after 3 September 2001 in accordance with the Regulations.

79. The second category to which it was provided that the minimum qualification would not apply, were teachers of classes I to V with a BEd qualification who had completed a six months' special BTC course approved by NCTE.

80. The third category comprised of teachers appointed before 3 September 2001. These teachers were appointed before the Regulations came to be notified for the first time by NCTE under the NCTE Act of 1993. Teachers appointed in accordance with the prevalent recruitment rules were governed by clause (c) of Para 4 of the notification.

81. The notification dated 23 August 2010 was subsequently amended by a notification dated 29 July 2011. The minimum qualifications for a person to be eligible for appointment as an Assistant Teacher contained in sub-paras (i) and (ii) of Para (I) of the principal notification were substituted.

82. Evidently, Shiksha Mitras could not either seek the benefit of clause (a) or clause (c) of Para 4 of the notification dated 23 August 2010. They were not teachers appointed in accordance with the Regulations of 3 September 2001 since, admittedly they did not possess the BTC qualification. Moreover, Shiksha Mitras did not have the benefit of clause (c) of Para 3 since any appointment made prior to 3 September 2001 had to be in accordance with the prevalent recruitment rules. The engagements of Shiksha Mitras were de hors the recruitment rules and were not in accordance with the Service Rules of 1981 which apply to appointments of basic teachers in the State of Uttar Pradesh. The proviso to sub-section (2) of Section 23 governs persons who are teachers and who, at the commencement of the RTE Act of 2009, did not possess the minimum qualifications prescribed under sub-section (1). They were given a period of five years to acquire the minimum qualifications. The proviso would govern persons who were recruited as teachers in the State of Uttar Pradesh under the Act and the Service Rules of 1981 and can have no application to Shiksha Mitras.

C3 Amendments of 2011 to NCTE Act

83. Now, at this stage, it would be necessary for the Court to dwell, briefly, on the legislative history which led to the amendments to the NCTE Act of 1993 in 2011.

84. In Basic Education Board, Uttar Pradesh Vs Upendra Rai21, a Bench of two learned Judges of the Supreme Court held that the NCTE Act deals only with teachers training institutions and had nothing to do with ordinary educational institutions, such as primary schools, high schools and intermediate colleges. The

view which was taken was that qualifications for appointment as teachers in 'ordinary' educational institutions, like primary schools, could not be prescribed under the NCTE Act. The correctness of the judgment in Upendra Rai was referred to a larger Bench of the Supreme Court in Irrigineni Venkata Krishnanand Vs Government of Andhra Pradesh22.

85. During the pendency of the reference to the Bench of three learned Judges of the Supreme Court, Parliament enacted Amending Act 18 of 2011 to provide for the insertion of Section 12-A into the NCTE Act of 1993. Section 12-A contemplates that NCTE may by Regulations determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate schools or colleges run, aided or recognised by the Central Government, State Government or a local authority. Section 12-A was introduced by Parliament to explicitly provide for a power in NCTE of a nature that the Act had contemplated in the power to frame regulations under Section 32(2)(d). The Statement of Objects and Reasons accompanying the introduction of the Bill in Parliament clarified that the intent of Parliament in introducing the amendment was of a clarificatory nature. The proviso to Section 12-A stipulated that nothing in the Section shall affect adversely the continuance of any person recruited under a rule, regulation or order of the Central or State Government or local or other authority, immediately before the commencement of the Amending Act, on the ground of non-fulfillment of such qualifications as may be prescribed by the NCTE. However, the minimum qualifications were required to be acquired within the period specified under the NCTE Act or under the RTE Act of 2009. The effect of the proviso was to ensure that while NCTE was recognised to possess a regulatory power to determine the qualifications for recruitment of teachers including in primary or upper primary schools, the insertion of Section 12-A would, by itself, not affect the continuance of a person who was recruited in pursuance of rules, regulations or orders of the government or authority concerned. Section 12-A was a provision which was introduced by way of abundant caution so as not to affect the continuance of such persons. Section 12-A is not a validation of the appointments of Shiksha Mitras nor, for that matter, does it elevate the engagements of such persons from a pure contractual level to anything higher. Section 12-A is intended to ensure that the objection to the regulatory power of NCTE over teachers of educational institutions other than teacher training institutions which had found acceptance in a judgment of two learned Judges of the Supreme Court in Upendra Rai, was placed beyond the pale of controversy. Hence, when the reference before a larger Bench of the Supreme Court came up for consideration, the Bench of three learned Judges held that, as a result of the subsequent amendments, the questions which were referred to the larger Bench had become academic and did not require any answer. Section 12-A does not deal with the nature of the appointments of Shiksha Mitras nor does it place them on a higher or surer legal footing than as contractual appointees.

C4 Training imparted to Shiksha Mitras

86. The next aspect of the matter which needs to be analysed is the training which was imparted to Shiksha Mitras in

the State of Uttar Pradesh in pursuance of the permission which was granted by NCTE on 14 January 2011. NCTE framed Regulations in 2009 to prescribe recognition norms and procedures. Regulation 3 provides that the Regulations apply to all matters related to teacher education programmes covering norms, standards and procedure for recognised institutions, the commencement of new programmes and the addition of sanctioned intake to existing programmes. Appendix-9 to the Regulations of 2009 lays down standards for a diploma in elementary education through the open and distance learning system. As the Preamble to Appendix-9 indicates, this was intended primarily for upgrading the professional competence of "working teachers" in elementary schools and for bringing into its fold those teachers who had entered into the profession without formal teacher training. NCTE accepted the open and distance learning system as a viable mode for the training of teachers presently serving in the elementary schools and for additional educational support to the teachers and educational functionaries working in the school system. Eligibility is defined in sub-clause (2) of Clause 5 of Appendix-9 to cover (i) senior secondary (class XII) or equivalent examinations passed with fifty percent marks; and (ii) two years' teaching experience in a government or government recognised primary/elementary school.

87. The State Government moved the Central Government for the grant of permission on 24 December 2010 in which it disclosed the functioning of 1.78 lac Shiksha Mitras of whom 1,24,000 were stated to be graduates. The State Government indicated in its letter that these persons were engaged on a contract basis and with a stipulation of a minimum qualification of intermediate though, under the service rules, the prescribed qualification was a graduate degree. Subsequently, on 3 January 2011, a revised proposal was submitted which envisaged training being imparted to 1,24,000 graduate Shiksha Mitras out of a total complement of 1,70,000. The permission which was granted by NCTE on 14 January 2011 was specifically in the context of the request made on 3 January 2011 for granting permission for the training of 1,24,000 untrained graduate Shiksha Mitras. Eventually, what seems to have transpired was that the State Government issued a Government Order on 14 August 2012 so as to provide for training to those Shiksha Mitras who had acquired graduate degrees by 25 July 2012. However, it is not in dispute before this Court that training was imparted not only to graduate Shiksha Mitras who were within the terms of the permission granted by NCTE by its letter dated 14 January 2011, but also to 46,000 Shiksha Mitras holding the intermediate qualification which was not within the purview of the permission which was granted by NCTE on 14 January 2011. NCTE had not permitted the State of U P to train the non-graduate Shiksha Mitras through the open and distance learning methodology. NCTE, we must note, has stated in its counter affidavit filed in these proceedings, that it was not specifically apprised of the nature of the engagement of Shiksha Mitras by the State. The counter affidavit which has been filed by NCTE, insofar as is material, reads as follows:

"That the rationale for including the T.E.T. as minimum qualification for a

person to be eligible for appointment as a teacher is that it would bring national standards and benchmark to quality teaching before the recruitment process is completed for appointing a candidate as a trained teacher.

That it is pertinent to mention here that since the State Authorities have not clearly sent the report that initial engagement of Shiksha Mitras was for a period of 11 months, as such the nomenclature of these Shiksha Mitras as untrained teacher was not in consonance with the provisions so issued after the Right of Children to Free and Compulsory Education Act, 2009 came into effect."

The State has disputed this.

88. However, the fact which remains is that the NCTE did not proceed to revoke the permission which was granted by it on 14 January 2011 at any stage. The eligibility qualification prescribed in Appendix-9 is intermediate. Hence, at this stage, this Court deems it inappropriate, in the considered exercise of its writ jurisdiction under Article 226 of the Constitution, to issue a direction which would have the effect of nullifying or abrogating the training qualifications which have been imparted to a large body of persons by the State Government. However, this would not preclude NCTE from duly verifying compliance with the conditions prescribed by it and particularly whether the training imparted is in accord with NCTE norms and standards.

C5 Amendments to the State RTE Rules 2011 and the Service Rules of 1981

89. That leads the Court to the final aspect of the matter which relates to the amendment made by the State Government in the RTE Rules of 2011 framed under the RTE Act 2009 and in the Service Rules of 1981.

90. The basic premise with which the discussion on this aspect must commence is that under Section 23(2) of the RTE Act 2009, the power to grant a relaxation from the minimum qualifications which are laid down by NCTE is vested exclusively in the Central Government. Parliament while enacting the legislation has carefully envisaged that minimum qualifications would be prescribed by NCTE under sub-section (1) of Section 23. The nature and extent of the relaxation under sub-section (2) is to be determined by the Central Government. In deciding whether to grant a relaxation, the guiding principles are laid down in the substantive part of sub-section (2). The Central Government has to determine whether or not the state has adequate institutions offering courses or training in teacher education or teachers possessing the minimum qualifications as laid down under sub-section (1).

91. The Central Government has exercised powers under sub-section (2) of Section 23 on 10 September 2012. The Union Ministry of Human Resource Development, in its notification, has granted a relaxation until 31 March 2014 only in respect of persons referred to in sub-clause (a) of Clause (1) of Para 3 of the notification dated 23 August 2010 as amended. This category covers persons with BA/BSc degrees with at least fifty percent marks and holding a BEd qualification. While issuing a notification on 10 September 2012 for the purpose of relaxing the qualifications under Section 23(2) in regard to a limited category of persons, the Central Government has also

clarified that this shall be a 'one time relaxation' and that no further relaxation under Section 23(2) shall be granted in the State of Uttar Pradesh. The Union Government has also directed that the State Government shall take steps to increase institutional capacity for preparing persons with specified qualifications so as to ensure that only persons possessing the qualifications laid down under the said notification are appointed as teachers for classes I to V after 31 March 2014. No relaxation has been granted by the Central Government in terms of the provisions of sub-section (2) of Section 23 to obviate compliance by Shiksha Mitras with the minimum qualifications laid down. NCTE has also issued Regulations on 12 December 2014 under the NCTE Act stipulating that the qualifications for primary and upper primary teachers shall be those as prescribed by its notification dated 23 August 2010 under Section 23(1) of the RTE Act of 2009.

92. Rules were formulated by the Central Government in 2010 under the RTE Act of 2009. The Rules being subordinate legislation could not have and did not prescribe any norm at variance with what was prescribed under sub-section (2) of Section 23. Rules 15, 16 and 17 of the Rules framed by the State Government in 2011 under the RTE Act of 2009 envisage that (i) the State Government would move the Central Government for relaxation of the prescribed minimum qualifications if teachers possessing the prescribed minimum qualifications are not available; and (ii) no appointment of a teacher for any school shall be made in respect of a person not possessing the minimum educational qualifications prescribed under Rule 15 without a notification of the Central Government under sub-rule (3) of Rule 16.

93. What has happened in the State of Uttar Pradesh is that the State Government, in a clear violation of the mandate of Section 23(2) which vests the power to relax the minimum qualifications in the Central Government, has arrogated to itself a power which it lacks, to grant exemption from the mandatory qualifications which are laid down by NCTE in their application to Shiksha Mitras in the State. The State Government has, in our view, acted in clear violation of its statutory powers. Parliament has legislated to provide, in no uncertain terms, that any relaxation of the minimum educational qualifications can only be made by the Central Government. However, Rule 16-A which has been introduced by the State Government by a notification dated 30 May 2014 purports to provide a non-obstante provision which will operate notwithstanding anything contained in Rules 15 and 16 of the State Rules. Rules 15 and 16 of the State Rules were originally formulated in a manner consistent with the provisions of Section 23(2) and the provisions contained in Rules 17 and 18 of the Central Rules of 2010. However, as a result of the introduction of Rule 16-A, the State Government has assumed to itself the power to make provisions for relaxing the minimum educational qualifications for appointment of Shiksha Mitras as Assistant Teachers in junior basic schools "as are considered otherwise eligible and in order to implement the provisions of the Act". There can be no manner of doubt that far from implementing the provisions of the Act, the State Government by its amendment of the

subordinate legislation has purported to negate the very object and purpose of the RTE Act of 2009.

C6 Extent of the rule-making power

94. The provisions of Section 38 of the RTE Act of 2009 confer a rule making power on the appropriate government. In exercise of the above powers the State had framed the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011. A reading of sub-section (2) of Section 38 establishes that the only clause which could be said to touch upon the issue raised before us would be clause (l) thereof.

95. Clause (l) confers a power upon the State to frame rules on the following subject matter:

"The salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of Section 23.'

Sub-section (3) of Section 23 provides as follows:

"(3) The salary and allowances payable to, and the terms and conditions service of, teacher shall be such as may be prescribed."

96. The power to frame a rule like Rule 16-A as inserted by the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules, 2014 is liable to be tested in the above background.

97. The power to fix qualifications is conferred upon an authority to be designated by the Central Government under sub section (1). The power to relax as we have found stands conferred upon the Central Government alone under sub-section (2) of Section 23. The subject of qualification of teachers and relaxation thereof stands encompassed in sub-sections (1) and (2) of Section 23.

98. In our view, the subject matter of qualification of teachers cannot fall within the expression "salary and allowances" or "terms and conditions of service" as employed in sub-section (3) of Section 23. This is not just because the "qualification of teachers" would not fall within the above expressions when accorded their plain and literal meaning but also on account of the fact that the power to fix such qualifications stood conferred on two different authorities specified as such in sub-sections (1) and (2) of Section 23. The field thus stood occupied completely. Obviously, therefore, when the State framed a rule under Section 38(2)(l), the same could not have been utilized to fix a qualification or to relax one fixed by the authority under sub-section (1). For these reasons also we are unable to sustain the provision made in Rule 16-A.

C7 Extent of State power under Article 162 to order regularisation

99. In State of UP Vs Neeraj Awasthi23, the Supreme Court considered the issue of a State direction refusing to accord approval to a regulation sought to be framed for regularization of illegal appointments. The Supreme Court approved the principles enunciated in the following cases:

(a) A Umarani Vs Registrar, Coop Societies24 where it was held that:

"45. No regularization is, thus, permissible in exercise of statutory power conferred under Article 162 of the

Constitution if the appointments have been made in contravention of the statutory rules."

(b) Mahendra L Jain Vs Indore Development Authority25 where it was held that:

"... An illegal appointment cannot be legalized by taking recourse to regularization. What can be regularized is an irregularity and not an illegality..."

In Neeraj Awasthi, the Supreme Court observed that:

"57. If no appointment could be made by the State in exercise of its power under Article 162 of the Constitution as the same would be in contravention of the statutory rules, there cannot be any doubt whatsoever that the Board or for that matter the Market Committee cannot make an appointment in violation of the Act and Regulations framed thereunder."

C8 Experience on the job is not a substitute for qualification

100. The contention that the experience gained by Shiksha Mitras over the course of their engagement should obviate the need of obtaining the essential qualification cannot be accepted for more than one reason. Firstly, the essential qualification must be held by the person on the date of entry into the service. If the entry be preceded by a selection process it is liable to be tested with reference to the date of advertisement. Viewed from any angle, the Shiksha Mitras did not possess the requisite qualification on either of the relevant cut off dates. Secondly, the experience that may have been gained by a person has never been construed as a substitute for an essential qualification that is statutorily prescribed. Acceptance of this contention would have grave ramifications, fall foul of settled precedent on the subject and be against the basic tenets of Article 16 and principles governing public employment.

101. While dealing with a similar contention, the Supreme Court in State of M P Vs Dharam Bir26 observed:

"31. The plea that the Court should have a "human approach" and should not disturb a person who has already been working on this post for more than a decade also cannot be accepted as the Courts are hardly swayed by emotional appeals. In dispensing justice to the litigating parties, the courts not only go into the merits of the respective cases, they also try to balance the equities so as to do complete justice between them. Thus the courts always maintain a human approach. In the instant case also, this approach has not been departed from. We are fully conscious that the respondent had worked on the post in question for quite a long time but it was only in ad hoc capacity. We are equally conscious that a selected candidate who also possesses necessary educational qualification is available. In this situation, if the respondent is allowed to continue on this post merely on the basis of his concept of "human approach", it would be at the cost of a duly selected candidate who would be deprived of cleared the selection. In fact, it is the "human approach" which requires us to prefer the selected candidate over a person who does not possess even the requisite qualification. The Courts as also the Tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications. should be allowed to continue on the post merely on the basis

of his experience. Such an order would amount to altering or amending the Statutory provisions made by the Government under Article 309 of the Constitution.

32. "Experience" gained by the respondent on account of his working on the post in question for over a decade cannot be equated with dducational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government."

C9 Significance of TET

102. The importance of the TET and its mandatory nature and character have been dealt with in a judgment of a Full Bench of this Court in Shiv Kumar Sharma Vs State of U P27. The Full Bench has observed as follows:

"...the purpose of a teacher eligibility test is to ensure that the candidate claiming himself to be possessed of such attributes and abilities, has actually acquired his academic and training qualifications genuinely. The capacity of a candidate claiming to be possessed of the educational and training qualifications has therefore to be screened to treat him to be qualified and then eligible for being appointed as a teacher. This is in tune with the object of 2009 Act to provide good and quality education at the elementary level with the aid of the best teachers. If the Council, duly authorised by the Central Government, has prescribed this norm which is for the purpose of ensuring the implementation of the Act, then the argument that the prescription is ultra vires to Section 23 of the Act has to be rejected."

103. The Full Bench has held that the object of the TET is to ensure that a teacher is qualified in the field which he is about to enter. Affirming the view which was taken in an earlier judgment of a Division Bench, the Full Bench affirmed the power of NCTE to prescribe qualifications and held that after the coming into force of the RTE Act of 2009 and the prescription of qualifications by NCTE, the State is not a free agent to do as it wills. The failure of the State Government to timely implement the qualifications which were laid down by NCTE, it was held, would not dilute or take away the impact of the notification which was mandatory. In the view of the Full Bench:

"...In our opinion, however, merely because the State incorporated these provisions in its rules later on would not take away the impact of the norms prescribed by the National Council for Teacher Education that stood enforced w.e.f. 23.8.2010. The delegated legislation of the State Government was subject to the primary legislation of the Central Government. The framing of rules as a subordinate legislation is subservient to the provisions framed by the Central Government. The notification dated 23.8.2010 therefore has an overriding effect and it could not have been ignored. If the State Government has proceeded to make appointments after 23.8.2010 without complying with the provisions of teacher eligibility test then such appointments would be deficient in such qualification."

104. The State Government could not have been unaware of the law laid down by the Full Bench of this Court. Yet, the effect of the amendment which was brought in by the introduction of Rule 16-A is to negate the prescription of norms laid down by NCTE and to allow the State Government to grant a relaxation. This power is conferred not upon the State Government by the statute but upon the Central Government.

C10 Validity of amendment to the Service Rules of 1981

105. On 30 May 2014 - the same day on which the UPRTE Rules of 2011 were amended, the State Government amended the Service Rules of 1981. Significantly, even the Service Rules, as amended, continue with the same definition of a teacher in Rule 2(o) to mean 'a person employed for imparting instructions in nursery schools, basic schools, junior basic schools or senior basic schools. By and as a result of an amendment to Rule 5, an additional source of recruitment has been provided by allowing the appointment of such Shiksha Mitras as were engaged and were working on the date of the commencement of the amended Rules of 2014. By Rule 6, as amended, the upper age limit for the engagement of Shiksha Mitras has been enhanced to sixty years. As a result of the amendment of Rule 8, the requirement of passing the TET has been completely done away with in the case of Shiksha Mitras. For the recruitment of Assistant Teachers from amongst Shiksha Mitras, it has been provided that the only requirement would be the possession of a bachelor's degree and the completion of a two year distance learning BTC course or a course equivalent thereto. The State Government has acted ultra vires the scope of the statutory powers conferred upon it by laying down qualifications for appointment of Shiksha Mitras as Assistant Teachers in direct conflict with what has been prescribed by NCTE both in pursuance of its powers under Section 23(1) of the RTE Act, 2009 (by the notification dated 23 August 2010) and in pursuance of its power to frame Regulations under Section 32 (2) of the NCTE Act of 1993 (by the Regulations of 12 December 2014 which adopt the notification dated 23 August 2010 for primary and upper primary teachers). The prescription of qualifications by the State Government by an amendment of its service rules in conflict with the minimum qualifications prescribed by NCTE is ultra vires. NCTE has the sole and exclusive authority to prescribe minimum qualifications. The encroachment by the State Government on the domain of NCTE is illegal and ultra vires.

106. Rule 14(6)(a) provides that Shiksha Mitras, after the completion of two years' training through the distance BTC course, would be appointed as Assistant Teachers in junior basic schools against substantive posts. The appointing authority is under a mandate under clause (b) of Rule 14(6) to prepare a list of such Shiksha Mitras who possess the prescribed qualifications. Their names are to be arranged in ascending order on the basis of their dates of birth.

107. The object and purpose of introducing the TET is to ensure that a teacher who embarks upon instructing students of primary and upper primary classes is duly equipped to fulfil the needs of the students, understands the relevance

of education for a child at that stage and can contribute to the well rounded development of the child. Teaching a child is not merely a matter of providing information. Deeply embedded in the process of imparting education is sensitivity towards the psyche of the child, the ability to understand the concerns of a young student of that age, the motivations which encourage learning and the pitfalls which have to be avoided. The emphasis on clearing the TET is to ensure the maintenance of quality in imparting primary education. These requirements which have been laid down by NCTE fulfil an important public purpose by ensuring a complement of trained teachers who contribute to the learning process of children and enhance their growth and development. These requirements should not be viewed merely as norms governing the relationship of a teacher with the contract of employment. These norms are intended to fulfil and protect the needs of those who are taught, namely, young children. India can ignore the concerns of its children only at the cost of a grave peril to the future of our society. The effort of the State Government to by-pass well considered norms which are laid down by NCTE must be disapproved by the Court. We have done so on the ground that the State Government lacks the legislative power and competence to do so. Equally, fundamental is the concern that a relaxation of the norms prescribed by an expert body will result in grave detriment to the development and growth of our young children and the provision of quality education to them. Providing quality education is crucial for students belonging to every strata of society. Education which is provided in schools conducted by the Basic Education Board should not be allowed to degenerate into education of poor quality which it will, if the norms which are prescribed by an expert body under legislation enacted by Parliament in the national interest are allowed to be ignored by the State Government on the basis of parochial or populist perceptions. Such an attempt is ultra vires the statutory powers of the State and is arbitrary and violative of Article 14 of the Constitution.

C11 Validity of absorption

108. The issue before the Court is in regard to the legality of the absorption. Articles 14 and 16 of the Constitution provide for equality in matters of public employment. The limit on the power of the State to grant regularization was considered by a Constitution Bench of the Supreme Court in a judgment in Secretary of State of Karnataka Vs Umadevi (supra). Emphasizing the principle of the 'rule of equality' in public employment, the Constitution Bench Court held as follows:

"...Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the

appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued." (emphasis supplied)

109. The Supreme Court held that there may be cases where certain appointments were not illegal but were irregular. These are situations where an appointment has been made (i) of duly qualified persons; and (ii) in duly sanctioned vacant posts and the employees would have continued to work for more than ten years without the intervention of the orders of the court or tribunal. In those cases, the judgment of the Supreme Court in Umadevi left it open to the State Governments, the Union Government and their instrumentalities to take steps to regularize, as a one time measure, the services of such irregularly appointed persons. The relevant observation in that regard is as follows:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

110. The observations of the Constitution Bench in paragraph 53 of the decision in Umadevi were elaborately explained in a subsequent decision of a Bench of two learned Judges of the Supreme Court in State of Karnataka Vs M L Kesari28. The exception which the judgment contemplated to the general principle which militated against regularization was laid down as follows:

"It is evident from the above that there is an exception to the general principles against `regularization' enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and

continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular." (emphasis supplied)

111. In M L Kesari's case, the Supreme Court emphasized that the period of six months as 'a one time measure' would have to be considered in its proper perspective. At the end of six months from the date of the decision in Umadevi, cases of several daily wagers/casual employees were still pending before the Court, as a result of which the one time regularization process was not undertaken. In many cases, regularization was not undertaken because cases were pending in courts or due to sheer oversight. The Supreme Court held that such persons will not lose their right to be considered for regularization because the one time exercise was completed without considering their cases or because the six months period stipulated in Umadevi had expired.

112. In Amarendra Kumar Mohapatra Vs State of Orissa29, the principles which were laid down in Umadevi and M L Kesari were applied by the Hon'ble Supreme Court while considering the validity of a legislative enactment by which regularization was granted. In the case before the Supreme Court, it was held that degree holder junior engineers were qualified for appointment as assistant engineers and they were appointed against sanctioned posts. All of them had worked for more than ten years and, in some cases, as long as for twenty years and some of them had, in fact, retired from their respective departments. In this background, it was held that the legislative enactment granting regularization did not call for interference at that late stage. Thus, the validity of a legislative provision providing for regularisation has also been judged on this touchstone. An illegal appointment cannot be regularised because that would infringe Articles 14 and 16.

113. The decision of the Constitution Bench in Umadevi as well as the subsequent decisions have circumscribed the power of the State Government to grant regularization by making a distinction between the illegal and irregular appointments. The Supreme Court has held that where appointments are not made or continued against sanctioned posts or where the persons appointed did not possess the prescribed minimum qualifications, such appointments would be considered to be illegal. However, if the person employed has possessed the prescribed qualifications and was working against a sanctioned post but was selected without going through the process of open competitive examination, such an appointment would be considered as irregular.

114. In deciding upon the validity of the provisions made by the State

Government in the amended Rules for regularization, it is these decisions which have to be applied by the Court.

115. The submission of the learned Additional Advocate General was that Shiksha Mitras had continued to work in schools for a long period of 16 years and, therefore, there is no requirement of asking them to clear the Teachers Eligibility Test. It was also submitted that since there was a paucity of qualified Assistant Teachers and there may not be a sufficient number of eligible candidates, the State is justified in granting appointment to the Shiksha Mitras as Assistant Teachers.

116. These submissions cannot be accepted.

117. The Supreme Court in Yogesh Kumar Vs Government of NCT, Delhi30 held that mere paucity of candidates holding a TTC qualification would not justify a departure from the prescribed qualifications.

118. Teachers Eligibility Test is conducted to ensure that a person has the required knowledge and aptitude to teach students studying in classes I to V. This is an important test which cannot be ignored even if a person has been engaged in teaching students of classes I to V for a number of years as Shiksha Mitra. In Dilip Kumar Ghosh Vs Chairman31, the Supreme Court formulated the following principle:

"(i) In the case of the junior basic training and primary teachers training certificate the emphasis is on the development of the child. The primary education is up to IVth standard. Thereafter there is middle education and then the secondary and higher secondary education. But in the primary school one has to study the psychology and development of child at a tender age. The person who is trained in B.Ed. Degree may not necessarily be equipped to teach a student of primary class because he is not equipped to understand the psychology of a child at that early stage."

119. The concept of relaxation which was explained by the Supreme Court in Umadevi's case requires that a person at the time of engagement must possess the requisite qualifications under the service rules. It is, therefore, important that Shiksha Mitras at the time of initial engagement should have possessed the requisite qualifications contained in the service rules. This is also what was observed by the Supreme Court in Pramod Kumar Vs U P Secondary Education Services Commission32. The Supreme Court held that if the essential qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned and an appointment which is contrary to the Statutes/statutory rules would be void in law.

120. From the material which has emerged before the Court, it is clear that Shiksha Mitras to whom the benefit of regularization has been granted neither fulfilled the prescribed minimum qualifications nor were they appointed against sanctioned posts. The fact that Shiksha Mitras did not fulfill the qualifications prescribed by NCTE which has the unquestioned jurisdiction under the NCTE Act of 1993 and RTE Act of 2009 is evident from the fact that the State Government, by inserting Rule 16-A into the Rules of 2011 has assumed to itself a

power to relax the minimum qualifications required to be observed, in the case of Shiksha Mitras. In other words, by Rule 16-A, the State Government has created an island of exclusion for the benefit of Shiksha Mitras who, in the exercise of the rule-making power of the State under Rule 16-A, would not have to fulfil the minimum qualifications prescribed by NCTE. The State Government has sought to get over the inseparable obstacle that the Shiksha Mitras do not fulfil the TET requirement by unlawfully conferring power on itself to relax the requirement. Having committed that illegality, the State has proceeded to do away with the TET qualification in its application to Shiksha Mitras, by unlawfully amending the service rules. These amendments have been held to be ultra vires and an impermissible encroachment on the exclusive domain of NCTE. Having done this the State Government has compounded its illegality by regularising/absorbing the Shiksha Mitras as Assistant Teachers. As a consequence, qualified candidates fulfilling the NCTE norms are denied the equality of opportunity to seek appointment as Assistant Teachers. We have earlier held Rule 16-A to be ultra vires the rule-making authority of the State Government since the power to grant a relaxation from the minimum qualifications is vested exclusively in the Central Government. In assuming to itself a power to relax the minimum qualification and thereafter by diluting the minimum qualifications in the case of Shiksha Mitras, the State Government has patently acted in a manner which is arbitrary, ultra vires the governing central legislation and in breach of the restraint on the limits of its own statutory powers. By this exercise, the State Government has sought to grant regularization to persons who failed to fulfil the minimum qualifications and who were never appointed against sanctioned posts. In these circumstances, the grant of largesse by the State Government to Shiksha Mitras cannot be upheld and the amendment to the Rules is ultra vires and unconstitutional.

121. The Additional Advocate General submitted that Shiksha Mitras were appointed in pursuance of a scheme implemented by the State Government and hence their appointments cannot be regarded as a backdoor entry. This submission will not support the absorption of Shiksha Mitras as Assistant Teachers in the regular service of the State. In Grah Rakshak, Home Guards Welfare Association Vs State of Himachal Pradesh33, Home guards appointed by the States of Himachal Pradesh, Punjab and NCT of Delhi sought regularisation of their services but their writ petitions were dismissed by the High Court. The Supreme Court held that the enrolment of the Home guards may not have been a back door engagement, but that would not entitle them to regularisation of service or the grant of regular appointments. They were never paid a regular salary and were engaged only as volunteers. They were not regular appointees in the service of the State. They had agreed to the conditions of engagement, by making declarations.

122. In the present case, it is evident that the Shiksha Mitras do not fulfil any of the norms laid down by the Supreme Court for regular absorption into the service of the State. They were at all material times appointed as and continued to be engaged as contractual appointees.

Their appointments were not against sanctioned posts. They did not fulfil the minimum qualifications required for appointment as Assistant Teachers.

C12 Locus of the petitioners

123. Admittedly, all the petitioners were qualified to apply for and be considered for appointment as Assistant Teachers. Their right of consideration was clearly affected and is in fact eclipsed by the absorption of Shiksha Mitras. It cannot therefore be said that the petitioners lacked locus to maintain the writ petitions.

PART D : OPERATIVE ORDERS

124. For all these reasons, we allow the writ petitions in the following terms:

(i) The amendment made by the State Government by its notification dated 30 May 2014 introducing the provision of Rule 16-A in the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 by the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules 2014 is held to be arbitrary and ultra vires and is quashed and set aside;

(ii) The Uttar Pradesh Basic Education (Teachers) Service (Nineteenth Amendment) Rules 2014, insofar as they prescribe as a source of recruitment in Rule 5(2) the appointment of Shiksha Mitras; the academic qualifications for the recruitment of Shiksha Mitras in Rule 8(2)(c) and for the absorption of Shiksha Mitras as Assistant Teachers in junior basic schools under Rule 14(6) are set aside as being unconstitutional and ultra vires; and

(iii) All consequential executive orders of the State Government providing for the absorption of Shiksha Mitras into the regular service of the State as Assistant Teachers shall stand quashed and set aside.

125. The batch of writ petitions shall stand disposed of in the aforesaid terms. However, there shall be no order as to costs.