ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.01.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 6 of 2016

Govind Pratap Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Jitendra Singh

Counsel for the Respondents:
C.S.C.

Constitution of India-Art.-226-petitioner the pharmacists claiming-authorization to prescribed medicines-in absence of doctor-such relief can not be granted-in view of Pharmacy Practice Regulation 2015-section 2b (I) and 2 (d)-dispensing of prescription-except preparation and delivery of a drugs or device to a patient-nothing more-petition dismissed.

Held: Para-3
At the very outset we may observe that this is a very hazardous proposition made by the petitioner and is directly against the interest of public at large. The petitioners are not practitioners of medicine nor they do hold any such qualification for prescribing medicines. Even otherwise learned Additional Chief Standing Counsel Sri Abdul Moin has rightly pointed out that the definition clause as contained in the Pharmacy Practice Regulations, 2015 authorizes the Practice of Pharmacy to mean dispensing of prescriptions and not prescribing medicines. The said regulations have been published and are contained at item no.153 at page 260 of part III of Lucknow Law Times, 2015.

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

1. Heard Sri Jitendra Singh, learned counsel for the petitioners and Mr. Abdul Moin, learned Additional Chief Standing Counsel for the respondents.

2. The petitioners are admittedly pharmacists. Their prayer is that a direction should be issued to permit the petitioners to prescribe medicines to patients in the absence of a Medical Officer in the hospital.

3. At the very outset we may observe that this is a very hazardous proposition made by the petitioner and is directly against the interest of public at large. The petitioners are not practitioners of medicine nor they do hold any such qualification for prescribing medicines. Even otherwise learned Additional Chief Standing Counsel Sri Abdul Moin has rightly pointed out that the definition clause as contained in the Pharmacy Practice Regulations, 2015 authorizes the Practice of Pharmacy to mean dispensing of prescriptions and not prescribing medicines. The said regulations have been published and are contained at item no.153 at page 260 of part III of Lucknow Law Times, 2015.

4. Having perused the same we find that the following is the definition contained in Regulation 2 (b)(i) and 2(d) of the Pharmacy Practice Regulations, 2015 :-

"2(b)(i) Interpretation, evaluation and implementation of medical orders; dispensing of prescriptions, drug orders;

(d) " Dispensing" means the interpretation, evaluation, supply and implementation of a prescription, drug order, including the preparation and delivery of a drug or device to a patient or

patient's agent in a suitable container appropriately labeled for subsequent administration to, or use by, a patient."

5. In view of the aforesaid definition clause the judgments which have been relied upon by the learned counsel for the petitioner and have been brought on record do not come to his aid with the enforcement of this new regulation. The petitioners have thus no right to prescribe medicines.

6. The writ petition is misconceived and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2016

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE ADITYA NATH MITTAL, J.

Habeas Corpus No. 54 of 2015

Azad Vikram Singh ...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:
R.P. Mishra

Counsel for the Respondent:
Govt.Advocate, A.S.G., Ajay Kumar Singh

(A)Constitution of India, Art.-226-Habeas Corpus petition-detention on ground-petition trying for bail-while the day on which impugned detention order passed-bail application already rejected-hence order passed without application of mind-other co-accused including father of petitioner are even in jail-no question of claiming parity-detention order quashed.

Held: Para-16
We have taken notice of the fact that in the impugned order dated 30.1.2015, it has been mentioned that the petitioner is making endeavour to come out on bail. One of the grounds taken for invoking provisions of the National Security Act is that after dismissal of application for bail by Chief Judicial Magistrate, Gonda, the application for bail of the petitioner is pending adjudication in Case Crime No.254 of 2014 (supra) in the Court of Sessions Judge, Gonda. Admittedly, the said fact has been wrongly recorded in the impugned order. Application for bail of the petitioner had been dismissed on 23.1.2015. As on the date when the proceedings under the National Security Act were initiated, application for bail on behalf of the petitioner in the murder case was not even pending. Thus, a non-existent circumstance has been taken into account for invoking the provisions of National Security Act. It is evident that the order has been passed without application of mind.

The apprehension of the detaining authority that the petitioner shall be released on bail appears to be without any cogent material and it appears to have been passed on mere ipse dixit of the detaining authority. In these circumstances, the order of detention is not based on sufficient material as well as subjective satisfaction of the detaining authority.

(B)Constitution of India, Art.-226-detention order-96 days unexplained delay-detention order lost its importance-quashed.

Held-Para-19-
In view of the aforesaid discussions, we are of the view that on the date of passing of the detention order, there was no subjective satisfaction of the District Magistrate Gonda and there was no possibility of being released on bail because on the date of passing of the detention order, any application for bail was not pending and even the bail of the similarly placed named co-accused, who is the father of the petitioner had also not been granted. The delay of 96 days in passing the impugned detention order

also looses its importance. There is no explanation to this inordinate delay and no such evidence is there that after lapse of 96 days of arrest, the petitioner was trying to disturb the public order again by any of his overt action. Therefore, the chain of connection between the dangerous activities relied on and the detention order passed is snapped by this long and unexplained delay. In these peculiar facts and circumstances of this case, the detention order dated 30.01.2015 is liable to be quashed.

Case Law discussed:
1970 (1) SCC 98; (1973) SCC (Cri) 16; AIR 1964 SC 334; 1983 SCC (Cri) 840; 1975 SCC (Cri) 365; (1989) SCC 22; [1964 SC 334]; [1983 (4) SCC 301]; [(1985) 4 SCC 232]; [1986 (4) SCC 378]; [(1984) 3 SCC 14]; [(1986) 4 SCC 407]; [(1986) 4 SCC 416]; [(1987) 4 SCC 48]; [(1988) 1 SCC 436.

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

1. This petition in the nature of Habeas Corpus has been filed with the prayer to declare the impugned detention order dated 30.01.2015 passed under National Security Act, 1980 as illegal and arbitrary with the further prayer to quash the consequential approval order dated 09.02.2015.

2. The facts giving rise to the present petition are that on 25.10.2014 at about 7.35 am, the petitioner along with his other companions had caused murder of one Sri Om Prakash Singh at his brick kiln and had absconded from there. Case Crime No.254 of 2014 under sections 147, 148, 149, 302, 34 Indian Penal Code, Police Station Wazirganj, District Gonda and another Case at Crime No.255 of 2014 under section 3/25 Arms Act in the same police station were registered and the petitioner was arrested.

3. On 26.01.2015, a report was made by the Police Station Wazir Ganj, District Gonda to the Superintendent of Police, Gonda stating therein that there was a serious threat to public law and order and the petitioner is trying to get his release in the aforesaid offences by which the maintenance of public law and order shall be disturbed. Therefore, the petitioner should be detained under Nation Security Act, 1980 (for short 'NSA'). Circle Officer Incharge of Police Station Wazirganj, District Gonda as well as Additional Superintendent of Police Gonda recommended to the District Magistrate Gonda for invoking the provisions of 'NSA'. Upon the recommendation of the police officers, the District Magistrate Gonda, considering all the facts and circumstances of the case, passed the impugned detention order dated 30.01.2015 for detaining the petitioner under section 3(2) of the NSA.

4. Learned counsel for the petitioner has submitted that the incident of murder had taken place on 25.10.2014 and the provisions of 'NSA' have been invoked after a lapse of about 96 days. Therefore, the order is stale. It has also submitted that the application for bail of the petitioner was already rejected on 23.01.2015 and on the date of passing of detention order i.e. 30.01.2015, second application for bail was not pending. Therefore, there was no intention of the petitioner to come out from Jail on 30.01.2015. There was no nexus between the prejudicial activities in the order of detention and the ground of detention was punitive. Therefore, the order is bad in law. It has also been submitted that the said incident of murder was committed by so many persons but the provisions of 'NSA' have been invoked only against the petitioner and no explanation has been furnished as to why the provisions were not invoked against other accused persons. In these circumstances, the order of detention is illegal.

5. Per contra, Sri Ajay Kumar Singh Learned Senior Central Government Counsel appearing on behalf of Union of India and Sri Rishad Murtaza, learned Government Advocate appearing on behalf of respondent State has supported the detention order in view of the grounds mentioned in the detention order.

6. We have heard learned counsel for the parties' and perused the pleadings of petition.

7. Hon'ble the Apex Court in the case of Arun Ghosh vs. State of West Bengal reported at 1970 (1) SCC 98 has held that :

"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. 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. There is no formula by which one case can be distinguished from another.

In Kanu Vishwas vs. State of West Bengal; (1973) SCC (Cri) 16, Hon'ble the Apex Court has held as under:

"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. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed.

In Rameshwar Shaw vs. District Magistrate, Burdwan and another; AIR 1964 SC 334, Hon'ble the Apex Court has held that:

"if a person is already in jail custody, as a result of a remand order passed by a competent authority, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under section 3(1)(a) and is outside its purview.

Similarly in Alijan Mian vs. District Magistrate, Dhanbad and others; 1983 SCC (Cri.) 840, Hon'ble the Apex Court has held as under :

"It may be pointed out at the very outset that the detaining authority was alive to the fact that the petitioners were in jail custody on the date of the passing of the detention orders as will be clear from the following statement in the grounds of detention:

"The subject is in jail and is likely to be released on bail. In the circumstances I am satisfied that if he is allowed to remain at large, he will indulge in activities prejudicial to the maintenance of public order."

The position would have been entirely different if the petitioners were in jail and had to remain in jail for a pretty long time. In such a situation there could be no apprehension of breach of 'public order' from the petitioners. But the detaining authority was satisfied that if the petitioners were enlarged on bail, of which there was every likelihood, it was necessary to prevent them from acting in a manner prejudicial to public order."

8. Learned counsel for the petitioner has also drawn our attention towards Rabindra Kumar Ghosel @ Buli vs. State of West Bengal; 1975 SCC (Cri) 365 in which Hon'ble the Apex Court has held as under:

"We find that the actual order of detention was passed only around three months thereafter. The whole purpose and object of the Maintenance of Internal Security Act is that persons who are likely to imperil public order are not allowed to be free to indulge in this dangerous activity. We cannot understand the District Magistrate sleeping over the matter for well nigh three months and then claiming that there is a real and imminent danger of prejudicial activity affecting public order. The chain of connection between the dangerous activities relied on and the detention order passed is snapped by this long and unexplained delay. If there were some tenable explanation for this gap we would have been reluctant to interfere with the detention order but none has been stated in the counter affidavit filed to-day many months after time was taken for filing a return. In these circumstances, we are not satisfied that there is any justification for the claim of subjective satisfaction put forward by the District Magistrate. The petition is allowed, the rule nisi confirmed and the petitioner directed to be set at liberty."

9. The petitioner Azad Vikram Singh alleged to have committed crime under sections 147, 148, 149, 302/34 Indian Penal Code on 25.10.2014 at 7.35 am regarding which the First Information Report at Case Crime No.254 of 2014 was lodged on 25.10.2014 at 8.30 am against the petitioner and four other companions. The petitioner was arrested by the local police on 25.10.2014 itself and upon his pointing out, a pistol is said to have been recovered on 26.10.2014. The detention order has been passed on 30.01.2015. It is admitted case of the prosecution also that on the date of detention order i.e. 30.01.2015, the second application for bail was not pending before any authority. However, the second application for bail has been rejected on 14.05.2015.

10. After passing of the impugned order dated 30.01.2015, the petitioner had moved his first representation to District Magistrate, Gonda on 06.02.2015, which was rejected on 11.02.2015. Second representation has also been rejected by order dated 15.02.2015 while representations made to Union of India on 11.02.2015 and 09.02.2015, have also been rejected by Union of India by order dated 24.02.2015. The aforesaid facts make it clear that on the date of passing of the impugned order dated 30.01.2015, the first application for bail was already rejected and the second application for bail was not pending.

11. Hon'ble the Apex Court in a case reported at (1989) SCC 22 [Abdul Razak Abdul Wahab Sheikh vs. S. N. Sinha, Commissioner of Police, Ahmedabad and another] after considering the law laid down in Rameshwar Shaw vs. District Magistrate, Burdwan and another [AIR 1964 SC 334]; Alijan Mian vs. District Magistrate, Dhanbad and others [1983 (4) SCC 301]; Ramesh Yadav vs. District Magistrate Etah [(1985) 4 SCC 232]; Suraj Pal Sahu vs. State of Maharashtra [1986 (4) SCC 378]; Vijay Narain Singh vs. State of Bihar [(1984) 3 SCC 14]; Raj Kumar Singh vs. State of Bihar [(1986) 4 SCC 407]; Binod Singh vs. District Magistrate Dhanbad [(1986) 4 SCC 416]; Poonam Lata vs. M. L. Wadhawan [(1987) 4 SCC 48] ; and Smt. Shashi Aggarwal vs. State of U.P. [(1988) 1 SCC 436 has held as under:

"On a consideration of the aforesaid decisions the principle that emerges is that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention. In this case, the detenu was in jail custody in connection with a criminal case and the order of detention was served on him in jail. It is also evident that the application for bail filed by the detenu was rejected by the Designated Court on 13th May, 1988. It is also not disputed that thereafter no application for bail was made for release of the detenu before the order of detention was served on him on 23rd May, 1988. It appears that in the grounds of detention there is a statement that at present you are in jail yet "there are full possibilities that you may be released on bail in this offence also." This statement clearly shows that the detaining authority was completely unaware of the fact that no application for bail was made on behalf of the detenu for his release before the Designated Court and as such the possibility of his coming out on bail is non-existent. This fact of non-awareness of the detaining authority, in our opinion, clearly establishes that the subjective satisfaction was not arrived at by the detaining authority on consideration of relevant materials."

12. In the present case also, it appears that the detaining authority was completely unaware of the fact that any application for bail was not pending before any competent court and, as such, there was no possibility of coming out of bail. It goes to show that the aforesaid subjective satisfaction as provided in Section 3(2) of the 'NSA' was not arrived at by the detaining authority.

13. Learned counsel for the petitioner has also placed reliance on various Division Bench judgments of this Court in which the same view has been taken that if there was no apprehension on the part of the detenue to get release on bail, the factum of subjective satisfaction was not proved and the detention order becomes vitiated.

14. Hon'ble the Apex Court in Smt. Sashi Agarwal vs. State of U.P.; 1988 (1) SCC 436 has further held that mere possibility of release on bail of the detenue is not enough for preventive detention. There must also be credible information or cogent reasons apparent on the record that the detenue, if released on bail, is likely to commit activities prejudicial to the maintenance of public order.

In the instant case, there is no other criminal history of the petitioner except the aforesaid two cases, out of which the second case is of recovery of country made pistol arising out of first case of murder.

15. The detention order of the petitioner has been served upon him when he is already in jail. Therefore, there should be a real possibility of his being bailed out provided he has moved a bail application, which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail and therefore, the detention order shall be illegal. However, an exception to this rule is that where a co-accused whose case stands on the same footing had been granted bail, in such circumstances, the detaining authority can reasonably conclude that there is likelihood of the detenue being released on bail even though no bail application of his, is pending since most courts normally grant bail on the ground of parity.

In the present case, the petitioner and his father are named in the first information report and three unknown persons have been shown accompanying the petitioner. Admittedly, the father of the petitioner has also not been released on bail.

16. We have taken notice of the fact that in the impugned order dated 30.1.2015, it has been mentioned that the petitioner is making endeavour to come out on bail. One of the grounds taken for invoking provisions of the National Security Act is that after dismissal of application for bail by Chief Judicial Magistrate, Gonda, the application for bail of the petitioner is pending adjudication in Case Crime No.254 of 2014 (supra) in the Court of Sessions Judge, Gonda. Admittedly, the said fact has been wrongly recorded in the impugned order. Application for bail of the petitioner had been dismissed on 23.1.2015. As on the date when the proceedings under the National Security Act were initiated, application for bail on behalf of the petitioner in the murder case was not even pending. Thus, a non-existent circumstance has been taken into account for invoking the provisions of National Security Act. It is evident that the order has been passed without application of mind.

The apprehension of the detaining authority that the petitioner shall be released on bail appears to be without any cogent material and it appears to have been passed on mere ipse dixit of the detaining authority. In these circumstances, the order of detention is not based on sufficient material as well as subjective satisfaction of the detaining authority.

17. As far as the delay in passing the detention order is concerned, there is delay of almost 96 days. The incident took place at a brick kiln, which is admittedly situated far away from the Abadi. Therefore, there cannot be a ground to invoke the provisions of 'NSA' on the ground that the shopkeepers in panic, downed their shutters or it amounted to disturbances of public order by such incident. At the most, there may be temporary disturbances at the place of incident, which is far away from the township. Therefore, the shorter life of such disturbance would be of lower potential to disturb the even tempo of the

life of the society. The said incident may be said to be related to law and order problem and it certainly not the public order. The detaining authority in exercise of power under 'NSA' must act strictly within the limitations provided under the Act, so that grant of liberty is not imperilled beyond the Constitution. Individual liberty is a cherished right, one of the most valuable fundamental rights provided by our Constitution to the citizens of this country. Such right may be envied only strictly in accordance with law. The authorities cannot be expected to deal with the liberty of individual in a causal manner.

As per the statement of the complainant recorded under section 161 Code of Criminal Procedure, there was enmity between the parties due to election of Pradhani. Therefore, it was an individual act on the part of the petitioner, which cannot be said to have affected the public order.

18. In the present case, the petitioner and his father are named in the first information report but admittedly, no detention order has been passed against the father of the petitioner, which establishes the discrimination with the petitioner.

19. In view of the aforesaid discussions, we are of the view that on the date of passing of the detention order, there was no subjective satisfaction of the District Magistrate Gonda and there was no possibility of being released on bail because on the date of passing of the detention order, any application for bail was not pending and even the bail of the similarly placed named co-accused, who is the father of the petitioner had also not been granted. The delay of 96 days in passing the impugned detention order also looses its importance. There is no explanation to this inordinate delay and no such evidence is there that after lapse of 96 days of arrest, the petitioner was trying to disturb the public order again by any of his overt action. Therefore, the chain of connection between the dangerous activities relied on and the detention order passed is snapped by this long and unexplained delay. In these peculiar facts and circumstances of this case, the detention order dated 30.01.2015 is liable to be quashed.

20. Thus, the detention order dated 30.01.2015 and the consequential approval order dated 09.02.2015 passed under National Security Act, 1980 are hereby quashed.

21. The petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.01.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 69 of 2016

Subhash Chandra Vishwakarma . Petitioner
Versus
Chief Information Commissioner U.P. State Information & Ors. ...Respondents

Counsel for the Petitioner:
Siddhartha Srivastava

Counsel for the Respondents:
C.S.C., Shikhar Ananad

Constitution of India, Art.-226-Petition against order-by National Forum under RTI Act-petitioner being accused in criminal case charge-sheet filed-against that application for fresh investigation-upon in

action-sought information under Section of the Act-than in second appellate authority-order impugned-held-matter beyond Act-rightly no response given-such process amounts to complete abuse the process of law-petition dismissed without exemplary cost taking very lenient view.

Held: Para-10

We have no hesitation to record that inaction on non-statutory applications/complaints filed by any person where the State Authorities are not obliged to take a decision would not fall within the definition of information giving rise to a cause under Section-6 of the Act. If all such inactions are construed to be cognizable under the Right to Information Act, the misuse of the Act would become rampant and the provisions of the Act in that view of the matter would result into an abuse of the process of law. Once it is held that the application filed by the petitioner did not fall within the scope of information under the Right to Information Act, the impugned order passed by respondent no.1 on 24.11.2015 does not call for any interference and the writ petition being devoid of merit deserves to be dismissed.

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

1. This writ petition is directed against the order dated 24.11.2015 passed by the State Chief Information Commissioner, U.P. whereby the appeal filed by the petitioner arising out of non furnishing of information in response to his application dated 28.01.2015 filed under Section-6 of the Right to Information Act has been consigned to record for not being maintainable.

2. The brief facts giving rise to the present writ petition are that the petitioner's brother viz Sri Shiv Poojan Vishvakarma is implicated in a Criminal Case no. 1311 of 2014. The investigation in respect of the said criminal case on completion resulted into filing of charge-sheet dated 07.01.2015 before the competent court having criminal jurisdiction. It appears that subsequently on 23.01.2015 an application was filed by the petitioner under Section 173 (8) of the Code of Criminal Procedure before respondent no.2 praying for fresh investigation in the matter on some grounds stated in the application which still remain available to an aggrieved person by availing the remedy of protest petition or otherwise in the regular course of enquiry and trial.

3. Soon after filing the application for fresh investigation, the petitioner chose to file an application under Section 6 of the Right to Information Act (hereinafter referred to as the Act) on 28.01.2015 praying for information to the effect as to what action was taken by the respondent no.2 on his representation made on 23.01.2015. Failure on the part of Information Officer to furnish the information within the statutory period is said to have given rise to first appeal filed on 05.02.2015 and the said appeal not yielding any result became the cause of filing second appeal before the commission on 16.03.2015.

4. On a close scrutiny of the present case, it is seen that the petitioner's application dated 28.01.2015 filed under Section 6 (1) of the Act is said to have been dealt with on 03.02.2015 and 09.03.2015 by the Information Officer and without disclosure of this fact, the petitioner chose to file the first and second appeals before the higher forums. After issuance of notices the Information Officer came to know about the appellate proceedings and by letter dated 02.09.2015 all these facts were brought to light.

5. We find that the information in response to the petitioner's representation dated 28.01.2015 was refused on the ground of exemption as envisaged under Section 8 (1) (h). Section 8 (1) (h) of Right to Information Act is extracted below for ready reference:--

"8.Exemption from disclosure of information.-(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(h) information which would impede the process of investigation or apprehension or prosecution of offenders:

6. In the instant case, it is an undisputed fact that a criminal case was registered against the petitioner's brother wherein after completion of investigation a charge-sheet has been submitted before the competent court on 07.01.2015. The petitioner appears to have filed an application under Section 173(8) of the Code of Criminal Procedure praying therein for fresh investigation. Section 173(8) of the Criminal Code of Procedure, for ready reference, is also extracted below:--

"8. Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections(2) to (6) shall, as far as may be, apply in relation to a report forwarded under sub-section (2). "

7. From a plain reading of the above provision, it is clear that an application for fresh investigation is not maintainable at the instance of an accused person and respondent no.2 even otherwise not being the Investigation Officer could not enter into any investigation within the purview of Section 173 (8) of the Code of Criminal Procedure on any such application being filed by the petitioner who happens to be the brother of the accused. The information to be furnished under Right to Information Act may broadly fall under two categories i.e. action and inaction:

(1) Actions of the State Government culminating into an information are to be understood in the light of definition provided under Section 2 (f) which reads as under:-

(f)"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

8. The aforesaid provision defining information makes it clear that an inaction on a non-statutory representation filed by any person does not fall within the strict sense of definition of information. On a close scrutiny of the other provisions of definition clause, it is further seen that inaction on the part of the authorities cannot be construed to be an information unless and until there is a statutory obligation on the part of the competent authority to take a decision on any representation or complaint filed by an aggrieved person and even if such an inaction is noticed, the representation remains at the stage of

investigation and the protection of section 8 (f) comes into play.

9. In the instant case, we have already extracted the provision under Section 173(8) hereinabove and we are of the considered opinion that once the charge-sheet was filed before the Court of competent jurisdiction, fresh investigation could not be ordered by respondent no.2 on a mere application filed by a third party, as such the application filed by the petitioner was rightly rejected by the Information Officer on 03.02.2015 and 09.03.2015 which orders have not been assailed in the Ist or IInd appeal. It is also not the case of the petitioner that respondent no.2 was ever entrusted with any further investigation of the case registered against his brother under the provisions of Section 158 of the Code of Criminal Procedure, therefore, his application was maintainable due to that reason. The application filed by the petitioner on 23.01.2015 rather makes a prayer for fresh investigation and the said jurisdiction as per law vests in the State Government but no such application was ever filed by the accused person before the State Government either himself or in representative capacity.

10. We have no hesitation to record that inaction on non-statutory applications/complaints filed by any person where the State Authorities are not obliged to take a decision would not fall within the definition of information giving rise to a cause under Section-6 of the Act. If all such inactions are construed to be cognizable under the Right to Information Act, the misuse of the Act would become rampant and the provisions of the Act in that view of the matter would result into an abuse of the process of law. Once it is held that the application filed by the petitioner did not fall within the scope of information under the Right to Information Act, the impugned order passed by respondent no.1 on 24.11.2015 does not call for any interference and the writ petition being devoid of merit deserves to be dismissed.

11. We may also put on record that in various cases it is noticed that cognizance of proceedings under Section 18 of the Act is taken without discharging the obligation to examine the maintainability of appeals and complaints. Once the Information Officers either fail to discharge their duties or there is some other grievance which is amenable to the remedy of first appeal, the provisions of Section 18 of the Act have to be scrupulously applied so that the purpose of Section 19 of the Act is not frustrated but is rather strengthened to serve better. Needless to say that exceptions carved out under Section-8 of RTI Act, 2005 remain protected under the Official Secrets Act, 1923 or any other law for the time being in force.

12. The writ petition lacks merit and the same is hereby dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2016

BEFORE
THE HON'BLE HULUVADI G. RAMESH, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Criminal Appeal No. 213 of 1983

Manna Singh & Ors. ..Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
R.P. Singh, S.L. Singh

Counsel for the Respondents:
D.G.A.

Criminal Appeal-conviction of life imprisonment-offence u/s 302, 34 IPC-challenged on ground of enmity with of eye witness with appellant/accused-such statement wrongly relied by Trial Court-held-no ground for rejection of their testimony.

Held: Para-20
In view of above as has been discussed above, the evidence of eye witnesses examined by prosecution cannot be discarded only on the ground that Chhote Singh and other neighbour witnesses were not examined.

Case Law discussed:
(2015) 1 SCC 737; AIR 2013 SC 308; 2012 (5) SCC 777; AIR 2010 SC 1378.

(Delivered by Hon'ble Shamsher Bahadur Singh, J.)

1. This appeal challenges the judgment and order dated 14.01.1983 passed by 2nd Additional Sessions Judge, Hamirpur in S.T. No.60 of 1979 (State Vs. Manna Singh and others) arising out of Case Crime No.205 of 1978, under Section 302 IPC, P.S.-Sumerpur, District Hamirpur, whereby the accused-appellants namely Manna Singh, Ganpat Singh, Lallu Singh and Subedar Singh have been convicted and sentenced to undergo imprisonment for life under Section 302 read with Section 34 IPC.

2. In pursuance of the order of this Court dated 07.05.2015, a report has been submitted by learned C.J.M. Hamirpur on 22.05.2015, mentioning therein that the appellant no.2 Ganpat Singh and appellant no.3 Subedar Singh have died, therefore, the appeal filed on behalf of appellant nos.2 and 3 stand abated.

3. The deceased Ram Sanehi Singh son of Bhagwan Deen Singh was resident of village Pachkhura Mahan within the jurisdiction of Police Station Sumerpur, District Hamirpur. Accused Manna Singh, Ganpat Singh @ Mihi Lal and Subedar Singh are real brothers and accused Lallu Singh is their cousin and all of them are residents of the same village.

4. The prosecution case, in brief, is that before the date of incident the deceased Ram Sanehi Singh had purchased a 'Bakhri' (house) of one Jaitpal Khori, a portion of which was in possession of accused Manna Singh. The dispute led to a prolonged civil litigation which terminated in favour of the deceased. Manna Singh was upset by this judicial defeat, his ego was lacerated and the fire of revenge was smouldering in his heart. On 09.12.1978 after mid-day meal Binda Singh, Manni Lal Shukla @ Manni, Chhote Singh and the deceased Ram Sanehi Singh were basking in the sun and playing cards sitting on the eastern 'chabutra' situate in front of the house of Manni Lal Shukla. At about 1.30 p.m. accused Manna Singh armed with a double barrel gun, Ganpat Singh @ Mihilal with a rifle, Lallu Singh with a single barrel gun came there and watched the play for a while. In the meantime, Subedar Singh armed with a 'Lathi' also reached there from the western side and exhorted the other accused to eliminate the enemy as it was a good opportunity. Thereupon, all the gun men rained multiple gun shots on Ram Sanehi Singh. Several shots were fired from a very close range which grievously wounded Ram Sanehi Singh and he succumbed to the injuries then and there. Manni Lal Shukla, Binda Singh and others entreated the accused to forbear but they were intimidated by the accused with dire consequence. After commission of the

murder all the accused escaped towards the west. At the time of incident Raja Bhaiya Singh son of the deceased was at his door. The sound of gun shots hijacked his attention and he along with Pratap Singh and Lallu Singh rushed towards the scene of occurrence and on his way witnessed the four accused, with their weapons, fleeing away by the same pathway. Raja Bhaiya Singh saw the corpse of his father lying in a pool of blood on the 'chabutra' of Manni Lal Shukla. Manni Lal Shukla and others playing the cards narrated the details of the incident to him and he went back to his house and scribed the report Ext. Ka-2 and transmitted the same through Sheo Prasad, Chowkidar of the village, to the reporting Chowki Surauli of the Police Station Sumerpur. The written report was submitted at 5.30 p.m. on the same day at Police Chowki Surauli situate at a distance of about three miles from the village. The written report was received by constable Moharrair Jodha Singh who prepared the Chik report Ext. Ka-4 and registered the crime at serial number 9 of the General Diary Ext. Ka-5. The information of the crime was sent to Shri Babu Singh Sengar, Station Officer, through Constable Govind Ram and Constable Moharrair Jodha Singh left for the scene of occurrence to keep vigil over the corpse. Information of the crime was received by the Station Officer the next day in village Terha, wherefrom he proceeded to the place of incident direct. He held inquest at 8.30 A.M. on 10.12.1978 vide Ext. Ka-6, inter alia, recovered the dead body of the deceased and two blood-stained playing cards lying under the corpse of the deceased, plain and blood-stained earth, tiklies of cartridges and pellets from the spot and prepared a memo ext. Ka-7. Photo of the dead body Ext. Ka-8 and challan of the corpse ext. Ka-9 were prepared. The corpse was sealed and sent for autopsy. Statements of the witnesses were recorded and a site plan Ext. Ka-10 was prepared. Autopsy on the corpse was conducted by Dr. T.D. Singh of District Hospital, Hamirpur on 11.12.1978 from 10.15 A.M. onward and the autopsy report is Ext. Ka-1.

5. The following ante mortem injuries were found on the person of the deceased;

1. Gun shot wound of inlet with scorched margin and also blackening and tattooing of margin present 4 cm x 3 cm x c.c deep on the medial part of left clavicle. Direction front to backwards and slightly downwards. Fracture of the left clavicle and 1st to 4th ribs anteriorly present under the wound. Wadding material found on the track. It severely lacerates the upper lobe of the left lung. It communicates with wound no.20 (exit wound).

2. Gun shot wound of inlet 4 ½ cm x 3 ½ cm x abdominal cavity deep, on the left costal margin at 7 O'clock position, 7 cms away from the left nipple. Margin scorched, blackened and tattooed. Direction left to right and slightly downwards. An scorched area size 5 cm x 3 ½ cms present above the wound contiguous with it. Fracture of the 10th anterior rib of the left side present, under the wound. It perforates the stomach through and through and extensively lacerated the liver. Wadding pieces found on the stomach and liver.

3. Gun shot wound of inlet 6 ½ cm x 2 cm x muscle deep left side of the abdomen horizontally disposed between 12 to 1 O'clock position 4 ½ cms above

the umbilicus. Margin scorched and blackened and tattooed. Direction left to right and horizontally.

4. Gun shot wound of outlet 2 cm x 1 ½ cm x muscle deep right side of the abdomen at 11 O'clock position 7 cm away from the umbilicus. Edges everted. Wadding material found on the muscle plane. It communicate to injury No.3.

5. Gun shot wound of inlet 4 cm x 3 cm x muscle deep. Margins scorched, blackened and tattooed right side of the abdomen lower part 3 cm above the right iliac crest. Direction left to right and slightly upward in the muscle plane.

6. A grazed and scorched area closely lateral to the wound no.5.

7. Gun shot wound of exit 1 ½ cm x 1 ½ cm x 1 ½ cm x communicating to the wound no.5. Margin everted right side of the abdomen lower part. It is 3 cm away from the wound no.5 lateral to it. Margin everted.

8. Gun shot wound of exit 1 cm x ½ cm x communicating the wound no.5. Margins everted 4 cm lateral to injury no.5.

9. Gun shot wound of exit 2 cm x 1 ½ cm x communicates with injury no.5. Margin everted on the right lower abdomen.

10. Gun shot wound of exit 1 cm x ½ cm x communicating to the injury no.5. Margin everted. It is 10 cm lateral to the injury no.5.

11. Gun shot wound of exit 1 cm x ½ cm x communicating with injury no.5. Margin everted. It is 14 cm away and lateral to the injury no.5.

12. Gun shot wound of exit 1 ½ cm x ½ cm x communicating with wound no.5. Margin everted. It is 9 ½ cm away and lateral to the injury no.5.

13. Gun shot wound of exit 1 cm x ½ cm x communicating with injury no.5. Margin everted. It is 9 cm away lateral and downwards to the injury no.5.

14. A grazed and scorched area size 2 cm x 1 ½ cm at 7 O'clock position 13 cm away from the umbilicus.

15. Two grazed and scorched spots 1 cm x 1 cm on the right iliac crest. They are 14 cm apart.

16. A grazed, scorched spot 5 cm x 1 cm right side of the thigh front aspect 14 cms below right iliac crest.

17. Gun shot wound of exit 1 cm x ½ cm x c.c. Deep right side of the back on the posterior axillary line 1-8 cm below the right armpit.

18. Gun shot wound of exit 5 cm x 4 cm x c.c. deep on the left scapula. Margin everted. Fracture of the 4th and 5th posterior ribs and scapula present. It is an exit of injury no.1.

19. Confluent gun shot wound of entry and exit (grazing) 23 cm x 5 cm x muscle deep left back lower part obliquely disposed. Margin scorched, tattooed and blackened. A scorched and blackened area size 11 cm x 4 cm is present above the wound continuous with it. Another scorched and blackened are size 6 cm x 3 cm present below the wound in continuation.

20. A gun shot wound of entry 5 cm x 4 cm x pelvic cavity deep on the right buttock, upper part. Direction back to front and medially wadding material found on the track. Four gun shots found on the right ground and iliac crest. Right iliac crerst fractured and bladder perforated through and through.

6. In the opinion of the doctor, the death occurred due to shock and haemorrhage as a result of the firearm injuries mentioned above.

7. The first I.O. was transferred and the remaining investigation was conducted

by the Sub-Inspector Ravendra Kumar who submitted the charge-sheet Ext. Ka-11. Thereafter, the case was committed to the Court of Session on 6.04.1979. To the charge under Section 302/34 IPC, the accused pleaded not guilty and attributed their prosecution to enmity with the deceased and with the witnesses.

8. To bring home guilt of accused, the prosecution has examined as many as six witnesses. Out of them PW 1 Dr. T.D. Singh, PW 5 Constable Moharrair Jodha Singh and PW 6 Babu Singh Senger, Station Officer are formal witnesses. PW 2 Manni Lal Shukla, P.W. 4 Binda Singh are the eye witnesses and PW 3 Raja Bhaiya Singh son of the deceased is scribe of the First Information Report Ext. Ka-2. He has also stated that while coming to the scene of occurrence he witnessed the four armed accused escaping by the same pathway. He has further proved the motive for murder of his father as mentioned in the First Information Report.

9. We have heard Sri R.P. Singh, learned counsel for the appellants, learned AGA for the State and perused the evidence and material available on record as well the impugned judgment.

10. The First Information Report was promptly lodged on the same day at 5.30 P.M. It mentions the names of the accused, a rifle and two guns used in the commission of offfence, date, time and place of occurrence, motive for the crime and names of the witnesses present at the time of incident. Thus, the F.I.R. corroborates the version of the prosecution. The medical evidence (statement of Dr. T.B. Singh and autopsy report prepared by him) establishes the fact that the deceased died of multiple gunshots injuries and his death was neither natural nor accidental.

11. The First Information Report, the ocular evidence of eye witnesses and the evidence of Investigating Officers, coupled with the site plan, leave no room for doubt that the death of the deceased was caused on the eastern 'chabutara' situate in front of the main door of the house of Manni Lal Shukla wherefrom the corpse of the deceased Ram Sanehi Singh was recovered. The date, time and scene of occurrence have not been challenged by the defence.

12. According to the prosecution version, Manni Lal Shukla, Binda Singh, Chhote Singh and deceased Ram Sanehi Singh were playing cards on the eastern 'Chabutara' of Manni Lal Shukla, when Ram Sanehi Singh was done to death by the multiple gunshots rained on him by the three accused Manna Singh, Ganpat Singh and Lallu Singh who were all armed with firearms. PW 2 Manni Lal Shukla whose presence on the scene of occurrence cannot be doubted by any stretch of imagination, has confirmed the prosecution version. He has frankly admitted that he is 'purohit' (family priest) of both accused Manna Singh and the deceased Ram Sanehi Singh. Manna Singh wanted to retrieve the land already given to Manni Lal Shukla by his family. There was a prolonged litigation before the consolidation court between Manni Lal Shukla and the accused in which Ram Sanehi Singh had appeared as his witness. This witness has also stated that when the accused were aiming at Ram Sanehi Singh to fire, he had entreated them with folded hands to forbear but the accused did not relent, intimidated him with dire

consequence and culminated their design. The testimony of this witness is natural, convincing and devoid of any concealment.

13. PW 4 Binda Singh while corroborating the version of the prosecution has admitted that after this incident a case under Section 107 of the Cr.P.C. was instituted between his brothers and the accused. The element of animosity is also manifest in the statement of PW 2 Manni Lal Shukla who has deposed that Binda Singh and Parasuram are real brothers and Parasuram's daughter is married to Ram Narain Singh son of deceased Ram Sanehi Singh.

14. PW 3 Raja Bhaiya Singh who is son of deceased Ram Sanehi Singh has proved the motive that impelled the accused to eliminate the deceased. He has specifically stated that on hearing the sound of gun shots while he was proceeding to the scene of occurrence he saw all the four armed accused at the door of Jagmohan coming from opposite direction. He ascertained the facts from Manni Lal Shukla, Binda Singh and Chhote Singh and prepared the written report Ext. Ka-2. Thus, this witness has corroborated the evidence of the eye witnesses Manni Lal Shukla and Binda Singh regarding participation of the accused in the commission of the offence of murder.

15. The ocular testimony of all the above three witnesses i.e. Manni Lal Shukla, Binda Singh and Raja Bhaiya Singh is natural and straightforward and the conscience of the Court is convinced about its veracity. The medical evidence corroborates the ocular evidence of the eye witnesses and there is no conflict between the medical evidence and the eye witnesses account.

16. The eye witnesses and the accused are sworn enemies of each other and resident of the same village. The incident occurred in bright sun shine, and therefore, possibility of any mistake in identification of accused is out of question.

17. The learned counsel for the appellants has vehemently contended that if the eye witnesses Manni Lal Shukla and Binda Singh and the deceased were playing cards sitting on a small 'chabutra' in close physical proximity and multiple gunshots were fired at the deceased then the eye witnesses examined and Chotey Singh (not examined) must have sustained gunshot injuries and absence of any such injuries on the persons of above three witnesses, renders their presence on spot at the time of occurrence very doubtful. The argument is attractive but an analysis of the eye witness account and human conduct make it without strength. Both Manni Lal Shukla and Binda Singh have made specific mention that they tried their best to dissuade the accused from assaulting Ram Sanehi Singh but the accused threatened them with dire consequence to move away. As they were only fair-weather-friends and not blood relation of the deceased, it was very natural for them to have left the deceased to his fate. Moreover, the accused had no intention to harm the witnesses and therefore they isolated the deceased and ensured that the witnesses kept away.

18. The next contention on behalf of the appellants is that both the eye witnesses are inimical to the accused and they have falsely stated before the trial

court to implicate the accused. It is noteworthy that the evidence of witnesses cannot be discarded solely on this basis. The Hon'ble Apex Court in case of Dilabar Singh Vs. State of Haryana (2015) 1 SCC 737, Dhari Vs. State of U.P., AIR 2013 SC 308, and Ramesh Harijan Vs. State of U.P., 2012 (5) SCC 777 and Dharamveer Vs. State of U.P., AIR 2010 SC 1378 propounded that the enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny, the testimony of such witness is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should be kept in mind and ascertained on the facts of each case. As has been enunciated above, though there is some enmity between the accused and witnesses prior to and after the incident but the evidence of eye witnesses i.e. Manni Lal Shukla and Brinda Singh is natural, straightforward and trustworthy, and therefore, the same is fit to be relied on for conviction. They are residents of the same village and their houses are in the close proximity of the scene of occurrence, therefore, their presence on spot was quite probable.

19. Further in support of above contention, it was contended that Chhote Singh who has no enmity with the accused had been purposely withheld by the prosecution apart from non-examination of Kunj Bihari, Laxmi Prasad, Guru Prasad Langra, Babu Singh, Jagmohan and others who have their houses in the vicinity of the place of occurrence. The presence of above neighbours at the scene of occurrence was natural, and their non-examination by prosecution renders the prosecution case doubtful. This contention has no legs to stand as most of the villagers are usually reluctant to get themselves involved in an occurrence specially when the accused are desperadoes and no blame can be laid at the prosecution for not examining other witnesses. It is nor the case of prosecution or defence that above neighbors were present at the scene of occurrence. So far as non-examination of independent witnesses and its effect are concerned, the Hon'ble Apex Court in the case of Kripal Singh Vs. State of Haryana, AIR 2013 SC 286, Sandeep Vs. State of U.P. (2012) 6 SCC 107 and Mano Dutt and another Vs. State of U.P. 2012 77 ACC 2009 SC propounded that if a witness examined in the court is otherwise found reliable and trustworthy, the facts sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not mathematical formula for discarding the weight of testimony available on record however, natural, trustworthy and convincing it may be. It is settled law that non-examination of eye witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of deceased and non-examination of independent witness would not be fatal to the case of prosecution.

20. In view of above as has been discussed above, the evidence of eye witnesses examined by prosecution cannot be discarded only on the ground that Chhote Singh and other neighbour witnesses were not examined.

21. Learned counsel for the appellants further submitted that only two playing cards were found on spot and there is no trace of the remaining cards and therefore the theory of playing cards on 'chabutra' appears to be manufactured and concocted. There is no force in this submission because recovery of two blood-stained playing cards was effected on the next day at 8.30 A.M. from the place of occurrence and that too from beneath the corpse. In natural course the remaining cards could not remain in their original place as there are several agents like children, animals and wind to disturb their status quo.

22. It has been further submitted that place of occurrence is doubtful as no empty cartridges were recovered from the spot. It is essential to mention that PW 6 Babu Singh Sengar who investigated the case, has deposed that, inter alia, he recovered pellets and ticklies from the scene of occurrence and this fact is specified in recovery memo Ext. Ka-7. Moreover, there is no suggestion by defence to the eye witness account that Ram Sanehi Singh was done to death elsewhere. Therefore, contention loses strength.

23. No other point has been highlighted before us nor mentioned during the course of argument.

24. To appreciate the testimony of eye witness, it has to be kept in mind whether the witness is credible and his presence on spot is probable and he has seen the incident. In this background, the witnesses examined by the prosecution are consistent in their version despite searching cross examination and there is no material contradiction or inconsistency which may militate against their credibility or trustworthiness. Further, the evidence of the eye witnesses is strengthened by medical evidence on record. The motive for crime is also proved by PW 3 Raja Bhaiya Singh son of the deceased Ram Sanehi Singh. The prosecution has proved its case beyond reasonable doubt and verdict of conviction is legally and factually justified by the evidence on record.

25. Being the court of first appeal, we have carefully scrutinized the case from every angle. The Court below has rightly appreciated the evidence available on record and rightly recorded the finding of conviction against the accused appellants. We do not find any justification for interference in the impugned judgment and sentence and the same deserves to be confirmed.

26. The appeal against Manna Singh and Lallu Singh is sans merit and deserves to be dismissed and is hereby dismissed. The conviction and sentence awarded by trial court against the accused Manna Singh and Lallu Singh is confirmed.

27. So far as accused Ganpat Singh and Subedar Singh are concerned, their appeals have been abated due to their death.

28. The appellants/ accused Manna Singh and Lallu Singh shall surrender before the trial Court immediately to serve out the sentence awarded by the trial Court.

29. The copy of the Judgment and entire record be transmitted back to the learned trial court for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.01.2016

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 560 of 2016

P.N.O. 872080197 Cons. Bhupendra Singh
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Surya Prakash Singh

Counsel for the Respondents:
C.S.C.

U.P. Police Regulation-Regulation 525-Transfer of civil police constable-to Government Railway Police-challenged on ground being civil police their cadre can not changed-held-in view of Full Bench decision Govt. Railway Police and Civil Police are same cadre-even after dismissal of petition by Second petition-quashing the validity of transfer-held-barred by constructive Res-judicata-moreover can approach by review-second petition-not maintainable-dismissed.

Held: Para-4
The action impugned in the present case is merely consequential to the issuance of the transfer order dated 07.10.2012 which was challenged in the earlier writ petition, therefore, now for the petitioner to file a second writ petition saying that he has attained the age of 47 years in July, 2014, therefore, irrespective of the Full Bench decision and in view of the circular dated 03.03.2012 he is not liable to be compelled to join in the Government Railway Police does not appear to be sustainable in the eyes of law as the petitioner had attained the age of 47 years when the earlier writ petition filed by him was still pending, therefore, he ought to have raised this issue before this Court in the said writ petition but not having done so, this writ petition is barred by the principle of constructive res-judicata and res-judicata, therefore, no writ of mandamus as prayed for can be issued. If at all permissible, the petitioner may seek appropriate remedy by way of review of the judgment dated 30.07.2015 passed in his earlier writ petition but no such relief can be granted in this second writ petition.

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

1. Heard learned counsel for the parties.

2. The petitioner herein has challenged an order dated 05.07.2015 by which the opposite party no. 3 has directed the opposite party no. 5 to relieve the petitioner consequent to the transfer order passed on 07.10.2012 transferring him from Civil Police to Government Railway Police as the litigation in this regard has come to an end and the legal position has been settled by a Full Bench decision of the Supreme Court in Om Prakash Singh's case.

3. The petitioner herein had earlier filed a writ petition bearing No. 5484(SS) of 2012 challenging the aforesaid transfer order dated 07.10.2012. Initially stay order was passed on 09.10.2012. Subsequently, in view of the Full Bench decision in the case of Om Prakash Singh and others Vs. State of U.P. and others, 2014 (3) ALJ 420 the writ petition was dismissed and the interim order was vacated. The judgment dated 30.07.2015 passed in the Writ Petition No. 5484(SS) of 2012 filed by the petitioner is quoted herein below:-

"Heard Sri Yashovardhan Swarup, Sri Desh Deepak Singh, Sri Rajesh Kumar Pandey, Sri Yogesh Kumar Awasthi and other counsel appearing on behalf of learned counsel for the petitioner in other

connected writ petitions, Sri Gyanandra Kumar Srivastava, learned Additional Chief Standing Counsel for opposite parties and perused the record.

Since the common question is involved in the writ petitions , so the same are being decided by a common judgment.

Facts, in brief, of the present matters are that petitioners, who are working as Constable in Civil Police have been transferred to Government Railway Police by means of impugned transfer orders under challenged in the instant matters by the petitioners on the ground that as they are working as Constable in Civil Police for a period of more than ten years, so they cannot be transferred from Civil Police to Government Railway Police in view of the provisions as provided under Regulation 525 of Uttar Pradesh Police Regulations.

Controversy involved in the present matters has been referred to Full Bench on the following points:-

(1) Whether a police constable working in the civil police who has rendered service for more than ten years cannot be transferred to another branch in view of the provisions of Regulation 525 of the Uttar Pradesh Police Regulations in view of the decision of the Supreme Court in Jasveer Singh Vs. State of U.P. & Ors. (2008) 1 UPLBEC 657.

(2) Whether the government railway police and civil police constitute one cadre or different service cadres.

Thereafter Full Bench of this Court in the case of Om Prakash Singh and others Vs. State of U.P. And others, 2014 (3) ALJ 420 answered to the above said questions after taking into consideration the Regulation 525 of Uttar Pradesh Police Regulations in following terms:-

(i) A police constable working in the civil police who has rendered service for more than ten years can be transferred to another branch, as explained above, in view of the provisions of Regulation 525 of the Uttar Pradesh Police Regulations;

(ii) The government railway police is a branch of the police force and hence the transfer of a civil police constable who has put in more than ten years' service to the government railway police would not be prohibited, subject to compliance with the norms stipulated in Regulation 525 of the U.P. Police Regulations.

In view of the above said fact, I do not find any illegality or infirmity in the impugned orders rather the same are as per Regulation 525 of the Uttar Pradesh Police Regulations under challenged in the writ petitions by which petitioners have been transferred from the post of Constable in Civil Police to Government Railway Police.

Accordingly, the writ petitions lack merit and are dismissed.

Interim order, if any, stands discharged."

4. The action impugned in the present case is merely consequential to the issuance of the transfer order dated 07.10.2012 which was challenged in the earlier writ petition, therefore, now for the petitioner to file a second writ petition saying that he has attained the age of 47 years in July, 2014, therefore, irrespective

of the Full Bench decision and in view of the circular dated 03.03.2012 he is not liable to be compelled to join in the Government Railway Police does not appear to be sustainable in the eyes of law as the petitioner had attained the age of 47 years when the earlier writ petition filed by him was still pending, therefore, he ought to have raised this issue before this Court in the said writ petition but not having done so, this writ petition is barred by the principle of constructive res-judicata and res-judicata, therefore, no writ of mandamus as prayed for can be issued. If at all permissible, the petitioner may seek appropriate remedy by way of review of the judgment dated 30.07.2015 passed in his earlier writ petition but no such relief can be granted in this second writ petition.

5. Subject to the above, the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2015

BEFORE
THE HON'BLE AMRESHWARI PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Special Appeal No. 565 of 2015

Nanhi Devi (Inre 6382 S/S 2015)
...Appellant
Versus
Dy. General Manager, Allahabad Bank & Ors. ...Respondents

Counsel for the Appellant:
Pradeep Kumar Tripathi

Counsel for the Respondents:
Gopal Kumar Srivastava

Constitution of India, Art.-226-Compassionate Appointment-Allahabad Bank introduced-scheme by circular dated 03.12.14-providing cut-off date as 05.08.2014-either death or voluntarily retirement or disappearance etc-admittedly the employee died on 25.10.2013-not within zone of consideration-in absence e of challenging cut-of date before Single Judge-can not be considered by Appellate court-appeal dismissed-as the petitioner already availed ex-gratia payment under scheme prevailing on that time.

Held: Para-6
We are unable to agree because the circular dated 03.12.2014 extracted herein above categorically clarifies the aforesaid position which was not under challenge before the learned Single Judge. The appellant had also accepted the benefit under the earlier scheme of ex-gratia payment.

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

1. Heard Sri Pradeep Kumar Tripathi, learned counsel for the appellant and Sri Gopal Kumar Srivastava learned counsel for the Bank.

2. The challenge raised in this appeal is to the judgment dated 04.11.2015 on the ground that the learned Single Judge has committed an error by not considering the applicability of this new scheme promulgated vide circular dated 03.12.2014 and, therefore, denial of compassionate appointment by the respondents cannot be upheld even though the appellant has received ex-gratia payment.

3. We have considered the submissions raised. The circular dated 03.12.2014 as produced by the learned counsel for the bank is as follows:-

Scheme for Compassionate Appointment in Allahabad Bank

In terms of directive issued by Government of India, forwarded by Indian Banks' Association, advising opening of compassionate appointment in Public Sector Banks, a scheme for providing appointment on compassionate grounds has been introduced in our Bank as per approval accorded by the Board of Directors in its meeting held on 21st November, 2014. The Scheme will be applicable from 5th August, 2014 and case of an employee (i) dying while in service on or after 05.08.2014 or (ii) retiring prematurely on medical ground after observing necessary formalities as per Rule on account of incapacitation for future work before reaching the age of 55 years on or after 05.08.2014 or (iii) becoming 'missing' on or after 05.08.2014 with at least two years of remaining service, will only be governed by the scheme. The term 'employee' in this case will be governed by the definition contained in the Scheme. .

The Complete Scheme, together with formats for Application for Sponsorship by the spouse of the ex-employee [Form No.01], Application for Compassionate Appointment by the Candidate [Form No. 02] and Affidavit to be executed by the Dependent Family members of the ex-employee [Form No.03] is annexed to this Instruction Circular as Annexure-1 for careful noting by all concerned.

As per clarifications received from the Government of India, forwarded by Indian Banks' Association, all the cases for ex-gratia pending before 05.08.2014 are not affected by the new Scheme. Accordingly, cases of compassionate benefit arsing out of death of an employee while in service or premature retirement on medical ground before reaching the age 55 years due to incapacitation for future work, occurring on or before 04.08.2014 will continue to be governed by Allahabad Bank Scheme for Payment of Lumpsum Ex-Gratia Amount in lieu of Appointment on Compassionate Grounds & Appointment of Dependents of Deceased Employees on Compassionate Grounds in Exceptional Cases' last updated vide H.O Instruction Circular No. 10203/PA/2008-09/35 dated 17.10.2008.

4. A perusal thereof demonstrates that the scheme would apply from 05.08.2014 in the case of an employee dying while in service on or after 05.08.2014. In the instant case, admittedly the death of the employee took place on 25.10.2013 that is prior to the enforcement of the new circular.

5. Learned counsel for the appellant has relied on the judgment in the case of State Bank of India vs. Sri Raj Kumar decided on 08.02.2010 by the Apex Court contend that the new scheme would apply even if the death had taken prior to the enforcement of the new scheme.

6. We are unable to agree because the circular dated 03.12.2014 extracted herein above categorically clarifies the aforesaid position which was not under challenge before the learned Single Judge. The appellant had also accepted the benefit under the earlier scheme of ex-gratia payment.

7. in such a situation, even if she had not disclosed the same, the same would not reflect upon the merits of the case as even otherwise the 03.12.2014 clarificatory circular does not entitle the petitioner to raise any such claim.

8. With these observations, the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Special Appeal Defective No. 610 of 2015

The State of U.P. & Ors. ...Appellants
Versus
Mahila Mahavidyalaya Kidwai Nagar Kanpur 6389 (M/S) 2011 . ...Respondent

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
Anurag Verma, Pali Anural

High Court Rules-1952-Chapter VIII Rule-5-Special Appeal -3 ½ years unexplained delay-Learned Single Judge considering pure legal aspect-quashed the G.O. 06.01.11 imposing ban on appointment of class 4th employee in Degree and Post Degree College affiliated to university-ignoring statute-meaning thereby-overriding legislation -such practice of litigation-can not be appreciated-appeal dismissed with cost of Rs. 10,000/-.

Held: Para-9
We are also surprised and we do not find any explanation that once the State itself had implemented the judgment of the learned Single Judge way back in the year 2013 it had every opportunity to assail any such orders two years ago. As noted above the appeal has been filed after 3 ½ years, moreso when the statutes have been amended on 24.2.2015. The appeal appears to have been prepared only to cover up the actions under the Government order that was sought to be enforced by the appellant and that had outlived itself for the reasons given by the learned Single Judge, both on legal and factual grounds. The aforesaid exercise of filing of the appeal by the State, therefore, at this belated stage has neither been validly explained on delay nor is there any plausible argument so as to find out a ray of hope on the merits of the claim as well. Consequently, for all the reasons aforesaid this exercise of drafting and filing of the appeal does not appear to be for protecting the interest of the State or raising a valid challenge to the learned Single Judge judgement on any legal grounds. The entire exercise of filing of the appeal appears to have been raised on the asking of the legal department without there being any cogent ground available to raise a challenge and without there being any plausible explanation for the delay.

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

1. This highly belated appeal has been filed by the State. It is reported to be beyond time by 3 years 2 months and 17 days.

2. In addition to the fact that there is an inordinate and inexcusable delay, we further find that the explanation set up is not worth accepting and is an effort made on behalf of the State to reopen an issue that does not deserve to be reopened at all on any valid legal principle and on merits as well.

3. The appeal had been taken up by us earlier and on 5.1.2016 a request was made on behalf of the State that the appeal be taken up on 6.1.2015 to enable the learned Advocate General to appear in the matter. Today, again an adjournment was being sought, but we do not find any good reason to grant any such accommodation in this highly belated and incompetent appeal nor is there any reason to entertain the same otherwise as well.

4. A group of writ petitions were decided together by the learned Single Judge on 6.9.2012 after having discussed the entire legal provisions, the case law touching the issue and also the stand taken by the appellant State Government vis-a-vis the selection and appointment against class-IV sanctioned posts in institutions, namely, Degree colleges affiliated and associated to any University governed by the provisions of U.P. State University Act, 1973. The learned Single Judge found that the direction for appointment against class-IV posts by outsourcing would not be permissible so long as the provisions of the 1973 Act remain intact, inasmuch as a government order being an executive instruction cannot override legislation. The learned Single Judge however left it open to the State to bring about any amendment in the first statutes of the respective universities to which the petitioner colleges were affiliated.

5. The learned Single Judge also found the impugned action amounting to a complete ban being imposed for appointment of class-IV employees in terms of the government order dated 6.1.2011 that was impermissible.

6. We have gone through the judgment of the learned Single Judge as well and the grounds that have been raised in the present appeal.

7. Sri Srivastava, learned Additional Chief Standing Counsel, has vehemently argued and pressed the grounds taken in the appeal, particularly, paragraphs no.1, 2 and 3 to urge that since it was a policy decision to fill up posts by outsourcing, the government order even though in the shape of an executive instruction was traceable to the powers under the U.P. State Universities Act, 1973 and as such the same could not have been struck down. Learned counsel submits that this policy decision was taken after due deliberations in order to engage skilled and semi skilled workers as in government departments in order to enforce austerity measurements.

8. There are two relevant informations that do not appear to be disputed. Firstly that as entailed in the judgment of the learned Single Judge, the statutes have been amended on 24.2.2015. This fact has nowhere been stated in the entire appeal. The second aspect is that the impugned judgment of the learned Single Judge has been implemented subject to any further orders being passed in the writ petitions or any decision taken in appeal by a higher court. The said orders dated 31.7.2013 in the case of two institutions, namely, D.B.S. College and D.A.V. College who were the petitioners before the learned Single Judge have been produced by the learned counsel for the respondent-Institutions to contend that this fact has also not been disclosed in the appeal and the appeal appears to have been filed for some other purpose so as to invite an adverse finding somehow the other.

9. We are also surprised and we do not find any explanation that once the State itself had implemented the judgment of the learned Single Judge way back in the year 2013 it had every opportunity to assail any such orders two years ago. As noted above the appeal has been filed after 3 ½ years, moreso when the statutes have been amended on 24.2.2015. The appeal appears to have been prepared only to cover up the actions under the Government order that was sought to be enforced by the appellant and that had outlived itself for the reasons given by the

learned Single Judge, both on legal and factual grounds. The aforesaid exercise of filing of the appeal by the State, therefore, at this belated stage has neither been validly explained on delay nor is there any plausible argument so as to find out a ray of hope on the merits of the claim as well. Consequently, for all the reasons aforesaid this exercise of drafting and filing of the appeal does not appear to be for protecting the interest of the State or raising a valid challenge to the learned Single Judge judgement on any legal grounds. The entire exercise of filing of the appeal appears to have been raised on the asking of the legal department without there being any cogent ground available to raise a challenge and without there being any plausible explanation for the delay.

10. We cannot appreciate such litigations being encouraged by the State when the courts are already filled with a heavy docket of pendency. Adding a litigation which cannot bear any results and that too even in a highly belated manner therefore cannot be appreciated.

11. The appeal is dismissed with Rs.10,000/- as costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2015

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

Writ Petition No. 655 (S/S) of 2014

Abhishek Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jay Krishna Shukla, Sri Rama Pati Shukla, Sri HGS Parihar, Ms. Meenakshi Singh, Sri Ramesh Pandey

Counsel for the Respondents:
C.S.C., Sri S.K. Yadav Warshi, Sri H.P. Srivastava

Uttar Pradesh Intermediate Education Act-1921-Section 16-E-ii-Ad-hoc appointment of teachers-except on recommendation of board-no appointment can be made-after enforcement of Act 1982-in case of delay-management can appoint for period not exceeding six months or till end of academic session-view taken in Sanjay Singh case not be upheld as laying down correct law-overruled-but judgment in Pradeep Kumar upheld.

Held: Para-49
For these reasons, we have come to the conclusion that the view of the learned Single Judge in Sanjay Singh's case (supra) cannot be upheld as laying down the correct position in law. The view of the learned Single Judge shall stand, accordingly, overruled. The judgment in Pradeep Kumar (supra) is upheld subject to the principles which, we have enunciated in this judgment.

Case Law discussed:
(2013) 1 UPLBEC 758; Writ-A No. 22520 of 2013(decided on 1 May 2013); 2010 (28) LCD 1375; (1995) 6 SCC 749; 2015 (33) LCD 2402; (1997) 2 UPLBEC 1329; 1994 (3) UPLBEC 1551; (1996) 10 SCC 62; (2008) 5 SCC 241; (2010) 11 SCC 694; (2009) 15 SCC 436; (2008) 7 SCC 153; (2008) 17 SCC 617; (2010) 4 SCC 393; (2011) 10 SCC 259.

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

The reference

1. The present reference before the Division Bench has arisen from a referring order dated 3 February 2014 of a learned Single Judge. Noticing a conflict between two judgments of the learned Single Judges of this

Court, while construing the provisions of the Uttar Pradesh Intermediate Education Act, 19211 and the Uttar Pradesh Secondary Education Services Selection Board Act, 19822, the learned Single Judge referred the difference of opinion that has arisen for being resolved by a Division Bench. The two judgments of the learned Single Judges in which the difference of opinion has arisen are:

(i) Sanjay Singh Vs State of Uttar Pradesh & Ors.3; and

(ii) Pradeep Kumar Vs State of Uttar Pradesh & Ors.4

Facts

2. Briefly stated, the facts in the referring judgment are that Lokmanya Tilak Inter College, Pratapgarh is a non-government recognized and aided institution governed by the provisions of the Act of 1921 and the Act of 1982. The College is on the grant-in-aid list of the State Government and salaries are paid under the provisions of the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries to the teachers and other staff of the College) Act, 19715. A post of a Lecturer in Hindi fell vacant on the retirement of a substantively appointed teacher on 30 June 2013. On 1 July 2013, the institution sent a request to the District Inspector of Schools to make an appointment on the post. The Manager of the College, finding that no teacher was made available, decided to fill up the post on a temporary or ad hoc basis invoking the provisions of Section 16-E (11) of the Act of 1921. After the vacancy was advertised by the Committee of Management, the petitioner was selected by a selection committee and was appointed as a Lecturer in Hindi until a regularly selected candidate was made available by the Uttar Pradesh Secondary Education Services Selection Board6. The petitioner, who is working since then, sought a writ of mandamus requiring the State to allow him to continue to work and to pay his salary for the post of Lecturer in Hindi from the State exchequer until a regularly selected candidate provided by the Board is made available.

Rival positions

3. In support of the case, the petitioner has relied upon the judgment of a learned Single Judge of this Court in Sanjay Singh (supra). The issue which arose before the learned Single Judge was in respect of persons who are appointed as Assistant Teachers or Lecturers against substantive vacancies or against short term vacancies which were subsequently converted into substantive vacancies in the Inter Colleges across the State of Uttar Pradesh.

4. The contention of the State is that after the enforcement of the Act of 1982 in the State of Uttar Pradesh, the Committee of Management had no right to select or appoint candidates against substantive vacancies in the posts of Assistant Teachers or Lecturers. On the other hand, the case of the Managements is that since the Board constituted under the Act of 1982 has not been able to send selected candidates, the institutions were entitled to appoint persons on an ad hoc basis until regularly selected candidates become available and the State would be liable to pay salaries to these teachers out of the grant made available to the institutions.

The decision in Sanjay Singh

5. The learned Single Judge in Sanjay Singh (supra) accepted the submission which was urged on behalf of the Management. The learned Single

Judge observed that there was no dispute about the legal position that after the enforcement of the Act of 1982, no Committee of Management would have the power to make an appointment against a permanent vacancy. This position of law which, as we shall notice is not in dispute, has been set out in the following observations of the learned Single Judge:

"Broadly speaking there is consensus in all the judgments that after the enactment of U.P. Secondary Education Services Selection Board Act, 1982, the committee of management does not have any power to make appointment on a permanent vacancy.

... ...

Petitioners have taken various contentions to prove that committee of management has power to appoint teachers but since this controversy has been settled by Division Bench in Daya Shankar Mishra's case7 which is authoritative on this subject; no contention can be entertained by this Court. Thus, committee of management do not have any power to appoint as it is law laid down by Division Bench (supra)."

(The reference to the decision of the Division Bench in the aforesaid extract is to the judgment in Daya Shankar Mishra Vs District Inspector of Schools, Allahabad (supra) which arose upon a reference by a learned Single Judge). However, having held that the Committee of Management would not have the power to make an appointment against a substantive vacancy, the learned Single Judge was of the view that some modalities had to be worked out to deal with a situation where the Board was unable over a long period to provide selected candidates for filling up substantive vacancies. In the view of the learned Single Judge, no steps have been taken by the State either to bring in legislation or an executive direction. The learned Single Judge formulated the issue for consideration before the Court in that regard in the following terms:

"(4) Lastly, should not the Court try to device (sic) some methodology by which the bleeding ignorance can be arrested in time to help 'knowledge and education' which are gasping for help at the hands of careless caretakers."

6. The view which was formulated by the learned Single Judge was as follows:

"The question which is troubling the conscience of the Court is reflected in above preposition (sic). The State has miserably failed in providing teachers to the institutions to fill up a permanent vacancy in less than three to four years. The same State through its legislation denies power to the committee of management to appoint qualified teachers to impart education in their institutions. Petitions are filed before the Courts for payment of salary to the teachers who in exigency of the situation are appointed by the committee of management as a last resort to salvage the situation. To keep the torch of knowledge burning lest it fades out and merges in darkness of ignorance. The moot question remains:- what is the step to be taken by the Court? Should This Court close its eyes to the situation and once again leave the matter by direction to the State Government to provide remedy (this experiment of the judiciary has failed in last ten years) or some method should be formulated to keep the work of education going and to save the students from ignorance, non-

education and illiteracy. The Court chooses the second option."

7. Accordingly, the following conclusion was arrived at:

"The Court comes to the conclusion that in case the Board has failed to provide selected candidates even after three months of requisition and the committee of management has appointed a duly qualified teacher after due advertisement in two newspapers, evaluated by a selection committee, permanent post is available, laws of reservation have been followed and qualification is not in doubt then salary should be paid to such teacher till the time regularly selected candidate is sent by the Board. The Court hastens to add that appointment of such a teacher is not to be validated in any manner. He does not acquire any right of a regularly selected candidate. This order also does not allow the committee of management to think that they have been given any power of appointment by this order. The order of the Court is being passed only as a desperate measure to keep the education of the students available to them as guaranteed by the Constitution of India."

8. The District Inspector of Schools was directed to make the payment of salary to the petitioner whose ad hoc appointment was to continue until a regularly selected candidate was made available by the Board.

The decision in Pradeep Kumar

9. Subsequently, in a judgment rendered on 1 May 2013 in Pradeep Kumar (supra), a writ of mandamus was sought to the State to ensure the payment of salary to an assistant teacher in an Intermediate College governed by the Act of 1921 and the Act of 1982. In that case, upon retirement of an assistant teacher, the Management made a requisition to the Board. Since the Board did not provide a candidate, the Management proceeded to advertise the vacancy and made a selection which was forwarded to the District Inspector of Schools for approval. Not having obtained an approval, the Management filed a writ petition in which reliance was placed on the decision in Sanjay Singh (supra). The learned Single Judge took notice of the provisions of Section 16 of the Act 1982 under which, an appointment of a teacher, after the enforcement of the provisions, can be made only on the recommendation of the Board failing which the appointment made would be void. In the view of the learned Single Judge, an appointment by the Committee of Management against a substantive vacancy was without any authority and hence, a direction for the payment of salary from the public exchequer could not be issued. The conclusion of the learned Single Judge was in the following terms:

"Appointment on substantive vacancy in a recognized intermediate college is regulated by the provisions of Act,1982. Section 16 of Act, 1982 declares that appointment shall only be made on the recommendation of the Selection Board and any appointment otherwise would be void. The Act as on date contains no provision for any ad-hoc/temporary appointment being made. Consequently, so far as the Act, 1982 is concerned, no selection for appointment can be made by the Committee of Management.

This Court may record that Section 16-E (11) of Act, 1921 permits appointment on temporary vacancy by the Committee of Management only for a

period not exceeding six months or till the end of academic session, otherwise, Act, 1921 does not contemplate any ad-hoc/temporary appointment.

In view of the aforesaid, there being no statutory provision permitting such appointment as has been made by the Committee of Management of the institution, against the substantive vacancy. There cannot be a direction to the State Government to make payment of salary through public exchequer."

10. The learned Single Judge held that if a delay occurs in making a selection by the Board and there is a shortage of teachers in the institution, the Management cannot adopt its own procedure for appointment and the proper remedy available to the Management is to approach the High Court for a mandamus against the Board to make an appointment at the earliest possible. However, if the Management makes an appointment on its own accord, that would be contrary to law and in the view of the learned Single Judge, the liability for payment of salary to such a teacher would fall only upon the Management. In the decision in Pradeep Kumar (supra), the learned Single Judge took notice of the earlier judgment in Sanjay Singh (supra), but held that the decision does not provide what procedure is to be followed and what method is to be adopted for selection nor can the High Court issue such a direction under Article 226 of the Constitution. The conclusion of the learned Single Judge was in the following terms:

"In these circumstances, merely because the management has made appointment of a person, who is qualified in terms of the Appendix-A, it will not mean that the said appointment is in accordance with law. In view of Section 16 of Act, 1982, it would be a nullity. No appointment against substantive vacancy can be made except on the recommendation of the Selection Board in view of the law as it stands today. Reference Smt. Prameela Mishra vs. State of U.P. & others; 1997 (2) UPLBEC 1329 and Surendra Kumar Srivastava vs. State of U.P. & others; 2007 (1) ESC 118."

11. The petition was, accordingly, dismissed.

The referring judgment

12. In the referring order of 3 February 2014, the learned Single Judge has adverted to the provisions of Section 16 of the Act of 1982 under which, notwithstanding anything contrary contained in the Act of 1921, an appointment of a teacher shall be made by the Management only on the recommendation of the Board. The learned Single Judge held thus:

"The law as has been evolved over the years clearly demonstrates that the legislature as well as the executive has gradually taken over the appointment of teachers both temporary/ad-hoc as well as permanent from the Committee of Management and has placed it in the hands of Selection Board by providing for a detailed mechanism for selection which meets the test under Articles 14 and 16 of the Constitution of India. The burden of salary is upon the State Exchequer. Permitting the Committee of Management to make appointments till the selection of regularly selected candidates or recommended by the Selection Board without following any procedure prescribed and without the education officers having any control, the selections

even if temporary would be violative of Articles 14 and 16 of the Constitution of India as well as reservation laws. Purpose of Article 21-A of the Constitution can be enforced only by a procedure established by law and any appointment made in violation of the provisions of the law cannot be held to sub-serve the purpose of Article 21-A."

13. In the view of the learned Single Judge, the decision in Sanjay Singh (supra) would virtually amount to re-writing legislation, which is impermissible. On this foundation, the following questions have been referred for adjudication by the Division Bench:

"1. Which of the two cases namely Sanjai Singh Versus State of U.P. and others in Writ Petition No. 3348 of (SS) of 2012 or Pradeep Kumar Versus State of U.P. and others in Writ Petition No. 22520 of 2013, lays down the correct law.

2. Scope of Section 16-E(11) of the Intermediate Act, 1921 read with Sections 16, 22, 32 and 33-E of the U.P. Secondary Education Service Selection Board Act, 1982."

14. The second issue is one of interpretation.

15. Before we turn to the submissions which were urged on behalf of the petitioner by learned counsel, it would be necessary to advert to the provisions of the relevant legislation on the subject. In the present case, the three enactments of the State legislature, which have a bearing on the subject matter, are:

(i) The Uttar Pradesh Intermediate Education Act, 1921 ("The Intermediate Education Act, 1921");

(ii) The Uttar Pradesh Secondary Education Services Selection Board Act, 1982 ("Act of 1982"); and

(iii) The Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries to the Teachers and Other Staff of the Colleges) Act, 1971 ("Payment of Salaries Act, 1971").

The Intermediate Education Act, 1921

16. The Intermediate Education Act, 1921 is inter alia intended to govern recognized Intermediate colleges, higher secondary schools or high schools. The Act constituted the Board of High School and Intermediate Education. Section 16-E provides for the procedure for selection of teachers and heads of institutions. Under sub-section (1) of Section 16-E, the head of an institution and teachers are to be appointed by the Committee of Management in the manner thereafter provided. Sub-section (11) provides for appointments to be made against temporary vacancies caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise. Sub-section (11) of Section 16-E is in the following terms:

"(11) Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise of an incumbent occurring during an educational session, may be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed:

Provided that no appointment made under this sub-section shall, in any case,

continue beyond the end of the educational session during which such appointment was made."

17. Regulations have been framed under the Act and insofar as is material, Regulation 13 of Chapter I empowers the Committee of Management to make appointments, confirmations, promotions and to decide disciplinary matters, including removal and dismissal of the heads of institutions and teachers therein. Chapter-II of the Regulations provides for the appointment of the heads of institutions and teachers. Regulation 9 of Chapter-II provides for filling up a vacancy in the post of a teacher for a period exceeding six months where a vacancy has arisen by grant of leave or where a teacher is placed under suspension duly approved in writing by the Inspector and the period of suspension is likely to exceed six months from the date of approval. Regulation 19 of Chapter-II provides that where any person is appointed as, or any promotion is made on any post of head of the institution or teacher in contravention of the provisions of the Chapter or against any post other than a sanctioned post, the Inspector shall decline to pay salary and other allowances, if any, to such person where the institution is covered by the provisions of the Act of 1971, and in other cases shall decline to give any grant for the salary and allowances in respect of such person.

Secondary Education Services Selection Board Act

18. In 1982, the State legislature enacted the Uttar Pradesh Secondary Education Services Selection Selection Board Act. The Statement of Objects and Reasons accompanying the introduction of the Bill in the State legislature contains the following rationale for the enactment of the law:

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

19. The Board came to be constituted under Chapter II of the Act and its powers in Section 9 include under clause (d), the power to make recommendations regarding the appointment of selected candidates. Section 16 of the Act of 1982 is in the following terms:

"16. Appointment to be made only on the recommendation of the Board.--(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but subject to the provisions of Sections 12, 18, 21-B, 21-C, 21-D, 21-E, 21-F, 33, 33-A, 33-B, 33-C, 33-D and 33-F, every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection

Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board.

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall mutatis mutandis apply.

Provided further that the appointment of a teacher by transfer from one Institution to another, may be made in accordance with the regulations made under Clause (c) of sub-section (2) of Section 16-D of the Intermediate Education Act, 1921.

Provided also that the dependent, of a teacher or other employee of an Institution dying in harness, who possesses the qualification prescribed under the Intermediate Education Act, 1921 may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under sub-section (4) of Section 9 of the said Act.

(2) Any appointment made in contravention of the provisions of sub-section (1) shall be void."

(emphasis supplied)

20. Section 16 contains a non-obstante provision which gives it overriding force and effect notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made under it. Under the provision, on and after the commencement of the Amending Act 2001, every appointment of a teacher must be made by the Management only on the recommendation of the Board. Any appointment, which is made in contravention of the provisions of sub-section (1) is declared to be void by sub-section (2).

21. In several decisions of this Court, the law has been settled to the effect that the power to make an appointment against a substantive vacancy does not vest with the Management by and as a result of Section 16. In Daya Shankar Mishra's case (supra), the Division Bench, while considering the reference made by the learned Single Judge, placed the position in law beyond any doubt in the following terms:

"We are also of the considered view that vacancies whether substantive or short term, should be filled up at the earliest to maintain our Constitutional goal of imparting quality secondary education. However, as long as the statutes create a bar, the management cannot be conferred with any power to make ad hoc appointment against substantive vacancy."

(emphasis supplied)

Payment of Salaries Act, 1971

22. It would now be necessary to turn to the provisions of the Payment of Salaries Act, 1971. Section 2 (b) of the Act defines the expression 'institution' to mean a recognised institution for the time being receiving a maintenance grant from the State Government. Section 2 (e) defines the expression 'teacher' in the following terms:

"(e) 'teacher' of an institution means a Principal, Headmaster or other teacher in respect of whose employment maintenance grant is paid by the State Government to the institution and includes any other teacher employed in fulfillment of the conditions of recognition of the institution or its recognition in a new subject or for a higher class or as a result of the opening with the approval of the Inspector of a new section in an existing class."

23. Section 3 requires the payment of salary to a teacher or other employee to

be made on or before the stipulated date without any deduction of any kind except a deduction which is authorized by the regulations or rules made under the Act, or by any other law for the time being in force. Under Section 9, no institution shall create a new post of a teacher or other employee except with the previous approval of the Director, or such other officer as may be authorized. Section 10 (1) imposes a liability on the State Government for the payment of salaries of teachers and other employees of every institution due in respect of any period after March 31, 1971.

Submissions

24. Now, it is in the background of these provisions that it would be necessary to consider the submissions, which have been urged on behalf of the petitioner by the learned counsel. Broadly, these submissions can be summarized thus:

(i) The posts against which the teachers have been appointed, albeit against substantive vacancies on an ad hoc basis, are sanctioned posts in respect of which grant-in-aid has been extended;

(ii) Under Section 9 of the Payment of Salaries Act, 1971, there is only an embargo against the creation of a new post by an institution except with the previous approval of the Director, while under Section 10, the State Government is under a mandatory duty and obligation to pay the salary of teachers and employees; the expression 'teacher' being defined in Section 2 (e). Section 16-E of the Intermediate Education Act, 1921 specifically confers a power to make appointments against temporary vacancies under sub-section (11).

(iii) Section 16 of the Act of 1982 falls in Chapter-IV where there is a selected teacher, since the chapter heading of the provision deals with the appointment of selected teachers. Hence, Section 16 of the Act of 1982 is not an embargo on the making of ad hoc appointments against substantive vacancies;

(iv) Alternatively, if Section 16 is to be read as placing an embargo on the management for making appointments of an ad hoc nature against substantive vacancies, this embargo should be 'tackled and set aside' by the Court in a situation where a recommendation of duly selected candidates is not made by the Board;

(v) Ad hoc appointment against substantive vacancies need to be protected until a regularly selected candidate is made available by the Board;

(vi) The interpretation which is placed by the Court on the provisions of Section 16 of the Act of 1982 must be such as would foster the implementation of the provisions of Articles 21 and 21-A of the Constitution;

(vii) The decision in Sanjay Singh's case (supra) is intended to deal with a situation where the legislation has remained silent. As a result of the amendment which was made to Section 18 of the Act 1982, the provision which existed earlier for making of ad hoc appointments of teachers has been substituted. As a result of this, Section 18, in its present form, does not contain any provision in relation to ad hoc appointments. Moreover, as a result of the introduction of Section 33-E with effect from 25 January 1999, the Removal of Difficulties Orders were rescinded. Section 32 provides that the Intermediate Education Act, 1921 and its regulations, shall continue to be in force for the purposes inter alia of selection, appointment and promotion insofar as

they are not inconsistent with the provisions of the Act of 1982. Consequently, the power to make ad hoc appointments which is recognized by Section 16-E of the Act of 1921 would survive notwithstanding the provisions of Section 16 of the Act of 1982 and in consequence, the State cannot deny its liability to pay salaries out of the public exchequer; and

(viii) The judgment of the learned Single Judge in Sanjay Singh's case (supra) has provided a practical modality for the disbursal of the salary of teachers who have been appointed on an ad hoc basis albeit against substantive vacancies so as to foster the attainment of the right to education. In these circumstances, the decision in Sanjay Singh's case (supra) which has taken a practicable and realistic view of the matter should be affirmed as laying down the correct position in law.

25. On the other hand, it has been urged on behalf of the State that:

(i) The decision in Sanjay Singh's (supra) has re-written the legislation since the consequence of the judgment is that notwithstanding the embargo which is imposed by Section 16 of the Act of 1982, managements have been permitted to make appointments on ad hoc basis even against substantive vacancies and to require that the salaries of the teachers who have been appointed should be disbursed by the State out of its grant-in-aid funds. This function, it has been submitted, is clearly not open to the Court in the exercise of the power of judicial review since it is well settled that a writ of mandamus cannot be issued contrary to a specific provision contained in law;

(ii) The decision in Sanjay Singh's case (supra) is erroneous insofar as it has relied upon a concurring judgment of one learned Judge of the Supreme Court in B C Chaturvedi Vs Union of India & Ors.8 holding that though there is no provision parallel to Article 142 of the Constitution in relation to the High Court, that would not be a ground to postulate that the High Court would not have a power to issue such directions as are necessary to do complete justice. This observation of the learned Judge in B C Chaturvedi (supra), which has been relied upon by the learned Single Judge, cannot be pressed in aid having due regard to the subsequent enunciation of law by the Supreme Court. The Supreme Court has held that the power even under Article 142 itself would not ordinarily be exercised contrary to statutory provisions;

(iii) In view of the specific embargo, which is imposed upon the management for making an appointment of a teacher except on the recommendation of the Board and overriding effect given in Section 16 of the Act of 1982 over the Intermediate Education Act, 1921 and its regulations, the view of the learned Single Judge in Sanjay Singh's case (supra) cannot be sustained;

(iv) The provisions of Section 16-E (11) of the Act of 1921 have been construed in the judgment of a Full Bench of this Court in Santosh Kumar Singh Vs State of Uttar Pradesh and Ors.9 as conferring a power in regard to the making of an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, or termination or otherwise and, even this appointment is not continued beyond the end of the educational session during which the appointment was made;

(v) In view of the judgment of a Full Bench of this Court in Smt. Pramila Mishra Vs Deputy Director of Education & Ors.10, it is a well settled position of law that an ad hoc appointment, even on a

short term vacancy, cannot continue after the vacancy has ceased to exist and a substantive vacancy has arisen in its place. In other words, where the management has made an ad hoc appointment against a substantive vacancy of its own accord, such an appointment, being contrary to the provisions of Section 16 of the Act of 1982, would have to be regarded as void having regard to the provisions of sub-section (2) and the liability to make payment of salary cannot be foisted on the State exchequer.

26. These submissions fall for consideration.

Analysis

27. Under the Intermediate Education Act, 1921, as it was enacted, the power to make appointments of teachers of institutions was vested in the Committee of Management under sub-section (1) of Section 16. Sub-section (2) and the succeeding provisions of Section 16-E regulated the procedure for making of appointments by stipulating the intimation of vacancies to the Inspector, advertising of vacancies, the convening of a Selection Committee, the award of quality points by the inspector and the preparation of the select list by the Selection Committee in order of preference. Sub-section (11) of Section 16-E specifically deals with appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. Under sub-section (11), it is stipulated that temporary vacancies of that nature would be filled up by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed. Under the proviso to sub-section (11), it has been stipulated that no appointment which is made under this sub-section shall, in any case, continue beyond the end of the educational session during which the appointment was made. In other words, the end of the educational session is marked under sub-section (11) as the terminal date upon which an appointment which is made either by direct recruitment or by promotion against a temporary vacancy of the nature prescribed in sub-section (11) will cease to exist.

28. The object of enacting the Act of 1982 was to deal with a situation where it was felt by the legislature that the selection of teachers under the provisions of the Intermediate Education Act, 1921 and its regulations had not been free and fair. The field of selection was restricted which, in the view of the legislature, had adversely affected the availability of suitable teachers and the standards of education. Hence the Secondary Education Services Selection Board came to be constituted. Under the provisions of Section 16, it came to be stipulated that notwithstanding anything contained in the Intermediate Education Act, 1921 or the regulations made thereunder, every appointment of a teacher shall be made only on the recommendation of the Board by the management. The position that an appointment made otherwise than on the recommendation of the Board cannot be permissible is elucidated in sub-section (2) which provides that an appointment made in contravention of the provisions of sub-section (1) shall be void. Section 22 provides specifically for punishment in respect of appointment of teachers in contravention of the provisions of the Act. Section 22 provides as follows:

"22. Punishment for appointment of teachers in contravention of the provisions

of the Act. - Any person who fails to comply with the recommendations of the Board or fails to comply with the order or direction of the Director under section 17, or appoints a teacher in contravention of the provisions of this Act shall on conviction, be punished with imprisonment for a term which may extend to three years or with fine which may extend to five thousand rupees or with both."

29. Prior to 1999, the matter relating to the selection and appointment of teachers on an ad hoc basis was provided for in various Removal of Difficulties Orders which were issued by the State Government. At that stage and particularly, in the absence of a detailed procedure for making ad hoc appointments under Section 18 of the Act of 1982, these Removal of Difficulties Orders governed the procedure for making ad hoc appointments against substantive vacancies or short term vacancies, as the case may be, respectively. In the decision of this Court in Radha Raizada Vs Committee of Management, Vidyawati Darbari Girls Inter College and Ors.11, the Full Bench held that appointments which were made de hors the First and the Second Orders would be void ab initio and would not confer any right on the appointees to claim their salary.

30. In Prabhat Kumar Sharma Vs State of Uttar Pradesh12, the Supreme Court upheld the view taken by the Full Bench of this Court in Radha Raizada (supra). The Supreme Court held that any ad hoc appointment of teachers under Section 18 of the Act of 1982 pending the allotment of a teacher selected by the Commission and recommended for appointment, was required to be made in accordance with the procedure prescribed in Paragraph 5 of the First Order of 1981 and any appointment made in transgression thereof, is an illegal appointment and being void, would confer no right on the appointees. The Supreme Court held that:

"As seen prior to the Amendment Act of 1982 the First 1981 Order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in an aided institution. It is obvious that when the salary is paid by the State to the government-aided private educational institutions, public interest demands that the teachers' selection must be in accordance with the procedure prescribed under the Act read with the First 1981 Order."

(emphasis supplied)

31. The principle which was laid down by the Supreme Court was that an appointment which was made in contravention of the procedure prescribed, would render the appointment void and since salary is paid by the State to government aided private educational institutions, the public interest demands that the selection of teachers must be strictly in accordance with the procedure prescribed under the Act of 1982.

32. Since the decision of the Full Bench of this Court in Smt Pramila Mishra (supra), it has been a well settled principle of law that a clear distinction has been maintained between a substantive vacancy and a short term vacancy on the post of a teacher. After construing the provisions of the relevant Acts, rules and regulations and Removal of Difficulties Orders, the Full Bench, while emphasizing this distinction, held that the procedure to be followed in making appointments and the considerations to be borne in mind in making such

appointments in the two cases are distinct and different from each other.

33. Section 18 of the Act of 1982, prior to its amendment which came into effect on 30 December 2000 by U P Act 5 of 2001, laid down a detailed procedure for making ad hoc appointments. Section 18 has traversed a considerable legislative history from the originally enacted provisions of the Act of 1982 to the subsequent amendments which took place by U P Act 24 of 1992, U P Act 1 of 1993, U P Act 15 of 1995, and U P Act 25 of 1998. Finally, by U P Act 5 of 2001 with effect from 30 December 2000, ad hoc appointment of teachers was done away with. The substituted provisions of Section 18, as they stand now, only provide for appointment of ad hoc Principals and Headmasters. The effect of this provision was considered by a Division Bench of this Court in a reference which arose from a learned Single Judge's order in Daya Shankar Mishra (supra). The Division Bench held that consequent upon the provisions of Section 32 of the Act of 1982, the provisions of the Intermediate Education Act 1921 and its rules and regulations would, inter alia, continue to be in force for the purpose of selection, appointment and promotion insofar as they are not inconsistent. In the view of the Division Bench, selection, appointment and promotion would include both substantive as well as short-term vacancies. Since there is no provision under the Act of 1982 for making selection and appointments against short-term vacancies, the Division Bench held, placing reliance on the provisions of Section 16-E, that the power of the management to make ad hoc appointments to fill up a short term vacancy is preserved. Consequently, it was held, taking the aid of Section 32 of the Act of 1982, that the power of the management to take steps to make ad hoc appointments against temporary vacancies till the end of the academic session would stand preserved.

34. In a recent decision of a Full Bench of this Court in Santosh Kumar Singh (supra), the judgment of the Division Bench in Daya Shankar Mishra's case (supra) was taken note of and it was held as follows:

"19. Sub-section (11) of Section 16-E has thus made a specific provision in regard to appointments in the case of temporary vacancies caused by (i) the grant of leave to an incumbent for a period not exceeding six months; (ii) by death, termination or otherwise of an incumbent occurring during an educational session. The object of the provision is to ensure that where a temporary vacancy arises as a result of fortuitous circumstances, such as leave, death, termination or otherwise, the educational needs of students should not be disturbed. The purpose of making an arrangement in the case of a temporary vacancy is to protect the interest of education so that students are not left in the lurch by the absence of a teacher in the midst of an academic session. The proviso to sub-section (11), however, stipulates that an appointment which is made under the provisions of sub-section (11) shall, in no case, continue beyond the end of the educational session during which the appointment was made. The proviso is intended to ensure that the purpose of appointment against a temporary vacancy caused due to the absence of a teacher in the midst of an academic session is met by continuing the appointment during and until the end of the academic session but not further. This is a provision which has been made by the state legislature in its legislating wisdom.

The statutory provision provides both for the circumstances in which a temporary vacancy can be filled up and the length of an appointment made against a temporary vacancy. The difficulty which arises is because the Board, which has been constituted under the Act, does not fulfill its mandate of promptly selecting teachers for regular appointment. The District Inspector of Schools is in possession of necessary factual data in regard to the dates of appointment and retirement of teachers of aided institutions. This can be summoned by the Board even if the management does not comply with its duty to intimate vacancies. There can be no justification for the Board not to discharge its duties with dispatch and expedition. This is liable to result in a situation where the educational needs of students are seriously disturbed due to the unavailability of duly selected teachers. Ad hoc appointments in temporary vacancies also cause a state of uncertainty for teachers and lay them open to grave exploitation at the hands of certain managements of educational institutions. Thus, considering the matter both from the perspective of the interest of education as well as the welfare of teachers, it is necessary that the Board must take due and proper steps well in advance of an anticipated vacancy to initiate the process of selection. Similarly, the State Government would do well to streamline the procedure for making appointments in respect of temporary vacancies consistent with the mandate of Section 16-E (11) so that, while the interest of students is protected, the teachers are not exposed to exploitation."

35. While answering the reference, the Full Bench held that:

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

36. Now, it is in this background, that it would be necessary to elucidate the provisions of the Payment of Salaries Act 1971. The expression 'teacher' in Section 2 (e) of the Act is defined to mean a Principal, Headmaster, or other teacher "in respect of whose employment" the maintenance grant is paid by the State Government to the institution. In other words, the definition of the expression 'teacher' is related to the person in respect of whose employment the maintenance grant is paid. The definition relates not to the post as much as the person in respect of whose employment the maintenance grant is paid.

37. The issue before the Court is whether a writ of mandamus can, as a matter of first principle, be issued for directing the payment of salary by the State to a teacher appointed without complying with mandatory legal provisions. The principle of law which must govern is settled by the judgment of the Supreme Court in Government of Andhra Pradesh Vs K Brahmanandam13, where it has been held that:

"14. The liability of the State to pay salary to a teacher appointed in the

recognized schools would arise provided the provisions of the statutory rules are complied with, subject to just exception. The right to claim salary must arise under a contract or under a statute. If such a right arises under a contract between the appointee and the institution, only the latter would be liable therefor. Its right in certain situation to claim reimbursement of such salary from the State would only arise in terms of the law as was prevailing at the relevant time. If the State in terms of the statute is not liable to pay the salary to the teachers, no legal right accrues in favour of those who had been appointed in violation of mandatory provisions of the statute or statutory rules."

38. The Supreme Court observed that where an appointment is made in violation of a mandatory provision of a statute, it would be illegal and void and such an illegality cannot be ratified or regularized.

39. The same principle has been emphasized in a later decision of the Supreme Court in State of West Bengal Vs Subhash Kumar Chatterjee14 in the following observations:

"30. ...Neither the Government can act contrary to the rules nor the court can direct the Government to act contrary to rules. No mandamus lies for issuing directions to a Government to refrain from enforcing a provision of law. No court can issue mandamus directing the authorities to act in contravention of the rules as it would amount to compelling the authorities to violate law. Such directions may result in destruction of rule of law."

40. In Shesh Mani Shukla Vs District Inspector of Schools, Deoria15, the Supreme Court dealt with a claim of equity at the behest of a person whose appointment was not in accord with the provisions of the First Removal of Difficulties Order 1981. Rejecting the submission, based on equity, the Supreme Court held that:

"19. It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. (See Food Corpn. of India v. Ashish Kumar Ganguly, (2009) 7 SCC 734. Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. (See State of M.P. v. Sanjay Kumar Pathak, (2008) 1 SCC 456)I."

41. A similar view has been adopted by the Supreme Court in Pramod Kumar Vs U P Secondary Education Services Commission16, where it has been held that:

"18. ...An appointment which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularized, particularly, when the statute in no unmistakable term says so. Only an irregularity can be. [See Secy., State of Karnataka v. Umadevi (3), (2006) 4 SCC 1, National Fertilizers Ltd. v. Somvir Singh (2006) 5 SCC 493 and Post Master General, Kolkata v. Tutu Das (Dutta), (2007) 5 SCC 317.]"

42. The learned Single Judge, in the course of the judgment in Sanjay Singh's case (supra), has specifically held that in view of the consistent position of law laid down in the judgments of this Court, and particularly having regard to the judgment of the Division Bench in Daya Shankar Mishra's case (supra), the Committee of Management does not have any power to make an appointment against a permanent vacancy. Moreover, it would also be necessary to note that the Act of 1982 has undergone two important changes of consequence in regard to the appointment of ad hoc teachers. The first relates to the substitution of Section 18 by U P Act 5 of 2001 with effect from 30 December 2000 by which, the ambit of the Section has now been confined to the appointments of ad hoc Principals and headmasters. The second important legislative development is Section 33- E as a result of which, the Removal of Difficulties Orders came to be rescinded. In consequence, and founded on the principle, it has been laid down by the Division Bench in Daya Shankar Mishra (supra) and by the Full Bench in Santosh Kumar Singh (supra), that any appointment to a temporary vacancy would have to meet the requirements as spelt out in Section 16-E (11) of the Intermediate Education Act 1921 and the regulations framed thereunder. There is no other source of power or provision that would enable the management to make an appointment where the field is completely regulated by the aforesaid statutory provisions.

43. The judgment of the learned Single Judge in Sanjay Kumar Singh's case (supra) seeks to derive sustenance for the view which was taken on the hypothesis that there vests in the High Court, a power analogous to Article 142 of the Constitution for the purpose of rendering complete justice. In fact, as we notice from the decision of the learned Single Judge, reliance has been placed on the observations in the judgment of Hon'ble Mr Justice Hansaria in B C Chaturvedi (supra). This issue is no longer res integra and has now been dealt with in several successive judgments of the Supreme Court, including in State of Jharkhand Vs Bijay Kumar17. Dealing with the aspect of whether it is open to the High Court in the exercise of its jurisdiction under Article 226 of the Constitution to issue directions analogous to those which are within the jurisdiction of the Supreme Court under Article 142 of the Constitution, the Supreme Court held thus:

"17. The Constitution of India conferred a special jurisdiction on this Court only. Although power of judicial review has been conferred on the High Courts, it had not been given any special jurisdiction as has been done on the Supreme Court in terms of Article 142 of the Constitution of India. It is, therefore, very difficult to comprehend that the High Court could issue the impugned direction which, in effect and substance, would be violative thereof."

(emphasis supplied)

44. This was followed in the judgment of the Supreme Court in Manish Goel Vs Rohini Goel18.

45. Finally, we may also refer to the judgment of the Supreme Court in A B Bhaskar Rao Vs Inspector of Police, CBI Vishakapatnam19 where the principles of law were formulated. Among them, the following principles have a bearing on the present case:

"30. ...

(f) An order, which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provision of the relevant statute. In other words, this Court cannot altogether ignore the substantive provisions of a statute.

(g) In exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provision nor is the power exercised merely on sympathy.

(h) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplanting the substantive law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.

(i) The powers under Article 142 are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

46. We hence, find merit in the contention which has been urged on behalf of the State that the general considerations which weighed with the learned Single Judge in the decision in Sanjay Singh (supra) cannot form the foundation of a sustainable direction in law, that the State can be issued a writ of mandamus to pay salaries from the public exchequer in respect of an appointment made by the management against a substantive vacancy on an ad hoc basis. The scope and ambit of the power of the management to fill up temporary vacancies is clearly defined by the provisions of Section 16-E (11) of the Act of 1921 and its regulations. The legislature in its wisdom has enacted the Act of 1982 so as to provide in Section 16 that notwithstanding anything contained in the Act of 1921, an appointment shall be made by the management only on the recommendation of the Board. The legislature further specified that any appointment made in contravention of the provisions of sub- section (1) of Section 16 would be void. During the period when the Removal of Difficulties Orders held the field, which contained a provision for making ad hoc appointments, the law was well settled both by the Supreme Court and by this Court that any appointment made in violation of the provisions contained in those orders would be void and that a direction for the payment of salary could not be sustained on the basis of such an appointment. After Section 18 was amended successively, a procedure was provided initially for making ad hoc appointments but, as we have noticed, Section 18, in its present form is confined only to Principals and Headmasters. The only source of power then for making appointments of an ad hoc nature is relatable to the provisions of Section 16-E (11) of the Act of 1921 read with regulations. Any appointment which is de hors the provisions of the Act of 1921 and the regulations cannot be countenanced in law. A mandamus cannot be issued to the State for the payment of salary where the appointment by its very nature is in contravention of law and void.

47. There can be no dispute about the basic principle of interpretation which was sought to be emphasized by the petitioner that, in the course of interpreting

a statute, it would be open to the Court to adopt an interpretation which, while being in accord with the terms of the statute, makes the statute workable. But equally in this process, it would not be open to the Court to re-write statutory provisions or to mandate an act such as the payment of salary in respect of an appointment which is made otherwise than in accordance with the statutory provisions and the rules. Article 21-A of the Constitution upon which reliance has been placed by the learned Single Judge in Sanjay Singh's case (supra) mandates that the State shall provide free and compulsory education to all children between ages of six to fourteen in such manner as the State may, by law, determine. The law undoubtedly, has to be fair, just and reasonable.

48. This Court in repeated judgments has drawn the attention of the State to the need to streamline the procedures in a line of precedent from this Court culminating in the judgment of the Full Bench in Santosh Kumar Singh (supra). The observations of this Court shall be taken up by the State with a sense of the highest priority and with all seriousness to ensure that a situation does not emerge where vacancies of a substantive nature are left unfilled over a long period of time to the detriment of education. The State Government must take up the matter with necessary alacrity and immediacy.

Conclusion

49. For these reasons, we have come to the conclusion that the view of the learned Single Judge in Sanjay Singh's case (supra) cannot be upheld as laying down the correct position in law. The view of the learned Single Judge shall stand, accordingly, overruled. The judgment in Pradeep Kumar (supra) is upheld subject to the principles which, we have enunciated in this judgment.

50. The second issue which has been referred for decision before the Division Bench is the scope of Section 16-E (11) when read in the context of Sections 16, 22, 32 and 33-E of the Act of 1982. We have already dealt with the interpretation of these provisions in the course of the judgment.

51. The reference to the Division Bench shall stand answered in the aforesaid terms. The record of these proceedings shall now be remitted back to the learned Single Judge, according to roster, for disposal in the light of the questions answered.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2016

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 1685 of 2016

Karta Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ganga Prasad Srivastava, Rishi Kumar Tripathi

Counsel for the Respondents:
C.S.C.

Civil Services Regulations-Regulation-468-qualifying service for pension-work charge employees after completing to 9 years 10 months 5 days regular service-retired authorities considering Division Bench Judgment-rejected claim-saying work charge period shall not be counted

to qualifying service of 10 years -held-in view of Regulation 468-fractions of half year shall be equal to 3 month or above to that-entitled for pensionary benefits-direction for fresh consideration within 3 months issued-petition disposed of.

Held: Para-5
In the light of the said provision, as the petitioner had put in 9 years 10 months and 5 days in service, fraction of a half year above three months is four months and 5 days, therefore, the case appears to be covered by Regulation 468 and the said period is liable to be treated as complete one-half year, which, if the facts as stated by the petitioner are correct, entitle the petitioner to ten years qualifying service for pension, but this aspect of the matter has not been considered while passing the impugned order.

Case Law discussed:
(2015) 8 ADJ 716

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

1. Heard learned counsel for the parties.

2. The petitioner herein claims to have been appointed on Daily Wages as Beldar on Muster Roll basis in the year 1977-73. He claims that on 26.06.1997 his services were regularized in terms of the then existing Regularization Rules. He attained the age of superannuation and retired from the service of the opposite parties on 30.04.2007. As the regular services rendered by him, which alone have been counted for the purposes of calculation of the qualifying services for determination of pension payable, was only nine years, ten months, five days, therefore, he has been held to be disentitled to such pension and has not been paid the same. As per the facts narrated by the petitioner, he fell short of the required qualifying services of 10 years only by one month and about twenty five days.

3. It is rather strange that such matters are coming up before this Court for consideration despite there being a specific provision under the said Service Regulation i.e. Regulation 468 which deals with such a situation and allows a period of service more than three months to be counted as six months.

4. The concerned authority while passing the impugned order dated 05.07.2014 has rightly stated that the services rendered on work charged basis can not be counted for the purposes of calculation of qualifying services, but has omitted to consider the provisions of Regulation 468 of the Civil Service Regulations which provides that the amount of pension that may be granted is determined by length of service. In calculating the length of qualifying service, fractions of a half year equal to three month and above shall be treated as a complete one-half year and reckoned as qualifying service.

5. In the light of the said provision, as the petitioner had put in 9 years 10 months and 5 days in service, fraction of a half year above three months is four months and 5 days, therefore, the case appears to be covered by Regulation 468 and the said period is liable to be treated as complete one-half year, which, if the facts as stated by the petitioner are correct, entitle the petitioner to ten years qualifying service for pension, but this aspect of the matter has not been considered while passing the impugned order.

6. In view of the above, though in view of the Division Bench judgment rendered in Special Appeal (Defective) No.23 of 2014 reported in (2015) 8 ADJ 716 the services rendered by the petitioner

as a muster-roll or work-charge employee cannot be counted for the purposes of calculating the qualifying service for pension, nevertheless, he is entitled to be considered for the benefit of the provisions contained in Regulation 468 of the Civil Service Regulations. The matter is remanded back to the competent authority for taking a fresh decision in terms of the observations made hereinabove within a period of six weeks from the date a certified copy of this order is produced before him. Consequences as regards payment of pension and other post-retirement benefits shall follow as per rules based on the decision so taken.

7. It is open for the petitioner to claim interest on the amount of pension payable if the delay is on account of the opposite parties by approaching the appropriate forum as and when the cause of action arises.

8. Considering the fact that such petitions are coming up before this Court everyday, let a copy of this judgment and order be sent to the Chief Secretary, U.P. and Principal Secretary, Karmik as also to the Principal Secretary, Finance for ensuring compliance of the said provision at the time of calculation of qualifying service of government servants who are due to retire or have retired so that they may not be compelled to approach this Court unnecessarily.

9. This writ petition is disposed of in the above terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2016

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 1788 of 2015

Vidya Dhar Pandey ...Petitioner
Versus
Lucknow University, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Shameem Khan

Counsel for the Respondents:
Shashi Prakash Singh

Constitution of India, Art.-226-forfeiture of salary-during suspension period-without show cause notice-without opportunity to explain-held-illegal-in view of O.P. Gupta case-separate show cause notice is must order quashed-with direction to proceed a fresh-after show cause notice.

Held: Para-8
As no show cause notice was issued to the petitioner therefore, the impugned order to this extent is set aside and liberty is given to the concerned authority to proceed afresh if forfeiture of remaining salary of the suspension of petitioner is proposed by issuing a show cause notice and thereafter take an appropriate decision in accordance with law.

Case Law discussed:
(1987) 4 SCC 328.

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

1. Heard learned counsel for the parties.

2. Sri Savitra Vardhan Singh has put in appearance on behalf of the Lucknow University.

3. The petitioner has challenged the order dated 14.03.2014 passed by the Registrar, Lucknow University by which the salary for the period of suspension of the petitioner has been forfeited by way of punishment.

4. Inspite of the order dated 20.04.2015 no counter affidavit has been filed by the University, therefore, the facts stated in the writ petition remain unrebutted.

5. The contention of the petitioner is that merely on the direction of the Vice Chancellor the impugned order of forfeiture of salary for the period of suspension has been passed without issuing any show cause notice.

6. A perusal of the impugned order reveals that a charge sheet was issued to the petitioner and he was placed under suspension on 08.11.2013. According to the petitioner he had filed reply to the charge sheet. The impugned order shows that the final decision was taken by the Vice Chancellor in the matter awarding an adverse entry for the alleged misconduct with a direction to the concerned authority to forfeit the salary of the petitioner for the suspension period.

7. The legal position is very well settled by the decision of the Supreme Court reported in (1987) 4 SCC 328 (O.P. Gupta vs. Union of India & others) that forfeiture of remaining salary for the period of suspension requires issuance of separate show cause notice under intimation as the matter of forfeiture of salary has financial implications. The petitioner needs to be confronted as to why the financial burden be not imposed upon him.

8. As no show cause notice was issued to the petitioner therefore, the impugned order to this extent is set aside and liberty is given to the concerned authority to proceed afresh if forfeiture of remaining salary of the suspension of petitioner is proposed by issuing a show cause notice and thereafter take an appropriate decision in accordance with law.

9. The writ petition is disposed of in the aforesaid terms

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2016

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Writ-A No. 2184 of 2016

Smt. Sangeeta Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rajesh Kumar Singh Kaushi

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act-1921-Section 16 (I), 16 E (ii)-appointment of Assistant Teacher-against substantive vacancy-on retirement of regular teachers-appointment by management not to continue more than 6 months or end of academic session-any appointment-in contravention of Section 16 (i)-held-void-as per law laid down by Division Bench-Abhishek Tripathi case-direction for financial approval can not be given-petition dismissed.

Held: Para-7
Though under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management has the power to make an appointment but in exercise of the said power, an appointment can only be made against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months, or in the case of

death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E, as provided in the proviso, in any case, shall not continue beyond the end of the educational session during which the appointment was made.

Case Law discussed:
2013 (1) UPLBEC 759; Writ -A No. 22520 of 2013; W.P. No. 655 (SS) of 2014.

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

1. This writ petition has been filed praying inter alia for the following reliefs: -

i) issue a writ, order or direction in the nature of mandamus commanding and directing the respondent no.2 to grant financial approval to the appointment of the petitioners on the post of assistant teacher in the institution.

ii) issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to pass appropriate order and release the salary of the petitioner as and when due as per the law month to month.

2. Rashtriya Inter College, Mehrenw, Purenw, Jaunpur (for brevity 'the College') is a recognized and aided college and is governed by the provisions of Intermediate Educaiton Act, 1921 and the Regulations framed thereunder. In the College two posts of Assistant Teachers fell vacant due to retirement of Sri Kalka Prasad Singh and Sri Bhola Nath Singh, who retired on 30.6.2002 and 30.6.2007 respectively. A requisiton for selection is alleged to have been sent to the Secondary Education Services Selection Board on 26.5.2014. On 5.9.2015, the Committee of Management of the College issued an advertisement in daily newspapers 'Tarun Mitra, Aaj' and 'Swatantra Bharat' inviting applications for appointment on two posts of Assistant Teachers in the College.

3. According to the petitioners, they applied for appointment on the said posts along with other candidates and after interview they were selected and in pursuance of the recommendation of the Selection Committee, the Committee of Management of the College approved the appointment of the petitioners on the posts in question. Thereafter, on 29.10.2015, the papers pertaining to selection of the petitioners were forwarded to the DIOS (for short 'DIOS'). As nothing was heard off from the DIOS in this regard, the petitioners have preferred this writ petition.

4. Shri Rajesh Kumar Singh Kaushi, the learned counsel for the petitioners has submitted that the selection of the petitioners was only till regularly selected candidates joined the posts. The counsel relying upon the decision of this Court in Sanjay Singh & Ors. v. State of U.P. & Ors., 2013 (1) UPLBEC 759 has submitted that in the circumstances, the respondent no.3 was obliged to accord approval to the appointment of the petitioners.

5. Appointment of teacher in a recognized Intermediate College is governed by the provisions of the U.P. Secondary Education (Service Selection Board) Act, 1982 (for short '1982 Act). As per Section 16 of 1982 Act, the appointment of a teacher in the Intermediate College is to be made only on the recommendation of the Board constituted under the Act and as per sub-

section (2) of section 16 of 1982 Act any appointment made in contravention of the provisions of sub-section (1) of Section 16 is void.

6. Admittedly, the posts of Assistant Teachers in the College fell vacant on substantive basis and in view of the provisions of Section 16 of 1982 Act the appointment on the said posts could only be made on the recommendation of the Board. There is no provision in the 1982 Act, which may empower the Committee of Management to make an ad hoc or temporary appointment against a substantive vacancy, and as such the petitioners could not have been selected for appointment by the Committee of Management of the College.

7. Though under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management has the power to make an appointment but in exercise of the said power, an appointment can only be made against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months, or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E, as provided in the proviso, in any case, shall not continue beyond the end of the educational session during which the appointment was made.

8. In Writ A No.22520 of 2013, Pradeep Kumar Vs. State of U.P. & 3 Ors., a Learned Single Judge of this Court after considering the case of Sanjay Singh (supra) held that an appointment made by the Committee of Management against a substantive vacancy is a nullity. Relevant portion of the said judgment is extracted below:-

"In these circumstances, merely because the management has made appointment of a person, who is qualified in terms of the Appendix-A, it will not mean that the said appointment is in accordance with law. In view of Section 16 of Act, 1982, it would be a nullity. No appointment against substantive vacancy can be made except on the recommendation of the Selection Board in view of the law as it stands today. Reference Smt. Prameela Mishra Vs. State of U.P. & othes; 1997 (2) UPLBEC 1329 and Surendera Kumar Srivastava vs. State of U.P. & others; 2007 (1) ESC 118."

9. The conflict in the opinion in the case of Sanjay Singh (Supra) and Pradeep Kumar (Supra) was resolved by a Division Bench of this Court in Writ Petition No.655 (SS) of 2014, Abhishek Tripathi vs. State of U.P. & Ors. wherein the case of Sanjay Singh was overruled. Para 42 of the judgment is quoted below:-

"42. For these reasons, we have come to the conclusion that the view of the learned Single Judge in Sanjay Singh's case (supra) cannot be upheld as laying down the correct postion in law. The view of the learned Single Judge shall stand, accordingly, overrulled. The judgment in Pradeep Kumar (supra) is upheld subject to the principles which, we have enunciated in this judgment."

10. In view of the above, the reliefs prayed for cannot be granted.

11. The writ petition is devoid of merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2015

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 7176 of 2015

Smt. Vandana Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Khaleeq Ahmad Khan

Counsel for the Respondents:
C.S.C., Anil Kumar Singh Vishen

U.P. Recruitment of Dependents of Government Servant Dying in Harness Rule 1974-Rule 5(3), (4), Rule-7-compassionate appointment-if there are more than one claimant-authorities to consider and take appropriate decision keeping in view of provisions of Rule 5(3) and 5(4)-petition disposed of.

Held: Para-8
In view of rule 7 of the Rules, 1974 as there are rival claimants the competent authority shall take a decision in the light of the aforesaid Rules, 1974 within a period of two months from the date a certified copy of the order is submitted before him, based on the application already submitted which has been decided by the impugned order and for this purpose the said application shall stand restored. The question of payment of death-cum-retiral dues shall be dealt with in accordance with the Rules within a period of next three months. Let a fresh decision be taken uninfluenced by the directions or order passed by this Court referred to hereinabove subject of course to their entitlement under the aforesaid provisions.

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

1. Heard learned counsel for the parties.

2. The petitioner herein is the wife of deceased Vivek Kumar Mishra who is said to have died in harness barely two and half months of the marriage with petitioner. The opposite parties 4 to 7 are the father, mother and sister of deceased. The opposite parties 4 to 7 had earlier filed a Writ Petition No. 3476 (SS) of 2015 which was decided on 18.06.2015 with a direction to consider the case of petitioner no.4 therein under rule 2(c)(iv) of the U.P. Recruitment of dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as 'the Rules, 1974') with a further direction to clear the dues in favour of petitioners 1 to 3.

3. Apparently the said direction appears to have been issued under some misconception as if, the deceased was unmarried whereas on perusal of the record of the said writ petition it is revealed that in paragraphs 8 and 9 of the writ petition it was specifically stated that the deceased had been married with the petitioner herein namely; Smt. Vandana Mishra on 18.06.2016 and within two and half months of the marriage, the the death of her husband happened. Therefore, no benefit can be derived by the opposite parties 4 to 7 in pursuance to the directions contained therein, in view of admitted factual error mentioned therein unless the claim of all the claimant is considered in accordance with the relevant Rules.

4. The petitioner herein on her part filed another Writ Petition No. 4568 (SS) of 2015 which was decided vide order dated 07.08.2015 with a direction to the concerned opposite party to take

appropriate decision on her representation.

5. In neither of the writ petitions, the rival parties were impleaded, therefore, both the contesting parties did not approach this Court with clean hands and cannot derive benefit of the orders passed in their writ petitions subject to their claim being reconsidered afresh in the light of the relevant Rules. The Rule 5(3) & (4) of the Rules, 1974 read as under:-

"5(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

"5(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

6. The said Rule enjoins upon the appointee to maintain other members of the family of the deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves and on failure to do so, such an appointment is liable to be terminated in accordance with the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999. Who were the persons dependent upon the deceased immediately after his death is a factor to be considered by the concerned authority.

7. Rule 7 of the aforesaid Rules, 1974 reads as under:-

"Rule-7. If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment.The decision will be taken keeping in the view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof."

8. In view of rule 7 of the Rules, 1974 as there are rival claimants the competent authority shall take a decision in the light of the aforesaid Rules, 1974 within a period of two months from the date a certified copy of the order is submitted before him, based on the application already submitted which has been decided by the impugned order and for this purpose the said application shall stand restored. The question of payment of death-cum-retiral dues shall be dealt with in accordance with the Rules within a period of next three months. Let a fresh decision be taken uninfluenced by the directions or order passed by this Court referred to hereinabove subject of course to their entitlement under the aforesaid provisions.

9. The writ petition is disposed of in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2015

BEFORE

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

Writ-C No. 8179 of 2015

Paras Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Vivek Kumar Singh

Counsel for the Respondents:
Shri C.B. Yadav, Shri Anurag Khanna, Shri Nipun Singh

(A) U.P. Municipalities Act-Section 48(2)-ceasure of financial & administrative power of Chairman-on fulfillment of any of contingencies of Section 48 (2)-on being satisfied the State Government can cease administrative and financial power-no need of formal enquiry-only on basis of show cause notice such powers can be ceased-as per law laid down by Full Bench-in Hafiz Attaullah Ansari-held-correct law.

Held: Para-45 (I) & (II)
(I) Re Question (a): The decision of the Full Bench in Hafiz Ataullah Ansari Vs State of U P (supra) lays down the correct position in law.

(II) Re Questions (b) & (c): The cessation of financial and administrative powers of the President does not necessarily follow merely upon the issuance of a notice to show cause under the substantive part of Section 48(2). The financial and administrative powers of the President shall stand ceased if the State Government has reason to believe that (i) the allegations do not appear to be groundless; and (ii) the President is prima facie guilty on any of the grounds of sub-section (2) resulting in the issuance of the notice to show cause and proceedings thereunder. The President of the municipality will, in that event, cease to exercise, perform and discharge financial and administrative powers, functions and duties from the date of the issuance of the notice to show cause containing the charges. For a cessation of financial and administrative powers to take effect, the requirements of the proviso to Section 48(2) must be fulfilled. Hence, proceedings for removal of a President of a municipality under Section 48(2) may take place in a given situation though the financial and administrative powers have not ceased under the terms of the proviso.

(B)U.P. Municipalities Act-Section 48 (2)-administrative and financial power of president of municipality-whether required to pass separate order ceasing of administrative & financial power-held-"no"-only on satisfaction about fulfillment of requirements specific in proviso to Section 48 (2)-power can be exercised.

Held: Para-45 (III)
Re Question (d): There is no requirement under the statute that a separate order has to be passed under the proviso to Section 48(2) when the financial and administrative powers of the President of a municipality cease. Such a consequence would come into being upon the requirements specified in the proviso to Section 48(2) being fulfilled.

(C)U.P. Municipalities Act-Section 48(2)-financial and administrative power-principle of natural justice-whether required to be followed?-held-"yes"-reason discussed.

Held: Para-45 (IV)
Re Question (e): An opportunity of being heard, consistent with the principles of natural justice, before there is a cessation of the financial and administrative powers of the President does not stand excluded by the provisions of Section 48(2). As a matter of textual interpretation, the requirement of complying with the principles of natural justice is an integral element of the proviso to Section 48(2). The requirements of natural justice

would warrant the grant of an opportunity to the elected head of a municipality to respond to the notice issued by the State indicating the basis for the formation of a reason to believe that the charges do not appear to be groundless and that the President is prima facie guilty on any of the grounds mentioned in sub-section (2) of Section 48. The period of notice can be suitably molded to deal with the exigencies of the situation.

Case Law discussed:
[2011 (3) ADJ 502 (FB)]; 1993 Supp (2) SCC 497:AIR 1993 SC 1167; (1985) 3 SCC 72:1985 SCC (Cri) 312:AIR 1985 SC 989; (1973) 3 SCC 83:AIR 1972 SC 2267; (1972) 3 SCC 234:AIR 1971 SC 2451; AIR 1967 SC 523; (1976) 3 SCC 757:1976 SCC (Tax) 402:AIR 1976 SC 1753; (1973) 3 SCC 265:1973 SCC (Tax) 177:AIR 1973 SC 370; UP Act 26 of 1964; UP Act 12 of 1994; UP Act 22 of 2001; UP Act 6 of 2004; (2012) 4 SCC 407; (2002) 5 SCC 685:AIR 2002 SC 2158; AIR 1963 SC 395; AIR 1964 SC 364; (2001) 6 SCC 260; (2010) 2 SCC 319; (1993) 1 SCC 78; (2015) 8 SCC 519; AIR 1967 SC 295; AIR 1967 SC 1753; (1972) 3 SCC 234; (2008) 4 SCC 144.

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

The issue in controversy

1. A Division Bench of this Court, finding itself "unable to accept the law" laid down in a decision of a Full Bench in Hafiz Ataullah Ansari Vs State of U P1, referred the following questions for determination by a larger Bench:

"(a) Whether the Full Bench judgment in the case of Hafiz Ataullah Ansari Vs. State of U.P. (supra) lays down the correct law;

(b) Whether in view of the language of the proviso to Section 48(2) of the U P Municipalities Act, there can be any proceedings for removal of the President without his financial and administrative powers ceasing, under the proviso;

(c) Whether cessation of financial and administrative powers of the President follows automatically with the issuance of a show cause notice under Section 48 (2) calling upon him to show cause as to why he may not be removed;

(d) Whether any separate order for cessation of financial and administrative powers of the President is required to be made while issuing a notice under the proviso to Section 48(2) or such cessation follows automatically; and

(e) Whether in view of the specific language of Section 48(2), the question of opportunity of hearing before cessation of the financial and administrative powers of the President stands excluded."

2. Since a decision rendered by a Bench of three Judges which constituted the Full Bench in Hafiz Ataullah Ansari has been doubted, the reference comes before this Bench of five Judges.

Removal of the President of a Municipality

3. The issue which falls for determination, turns upon the provisions of Section 48 of the Uttar Pradesh Municipalities Act, 19162. Sub-section (2) of Section 48 deals with the removal of the President of a municipality and is in the following terms:

"48. Removal of President.- (1) ..... [omitted]

(2) Where the State Government has, at any time, reason to believe that -

(a) there has been a failure on the part of the President in performing his duties, or

(b) the President has-

(i) incurred any of the disqualifications mentioned in Sections 12-D and 43-AA; or

(ii) within the meaning of Section 82 knowingly acquired or continued to have, directly or indirectly or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with, by or on behalf of the Municipality; or

(iii) knowingly acted as a President or as a member in a matter other than a matter referred to in Clauses (a) to (g) of sub-section (2) of Section 82, in which he has, directly or indirectly, or by a partner, any share or interest whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person; or

(iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the Municipality or against the State Government in respect of nazul land entrusted to the management of the Municipality or acted or appeared for or on behalf of any person against whom a criminal proceeding has been instituted by or on behalf of the Municipality; or

(v) abandoned his ordinary place of residence in the municipal area concerned; or

(vi) been guilty of misconduct in the discharge of his duties; or

(vii) during the current or the last preceding term of the Municipality, acting as President or as Chairman of a Committee, or as member or in any other capacity whatsoever, whether before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976, so flagrantly abused his position, or so willfully contravened any of the provisions of this Act or any rule, regulation or bye-laws, or caused such loss or damage to the fund or property of the Municipality as to render him unfit to continue to be President; or

(viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976 whether as President or as member; or

(ix) caused loss or damage to any property of the Municipality; or

(x) misappropriated or misused Municipal fund; or

(xi) acted against the interest of the Municipality; or

(xii) contravened the provisions of this Act or the rules made thereunder; or

(xiii) created an obstacle in a meeting of the Municipality in such manner that it becomes impossible for the Municipality to conduct its business in the meeting or instigated someone to do so; or

(xiv) willfully contravened any order or direction of the State Government given under this Act; or

(xv) misbehaved without any lawful justification with the officers or employees of the Municipality; or

(xvi) disposed of any property belonging to the Municipality at a price less than its market value; or

(xvii) encroached, or assisted or instigated any other person to encroach upon the land, building or any other immovable property of the Municipality;

it may call upon him to show cause within the time to be specified in the notice why he should not be removed from office.

Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima facie guilty on

any of the grounds of this sub-section resulting in the issuance of the show-cause notice and proceedings under this sub-section he shall, from the date of issuance of the show-cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show-cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2-A) and the said powers, functions and duties of the President during the period of such ceasing, shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector."

4. Sub-section (2) of Section 48 enables the State Government to issue a notice to show cause to the President of a municipality to explain why he should not be removed from office where the State Government has "reason to believe" that any of the provisions of clauses (a) or (b) are attracted. Broadly speaking, the reason to believe relates to any one of the breaches specified in clause (a) or in sub-clauses (i) to (xvii) of clause (b) of sub-section (2). Each of them has a bearing on the discharge or the failure to discharge duties on the part of the President of a municipality or conduct of a nature which is proscribed therein. In the event that the State Government has reason to believe that any of those stipulations is attracted, it is empowered to call upon the President to show cause why he should not be removed from office.

5. The proviso to Section 48 (2) entails that where its conditions are fulfilled, the President of a municipality shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the notice to show cause and the finalization of the proceedings under sub-section (2-A). In order that the proviso be attracted, several stipulations have to be fulfilled. These stipulations are - firstly, that the State Government must have reason to believe that the allegations do not appear to be groundless; secondly, the State Government must have reason to believe that the President is prima facie guilty of any of the grounds contained in the sub-section resulting in the issuance of the notice to show cause and proceedings thereunder; and thirdly, that the notice to show cause must contain the charges against the President of the municipality. Where these three conditions have been fulfilled, the consequence entailed by the proviso to sub-section (2) comes into being and the President shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until exonerated of the charges mentioned in the notice to show cause and finalization of the proceedings under sub-section (2-A).

The judgment of the Full Bench

6. In Hafiz Ataullah Ansari, a Full Bench of this Court held that Section 48(2) may envisage two situations - the first, where the financial and administrative powers of a President do not cease and the other, where they cease. The Full Bench held that a ceasing of the financial and administrative powers of the President can take place only where the conditions specified in the proviso to

Section 48 (2) apply. As the Full Bench held:

"54. The intention of the legislature is clear from the language of the provision. It envisages two kinds of proceedings under section 48(2) of the Municipalities Act:

One, simpliciter where financial and administrative powers of the President do not cease;

The other, where his financial and administrative powers cease. This can happen only if the conditions under proviso to section 48(2) are satisfied.

55. The proviso to Section 48(2) is meant to apply in the serious situation where it is expedient to cease the financial and administrative powers of the President. It is not to apply in every case. It is for this reason that extra precautions have been provided in the proviso to Section 48(2) of the Municipalities Act."

7. Dealing with the conditions which have been spelt out in the proviso to Section 48 (2), the Full Bench observed as follows:

"73. The proviso to Section 48(2) of the Municipalities Act prescribes conditions that have to be fulfilled before the right of a President to exercise financial and administrative powers can cease. It states that:

(i) The State Government should have reasons to believe that:

The allegations do not appear to be groundless; and

The President is prima facie guilty of any of the grounds mentioned in Section 48(2) of the Municipalities Act.

(ii) The State Government should also issue show cause notice for removal under Section 48(2) of the Municipalities Act and it must contain charges.

74. The phrase 'reasons to believe' is often used in statutes and has been repeatedly held by the Courts (for citation of the rulings see below)3 to mean that reasons for the formation of the belief must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material and formation of the belief."

8. On the applicability of the principles of natural justice before the financial and administrative powers of the President of a municipality cease, the Full Bench emphasised that such an order envisages civil consequences which cannot be cured merely by a post-decisional hearing:

"In the case, where a head of a local body is deprived to exercise financial and administrative power, and ultimately the proceeding for removal are dropped then in such an event his loss can never be compensated. A post decisional hearing cannot cure the harm/damage done to him."

9. The Full Bench opined that it was necessary to furnish an opportunity of submitting an explanation to the head of the local body and this would eliminate an arbitrary exercise of power, besides bringing about fairness in procedure. In the view of the Full Bench:

"...The principles of natural justice or the yardstick of fairness would be met if the explanation of the affected head of the local body or his point of view or version is considered before recording the

satisfaction or finding of prima facie guilt before issuing notice and passing order for ceasing financial and administrative powers."

10. The Full Bench has explained that such an opportunity to submit an explanation need not be as detailed as in a regular enquiry and all that is necessary is to enable the elected head of the municipality to have his point of view or version considered. The conclusions which were arrived at by the Full Bench were as follows:

"133. Our conclusions are as follows:

(a) There can be proceeding for removal of President under Section 48(2) of the Municipalities Act without ceasing his financial and administrative power under its proviso;

(b)The following conditions must be satisfied before cessation of financial and administrative powers of a President of a Municipality can take place:

(i) The explanation or point of view or the version of the affected President should be obtained regarding charges and should be considered before recording satisfaction and issuing notice/order under proviso to Section 48(2) of the Municipalities Act;

(ii) The State Government should be objectively satisfied on the basis of relevant material that:

The allegations do not appear to be groundless; and

The President is prima facie guilty of any of the grounds under Section 48(2) of the Municipalities Act.

(iii) The show-cause notice must contain the charges against the President;

(iv) The show-cause notice should also indicate the material on which the objective satisfaction for reason to believe is based as well as the evidence by which charges against the President are to be proved. Though in most of the cases they may be the same;

(c) It is not necessary to pass separate order under proviso to Section 48(2) of the Municipalities Act. It could be included in the notice satisfying the other conditions under proviso to Section 48(2). In fact it is not even necessary. It comes into operation by the Statute itself on issuance of a valid notice under proviso to Section 48(2) of the Municipalities Act.

(d) In case a notice/order ceasing financial and administrative powers is held to be invalid on any ground then this does not mean that the proceeding of removal are also invalid. They have to continue and taken to their logical end. The proceeding to remove can come to an end only if the charges on their face or even taken to be proved do not make out a case for removal under Section 48(2) of the Municipalities Act.

(e) It is not necessary to involve the President with the process of collecting material or give President the copies of the material before asking his explanation or point of view or version of the President to the charges."

Legislative history

11. The legislative history of Section 48 has a bearing on the issue in controversy.

12. By the Uttar Pradesh Municipalities (Amendment) Act, 19644, sub-sections (2-A) and (3) were introduced into Section 48. Sub-section (2-A) confers upon the State Government the power to remove the President of a municipality from his office. The proviso

to sub-section (2-A) enabled the State Government to issue a warning instead of removing the President in stipulated situations. Sub-section (3) empowered the State Government to suspend a President.

13. Sub-sections (2-A) and (3), as introduced by U P Act 26 of 1964 were in the following terms:

"(2-A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may for reasons to be recorded in writing, remove the President from his office:

Provided that in a case where the State Government has issued notice in respect of any ground mentioned in clause (a) or sub-clause (ii), (iii), (iv), (vi), (vii) or (viii) of clause (b) of sub-section it may instead of removing him give him a warning.

(3) The State Government may place under suspension a President who is called upon to show-cause in respect of any ground mentioned in clause (a) or sub-clause (vi), (vii) or (viii) of clause (b) of sub-section (2) or against whom a prosecution for an offence which in the opinion of the State Government involves moral turpitude is commenced until the conclusion of the enquiry or the prosecution, as the case may be, and where a President has been so suspended he shall not, for so long as the order of suspension continues, be entitled-

(a) to exercise the powers or perform the duties of a President conferred or imposed upon him by or under this Act or any other enactment for the time being in force, or

(b) to take part in any proceedings of the board."

14. Upon the Seventy-third and Seventy-fourth Constitutional Amendments being brought into force, the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 19945 was enacted. The amending legislation omitted Section 48(3). As a result, the power to suspend the President of a municipality during the pendency of a proceeding for his removal was deleted.

15. Subsequently, by the Uttar Pradesh Municipalities (Amendment) Act, 20016, sub-section (2-A) of Section 48 was amended to delete the proviso that empowered the State Government to issue a warning instead of a removal.

16. In 2004, the Uttar Pradesh Municipalities (Amendment) Act, 20047 was enacted by the state legislature. By the Amending Act, a provision which was numbered as sub-section 2-A was introduced in Section 48 in the following terms:

"(2-A) Where in an inquiry held by such person and in such manner as may be prescribed, if a President or a Vice-President is prima facie found to be guilty on any of the grounds referred to in sub-section (2), he shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President or the Vice-President, as the case may be, which shall, until he is exonerated of the charges mentioned in the show-cause notice issued to him under sub-section (2), be exercised and performed by the District Magistrate or by an officer nominated by him not below the rank of the Deputy Collector."

17. The reason which led to the introduction of sub-section (2-A) in the above terms was spelt out in the

Statement of Objects and Reasons accompanying the introduction of the Bill in the state legislature. The State of Objects and Reasons provided as follows:

"Section 48 of the Uttar Pradesh Municipalities Act, 1916 (U.P. Act No. 2 of 1916) provides for the removal of President of a municipality.

In the said Section the State Government is empowered to issue show-cause notice to the guilty President on the grounds mentioned under Section 48, before removing him from his office. Most of the Presidents used to delay the proceedings by not replying the show-cause notice in time and they continue to misuse their financial powers. It has, therefore, been decided to amend the said Act to cease the financial powers of such President or a Vice-Present during the pendency of the inquiry and his financial powers and functions will be exercised and performed by the District Magistrate until he is exonerated of the charges.

The Uttar Pradesh Municipalities (Amendment) Bill, 2004 is introduced accordingly." (emphasis supplied)

18. The numbering of the above provision as sub-section 2-A suffered from an obvious error on the part of the legislative draftsman. That was because there was already in existence a provision, numbered as sub-section (2-A) which had been introduced by U P Act 26 of 1964 to entrust the State Government with the power of removal to be exercised after considering the explanation that may be offered and upon making an enquiry as considered necessary and for reasons to be recorded in writing. The existing sub-section (2-A) which provides for removal was not deleted. The new provision was erroneously numbered as sub-section (2-A). This mistake was rectified by the Uttar Pradesh Municipalities (Amendment) Act, 20058. By the Amending Act, sub-section 2-A, as was inserted by U P Act 6 of 2004, was omitted and, in its place, a proviso was introduced in sub-section (2). The proviso which we have analysed earlier sets out the manner in which and the conditions upon which the financial and administrative powers of the President can cease.

Part IX-A of the Constitution

19. Part IX of the Constitution contains provisions in relation to the panchayats. Part IX-A provides for the municipalities. These provisions were introduced by the Seventy-third and Seventy-fourth amendments to the Constitution. Municipalities and panchayats as institutions of local self- government have a constitutional status. Their role and position are defined by the Constitution as are their powers, duties and responsibilities. They are not mere administrative agencies of the State but, as institutions of self-governance, have been conferred with a degree of autonomy to ensure that democracy finds expression at the grassroots of Indian society. The Constitution seeks to attain a decentralisation of democratic governance through these institutions.

20. The extent of control which the agencies of the State exercise over these institutions of local self-government must necessarily conform to constitutional standards. State legislation of a regulatory nature must be interpreted in a manner that fosters the attainment of constitutional objectives. The Court, consistent with the high constitutional purpose underlying Parts IX and IXA of the Constitution, must give expression to the autonomy expected to be wielded by the constitutionally recognized levels of local self-government. Hence, while interpreting state legislation, the need to

conform to constitutional parameters must be borne in mind. An interpretation of state legislation which will dilute the autonomy of institutions of local self-government must, to the extent possible, be avoided. Similarly, an interpretation which would result in reducing the panchayats and municipalities to a role of administrative subordination must be eschewed. Consequently, where an issue arises in regard to the removal of an elected head of a municipality, as in the present case, the procedure prescribed by the law must be followed. The law itself must be interpreted in a manner that would render it fair, just and reasonable in its operation and effect. Moreover, in areas where the law is silent, an effort must be made by the Court in the process of interpretation to ensure that the procedure for removal is just, fair and reasonable to be consistent with the mandate of Article 14.

21. In Ravi Yashwant Bhoir Vs District Collector, Raigad9, the appellant who was the President of a Municipal Council was declared to be disqualified under the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. Among the charges against him, was a failure to call for a general body meeting, the acceptance of fresh tenders at high rates in connection with the work of laying down a water supply pipeline and allowing unauthorized construction. A writ petition filed by the elected head was dismissed by the High Court. In appeal, the Supreme Court emphasized the importance ascribed by Parts IX and IXA of the Constitution to the role and position of the elected head of a local self-governing institution in the following observations:

"Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution."10

22. Dealing with the aspect of observing the principles of natural justice, the Supreme Court held that:

"There can also be no quarrel with the settled legal proposition that removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. [Vide: Indian National Congress (I) v. Institute of Social Welfare11]. This view stands further fortified by the Constitution Bench judgments of this Court in Bachhitar Singh v. State of Punjab12 and Union of India v. H. C. Goel13. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office bearer."14 (emphasis supplied)

23. The Supreme Court observed that an elected official is accountable to the electorate and removal has serious repercussions since it takes away the right of

the electorate to be represented by a candidate who is elected. Undoubtedly, the right to hold the post is statutory and in that sense is not absolute but removal can take place - it was held - only after strictly adhering to the provisions laid down by the legislature for removal. The requirement of observing the principles of natural justice was hence held to be mandated before an order of removal is passed:

"...the law on the issue stands crystallized to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-bearer but his constituency/electoral college is also deprived of representation by the person of his choice."15

24. A Bench of three learned Judges of the Supreme Court in Tarlochan Dev Sharma Vs State of Punjab16 dealt with the power of removal under Section 22 of the Punjab Municipal Act, 1911. The Supreme Court emphasized that :

"In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within Section 22 of the Act must be clearly made out. A President may be removed from office by the State Government, within the meaning of Section 22, on the ground of "abuse of his powers" (of President), inter alia."17

25. Interpreting the expression "abuse of powers" as a ground for removal, it was held that this would not mean the mere use of power which may appear to be simply unreasonable or inappropriate but implies a willful abuse or an intentional wrong.

26. In Sharda Kailash Mittal Vs State of Madhya Pradesh18, the Supreme Court construed the power vested in regard to the removal of the President of a Nagar Palika under the Madhya Pradesh Municipalities Act, 1961. The Supreme Court emphasized that the power has to be exercised for strong and weighty reasons and not merely on the basis of minor irregularities in the discharge of the duties by a holder of an elected office. In that context, the Supreme Court observed thus:

"There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office-bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such

power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation."19 (emphasis supplied)

27. These decisions emphasise the importance of the role and position of elected heads of government under Part IXA of the Constitution. They represent the electorate and their removal affects the right of the electorate to be governed by an elected head accountable to it. Hence the power of removal which the State exercises under legislative provisions has to be exercised strictly in accordance with the terms of authorizing legislation. Removal entails consequences of a serious and adverse nature. Hence an order of removal has to be preceded by compliance with the principles of natural justice, whether or not there is an express statutory provision.

Natural justice as an incident of procedural fairness

28. The next aspect of the matter which must be emphasized is the importance of the observance of natural justice as an integral element or facet of procedural fairness. The principles of natural justice in our jurisprudence are not only a foundational basis of administrative law as it has evolved but constitute an essential part of fair procedure guaranteed by Article 14 of the Constitution. Observance of natural justice has progressively been extended to areas of administrative decision making where the decision is liable to result in serious consequences for those who are affected or regulated. The line between what is judicial or quasi-judicial on one hand and what is administrative on the other, has progressively been effaced.

29. In C B Gautam Vs Union of India20, the Supreme Court held that even where a statutory provision - in that case Section 269UD of the Income Tax Act 1961 - does not provide specifically for compliance of the principles of natural justice, adherence to those principles must be read into the interstices of the statute.

30. These principles have been reiterated in a recent judgment of the Supreme Court in Dharampal Satyapal Limited Vs Deputy Commissioner of Central Excise, Gauhati21 where it was held that:

"It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."22

31. Again, the Supreme Court emphasized that the applicability of the principles of natural justice is not dependent upon an enabling statutory provision for, where a decision is liable to result in an adverse consequence, natural justice must be observed despite the absence of a statutory requirement to that effect. The principle which was formulated by the Supreme Court is thus:

"...the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."

Interpreting Section 48 (2)

32. Now, it is in this background that it would be necessary to interpret the provisions of Section 48(2). The substantive part of sub-section (2) empowers the State Government to issue a notice to show cause to the President of a municipality as to why he should not be removed from office where it has reason to believe that the requirements of clause (a) or clause (b) have been fulfilled. The substantive violations which are adverted to in clauses (a) and (b) of sub-section (2) cover a broad spectrum. At one end of the spectrum is clause (a) which postulates that there has been a failure on the part of the President in performing his duties. On the other hand, clause (b) covers a broad range of violations including:

(i) incurring one of the stipulated disqualifications;

(ii) acquisition of a share or interest in a contract or employment with the municipality;

(iii) knowingly acting as a President or as a member in a matter in which he/she has a direct or indirect share or interest, whether pecuniary or otherwise;

(iv) acting as a legal practitioner against the municipality or the State Government in respect of certain classes of proceedings or subjects;

(v) abandoning an ordinary place of residence in the area;

(vi) misconduct in the discharge of duties;

(vii) flagrant abuse of position, willful contravention of the Act or regulations or bye-laws or causing loss or damage to the property or fund of the municipality during the current or the last preceding term while acting as a President, Chairman of a Committee, member or in any other capacity;

(viii) misconduct, whether as a President or as a member;

(ix) loss or damage to the property of the municipality;

(x) misappropriation or misuse of municipal funds;

(xi) acting against the interest of the municipality;

(xii) contravention of the provisions of the Act or the rules;

(xiii) creating obstacles in the orderly conduct of a meeting of the municipality;

(xiv) willful contravention of an order or direction of the State Government;

(xv) misbehaviour without any lawful justification with officers or employees of the municipality;

(xvi) disposal of the property of the municipality at a price less than its market value; and

(xvii) encroachment over the land, building or property of the municipality or instigation of such acts.

33. The proviso to sub-section (2), it must be noted, does not stipulate that the

mere issuance of a notice to show cause under the substantive part of sub-section (2) would result in the President ceasing to exercise the financial and administrative powers, functions and duties of the office. On the contrary, the proviso stipulates, firstly, that the State Government must have reason to believe that the allegations do not appear to be groundless; secondly, there must be a reason to believe on the part of the State Government that the President is prima facie guilty on any of the grounds set out in the sub-section resulting in the issuance of the show cause notice and proceedings there-under; and thirdly, the show cause notice must contain the charges which have been levelled against the President of the municipality. In other words, this threefold requirement has to be fulfilled before the cessation of financial and administrative powers, functions and duties takes effect.

Reason to believe

34. The proviso requires the State Government to have a reason to believe. Reason to believe postulates an objective satisfaction after an application of mind to material and relevant circumstances. The expression "reason to believe" when used in a statute is to be distinguished from an exercise of a purely subjective satisfaction.

35. In Barium Chemicals Ltd Vs Company Law Board23, the Supreme Court held that the words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining a reason to believe or the opinion is altogether a subjective process, not lending itself even to a limited scrutiny by the Court that it was not formed on relevant facts or within statutory limits. Explaining the words "reason to believe" in Section 147 of the Income Tax Act 1961, the Supreme Court in ITO Vs Lakhmani Mewal Das24 held that the reasons for the formation of belief must have a rational connection with or a relevant bearing on the formation of the belief. A rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment on a failure to disclose fully or truly all material facts. Every material, howsoever vague, indefinite or distant, would not warrant the formation of the belief. Moreover, the reason for the formation of the belief must not be a mere pretence and must be held in good faith.

36. In Shiv Nath Singh Vs Appellate Assistant Commissioner of Income Tax, Calcutta25, the Supreme Court held that the expression reason to believe suggests that the belief must be that of an honest and reasonable person based on reasonable grounds and not merely on suspicion. These principles were reiterated in a judgment of the Supreme Court in Bhikhubhai Vithlabhai Patel Vs State of Gujarat26.

37. The formation of a reason to believe within the meaning of the proviso must be on objective considerations which have a rational connection or link to the material before the State Government. Fairness requires that this be disclosed to the President of the municipality before the consequences in the proviso ensue. The President must have an opportunity to explain.

38. The State Government is also required by the proviso to be of the view that the President is prima facie guilty on any of the grounds contained in the sub-section which have resulted in the issuance of the notice to show cause. The formulation of a

reason to believe that the allegations do not appear to be groundless and that the President is prima facie guilty on any of the grounds mentioned in the sub-section would postulate that before these statutory requirements are found to exist, a fair opportunity of being heard must be granted to the President of the municipality. A finding of prima facie guilt must, in our view, be consistent with a prior fulfillment of the norms of natural justice, consistent with the stage of enquiry. There is intrinsic evidence in the statutory provision which leads to the inference that the mere issuance of the notice to show cause does not a fortiori result in the cessation of the financial and administrative powers, functions and duties but it is only when the conditions which are spelt out in the proviso exist, that such a consequence will follow. If a mere issuance of a notice to show cause was intended to necessarily result in the consequence of the cessation of financial and administrative powers as envisaged in the proviso, the legislature would have made a provision to that effect. On the contrary, the legislature has carefully crafted a statutory provision, in the form of a proviso which ensures that it is only upon the State Government having a reason to believe that the allegations do not appear to be groundless and that the President is prima facie guilty on any of the grounds contained in the sub-section, that the cessation of the financial and administrative powers would follow from the date of the issuance of the notice to show cause containing the charges.

39. The cessation of financial and administrative powers of an elected head of a municipality is a matter of significance and is replete with serious consequences. The effect of the financial and administrative powers, functions and duties being ceased, has a direct impact upon the authority of the elected head. It erodes authority and impacts upon the ability of the President to effectively discharge the functions of the office by preventing the discharge of financial and administrative authority. Bereft of financial and administrative powers, functions and duties, the office of the President of a municipality is reduced to a cipher. In fact, the proviso envisages that upon the powers being ceased, they shall be exercised by the District Magistrate or an officer nominated, not below the rank of a Deputy Collector. This consequence is serious enough to warrant the Court to read a compliance with the principles of natural justice into the provision so as to ensure a fair procedure and safeguard against an unfair recourse to its power by the State Government. The principles of natural justice, as we have noted above, are required to be observed as a matter of first principle when a decision - administrative, quas-judicial or judicial - adversely affects the rights of parties. The principle of reading into the statutory provision a requirement of complying with the principles of natural justice is a mandate of Article 14 because it would be an anathema to a fair procedure for the State Government to issue dictats that abrogate the financial and administrative powers of an elected head of a local self-governing institution without complying with the principles of natural justice. The requirement of observing the principles of natural justice, as a matter of first principle, must be weighed in together with the additional factors present in the proviso to Section 48(2) that lead to the conclusion that a decision to cease financial and administrative powers must be preceded by adherence to a fair procedure. The first of the three indicia in the proviso is the existence of a reason to believe on the part of the State that the allegations do not appear to be groundless. The second indicia is the

requirement of the formation of the reason to believe that the President of a municipality is prima facie guilty on any of the grounds mentioned in the sub-section, resulting in the notice to show cause. Arriving at a determination in regard to the prima facie guilt of a person, as the statute mandates, must be upon due observance of the principles of natural justice. The third indicia is that the notice to show cause has to contain the charges against the person. Hence, even though the proviso to sub-section (2) of Section 48 does not contain an explicit requirement of observing the principles of natural justice, nonetheless such a requirement must necessarily be read into the provision.

40. The rules of natural justice require that the person against whom action is proposed, must be made aware of the grounds of the proposed action and must have an opportunity to respond to the action proposed, by setting forth an explanation. Undoubtedly, the formation of the reason to believe under the proviso to sub-section (2) is not final having due regard to the fact that the enquiry is still to be concluded and the cessation of financial and administrative powers is to enure during the period when the proceedings in pursuance of the notice to show cause are still to be concluded. A personal hearing is not a necessary ingredient of complying with the principles of natural justice at every stage. The minimum requirement of the principle is that the President of a municipality should be made aware of the grounds on which the action against him is proposed in the formulation of the charges which are issued to him, as mandated by the proviso. The person who is sought to be proceeded against must be informed of the basis on which the State Government proposes to entertain a reason to believe that the allegations do not appear to be groundless and that he or she is prima facie guilty on any of the grounds of sub-section (2) resulting in the issuance of the notice to show cause and the proceedings in the sub-section. The period which is allowed to the elected head to explain must be reasonable: what is a reasonable period being dependent upon the facts and circumstances of each case. In a case involving an element of urgency where there is a need for the State to take an expeditious decision, the period during which an explanation can be submitted, can be suitably tailored to meet the exigencies of the situation. No absolute rule can be laid down in the abstract on what constitutes a reasonable period to show cause. But the minimum requirements of fair procedure must be fulfilled. An opportunity has to be granted. Otherwise, the provision would be capable of grave misuse to derogate from the authority of an elected head on arbitrary and whimsical grounds.

41. The learned Additional Advocate General submitted that (i) the judgment of the Full Bench in Hafiz Ataullah Ansari has read something which is not a part of the proviso to Section 48(2) into the statutory provision; and (ii) the requirement of complying with the principles of natural justice arises where "there is some space for it" whereas, in the present case, no space exists between the issuance of a notice to show cause and the ceasing of financial and administrative powers.

42. We are not inclined to accept the submission that the reading into the proviso of a requirement of complying with the principles of natural justice would amount to the imposition of an alien condition not contemplated by the legislature. For one thing, it is a well settled principle of our jurisprudence that even where a statute is

silent, compliance with or adherence to natural justice must be read into the statute as an intrinsic element of a fair procedure consistent with the mandate of Article 14, where an administrative or quasi judicial decision has adverse consequences for a person who is proceeded against. Reading into a statute a requirement of complying with the principles of natural justice does not amount to rewriting the statute or engrafting a new legislative provision. Reading natural justice into the interstices of a statute is an exercise of an interpretation which is necessary to render the statutory provision consistent with the mandate of Article 14. Otherwise if a statutory provision were to be held to authorise the taking of adverse decisions without complying with procedural norms which are fair and reasonable, the provision would itself become vulnerable to constitutional challenge. Hence, the principle that natural justice should be read as a matter of interpretation into a statutory provision where a decision which is taken has adverse consequences is connected with the mandate of Article 14 of the Constitution. For a Court to read a statutory provision in a manner which renders it fair, just and reasonable, is not to re-write the statute but to make it consistent with constitutional norms.

43. Secondly, we are not impressed with the submission that there is no space, as the Additional Advocate General calls it, between the issuance of a notice to show cause and the ceasing of financial and administrative powers of the President of the municipality. The legislature has clearly not intended that the mere issuance of a notice to show cause under sub-section (1) should result in the ceasing of financial and administrative powers as an inexorable consequence, as night follows day. If the legislature so intended, it would have provided that upon the issuance of a notice to show cause, the financial and administrative powers of an elected President of the municipality cease. The state legislature did not do so. Instead, it imposed a statutory condition that it was where the State Government has reason to believe that the allegations do not appear to be groundless and that the President is prima facie guilty on any of the grounds of sub-section (2) resulting in the issuance of the notice to show cause and proceedings, that he shall, from the date of the issuance of the notice containing the charges, cease to exercise, perform and discharge financial and administrative powers, functions and duties. It is only when these requirements of the proviso are fulfilled that the ceasing of financial and administrative powers takes effect by operation of law. In other words, the ceasing of financial and administrative powers is not an automatic consequence envisaged upon the mere issuance of a notice to show cause under sub-section (1). For the consequence to ensue as a matter of law under the proviso to sub-section (2), the requirements of the proviso must be fulfilled.

44. The referring order of the Division Bench dated 10 February 2015 doubted the correctness of the view of the Full Bench by observing that under Section 48(2), the State Government is required to issue a show cause notice calling upon the President of a municipality to show cause as to why he should not be removed only when (i) the facts which disclose any or all of the grounds mentioned in clause (a) or clause (b) (i) to (xvii) are brought to the knowledge of the State Government and (ii) the State Government has reason to believe that the allegations are not baseless and the President is prima facie guilty. In the view of the Division Bench, once such a notice under Section 48(2) is issued, the financial and administrative powers of the President would

stand ceased by operation of law. With respect, the error on the part of the Division Bench lies in not distinguishing between the requirements of the proviso and those of the substantive part of Section 48 (2). The substantive part of Section 48(2) envisages the State Government to issue a notice to show cause to the President of a municipality why he should not be removed from office where it has reason to believe that the grounds mentioned in clause (a) or any of the grounds in clause (b) are fulfilled. The proviso, however, requires the State Government to apply its mind to certain specified aspects, including among them, whether there is reason to believe that the President is prima facie guilty on any of the grounds of the sub-section. The formation of a reason to believe that the allegations are not groundless; and that the President is prima facie guilty are pre-conditions to the consequence envisaged under the proviso, of the financial and administrative powers ceasing to vest in the President of the municipality. The ceasing of financial and administrative powers is not a consequence which ensues merely upon a notice to show cause under the substantive part of sub-section (2). The conclusion of the Division Bench that the cessation of powers takes place by operation of law merely with the issuance of a notice to show cause under Section 48(2) is, with respect, not consistent with the plain text and language of the provision since the legislature envisages that the consequence would ensue only upon the conditions contained in the proviso being fulfilled.

Conclusion

45. We accordingly proceed to answer the reference in the following terms:

(I) Re Question (a): The decision of the Full Bench in Hafiz Ataullah Ansari Vs State of U P (supra) lays down the correct position in law.

(II) Re Questions (b) & (c): The cessation of financial and administrative powers of the President does not necessarily follow merely upon the issuance of a notice to show cause under the substantive part of Section 48(2). The financial and administrative powers of the President shall stand ceased if the State Government has reason to believe that (i) the allegations do not appear to be groundless; and (ii) the President is prima facie guilty on any of the grounds of sub-section (2) resulting in the issuance of the notice to show cause and proceedings thereunder. The President of the municipality will, in that event, cease to exercise, perform and discharge financial and administrative powers, functions and duties from the date of the issuance of the notice to show cause containing the charges. For a cessation of financial and administrative powers to take effect, the requirements of the proviso to Section 48(2) must be fulfilled. Hence, proceedings for removal of a President of a municipality under Section 48(2) may take place in a given situation though the financial and administrative powers have not ceased under the terms of the proviso.

(III) Re Question (d): There is no requirement under the statute that a separate order has to be passed under the proviso to Section 48(2) when the financial and administrative powers of the President of a municipality cease. Such a consequence would come into being upon the requirements specified in the proviso to Section 48(2) being fulfilled.

(IV) Re Question (e): An opportunity of being heard, consistent with the principles

of natural justice, before there is a cessation of the financial and administrative powers of the President does not stand excluded by the provisions of Section 48(2). As a matter of textual interpretation, the requirement of complying with the principles of natural justice is an integral element of the proviso to Section 48(2). The requirements of natural justice would warrant the grant of an opportunity to the elected head of a municipality to respond to the notice issued by the State indicating the basis for the formation of a reason to believe that the charges do not appear to be groundless and that the President is prima facie guilty on any of the grounds mentioned in sub-section (2) of Section 48. The period of notice can be suitably molded to deal with the exigencies of the situation.

46. The reference to the Full Bench shall accordingly stand answered. The writ petition shall now be placed before the regular Bench according to roster for disposal in light of the questions so answered.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.01.2016

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE ADITYA NATH MITTAL, J.

Misc. Bench No. 10562 of 2015

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

Counsel for the Petitioners:
Chandra Bhanu Singh

Counsel for the Respondents:
Govt. Advocate, B.B. Tripathi

Constitution of India, Art.-226-FIR quashing-offence under Section 363 IPC-considering statement recorded u/s 164 Cr.P.C.-had jointed the company of her own will-and married with accused-coercion, inadvertent or forceful act on part of accused not established-keeping in veiw of Bhajan Lal case as well as Sahina Parveen-ingredients of Section 363 IPC-not satisfied-initiating criminal proceeding would amount to abuse the process of court-if such cases are brought under trail-will be burden upon judicial system-FIR quashed.

Held: Para-11, 12 and 14

11. In the considered opinion of the court, case of the petitioner would be covered by sub para 2 of para 108, extracted above, from the judgement rendered in Ch. Bhajan Lal's case (supra). The material that has come on record to which reference has been made hereinabove establishes that ingredients of Section 363 I.P.C. are not satisfied. Offence has not been committed.

12. Criminal proceedings have been initiated only on account of ego. Petitioner no.1 got married against the wishes of her parents, which apparently has aggrieved them in initiating criminal proceedings. In the considered opinion of the court by initiating impugned criminal proceedings, the process of the court and the law has been abused. .

14. This court also takes judicial notice of the fact that the prosecuting agency and the courts are heavily burdened with cases. Cases of this nature if are brought to trial would burden the judicial system, unnecessarily.

Case Law discussed:
W.P. No. 3519 (M/B) of 2015; AIR 1992 SC 604

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

1. This petition seeks issuance of a writ in the nature of certiorari quashing First Information Report lodged as Case Crime No.239 of 2015, under Section 363 I.P.C., Police Station Naseerabad, District Raebareli.

2. Counter affidavit filed on behalf of prosecuting agency sworn on 5.12.2015, is available on record. Counsel for respondent no.4 has not appeared to address arguments.

3. In judgment dated 23.7.2015, rendered by a Division Bench of this Court, of which one of us (Ajai Lamba,J) was a Member, in Writ Petition No.3519(M/B) of 2015 Shaheen Parveen and another versus State of U.P. and others, the following (relevant portion) has been held :-

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

7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.

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

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

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

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

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

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

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

14. The Investigating Agency is concluding that at the point in time when the victim left in the company of the accused, she was a few months less than 18 years, which is the relevant age mentioned in Section 361 of the Indian Penal Code, above extracted. Clearly, the Investigating Agency is taking a hypertechnical view of the issue. The other relevant facts and circumstances of the case are being ignored.

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

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

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

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

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

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

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

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing.

Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

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

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

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

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

27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise

of trial is going to be in futility, as observed hereinabove.

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

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

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

4. The facts and circumstances of this case are that allegedly petitioner no.1 got married to petitioner no.2 of her own free will. Respondent no.4, however has not accepted the marriage. Under the circumstances, impugned criminal proceedings have been initiated.

5. The investigating officer of the case has placed on record statement of the prosecutrix/ victim of the offence, recorded under Section 164 Cr.P.C., as Annexure No.SCA-1. Perusal of the statement indicates that father of petitioner no.1 wanted to get her married to an aged person. Petitioner no.1 refused the proposal. Petitioner no.1 was given beatings. Approximately, six months before the statement was given, petitioner no.1 left her house for railway station. Petitioner no.2 Manoj Kumar was approached telephonically and she went with him to Delhi. On returning back to Lucknow, the petitioners got married in Arya Samaj Mandir and also through court. It has been stated clearly that petitioner no.1 wanted to live with Manoj Kumar and she got married with Manoj Kumar of her free will.

6. Perusal of Annexure SCA-2, appended with the counter affidavit of investigating agency, indicates the age of petitioner no.1 to be about 18 years.

7. Considering the medical age of petitioner no.1 and her statement recorded under Section 164 Cr.P.C., it has become evident that case of the petitioners is covered by judgement rendered in Shaheen Parveen's case (supra), portion whereof has been extracted above.

8. We have also taken into account the fact that the victim of offence of kidnapping/abduction would be petitioner no.1. Petitioner no.1 has admitted that she has not been kidnapped or abducted, rather had gone of her own free will. In such circumstances, continuance of proceedings would be an exercise in futility. Conviction cannot possibly be recorded in view of statement of victim of offence as has been demonstrated through her statement recorded under Section 164 Cr.P.C.

9. We have considered the law laid down in AIR 1992 SC 604 State of Haryana and others versus Ch. Bhajan Lal and others.

10. Hon'ble Supreme Court of India while taking notice of various judgments on the issue in Ch. Bhajan Lal's case(supra), has summed up as follows in paragraph 108. The said para when extracted reads as under :

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such powers should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

(emphasised by us)

11. In the considered opinion of the court, case of the petitioner would be covered by sub para 2 of para 108, extracted above, from the judgement rendered in Ch. Bhajan Lal's case (supra). The material that has come on record to which reference has been made hereinabove establishes that ingredients of Section 363 I.P.C. are not satisfied. Offence has not been committed.

12. Criminal proceedings have been initiated only on account of ego. Petitioner no.1 got married against the wishes of her parents, which apparently has aggrieved them in initiating criminal proceedings. In the considered opinion of the court by initiating impugned criminal

proceedings, the process of the court and the law has been abused. .

13. The court has been informed that investigation had been concluded and no further evidence is likely to come on record to draw a different conclusion as drawn above.

14. This court also takes judicial notice of the fact that the prosecuting agency and the courts are heavily burdened with cases. Cases of this nature if are brought to trial would burden the judicial system, unnecessarily.

15. Considering the law, as laid down in Ch. Bhajan Lal's case(supra) and Shaheen Parveeen(supra), portion from which has been extracted above, this petition is allowed. Impugned First Information Report, lodged as Case Crime No.239 of 2015, under Section 363 I.P.C., Police Station Naseerabad, District Raebareli, is hereby quashed.

16. Let a copy of this order be conveyed to the Court concerned as also to the Superintendent of Police, Raebareli through Senior Registrar of the Court and learned Additional Government Advocate.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.01.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 11783 of 2015

Vipin Verma ...Petitioner
Versus
The Collector District Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Manish Mathur, Vaibhav Srivastava

Counsel for the Respondents:
C.S.C., Chandra Shekhar Pandey

Constitution of India, Art.-226-Recovery from amount of compensation-accident by private vehicle-playing by U.P. State Transport Corporation by reliance upon clause 10 of agreement-issuing citation under Rule 236 and Section 282 of U.P.Z.A. & L.R. Act-without being any provision under agreement-recovery can not be enforced through Collector as arrears of land revenue.

Held: Para-9
We are not entering into the merits of the claim and the counter claim relating to the extent of liability which is now sought to be recovered from the petitioner but the mode of recovery in our opinion does not conform to Clause-10 of the aforesaid agreement. The recovery from the petitioner as arrears of land revenue on a recovery certificate issued by the UPSRTC without there-being any provision under the agreement was, therefore, not enforceable through the Collector by the Tehsildar and as such this mode of recovery cannot be approved of.

Case Law discussed:
F.A.F.O. No. 199 of 2001; 2011 Volume 8 SCC pg. 42.

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

1. Heard learned counsel for the petitioner and Sri Chandra Shekhar Pandey, learned counsel for the respondent nos. 3 and 4 as well the learned Standing Counsel for the respondent nos. 1 and 2 .

2. The impugned recovery is sought to be made from the petitioner through a citation dated 24.11.2015 issued by the

Tehsildar, , in Form No. 69 under Rule 236 read with Section 282 of the U.P. Z.A & L.R. Act 1950 and the rules frame thereunder.

3. Apart from the liability being denied by the petitioner, who is the owner of the vehicle, the petitioner contends that the recovery which is sought to be made from him is not in accordance with law and even otherwise it cannot be recovered as arrears of land revenue through a process under which the impugned citation has been issued.

4. We had earlier called upon the learned counsel for the Corporation to produce the copy of the agreement under which the said recovery is being attempted by the Corporation. Sri Chandra Shekhar Pandey, learned counsel for the respondents has produced a copy of agreement and Clause 10 thereof as reads as follows-:

"चालक की किसी त्रुटि, असावधानी दुर्घटना या अन्य अवैध कार्यों का पूर्ण दायित्व द्वितीय पक्ष का होगा तथा इस सम्बंध में किसी भी प्रतिकर या अन्य देय धनराशि के भुगतान का दायित्व बस स्वामी या अधिनियमों के अन्तर्गत बीमा कम्पनी का होगा। किसी भी अवस्था मे चालक की त्रुटि असावधानी दुर्घटना या अवैध कार्य का दायित्व प्रथम पक्ष का नहीं होगा। यदि किसी न्यायालय आदि के आदेश के अनुपालन में प्रथम पक्ष द्वारा कोई भुगतान किया गया हो तो द्वितीय पक्ष के देयकों से या अन्य विधियों से प्रथम पक्ष व्यवसायिक दर पर ब्याज वसूली करने के लिए अधिकृत होगा।"

5. Admittedly, the vehicle of the petitioner under the aforesaid agreement with the UPSRTC was plying when an accident occurred and as a result of the Motor Accident Claim, arising therefrom, the liability was fixed which is now sought to be recovered from the owner, keeping in view Clause 10 of the aforesaid agreement.

6. Learned counsel for the petitioner has relied upon a Division Bench Judgment in the case of United India Insurance Company Ltd. Vs U.P.S.R.T.C, Sapru Marg, Lucknow in F.A.F.O 199 of 2001 and other connected appeals decided on 18.09.2009, to urge that such liability cannot be fixed on the petitioner nor recovered from him and it has to be borne by the Corporation itself.

7. It is also urged that the said judgment had been taken up in Appeal before the Apex Court and the SLP has been dismissed.

8. Learned counsel for the respondents, on the other hand has relied on the judgment in the Case of U.P.S.R.T.C. Vs. Kulsum and Ors, 2011 Volume 8 SCC pg.42 to contend otherwise.

9. We are not entering into the merits of the claim and the counter claim relating to the extent of liability which is now sought to be recovered from the petitioner but the mode of recovery in our opinion does not conform to Clause-10 of the aforesaid agreement.The recovery from the petitioner as arrears of land revenue on a recovery certificate issued by the UPSRTC without there-being any provision under the agreement was, therefore, not enforceable through the Collector by the Tehsildar and as such this mode of recovery cannot be approved of.

10. Consequently, we quash the citation dated 24.11.2015 as well as the recovery proceedings which have been initiated as arrears of Land Revenue under the U.P.Z.A & L.R.Act, 1950.

11. It shall be, however, open to the Corporation to take recourse to such other

legal remedy which may be available to it under the agreement for the said purpose.

12. With these observations, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2016

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

C.M.W.P. No. 30909 of 2014

Suresh Bansal & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
M.D. Singh "Shekhar", B.P. Verma

Counsel for the Respondents:
A.S.G.I., Rajesh Tripathi, Fuzail Ahmand

Constitution of India, Art.-226-Rejection of application-to sanction map without assigning any reason-held-unsustainable-recording reasons when necessary explained.

Held: Para-9
No doubt, the concerns of the security of the country is supreme, but the petitioner, as a citizen of this country, in the least is entitled for a reasoned order, in case, his claim was liable to be rejected. Though, the respondent authorities have tried to justify the rejection by setting out some reasons in the counter affidavit, but it is well settled that the reasons should be reflected from the order and no amount of reasons supplemented in the affidavits filed during judicial review of the action, can justify the same.

Case Law discussed:
AIR 1952 SC 16; (1978) 1 SCC 405; (2013) 10 SCC 95

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

1. Heard Shri B.P. Verma, learned counsel for the petitioners and Shri Rajesh Tripathi for respondent nos. 1 to 3.

2. Petitioners have approached this Court challenging the letter dated 15th March, 2014 communicated to him by the office of the City Magistrate, Mathura that Military authorities have refused to grant No Objection Certificate for construction of multi-storied building adjacent to A-1 defence land.

3. Petitioners claiming to be bhoomidhar of plot nos. 228, 229, 230, 231, 234 and 235 situate in Gram Narhauli, Tehsil Sadar, District Mathura after seeking a declaration under Section 143 of the U.P.Z.A. & L.R. Act, which was duly granted vide order dated 20th June, 2003, started some constructions over the said land, which was objected by the officers of the Station Headquarter, Mathura Cantt. and they forcibly stopped the construction for want of No Objection Certificate from the army authorities. Petitioners made an application dated 27.10.2011 before the City Magistrate for obtaining No Objection Certificate from the Station Headquarter, Mathura Cantt. in accordance with the guidelines issued by the Government of India, Ministry of Defence dated 18th May, 2011.

4. However, when no decision was taken despite various communication and letters, the petitioners approached this Court by filing Writ Petition No. 37904 of 2013, which was disposed of vide order dated 16.07.2013 requiring the petitioner to make a fresh representation before the competent authority, who in turn, was directed to take appropriate decision with

all expedition, preferably within a period of two months from the date of receipt of the application. Still when no decision was taken, the petitioner was compelled to file a Contempt Application No. 6192 of 2013, which was also disposed of giving one more opportunity to the authorities to take decision in the matter. Thereafter, the petitioner was informed vide impugned order dated 15th March, 2014 addressed to the City Magistrate that Military authorities have not agreed to grant No Objection Certificate for construction of multi-storied building on account of the fact that the land on which the building was proposed to be constructed, was adjacent to A-1 defence land.

5. Learned counsel for the petitioners contends that the order is bad in law inasmuch as it does not record any reason for rejecting the claim of No Objection Certificate to the petitioners. He further points out that it was categorically brought to the notice of the authorities that the plot in dispute over which the construction is sought to be raised by the petitioner, is surrounded by residential colony on western side and a market on the northern side, and on the southern side, there is a railway line. He further points out that the authorities were duly informed by the petitioners that they do not intend to raise any multi-storied construction, but only ground and first floor are to be constructed and without considering these aspect of the matter, the No Objection Certificate has been refused.

6. A counter affidavit has been filed by the respondent-authorities stating that the khasra plot no. 236, which is A-1 defence land, is being managed by local Military authorities for the purpose of Army, i.e., training activities, control of vehicle movement, establishing of communication, attachments alongwith equipments and loading/unloading of military stores as a part of Ordinance Depot Unit during operations and mobilization for war. It is further alleged that the land is kept barren being camping ground for accretion forces for Northern and Western sector in war. The counter affidavit further refers to a policy decision taken by the Ministry of Defence, Government of India for issuing No Objection Certificate.

7. A perusal of the policy enclosed as Annexure 2 to the counter affidavit goes to show that same was issued in order to strike a balance between the security concerns of the forces and the right of public to undertake the construction activities on their land. The relevant provisions of the said policy are quoted hereunder.

"(a) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders/private parties.

(b) Where the local municipal laws do not so require, yet the Station Commander feels that any construction coming up within 100 meter (for multistorey building of more than four storeys the distance shall be 500 meters) radius of defence establishment can be a security hazard, it should refer the matter

immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey its objection/view to the local municipality or State Government agencies. In case, the municipal authority/State Government do not take cognizance of the said objection, then the matter may be taken up with higher authorities, if need be through AHQ/MoD.

(c) Objection/view/NOC shall not be given by any authority other than Station Commander to the local municipality or State Government agencies and shall not be given directly to private parties/builders under any circumstances.

(d) NOC once issued will not be withdrawn without the approval of the Service Hqrs."

8. A perusal of the impugned order goes to show that it does not record any reason for rejecting the No Objection Certificate nor there is any material to indicate that provisions of the Policy quoted hereinabove, were followed while considering the application of the petitioner for No Objection Certificate.

9. No doubt, the concerns of the security of the country is supreme, but the petitioner, as a citizen of this country, in the least is entitled for a reasoned order, in case, his claim was liable to be rejected. Though, the respondent authorities have tried to justify the rejection by setting out some reasons in the counter affidavit, but it is well settled that the reasons should be reflected from the order and no amount of reasons supplemented in the affidavits filed during judicial review of the action, can justify the same.

10. Reference may be made to the judgment of the Hon'ble Apex Court in the case of Commissioner of Police Vs. Gordhandas Bhanji, AIR 1952 SC 16, wherein it was held as under.

"9. ... public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

11. This proposition has been quoted with approval in para 8 by a Constitution Bench in Mohinder Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405, wherein Krishna Iyer, J. has stated as follows:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

12. In the case of Rashmi Metaliks Limited & Anr. Vs. Kolkata Metropolitan Development Authority & Ors., (2013) 10 SCC 95, the Hon'ble Apex Court held that during judicial review of an administrative action, the order must be examined with reference to the grounds set out in the order itself and not with

reference to any fresh ground brought out subsequently and a ground not adopted or expressed in the impugned administrative order, cannot be sought to be raised to justify its validity.

13. In such view of the matter, in our considered opinion, the impugned order being cryptic and without containing reason on which the decision is predicated, is not liable to be sustained. As a result, the writ petition succeeds and stands allowed.

14. The impugned order dated 15th March, 2014 is hereby set aside. The respondent authorities are directed to reconsider the application of the petitioner for grant of No Objection Certificate afresh in accordance with the provisions of the Policy dated 18th May, 2011 by passing a reasoned order expeditiously, preferably within a period of six weeks from the date of production of a certified copy of this order.

15. However, in the facts and circumstances, there shall be no orders as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2016

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 No. 37202 of 2015

Rahul & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Appellants:
Anoop Trivedi

Counsel for the Opp. Parties:
G.A.

Cr.P.C. Section 482-Trail Court closed the evidence-as the defence counsel withdraw himself from conducting the case-consequently the witness-could not be cross examined-on request to engage another counsel- 2days adjournment given-certainly a very short time for new counsel to prepare himself to cross examined the witness-which resulted complete miscarriage of justice, principle of Natural Justice and constitutional right of fair trail stand defeated-order quashed with necessary direction.

Held: Para-5
It also does not appear to be a disputed fact that the counsel who had been conducting the trial was no more counsel in the case because of his own refusal or because of the withdrawal of the instructions by the applicants. In such a situation, the opportunity of two days time to engage the new counsel to cross examine the witness and conduct the trial does not appear to be an adequate opportunity. It cannot be said with any justification that in such a short time even if a new counsel was engaged he could have prepared the case and do justice with the trial of murder. In such circumstances, in order to arrive at the ends of justice and in order to meet and fulfill the vital requirements of equity and in order to ensure a fair trial, this Court feels inclined to direct that the trial court should fix some date and call the aforesaid witness to be cross examined by the accused.

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

1. The application u/s 482 Cr.P.C. has been filed for setting aside the order dated 16.12.2015 passed by the Sessions Judge, Meerut by which the Application No. 47 Kha, under Section 311 Cr.P.C. has been rejected by the court below denying the opportunity to the applicants to cross examine P.W.11 Meenu.

2. Heard applicants' counsel as well as learned AGA and perused the record.

3. Submission of counsel for the applicants is that PW-11 Meenu has been examined in-chief but as the counsel who was conducting the trial has returned the brief therefore, the applicants (accused) had to engage another counsel for the cross examination of the witnesses. It was further pointed out that though the examination-in-chief was done on 8.12.2015 but when the adjournment was sought on that date because of the inability of the counsel to continue the trial, another date 10.12.2015 was fixed for the cross examination immediately after two days. Further submission is that this period of adjournment was very short. As it was a murder trial the rights and liability of the applicants, who were facing the trial as accused, must be adjudicated upon after the witnesses were cross examined. Otherwise it is bound to cast serious deleterious/prejudicial effect against the interest of the applicants and would go to the extent of infringing upon the fairness of the trial. But on the next date i.e. 10.12.2015 when adjournment was again sought the court refused to grant the same and closed the evidence. It was also submitted that it is not a case or a matter in which the repeated adjournments might have been sought on behalf of the applicants for cross examination nor is it a case in which the counsel can be said to have deliberately resorted to any delaying tactics and was under any false pretext or pretence indulging in any such exercise which may be said to be unfair or deliberate. In fact, the witness could be procured for cross examination only after enormous efforts were done by the trial court in that regard and she could be brought to be examined as PW-11 after ten prosecution witnesses had already been examined. The emphasis was laid by counsel who tried to elaborate and demonstrate that the facts and circumstances of the case are such that the applicants cannot be accused of any such delaying tactics which could have justly impelled the court to close the evidence and deprive the accused from their most valuable right of cross examination. Counsel for the applicant has tried to show that the adjournment was sought in a bonafide manner because the counsel himself had refused to continue conducting the trial itself. It was in that background that another counsel had got to be engaged. Submission is that in fact even if a new counsel could have been engaged within two days then also it would have been an insufficient period of time for a new counsel to prepare the case and to do justice with the trial of murder. Further submission is that in fact whether the accused applicants withdrew their instructions from the counsel or the counsel himself refused to continue with the trial is not of much significance in the facts and circumstances of the case and in any view of the matter, if a new counsel had to be engaged, a sufficient opportunity should have been provided to the accused to do justice with their cause. It was further submitted that the applicants have absolutely no intention to delay the proceedings of the trial or to prolong the matter and if an opportunity shall be given to them to cross examine the witness, it shall be availed on the first date and no further adjournment shall be sought by them. It was next submitted that if the PW-11 Meenu goes uncross examined, the prejudicial effect cast on the rights of the applicants shall result in complete miscarriage of justice and principles of natural justice and principles

of equity and constitutional right to have a fair trial, all shall stand defeated. The contention is that the accused ought to be granted a reasonable opportunity to cross examine the witness which has already been denied to them by closing the evidence after recording the examination-in-chief of the witness.

4. Ordinarily this Court would have proceeded with the matter after issuing notice to the opposite party no. 2 but in that situation the proceedings of the trial had to be stayed. In the wake of heavy pendency of the cases, there is hardly any likelihood for this matter to be taken up in any near future. Such a course would be very detrimental to the interests of the prosecution. In such a situation, when the facts and circumstances of the case also appear to be of such nature that the Court feels that the matter may be disposed off on the basis of record taking the assistance of learned A.G.A., the Court deems it fit to proceed with the matter and pass order after hearing the learned A.G.A. and counsel for the applicants. The Court has preferred to adopt this course more so because the hub of the controversy involves nothing except the appreciation of the wider principles of fairness or to say the first principles of justice.

5. It appears that PW-11 Smt. Meenu was not making herself available in the court because she apprehended danger to her life and it was only after making enormous efforts that the trial court could ensure her presence for the purpose of cross examination in the court. The difficulty in procuring her attendance and the delay caused because of her non examination seems to have cast significant effect on the mind of the trial court and for prompting it to close the evidence as the court for obvious reasons did not want to take any chance to let the witness slip again during the trial. It also appears that the additional reason to take a strict view in the matter was that there was a direction of High Court to expedite the proceedings of the trial. Apparently the order passed by the court below is such which cannot be very seriously assailed on the ground of any illegality or impropriety and the view taken by the court below can also not be castigated for being perverse. But despite this fact, when this Court takes an over all broader view of the matter and keeps in perspective the imperative concept of fair trial, in the view of the Court it appears necessary that the trial should be finally decided and adjudicated upon, not on the basis of untested testimony of the witnesses, but after their testimonies have been tested on the anvil of cross examination. Such a course would not only enable the court to evaluate the evidenciary value and its worth more adequately but there shall also not be left any chance for either of the parties to assail the final verdict of the trial court on the ground that the judgment was based on unscrutinized testimonies which were never vetted on the touchstone of cross examination. Off course, it goes without saying that whenever the court feels that the adjournment sought by a party is not based on reasonable grounds or is actually having an oblique motive behind the same to delay the trial or to otherwise defeat the ends of justice, it is very much within the powers of the court not to grant the adjournment and close the evidence. But the present matter does not display any such circumstances on the basis of which this Court may come to the conclusion that the adjournment was sought for any of such reasons. The first date on which the witness was available was 8.12.2015

and the next date was fixed as 10.12.2015. It also does not appear to be a disputed fact that the counsel who had been conducting the trial was no more counsel in the case because of his own refusal or because of the withdrawal of the instructions by the applicants. In such a situation, the opportunity of two days time to engage the new counsel to cross examine the witness and conduct the trial does not appear to be an adequate opportunity. It cannot be said with any justification that in such a short time even if a new counsel was engaged he could have prepared the case and do justice with the trial of murder. In such circumstances, in order to arrive at the ends of justice and in order to meet and fulfill the vital requirements of equity and in order to ensure a fair trial, this Court feels inclined to direct that the trial court should fix some date and call the aforesaid witness to be cross examined by the accused.

6. It may be observed that whenever the witness appears in the Court to be cross examined, no adjournment shall be sought on behalf of any of the accused and cross examination will be done on that very date. If at all any adjournment is sought by accused, the court shall be at liberty to close the evidence and proceed with the trial in accordance with law.

7. In view of the above, the impugned order dated 16.12.2015 stands set aside. The court below is required to take steps in order to get the witness cross examined in the light of the directions made in this order.

8. The application stands allowed.

9. A copy of this order be certified to the lower court forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2016

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ -A No. 45262 OF 2015

Smt. Geeta Dixit & Ors. ...Petitioners
Versus
The Secy. Govt. of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
L.C. Srivastava, Neeraj Srivastava

Counsel for the Respondents:
C.S.C.

U.P. Absorption of Retrenched Employees of Government or Public corporation in Government Service Rules 1991-Rule 3 (1) read with U.P. Absorption of Retrenched Employee of Government or Public Corporation in Government Services (Recession) Rules 2003-Rule 3 (2)(ii)- Project officers working under non formal education scheme-after abolition of scheme-Government decided to absorb them as L.T Grade teacher in Government Inter College-the G.O. by which decision taken-High Court directed to re-consider the feasibility of protection of status and pay-High Court considering them as retrenched employee issued direction-admittedly the petitioners not worked since April 2001-after 08.04.2003 the date on enforcement of (Recession) Act 2003-their services automatically dispense with-no question of arrears of salary and other consequential benefits-as two wrong can not make one right-petition dismissed.

Held: Para-23 & 24

23. We are constrained to make a mention that inspite of categorical provision of Rule 1991 no other provisions were available to the State Government for any absorption of incumbent, once the project

was abrogated but at no point of time neither Rule, 1991 nor Rule, 2003 has been looked into. As indicated above, detail procedure was prescribed for absorption of retrenched employee, but no such procedure had ever been adopted in the matter. This is undisputed factual position that in the State of U.P for retrenched employees the State Government has framed the Rules of 1991 and thereafter the State Government had proceeded to promulgate Recession Rules of 2003. Once the Rules of 1991 was rescinded by means of Rules of 2003 and as such thereafter there is no provision of absorption of the retrenched employees. Whereas in the present case undisputed factual position, which is emerging is that petitioners' claims are not better than the retrenched employees. They were engaged purely under the project known as 'Non-Formal Education Project' and the said project had come to an end itself in the year 2001. Thereafter the State Government under its wisdom has proceeded to absorb the Project Officers against L.G. Grade teachers and once the petitioners have not chosen to be absorbed under the L.T. Grade Teachers, even though they were not the retrenched employees.

24. The petitioners have contended that their right had accrued in the past in their favour and as such, they were entitled for absorption according to their status but as indicated above at no point of time the petitioners were given any certificate to indicate that they were the retrenched employees contrary their engagement was purely temporary in nature and was liable to be terminated at any time without any prior information. The petitioners are claiming that they may be absorbed according to their status whereas the writ jurisdiction is meant to enforce the rule of law and not to violate the law. Once the State Government had framed the Rules of 1991, which was eventually rescinded by means of Rules of 2003 and admittedly the case of petitioners did not fall under the category of retrenched employees, no directive can be issued in violation to the Rules merely because some incumbents have been offered appointment, under the cover of the orders passed by this Court will not improve the case of the petitioners as two wrongs will not make a thing right, and equality in illegality, is totally against the rule of fair play and demand of petitioners, if accepted would be clearly violative of Articles 14 and 21 of Constitution of India.

Case Law discussed:
(1997) 8 SCC 372; AIR 1973 SC 2641; 1996 (3) ESC 622 (SC); Civil Appeal No. 5203 of 2004.

(Delivered by Hon'ble M.C. Tripathi, J.)

1. Smt. Geeta Dixit and 5 others are before this Court for quashing Para 5 (1) of the impugned order dated 15.6.2015 passed by the Secretary, Basic Education, Government of UP, Lucknow-respondent no.1 and have further prayed for direction commanding the respondents to extend all consequential benefits alongwith 12% interest thereon treating cadre holder post as per terms of earlier judgment dated 5.4.2002.

2. Brief background of the case, as is reflected from the record, is that a Non-Formal Education Scheme was initially introduced by the Central Government in the year 1979-80 for imparting education to children in the age group of 6 to 14 years, who either did not attend any school or who after the joining left the school before completing primary education. Initially the expenses incurred towards the said scheme were shared by the State Government and Central Government in the ratio of 50 : 50 but later on, it was revised to 40% : 60%. The said scheme was implemented in the State of Uttar Pradesh under the Directorate of Education (Basic) U.P. For the smooth running of the scheme, certain posts, including the posts of Supervisors were

created by the State Government vide Government Order dated 11.8.1981 to supervise the work at various centres. Consequently appointments were made to the post of Supervisors by the Government on 11.2.1982. The said scheme was purely temporary in nature. Appointments were made purely on temporary and adhoc basis and were liable to be terminated at any time without notice. It appears that subsequently the said scheme was modified and was known as 'Non-Formal Education Project'. Various posts were created by the Government on 30.3.1988. The said posts so created included the post of Project Officer at project level. It is also reflected that the project itself was temporary in nature. The Government Order clearly visualised that all the posts would be temporary liable to be abolished at any time without any prior information.

3. It is also reflected that the posts other than the posts of Project Officer (Pariyojana Adhikari) had their equivalent posts in the education department under the Director of Education, U.P. and accordingly all the posts other than posts of Pariyojana Adhikari were filled on deputation by transfer of officers/officials holding equivalent posts in the regular education. The State Government vide order dated 15.7.1988 had proceeded to appoint a Selection Committee empowered to select Project Officers. As per terms and conditions the persons appointed as Project Officers would be bound to work for at least three years and further that on cessation of the project, their services would automatically come to an end. The Non-formal Education Project as indicated above continued till 31.3.2001. Thereafter, the Central Government stopped funding and abrogated the project. Consequently, the State Government proceeded to come out with a revised project under the name of 'Education Guarantee Scheme and Alternative and Innovative Education' w.e.f. 1.4.2001. The petitioners did not hold any lien on any posts as they were initially appointed as supervisors under 'Non-Formal Education Scheme', the posts were abolished but they were selected and re-engaged on the post of Project Officers under the 'Non-Formal Education Project' itself. Most of the petitioners were issued appointment letters on 13.8.1989 and on 27.2.1991. A Writ Petition being Civil Misc. Writ Petition No. 42806 of 2000 came to be filed by Pradeshiya Pariyojana Adhikari Anopcharik Shiksha Sangh, U. P., through its General Secretary and ors. v. State of U. P. and Ors., inter-alia for the following reliefs :

"(a) A writ, order or direction of a suitable nature commanding the respondents to treat the posts of Project Officer, Non-Formal Education as cadre post in the subordinate education (Gazetted) service with all consequential benefits thereof to the petitioners and the members of the petitioner No. 1 Association;

(b) A writ, order or direction of a suitable nature commanding the respondents to treat the petitioners as regularly and substantively appointed on the post of Project Officer, Non-Formal Education and as members of Subordinate Education (Gazetted) Service with all consequential benefits thereof;

(c) A writ, order or direction of a suitable nature commanding the respondent No. 1 to take a Director, Non-Formal Education, U. P., Lucknow, as contained in his communication dated 4.2.1999 and 19.1.2000 (Annexures-20 and 17 to the writ petition) ; within a period to be specified by this Hon'ble Court and to maintain the existing status of the petitions till such decisions ;"

4. The aforesaid writ petition was finally disposed of by order dated 9.10.2000 with a direction to the State Government to take final decision on the representations filed by the petitioners therein after taking into reckoning the recommendation made by the Director, Non-Formal Education, U. P., Lucknow vide letters dated 4.2.1999 and 19.1.2000. The decision was required to be taken by means of a reasoned order, if possible, within two months from the date of production of certified copy of that order. Consequent upon the said direction, the State Government took up the matter but ultimately rejected the representations vide order dated 23.3.2001. However, on 24.3.2001 the Government issued another order visualising thereby that after the cessation/revision of 'Non-Formal Education Project' w.e.f. 31.3.2001 due to non-sanction of funds by the Central Government, services of the Project Officers/ Assistant Project Officers working at project level on ex-cadre posts although came to an end but it was decided by the Government on humanitarian grounds that such Project Officers/Assistant Project Officers, who were working on ex-cadre posts would be absorbed in the available posts of Assistant Teacher L.T. Grade in the pay scale of Rs. 4,500-7,000 with a clear stipulation that they would not get any pay protection on account of such absorption. The orders dated 23.3.2001 and 24.3.2001 were challenged in Writ Petition No.13653 of 2001. After exchange of the pleadings between the parties, the aforesaid Writ Petition alongwith 32 writ petitions were partly allowed by a common judgment dated 5.4.2002, being leading Writ Petition No.12879 of 2001 (Uma Shanker Singh and ors vs. State of UP and ors) with following observations:-

"6. On behalf of the petitioners main argument was advanced by Sri Ashok Khare, Senior Advocate while on behalf of the State, Sri Vinod Swarup, Additional Advocate General appeared in these petitions. The nub of the submissions of Sri Ashok Khare is two fold : first, that the petitioners have been illegally denied the status and pay they were enjoying as Project Officers on erroneous view that the posts of Project Officers were ex-cadre posts ; and second, that the petitioners have been illegally discriminated from the incumbents of other posts in the project whose status and pay have not been disturbed after the cessation of the project, Sri Vinod Swarup on the other hand submitted that the petitioners could not legally claim any parity with those incumbents of the posts of Project Officers, who had permanent lien in the education department and who have been repatriated to their substantive posts after abolition of the posts of Project Officers. As regards pay protection it has been submitted by the learned Additional Advocate General that any protection of status and pay if given to the petitioners would result in denial of equality of treatment to those, who have been repatriated to their parent department.

7. As regards the plea that the petitioners were not appointed on deputation, we are of the view that the use of the word 'deputation' in the appointment orders in relation to the petitioners was a misnomer. In State of Punjab and ors vs. Inder Singh and ors, (1997) 8 SCC 372, the Supreme Court explained the concept of 'deputation' in the following words :

The concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means service outside the cadre or outside the parent

department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry of period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."

8. Since the petitioners did not have any lien on any of the posts and rather they were appointed directly on the posts of Project Officers and not on transfer from any other department, they cannot be said to be deputationists. The earlier report of the Director Basic Education (Non-Formal Education) submitted in this regard on 19.1.2000, was correct and the subsequent report justifying the use of the word "deputation" in the appointment orders of the petitioners is unsustainable. However, since the posts of Project Officers were abolished and incumbents could not claim absorption or regularisation as of right on equivalent posts, in the absence of the statutory rules, what is now to be examined is whether Government having decided to absorb the petitioners could legally protect their status and pay. In this connection, Sri Vinod Swarup has submitted that is the status and pay of the petitioners are protected, that would be violative of fundamental rights of other Project Officers, who have been repatriated to their substantive posts of Sub-Deputy Inspector, Inspector of Schools, Assistant Teacher L.T. Grade, Lecturer and Extension Teacher after abolition of the project. The Government have not adverted to this aspect of the matter while deciding the petitioners' representation and since for the reasons disclosed hereinafter, we are persuaded to remit the matter to the State Government for reconsideration. We do not consider it necessary to express any opinion on the submission of the Additional Advocate General that if status and pay of the petitioners are protected, that would result in violation of fundamental rights guaranteed by Articles 14 and 16 of the Constitution of other Project Officers, who have been repatriated to their parent department. It is for the Government to see whether protection of status and pay to the petitioners would lead to violation of Articles 14 and 16 of the Constitution.

9. There is no denying fact that creation and abolition of posts are the attributes of the exercise of sovereign power of the State, State of U. P. and Anr., v. Dr. P. B. L. Saxena, AIR 1969 All 449 (FB), for "every sovereign Government has within its own jurisdiction the right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration and to abolish such offices as it may deem superfluous, 42 Am Jur 902 para 31 quoted in para 36 of the judgment by R.S. Pathak, J. (as he then was) in State of V.P. And another vs. Dr. P. B. L. Saxena (supra)." The Supreme Court in N. Ramanatha v. State of Kerala, AIR 1973 SC 2641. too has very clearly laid down that the power to create, continue and abolish any

civil post is Inherent in every sovereign Government and the decision in this regard is taken as a matter of Government policy depending on exigencies of circumstances and administrative necessities. In fact, the petitioners have not questioned the abolition of posts of Project Officers and other posts created under the Non-Formal Education Project. What is essentially under challenge in these petitions is the denial of status and pay protection while absorbing the petitioners after abolition of posts of Project Officers. We are of the considered view that although the petitioners could not claim, on abolition of posts of Project Officer created under Non-Formal Education in which they were appointed as of right, their absorption but once it was decided by the Government to absorb the retrenched Project Officers, it was obligatory for the Government to follow such norms and conditions as may have been laid down from time to time for absorption of surplus or retrenched employees.

10. Attention of the Court was invited to G.O, No. 88 (l)/66 O&M dated Lucknow March 2, 1967, laying down the terms and conditions of absorption of surplus employees. Surplus employees according to the said Government order could broadly be placed in the following categories :

"(a) those rendered surplus as a result of raising of norms of work or other economy measures approved by Government.

(b) those rendered surplus as a result of reorganisation of a department/ organisation/ office with a view to improve efficiency or to effect economy.

(c) all other viz., who have been recruited for specified jobs expected to last for a specified period or whose services are terminated in the normal course in accordance with the terms and conditions of their service such as additional copyists, seasonal peons attached to collection Amins, etc."

11. So far employees under category (c) above are concerned, the Government order aforesaid visualised that since they were recruited for a particular work and they clearly knew that their term of employment would expire after a specified period, therefore, their services should stand terminated on completion of the work or on the expiry of the fixed period for which they were employed in accordance with the terms and conditions of their appointments. As regards the employees under categories (a) and (b) above, they may be either permanent or temporary. These persons are to be absorbed on posts which may fall vacant on account of retirements, discharge, death, etc. or on new posts which may be created in future to meet the requirements of public work, and for that purpose, the terms and conditions of their absorption as laid down in the Government order are as under :

"A. Permanent employees will be absorbed in posts in identical or higher scale of pay, their pay being fixed in accordance with the existing rules except that in case of absorption on a higher posts, their pay will not be fixed at a stage next above the existing pay because such a case cannot be treated as a case of promotion and of assumption of duties and responsibilities of higher order in the normal course. They will also be allowed to draw their next increment on the same date on which they would have drawn it on their old post. On absorption in other departments, they will retain their lien on their permanent posts until they are confirmed on their new posts. They will also be eligible for promotion in their old department in clear and regular vacancies till they are confirmed on their new posts ; but their cases will not be considered for promotion to vacancies of shorter duration as that will mean unnecessary dislocation. The

procedure of absorption will be the same as adopted in normal course in releasing permanent Government servants for taking up new appointments in other departments and they will be entitled to all such facilities as are admissible under normal rules except as provided above.

B. (i) Temporary employees, as far as possible, will be absorbed in identical scale of pay. If such posts are not available they may be absorbed in posts in lower or higher scales of pay. Pay in such cases will be fixed in accordance with the following orders and they will be allowed to draw their next increment on the same date on which they would have drawn it on their old post:

(a) In case of absorption in lower posts, pay will be fixed at the same stage at which he was drawing pay in his old post by taking recourse to the provisions of Fundamental Rule 27, Financial Hand Book, Vol. II, Part II subject to the condition that the pay so fixed does not exceed the maximum of the pay scale of the new post. If there is no corresponding stage, the pay will be fixed at the next lower stage, difference being allowed under Fundamental Rule 19 read with Fundamental Rule 9 (23) (b), Financial Hand Book, Vol. II, Part II as personal pay to be absorbed in future increments. If an employee is drawing more than the maximum of scale of pay of his new post, the difference will be allowed as personal pay to be absorbed in future increases of pay on account of promotion, if any, or for any other reasons

(b) In case of absorption in a highest post, the benefit of fixation of pay at the stage next above the present pay will not be allowed and the pay will be fixed at the same stage, or if there is no such stage then at the" next below stage-difference being allowed under Fundamental Rule 19 read with Fundamental Rule 9 (23) (b). Financial Hand Book, Vol. II, Part II as personal pay to be absorbed in future increments.

(ii) To facilitate fixation of pay of these employees, the Governor has been pleased to delegate to Heads of Departments, the power of fixation of pay of such employees under Fundamental Rule 27, Financial Hand Book Vols. II to IV in accordance with the above principles. The cases -not covered by these orders should be referred to Government in the administrative department concerned.

(iii) The procedure for absorption will be that as soon as an alternative appointment is available, the surplus employee shall be served with the formal orders, to be passed by the competent authority, for termination of the services of the employee concerned. in accordance with his terms and conditions of appointment and simultaneously informed about the alternative appointment. If he agrees to join the new post within the period allowed, he will be appointed on the new post by the appropriate authority for the new post, but if he fails to do so, his services shall stand terminated in accordance with the formal orders already served on him. If he Joins the new post, he will be allowed a compensatory allowance which will be equal in amount to what would have been admissible to him under Rule 42, Financial Hand Book, Vol. III in the event of his transfer in the Interest of Government work from his old to the new post. The amount so paid will be debited to the primary unit "Allowances and Honoraria" of the departmental budget from which the pay of the new post is to be met. On absorption, the temporary employee will be deemed to have severed all connections with his previous post, but he will carry forward his leave account and his post service will count for pension if he is later confirmed in his new

post without interruption in service. Any break occurring between the relinquishment of the charge on the old post and the assumption of the charge on the new post which does not exceed the rules on the subject as standing on the date of such relinquishment in a case of transfer from the old to the new post will not be deemed to be an interruption within the meaning of Article 420, C.S.R., but the period of such break itself will not count as qualifying service. Inter se seniority of such an employee in the new department or in respect of new post will be fixed in accordance with principles which will be communicated separately by the Appointment Department."

12. In Dr. Chittaranjan Sharma and ors vs. State of Himachal Pradesh and another, 1996 (3) ESC 622 (SC), the appellants therein were not regularly appointed in H. I.M. Ayurvedic Degree College, Paprola, Kangra, which was taken over by the Government and handed over to Himachal Pradesh Health and Family Welfare Department and under relevant clause of the agreement, existing staff, Principal, Teaching and another employees were eligible to be absorbed in the college on a recommendation made by the screening committee after taking into consideration as to whether they fulfilled requisite conditions. The appellants therein were absorbed in suitable administrative posts to which they were eligible. They challenged their absorption before the Administrative Tribunal. The Tribunal directed to maintain the scale of pay which they were drawing on the date of the takeover and directed their absorption in the posts of Ayurvedic Chikitsa Adhikaries, etc. The Supreme Court held :

"It is seen that since the appellant had not fulfilled the requisite qualifications either when they were initially appointed by the committee before takeover nor when statutory rules were made by the Governor so as to enable for absorption. Instead of retrenching them from service, due to non-fulfilment of the requisite qualifications, the Government came to absorb them in the Ayurvedic Chikitsa, Adhikaries post, etc. to which they are eligible. The Tribunal has given the direction to maintain the pay scales and to make adjustment and absorption. In our view, directions are correct and based on equity and do not call for any interference. They may also be considered for further promotion from the absorbed posts in accordance with the rules."

13. Since the Government have not addressed itself to factors relevant to the question as to protection of pay and status, we are of the view that the matter should be remitted to the State Government for reconsideration.

14. Accordingly, the petitions succeed and are allowed in part. The impugned order dated 23.3.2001 is quashed. The matter is remitted to the State Government to reconsider the feasibility of protection of pay and status of the petitioners after taking into reckoning all the relevant factors stated in this judgment and if necessary to modify its order dated 24.3.2001, accordingly."

5. It is also reflected from the record that the State Government has proceeded to challenge the aforesaid judgement passed by Division Bench of this Court by means of Special Leave Petition No.12422 of 2002 (State of UP and ors vs. Smt. Vandana Singh and ors). Hon'ble Supreme Court vide an order dated 22.7.2002 had stayed operation of the judgement dated 5.4.2002 passed by the Division Bench. Finally the Civil Appeal No.8658 of 2002 and other connected appeals were dismissed on 1.12.2011 with following observations:-

"Having heard learned counsel for the parties and perused the impugned

judgment, we are of the opinion that the direction by the High Court to the Government to consider the question of protection of pay and status of the writ petitioners in the light of the observations made in the impugned judgment, does not warrant our interference with the impugned judgment. Accordingly, the appeal is dismissed.

However, having regard to the fact that the issue is hanging fire for over 10 years, we would request the authorities concerned to take a final decision in the matter, as expeditiously as practicable and in any case, not later than 6 months from the date of receipt of a copy of this order.

In view of the order passed in the appeal, all applications for impleadment and intervention are rendered infructuous and are disposed of accordingly.

CIVIL APPEAL NO. 631 of 2007

In light of the order passed in Civil Appeal No. 8658 of 2002 arising out of SLP(C) No. 12422 of 2002 [@ C.M.W.P. No. 18619 of 2001], this appeal also merits dismissal. We order accordingly. However, insofar as the enforcement of order dated 5th September, 2002 passed by the High Court of Uttarakhand at Nainital in terms of the subsequent order dated 8th June, 2004 passed in Civil Contempt Petition No. 96 of 2003 is concerned, it will be open to the parties to pursue appropriate remedy as may be available to them in this behalf."

6. After the aforesaid matter attained finality, the opposite parties considered the matter and passed an order on 27.09.2012, whereby the petitioners were granted the revised pay scale corresponding to the pay scale of post of Project Officer/ Assistant Project Officer after seeking approval of the finance department. The relevant extract of the order dated 27.09.2012 is being quoted hereinbelow:

"2. इस संबंध में शासन द्वारा माननीय उच्चतम न्यायालय में योजित की गयी विशेष अनुज्ञा याचिका संख्या– 8658/2002, दिनांक 01 दिसम्बर, 2011 में दिये गये आदेशों के क्रम में पुर्नविचार करते हुये वित्त विभाग द्वारा की गयी टिप्पणी के प्रकाश में निम्नवत निर्णय लिया गया है:–

"परियोजना अधिकारी एवं सहायक परियोजना अधिकारी के पदों पर पदधारक क्रमशः वेतनमान रू0 6500–10500 एवं 5000–8000 में तैनात थे। छठे वेतन आयोग के संदर्भ में इन वेतनमानों का सामान्य पुनरीक्षण क्रमशः वेतन बैण्ड–2 रू0 9300–34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैण्ड–2 रू0 9300–34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैण्ड–2 रू0 9300–34800 ग्रेड वेतन रू0 4200 के पदों पर तैनाती दिये जाने से उनके वेतन एवं स्तर का संरक्षण ;चतवजमबजपवद वि चंल ंदक `जंजनेद्ध हो जाता है।

3- इस संबंध में मुझे कहने को निर्देश हुआ है कि ऐसे परियोजना अधिकारी/ सहायक परियोजना अधिकारी को शासन के पत्र सं0 454/15–68–प्रौ0–2001–200–93/2000 दिनांक 24 मार्च, 2001 द्वारा एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय पदों पर समायोजित किया गया था। तत्समय 281 परियोजना अधिकारी/ सहायक परियोजना अधिकारी द्वारा कार्यभार ग्रहण किया गया था केवल 36 परियोजना अधिकारी/ सहायक परियोजना अधिकारी ने एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय पदों पर कार्यभार नहीं ग्रहण किया था। उनकी पूर्व की सेवाओं को दृष्टिगत रखते हुये मा0 उच्चतम न्यायलय के आदेश के अनुपालन में उपरोक्त शसनादेश का लाभ प्रदान करते हुये एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय रिक्त पदों पर समायोजित / तैनाती किये जाने की कार्यवाही सम्पन्न कराया जाय ।

4- उक्त आदेश तत्काल प्रभाव से लागू माना जायेगा ।"

7. After the decision was taken by the State Government on 27.9.2012, the petitioners again approached to this Court by means of Writ Petition No.61522 of 2012 (Smt. Meena Manral and ors vs. State of UP and ors) and while entertaining the writ petition an interim

order was passed on 27.11.2012 by which the impugned order dated 27.9.2012 was stayed leaving it open to the State Government to pass appropriate order dealing with the issue. However, no such decision was taken by the State Government during the pendency of the writ petition. On 09.3.2014, after hearing the matter at length, this court had passed the following order:

"By means of this writ petition the petitioners have challenged the order dated 27.9.2012 passed by the State Government in-purported compliance of the earlier judgment of the Apex Court dated 1.12.2011 passed in Civil Appeal No.8658 of 2002 and connected matters.

By means of the impugned order as per the State Government the claim of pay and status of the post of Project Officer/Assistant Project Officer have been granted to the petitioners who have been absorbed as L.T. Grade Assistant Teachers. However, the grievance of the petitioners is that under the judgment dated 1.12.2011 their case for grant of status equivalent to the post of Project Officer was required to be considered which has not been done by the State Government.

The contention is that in view of the said judgment they are entitled to be considered for being absorbed on the post equivalent to the post of Project Officer, namely, D.I./A.D.I/.D.I.G.S. and to be given salary in the pay scale corresponding to the said post which has not been done in the instant case.

Sri Sashi Nandan, learned senior counsel appearing for the petitioners in one of the matters has invited the attention of the Court to certain recommendations made by Under Secretary, Education Department, Government of U.P. to the State Government by which he has proposed that the post of Deputy Basic Education Officers in the pay-scale of Rs.6000-10500/- which are vacant should be kept vacant and the absorption of the petitioners should be considered against the said post which are equivalent to the earlier post of Project Officer.

The contention is that this recommendation has not been considered and the impugned order has been passed in a mechanical manner.

Put up this matter on Tuesday next, i.e. 13.5.2014.

Learned counsel for the respective parties shall address the Court on the issue that what would be the modality for absorbing the petitioners on a post equivalent to the post of Project Officer as also the feasibility by such an exercise keeping in view the relevant service rules applicable to the said post and the promotional opportunities etc. of the Feeder Cadres as also the nature of duties to be performed."

8. The Court had considered the matter in detail on the issue of according status equivalent to the post of Project Officer/ Assistant Project Officer and partly allowed the writ petition on 13.5.2014 with following observations:-

"After hearing learned counsel for the petitioners as also the learned standing counsel for State and after perusing the material on record including the affidavits filed, we are of the view that the State has not considered the matter strictly in accordance with the observations of this court made in the earlier judgment dated 05.04.2002. Under some misconception, it has arrived at the conclusion that by absorbing the petitioners in L.T. Grade as Assistant Teachers and granting the revised pay-scale in respect of the pay-scale of the erstwhile post of Project Officer, status of Project Officer/ Assistant Project Officer also stood

conferred. Learned counsel for the petitioners have contended that under the non-formal education scheme, they were not performing a teaching job but were exercising supervisory functions, whereas their absorption has been made on the post of Assistant Teachers in L.T. Grade, which is a teaching post. Learned counsel for the petitioners have also invited the attention of the court to a recommendation dated 23.06.2010 made by the Under Secretary, Department of Education to the State Government, a copy of which is annexed as Annexure-6 to the writ petition. The relevant extracts of the said recommendation are as under:

"इस संबंध में पूर्व पृष्ठ–7 एवं 8 पर स्थिति स्पष्ट की जा चुकी हैं । प्रकरण में यह उल्लेखनीय है कि कार्मिक अनुभाग–2 के शासनादेश सख्या–20/1/91/का–2–2008 दिनांक 9 जून 2009 में यह नीतिगत निर्णय लिया जा चुका है कि विभागों में उपलब्ध सरप्लस कार्मिकों का समायोजन कर दिया जाये और इनके समायोजन होने तक रिक्त पदों को न भरा जाये । इसलिए सरकार / विभाग का यह दायित्व बनता है कि इनका अतिशीघ्र समायोजन कर दिया जाये। इनके पैतृक विभाग बेसिक शिक्षा अन्तर्गत ही निरीक्षण अनुभव के अनुरूप वेतनमान रू0 6500–10500 में उप बेसिक शिक्षा अधिकारी के 27 आस्थगित पद रिक्त है। इसलिए उक्त रिक्त पदों के सापेक्ष समायोजन किये जाने में कोई विधिक अथवा अन्य कठिनाई नहीं है। अतः विनम्र अनुरोध है कि प्रश्नगत सरप्लस परियोजना अधिकारियों का इन्हीं के पैतृक विभाग बेसिक शिक्षा अन्तर्गत उप बेसिक शिक्षा अधिकारी के रिक्त 27 आस्थगित पदों के सापेक्ष समायोजन आदेश निर्गत किये जाने के संबंध में कृपया उच्चादेश प्राप्त करना चाहें ।"

On an overall consideration of the facts and circumstances of the case, we find that the impugned order does not show any consideration of the observations made in the report of the Under Secretary as quoted hereinabove. The relevant aspects noted by us in the order dated 09.05.2014 have also not been adverted to by the State Government while taking the impugned decision.

The reasons given in the impugned order for granting of status of Assistant Teacher in L.T. Grade does not appear to be sound. The State has not considered the relevant aspects of the matter, as directed by this court on 05.04.2002 and as has been noticed by us in the order dated 09.05.2014.

In the aforesaid circumstances, the impugned order, in so far as it relates to the grant of status of Assistant Teacher in L.T. Grade to the petitioners is concerned, is not sustainable and the same is quashed, and so far as the grant of status equivalent to the post of Project Officer/ Assistant Project Officer was concerned, the same requires no interference at this stage.

Consequently, we direct the State Government to reconsider the matter pertaining to the issue of grant of equivalent status to the petitioners as ordered by this court in its judgment dated 05.04.2002 by considering all the relevant aspects of the matter including the recommendation dated 23.06.2010 against existing post or any other equivalent post. It shall be open for the petitioners also to file appropriate representation stating therein their version before the State Government. The State Government shall take a decision in this regard within a period of three months from the date of production of a certified copy of this order before it and in the event, the claim of the petitioners is accepted then all consequential benefits flowing therefrom shall also be granted to them. The pay protection granted under the order dated 27.09.2012 shall be subject to the fresh decision to be taken as aforesaid.

The existing status of the petitioner shall continue till the aforesaid decision is taken by the State Government.

The writ petition is partly allowed."

9. In pursuance of the order passed by Division Bench of this Court dated 13.5.2014 in Writ Petition No.61522 of 2012 the State Government on 15.6.2015 had proceeded to dispose of the claim. The said order dated 15.6.2015 has been challenged in the present writ petition. The order dated 15.6.2015 is reproduced hereinbelow:-

" उपर्युक्त विषयक शासन के पत्र संख्याः 454/ 15–86–प्रौ0– 2001–200 (93)/ 2000 दिनांक 24 मार्च, 2001 एवं पत्र संख्याः 985/79–14–2012–200 (93)/ 2000 टीसी दिनांक 27.9.2012 (छायाप्रति संलग्न) का कृपया संदर्भ ग्रहण करनें, जिसके द्वारा अनौपचारिक शिक्षा की समाप्ति के पश्चात् परियोजना अधिकारियों के समायोजन, स्टेटस एवं अन्य लाभ प्रदान किये जाने के सम्बंध में शासन द्वारा पूर्व में निम्नवत् निर्णय लिया गया थाः–

2- भारत सरकार की आर्थिक सहायता से संचालित अनौपचारिक शिक्षा योजना को दिनांक 31.3. 2001 से समाप्त/ पुनरीक्षित कर योजनान्तर्गत कोई भी धनराशि उक्त तिथि के उपरान्त भारत सरकार द्वारा स्वीकृत न किये जाने के निर्णय के फलस्वरूप परियोजना स्तर पर तदर्थ एवं निःसंवर्गीय पदों पर तैनात परियोजना अधिकारियों/ सहायक परियोजना अधिकरयिों की आवश्यकता नही रह गयी थी। अतः ऐसे परियोजना अधिकारियों, जिनकी नियुक्तियॉ पर्यवेक्षक/पर्यवेक्षिकाओं/प्रसार शिक्षकों में से तदर्थ एवं निः संवर्गीय पदों पर इस शर्त के अधीन की गयी थी कि परियोजना की समाप्ति पर इनकी सेवाएं बिना किसी पूर्व सूचना के स्वतः समाप्त हो जायेगी एवं ऐसे सहायक परियोजना अधिकारी (निःसंवर्गीय) जिनका समायोजन परियोजना अधिकारियों के पदों को डाउनग्रेड करके सहायक परियोजना अधिकारी के निःसंवर्गीय पदों पर वेतनमान रू0 5000–8000 में किया गया था, के सम्बंध में शासनादेश 454/ 15–86–प्रौ0– 2001–200 (93)/ 2000 दिनांक 24 मार्च, 2001 द्वारा यह निर्णय लिया गया था कि इन सभी परियोजना अधिकारियों/ सहायक परियोजना अधिकारियों की विभाग में लम्बी सेवा अवधि को देखते हुए इनकी सेवाये समाप्त न की जाए अर्थात मानवीय दृष्टिकोण अपनाते हुए विभाग में उपलब्ध एल0टी0ग्रेड के वेतनमान रू0 4500–7000 में सहायक अध्यापक के संवर्गीय रिक्त पदों पर नियुक्ति प्रदान कर दी जाए, किन्तु इन्हे वेतन संरक्षण अनुमन्य न होगा।

3- उक्त शासनादेश संख्याः 454/ 15–86–प्रौ0– 2001–200 (93)/ 2000 दिनांक 24 मार्च, 2001 के अनुपालन में तत्समय 281 परियोजना अधिकारियों/ सहायक परियोजना अधिकारियों द्वारा कार्यभार ग्रहण किया गया था। केवल 36 परियोजना अधिकारियों/ सहायक परियोजना अधिकारियों ने एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय पदों पर कार्यभार नही ग्रहण किया था। अतः शासनादेश संख्याः 985/79–14–2012–200 (93)/ 2000 टीसी दिनांक 27.9.2012 द्वारा उनकी पूर्व की सेवाओं को दृष्टिगत रखते हुए मा0 उच्चतम न्यायालय के आदेशों के अनुपालन में उपरोक्त शासनादेश दिनांक 27 मार्च, 2001 का लाभ उन्हें प्रदान करते हुए एल0टी0 ग्रेड के संवर्गीय रिक्त पदों पर समायोजित/ तैनाती किये जाने हेतु निर्देश दिये गये।

4- परियोजना अधिकारियों / सहायक परियोजना अधिकारियों के वेतन एवं स्तर को संरक्षित किये जाने के सम्बंध में शासनादेश दिनांक 27.9.2012 द्वारा यह निर्णय लिया गया कि परियोजना अधिकारी एवं सहायक परियोजना अधिकारी के पदों पर पदधारक क्रमशः वेतनमान रू0 6500– 10500 एवं 5000–8000 में तैनात थे। छठें वेतन आयोग के संदर्भ में इन वेतनमानों का सामान्य पुनरीक्षण क्रमशः वेतन बैण्ड–2 रू0 9300–34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैण्ड–2 रू0 9300–34800 एवं ग्रेड वेतन रू0 4200 होता है। इन पदधारकों को क्रमशः वेतन बैण्ड–2 9300–34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बेण्ड–2 रू0 9300–34800 ग्रेड वेतन रू0 4200 के पदों पर तैनाती दिये जाने से उनके वेतन एवं स्तर का संरक्षण (Protection of Pay and Status) हो जाता है।

5- शासन के उक्त आदेश दिनांक 27.9.2012 के विरूद्ध पुनः कतिपय परियोजना अधिकारियों द्वारा मा0 उच्च न्यायालय में रिट याचिका संख्या 61522/ 2012 मीना मनराल व अन्य बनाम उ0प्र0 राज्य व अन्य योजित की गयी, जिस पर माननीय उच्च न्यायालय द्वारा दिनांक 13.5.2014 के अनुपालन में शासन द्वारा कार्यालय ज्ञाप संख्या 142/79–14–2015–200 (93)/ 2000 टीसी दिनांक 30.4.2015 निर्गत किया गया, जिसकी प्रतिलिपि आपको भी पृष्ठांकित है। इस कार्यालय ज्ञाप की छायाप्रति सुलभ संदर्भ हेतु पुनः संलग्न है, जिसमें निम्नलिखित निर्णय लिये गये हैः–

(1) शिक्षा अनुभाग–14 के पूर्व निर्गत शासनादेश दिनांक 29 सितम्बर, 2012 को संशोधित करते हुए अनौपचारिक शिक्षा योजना के परियोजना स्तर पर तदर्थ और निःसंवर्गीय पदों पर कार्यरत परियोजना अधिकारियों एवं सहायक परियोजना अधिकारियों की संख्या के समतुल्य संख्या में समान पदनाम व वेतनमान के निःसंवर्गीय पदों (वेतनमान रू0 6500–10500 एवं रू0 5000–8000) का सृजन परियोजना समाप्ति की तिथि से करते हुए पूर्व

परियोजना के इन पदधारकों का समायोजन समान पदनाम के इन निःसंवर्गीय पदों के सापेक्ष इस प्रतिबन्ध के अधीन किया जाता है कि इन पदाधारकों की सेवा निवृत्ति अथवा अन्य कारणें से रिक्त होने वाले उक्त निःसंवर्गीय पद स्वतः समाप्त हो जायेगें।

(2) पूर्व निर्गत शासनादेश दिनांक 24 मार्च, 2001 के क्रम में जिन पदधारकों द्वारा एल0टी ग्रेड अध्यापक के पद पर पूर्व में कार्यभार ग्रहण कर लिया है उन्हे यह विकल्प होगा कि वह एल0टी ग्रेड अध्यापक के रूप में कार्यरत बने रहें अथवा वह इन निःसंवर्गीय पदों के सापेक्ष कार्यभार ग्रहण करें। यह विकल्प उक्त कार्यालय ज्ञाप निर्गत होने से 30 दिन की अवधि में दिया जा सकेगा।

6- शासन के संज्ञान में यह लाया गया है कि उक्त कार्यालय ज्ञाप संख्या 142/79–14–2015–200 (93)/ 2000 टीसी दिनांक 30.4.2015 के अनुपालन की दिशा में अभी तक कोई लापरवाही सम्पादित नही की गयी है तथा किसी भी परियोजना अधिकारी/ सहायक परियोजना अधिकारी को उक्त कार्यालय ज्ञाप दिनांक 30.4.2015 में दी गयी व्यवस्था के अनुसार कोई लाभ/ वेतन संरक्षण आदि नही प्राप्त हुआ है।

7- अतः मुझे आपसे कहने को निर्देश हुआ है कि कृपया शासन के कार्यालय ज्ञाप संख्या 142/79–14–2015–200 (93)/ 2000 टीसी दिनांक 30.4.2015 का अनुपालन अवलिम्ब सुनिश्चित करते हुए अपने स्तर से निम्नलिखित कार्यवाही तत्काल सम्पादित कराने का कष्ट करें:–

1- परियोजना अधिकारी/ सहायक परियोजना अधिकारी, जो शासनादेश दिनांक 24.3.2001 के अनुपालन में एल0टी0 ग्रेड वेतनमान में समायोजित हुए है, उन सभी dfe;k dk vukipkfjd f'k{kk e le;≤ ij fuxr llxr 'kklukn'kk d v/khu ikIr dj jg oru dk ¼mUg vfUre oru iek.ki= d vk/kkj ij½ foRrh; gLrifLrdk e oru fu/kkj.k gr fu/kkfjr fu;ek d vUrxr rRle; ,yOVh0 xM e ikIr orueku e oru fu/kkfjr dju dh dk;okgh lfuf'pr djk;A

2- ftu ifj;ktuk vf/kdkfj;k }kjk fodYi i= Hkjdj ifj;ktuk vf/kdkjh d in ij tku dk fodYi iLrr fd;k x;k g] mu lHkh fodYi i=k dk e.Myh; l;Dr f'k{kk fun'kd l ikIr dj ldfyr fodYi i=k dk fun'kd] lk{kjrk ,o odfYid f'k{kk dk rRdky miyC/k djk;k tk;A

lyXud% ;FkkDr%

Hkonh;
¼ ,p0,y0 xlrk½
lfpoA

10. Learned counsel for the petitioner submits that the petitioners being cadre holder became fully entitled for the benefit of promotion, time scale, super time scale, gratuity, pension etc. post likewise Deputy Inspector of Schools (now Block Education Officer) and Deputy Inspector of Girls Schools. He further makes submission that the judgement of this Court dated 5.4.2002, by which the post of Basic Education has been held cadre post, has become final and the petitioners became entitled for benefit of promotion, time scale, super time scale, gratuity, pension etc. Inspite of specific direction of this Court as well as Hon'ble Supreme Court the respondents have not taken any positive steps towards joining of the petitioners as it is clear from perusal of Para-5 (1) the impugned order dated 15.6.2015. The respondents could not justify their conduct by permitting to work on the post of LT Grade Teacher. The same is in violation to the dictum of the judgement of this Court dated 5.4.2002 passed in Uma Shanker Singh and ors's case (supra), which was affirmed by Hon'ble Supreme Court on 1.12.2011. The petitioners attained the age of superannuation in between 31.3.2012 to 30.6.2015 and despite of protection of this Court the respondents neither allowed the petitioners to work nor paid the salary since April, 2001 and keeping in view of the final decision, the petitioners are entitled to get the post retiral benefits in corresponding pay scale of Rs.6500-10500.

11. On the other hand, learned Standing Counsel has opposed the writ petition by submitting that the petitioners could not legally claim any parity with those incumbents on the post of Project Officer, who had permanent lien in the education department and who have been repatriated to their substantive post after abolition of the post of Project Officer and moreover under the Scheme the appointments were made purely on temporary and adhoc basis, liable

to be terminated at any time without notice and subsequently the scheme in question had also been abrogated. In the appointment letters the terms and conditions were given in most categorical manner without any ambiguity that their engagement were purely on temporary basis. Once the project itself has come to an end, then the petitioners had no right to dictate the authority concerned for giving any corresponding post. The appointments of the petitioners were not made against the substantive post. No rules have been framed and no recruitment process had been adhered to and since the posts of Project Officer were abolished and as such, incumbents could not claim absorption or regularization as of right on equivalent post in the absence of statutory rule.

12. Heard rival submissions and perused the record.

13. It is not disputed that the petitioners were initially engaged as Project Officer created under Non-Formal Education Scheme. The post was created including the post of Project Officer at Project level and since the project itself was temporary in nature, all the persons who had applied and were selected, gave an undertaking to the effect that on being selected to the post of Project Officers, they would continue on the post at least for a period of three years and in the event of project coming to an end, their services would automatically stand terminated. It is not disputed that there was mention in the Government Order, by which the posts of Project Officer were created, that the posts of Project Officers were ex-cadre post. The State Government has taken steps only on humanitarian ground for accommodating incumbents those, who were working as Project Officers and tried to absorb them as LT Grade Teachers. Therefore, as per the appointment letter and their discontinuation, it is not disputed that the petitioners were not retrenched employees. Their engagement was under project and admittedly the said project had come to an end. While deciding the Writ Petition filed by Bal Krishna Mishra and ors (supra) this Court has proceeded to quash the initial order dated 23.3.2001 and the matter was remitted back to the State Government for reconsidering the feasibility of protection of pay and status of the petitioners.

14. At this stage we proceed to make a mention that there is Rule known as 'Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rule, 1991' (hereinafter referred as Rule 1991), which had been framed in exercise of powers vested under the provisions of Article 309 of Constitution of India. The State Government was empowered to notify order whereby it may provide for absorption of Retrenched Employees in any post or service under the Government and also prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees. Such notified order by virtue of sub- rule (1) of Rule 3 of 1991 Rules was to have over riding effect. Said rule nowhere provide for any automatic absorption of any retrenched employee covered under the definition of "Retrenched Employee" of 1991 Rules, unless and until a notified order has been issued by the State Government and the matter of such Retrenched Employee is covered by such order and the manner and the procedure for absorption was followed in accordance with such notified order read with relevant service rules.

15. It is relevant to refer the judgment dated 28.4.2006 passed by the Hon'ble Apex Court in Civil Appeal No. 5203 of 2004

Awas Vikas Sansthan and another. Vs. Awas Vikas Sansthan Engineers Association and others, wherein it has been held that "department which was abolished or abandoned wholly or partially for want of funds, the court cannot, by a writ of mandamus, direct the employer to continue employing such employees as have been dislodged".

16. We would like to proceed to examine the claim of petitioners in the light of Rules 1991 whereas the State Government has provided for absorption of the retrenched employees and the Rule itself had provided exhaustive procedure for deciding the claim of the retrenched employees if they claimed their absorption under Rules 1991. Under Rule 3 (1) of this Rules, the retrenched employees were given the rights to be absorbed on any post or service under the Government and the procedure prescribed for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employee.

17. It is relevant to indicate that the Rules of 1991 had been tested by this Court in Writ Petition No.17195 of 1998 (Bageshwari Prasad Srivastava and others and State of U.P. and others decided on 29.4.1999 in which the Court held as follows:-

"The purpose of retrenchment certificate is to enable the employee who will absorb him to know the reason for retrenchment. It obviates the necessity to find out whether the employee was terminated for any disciplinary action etc. An employee satisfying all the requirement of retrenchment cannot be denied absorption only because he was not possessed of the certificate. In absence of a form or manner in which a certificate should be issued, the provisions should be construed or as to advance the main objective of the rule namely Absorption of an Employee whose services have come to an end as a result of winding up of the Company. The petitioner had applied for retrenchment certificate to the Managing Director. He did not refuse to issue it nor did he hold that petitioners were not retrenched employee. Since there were 323 employees of the Managing Director instead of issuing of individual certificate wrote a letter to the Government to absorb them in Government Department. There is no reason as to why this letter of the Managing Director should not be construed as a retrenchment certificate. It is settled law that no one should fact that the petitioner applied for retrenchment certificate. Therefore, they did whatever was possible for them to avail the benefit of absorption. It the Managing Director instead of issuing certificate individually issued a letter generally for absorption then I am of the opinion that the Rule 1991 were complied and the employee could not be denied absorption as they were not possessed of retrenchment certificate. Therefore, all the impugned order could not be upheld.

The respondent while rejecting the claim of the petitioner held that even if a retrenched employee was found entitled to absorption he could be given certain marks in accordance with the order issued by the Government under Rule (3) but the order does not refer to any specific order of the Government. The petitioners have filed copy of two Government Orders issued on 4.5.1994 and 2.6.1994. The first order no. 1974 directed that any vacancy arising in future should be filed by retrenched employee and such employee should be given preferences and priority. The order further made it clear that the ban on appointment did not apply to regular appointment, promotions under Service

Rule. The second order No. 2356 directed to give priority to retrenched employee in all future appointment in accordance with their qualification. These orders were issued under Rule 3 of the 1991 Rules, which, provides that the orders could be issued by the Government irrespective of any thing contained in any other service rule. The sub rule 2 of Rule 3 further provides that the relevant service rule shall stand modified to the extent an order is issued by the Government. It is, therefore, clear that a retrenched employee is not only entitled to absorption in accordance with the Government orders but he is entitled to preference and priority in Government service for which he is qualified. The order of the respondent cannot be maintained even for this reason.

In the result this petition succeeds and is allowed and the orders dated 28.4.1998 (Annexure-18 to the writ petition) are quashed. The respondents are directed to absorb the petitioners/employees of the Bhadohi Woolens Limited in Government service in accordance with their qualification in Class 3 and 4 posts forthwith."

18. The aforesaid judgment was upheld in Special Appeal No. 540 of 1999 decided on 19.11.2001 with the observations that the petitioners will have no right to claim appointment on Class III posts which are required to be filled up on the basis of recommendation of the U.P. Public Service Commission. The Special Leave to Appeal (Civil) No. 5379 of 2002 against the order in Bageshwari Prasad Srivastava' case was also dismissed by Supreme Court on 18.3.2002.

19. It is relevant to indicate that subsequently the State Government had promulgated the Rules known as 'Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003', which rescinded the Rule 1991 with immediate effect i.e. 8.4.2003, and clearly held that the right of the retrenched employees to be considered for absorption accrued under 1991 Rules but the person, who has not been absorbed till the commencement of 2003 Rules, shall stand terminated from the date of enforcement of 2003 Rules. Recession Rules 1, 2 and 3 of the Rule of 2003, are as under:-

"1.(i) These rules may be called the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003.

(ii) They shall come into force at once.

2.In these rules, unless there is anything repugnant in the subject or context.

(a)" Constitution" means the Constitution of India;

(b)"Governor" means the Governor of Uttar Pradesh.

3 (1) Uttar Pradesh Absorption of Retrenched Employees of Government Rescission and Public Corporation in Government Service Rules, 1991 are hereby rescinded and as a consequence of such rescission.

(i) the right of a retrenched employee to be considered for absorption accrued under the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991 but who has not been absorbed till the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 shall stand terminated from such date,

(ii) the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection, shall stand abrogated from the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003,

(2) Notwithstanding such rescission:-

(i) the benefit of pay protection granted to an absorbed retrenched employee prior to the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 shall not be withdrawn,

(ii) a retrenched employee covered by the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991 prior to the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003, but who has not been absorbed till such date shall be entitled to get relaxation in upper age limit for direct recruitment to such Group "C" and Group 'D' posts which are out aside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or Public Corporation in completed years."

20. Perusal of the aforesaid Rules would go to show that the Governor in exercise of his legislative power conferred by the proviso to Article 309 of the Constitution, has been pleased to make the said rules with a view to rescind the Rules 1991. Sub-rule (1) of Rule 3 of Recession Rules 2003 clearly deals with consequence of such rescission by mentioning that right of the retrenched employee to be considered for absorption accrued under the Rules, 1991 but who has not been absorbed till the date of the commencement of the Rules, 2003, shall stand terminated from such date. It further provided that the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection, shall stand abrogated from the date of the commencement of the Rules, 2003. Sub-rule (2) of Rule 3 of Rule, 2003, notwithstanding such rescission has saved and extended certain benefit. Benefit of pay protection already accorded prior to commencement of Rules 2003 has been saved, and further who have not been absorbed, qua them provision has been made for age relaxation in upper age limit for direct recruitment to such Group 'C' and 'D' post which are outside the purview of U.P. Public Service Commission to the extent he has rendered his continuous service in substantive capacity in the concerned Government Department or Public Corporation in completed years Except for these protection, no other benefit has been saved or extended.

21. It is reflected from the record that initially the petitioners approached to this Court by means of Writ Petition No.42806 of 2000. The said writ petition was disposed of on 9.10.2000 with a direction to the State Government to consider the representations of the petitioners. The State Government vide an order dated 23.3.2001 had proceeded to reject their claim but taken a very lenient view by which the petitioners i.e. Project Officers, who were not having any lien

anywhere, their services were decided to be absorbed as Assistant Teachers in L.T. Grade. Instead of terminating their services and in pursuance of the said decision, most of the petitioners were adjusted against the said post in Government Inter Colleges in the pay scale of Rs.4500-7000 but the petitioners in their own wisdom have chosen to challenge the orders dated 23.3.2001 and 24.3.2001 and approached to this Court by filing various writ petitions, which were clubbed together and decided by this Court on 5.4.2002 and the order dated 23.3.2001 was quashed. The main grievance of the petitioners at that point of time was to the effect that the State Government had not addressed itself to factors relevant to the question as to protection of pay and status and as such the Court remitted the matter to the State Government for re-consideration. The Court had taken a prima facie view that while absorbing the petitioners as Assistant Teachers in L.T. Grade, the State Government had not considered the pay and status commensurate with the post of Project Officer, which was being held by them earlier and accordingly the said direction was issued. It is relevant to indicate that the said order passed by this Court was stayed by Hon'ble Supreme Court in Civil Appeal No.8658 of 2002 but eventually the said Civil Appeal filed by the State was dismissed vide an order dated 1.12.2011.

22. Now at this stage we proceed to make a mention that the State Government had taken a most lenient view while passing the order dated 23.3.2001 by which the services of the petitioners i.e. Project Officers, who were not having any lien anywhere, were decided to be absorbed as Assistant Teachers in L.T. Grade, instead of terminating their services and pursuance of the said order most of the Project Officers have proceeded to join but the petitioners, who are six in numbers before this Court, at no point of time had proceeded to join in pursuance of the order of the State Government dated 23.3.2001 and admittedly they have not rendered any work since then and now at this stage they claimed that they have every right to get the pay and status commensurate with the post of Project Officer.

23. We are constrained to make a mention that inspite of categorical provision of Rule 1991 no other provisions were available to the State Government for any absorption of incumbent, once the project was abrogated but at no point of time neither Rule, 1991 nor Rule, 2003 has been looked into. As indicated above, detail procedure was prescribed for absorption of retrenched employee, but no such procedure had ever been adopted in the matter. This is undisputed factual position that in the State of U.P for retrenched employees the State Government has framed the Rules of 1991 and thereafter the State Government had proceeded to promulgate Recession Rules of 2003. Once the Rules of 1991 was rescinded by means of Rules of 2003 and as such thereafter there is no provision of absorption of the retrenched employees. Whereas in the present case undisputed factual position, which is emerging is that petitioners' claims are not better than the retrenched employees. They were engaged purely under the project known as 'Non-Formal Education Project' and the said project had come to an end itself in the year 2001. Thereafter the State Government under its wisdom has proceeded to absorb the Project Officers against L.G. Grade teachers and once the petitioners have not chosen to be absorbed under the L.T. Grade Teachers, even

though they were not the retrenched employees.

24. The petitioners have contended that their right had accrued in the past in their favour and as such, they were entitled for absorption according to their status but as indicated above at no point of time the petitioners were given any certificate to indicate that they were the retrenched employees contrary their engagement was purely temporary in nature and was liable to be terminated at any time without any prior information. The petitioners are claiming that they may be absorbed according to their status whereas the writ jurisdiction is meant to enforce the rule of law and not to violate the law. Once the State Government had framed the Rules of 1991, which was eventually rescinded by means of Rules of 2003 and admittedly the case of petitioners did not fall under the category of retrenched employees, no directive can be issued in violation to the Rules merely because some incumbents have been offered appointment, under the cover of the orders passed by this Court will not improve the case of the petitioners as two wrongs will not make a thing right, and equality in illegality, is totally against the rule of fair play and demand of petitioners, if accepted would be clearly violative of Articles 14 and 21 of Constitution of India.

25. Consequently we cannot grant any relief and reprieve to the petitioners.

26. For the aforesaid reasons, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Writ-C No. 46652 of 2012

Maharashtra Shikshan Mandal Jhansi & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
G.K. Singh, G.K. Malviya

Counsel for the Respondents:
C.S.C., Aklank Jain

Constitution of India, Art.-19(i)(c)- Inclusion of 7 persons-as member of society-by Assistant Registrar-illegibility to become member-immaterial-unless voluntarily accepted as member-by managing committee-otherwise would be thrust upon society-however the electoral roll/membership controversy can not be challenged prior election - only course upon to file civil suit when election over.

Held: Para-28
In view of the aforesaid facts and circumstances, the impugned order of the Assistant Registrar is patently without jurisdiction and amounts to compelling the Society to make members against its wishes or the wishes of those members who have formed the Society or are running it which is not legally permissible.

Case Law discussed:
(1997) 3 SCC 681; 1971 (1) SCC 678; 2010 (10) ADJ 84 (DB); (1995) 2 UPLBEC 1242; 2013 (10) ADJ 446; 2013 (10) ADJ 532.

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

1. The dispute in this writ petition is with regard to membership of the Society Maharashtra Shikshan Mandal Jhansi which is registered under the Societies

Registration Act, 1860 (hereinafter referred to as the 'Act').

2. The petitioner society through its Secretary and its Secretary have jointly preferred this writ petition challenging the order dated 30.6.2012 (anneuxre 12 to the writ petition) passed by the Assistant Registrar, Firms Societies and Chits and the consequential order dated 29.8.2012 passed by the District Inspector of Schools (in short DIOS) annexure 13 to the writ petition.

3. In short, the dispute is about the 7 persons (Respondents no. 4 to 10) who have been directed to be included in the list of members of the Society by the Assistant Registrar even though the membership of these 7 members and 8 others was never accepted by the Society.

4. The society is registered and is having its own bye-laws. The bye-laws provide for ordinary membership to Marathi knowing persons aged above 18 years, if they pay Rs. 2/- only annually. Any such person who pays Rs. 101/-or more would be the life member of the society. In other words, a Marathi knowing person of 18 years and paying Rs. 101/- and more would be the life member of the Society.

5. Some of the life members of the society died and there were large vacancies. Therefore, the society decided to enrol new members. The applications were invited between 8.3.2010 to 18.3.2001. About 37 applications were received. The said applications were placed before the Managing Committee of the Society in its meeting held on 22.3.2011. The Managing Committee resolved that the ordinary membership should not be allowed to unmarried boys and girls who are not earning and that it should be open to persons who are graduates but no final decision on the applications so received was taken and the matter was referred to the general body of the Society. The Society in its meeting held on 22.4.23011 considered all the 37 applications received for the membership and decided to accept the membership of only 22 persons and no resolution was passed in respect of the remaining 15 applicants. These 15 applicants made a complaint before the Assistant Registrar who without interfering with the decision of the Society passed an order on 18.2.2012 that as the term of the Managing Committee of the society is over fresh elections of its office bearers be held under Section 25 (2) of the Act and appointed DIOS, Jhansi for the purpose.

6. The Assistant Registrar vide letter dated 27.3.2012 addressed to the DIOS sent a list of 89 members of the Society. The said list included 7 persons whose applications for membership were not accepted by the Society along with 8 other applicants.

7. The DIOS in response to it sent a letter dated 11.5.2012 to the Assistant Registrar informing him that the names of the above 7 persons have not been accepted by the Society, they are not in the list and their drafts of membership fee have already been returned by the Society. The Assistant Registrar on receiving the above letter of the DIOS passed an order dated 21.5.2012 directing him to hold the elections of the society on the basis of the list of 89 persons/members as submitted by him.

8. The above order of the Assistant Registrar dated 21.5.2012 and the letter dated 27.3.2012 were challenged by the

petitioners by filing writ petition no. 28022 of 2012. The writ petition was allowed by the High Court vide judgment and order dated 30.5.2012 and the order of the Assistant Registrar dated 21st May 2012 was quashed. He was directed to decide about the legality of the enrolment of the disputed 7 persons as members of the Society in the light of the objections of the DIOS contained in his letter dated 11.5.2012.

9. It is in pursuance of the above order of the High Court that the Assistant Registrar has passed the impugned order dated 30.6.2012. He has held that as all the 37 applicants were eligible for the membership of the Society, they all are entitle to be enrolled as members and their applications were not liable to be rejected and thus issued directions to give membership to all of them.

10. I have heard Sri G.K. Singh, Senior counsel assisted by Sri G.K. Malaviya, learned counsel for the petitioners, learned Standing counsel for respondents no. 1 to 3 and Sri H.N. Singh, Senior counsel assisted by Sri Aklank Jain, learned counsel for respondents no. 4 to 10.

11. The main plank of the argument of learned counsel for the petitioners is that the membership can not be thrust upon the Society. The Society can not be compelled to make all persons who are eligible and have applied for membership, the members of the Society. The Assistant Registrar has no authority of law under the Act to pass an order directing the Society to give membership to those who have not been accepted as members by the Society.

12. Sri H.N.Singh on the other hand contends that the order impugned has been passed pursuant to the directions of the Court. The aforesaid 7 persons fulfils all the requisite qualifications for the membership of the Society as laid down under the bye-laws. Any resolution of the Managing Committee laying down any further condition restricting membership is not valid. The Society has acted in an arbitrary and discriminatory manner in accepting the membership of few persons and rejecting that of others including the aforesaid 7 persons. The Assistant Registrar is competent to decide about the dispute of membership of the Society.

13. The bye-laws of the Society are annexure 1 to the petition. They provide that any Marathi knowing person aged 18 years and above and paying Rs. 2 annually can be enrolled as ordinary member of the Society and that any such person who pays Rs. 101/- and more would be enrolled as a life member. The aforesaid bye-laws have not been amended. It is not in dispute that in pursuance of resolution of the Society inviting applications for enrolment of new members, only 37 applications were received in time and out of the said 37 applications, only 22 were accepted in the meeting dated 22.4.2011. There was no resolution or any decision to accept the other 15 applications including 7 in dispute as members of the Society. No other resolution of the Society is on record which may establish that the applications of the said 7 persons were accepted to enrol them as members of the Society.

14. The right to form Associations guaranteed under Article 19 (1) (c) of the Constitution of India though fundamental but does not inheres in a person a right to become a member of any Association in existence by force or against the wishes of its existing members. Thus, no person has

any vested or a fundamental right to become a member of a Society merely for the reason that he fulfils the eligibility conditions unless he is accepted to be a member by the Society itself.

15. In State of U.P. And another Vs. C.O.D. Chheoki Employees Cooperative Society Limited and others (1997) 3 SCC 681 it has been held that no citizen has a fundamental right under Article 19 (1) (c) of the Constitution to become a member of a co-operative Society even on fulfilment of the qualifications prescribed to become a member unless he is admitted to the membership.

16. The ratio of the above decision is that mere eligibility is not sufficient to become a member of a Society or Association unless a person is admitted to the membership by the Association/Society in a voluntary manner.

17. In Smt. Damyanti Naranga Vs. Union of India and others 1971 (1) SCC 678 the Constitution Bench of 5 Judges while considering the right of the citizens to form association or Union under Article 19 (1) (c) of the Constitution held that freedom of association includes right to associate with persons of one's choice. It was held that right to form an association, in the opinion of the Court necessarily implies that the persons who form the association have also the right to continue to be associated with only those, whom they voluntarily admit in the association.

18. In view of the above legal position no person even if he is eligible and qualified to be member of a Society has any right to be admitted as member until and unless the persons forming the association or running the same voluntarily accepts him to be a member. The aforesaid 7 persons have not been accepted to be members of the Society by its Managing Committee or the general body. Thus, they can not be thrust upon the Society as members.

19. The second aspect which requires consideration is if the Assistant Registrar is competent to direct the Society to give membership to the above 7 persons or not.

20. Sri H.N. Singh in this connection has placed reliance upon the Division Bench decision of this Court in case of Jamia Razjviya Merajul Uloom, Chilmapur, Gorakhpur and another Vs. State of U.P. and others 2010 (10) ADJ 84 (DB). It is a case relating to the powers of the Registrar/Assistant Registrar in relation to the elections of the Managing committee of the Society. The Court held that as the matter before the Registrar/Assistant Registrar is only in connection with membership, the dispute in that regard is not referable under Section 25 of the Act to the prescribed authority rather could be decided by the Registrar/Assistant Registrar himself in exercise of powers vested under Section 4 of the Act. The Court relying upon a previous decision of the Committee of Management, Kisan Shiksha Sadan, Banksahi, District Basti and another Vs. Assistant Registrar, Firms Societies and chits, Gorakhpur Region, Gorakhpur and another (1995) 2 UPLBEC 1242 held that the ratio of the aforesaid judgment is that where there is a dispute of membership of person to a Society, even the Registrar/Assistant Registrar who maintains the list of members under Section 4 of the Act can apply his mind to the facts of the case and declare if the person is a valid member or not.

21. The aforesaid decision lays down that under Section 4 of the Act as the Registrar/Assistant Registrar is vested with the power to maintain the list of members of the Society, in case any dispute of membership is raised before him, he can rule if a person is a valid member of the Society or not.

22. The aforesaid decision is not a decision on the point that the Registrar/Assistant Registrar is competent and have any authority in law to issue directions to the Society to give membership to any person. His powers are confined only with regard to adjudication of the validity of the membership.

23. In the instant case, the validity of the members of the Society was not in dispute rather the complaint was that the 7 persons were arbitrarily left out from being enrolled as members of the Society.

24. The order of the High Court dated 30.5.2012 passed in Writ Petition No. 28022 of 2012 also does not confer any power upon the Registrar/Assistant Registrar to decide if the said 7 persons are entitled to be enrolled as members. It only directs to adjudicate about the validity of the members of the Society. In deciding the validity of the membership, the Assistant Registrar was not possessed of any power to rule about the persons who were never accepted as members. He could have only decided if the existing members have been legally enrolled or if any of the them has been illegally thrown out.

25. In Tej Pal Singh and others Vs. State of U.P. And others 2013 (10) ADJ 446 his Lordship of this Court seized of a similar controversy observed that the authorities can not thrust upon the Society new members against their wishes as it would clearly be an infringement of the right possessed by the existing members to enrol new members.

26. The Registrar/Assistant Registrar has no jurisdiction under law or even under Section 4 of the Act to direct for inducting any person as a member who has not been accepted by the Society for any reason even though may be qualified.

27. It was not the grievance of the respondents that membership was granted to them but they were ousted in an illegal manner. The membership of other persons who were enrolled was not in question.

28. In view of the aforesaid facts and circumstances, the impugned order of the Assistant Registrar is patently without jurisdiction and amounts to compelling the Society to make members against its wishes or the wishes of those members who have formed the Society or are running it which is not legally permissible.

29. In Committee of Management Maharanapratap Vidyalaya Prabandh Samiti Bhadwara, Kanpur and another Vs. State of U.P. And others 2013 (10) ADJ 532 a division Bench of this court considering the general propositions relating to the elections, in context with the elections of the Committee of Management of educational institutions held that any grievance with regard to electoral roll could be considered after the elections are held in accordance with law or by filing civil suit.

30. The ratio of the above decision is that a dispute of membership/electoral roll of any organization is not open to

challenge before the elections and if necessary, could be challenged after the elections are over or by filing a civil suit. The 7 persons who have been denied membership of the Society could have taken recourse to the civil suit but the Assistant Registrar could not have usurped the jurisdiction to direct the Society for giving membership to them. Such a direction is even contrary to the bye laws of the Society.

31. In view of the above facts and circumstances, the impugned order dated 30.6.2012 passed by the Assistant registrar is held to be without jurisdiction and is quashed. The consequential order of the DIOS dated 29.8.2012 also falls to the ground.

32. The writ petition stands allowed with no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2015

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 53525 of 2011

Gram Shiksha Samiti Primary School Sant Kabir Nagar& Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anuj Kumar, Tripathi B.G. Bhai

Counsel for the Respondents:
C.S.C., Anand P. Pandey, K.S. Shukla, M.D. Mishra, Rajendra Kumar Pandey

Constitution of India, Art.-226-payment of salary-engagement of Shiksha Mitra-discontinued by resolution of Gram Shiksha Samit-after appraisal of his performance-direction of District Magistrate contrary to that-held-not sustainable-unless-resolution of Samit challenge-order impugned by D.M. Held-without jurisdiction.

Held: Para-10
Unless the aforesaid resolution dated 19.5.2007 is set aside by a competent court, it was not open for the District Magistrate to pass the impugned order directing for payment of honorarium to the respondent no.5 and renewal of her contract of Shiksha Mitra. Thus the impugned order dated 24.6.2011 passed by District Magistrate, Sant Kabir Nagar is arbitrary, illegal and without jurisdiction and, therefore, deserves to be set aside.

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

1. Heard Smt. Anita Tripathi, learned counsel for the petitioners, Sri H.C. Pathak, learned standing counsel for respondent no.1 and 3 and Sri M.D. Misra, learned counsel for respondent no.5.

2. No one appears for respondent nos.2 and 4.

3. This writ petition has been filed by the Gram Shiksha Samiti praying to quash the order dated 24.6.2011 passed by District Magistrate, Sant Kabir Nagar directing for payment of honorarium to the respondent no.5.

4. Submission of learned counsel for the petitioner is that by unanimous resolution dated 19.5.2007 the engagement of respondent no.5 (Shiksha Mitra) was cancelled after following due procedure as provided in clause 9 of the Government Order No. 2604/15-5-99-

282-98. The said resolution has not been set aside by any authority of Court. Under the circumstances it was not open for the District Magistrate to issue direction by the impugned order to pay honorarium to the respondent no.5. It is further submitted that the resolution dated 19.5.2007 was not challenged by the petitioner before any court.

5. Sri M.D. Mishra, learned counsel for respondent no.5 submits that the petitioners have illegally passed the resolution and consequently, the respondent no.5 approached the District Magistrate who lawfully several times passed the impugned order directing for payment of honorarium to the respondent no.5. He submits that the writ petition is wholly misconceived and, therefore, deserves to be dismissed.

6. Learned standing counsel supports the impugned order.

7. I have carefully considered the submissions of the learned counsel for the parties and perused the record.

8. Clause Nos. 6,7,8 and 9 of the Government Order No. 2604/15-5-99-282-98 provides as follows:

6- f'k{kk feJ dk p;u& ¼d½ xke f'k{kk lfefr f'k{kk fe=@fe=k d p;u gr cBd vkgr djxh] ftle lfefr d lnL;k dh dy l[;k d nk frgkb lnL;k dh mifLFkfr vfuok;Z gkxhA

¼[k½ lfefr d }kjk lnL;k d lEe[k miyC/k vg 0;fDr;k dh lph lkLrr dh tk;xh] ;g lph mud }kjk gkbLdy rFkk b.VjehfM,V ijh{kk d ikIr dy vdk d ifr'kr d vkIr vdk d vk/kkj ij fufer dh tk;xh rFkk lph e vf/kd vd ikIr dju dk uke igy j[kk tk;xkA

¼x½ lfefr vko';drkulkj f'k{kk fe=k dh l[;k dk vkdyu djxA ;g l[;k 1¼ 40 d vk/kkj ij f'k{kdk dh dy l[;k e l dk;jr f'k{kdk dh l[;k dk ?kVkdj fudkyh tk;xhA rnulkj 101 Nk= l[;k ij 3 rFkk bld mijkur 40 Nk=k dh i.k l[;k ij ,d vfrfjDr f'k{kd dh vko';drk dk vkdyu fd;k tk;xkA

¼?½ fo|ky; e dy j[k tku oky f'k{kk fe=k e l 50 ifr'kr efgyk; gkxhA budk Hkh p;u fcUn ¼[k½ e bfxr vk/kkj ij fd;k tk;xkA

¼³½ vulfpr tkfr;k@vulfpr tu tkfr;k vU; fiNM oxZ ,o vU; Jf.k;k e vkj{k.k gr ipfyr fu;ek@fun'kZ dk ikyu ;Fkkor lfuf'pr fd;k tk;xkA

¼p½ xke f'k{kk lfefr d lHkkifr o lfefr d fudV lc/kh dk p;u f'k{kk fe= d :i e ugh fd;k tk;xkA

7- lfonk dh vof/k& f'k{kk fe= xke f'k{kk lfefr }kjk iLrko ikfjr dj pky 'kf{kd l= d fy; lfonk ij j[kk tk;xkA tk eb ekg d vfUre fnol dk Lor% lekIr gk tk;xhA

8- lfonk vof/k dk ekun;& f'k{kk fe= dk lfonk ij :0 1450@&ifrekg fu;r ekun; ij j[kk tk;xkA

9- lfonk lekIr dju dh ifd;k& ¼v½ fdlh Hkh f'k{kk fe= dk dk; lrk"k tud u gku dh n'kk e xke f'k{kk lfefr] d nk frgkb cger l fyf[kr iLrko ikfjr dj lfonk lekIr dj ldrh gA xke f'k{kk lfefr }kjk bl lc/k e fd;k x;k fu.k; vfUre gkxkA

¼c½ lEcfU/kr f'k{kk fe= dk ml ekg dk ekung gkxk ftl ekg e mld fo:) xke f'k{kk lfefr }kjk lfonk lekIr dju d vk'k; dk iLrko ikfjr dj fu.k; fy;k tk;xk rFkk bl idkj gVk; x; f'k{kk fe= dk iu% lok dk volj inku ugh fd;k tk;xkA

9. Undisputedly, the resolution dated 19.5.2007 was unanimously passed by the petitioner, Shiksha Samiti, in which it is recorded that directions were issued to the respondent no.5 on 1.4.2007, 16.4.2007 and 27.4.2007 to make improvement in discharge of her duties and behaviour but she did not adhere to it. She seldom used to come to the school and whenever she came she engaged herself only in talking and did not teach the students. She beats the students. Consequently, there was annoyance amongst the guardians of the students. These facts, by the aforesaid unanimous resolution dated 19.5.2007 the contract of the respondent no.5

for engagement as Shiksha Mitra was terminated in terms of clause 9 of the aforesaid Government Order dated 26.5.1999. The said resolution was not challenged by the respondent no.5 before any Court. Consequently, it attained finality.

10. Unless the aforesaid resolution dated 19.5.2007 is set aside by a competent court, it was not open for the District Magistrate to pass the impugned order directing for payment of honorarium to the respondent no.5 and renewal of her contract of Shiksha Mitra. Thus the impugned order dated 24.6.2011 passed by District Magistrate, Sant Kabir Nagar is arbitrary, illegal and without jurisdiction and, therefore, deserves to be set aside.

11. In result, the writ petition succeeds and is hereby allowed. The impugned order dated 24.6.2011 passed by District Magistrate, Sant Kabir Nagar, is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2015

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

Writ-A No. 58456 of 2015

Smt. Savita Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pankaj Kr. Srivastava, Sasmita Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-payment of salary-officiating Principal entitled for salary of principal-in view of full Bench decision-order impugned contrary to that-not sustainable-quashed-consequential direction issued.

Held: Para-21
In addition to above, the law in respect of payment of salary to officiating principal is no more res integra. This Court in a long line of decisions has held that the officiating/ad hoc principal is entitled to salary of principal's grade while officiating on the post of the principal.

Case Law discussed:
1980 UPLBEC 286; 2014 (8) ADJ 617(FB); 1982 UPLBEC 171; 1985 UPLBEC 113; (2014) 14 SCC 388; (1996) 4 Supreme Court Cases 622

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

1. The petitioner is an officiating Principal of an institution, namely, Arya Shyama Balika Inter College, Bharthana, District Etawah. The said institution is a recognized and is under the grant-in-aid list of the State Government. It is governed under the provisions of the U.P. Intermediate Education Act, 1921 and the U.P. High Schools and Intermediate Colleges (Payment of Salaries to Teachers and other Employees) Act, 1971.

2. In the institution a vacancy occurred in the office of the Principal. The petitioner, who was senior-most Lecturer in the institution was appointed as officiating Principal. The appointment of the petitioner was approved by the District Inspector of Schools vide order dated 30.11.2007. The District Inspector of Schools approved the said appointment till the regular selection of the Principal is made by the U.P. Secondary Service Selection Board. A copy of the order dated 30.11.2007 is on the record as Annexure-2 to the writ petition.

3. It is recorded in the order of the District Inspector of Schools that the signature of the petitioner has already been attested on 06.07.2007. Since then the petitioner is working as officiating Principal in the institution. .

4. The Director of Education on 02.04.2014 issued an order for recovery of the salary of the petitioner on the ground that she is not entitled for salary of the Principal as the grade granted to her is not applicable to ad hoc/officiating Principal.

5. The said order was challenged by the petitioner by means of Writ Petition No.43095 of 2014 (Smt. Savita Gupta v. State of U.P. & others). This Court vide order dated 20.08.2014 has passed the following order:

"It is contended that the petitioner who is working as officiating Principal is entitled for the salary in view of the various judgements of this Court, however the Director of Secondary Education i.e. respondent no. 2 by impugned order dated 02 April 2014 has issued direction to the District Inspector of Schools, Etawah i.e. respondent no. 4 to recover the difference of salary and for the fresh pay fixation in the light of his directions.

The respondent no. 4 has passed the consequential order on 26 April 2014 for the recovery of the excess amount.

Matter needs consideration.

Learned Standing Counsel is granted six weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within a week thereafter.

List this case in the week commending 27 October 2014. Till the next date of listing no recovery for the excess amount shall be made in pursuance of the impugned order."

6. In spite of the said order, the District Inspector of Schools in his order dated 03.08.2015 after extracting the order of this Court dated 20.08.2014 has issued a direction to the Principal of the institution that her salary as Principal should not be paid and the salary bill has been returned to correct it. A copy of the order dated 03.08.2015 is on the record.

7. It appears that in response to the said communication of the District Inspector of Schools the Committee of Management on 26.09.2015 again sent the salary bill of the petitioner on the ground that this Court has already granted the interim order on 23.02.2012 in Writ Petition No.9708 of 2012 (Dr. Manju Verma v. State of U.P. & others) which is also pending in this Court.

8. The grievance of the petitioner is that the District Inspector of Schools in spite of the interim order passed by this Court is not paying the salary of the petitioner although the interim order is still continuing.

9. While entertaining this writ petition this Court on 13.10.2015 has recorded the following observation:

"I am prima facie satisfied that the District Inspector of Schools has tried to overreach the order of this Court dated 20.08.2014. The said order is in his full knowledge. He has extracted the order himself. The order does not assign any reason for not paying the salary to the petitioner as officiating Principal. Accordingly, the District Inspector of

Schools is directed to file his personal affidavit on or before 28th October, 2015."

10. In compliance of said order the District Inspector of Schools has filed his personal affidavit.

11. Learned Standing Counsel has placed the various paragraphs of the counter affidavit filed by the District Inspector of Schools.

12. The District Inspector of Schools in his counter affidavit has reiterated the same stand which he has taken in his order dated 03.08.2015. The District Inspector of Schools has also taken the stand that in the previous Writ Petition No.43095 of 2014 (Smt. Savita Gupta v. State of U.P. & others) a counter affidavit has been filed, therefore, granting the salary of the Principal to an ad hoc Principal would not be legal. The relevant part of the affidavit filed by the District Inspector of Schools is extracted hereunder below:

"6& ;g fd ifr'kiFki= nkf[ky dju d mijkUr ic/kd] vk; ';kek ckfydk b.Vj dkyt] HkjFkuk] bVkok d }kjk ,d i= fnukd 30-12-2014 bl dk;ky; dk if"kr djr g, rnFk i/kkukpk; dk oru io dh Hkkfr l'kkf/kr fd; fcuk ikfjr dju dk vujks/k fd;k x;k FkkA ftld mRrj e bl dk;ky; d i= fnukd 19-01-2015 d }kjk ic/kd dk ;g fy[kr g, voxr djk;k x;k fd mDr idj.k e ekuuh; mPp U;k;ky; e ;kftr ;kfpdk lO 43095@2014 d vkn'k fnukd 20-08-2014 d vuikyu e ifr'kiFki= nkf[ky fd;k tk pdk gA vr% rnFk i/kkukpk;k dk io dh Hkkfr l'kk/kku fd; fcuk oru Hkxrku fd;k tkuk fof/k lxr ugh gA bld mijkUr ;kph u ,d vkonu i= fnukd 17-07-2015 dk;ky; dk viu oru Hkxrku d lc/k e if"kr fd;kA ftld mRrj e bl dk;ky; d i= fnukd 03-08-2015 d }kjk ;kph dk iu% fu;ek d vkykd e voxr djk;k x;k fd mudh ekx dk Lohdk; djr g, io dh Hkkfr oru fn;k tkuk fof/k lxr ugh gA vr% vki viuk oru l'kkf/kr djkr g, oru fcy bl dk;ky; dk 'kh?k miyC/k djkdj ikfjr djokuk lfuf'pr dj ekuuh; U;k;ky; d voykdukFk vkonu i= fnukd 17-07-2015 ,o dk;ky; d i= fnukd 03-08-2015 dh Nk;kifr de'kh lyXud lh0,0 04 o 05 d :i e lyXu dh tk jgh gA bld mijkUr dk;ky; Lrj ij i= fnukd 21-09-2015 o 19-10-2015 e ;kph dk oru l'kkf/kr djkr g, oru n;d iLrr dju d fun'k inku fd; x;A ekuuh; U;k;ky; d voykdukFk dk;ky; d i= fnukd 21-09-2015 o 19-10-2015 dh Nk;kifr de'kh lyXud lh0,0&06 o 07 d :i e lyXu dh tk jgh gA fdUr ;kph }kjk mDr vkn'k fnukd 03-08-2015 d fo:) iuh ,d ;kfpdk lO 58456@2015 ekuuh; mPp U;k;ky; e ;kftr djr g, vkn'k fnukd 13-10-2015 ikfr fd;k x;kA ;kph }kjk viu v/khu f'k{kdk@ depkfj;k dk fu;fer :i l viu fo|ky; dk oru fcy gLrk{kj dj Lo; if"kr fd;k tkrk jgk g foHkkxh; vkn'kk d mijkUr Hkh ;kph oru l'kkf/kr u djku d dkj.k Lo; viuh bPNk l viuk oru l'kkf/kr djkdj ikfr ugh dj jgh gA"

13. As can be seen the District Inspector of Schools has tried to justify his order ignoring earlier interim order passed by this Court.

14. The learned counsel for the petitioner contended that this Court in a long line of decisions has held that ad hoc/officiating principal is entitled the principal's grade.

15. Learned counsel for the petitioner has also placed reliance on the judgment of this Court in the case of Dhaneshwar Singh Chauhan v. The District Inspector of Schools, Budaun and others, 1980 UPLBEC 286, wherein the Court has taken a view that the teacher officiating on the post of Principal shall be entitled to receive salary in Principal's grade. The said view has been reiterated by a recent Full Bench of this Court in Dr. Jai Prakash Narayan Singh v. State of U.P. and others, 2014 (8) ADJ 617 (FB), and the Division Benches of this Court in Narbdeshwar Misra v. District Inspector of

Schools, Deoria, 1982 UPLBEC 171, and Soloman Morar Jha v. District Inspector of Schools, Deoria, 1985 UPLBEC 113.

16. I have heard learned counsel for the petitioner and the learned Standing Counsel.

17. A perusal of the order of the District Inspector of Schools dated 03.08.2015 indicate that despite the fact that he has extracted the order of this Court, even then has taken the stand that granting the salary of the officiating Principal would not be legal, clearly indicates the adamant attitude of the District Inspector of Schools, coupled with the fact that a stand has been taken by him in paragraph-6 of the counter affidavit that since a counter affidavit in another writ petition has been filed, it would not be proper to pay the salary to the petitioner.

18. From the tenor of the counter affidavit of the District Inspector of Schools it is evident that he is bound by the Government Orders and not by the judgments of this Court. In the counter affidavit he has not expressed any regret for taking the stand mentioned in the impugned order dated 03.08.2015.

19. The Supreme Court in the case of State of Uttarakhand and others v. Kanhaya Lal, (2014) 14 SCC 388, has considered the somewhat similar facts where in spite of the direction of the learned Single Judge the Additional Director of Education, without investigating the aspect properly, has revisited the entire case and has virtually overruled the order passed by the learned Single Judge. The Supreme Court, in such a situation, found that the action of the Additional Director of Education is contemptuous of the order of the High Court. Paragraph-3 of the judgment, as is material for the present case, is quoted below:

"3. On a perusal of the SLP paper book, we are disturbed to note that pursuant to the orders of the learned Single Judge, the Additional Director of Education, Garhwal Division, Pohri, instead of investigating the aspect whether or not any other obstacles existed, has revisited the entire case and has virtually overruled the order passed by the learned Single Judge. Having perused the report/order of the Additional Director of Education, Pohri dated 23-5-2008, it would be possible to view his action as contemptuous of the orders of the High Court. The learned Single Judge had directed for appointment to the post of Assistant Teacher (Language) LT Grade "unless there was some other impediment in selection". As we have already opined, the Additional Director of Education has not disclosed "any other impediment" and instead has merely reiterated the already articulated case of the State, which had not found favour with the High Court. It is palpably clear that the Additional Director of Education, Garhwal Division, Pauri, has contumaciously adorned itself with appellate powers over the decision of the learned Single Judge of the High Court. We shall desist from making any further directions, however, leaving it open to the respondent to initiate proceedings, if so advised."

20. In the same judgment, the Supreme Court has also deprecated the practice of the State to engage a teacher in fighting futile litigation. The relevant part of the judgment being paragraph-5 reads as under:

"5. ...In this case, the writ petitioner is a Teacher and it is unfair to him to be repeatedly drawn into fighting futile, if

not frivolous litigation by the State. It has become the practice of the State to carry on filing appeals even where the case does not deserve it, knowing fully well that private respondents will be physically fatigued and economically emasculated in pursuing protracted litigation."

21. In addition to above, the law in respect of payment of salary to officiating principal is no more res integra. This Court in a long line of decisions has held that the officiating/ad hoc principal is entitled to salary of principal's grade while officiating on the post of the principal. The Division Bench of this Court in the case of Dhaneshwar Singh Chauhan v. The District Inspector of Schools, Budaun and others, 1980 UPLBEC 286 held as under:

"2. The petitioner is a teacher in aided and recognised institution and the liability for the prejoint his salary is on the State Government under the U.P. High School and Intermediate College (Payment of Salary of Teacher and other Employees) Act, 1971. The salary of a teacher in aided and recognized institution is regulated by the regulation framed under the U.P. Intermediate Education Act and the order issued by the State Government from time to time. Regulation 46 in Chapter III lays down that employees of an aided and recognized institution shall be given the pay scale sanctioned by the State Government from time to time. The State Government has prescribed the scales of pay for teachers. The State Government issued an order on 18th January, 1974 accepting the recommendations of the U.P. Pay Commission prescribing scales of pay for teachers. Paragraph 5(2) of the Government order lays down that a teacher while officiating on the post carrying higher grade is entitled to officiating salary in the higher grade and it further prescribed procedure for determining the salary of officiating teacher in the higher grade. A copy of the Government order was before us by the petitioner. Respondents do not deny the petitioner's averment that the State Government issued orders sanctioning officiating pay to a teacher in the higher grade. The petitioner's claim for salary in Principal's grade was sanctioned by the District Inspector of Schools in pursuance of the aforesaid Government order. Respondents have failed to show any subsequent Government order or rule superceding the direction contained in Government order dated 24-1-74. The respondents have further failed to place any material before the court showing that the petitioner was not entitled to the salary in the Principal's grade while officiating on the post of Principal. The order of the District Inspector of Schools dated 31-8-77 is therefore not sustainable in law.

3. In the result we allow the petition and quash the order of the District Inspector of Schools and direct the respondents to pay salary to the petitioner in the Principal's grade for the period during which he has been officiating as Principal in accordance with the orders contained in the letter of the District Inspector of Schools dated 14-4-79. The petitioner is entitled to his cost."

22. The same view was taken by another Division Bench of this Court in the cases of Narbdeshwar Mishra v. The District Inspector of Schools, Deoria and others, 1982 UPLBEC 171 and Soloman Morar Jha v. District Inspector of Schools, Deoria and others, 1985 UPLBEC 113.

23. The same issue was referred to a Full Bench in the case of Dr. Jai Prakash Narayan Singh v. State of U.P. and others, 2014 (8) ADJ 617 (FB). The relevant material in the present controversy reads as under:

"29. A somewhat similar situation had arisen under the provisions of the U.P. Secondary Education Service Selection Board Act, 1982. That Act was enacted to establish a Secondary Education Service Commission for the selection of teachers in institutions recognized under the Intermediate Education Act, 1921. The expression 'teacher' was defined to include a principal. Section 16 provided that subject to the provisions of Sections 18 and 33 and certain other sections, every appointment of a teacher upon the commencement of the Act would be made by the management only on the recommendation of the Commission and an appointment made in contravention of the provisions would be void. Section 18 dealt with ad hoc appointments of teachers. Since the provisions of Section 16 were made subject to Section 18, ad hoc appointments could be validly made under Section 18. However, after the enactment of U.P. Act 1 of 1993, Section 16 was substituted and Section 18 of the Principal Act was sought to be deleted. Section 33 empowered the State Government to issue and notify Orders for removing any difficulty, during such period as may be specified in the Order, whereupon the provisions of the Act would have effect subject to adaptations whether by way of modification, addition or omission. Two notified Orders were issued under Section 33 (1). Neither of the two Orders provided for any time limit during which the orders would remain effective.

30. These provisions came up for consideration before a Full Bench of this Court in Radha Raizada v. Committee of Management, Vidyawati Darbari Girls Inter College, 1994 (2) ESC 345 (All)(FB). Dealing with the situation, the Full Bench held as follows:

"...After enforcement of U.P. Act No.1 of 1993 except Section 13 thereof the situation that emerges is that by new Section 11 of Amendment Act which has substituted Section 16 of the Principal Act, has come into force whereas the omission of Section 18 from the principal Act by Section 13 of this amending Act has not been enforced which means Section 18 still continues in the Principal Act. In view of this legislative development a peculiar situation has arisen that new Section 16 which has come into force is no longer subject to Section 18 of the Act which means that no appointment on ad hoc basis can be made under Section 18 of the Act. New Section 16 begins with a non-obstante clause which means in spite of other provision, no appointment shall be made except on the recommendation of the Board. Where a section begins with a non-obstante clause, it indicates that the provision should prevail despite anything to the contrary in the provisions in the Act. Thus after omission of Section 18 from Section 16 no ad hoc appointment is permissible under Section 18 and if made, would be void under sub-section (2) of Section 16 of the Act. It has not been brought to my notice that First Removal of Difficulties Order 1981 issued by the State Government has either been revoked or rescinded. On the contrary, it was asserted that the said Removal of Difficulties Order is continuing.

49. Now the question for consideration is that if no ad hoc appointment of teacher or Principal can be made under Section 18 of the Act, whether it is permissible to appoint a teacher or Principal on ad hoc basis under the First Removal of Difficulties Order? A perusal of Section 16 would show that Section 16 is still subject to Section 33 of the

Act which empowers the State Government to issue Removal of Difficulties Order. Since Removal of Difficulties Orders have been issued under Section 33 of the Act, an ad hoc appointment either by direct recruitment or by promotion under the Removal of Difficulties Order would be a valid appointment."

24. Regard being had to the fact that recently the Director of Education (Secondary), U.P., Lucknow on 25th August, 2015 issued an order to all the District Inspector of Schools that an officiating principal shall be paid in the grade of the principal. A copy of the order of the Director dated 25th August, 2015 is quoted here-under below:

"lPp g fd tuifrfuf/k;k ,o ek/;fed fo|ky;k d lok l?kk d ifrfuf/k;k }kjk ;g lKku e yk;k x;k g fd v'kkldh; lgk;rk izkIr ek/;fed fo|ky;k e ekfyd :i l fjDr i/kkuk/;kid@i/kkukpk; d in ij lLFkk d T;"Bre l-v-@T;"Bre ioDrk d LFkku ij dfu"B l-v-@dfu"B ioDrk d gLrk{kj iekf.kr fd; tkr gA

2- vki voxr gh g fd mRrj in'k ek/;fed f'k{kk lok p;u ckM vf/kfu;e] 1982 ¼;Fkk l'kkf/kr½ dh /kkjk&18 e iko/kku fd;k x;k g fd /kkjk 10 dh mi/kkjk&1 e fd; x; iko/kkulkj ckM dk fjfDr dh lpuk fn; tku ,o i/kkuk/;kid@i/kkukpk; dk in okLro e 02 ekg l vf/kd fjDr gku dh fLFkfr e lLFkk d i/kkuk/;kid@i/kkukpk; d in ij lLFkk d T;"Bre l-v-@T;"Bre ioDrk dh rnFk inkUufr lLFkk icU/kr= }kjk dh tk;xhA mijkDr /kkjk e ;g Hkh iko/kku fd;k x;k g fd tgk icU/kr= T;"Bre l-v-@T;"Bre ioDrk dk rnFk :i l inkUufr dju e foQy jg ogk fujh{kd ,l v-v-@ioDrk dh inkUufr vkn'k Lo; tkjh djxk ,o lEcfU/kr l-v-@ioDrk tc inkUufr d ,l vkn'k d vulj.k e in dk dk;Hkkj xg.k dj] i/kkuk/;kid@i/kkukpk; d :i e viu oru dk gdnkj gkxkA

3- mijkDr iko/kkuk d vkykd e f'k{k.k lLFkk e i/kkuk/;kid@i/kkukpk; dk in ekfyd :i l fjDr gku dh fLFkfr e lLFkk d dfu"B l-v-@dfu"B ioDrk d gLrk{kj dk;okgd i/kkuk/;kid@ dk;okgd d :i e iekf.kr fd;k tkuk lUnfHkr vf/kfu;e d loFkk foijhr gA

4- vr% vkidk funf'kr fd;k tkrk g fd vf/kfu;e 0;oLFkkulkj dk;okgh fd;k tkuk lfuf'pr djA vf/kfu;e d iko/kkuk d foijhr dk;okgh gr vki Lo; mRrjnk;h gkx ,o vkidk mDr vkpj.k mRrj in'k jktdh; depkjh fu;ekoyh] 1956 d vkpj.k fu;e&3 d foijhr gku d vk/kkj ij vkid fo:) vu'kklfud dk;okgh lfLFkr fd; tku gr 'kklu l vujk/k dju dh i'kkldh; ck/;rk gkxhA vk'kk g fd vki ,lh v:fpdj fLFkfr mRiUu ugh gku nxA"

(emphasis supplied)

25. In view of the above, it is evident that the District Inspector of Schools has tried to overreach the interim order of this Court dated 20.08.2014 passed in companion writ petition, Writ-A No.43095 (Smt. Savita Gupta v. State of U.P. & others).

26. The Supreme Court in the case of Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and another (1996) 4 Supreme Court Cases 622, has approved the decisions of the Madras and the Calcutta High Courts. Relevant part of the order reads as under:

"19. To the same effect are the decisions of the Madras and and Calcutta High Courts in Century Flour Mills Ltd. v. S. Suppiah, AIR 1975 Mad 270 : (1975) 2 MLJ 54 and Sujit Pal v. Prabir Kumar Sun AIR 1986 Cal 220 : (1986) 90 CWN 342. In Century Flour Mills Ltd. AIR 1975 Mad 270 : (1975) 2 MLJ 54 it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. The inherent power of the court, it was held, is not only available in such a case, but it is bound to exercise it to undo the wrong in the

interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.

20. In Sujit Pal AIR 1986 Cal 220 : (1986) 90 CWN 342 a Division Bench of the Calcutta High Court has taken the same view. There, the defendant forcibly dispossessed the plaintiff in violation of the order of injunction and took possession of the property. The Court directed the restoration of possession to the plaintiff with the aid of police. The Court observed that no technicality can prevent the court from doing justice in exercise of its inherent powers. It held that the object of Rule 2-A of Order 39 will be fulfilled only where such mandatory direction is given for restoration of possession to the aggrieved party. This was necessary, it observed, to prevent the abuse of process of law.

27. The adamant attitude adopted by the District Inspector of Schools in his counter affidavit clearly indicates that his order is suffered from malice in law.

28. In Writ-A No.58665 of 2015 (Ram Raseeley Pandey v. State of U.P. & others), there was similar fact. The District Inspector of Schools in the said case has refused to follow the law laid down by this Court.

29. The Court in the said case found that the action of the District Inspector of Schools suffered from malice in law. The Court held as under:

"In Kalabharati Advertising (supra) the Supreme Court has followed its earlier decision in Punjab State Electricity Board Ltd. v. Zora Singh and others (2005) 6 SCC 776, where the malice in the legal sense has been explained by the Court. Relevant parts of the judgment in Punjab State Electricity Board Ltd. (supra), being paragraphs- 40, 41 & 42, are extracted below:

"40. Furthermore, there cannot be any doubt whatsoever that even if an order is found to be not vitiated by reason of malice on fact but still can be held to be invalid if the same has been passed for unauthorised purposes, as it would amount to malice in law.

41. In S.R. Venkataraman v. Union of India (1979) 2 SCC 491:1979 SCC (L&S) 216:AIR 1979 SC 49 this Court observed: (SCC p. 494, para 5)

"It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is, however, quite different. Viscount Haldane described it as follows in Shearer v. Shields 1914 AC 808: 111 LT 297 (HL):

'A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.'

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

42. In State of A.P. v. Goverdhanlal Pitti (2003) 4SCC 739 this Court observed: (SCC p. 744, paras 12-13)

"12. The legal meaning of malice is 'ill-will or spite towards a party and any indirect or improper motive in taking an action'. This is sometimes described as 'malice in fact'. 'Legal malice' or 'malice in law' means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others'. (See Words and Phrases Legally defined, 3rd Edn., London Butterworths, 1989.)

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in his authoritative work on Administrative Law (8th Edn., at p. 414) based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seeks to 'acquire land' 'for a purpose not authorised by the Act'."

(See also Chairman & MD, BPL Ltd. v. S.P. Gururaja (2003) 8 SCC 567 and P. Anjaneyulu v. Chief Manager, A.P. Circle, Bharat Sanchar Nigam Ltd. (2001) 3 An LD 313 (DB)"

On the analysis of the above principle I am of the opinion that the stand taken by the second respondent in his counter affidavit is suffered by malice in law.

It is astonishing that the District Inspector of Schools, being a senior official in education department, is totally unaware about the well settled law laid down by this Court and the order issued by the Director of Education. It is a common experience of the Court that the Government officers in general and officials of education department in particular disregard the well-settled law of this Court and try to justify their orders even after their order is set aside by the Court, on the pretext of some Government Order or circular of the department. The Supreme Court has noticed this tendency of the officials in the case of E.T. Sunup v. C.A.N.S.S. Employees Association and another (2004) 8 SCC 683. The relevant paragraph of the judgment is as under:

"16. It has become a tendency with the government officers to somehow or the other circumvent the orders of court and try to take recourse to one justification or other. This shows complete lack of grace in accepting the orders of the Court. This tendency of undermining the Court's order cannot be countenanced. This Court time and again has emphasised that in a democracy the role of the court cannot be subservient to administrative fiat. The executive and legislature have to work within the constitutional framework and the judiciary has been given the role of watchdog to keep the legislature and executive within check...."

The said judgment has been followed by the Supreme Court in the case of Maninderjit Singh Bitta v. Union of India and others (2012) 1 SCC 273.

If such an official/officer is allowed to continue, his ignorance of law will be oppressive for the teaching and non-teaching staff of the institutions and will also burden this Court by unnecessary litigations. Public time will be wasted in such litigations."

30. In view of the above I am of the view that the District Inspector of Schools has taken a wholly unjustified stand for

denying the principal's grade to the petitioner in spite of the well settled law on this issue. He has also ignored the order of the Director dated 25th August, 2015 extracted herein above wherein a clear direction has been issued for payment of principal's grade to the officiating principal.

31. In the counter affidavit it has not been denied by the District Inspector of Schools that the approval granted by him dated 30th November, 2007 has not been recalled or cancelled. Thus, in my view the petitioner is entitled for principal's grade from the date of assuming the charge of the office of officiating principal.

32. Pertinently, now the Director of Education (Secondary) on 25th August, 2015 has issued a direction for the purpose of principal's grade to ad hoc/officiating principal. The Director has also warned the concerned authorities that if direction is not complied it shall be treated as misconduct and they will be subjected to disciplinary proceedings.

33. In view of the recent order of the Director, there is no need to send the matter again to the District Inspector of Schools, who appears to adamant to reject the claim of the petitioner.

34. Accordingly, the writ petition is allowed. The District Inspector of Schools is directed to pay petitioner's salary in principal's grade within two months from the date of communication of this order.

35. The petitioner shall file an affidavit that payment received by her shall abide the result of writ petition, Writ-A No.43095 of 2014 (Smt. Savita Gupta v. State of U.P. & others).

36. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2015

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

Writ-C No. 60881 of 2015.
with
Writ-C No. 14853 of 2015 and Writ-C No. 20204 of 2015

Smt. Vimla Srivastava ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Santosh Kumar Srivastava, Nitin Kumar Rai, Pavan Kumar Singh

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Recruitment of Dependents of Government Servant Dying-in-Harness Rules-1974-Rule 2(c)(iii)-definition of "Family"-ward unmarried daughter-being indiscriminately violate by Art.-14 and 15 of Constitution-even married daughter is the daughter of deceased employee-hence word 'married' struck down-consequential follow up directions given.

Held: Para-27 & 28

27. In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

28. We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

Case Law discussed:

Writ-C No. 41279 of 2014; AIR 1979 SC 1868; AIR 1987 SC 1100; (1999) 2 SCC 228; 1996 2 SCC 380; (2003) 6 SCC 277; (2014) 5 SCC 438; 2005 (104) FLR 271; W.P. No. 16153 2015, decided on 9 June 2015; W.P. No. 33967 (W) of 2013, decided on 19 March 2014; W.P. No. 49766 of 2015.

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

1. The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 19741 have been framed under the proviso to Article 309 of the Constitution and regulate the grant of compassionate appointment to the members of the family of a government servant who dies in harness. The Rules define the expression "family" to include, among others, "unmarried daughters and unmarried adopted daughters". The Rules also bring sons and adopted sons within the ambit of a family. The eligibility of a son or adopted son is not conditioned by marital status. The challenge in these proceedings is to the stipulation that only an unmarried daughter falls within the definition of the expression "family". As a consequence of the condition, a married daughter ceases to fall within the family of a deceased government servant for the purpose of seeking compassionate appointment.

2. Rule 2 (c) of the Dying-in-Harness Rules defines the expression "family" in the following terms:

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

(i) Wife or husband;

(ii) Sons/adopted sons;

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

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

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

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

3. In exploring the nature of the constitutional challenge which has been addressed in these proceedings, it would at the outset be necessary to dwell briefly on the nature and purpose of compassionate appointment. The object and purpose of compassionate appointment is to provide ameliorative relief to the family of a government servant who has died in harness. Compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment under Article 16 of the Constitution. Equality of opportunity postulates a level playing field where all eligible persons are entitled to compete in an effort to secure public employment. The basis of the exception that is carved out by the Dying-in-Harness Rules is that the death of a wage earner while in the service of the State imposes severe financial hardship on the family faced with an untimely death. Compassionate appointment is intended to provide immediate financial support to such a family by stipulating that upon the death of

its wage earner while in harness as a government servant, another member of the family would be granted appointment. Compassionate appointment is not a reservation of a post in public employment but is in the nature of an enabling provision under which a member of the family of a deceased government servant who has died while in harness can seek appointment based on financial dependency and need.

4. Rule 5 of the Dying-in-Harness Rules provides that such an appointment is contemplated to be given to a member of the family of a deceased government servant who has died in harness where the spouse of the government servant is not already employed with the Central or the State Governments or a Corporation owned by them. Moreover, a member of the family who is not already employed with the Central or State Governments or their Corporations can be given suitable employment in government service in relaxation of the normal recruitment rules. Such an appointment can be granted if the person (i) fulfills the educational qualifications prescribed for the post; (ii) is otherwise qualified for government service; and (iii) makes an application for employment within five years from the date of the death of the government servant. The rationale for imposing the requirement of the application being made within five years is that the nexus between the grant of employment and the need of the family is preserved. That is because after a lapse of time the sense of need or dependency may cease to exist both financially and otherwise. However, Rule 5 enables the time limit to be dispensed with or relaxed for the purpose of dealing with a case in a just and equitable manner where undue hardship is shown. Where compassionate appointment is provided under Rule 5, there is an obligation under the rule for the person appointed to maintain the other members of the family of the deceased government servant who were dependent on him/her immediately before the death occurred and who are unable to maintain themselves. When the person appointed neglects or refuses to maintain a person whom he or she is liable to maintain, the services are liable to be terminated under the Conduct, Discipline and Appeal Rules.

5. The basic rationale and the foundation for granting compassionate appointment is thus the financial need of the family of a deceased government servant who has died in harness and it is with a view to alleviate financial distress that compassionate appointment is granted.

6. The submission which has been urged on behalf of the petitioners in challenging Rule 2 (c) (iii), insofar as it confines the zone of eligibility only to unmarried daughters, is two fold. Firstly, it has been submitted that in matters of public employment, marital status cannot disqualify an applicant and any discrimination on the ground of marital status would be violative of Articles 14 and 15 of the Constitution. Secondly, it has been urged that there can be no discrimination between a son and a daughter in the grant of compassionate appointment and any discrimination on the ground of gender violates Article 15 of the Constitution.

7. A counter affidavit has been filed on behalf of the State in these proceedings in which, it has been asserted that:

"After marriage, the daughter becomes the family member of her husband and the responsibility of her maintenance solely lies upon her husband, therefore, in such circumstance there is no justification of giving employment to the

married daughter of the deceased employee as the dependent of deceased employee.

That, it is also relevant to mention here that the employment as a dependent of deceased is a compassionate appointment which is not a matter of right. It is further submitted that the married daughter is not covered by definition of "family", therefore, she cannot be considered eligible for giving the compassionate appointment. It is further submitted that under the Hindu Law, a married daughter cannot be considered as dependent of her father or dependent of joint Hindu family. After the marriage, her husband is not only her guardian but he is under legal obligation to maintain her. Under the Hindu Law, after the marriage, the daughter even does not remain member of the family of her father and she becomes member of her in laws family."

8. Moreover, it has been submitted that a married daughter is not considered as a dependent of her deceased father and is not legally entitled to get compassionate appointment.

9. In support of the submissions which have been urged in the counter affidavit, learned Standing Counsel submits that Rule 2 (c) has made no discrimination on grounds of gender. The submission is that the purpose of Rule 2 (c) is to enable the State to grant compassionate appointment to a member of the family who was dependent on the deceased government servant. When a daughter is married, it is asserted, the element of dependency on the deceased government servant ceases to exist and the reason for the exclusion is not gender but the absence of dependency.

10. While assessing the rival submissions, it must be noted at the outset that the definition of the expression "family" in Rule 2 (c) incorporates the categories of heirs of a deceased government servant. Among them are the wife or husband, sons and adopted sons, unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law. Clause (ii) of Rule 2 (c) brings a son as well as an adopted son within the purview of the expression "family" irrespective of marital status. A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (c). But by the stroke of a legislative definition, a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. The invidious discrimination that is inherent in Rule 2 (c) lies in the fact that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is invidious. A married daughter who has separated after marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. A divorced daughter would similarly stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried". The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

11. The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son continues to be a member of the family and that upon marriage, he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father. It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter when equivalent benefits are granted to a son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. The State has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15.

12. The stand which has been taken by the state in the counter affidavit proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter after marriage. The affidavit postulates that after marriage, a daughter becomes a member of the family of her husband and the responsibility for her maintenance solely lies upon her husband. The second basis which has been indicated in the affidavit is that in Hindu Law, a married daughter cannot be considered as dependent of her father or a dependent of a joint Hindu family. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Our society is governed by constitutional principles. Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding

daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.

13. A variety of situations can be envisaged where the application of the rule would be invidious and discriminatory. The deceased government servant may have only surviving married daughters to look after the widowed parent - father or mother. The daughters may be the only persons to look after a family in distress after the death of the bread earner. Yet, under the rule, no daughter can seek compassionate appointment only because she is married. The family of the deceased employee will not be able to tide over the financial crisis from the untimely death of its wage earner who has died in harness. The purpose and spirit underlying the grant of compassionate appointment stands defeated. In a given situation, even though the deceased government employee leaves behind a surviving son, he may not in fact be looking after the welfare of the surviving parents. Only a daughter may be the source of solace - emotional and financial, in certain cases. These are not isolated situations but social realities in India. A surviving son may have left the village, town or state in search of employment in a metropolitan city. The daughter may be the one to care for a surviving parent. Yet the rule deprives the daughter of compassionate appointment only because she is married. Our law must evolve in a robust manner to accommodate social contexts. The grant of compassionate appointment is not just a social welfare benefit which is allowed to the person who is granted employment. The purpose of the benefit is to enable the family of a deceased government servant, who dies in harness, to be supported by the grant of compassionate appointment to a member of the family. Excluding a married daughter from the ambit of the family may well defeat the object of the social welfare benefit.

14. The living tree - the Constitution - on which the law derives legitimacy is a liberal instrument for realising fundamental human freedoms. The law and the Constitution must account for multiple identities. Individuals - men and women - have multiple identities : as a worker in the work place; as a child, parent and spouse; identities based on preferences and orientation; those based on language, religion and culture. But from a constitutional perspective, they are protected and subsumed in the overarching privileges of citizenship and in the guarantee of individual freedoms.

15. In the judgment of this Court in Isha Tyagi vs. State of U.P.2, a Division Bench considered the legality of a condition which was imposed by the State Government while providing horizontal reservation to descendants of freedom fighters. The condition which was imposed by the State excluded the children of the daughter of a freedom fighter from seeking admission to medical colleges in the State under an affirmative action programme. Holding this to be unconstitutional, the Division Bench held as follows:

"It would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to

his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter."

16. Dealing with the aspect of marriage, the Division Bench held as follows:

"Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status."

17. The principles underlying Articles 14 and 15 of the Constitution have an important bearing on gender identity. In C.B. Muthamma vs. Union of India3, the Supreme Court considered the legality of a rule in the Indian Foreign Service (Conduct and Discipline) Rules under which a woman member of the service was required to obtain the permission of the Government before her marriage was solemnized and could be required to resign from service after her marriage, if the Government was satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. The Supreme Court held that "If a married man has a right, a married woman, other things being equal, stands on no worse footing". In the meantime the Central Government had indicated that the rule was being reconsidered and its deletion was being gazetted.

18. In Vijaya Manohar Arbat vs. Kashirao Rajaram Sawai4, the Supreme Court held in the context of the provisions of Section 125 of the Code of Criminal Procedure 1973 that "a daughter after her marriage does not cease to be a daughter of the father or mother".

19. The same principle was applied in Githa Hariharan vs. Reserve Bank of India5 while defining the ambit of the expression "the father, and after him, the mother" in Section 6(a) of the Hindu Succession Act, 1956. The Supreme Court observed that if the word 'after' was read to mean that a mother would be disqualified from acting as a guardian of a minor during the lifetime of the father, this would run counter to the constitutional mandate of gender equality and will lead to an impermissible differentiation between males and females. Interpreting the word 'after', the Supreme Court held that it does not necessarily mean after the death of the

father but would mean in the absence of, whether temporary or otherwise or in a situation of the apathy of the father or his inability to maintain the child.

20. In Savita Samvedi vs. Union of India6, the Supreme Court considered the validity of a circular of the Railway Board by which a railway servant who is an allottee of service accommodation was entitled to nominate, while retiring from service, a son or unmarried daughter among other persons for allotment of the accommodation on out-of-turn basis. Holding that the circular (insofar as it precluded the nomination of a married daughter for allotment of accommodation) violated Article 14, the Supreme Court observed as follows:

"... If he has only one married daughter, who is a railway employee, and none of his other children are, then his choice is and has to be limited to that railway employee married daughter. He should be in an unfettered position to nominate that daughter for regularization of railway accommodation. It is only in the case of more than one children in Railway service that he may have to exercise a choice and we see no reason why the choice be not left with the retiring official's judgment on the point and be not respected by the railway authorities irrespective of the gender of the child. There is no occasion for the railways to be regulating or bludgeoning the choice in favour of the son when existing and able to maintain his parents. The Railway Ministry's Circular in that regard appears thus to us to be wholly unfair, gender biased and unreasonable, liable to be struck down under Article 14 of the Constitution. The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit of the earlier part of the Circular, referred to in its first paragraph, above-quoted."

21. In Air India Cabin Crew Assn. vs. Yeshaswinee Merchant7, the Supreme Court dealt with the prohibition under Article 15(2) on discrimination on the ground only of sex. Interpreting the provisions of Articles 15 and 16, the Supreme Court held that the constitutional mandate would be infringed where a woman would have received the same treatment as a man but for her sex.

22. In National Legal Services Authority vs. Union of India8, the Supreme Court recognized that gender identity, is an integral part of sex within the meaning of Articles 15 and 16 and no citizen can be discriminated on the ground of gender. The Supreme Court observed as follows:

"We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community."

23. Specifically in the context of compassionate appointments various High Courts have taken the view that a woman who is married cannot be denied entry into service on compassionate appointment merely on the ground of

marriage. This view was taken by a learned Single Judge of the Karnataka High Court in Manjula vs. State of Karnataka9. The same view has been adopted by a Division Bench of the Bombay High Court in Smt. Ranjana Murlidhar Anerao vs. The State of Maharashtra10 where it was held that the exclusion of a married daughter for the grant of a retail kerosene license on the death of the license holder was not justifiable. The Division Bench of the Bombay High Court held as follows:

"This exclusion of a married daughter does not appear to be based on any logic or other justifiable criteria. Marriage of a daughter who is otherwise a legal representative of a license holder cannot be held to her disadvantage in the matter of seeking transfer of license in her name on the death of the license holder. Under Article 19(1)(g) of the Constitution of India the right of a citizen to carry on any trade or business is preserved. Under Article 19(6) reasonable restrictions with regard to professional or technical qualifications necessary for carrying on any trade or business could be imposed. Similarly, gender discrimination is prohibited by Article 15 of the Constitution. The exclusion of a married daughter from the purview of expression "family" in the Licensing Order of 1979 is not only violative of Article 15 but the same also infringes the right guaranteed by Article 19(1)(g) of the Constitution."

24. The same view has been adopted by a learned Single Judge of the Madras High Court in S Kavitha vs. The District Collector11. A learned Single Judge of the Kolkata High Court in Purnima Das vs. The State of West Bengal12 has held that while appointment on compassionate ground cannot be claimed as a matter of right, at the same time, it was not open to the State to adopt a discriminatory policy by excluding a married daughter from the ambit of compassionate appointment.

25. We are in respectful agreement with the view which has been expressed on the subject by diverse judgments of the High Courts to which we have made reference above.

26. During the course of submissions, our attention was also drawn to the judgment rendered by a learned Single Judge of this Court in Mudita vs. State of U.P.13. The learned Single Judge while proceeding to deal with an identical issue of the right of a married daughter to be considered under the Dying-in-Harness Rules observed that a married daughter is a part of the family of her husband and could not therefore be expected to continue to provide for the family of the deceased government servant. The judgment proceeds on the premise that marriage severs all relationships that the daughter may have had with her parents. In any case it shuts out the consideration of the claim of the married daughter without any enquiry on the issue of dependency. In the view that we have taken we are unable to accept or affirm the reasoning of the learned Single Judge and are constrained to hold that Mudita does not lay down the correct position of the law.

27. In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

28. We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

29. In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status.

30. The writ petitions shall, accordingly, stand allowed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Writ-C No. 60941 of 2015

Smt. Kusum Yadav & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shiv Babu Dubey

Counsel for the Respondents:
C.S.C., Kaushalendra Kumar

Constitution of India, Art.-226-Protection to married life-petitioner illegally detained by Petitioner No. 2-against her will-forced to sign on writ petition-marriage if found nullity-petitioner is free to go on place of her choice-petition dismissed with cost of Rs. 25000/-.

Held: Para-9, 10 & 11

9. The demeanor of petitioner no. 1 in making the above statement strengthens the belief of the Court at her statement is true and correct and that she has been pressurised to sign and file this petition. The filing of this petition on her behalf is not her free and independent act.

10. In view of the statement of the petitioner no. 1 given before this Court, it is apparent thatpetitioner no. 2 had kept petitioner no. 1 in illegal detention and there is no marriage between the petitioners with the free will of both of them.

11. Accordingly, the marriage as alleged in the petition of the petitioners if any is declared to be a nullity. The petitioner no. 1 is permitted to go with her parents to her home.

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

1. This is a petition under Article 226 of the constitution of India by two petitioners claiming protection to their married life on the ground that they are both majors and have married of their own free will, but their life is being disturbed by the respondents.

2. On the first date when the petition was taken up, learned Standing Counsel on the basis of the instructions received by him had informed the Court that a First Information Report/N.C.R. has been lodged against petitioner no. 2 under Section 498 IPC.

3. Learned counsel for the petitioners was accordingly directed to file an affidavit of the petitioner no. 2 clarifying his marital status at the time of the alleged marriage with the petitioner no. 1.

4. Accordingly, affidavit of petitioner no. 2 was filed stating he had married petitioner no. 1 and he was not married to any one earlier.

5. Sri Kaushlendra Kumar, learned counsel who had put in appearance on behalf of respondent no. 5, had stated that the petitioner no. 1 is in illegal detention of petitioner no. 2. She had not married

him. The petitioner no. 1 had forced her to sign the affidavit filed in support of the petition.

6. In view of the above allegations made by the learned counsel for the respondent no. 5, petitioner no. 1 was directed to be produced before the Court.

7. The petitioner no. 1 is present in Court. She has been identified by counsel for respondent no. 5, who is representing the father of the petitioner no. 1. Her identity is not disputed by the counsel for the petitioners.

8. She states that she knows petitioner no. 2. He is the person who had forcibly taken her away and had detained her for many days. He had forced her to put signatures on the affidavit as well as vakalatnama. She had not married him at all. She also stated that she wants to go with her parents and live with them.

9. The demeanor of petitioner no. 1 in making the above statement strengthens the belief of the Court at her statement is true and correct and that she has been pressurised to sign and file this petition. The filing of this petition on her behalf is not her free and independent act.

10. In view of the statement of the petitioner no. 1 given before this Court, it is apparent thatpetitioner no. 2 had kept petitioner no. 1 in illegal detention and there is no marriage between the petitioners with the free will of both of them.

11. Accordingly, the marriage as alleged in the petition of the petitioners if any is declared to be a nullity. The petitioner no. 1 is permitted to go with her parents to her home.

12. The writ petition is dismissed with costs of Rs. 25,000/- which has been reduced by the Court to half on the persuasion of the counsel appearing for petitioners. It shall be realized by the Collector Jaunpur from petitioner no. 2 as arrears of land revenue within three months and a report of realizing the same shall be submitted to the Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2015

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

C.M. W. P No. 62660 of 2015

Srikant Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Madan Lal Srivastava

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Minor Minerals (concession) Rules 1963-Rule-3(2), 67-Permission to mining operations-petitioner claims himself to be owner of plots in question-without no objection on his part-permission illegal-held-even owner can not conduct any mining operation on his own land-without prior permission of authority- petition devoid of any merit-dismissed.

Held: Para-7

In view of provisions of Rule 67 and the mandate of Rule 3, no mining operation can be undertaken, by any person, of any minor mineral within the State to which the Rules are applicable, except in accordance with the terms and conditions of a mining lease or mining permit granted under the Rules, and land holder has a right only to claim

compensation from the holder of the lease or of the mining permit in accordance with the provisions and the procedure prescribed by Rule 67. The scheme of the Rules is such that even a land holder cannot carry on mining operations without obtaining a valid mining lease or permit. Consent by a land owner is not a condition precedent to carry on mining operations. If a person is granted mining lease or permit under the Rules, he becomes entitled to carry on mining operation and he cannot restrained to do so by the land owner simply because his consent was not obtained. There is no requirement for grant of a consent or No Objection by the land owner.

Case Law discussed:
AIR 1976 SC 1393.

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

1. Petitioner has approached this Court seeking a writ of certiorari to quash the advertisement dated 16.09.2015 issued by District Magistrate, Sonbhadra, respondent no. 2 inviting application for grant of mining lease in respect of plot nos. 4783, 4785, 4786, 4787, 4811, 4812 and 4813, area 3.40 acre situate at village Billi Markundi, Tehsil Robertsganj, District Sonbhadra (hereinafter referred to as the 'plots in dispute').

2. According to the pleadings set out in the writ petition, the plots in dispute were jointly owned by one Ramdev and one Ghoorahu, father of respondent nos. 5 and 6, each having half share in the plots in dispute. Ramdev is alleged to have transferred his half share in favour of the petitioner through registered sale deed dated 30th June, 2009 and thereafter his name also came to be mutated in the revenue record in pursuance of an order dated 29.08.2009 passed by Naib Tehsildar, Robertsganj, District Sonbhadra under Section 34 of the Land Revenue Act in Case No. 616 of 2009. The plots in dispute along with certain other plots were subject matter of advertisement inviting applications for grant of mining lease. Respondent nos. 5 and 6 in pursuance whereof made an application in respect of plots in dispute. A No Objection Certificate dated 08.09.2015 is alleged to have been issued by the Divisional Forest Officer, Obra, Van Prabhag, Obra, District Sonbhadra. The petitioner on attaining knowledge of the fact, made a representation/objection before the District Magistrate, Sonbhadra dated 18.10.2015 seeking cancellation of the proceedings for granting mining lease in respect of plots in dispute on the allegation that he was share holder to the extent of the half share in the said plots and the respondent nos. 5 and 6 have not taken any No Objection Certificate from him. However, when no action has been taken, he has approached this Court by filing instant writ petition seeking the abovequoted relief.

3. We have heard Shri Madan Lal Srivastava, learned counsel for the petitioner and learned Standing Counsel representing the State respondents.

4. The main grievance of the petitioner is that he is co-tenure holder of the plots in dispute to the extent of half share and the application made by respondent nos. 5 and 6 for grant of mining lease in respect of said plots is liable to be rejected for want of no objection from him.

5. The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (for short the 'Rules) framed by the State of

U.P. provides for grant of a mining lease or mining permit. Rule 3 of the Rules clearly prohibits any mining operation by any person within the State of any minor mineral to which the Rules are applicable, except under and in accordance with the terms and conditions of a mining lease or mining permit granted under the Rules. Sub-rule (2) of Rule 3 of the Rules provides that no mining lease or mining permit shall be granted otherwise than in accordance with the provisions of the Rules.

6. The statutory Rules governing the procedure and the conditions for grant of a mining lease or permit, do not prescribe any requirement for the consent of a land owner for grant of a mining lease or permit. On the contrary, Rule 67 of the Rules disentitles a person having any right in any capacity over the land covered by a mining lease or mining permit, to impose any prohibition or restriction on a right of a person holding any lease or permit to carry out such operation and such a person is only entitled for annual compensation for use of the surface either under an agreement with such person and in case of dispute between them for such sum as may be determined by the District Officer in the manner prescribed under Rule 67. It may be relevant to quote Rule 67, which reads as under.

"67. No restriction etc., to be imposed by owner of land on mining operation except demand of compensation.-(1) No person, who has right in any capacity on the land covered by a mining lease or mining permit, shall be entitled to impose any prohibition or restriction on the mining operations by the holder or such lease or permit of such land or to demand any sum by way of premium of royalty for the removal of minor mineral.

Provided that such person shall be entitled to get annual compensation from the said holder of mining lease or permit for the use of surface of the land for mining operations, as may be agree upon between them.

(2) Where the holder of a mining lease or permit and the owner of the surface of the land could not agree upon the amount of annual compensation and a dispute arises in respect thereof, it shall be determined by the District Officer in such manner that-

(a) in the case or agricultural land, the amount of annual compensation shall be worked out on the basis of the average annual net income from the cultivation of similar land for the past three years, and

(b) in the case of non-agricultural land, the amount of annual compensation shall be worked out on the basis of average annual letting value of similar land for the previous three years."

7. In view of provisions of Rule 67 and the mandate of Rule 3, no mining operation can be undertaken, by any person, of any minor mineral within the State to which the Rules are applicable, except in accordance with the terms and conditions of a mining lease or mining permit granted under the Rules, and land holder has a right only to claim compensation from the holder of the lease or of the mining permit in accordance with the provisions and the procedure prescribed by Rule 67. The scheme of the Rules is such that even a land holder cannot carry on mining operations without obtaining a valid mining lease or permit. Consent by a land owner is not a condition precedent to carry on mining operations. If a person is granted mining

lease or permit under the Rules, he becomes entitled to carry on mining operation and he cannot restrained to do so by the land owner simply because his consent was not obtained. There is no requirement for grant of a consent or No Objection by the land owner.

8. The aforesaid view taken by us finds support from the judgment of the Hon'ble Apex Court in the case of Bhagwan Dass Vs. State of U.P. & Ors., AIR 1976 SC 1393, wherein the Hon'ble Apex Court while considering the provisions of Rule 67, in paragraph 14 of the report, has observed as under.

"We would like before closing to invite especial attention to Rule 67 of the Rules of 1963 under which a "person having a right in any capacity in the land covered by a mining lease or mining permit ..... shall be entitled to get compensation" from the holder of a mining lease or mining permit of such land for the use of the surface, which may be agreed upon between the parties. In case of any dispute, the amount of compensation has to be determined by the District Officer whose order assumes finality. The counter-affidavit filed by the State Government in the High Court concedes expressly, as it ought, that considering the fact that the person entitled to the use of a land may be prevented from using it by reason of a mining lease or permit, Rule 67 provides for the payment of compensation to him for such deprivation. When the right to conduct a mining operation is auctioned by the Government the person who is otherwise entitled to the user of the land, say for agricultural purposes, is deprived of its user and the object of Rule 67 is to ensure that he should be compensated adequately for the deprivation of such user."

9. In view of the above facts and discussions, the petitioner cannot be held entitled to raise any objection either in respect of grant of mining permit/lease for mining operations for inclusion of his plots in the advertisement in accordance with law and the procedure prescribed by the Rules, for want of a No Objection from him.

10. This writ petition is, thus, devoid of any merit and, accordingly, stands dismissed in limine.
