ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: THE ALLAHABAD : 30.11.1999.

BEFORE
THE HON'BLE O.P. GARG, J.
THE HON'BLE V.K. CHATURVEDI, J.

Criminal Misc. Writ Petition No. 7111 of 1999.

Imaran alias Abdul Quddus Khan...Petitioner.
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Shri S.P. Sharma,

Counsel for the Respondents:
A.G.A.

U.P. Control of Goonda Act, 1970 Section 3- Writ Petition challenging the show cause notice issued under section 3 of Act No. VIII of 71, is maintainable, guidelines issued to all the District Magistrates so that they may be cautious enough and should not issue Notices in a routine, casual and mechanical manner without applying their minds and observing the provisions of law.

Held –

Show cause notice can be issued only if the District Magistrate is satisfied of the twin conditions on basis of the material brought before him (1) that a person answers the descriptions of 'Goonda' as defined in Section 2 (b) of the Act (2) and the control and suppression of such a 'Goonda' is necessary for the maintenance of 'public order'. Para 19
Case Law Discussed :
AIR.1996 S.C. P. 691.
U.P.Cr. Ruling 1999 P. 417
U.P.Cr. Ruling 1982. P.1.(F.B.)
S.C.C 1998. P.1.
S.C.C. 1984. (3) P. 14
A.I.R.1960 Alld. P. 754.

By the Court

1. The neat point for determination in the present writ petition under Article 226 of the Constitution is whether a bona fide student of Master of Arts can be dubbed as 'Goonda' primarily for the reason that he adopted an agitational approach to espouse the cause of the students of the college with a view to get the memorandum of their demand accepted by the college authorities. The thumb nail sketch of the case is as follows:

2. Imram alias Abdul Quddus Khan, a student of Master of Arts in Bundelkhand College, Jhansi has been issued a show cause notice by Sri Bhagwat Prasad Misra, District Magistrate Jhansi under the provisions of Section 3 of the U.P. Control of Goondas Act, 1970 (Act No. VIII of 1971) (hereinafter referred to as 'the Act') case no. 65 of 1999. This show cause notice has been challenged on the ground that it has been issued by the District Magistrate on insufficient and perfunctory material and there has been total non-application of mind to the stringent provisions of law and since the notice has been issued in an arbitrary, perfunctory and cursory manner to repress the legitimate demands of the students, it may be quashed.

3. The learned A.G.A. took notice on behalf of the District Magistrate/State and vehemently urged that a writ petition against a 'show cause notice' is not maintainable. The submission was repelled and appears to be against the well established legal position.

4. Normally, a writ petition against a show cause notice is not maintainable as has been held in Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others (A.I.R. 1996 SC-691) wherein, the apex court was concerned with the entertainment of the writ petition against a show cause notice issued by the competent authority. In that case there was no attack against the vires of the statutory provisions governing the matter and no question of infringement of any fundamental right guaranteed by the Constitution was alleged or proved. It could also not be said in that case that the notice was ex facie 'nullity' or totally

'without jurisdiction' in the traditional sense of that expression that is to say, that even the commencement or initiation of the proceedings on the face of it and without anything more, was totally unauthorized. In the backdrop of these facts, the apex court observed as follows :-

" ……In such a case, for entertaining a writ petition under Article 226 of the Constitution of India against a show cause notice, at that stage, it should be shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the party should avail of the alternative remedy and show cause against the same before the authority concerned and take up the objection regarding jurisdiction also, then. In the event of an adverse decision, it will certainly be open to him, to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article 226 of the Constitution of India."

5. Learned counsel for the petitioner urged that in view of the law laid down by a full Bench decision of this Court in Bhim Singh Tyagi V. State of U.P. – 1999 U.P. Criminal Rullings-417, in which the earlier decision of this court in Ramji Pandey V. State of U.P. and others (1982) U.P. Cr. R 1 (F.B.) has been relied upon and approved and in the light of the observations of the apex court in the case of Whirlpool Corporation V. Registrar of Trade Marks, Mumbai and others 1998) SCC-1, alternative remedy does not affect the jurisdiction of the High Court under Article 226 of the Constitution of India, the present writ petition is maintainable.

6. We have heard Sri S.P. Sharma, learned counsel for the petitioner as well as Sri Mahendra Pratap, Additional Government Advocate at some length. Since purely a legal question is involved in the present case, we propose to decide the writ petition finally at this stage. The scanning of this question does not call for any further material.

7. The crucial point for consideration in the present case is whether in the light of the facts and circumstances, as mentioned in the show cause notice, a copy of which is Annexure 6 to the writ petition, the District Magistrate was justified in labelling the petitioner as Goonda and clamping upon him with a notice.

8. Before taking up the legal question it would be advantageous to advert to the definition of 'Goonda' as contained in Section 2 (b) of the Act, which is as follows :-

"2. Definitions : …….
(a)…….
(b) " Goonda" means a person who

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian penal Code or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;

Explanation: 'Tout' means a person who-

(a) accepts or obtains, or agrees to accepts or attempts to obtains, or agrees to accept or attempts to obtain from any person for himself : or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means any public servant or member of Government, Parliament or of State Legislature, to do or forbear to do anything or to show favour or disfavour to any person or to render or attempt to render any service or disservice to any person, with the Central or State Government, Parliament or State Legislature, any local authority, corporation, Government Company or public servant: or

(b) procures in consideration of any remuneration moving from any legal practitioner interested in any legal business or proposes to any legal practitioner or to any person interested in legal business to procure, in consideration of any remuneration moving from either of them, the employment of legal practitioner in such business; or

(c) for the purposes mentioned in explanation (a) or (b), frequents the precincts of civil, criminal or revenue courts, revenue or other offices, residential colonies or residences or vicinity of the aforesaid or railway or bus stations, landing stages, lodging places or other places of public resort; or

(vii) is house-grabber.

Explanation- 'House –grabber' means a person who takes or attempts to take or aids or abets in taking unauthorized possession or having lawfully entered unlawfully remains in possession, of a building including land, garden, garages or out-houses appurtenant to a building."

9. The preamble to the Act gives a clue to the intention which impelled the law makers to enact the legislation. It makes it clear that the Act was brought on the Statute book with a view to make special provisions for the control and suppression of Goondas with a view to the maintenance of 'public order'. A bare reading of the various provisions of the Act makes it clear that there are two pre-requisites which are required to be fulfilled before issuing a show cause notice under Section 3 of the Act, firstly, a person should fall within the definition of the expression 'Goonda' and secondly, it is necessary to control and suppress him with a view to the maintenance of 'public order. If either of the two prerequisites are missing, the District Magistrate shall not be entitled to initiate action under the Act.

10. Let us now take up the first point whether the petitioner answers the description of a 'Goonda' as defined in Section 2 (b) of the Act. For this purpose, it would be necessary to wade through the recitations, or say the grounds as unfolded from the impugned show cause notice issued by the District Magistrate. Rendered in English, in the prefatory clause of the notice, it has been substantially mentioned as follows:

"……Sri Imram son of Mohd. Aslam resident of ……district Jhansi, who normally resides in Mohalla……is a 'Goonda' meaning thereby, he is habituated to commit crimes covered by Chapters XVI, XVII and XXII of the Indian penal Code and that he has acquired the general reputation of being desperate criminal, dangerous person to the society."

A sweeping allegation has come to be made in the second clause that the activities of the petitioner in district Jhansi are such that he causes damage to the person and property of the citizens and criminally intimidates, insults, and annoys them or plans to commit the aforesaid crimes and there is reason to

believe that the petitioner is engaged in committing the offences punishable under Chapters XVI, XVII and XXII of the Code.

In the third clause, it is mentioned that in respect of the above allegations no person is prepared or comes forward to stand as a witness against the petitioner on account of fear of hurt to his person and damage to his property. A mention has been made with regard to the two incidents-firstly, dated 14.10.1999 about which Sub Inspector Ved Ram had submitted a beat information that on account of enhancement in the amount of fee, the petitioner and his companion incited students, attempted to disturb the peace and tranquility in the college campus and being over-awed, the Principal, Professors and clerical staff of the college are feeling unsafe and insecure; secondly, Constable Mani Ram, while he was on patrol duty on 23.10.1999, registered a beat information that the petitioner along with his companion assembled in front of the gate of the college and were making preparations to intimidate the Principal and Professors and to created an atmosphere of unrest in the campus; that he was also planning that the Principal should be so much terrorized that he may not be in a position to object the conduct of the unruly crowd of students. It was further mentioned in the notice that some unknown student had sent an application, obviously anonymous, addressed to the District Magistrate that on account of criminal activities of the petitioner and his companions, the college atmosphere was terror-stricken and that Sri S.P. Pathak, Principal and other Professors and Ministerial staff were not prepared to lodge an F..I.R. or complain against the conduct of the petitioner or to stand as a witness against him and his companions; that the petitioner along with his associates tease the passing by girls in front of the crossing of the college. On the basis of the aforesaid allegations, the District Magistrate required the petitioner to show cause by 18th November,1999 as to why an order of externment against him should not be passed under the provisions of Section 3 (3) of the Act.

11. A reading of the various allegations made in the impugned notice would reveal that all of them are vague, general and inconcrete. On the basis of the sweeping allegations, the petitioner has been termed as 'goonda' and has been required to show cause as to why he should not be directed to remove himself outside the district for a specified period. Prior to the issuance of the impugned notice, no case was ever registered against the petitioner. He is not involved in any criminal case. The petitioner is a bona fide student of M.A.-IInd year (Politics) in the college as would be evident from the documents brought on record as Annexures 1 and 2. The Principal of the college had recently issued a character certificate dated 2.8.1999, Annexure 4 to the writ petition. He has certified that the work, conduct and character of the petitioner is good and he wished him well for his future.

12. As said above, the Act was enacted with a view to make special provision for the control and suppression of 'Goondas' with a view to the maintenance of 'public order'. Unless a person is a 'goonda' with in the meaning of Section 2 (b) of the Act, no show cause notice can be served upon him. The definition of the expression 'goonda' has been extracted above. A bare reading of this definition would indicate that a person before he is termed as a 'goonda' should either by himself or as a member or leader of a gang, habitually commits or attempts to commit or abets the commission of an offence punishable under Section 153, or Section 153-B or Section 294 or Chapter XV, XVII, or XXII of the Indian Penal code or has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act 1956 or under the U.P. Excise Act, Public Gambling Act or under certain Sections of the Arms Act, is generally reputed to be a person who is desperate and dangerous to the community or has been habitually

passing indecent remarks or teasing women or girls or is a tout. Except for the bald averments made in the show cause notice issued by the District Magistrate there is no material, whatsoever, incorporated in the notice to support the various grounds.

13. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of section 2 (b) of the Act are almost akin to the expression 'anti social element' occurring in section 2 (d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element' the connotation 'habitually commits' came to be interpreted by the apex court in the case of Vijay Narain Singh V. State of Bihar and others (1984) 3 SCC-14. The meaning put to the aforesaid expression by the apex court would squarely apply to the expression used in the Act, in question. The majority view was that the word 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Even the minority view which was taken in Vijay Narain's case (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a criminal instinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be an 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of Vijay Narain's case (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life of crime. In simple language, the minority view was expressed that the word 'habitually; means 'by force of habit'. The minority view is based on the meaning given in stroud's Judicial Dictionary, Fourth Ed. Vol. II– 1204-habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day. Thus, the word- 'habitual' connotes some degree of frequency and continuity.

14. The word 'habit' has a clear well understood meaning being nearly the same as 'accustomed' and cannot be applied to single act. When we speak of habit of a person, we prefer to his customary conduct to pursue, which he has acquired a tendency from frequent repetitions. In B.N. Singh V. State of U.P.AI.R. 1960-Allahabad –754 it was observed that it would be incorrect to say that a person has a habit of anything from a single act. In the Law Lexicon – Encyclopedic Law Dictionary, 1997 Ed. by P. Ramanatha Aiyer, the expression 'habitual' has been defined to mean as constant, customary and addicted to a specified habit; formed or acquired by or resulting from habit; frequent use or custom formed by repeated impressions. The term 'habitual criminal', it is stated may be applied to any one, who has been previously more than twice convicted of crime, sentenced and committed to prison. The word 'habit' means persistence in doing an act, a fact, which is capable of proof by adducing evidence of the commission of a number of similar acts. 'Habitually' must be taken to mean repeatedly or persistently. It does not refer to frequency

of the occasions but rather to the invariability of the practice.

15. The expression 'habitual criminal' is the same thing as the 'habitual offender' within the meaning of section 110 of the Code of Criminal Procedure, 1973. This preventive Section deals for requiring security for good behavior from 'habitual offenders'. The expression 'habitually' in the aforesaid section has been used in the sense of depravity of character as evidenced by frequent repetition or commission of offence. It means repetition or persistency in doing an act and not an inclination by nature, that is, commission of same acts in the past and readiness to commit them again where there is an opportunity.

16. Expressions like 'by habit' 'habitual' 'desperate' 'dangerous' and 'hazardous' cannot be flung in the face of a man with laxity or semantics. The court must insist on specificity of facts and a consistent course of conduct convincingly enough to draw the rigorous inference that by confirmed habit, the petitioner is sure to commit the offence if not externed or say directed to take himself out of the district. It is not a case where the petitioner has ever involved himself in committing the crime or has adopted crime as his profession. There is not even faint or feeble material against the petitioner that he is a person of a criminal propensity. The case of the petitioner does not come in either of the clauses of Section 2 (b) of the Act, which defines the expression 'Goonda'. Therefore, to outright label bona fide student as 'goonda' was not only arbitrary capricious and unjustified but also counter productive. A bona fide student who is pursing his studies in the Post Graduate course and has never seen the world of the criminals is now being forced to enter the arena. The intention of the Act is to afford protection to the public against hardened or habitual criminals or bullies or dangerous or desperate class who menace the security of a person or of property. The order of externment under the Act is required to be passed against persons who cannot readily be brought under the ordinary penal law and who for personal reasons cannot be convicted for the offences said to have been committed by them. The legislation is preventive and not punitive. Its sole purpose is to protect the citizens from the habitual criminals and to secure future good behavior and not to punish the innocent students. The Act is a powerful tool for the control and suppression of the 'Goondas'; it should be used very sparingly in very clear cases of 'public disorder' or for the maintenance of 'public order'. If the provisions of the Act are recklessly used without adopting caution and desecretion, it may easily become an engine of operession. Its provisions are not intended to secure indirectly a conviction in case where a prosecution for a substantial offence is likely to fail. Similarly the Act should not obviously be used against mere innocent people or to march over the opponents who are taking recourse to democratic process to get their certain demands fulfilled or to wreck the private vengeance.

17. In the instant case, it appears that the college fee was substantially enhanced; there were certain discrepancies in the admission of students to M.A. Previous and L.L.B. classes; the college teachers had adopted a recalcitrant attitude of not attending the classes regularly. In order to curb the aforesaid maladies, and to adopt remedial measures, the students of the college united to get their grievances ventilated by preparing a demand note with which they met the Principal of the College on 12.10.1999 under the leadership of the present petitioner, Rashid Khan, Yashendra Singh Rajput, in a delegation. They have mentioned in the demand note. Annexure 5 to the writ petition, that in case their demands are not fulfilled they would abstain to attend the classes and close the fee counter and that the students shall then be compelled to stage dharna and demonstrations in the campus. The demand note was signed by a body of

students, the number of which swelled to 65. The students have adopted a lawful and democratic method to get their demands fulfilled. There is absolutely nothing on record that the students under the leadership of the present petitioner had committed the acts of violence or , in any manner, threatened, intimidate, insulted or annoyed their Principal, Professors, and the clerical staff. The notice itself indicates that none of these persons have come forward to complain against the petitioner and others. The petitioner cannot be expected to have such a monstrous capacity as to manoeuver that the Principal of the college and other Professors and Lecturers would submit to his criminal acts without any demur or objections. There is also no material on record to indicate that there has occasioned a 'public disorder' and for the maintenance of which it was necessary to brand the petitioner as; Goonda' and to initiate action against him for his externment. The nature of the menace posed by the petitioner would have been the determinative factor in the case.

18. Our Constitution does not give a carte blench to any organ of the State to be the sole arbiter in the matter of maintenance of security and public order. It would be too perilous a proposition to say that the District Magistrate was the sole judge of the steps required to be taken for the maintenance of public order. In the instant case, the District Magistrate has blatantly transgressed the limits of his jurisdiction and has issued a show cause notice without applying his mind to the twin aspects required to be established before issuing a notice to a person for externment. As said above, firstly, the person concerned should answer the description of a 'Goonda' as defined under Section 2 (b) of the Act and secondly, it was necessary to control and suppress him with a view to the maintenance of 'public order'. Unfortunately, the District Magistrate has not taken note of the provisions of the Act and with a view to repress the legitimate activities of the students, which may have irked the School authorities or administration, a show cause notice wholly without jurisdiction was issued not realizing the implications that the future career of a bona fide student of Post Graduate class and who has to pass out the college in the near future would be seriously jeopardized and marred. The show cause notice issued by the District Magistrate not only suffers from the infirmity of lack of jurisdiction but is bereft of propriety. It is true, that the District Magistrate has the responsibility to maintain 'public order' and to initiate action to control and suppress the 'Goondas' but he is not unbridled. His actions must have a flavour of law and unless he has an umbrella of law to protect his actions, this court would not hesitate to step-in to correct and quash the illegal, arbitrary whimsical and uncalled for action of the District Magistrate.

19. The instance of an order and the circumstances in which the show cause notice have come to be issued, in the situations like the present one, may be multiplied. More often than not, the orders passed by the District Magistrate are being assailed, not in vain, before this court primarily on the ground that the District Magistrate, without applying the mind and observing the provisions of law, are issuing show cause notices under the Act in routine, casual and mechanical manner. Before parting, therefore, it may be mentioned that because of the litigation cropping up from time to time due to unwarranted and illegal steps taken by the District Magistrates concerned in flagrant violation of the provisions of the Act, an endeavour has been made above to indicate the circumstances in which a show cause notice can be issued- to reiterate- it can be issued only if the District Magistrate is satisfied of the twin conditions of the basis of the material brought before him (1) that a person answers the descriptions of 'Goonda' as defined in Section 2 (b) of the Act, (2) and that control and suppression of such a 'Goonda' is necessary for the maintenance of 'public order'- so that the

District Magistrate may be cautious enough to deal with the persons who are sought to be externed under the Act in accordance with law leaving no scope for unnecessary litigation.

20. In the conspectus of the above facts, the impugned notice dated 26th October,1999 is without jurisdiction and cannot be sustained. It would be proper to nip the evil in the bud. The writ petition, therefore, succeeds and is allowed. The impugned show cause notice dated 26th October, 1999 issued by the District Magistrate, Jhansi- respondent no.2, Annxure 6 to the writ petition is hereby quashed.

21. The Registrar of this Court is directed to ensure that a copy of this judgement is sent to all the District Magistrates in the State with promptitude. A copy of the judgement should also be sent to the Chief Secretary, Government of Uttar Pradesh, Schivalaya, Lucknow, who in his turn, shall issue necessary instructions to all concerned so that the observation made above are faithfully followed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.11.1999

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 2239 of 1982

Chandan Singh ...Petitioner.
Versus
Ist Additional District Judge, Mathura and others ... Respondents.

Counsel for the Petitioner:
Shri R.C. Srivastava
Shri Pradeep Chandra

Counsel for the Respondents:
S.C.

Urban Buildings (Regulation of Letting, Rent and Eviction) Act,1972, Section 9(2) - When an application under section 9 (2) of the Act was filed, it was the duty of the Rent Control and Eviction Officer to have considered the factors and circumstances in accordance with Section 9(2) of the Act. As it was not done, the order passed by R.C.E.O. is illegal.
Held-
Admittedly, there was no rent agreed between the land lord and the tenant. The rent was fixed by the District Magistrate under section 16(9) of the Act and that was presumptive rent. When application under section 9 (2) of the Act was filed a prayer was made for fixing Rs.40/- per month as rent and court was convinced that Rs. 40/- cannot be fixed then it should have considered the factors and circumstances mentioned under Section 9(2) of the Act. As it has not been considered and the rent has been fixed on the basis of the payment made by the last tenant the judgement is illegal. (Para 11)

Case Law Discussed
1980 A.R.C. 192
1984(1) A.R.C. 662
1982 A.R.C. 243
1984(2) ARC332

By the Court

1. This petition under Article 226 of the Constitution of India, has been filed by the petitioner, who is tenant of the premises in dispute, i.e. premises No. 2166/2, Dampier Nagar, Mathura, which was allotted to him on 27.4.1978. The petitioner has prayed for quashing the order dated 16.8.1980 passed by the respondent no. 1, which is Annexure-5 to the writ petition and order dated 20.11.1981 so far as it relates to the dismissal of the appeal of the petitioner passed by the respondent no. 1.

2. The brief facts, as stated by the petitioner in the petition are that the house in question was assessed at Rs.30/- in the year 1970. It is stated that the presumptive rent at the time of allotment of the aforesaid building was fixed at Rs.175/- by the Rent Control & Eviction Officer while making allotment in favour of the petitioner. The allegations of the petitioner are that since the presumptive rent was exhorbitant, therefore, the petitioner filed

an application before the Rent Control & Eviction Officer, Mathura under Sections 8/9 of U.P. Act No. XIII of 1972, hereinafter referred to as the Act only. The application of the petitioner was contested by the land-lord-respondent no. 3. The petitioner and the respondents in support of their respective claim filed written statements of the witnesses and of their own. The land-lord filed an affidavit of one Sri H. Chandra, Sales Tax Officer, who was previous tenant of the accommodation in question. An application was filed by the petitioner with a request to cross examine Sri Harish Chandra, the earlier tenant. But this application of the petitioner was rejected. The Rent Control & Eviction Officer has fixed Rs.175/- as monthly rent by order dated 16.8.1980. The petitioner, aggrieved by this order filed an appeal. The land-lord also filed an appeal and stated that the rent at least Rs.200/- be fixed. The District Judge dismissed both the appeals on 20.1.1981. The petitioner has only challenged this order.

3. Heard learned counsel for the petitioner and learned Standing Counsel.

4. Sri R.C. Srivastava, learned counsel appearing on behalf of the petitioner has vehemently urged that the two authorities below having not considered while determining the rent of the premises in dispute the principle laid down in sub-section (2) of Section 9 of the Act have committed manifest error of law. He has further submitted that the authorities below have not taken into consideration the provisions of Section 9(2-A) of the Act in determining the rent. His further submission is that the Rent Control & Eviction Officer has not considered the evidence of the petitioner which conclusively proved that the standard rent of the premises in dispute could not be more than Rs.40/- or Rs.45/- per month. His further argument is that the Rent Control and Eviction Officer has not considered the provisions of the Act.

5. I have heard learned counsel for the parties and have perused the record. From the judgement of the Rent Control & Eviction Officer it is apparent that he considered the rent paid by Sri Harish Chandra, Sales Tax Officer, who was earlier tenant and was paying Rs.175/- per month as rent. This payment was made by the Sales Tax Officer on the basis of the agreement between him and land-lord, and fixed Rs.175/- as monthly rent. The appellate court affirmed the same finding. The appellate court considered the explanation given under Section 16(9) of the Act and held that in view of this provision the District Magistrate is required to pass order that the tenant should pay the presumptive rent. The explanation further says that the presumptive rent will not be less than the rent which was payable by the last tenant. In this case the last tenant was Sri Harish Chandra, Sales Tax Officer, who was paying Rs. 175/- per month as rent and this rent was settled by agreement, paper no. 17/2. The agreement remained in force for one year and thereafter the rent was increased to Rs. 200/- per month. The appellate court found that the disputed accommodation is an old building and the rent fixed by the Rent Control & Eviction Officer is perfectly correct, therefore, he dismissed both the appeals.

6. Before discussing the argument of the learned counsel for the parties it is necessary to see the provisions which are relevant for the present case. It is apparent that application was filed by the petitioner under Sections 8 and 9 of the Act. The relevant provisions of Sections 8 and 9 of the Act are quoted below:

"8**. Disputes regarding amount of standard rent. Etc.**

(1)Where a dispute arises with regard to the amount of the standard rent or the amount of enhancement in rent permissible under section 5 or Section 6 or to the date with effect from which such enhancement shall take effect, or the amount of taxes payable by

tenant under Section 7, or to the amount of proportionate rent payable by the tenant after a part of the building or any land appurtement there to is released under Section 16 or Section 21, or to the amount of rent payable by the original tenant for the new building allotted to him under sub-section (2) of Section24, the District Magistrate shall, on an application being made in that behalf, by order (determine such dispute),

(2) Where the assessment of a building occupied by a tenant is lower than the agreed rent payable there for, the District Magistrate, on an application of the tenant or of his own motion, may, after giving to the land lord an opportunity of being heard, direct the local authority concerned to enhance the assessment in accordance with the agreed rent with effect from the date from which the agreed rent, has been payable or the date of commencement of this Act, whichever is later, and there upon, notwithstanding anything contained in the law relating to that local authority, the assessment shall be corrected accordingly,

(3) Every order under sub-section (1) or sub-section (2) shall, subject to the result of any appeal preferred under section 10, be final."

"9. **Determination of standard rent-** (1) in the case of a building to which the old Act was applicable and which is let out at the time of the commencement of this Act in respect of which there is neither any reasonable annual rent nor any agreed rent or in any other case where there is neither any agreed rent nor any assessment in force, the District Magistrate shall, on an application being made in that behalf, determine the standard rent.

(2) In determining the standard rent the District Magistrate may consider –

(a) the respective market-value of the buildings and of its site immediately before the date of commencement of this Act or the date of letting, whichever is later (hereinafter in this section referred to as the said date);

(b) the cost of construction, maintenance and repairs of the building;

(c) the prevailing rents for similar buildings in the locality immediately before the said date;

(d) the amenities provided in the building ;

(e) the latest assessment, if any, of the building;

(f) any other relevant fact which appears in the circumstances of the case to be material.

(2-A) Subject to the provisions of sub-section (2), the District Magistrate shall ordinarily consider ten percentum per annum on the market value of the building (including its site) on the said date to be the annual standard rent thereof, and the monthly standard rent thereof, and the monthly standard rent shall be equal to one-twelfth of the annual standard rent so calculated).

(3) Every order made under sub-section (1) shall, subject to the result of any appeal preferred under Section 10, be final."

Section 16(9) of the Act is also relevant which is quoted below:

"16(9)- The District Magistrate shall, while making an order under clause (a) of sub-section (1), also require the allottee to pay to the landlord an advance, equivalent to-
Where the building is situated in a hill municipality, one-half of the yearly presumptive rent, and
In any other case, one month's presumptive rent, and on his failure to make or offer the payment within a week thereof, rescind the allotment order.

Explanation: In this sub-section the expression "presumptive rent" means an amount of rent which the District Magistrate prima facie considers reasonable having regard to the provisions of sub-section (2) and (2-A) of Section 9, provided that such amount

shall not be less than the amount o rent which was payable by the last tenant, if any."

Section 3(k) of the Act is also relevant which is quoted below:

"3(k)-"standard rent" subject to the provisions of Section 6, 8 and 10, means-

(i) in the case of building governed by the old Act and let out at the time of commencement of this Act-

(a) where there is both an agreed rent payable therefor at such commencement as well as a reasonable annual rent (which in this Act has the same meaning as in Section 2(f) of the old Act, reproduced in the Schedule) the agreed rent of the reasonable annual rent plus 25 per cent thereon, whichever is greater ;

(b) where there is no agreed rent, but there is a reasonable annual rent, the reasonable rent plus 25 per cent thereon.

(c) Where there is neither agreed rent nor reasonable annual rent, the rent as determined under Section 9.

(ii) in any other case, the assessed letting value, for the time being in force, and in the absence of assessment, the rent determined under Section 9."

8. The question which has arisen in the case is as to what should be the basis for fixing rent under Section 8 and 9 of the Act. As is admitted to the petitioner that at the time of allotment the District Magistrate has fixed Rs.175/- as presumptive rent which was not agreed by the petitioner and he has filed application under sections 8 and 9 of the Act to fix the rent and has prayed for fixing Rs.40/- per month as rent. Therefore, it is necessary to see the relevant sections of the Act. A bare perusal of Section 16(9) of the Act would show that the District Magistrate shall, while making an order under clause (a) of sub-section (1), also require the allottee to pay to the landlord an advance, equivalent to where the building is situated in a hill municipality, one-half of the yearly presumptive rent and in any other case, one month's presumptive rent, and on his failure to make or offer the payment within a week thereof, rescind the allotment order. The explanation given is in this sub-section the expression "presumptive rent" means an amount of rent which the District Magistrate prima facie considers reasonable having regard to the provisions of sub-section (2) and (2-A) of Section 9, provided that such amount shall not be less than the amount of rent which was payable by the last tenant, if any. According to Section 9 of the Act when there is neither any reasonable annual rent nor any agreed rent or in any other case where there is neither any agreed rent nor any assessment in force, the District Magistrate shall, on an application being made in that behalf, determine the standard rent. Section 16(9) and Section 9 if read together will make it clear that the presumptive rent can be fixed which should not be less than the rent which was payable by the last tenant. But while determining the standard rent the court has to see various aspects as mentioned in sub-section (2) of Section 9 of the Act. Section 8 of the Act under which application was filed deals with the dispute with regard to the amount of standard rent or to the amount of enhancement in rent. So section 8 of the Act also mentions the standard rent.

9. Sri R.C. Srivastava, senior counsel appearing on behalf of the petitioner has submitted that when application under section 9(2) of the Act was filed it was the duty of the Rent Control & Eviction Officer to have considered the factors and circumstances in accordance with Section 9(2) of the Act and as it was not done the order passed by the Rent Control and Eviction Officer is illegal. In this respect he has submitted that the rent paid by the earlier tenant cannot be the basis for fixing standard rent. His submission is that the case reported in 1980, A.R.C. page 192 has not been correctly considered by the authority below. Learned counsel for the petitioner has placed reliance in a case reported in 1984(1) A.R.C., page 552-Smt.

Shakila Khatoon Versus I Addl. District Judge wherein the court held that the rent should be determined in accordance with the provisions of Section 9(2) of the Act. He has further placed reliance in a case reported in 1984 (2) A.R.C., page 332- Smt. Prem Kumari Gupta Versus District Judge Saharanpur and others. Sri R.C. Srivastava, learned senior counsel appearing on behalf of the petitioner has further placed reliance in a case reported in 1982, A.R.C. page 243- Alkesh Mittal Versus Gendan Lal Mittal.

10. Sri Manish Tiwari, learned counsel appearing on behalf of the respondents has submitted that as presumptive rent was fixed in accordance with the provisions of Section 16(9) of the Act the authorities below were justified for fixing standard rent on the basis of the rent paid by the last tenant. Therefore, no errors were committed by the Rent Control authorities or by the appellate court.

11. After hearing learned counsel for the parties I am of the view that there is much force in the argument of Sri R.C. Srivastava. Admittedly, there was no rent agreed between the landlord and the tenant. The rent was fixed by the District Magistrate under section 16(9) of the Act and that was presumptive rent. When application under section 9(2) of the Act was filed a prayer was made for fixing Rs.40/- per month as rent and court was convinced that Rs.40/- cannot be fixed then it should have considered the factors and circumstances mentioned under Section 9(2) of the Act. As it has not been considered and the rent has been fixed on the basis of the payment made by the last tenant the judgment is illegal. Therefore, the orders passed by both the authorities are hereby quashed and the matter is being sent back to the Rent Control & Eviction Officer to redetermine the standard rent as provided under section 9(2) of the Act.

12. Accordingly, the writ petition succeeds and is allowed. The judgments and orders passed by the I Additional District Judge, Mathura, dated 20.11.1981 and the Rent Control & Eviction Officer, Mathura, dated 16.8.1980 are hereby quashed and the matter is being sent back to the Rent Control & Eviction Officer, Mathura to decide the application filed by the petitioner afresh keeping in view the provisions of Section 9(2) of the Act. There will be no orders as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.1999

BEFORE
THE HON'BLE G.P.MATHUR, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 41975 of 1999

M/S Bareilly Flour Mills (Pvt.) Ltd. and another ...Petitioners

Versus

U. P. State Electricity Board and others ...Respondents

Counsel for the Petitioners:
Sri Arun Tandon
Sri V.B.Upadhaya

Counsel for the Respondents:
Sri Sudhir Agrawal
S.C

Constitution of India Article 226 - Existence of alternative remedy-Assessment Bill of Electricity Challenged- It is only provisional in nature and Final Bill shall be passed after giving an opportunity of hearing. Against Final Bill, an appeal lies under Electricity Regulations-Writ dismissed on the ground of Statutory alternative remedy.
Held-
The petitioners have an efficacious and alternative remedy of filing an objection to the assessment bill and also filing an appeal against the final bill. In these circumstances, it is not a fit case for exercise of our discretionary jurisdiction under Article 226 of the Constitution at this stage. (Para 7)
Case Law discussed.
AIR 1985 SC 1147

By the Court

1. This petition under Article 226 of the Constitution has been filed praying for the following relief's:-

1. issue a writ, order or direction in the nature of certiorari calling for the record and quashing the proceedings initiated under assessment order dated 1.9.1999

2. issue a writ , order or directions in the nature of mandamus commanding the respondents not to assess or realise any amount from the petitioner in pursuance of the assessment order dated 1.9.1999 which in turn is based on the alleged ex-parte checking report dated 23.8.1999

or in alternative

3. issue a suitable writ, order or direction in the nature of mandamaus, directing the respondents that the assessment proceedings in the present case be finalised by the Executive Engineer posted out side Bareilly.

2. The petitioner no. 1 M/s Bareilly Flour Mills (Pvt.) Ltd. is a company incorporated under the Companies Act and it has established a unit in village Zerh tehsil Faridpur in the district of Bareilly. It has been sanctioned a load of 500 K.V.A. by U.P. State Electricity Board (for short UPSEB) in the year 1989. The UPSEB has installed an Electronic Secured Meter which is an electronic device for measuring the amount of electricity which is supplied to the petitioner no.1. This Electronic Secured Meter is supplied by a company and the reading in the same is recorded by a nominee of the company who conducts an inspection once in a month along with an Engineer of UPSEB. This process of recording the consumption of electricity is commonly known as M.R.I. At 15.20 hours on 23.8.1999, a team consisting of Sri Atul Rastogi, nominee of the company which had supplied the Electronic Secured Meter, Sri J.P. Gupta, Assistant Engineer (Meter), Sri M.I. Haider (J.E.), Sri Ghanshyam and Sri Munshi Lal , employees of UPSEB went to the premises of petitioner no. 1 for the purpose of M.R.I. They found that a cable had been directly connected from the 11 KVA line to the transformer installed there and the cable which connects the meter to the transformer had been disconnected. The result of this directly connecting the main 11 KVA line to the transformer was that no electricity was passing through the meter and no consumption of the same was being recorded therein. The petitioner no. 1 was thus committing theft of the electricity. Sri J.P. Gupta, Assistant Engineer gave information about it to his superior officers. Subsequently, on 24.8.1999 the electricity connection of petitioner no.1 was disconnected. The Divisional Engineer (Executive Engineer). Electricity Distribution Division, Bareilly, thereafter sent an assessment bill for an amount of Rs. 77,23,095.00 dated1.9.1999 to the petitioner no.1. The petitioner seeks quashing of this assessment bill.

3. We have heard Sri V.B. Upadhaya, Senior Advocate assisted by Sri Arun Tandon for the petitioners and Sri Sudhir Agrawal for respondents no. 1 to 3 and have perused the record.

4. Learned counsel for the petitioners has contended that the petitioner no. 1 had been sanctioned a load of 500 KVA in the year 1989. Subsequently, on 20.5.1999 the petitioner no. 1 moved an application for reduction of load from 500 KVA to 150 KVA and thereafter Executive Engineer, Electricity Distribution Division, directed the Sub-Divisional Officer to check the installation of petitioner no.1 and to ascertain the number of motors installed therein for the purpose of reduction of load. The petitioner was informed that as per the M.R.I. of sub-station, the consumption of electricity appeared to be more than one recorded at the meter installed in the Flour Mill and consequently an objection was raised that on the basis of M.R.I. of the sub-station from where

electricity was supplied to many industries, no bill should be raised against the petitioners. On the basis of the complaint of the petitioners, the Zonal Chief Engineer constituted a Committee consisting of Superintending Engineer, three Executive Engineers and Assistant Engineers, who made physical inspection of the Flour Mill on 18.8.1999 and after being satisfied that there was no misutilisation or misapplication of the electrical energy submitted a sealing report dated 18.8.1999. This showed that no theft of electricity was being committed by the petitioner. Learned counsel has further contended that a report about the alleged theft was also lodged with the police who, after investigation, has submitted a report to the effect that no theft of the electricity had been committed. Lastly, it has been contended that the inspection is alleged to have been done in the presence of Sri R.P. Singh (Superintending Engineer) as well as officers and employees of Vigilance Cell and consequently the Executive Engineer who had sent the assessment bill cannot act fairly while finalising the assessment bill as he cannot disregard the report of Sri R. P. Singh, Superintending Engineer, as he is a superior officer. It is thus urged that this Court should intervene in the matter and quash the assessment bill as from the material on record the commission of theft by the petitioner no. 1 is not established.

5. Sri Sudhir Agrawal, learned counsel for the contesting respondents has however submitted that the report of Sri J.P. Gupta, Assistant Engineer, which had also been signed by Sri Atul Rastogi, nominee of the company which has supplied the Electronic Secured Meter, besides Sri M.I.Haider, J.E., Sri Ghanshyam and Sri Munshi Lal clearly showed that a cable had been directly connected with the 11 KVA line to the transformer installed in the Flour Mill by – passing the meter. Learned counsel has also contended that there is other strong evidence which conclusively establishes that petitioner no. 1 had committed theft of electricity. Regarding the assessment bill, it has been urged that the same has been prepared by Sri Shashi Kant, Executive Engineer (Revenue) and ‘he was not a member of the team which had conducted the inspection and no allegation of any kind has been made against him in the writ petition. Sri Agrawal has further submitted that the assessment bill is only provisional in nature, which has to be finalised after giving an opportunity of hearing to the consumer and against the final bill, an appeal lies under the Regulations and, therefore, this Court should not exercise its discretionary jurisdiction under Article 226 of the Constitution at the present stage. The question whether a theft was being committed by directly connecting a cable with 11 KVA line with the transformer installed in the Flour Mill is a pure question of fact. It is not possible for this Court to record any finding on this question while exercising jurisdiction under Article 226 of the Constitution. It is for the concerned Authority of UPSEB to consider the material and circumstances of the case and record a finding on this question. The report of the police station, Faridpur, submitted to S.S.P. Bareilly, copy of which has been filed as Annexure-9 to the writ petition, has hardly any evidentiary value. The only reason given therein is that it is not possible to run a Mill by directly connecting a cable with 11 KVA line. There port dated23.8.1999 given by Sri J.P. Gupta, Assistant Engineer, which has also been signed by Sri Atul Rastogi, nominee of the company which had supplied the Electronic Secured Meter, Sri M.I. Haider, Sri Ghan shyam and Sri Munshi Lal, mentions that they had personally seen that cable had been connected from the 11 KVA line to the transformer of the Flour Mill bypassing the meter. Besides above the M.R.I. done in the sub-station from where electricity is supplied to petitioner no. 1 and the number and capacity of the motors installed therein can also give clinching evidence on the point whether theft of electricity was being

committed or not. This question has therefore to be examined by the experts of the department and it is not possible for this Court to record a finding in favour of petitioner only on the basis of the sealing report dated 18.8.1999 and the police report.

6 . Annexure-11 to the writ petition is a copy of the assessment bill dated 1.9.1999 and it has been sent to petitioner no. 1 by an Executive Engineer of UPSEB. The bill itself mentions that if the petitioner has any objection to the assessment bill it may file a written objection alongwith proofs within 15 days of the receipt of the assessment bill failing which the same shall be deemed to be final. This assessment bill has been prepared under clause 22 of Electricity Supply (Consumers) Regulations, 1984. Clause B of this Regulation relates to theft of energy and it provides that where there is evidence that a consumer had dishonestly abstracted, consumed, used or wasted energy the supplier may estimate the value of the electrical energy so abstracted, consumed or used as per guide lines given in Annexure-1 and may also disconnect the supply without notice. Towards the end of the Regulations, Annexure-1 has been given which provides the guidelines for assessment. The assessment bill appears to have been prepared in accordance with the Regulations contained in Annexure-1.Regulation 23 (I) provides that the Executive Engineer shall finalise all the assessment cases after giving an opportunity to the consumer to state his point of view. Sub-clause (ii) of clause 23 lays down that if the consumer is dissatisfied with the assessment so made, he may prefer an appeal. Under the amended Regulations, if the assessment bill is upto Rs.2 lakhs, the appeal lies to a Circle Level Committee headed by Superintending Engineer, if the assessment bill is above Rs.2 lakhs and is upto Rs.10 lakhs, it lies to a Zonal level committee headed by a Chief Zonal Engineer and if the assessment bill exceeds Rs. 10 lakhs the appeal lies to an Area Level Committee headed by Area Chief Engineer (Level-1). As mentioned earlier, only an assessment bill has been issued to the petitioner on 1.9.1999 and this itself mentions that if the petitioners objects to the same they may file a written objection alongwith proof within 15 days failing which the assessment bill shall be deemed to be final. The petitioners had an opportunity to file an objection against the assessment bill and thereafter a final bill would have been prepared. Against the final the petitioners have aright to file an appeal. Thus, the statute itself provides an efficacious and alternative remedy to challenge the assessment bill dated 1.9.1999.

7. Learned counsel for the petitioners has urged that at the time of the inspection Sri R.P. Singh, Superintending Engineer as well as officers and employees of Vigilance Cell were present and therefore no useful purpose will be served by filing objection to the assessment bill and consequently the alternative remedy provided under the Regulations is illusory in character. In support of this submission, reliance is placed on Ram and Shyam Company Versus State of Haryana AIR 1985 SC 1147. In our opinion, the contention raised has no substance. The assessment bill has been issued under the signature of Sri Shashi Kant, Executive Engineer (Revenue). No allegation has been made against him in the writ petition nor it is alleged that he was present at the time of the inspection. The authority cited is clearly distinguishable on facts as in the said case the order for grant of mining lease was passed by an Authority on the dictate of Chief Minister and in the said circumstance it was held that an appeal to the State Government would be ineffective. There is no reason to doubt that Sri Shashi Kant, Executive Engineer (Revenue) would not act fairly while finalising the assessment bill if an objection to the same is filed by the petitioners. That apart against the final bill, the petitioners will have a right of appeal to Area Level Committee, which is headed by an Area Chief Engineer

(Level-1). In our opinion, the petitioners have an efficacious and alternative remedy of filing an objection to the assessment bill and also filing an appeal against the final bill. In these circumstances, it is not a fit case for exercise of our discretionary jurisdiction under Article 226 of the Constitution at this stage.

8. In view of the discussions made above, the writ petition is dismissed on the ground of alternative remedy. It is however directed that if the petitioners file an objection to the assessment bill within 15 days from today, the Executive Engineer concerned shall entertain the same and finalise the assessment case after giving an opportunity to the petitioners to state their point of view and in accordance with law.

9. Office is directed to issue a certified copy of this order on payment of usual charges within three days.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD NOVEMBER 30, 1999

BEFORE
THE HON'BLE O. P. GARG , J.
THE HON'BLE V. K. CHATURVEDI, J.

Habeas Cor. Writ. Petition No.44025 of 1999

Aslam Khan ...Petitioner
Versus
Superintendent, District Jail, Moradabad & others ...Respondent

Counsel for the Petitioner:
Shri D.S. Misra

Counsel for the Respondents:
Shri Mahendra Pratap
A.G.A.

Constitution of India Article 22 (5) and Sections 3 (2) and 8 of National Security Act-Delay in deciding the representation-when question of liberty is involved, it is incumbent on all the authorities to explain delay in consideration of representation. They all have to act as one unit to ensure early decision on the representation of the detenu.

Held--

Requisite care has not been taken by respondent no. 2 in sending the representation of the petitioner to the Central Government and there is no valid and justified explanation of delay with effect from 7.8.99 to 24.8.99 . In our opinion, it renders the continued detention of the petitioner to be illegal and the petitioner is entitled to relief. Para 13

Case Law discussed .
1991 (1) S.C.C. 476

By the Court

1. By means of this writ petition, the petitioner has challenged detention order dated 22.7.99 passed against him by respondent no . 2—District Magistrate, Jyotibba Phuley Nagar, under section 3 (2) of the National Security Act and his continued detention thereunder.

2. Counter—affidavit and rejoinder affidavit have been exchanged between the parties. We have heard Mr. D.S. Misra, learned counsel for the petitioner, Mr. Mahendra Pratap, learned A.G.A. appearing of behalf of respondent no. 1,2 & 3 and Mr. Shesh Mani Misra representing respondent no. 4—Union of India.

3. Learned counsel for the petitioner has challenged the impugned detention order only on the ground that there was inordinate delay in sending the petitioner's representation dated 7.8.99 to the Central Government which was received there on 24.8.99.

4. We have considered the respective submissions made by learned counsel for the parties on this point.

5. Mr. Mahesh Kumar Gupta, Jailor, district Jail, Moradabad in his counter—affidavit in paragraph 5, has admitted that representation of the petitioner was received on 7.8.1999 and the said representation was sent to the District Magistrate, Jyotiba Phuley Nagar on the same day through Special messenger.

6. In paragraph 11 of his counter-affidavit, Mr. Ram Saran Singh, District Magistrate, Jyotiba Phuley Nagar, has submitted that the representation of the petitioner was received in his office and the deponent called for police report. After receiving the police report, the deponent prepared his parawise comments and sent it to the State Government without any fail.

7. Mr. R.A. Khan, Under Secretary, Home & Confidential Department, U.P. Civil Secretariat, Lucknow in paragraph 4 of his counter—affidavit, has stated that the petitioner's undated representation alongwith parawise comments was forwarded by the District Magistrate, Jyotiba Phuley Nagar vide his letter dated 15.8.99 which was received by the State Government on 16.8.99. The District Magistrate, Jyotiba Phuley Nagar directly sent the representation and parawise comments to the Advisory Board as well as to the Secretary, Ministry of Home Affairs, New Delhi vide his letter dated 15.8.99.

8. On behalf of the Union Of India, a counter-affidavit has been filed by Mr. Sushil Kumar, under Secretary, Ministry of Home Affairs, Government of India, New Delhi , and in paragraph 7 thereof he has stated that a representation dated Nil from the detenu alongwith parawise comments of the detaining authority was received by the Central Government in the concerned desk of Ministry of Home Affairs on 24.8.99 through District Magistrate, Jyotiba Phuley Nagar on behalf of State of Uttar Pradesh vide letter no. 1451(2) /JA/99 dated 15.8.99 and the Union Home Ministry rejected the representation of the detenu on 25.8.99.

9. On the basis of the averments made in the counter-affidavit as indicated above, learned counsel for the petitioner submitted that there is no explanation of delay with affect from 7.8.99 to 15.8.99 and from 15.8.99 to 24.8.99.

10. It is significant to point out here that the idea behind section 8 of the National Security Act is that the detenu should have the earliest opportunity of making representation against the detention order to the appropriate authorities and indeed a duty is cast on the authorities concerned also to take all possible steps for consideration of the representation of the detenu at the earliest without any loss of time.

11. In the present case, the District Magistrate, Jyotiba Phuley Nagar ought to have stated in his counter-affidavit that on what date the representation has been received and on what date he has forwarded it to the State Government or Central Government. But his counter-affidavit is silent on the point and even the mode of delivery has also not been disclosed in his counter-affidavit. While the Jailor in his counter-affidavit has admitted that the representation of the petitioner has been received on 7.8.99 and on the same day he forwarded the same to the District Magistrate. But the District Magistrate, Jyotiba Phuley Nagar has not explained the delay in forwarding the representation of the petitioner dated 7.8.99 to the Central Government and thus the delay in forwarding the petitioner's representation with effect from 7.8.99 to 24.8.99 remains unexplained, Though there is no delay on the part of the Central Government in deciding the representation because the representation was receive in the Ministry of Home Affairs (Central Government) on 24.8.99 and the same was rejected on 25.8.99.

12. At this juncture, observations made by the Constitution Bench of the Apex Court in K. M.Abdullah Kunhi Versus Union of India and others (1991 (1) S.C.C.-476, are relevant which read as under:

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The word " as soon as may be" occurring in clause (5) of Art. 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the constitution or under the concerned detention law, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation . Any unexplained delay in the disposal of representation would be breach of the constitution imperative and it would render the continued detention impermissible and illegal".

13. When question of liberty is involved and that too by means of preventive detention, it is incumbent of all the authorities to explain delay in consideration of the representation. They all have to act as one unit to ensure earlier decision of the representation of the detenu. Every step is required to be taken by each part of the machinery concerned to facilitate and ensure earliest decision on the representation of the detenu. In the present case, the requisite care has not been taken by respondent no. 2 in sending the representation of the petitioner to the Central Government and there is no valid and justified explanation of delay with effect from 7.8.99 to 24.8.99. In our opinion, it renders the continued detention of the petitioner to be illegal and the petitioner is entitled to relief.

14. For the reasons stated above, this Habeas Corpus Petition is allowed and the continued detention of the petitioner is found to be illegal. The respondents are directed to set the petitioner at liberty forthwith if his detention is not required in any other case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 22, 1999

BEFORE
THE HON'BLE M.C, AGARWAL, J.
THE HON'BLE S. RAFAT ALAM, J.

Civil Misc. Writ Petition No. 284 of 1998

M/s S.K. Gupta & Company ...Petitioner.
Versus
Income Tax Officer, & others...Respondents.

Counsel for the Petitioner:
Shri A. Upadhyay
Shri V.B. Upadhya

Counsel for the Respondents:
S.C.
Shri Bharat Ji Agarwal

Income Tax Act, Section 147 - An Assessment can be reopened only if the assessing officer has reasons to believe that the income has escaped assessment and not on the dictates of the Commissioner. But the petitioner has to take a specific ground in the writ petition. He can not succeed on the basis of any averment in the counter affidavit.

Held—
That the petitioner having not advanced such a contention in the writ petition, he cannot legally and justifiably raise such a contention. The petitioner's case has to be solely examined on what is stated in the writ petition. The statement made in the counter affidavit is not an admission of any averments made by the petitioner in the writ

petition. Therefore, that statement is of no consequence. (Para 7)
AIR 1974 SC P. 1960
ITR (1984) 145 P. 255
ITR (1990) 181 P. 237

By the Court

1. By this petition under Article 226 of the Constitution of India the petitioner challenges a notice dated 26.3.1998 issued under Section 148 of the Income Tax Act 1961 for assessment year 1987-88, copy of which is annexure 5 to the writ petition.

2. We have heard Sri V.B. Upadhya, Senior Advocate assisted by Sri A. Upadhya, Advocate, learned counsel for the petitioner and Sri Bharat Ji agarwal, Senior Advocate for the respondents.

3. The proceedings relate to assessment year 1987-88 for which a return of income was filed and an assessment was made under Section 143 (1) of the Income Tax Act. Thereafter on 5.10.1990 the assessing officer issued a notice under section 148 which was received by the assessee on10.10.1990. In compliance with the said notice a return of income was filed on 16.11.1990. The petitioner claimed the status of a registered firm. On 27.3.1991 the assessment was completed in the status of an association of persons (AOP). On 22.4.1991 the assessing officer i.e. the respondent no.1 passed an order under Section 154 of the Act stating that there had been a mistake in mentioning the status of the assessee in the assessment order and that in place of AOP. URF (un-registered firm) be read throughout the assessment order. The assessee appealed and the CIT (Appeals) who allowed the appeal on the ground that an assessment on an AO P could not be made without issuing a notice to the AOP. He, therefore, set aside the assessment directing that the assessment be made again, in accordance with law. Thereafter cross appeals were filed before the Tribunal by the department as well as by the assessee against the order passed by the CIT (Appeals). The Tribunal dismissed the revenues appeal and allowed the appeal by the assessee and quashed the assessment on the ground that in the circumstances of the case, no assessment could be made on the AOP.

4. During the time taken in the aforesaid proceedings, the assessment proceedings that had commenced on the basis of the notice dated 5.10.1990 under Section 148 of the Act became barred by time. Consequently, the assessing officer issued a fresh notice under Section 148 on 26.3.1998 and it is this notice which is under challenge in the present writ petition and the grounds of challenge have been mentioned in paragraph 26 of the writ petition which is as under:

"A- Because, the Original notice under section 148 having not been quashed and Return in pursuance of that notice having been filed, the Department has no jurisdiction to issue subsequent notice dated 26.3.1998 on the same facts for the same Assessment year i.e.1987-88, during the pendency of the earlier proceedings.

B-Because, the notice having been issued with a view to circumven the period of limitation, is therefore illegal, arbitrary and without jurisdiction.

C-Because, no subsequent notice can be issued on the same facts and on the same ground for the same Assessment year i.e. 1987-88."

5. The respondents have filed a counter affidavit which is sworn by one Shiv Ran Singh Chahal in which it is stated that a search was conducted at the business premises of the assessee as well as the residential premises of the partners and some incriminating material was found and seized. The history of the case, as stated above, is admitted and it is stated that an application under Section 256 (1) has been filed against

the aforesaid order of the Tribunal. It is stated that the Commissioner of income Tax directed that the assessment for the year under consideration may be reopened under Section 147 and in compliance of the directions of the Commissioner, the case was reopened with the approval of the Commissioner of Income Tax and the impugned notice under Section 148 was issued and was duly served. It is stated that the impugned notice was served on the partnership firm. It is also stated that the notice under Section 148 was issued to assess the income which was surrendered by the assessee itself during the course of search and seizure operation. In the rejoinder affidavit it is stated that from the counter affidavit itself it is apparent that the assessment was reopened under the dictates of the Commissioner of Income Tax while Section 147 of the Act provides that an assessment can be reopened only if the assessing officer has reason to believe that the income has escaped assessment.

6. Under Section 147 of the Income Tax Act if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may ……assess or reassess such income…..Thus, the law equires that the assessing officer should have the reason/reasons to believe and sub-section (2) of Section 148 provides that before issuing a notice for an intended assessment/ reassessment under Section 147 the assessing officer shall record his reasons for issuing a notice under Section 147 and he has to have his own reasons to believe that any income chargeable to tax has escaped assessment. There is no dispute on this proposition of law and it was so held by the Hon'ble Supreme Court in Indian & Eastern Newspapers Society vs. Commissioner of Income Tax AIR 1979 SC 1960 in which a question had arisen whether proceedings under Section 147 could be initiated on the basis of report by an internal audit party. In paragraph 13 of the judgment, the Hon'ble Supreme Court observed that in every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment and that the opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income-Tax Officer. Some other authorities were also cited on this point but since the legal position is settled and is not disputed, it is not necessary to refer to them here.

7. In raising the aforesaid argument the learned counsel for the petitioner has attempted to make capital out of an unguarded statement made in the counter affidavit that the Commissioner directed that the assessment may be reopened under Section 147. It is to be borne in mind that in the writ petition the petitioner has not set up a case that before issuing the impugned notice the Income Tax Officer did not apply his own mind to the facts of the case and did not himself come to have the reason to believe that income chargeable to tax has escaped assessment and it is for this purpose that we have reproduced above the grounds of attack that have been set up by the petitioner in the writ petition. Therefore, we are of the view that the petitioner having not advanced such a contention in the writ petition, he cannot legally and justifiably raise such a contention. The petitioner's case has to be solely examined on what is stated in the writ petition. The statement made in the counter affidavit is not an admission of any averments made by the petitioner in the writ petition. Therefore, that statement is of no consequence. We may mention that even in the rejoinder affidavit, no assertion to that effect is made on behalf of the petitioner. What has been stated is that from contents of

the counter affidavit, it is apparent that the assessment for the year 1987-88 was reopened under Section 147 of the Act under the dictates of the Commissioner.

8. In case the petitioner wanted to contend that the Income Tax Officer had no material on the basis of which he could have the requisite reason to believe or that he did not apply his own mind to the material on record and issued the notice under Section 148 solely under the orders of the Commissioner, it was necessary for him to amend the petition by incorporating therein the requisite averments and preferably annex to the writ petition a copy of the reasons recorded by the assessing officer. Had he done so, the respondents would have had an effective opportunity to controvert the allegation and annex to the counter affidavit the alleged direction of the Commissioner., the reasons recorded by the assessing officer for having a reason to believe and for proposing to issue notice under Section 148 and the necessary correspondence between the assessing officer and the Commissioner for obtaining the latter's approval for the issue of a notice that was statutorily required to be obtained. In our view, therefore, the petitioner is not legally entitled to raise such a condition.

9. Even if the petitioner is allowed to rely on the aforesaid averments in the counter affidavit, no sound basis is laid for the argument that the assessing officer did not himself have the reason to believe that income has escaped assessment. "Direct" according to Webster's New Collegiate Dictionary Indian Ed. Means " to show or point out the way for" and "direction" means "guidance or supervision of action or conduct". Direction also means "something imposed as an authenticative instruction or order". Therefore, direction does not necessarily mean a command and the language used in the counter affidavit shows that the so-called direction was merely a guidance because according to the counter affidavit the direction was that the assessment may be reopened meaning thereby the Commissioner merely indicated a direction to the assessing officer in which he may proceed and the ultimate decision was left to the assessing officer.

10. As stated above, before issuing a notice under Section 148 of the Act, the assessing officer has to record his reasons. He has to seek the approval of the Commissioner. Therefore, it cannot be presumed that the assessing officer did not apply his mind and did not make up his own belief. Whenever such a contention is raised, the burden is on the assessee to show that the assessing officer did not act according to law. For that purpose he may take the assistance of the court and require the production of the relevant records and he may also obtain certified copies of the requisite documents. Such a plea cannot be raised a random as in the case before us. We, therefore hold that it is not permissible to the assessee to raise the aforesaid contention and in any case we further hold that it is not established that the assessing officer did not himself examine the matter and arrived at his own belief and that he acted solely on any command from the Commissioner.

11. The second contention raised on behalf of the petitioner is that when the Tribunal quashed the assessment, the earlier notice issued by the assessing officer under Section 148 and the return file by the assessee revived and, therefore, the assessing officer could have proceeded on those documents if it was permissible under the law. Reliance is placed on a judgment in S.P. Cochhar Vs Income Tax Officer (1984) 145ITR255 in which it was held that where an assessment is pending, a notice under Section 148 cannot be issued. Reliance is also placed on CIT vs. P. Krishnankutty Menon(1990) 181 ITR 237. In that case reassessment proceedings had been initiated under Section 147 (b) and during the pendency of the reassessment, further notices under Section 147 (a) were issued. It was held that when the assessment was open, no

valid notice under Section 147(a) could be issued. This proposition of law was also not challenged on behalf of the revenue. However, what is evident is that due to the time taken in the earlier round of proceedings., the limitation for making an assessment of the basis of the return of income, filed in pursuance of the notice dated 5.10.1990, has expired and, therefore, it cannot be said that either the said notice or the return of income had revived and could be treated to be pending. Such a situation has been taken care of by sub-clause (b) of Explanation 2 to Section 147. Explanation 2 states that for the purposes of section 147, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment namely:-

(a)……

(b) Where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understand the income or has claimed excessive loss, deduction, allowance of relief in the return;

(c)……

12. Thus in view of this Explanation and the fact that because of the events, narrated above, no assessment was made on the assessee partnership firm, it becomes a case where income chargeable to tax has escaped assessment. As stated is paragraph 7 of the counter affidavit, the income was not stated by the assessee in the return that was filed in pursuance of the earlier notice under Sec. 148 on 16.11.1990. The income declared in the said return was only Rs. 99,620/- while as stated in paragraph 16 of the counter affidavit during the course of search and seizure operations, the assessee had offered an additional income of Rs, one lac. Therefore, all the conditions mentioned in clause (b) reproduced above were satisfied in this case and the assessing officer could reassess the income after issuing a notice under Section 148. It is not a case of circumventing the period of limitation but is a case where because of the certain circumstances, the statute itself allows the assessing officer an opportunity to bring to tax escaped income although the period originally prescribed had expired. It was also contended that the impugned notice, copy of which is at page 38 of the paper book as annexure 5, did not specify whether it was issued to the AOP or to the partnership firm. No. such ground has been set up in the writ petition. The notice has been issued to M/s S.K. Gupta Co. which as admitted in the petition itself, is a partnership firm and was being assessed to tax from before at general index register no. S 302/W1. This number is mentioned in the notice itself making it quite clear that it has been issued to the partnership firm. The conduct of the assessing officer in making the order under Section 154 also indicated that he wanted only to assess a partnership firm and not an AOP. Therefore, in any case there is no infirmity in the notice on this account as well.

13. No other point was raised in this writ petition and for the reasons discussed above, the same is hereby dismissed with costs to the respondents. The interim order, if any is discharged.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 09.12.1999

BEFORE
THE HON'BLE RAVI S.DHAVAN, J.
THE HON'BLE A. CHAKRABARTI, J.

Special Appeal No.10 of 1996

Ranbir Singh ...Appellant
Versus
District Inspector of Schools, Jalone at Orai and others ...Respondent

Counsel for the Appellant:

Shri A.P. Sahi

Counsel for the Respondents:
S.C.
Shri V.B. Singh

Constitution of India, Article 226- Induction of new life member – D.I.O.S. empowered by the Court to hold election of the management and to hand over the affairs to the newly elected body – DIOS inducted 31 new life members- held –DIOS is nothing more than an authorised controller- hence can not be permitted to act beyond its scope .

Held-

Permitting induction of new members by an authorised Controller or, for that matter, the District Inspector of Schools in a similar situation would be putting such an authority into a power and position which even the law did not spell out. Induction of new members is best left to be filtered and inducted by the general body and the Committee of Management as the scheme of administration may provide. But for an Authorised Controller, as a corporation –sole, to take the responsibility of changing, the febric of the committee of members of a society or a trust may be too sweeping a power which is not compatible with the provisions of the Act, aforesaid. Para 16

Cases Referred:
W.P. 12992 of 1997, Shiv Pratap Singh V. D.D.E., decided on 11.11.1998.

By the Court

1. This special appeal is the third case relating to the same issues about elections within a society known as the Mahatma Gandhi Shiksha Pracharini Samiti, Kudari, District Jalaun. This society runs an institution known as the Mahatma Gandhi Uchchttar Madhyamik Vidyalaya , Khudari district Jalaun. This institution is recognised under the U.P. Intermediate Education Act, 1921 and the regulations framed under the Act, aforesaid. The institution has a scheme of administration which saw amendments and it is accepted that the scheme of administration together with the amendments had been approved by the Deputy Director of Education, Jhansi Region, Jhansi, on 31 December 1983. It was by an ad interim order dated 17 July 1992 in writ petition no.28805 of 1992 that there was a direction, regard being had to certain circumstances that the District Inspector of Schools, Jalaun, was required to take over the institution forthwith and operate the accounts of the institution. Subsequently, by another order of 10 October 1993, a direction was issued to the District Inspector of Schools to take over the management of the institution. By the subsequent order he had also been required to conduct an election of the office bearers of the Committee of Management within one month in accordance with the provisions of the scheme of administration. The Court also directed that once the election is over, the management is to be handed over to the duly elected Committee of Management. Not to be unnoticed is that the order was to the effect as indicated by the Court, even otherwise to be understood, that the election was to be carried out in accordance with law.

2. In so far as the issue is concerned, there, apparently, is no dispute amongst the parties at Bar, whether appellant, the respondent or even the State respondents. The issue is that, while the conduct of an election was in process with the District Inspector of Schools sitting over as Incharge to run the management of the institution, could he induct new members; in the instant case life members? Submissions have been made at the Bar on behalf of the appellant, Ranbir Sing and the respondent, S.K. Misra, the respondent Committee of Management, whatever be its status, and the District Inspector of Schools. The issue as noticed remains. The contentions of parties are also in affidavits exchanged on the stay application of the appellants.

3. The District Inspector of Schools in his affidavit, in paragraph 8 submits that point involved is, to the effect, whether the District

Inspector of Schools had powers to induct new members, while holding the charge of the institution as a Manager. Unfortunately, in this affidavit affirmed on 24 May 1996, the District Inspector of Schools required a petty clerk to make submission before the High Court. But, the District Inspector of Schools seems to be conscious of the powers he may have been so vested with when the High Court appointed him to take charge of the Management of the educational institution.

4. However, as between counsel for the appellant, Mr. A.P. Sahi and counsel for the contesting respondent, Mr.V.B. Singh, the contention has been that the matter may be seen as analogous to under Section 16-D of the Act, aforesaid. On the proposition on whatever may be the powers which may vest in an Authorised Controller of an institution, until such time when a Committee of Management has been lawfully constituted to replace it, the powers of the District Inspector of Schools, in the present case, could not be more unless spelled out by the High Court. The premises of the issue is accepted by the parties.

5. In so far as the contention of the District Inspector of Schools is concerned, submitted through a clerk on an affidavit, the Standing Counsel, Mr. U.K. Pandey has been more than fair to submit that the District Inspector of Schools can have no more powers than an Authorised Controller may not have and in so far as the other aspects are concerned, has straight away conceded that a power which has not been spelled out, the District Inspector of Schools may not have. Consequently, learned Standing Counsel submitted, the District Inspector of Schools, in the present case, cannot assume a power to induct new members while the committee of Management is superseded. While this proposition of learned Standing Counsel may remain on record, the Court will see the aspect as contended between the rival parties.

6. The Court has referred to the two orders by which the District Inspector of Schools had been required to replace the Committee of Management and, thereafter, conduct an election, in accordance with law, and hand over the management to the elected Committee of Management and its office bearers. The issue, apparently, sprang up when the District Inspector of Schools, permitted the induction of 31 life members. This gave rise to writ petition no.35059 of 1995: S.K. Mishra and another v.The District Inspector of Schools, Jalaun, at Orai, and others. On this writ petition came a decision dated 14 December 1995. In so far as the relevant parts of the judgement are concerned, the extracts are:

"…..There is no doubt that the authorised controller can never be treated as substitute for the management committee or the general body of an Association or Institution. The authorised controller is not appointed within the scheme of administration of the Institution. He is appointed by reason of statutory provisions only to fill up the void and restore the management of the Institution according to the scheme of administration by directing him to hold the election. The authorised controller is not given power by reason where of he can induct members in an association of persons or bring about changes in the structure of the association much to the chagrin and prejudice of the members.

7. The authorised controller, who are directed to hold the election according to scheme of administration by order dated 10/10/1995 was never empowered under the scheme of administration to induct members. An authorised controller can never be authorised to take upon himself the function of an association with an element of democracy. He simply manages the administration as stop gap measure. He can never be empowered to usurp the decision making process or power with regard to the basic structure of the association he acts only as manager. Such a power would be

completely opposed to the concept of an association of persons. An authorised controller if enter upon such a domain in that event it would amount to encroaching upon the freedom of association of which he is not a member. Then again the way the members have been inducted also does not show that these members were taken in the normal course of functioning. All the members have come in a group for particular purpose. By an order dated 21.9.1995which is Annexure-VII to the writ petition the District Inspector of Schools had already settled the list of members containing 17 names. Thereafter, he had issued another letter on 25.11.1995 by which he has shown 31 new members. This induction of members is not a part of the election process. It is a part, which is to be played by the general body or the management committee who according to the authorised controller is entitled to induct members. The District Inspector of Schools was authorised to hold the election on the basis of members of the Institution The process of election would commence with the holding of the election with the existing members which he had finalised on 21.9.1995.

8. Be that as it may in the present case Mr. Rai submits that the election has already been held and the result has already been declared. Therefore, the contention of Mr. Sankatha Rai, counsel for the respondent that this court cannot interfere with the election process once started cannot be sustained. Election having been over the same is now open to scrutiny.

9. The proposition that an election if commenced the process cannot be stopped and cannot be interfered with is an established proposition and it need no repetition as has been held particularly in the case cited by Mr. Rai. The said submission now has become redundant since the result of the election has already been declared.

10. In the present case the question can be decided without any further evidence only by the decision as to the entitlement of the District Inspector of Schools to induct members. It is, therefore, would not be desirable to refer the parties to Civil Court now.

11. Therefore on the basis of material placed before this Court when it had been found that the District Inspector of Schools has no jurisdiction to induct new members as has been done in this case, the election in which those new members admittedly have taken part, cannot be sustained and therefore the same is quashed. The District Inspector of Schools shall hold fresh election on the basis of the members already on record without allowing the 31 new members to participate in the election. This process should be completed within a period of eight weeks from the date a certified copy of this order is produced before the District Inspector of Schools. The petition is thus disposed of.

There will however no order as to costs."

12. Before any thing else is reflected upon this issue, it would be safer to see the relevant provisions of the law under the Act, aforesaid. Given a certain situation, the law permits the Committee of Management of an institution to be replaced by the appointment of an Authorised Controller to take over for a specified period which may not exceed two years. This aspect is discernible from sub-clause (4) to Section 16-D. The Court is not going into the question as to how long an Authorised Controller may continue as the aspect before the Court is on what may be the limits of his powers. Are they same as are normally attributed in totality to the Committee of Management? The answer is in the negative.

13. While the Committee of Management may have the power to transfer any moveable property, the Authorised Controller does not.

The Authorised Controller may set about to discharge his function day to day but does not have the power to alienate and transfer any immovable property, (except by way of letting from month to month in the ordinary course of management) but may create a charge on the properties. Thus, while he may carry out day to day functions, as the Committee of Management otherwise may have done, any special directions he may receive from the Director for the proper management of the institution or its properties. This aspect is spelled out in sub-clause (9) and (11) to Section 16-D of the Act, aforesaid. Section 16-DD permits an Authorised Controller to take over charge of the concerned institution and its properties to the exclusion of the Committee of Management, but his powers will be subject to such restrictions as the State Government may impose. These are the broad guidelines on the functions of an Authorised Controller. The rest is a matter of prudence.

14. Plainly the issue is as if there is local government and local-self-government. An aspect which can be seen as a corporation – sole as opposed to a corporation with elected members. Even where local-self-government, as an institution, has been provided for and protected by the Constitution of India, it is not that local-self-government may not be superseded. But, the powers of an Administrator of a superseded local body, a municipality for instance, are curtailed. He may carry on the administration, yet may not impose fresh taxes as this is best left to the elected representatives. Taking it to a higher plain, when a Legislature is not in Session a Governor may issue an Ordinance, but within a specified period it must be laid before the legislature.

15. In the instant case, the Committee of Management is not available, instead there is a District Inspector of Schools who has been appointed, in effect, as an Authorised Controller by an order of the High Court. He had been caused with an obligation to conduct an election. The question is whether the District Inspector of Schools could, during the course of his management of the institution as an Authorised Controller, induct life members. The learned Judge, who gave the judgement on the writ petition, was of the view that the basic structure of the institution, whether the general body or the Committee of Management, could not be changed by such induction of life members. The learned Judge was of the opinion that this should best be left to the normalcy of the institution, when there is a general body and a Committee of Management. It is for this reason and for good measure, the Court has observed that an Authorised Controller can never be treated as a substitute to a Committee of Management or a general body of a society or an institution.[1]

16. Permitting induction of new members by an Authorised Controller, or, for that matter, the District Inspector of Schools in a similar situation would be putting such an authority into a power and position which even the law did not spell out. Induction of new members is best left to be filtered and inducted by the general body and the Committee of Management as the scheme of administration may provide. But for an Authorised Controller, as a corporation-sole, to take the responsibility of changing the fabric of the committee of members of a society or a trust may be too sweeping a power which is not compatible with the provisions of the Act, aforesaid. The appointment of an Authorised Controller is in itself a temporary phase. The law suffers the appointment of an Authorised Controller and provides for it, but does not encourage it. What is encouraged by the law is the return to normalcy by an election and the management being handed over to a Committee of Management.

[1] Writ petition No.12992 of 1997: Shiv Pratap Singh v.Deputy Director of Education and others: Decided on 11.11.1998.

17. In the circumstances, this Court is of the opinion that the learned Judge was not in error when he quashed the induction of 31 new members, to participate in an election, and consequently gave a direction to the District Inspector of School to hold a fresh election.

The judgement is affirmed.

The appeal is dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD JANUARY 12, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

Civil Misc. Writ Petition No. 13567 of 1992

M/s U.P. Petroleum Traders' Association and another ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Shri Ravi Kant

Counsel for the Respondents :
Shri K.K. Parekh
Shri P.K. Bisaria
Shri S.S. Sharma
Shri U.N. Sharma
Sri S.N. Srivastava
Shri V.K. Singh
S.C.

Standards of weight and measures (Enforcement) Act, 1985, section 39, 60, 61 readwith constitution of India, Articles 19 (1) (G) and 21- Provision for Prosecution to those dealers- ultimately found guilty- neither harassed nor subjected to vexes by the officers- prosecution of those who found committing deleberate breach –held such provisions are neither arbitrary nor unreasonable- provisions of Article 14, 19 (1) (g) and 21 of the Constitution not violated.
Held –

The errors specified in the circular do not permit dealers to cheat consumers by way of short delivery, sections 39, 60 and 61 alongwith section 37 of the Act clearly deal with various aspects in regard to ensuring correct delivery to the consumers and provide suitable punishment of the dealers found guilty of committing breach of the aforementioned provisions, which are reasonable and in no way violate Article 19 (1) (g) and (21) of the constitution, the petitioners are neither harassed nor are vexed by the officers of the Department, rather they are prosecuted only when they are found committing deliberate breach of the aforementioned provisions Para 4

Case law discussed
AIR 1951 SC 118,
AIR 1951 SC 204,
AIR 1981 SC 873,
AIR 1992 SC 1033
AIR 1964 SC 1279,
AIR 1965 SC 772,
1994 (2) J.T. 423
1994 (5) J.T. (SC) 540
AIR 1952 SC 190
AIR 1954 SC 224
AIR 1982 SC 1016
AIR 1989 SC 867
AIR 1964 SC 1140
AIR 1973 SC 2309

By the Court

1. The Petitioners have come up with prayers to (i) declare Section 39, 60 and 61 of the Standards of Weights and Measures (Enforcement) Act, 1985 (hereafter referred to as the Act) as unconstitutional and void and (ii) restrain the Respondents from prosecuting them for violation of the aforementioned provisions of the Act.

2. Petitioner No.1 claims itself to be representative body of the dealers of petroleum products in our State, duly registered with the Registrar- Chits, Firms and Societies, U.P., Lucknow and its registered office at Kanpur. Petitioner no.2 is a petrol pump owner and dealer appointed by the Indian Oil Corporation situate at G.T. Road, Bamrauli, Allahabad.

The Pleadings :-

3. Shortly put the case of the Petitioners is to this effect :-

The petrol and diesel supplied by the Oil Companies, are stored in an underground tank from which retail supply is made through a measure which is a mechanical process through machines, manufactured by leading manufacturers (1) M/s Larson & Tourbo and (2) M/s Mercantile and Industrial Company Limited, which are maintained by them; according to the Brochures issued by the aforementioned manufacturers (as contained in Annexures 1 and 2) there are five causes for inaccurate measurements, namely, (i) Improper adjustment of the calibrating wheel; (ii) Swollen 'O' ring GM 50002; (iii) Worn scaling surface, i.e. valve, valve seal and valve seat; (iv) Worn piston cups, and (v) inaccurate test can; these machines are beyond the control of the petitioners, besides the faults can occur at any point of time; at the time of installation of these machines variation of a range up to 0.6% and while delivering 5 litres of oil variation between 4.86 liters to 5.16 liters i.e. 0.3% have been found, which is apparent from the test checks carried out by the manufacturers, as contained in Annexures 3 and 4; the Government being alive to these natural variations, has been issuing Orders dated 5th September, 1977 and 5th September, 1975 (Copies appended as Annexures 5 and 6) to the effect that a dealer should not be prosecuted merely on account of variations unless there are solid reasons or proof of dishonesty; the legislation in question is a new one; Section 39 and 60 of the Act are totally unreasonable and they infringe upon their fundamental rights under Article 19 (1) (g) and Article 21 of the Constitution of India and the presumptions mentioned in Section 60 and 61 of the Act per se imposes wholly unreasonable restriction on the fundamental rights of the petitioner to carry on their trade, business and occupation as guaranteed under Article 19 (1) (g) of the Constitution.

4. In the Counter Affidavit (filed on 7.12.1998; and a copy of which was sent by Registered Post on 30.11.1998 to Petitioner No2) of the Respondents no. 2 and 3 following facts have been stated :-

The stand that until 1984 there was no comprehensive provision for regulating the Weights and Measures is not true inasmuch as there were specific provisions to regulate and enquire the commercial transactions under the U.P. Weights and Measures (Enforcement) Act, 1959 and the Rules framed thereunder; the petitioners are required to maintain their dispensing pumps in such a way so as to deliver correct quantity; the Act and the Rules made thereunder provide range of variation 0.6% in excess and 0.3% in deficiency at the time of Inspection of the dispensing pumps; the G.O. dated 5th September, 1977, requires the petrol/diesel dealers to check the quantity delivered by the dispensing pumps each and every morning and on finding any deficiency they are required to inform in that regard to the Oil Company and stop the sale till the dispensing pump is corrected; it does not prohibit the Weights and Measures Department from prosecuting the retail out-lets of the Oil Companies on finding committal of malpractice's by the owners of the retail outlets/dispensing pumps, rather it provides guidance that only on finding solid proof of tempering or dishonesty, prosecution should be lodged; the officers of the Department follow the guide lines though the provisions of the Act and the Rules will prevail; the said G.O. should not be misinterpreted by the petitioners for their own benefits; once weights and measures are duly verified and stamped by the Inspector of Weights and Measures they shall be deemed to conform to the standards prescribed under the Act; a certificate is issued under Section 24(4) of the Act but it is not admitted that a dealer cannot be prosecuted, if defects

develop during the course of the currency of the certificate because such defects can be deliberately caused by the dispensing pump owners by adopting various illegal ways and means and effecting manipulations by several devices in the machines; Circular dated 23rd December, 1989 was issued by the Ministry of Supplies (Civil and Food) (Department of civil Supplies), Government of India, which indicate that the Directorate was considering details of alternative arrangement to be worked out by an expert panel regarding the verification of such dispensing pumps which deliver short quantities; considering the variation in speed in dispensing pumps while the products to the consumers appropriate amendment has been made in this regard in the Rules by notification dated 15th July, 1991 (being filed as C.A.-1) though the Oil Companies have not yet made provision in dispensing pumps as per the amended Rules; the permissible variations allowed is upto 0.6% that is to say 30 ml. In 5 liters at the time of verification to condone minor variation only to develop in course of use of the dispensing pumps mechanism for delivery purposes; the said circular does not indicate that this variation has been allowed in deficiency also; the Act aims to safeguard the interest of the consumers and that is why no variation either at the time of verification or at the time of inspection is allowed in deficiency beyond tolerance limit prescribed under the Act or the Rules; the stand of the petitioners that they have absolutely no control over the maintenance of measuring Machines is not correct and they cannot be exonerated from their responsibilities in not keeping them in perfect condition with a view to ensure correct delivery; the petitioners have deliberately not impleaded the Oil Companies to have their version in this regard though they have tried to fix up the entire responsibility on them; the Oil Companies have been issuing marketing guide lines and suitable instructions to their dealers time and again to maintain accuracy of dispensing pumps so that the consumers should not be cheated by short delivery; the reports of the Companies also suggests that they are taking action against such erring dealers, who are found involved in cheating consumers by their fraudulent activities and other malpractice viz. short delivery, overcharging , adulteration etc.; it is prima facie duty of the users of the dispensing pumps to maintain its accuracy with the help and active association of their Principals i.e. the Oil Companies ; it is not true that the defects may not come to the knowledge of the petitioners for months altogether when they are required to check their pumps every morning and tally the stock position stored in the tanks with their daily records of the sale balance, and thus they can very well know the defects every day; the dealers shall also be held responsible for the abatement of the offence being committed by them by their connivance in causing defects in the machines either deliberately or by their callous negligence in regard to maintenance of the accuracy of the machines; [the errors specified in the circular do not permit dealers to cheat consumers by way of short delivery; Section 39, 60 and 61 along with section 37 of the Act clearly deal with various aspects in regard to ensuring correct delivery to the consumers and provide suitable punishment of the dealers found guilty of committing breach of the aforementioned provisions, which are reasonable and in no way violate Articles 19 (1) (g) and 21 of the Constitution; the petitioners are neither harassed nor are vexed by the Officers of the Department, rather they are prosecuted only when they are found committing deliberate breach of the aforementioned provisions:] none of the grounds taken are tenable in law and the petitioners are not entitled to any relief under Article 226 of the Constitution; and their petition is liable to be dismissed with costs.

5. No Rejoinder to the aforesaid Counter has been filed by the petitioners.

The Submissions:-

6. Sri Ravi Kant, learned counsel appearing on behalf of the petitioner, contended as follows:-

(i) It is impossible for the petitioner to have a machine, delivery petrol/diesel, free from any fault. In view of the inherent defect in the machines the Government itself has recognised variation 0.6% while delivering five liters of petrol/diesel and has issued G.O.'s yet prosecution has been made in case of even such a variation. Restriction in the variation between the actual weight being inherent it is per se excessive and not consummate with public interest and accordingly violative of Article 19 (1) (g) of the Constitution of India.

(ii) Sections 60 and 61 of the Act create a presumption regarding guilt ruling out Mens rea which ultravires the Constitution.

In order to support his submission he placed reliance on Chintamanrao and another v. The State of Madhya Pradesh A.I.R.1951 S.C.118 (Paragraph 7); Ravula Hariprasada Rao v. The State A.I.R.1951 S.C. 204 (at page 206); The State of Madras v. V.G.Row A.I.R.1952 S.C. 196 (Paragraph 15); Messears Dwarika Prasad Laxmi Narain v. State of Uttar Pradesh and others A.I.R.1954 S.C. 224 (Paragraph 6); M/s. Laxmi Khandsari etc. v. State of U.P. and others A.I.R.1981 S.C. 873 (Paragraph 12,14 and 19); P.P.Enterprises etc. etc. v. Union of India and others etc. A.I.R.1982 S.C. 1016 (Paragraph 8 and 10); Peerless Generall Finance and Investment Co. Ltd. And another v. Reserve Bank of India A.I.R. 1992 S.C. 1033(Paragraph 3 and 49); Adhunik Grah Nirman Sahkari Samiti Ltd.etc. v. State of Rajasthan and another A.I.R.1989 S.C. 867 (at page 873); The Corporation of Calcutta v. Calcutta Tramways Co. Ltd. Calcutta A.I.R.1964 S.C. 1279(Paragraph 4 and 6); Indo China Steam Navigation Co. Ltd. v. Union of India and others A.I.R. 1964 S.C. 1140 (at page 1149); State of Maharashtra v. Mayer Hans George A.I.R. 1965 S.C. 722 (At Page 736); Indra Sain v. State of Punjab A.I.R.1973 S.C. 2309 (At Page 2311); Kartar Singh v. State of Punjab 1994(2) J.T.423 (At page 464) AND Sanjay Dutt v. The State through C.B.I. Bombay 1994(5) J.T.(S.C) (At Page 540).

7. Sri Krishna Kumar Parekh, the learned Additional Standing Counsel of the Union appearing for the Respondent no.1 the Union of India-contended as follows:-

(i) The provisions in question do not ultravires Articles 14,19 (1)(g) and 21 of the Constitution of India.

(ii) we are having in our country best software technology and computer and/or with the help of micro gauge and miscroscope so as to have variation upto .005 only at the time of delivery. In fact on many petrol pumps machines with computers have been installed for supplying petrol and diesel.

(iii) in fact the petitioners are adopting dubious methods at the time of delivery of petrol/diesel to the consumers. Some of them are even using adulterated petrol/diesel which is causing damage to the engine of the vehicle of the consumer. In support of his contentions he placed reliance on A.K. Gopalan vs. State of Madras, 1950 S.C.R.88 and Maneka Gandhi vs. Union of India, 1978 S.C. 597. Thus there is no merit in the submissions made by Mr. Ravi Kant.

(iv) The Oil Companies are necessary parties, who have been left out and thus this writ petition is liable to be dismissed.

8. Sri P.K. Bisaria, learned Standing Counsel appearing on behalf of the Respondents No. 2 and 3 contended as follows :

(i) The impugned section safeguard the protection of the consumers from being cheated by unscrupulous dealers/traders who indulge in delivering lessor quantum of petrol/ diesel by using substandard weight and measures. The sections in question were enacted by the Parliament to safeguard the interest of the consumers, which by no stretch of imagination can be dubbed as arbitrary and unreasonable and/or violative of the constitutional mandate enshrined under Articles 14, 19(1) (g) and 21 of the Constitution of India.

(ii) In our State there was U.P. Weights and Measures Act,1959 and 1960 Rules framed thereunder, but having found them insufficient to curb the malpractice of the unscrupulous traders the Parliament enacted Standards of Weights and Measures Act, 1966; Standards of Weights and Measures (Enforcement) Act, 1985 and Standards of Weights and Measures (General) Rules,1987 were framed with a view to provide more severe punishment for those dealers who intended to deceive and cheat the consumers/buyers by delivering fraudulently lesser quality of petroleum products by using non standard and false weights and measures.

(iii) The range of variation in the machine is only minor one. The Oil Companies have been issuing instructions to the petitioners to maintain accuracy in supply of petrol/diesel so that the consumers are not cheated by short delivery. They have been even taking positive action against such dealers who have been found involved in cheating the consumers by their fraudulent activities and malpractice in supplying short delivery of the fuel, overcharging, adulteration etc. which stand corroborated by the very documents appended as Annexure-1 to the written submissions made by Sri Ravi Kant. Accordingly there is no merit in the submission of Mr. Ravi Kant and the writ petition is fit to be dismissed summarily.

8.1 When this case was listed for further hearing on 17.12.1998 the learned counsel for the Parties informed us that no further argument will be advanced by them.

9. <u>Our findings :-</u>

9.1 The need to have correct balances, weights and measures is not a new need. In our Country more than 2200 year ago Kautilya in his book 'Arthshastra' Adhyaksh Prachar Dwitiya Adhikaran, 19th Chapter, has stated as follows :-

"चातुर्यांषिकं प्रतिवेधनिक कारयते ।
अप्रतिविदस्यात्यय स्वाद स्प्तविशतियण:।"

In English Translation it means : The balance & Weights should be examined at the interval of every four months. Those who do not get examined at the Schedule time they should be awarded an economic punishment of 27-1/2 Pan"

9.2 Even around 7th Century the Holy-Quran, Verse (Aayat) No.35 Surah 17-A stated thus :

" Give full measure when ye
Measure, and weight
With a balance that is straight-:
That is better and fairer
In the final determination."

10. Through the Preamble of the Constitution an attempt has been made to secure to all its citizen, inter alia, social and economic justice; and through Article 19 (2) it has been provided that nothing in sub clause (g) of Article 19 (1) will prevent the State (means Parliament or the Stated Legislature) from making any law imposing reasonable restriction on the exercise of the right to carry on any occupation, trade or business guaranteed under Article 19 (1)(g). Thus, in order to achieve the objective of securing social and economic justice, and the directive principle of the State policy under Articles 38 and 39 the Parliament enacted ' The standards

of Weight and Measures Act,1976 in order to establish standards of weights and measures, to regulate inter-state trade or commerce in weights, measures and other goods, which are sold or distributed by weight, measures or number; and to provide for matters connected therewith or incidental thereto. The Parliament in 1985 enacted the instant Act to provide for the enforcement of the standards of weights and measures established by or under the aforesaid Act, and for matters connected therewith or incidental thereto. The Act came into force in our State with effect from January 26, 1990, the day appointed by the Governor in exercise of powers under Section 1(3) of the Act.

Section 39, of the Act reads thus :-

"39. Penalty for keeping non standard weights or measures for use and for other contraventions,--

(1) Whoever keeps any weight or measures other than the standard weight or measure in any premises in such circumstances as to indicate that such weight or measures is being, or is likely to be, used for any
(a) weightment or measurement, or
(b) transaction or for industrial production or for protection, shall be punished with fine which may extend to two thousand rupees, and, for the second of subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

(2) Whoever,--

(i) in selling any article or thing by weight, measure or number, delivers or cause to be delivered to the purchaser any quantity or number of that article or thing less than the quantity or number contracted for and paid for, or

(ii) in rendering any service by weight, measure or number, renders that service less than the service contracted for and paid for, or

(iii) in buying any article or thing by weight, measure or numbers, fraudulently receives, or causes to be received any quantity or number of that article or thing in excess of the quantity or number contracted for and paid for, or

(iv) in obtaining any service by weight, measure or number, obtains that service in excess of the service contracted for and paid for;

shall be punished with fine which may extend to five thousand rupees, and for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine.

(3) Whoever enters, after the commencement of this Act, into any contract or other agreement (not being a contract or other agreement for export) in which any weight, measure or number is expressed in terms of any standard other than the standard weight or measures, shall be punished with fine which may extend to two thousand rupees and, for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine."

11.1 Its perusal shows that Sub-Section (1) prohibits keeping of sub-standards weights or measures with an intention to use them for weighment or measure or transaction or for industrial production or even for protection and on the first occasion shall be fined upto Rs.2000/- and on second time or subsequent time with imprisonment upto 1 year with fine. Sub-section 2 (i) provides punishment for those, who are found guilty in selling any article or thing by weight, measures or number, delivers to purchasers less than the quantity contracted and paid for. Sub-section 2 (ii) likewise deals with persons who are rendering any service. Sub- section 2(iii) likewise deals with such persons who in buying fraudulently receive or cause to be received in excess. Sub-section 2 (iv) deals with those who obtain service, and prescribes

punishment with fine upto Rs.5000/- on first account, and for second and subsequent time, with imprisonment upto 5 years alongwith fine Sub-section (3) imposes punishment of fine upto Rs.2000/- on first count, and second and subsequent acts imprisonment upto 1 year and with fine for those who enter into any contract or agreement except for export in which any weight/measure/number is expressed other than the standard ones.

12.Section 60 of the Act reads thus :-

"60. Presumption to be made in certain, cases,-
(1) If any person

(a) makes or manufactures, or causes to be made or manufactured, any false weight or measures, or

(b) uses, or causes to be used, any false or unverified weight or measure in any transaction or for industrial production or for protection, or

(c) sells, distributes, delivers or otherwise transfers, or causes to be sold, distributed, delivered or otherwise transferred, any false or unverified weight or measure,

it shall be presumed, until then contrary is proved, that he had done so with the knowledge that the weight or measure was a false or unverified weight or measure, as the case may be.

(2) If any person has in his possession, custody or control any false or unverified weight or measure in such circumstances as to indicate that such weight or measure is likely to be used in any transaction or for industrial production or for protection, it shall be presumed, until the contrary is proved, that such false or unverified weight or measure was possessed, held or controlled by such person with the intention of using the same in any transaction or for industrial production or for protection."

12.1 This Section talks of a statutory presumption against such persons who indulge in the acts mentioned unless contrary is proved.

13. Section 61 of the Act reads thus :-

"61. When employer to be deemed to have abetted an offence,--(1) Any employer, who knows or has reason to believe that any persons employed by him has, in the course of such employment, contravened and provision of this Act or any rule made thereunder, such be deemed to have abetted an offence against this Act :

Provided that no such abatement shall be deemed to have taken place if such employer has, before the expiry of seven days from, the date on which,

(a) he comes to know of the contravention, or

(b) he has reason to believe that such contravention has been made, intimated in writing, to the Controller the name of the person by whom such contravention was made and the date and other particulars of such contravention.

(2) Whoever is deemed under sub-section (1) to have abetted an offence against this Act shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine.

Explanation Dismissal or termination of service of an employee after the expiry of the period specified in the proviso to sub-section (1) shall not absolve any employer of his liability under this sub-section."

13.1 The aforesaid Section takes care of those who abate the acts constituting the offence/offences.

14. The consumers are now said to be kings of the market. Petrol is being called Petro-Gold. One of the well known slogans of

the 'Bharat Petroleum' is to the effect that every drop of Petrol should be saved as it is not going to last for ever. Obviously the emphasis is on its limited resources and on its weight/measurement and utilisation to the maximum. The Parliament has made endeavours to protect the consumer's interest. The law stands well settled that there is a presumption of constitutionality of an Act and the onus lies on the person challenging its vires. Having gone through the aforementioned sections and other provisions of the Act we find substance in the contentions of Mr. Parekh and Mr. Bisaria both.

15. By installation of computerised machines in the petrol pumps the variations have now been brought to the minimal as claimed by the learned Standing counsel for the Union, which has not been disputed before us. Unfortunately the Petitioners have not impleaded the Oil Companies, whose presence would have been useful to know their view points. Thus, the assertion of the petitioners that it is impossible for them to install foolproof machines, is not acceptable to us. The submission in this regard being based on mere self serving statements of petitioner no.2 is not worthy of acceptance. True it is that is well known dectum that the law does not expect a party to do the impossible- "impossibilium mulla obligatio est"- but here we do find that the law is asking the petitioners to do impossible rather the Petitioners have been given a latitude to supply upto 0.3 % deficient fuel to the consumers out of 5 litres. It, thus, cannot be held to be unreasonable or an arbitrary legislation. The Act is a socio economic legislation which intends to remedy the evil of short supply of Petrol/Diesel/or any commodity which may be purchased by any consumer.

16. We have also perused the judgement relied upon by Sri Ravi Kant. They do not support his contentions as claimed.

17. We thus do not see any vice of arbitrariness or unreasonableness so as to hold these sections as violative of Articles 14, 19 (1) (g) and 21 of the Constitution of India.

18. For the reasons aforementioned we dismiss this writ petition but without cost.

19. The office is directed to hand over a copy of this order within one week to (i) Sri K.K. Parekh, the learned Additional Standing Counsel of the Union and (ii) Sri P.K.Bisaria, learned Standing Counsel of the State of U.P. both for its intimation to the authorities concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 12,2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

Civil Misc. Writ Petition No. 24962 of 1998

People's Union for Civil Liberties ...Petitioner.
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner :
Sri Ravi Kiran Jain
Sri K.K. Roy,
Sri Pushkar Mehrotra

Counsel for the Respondent :
Sri R.P. Goyal
Sri Yatinder Singh
Sri H.R. Mishra
Sri S.K.Agarwal

Construction of India Article 226 – Petition filed for commanding the State Government of U.P. to constitute a Human Rights Commission u/s 21 of the Protection of Human Rights Act 1994 and to create Human Right Court at District Level u/s 30 of the Act – State cannot refuse to exercise its discretion arbitrarily and discriminatory –

Directions issued to the State Government to take expeditious step for obtaining recommendations of statutory committee constituted u/s 22(1) of the Act and to proceed to make appointments in terms of section 21 (2) and (3) of the Act.
Held
This Court cannot remain a silent spectator, and it is required to create new tools and avenues to achieve the avowed objects regarding Human Rights. (Para 33)

By the Court

1. The Petitioner has come up to this Court for commanding Respondent no.1 the State of U.P. to (I) constitute a State Human Rights Commission (hereinafter referred to as S.H.R.C.) under section 21 of the Protection of Human Rights Act, 1994 (hereinafter referred to as the Act) and (ii) create Human Rights Courts at district level under section 30 of the Act.

2. The case of the petitioner is to this effect :- The Petitioner is a non-political organisation of such citizens of India who are committed to promote and protect, interalia, human rights; a copy of its aims and object is filed as Annexure – 1; after recording his satisfaction that the circumstances existed for an immediate action for protection of human rights and to achieve the objects/purpose as contained in Section 2(1) (d) the read with preamble, the President of India promulgated Protection of Human Rights Ordinance, 1993 (Ordinance No. 30 of 1993) on 28.9.1993 which was later replaced by the Act; Section 3 of the Act provides that the Central Government shall constitute a body to be known as the National Human Rights Commission (hereinafter referred to as N.H.R.C.) pursuant to which Respondent no.3 was constituted; Section 21 of the Act provides that the State Government may constitute a body to be known as S.H.R.C.; Respondent no.3 started functioning immediately, and receiving complaints in regard to custodial deaths, rapes, fake encounters and other police excess; this Court passed direction for consideration by the State of U.P. for establishing a S.H.R.C. on the ground that the legislative intent of the Parliament is being ignored for long vide its Judgement & Order dated 9.2.1996 in C.M.W.P No. 32984 of 1994 Uttarakhand Sangharash Samiti Versus State of U.P.; the Governor of U.P., when the State was under President's Rule, issued a Notification on 4.4.1996 under section 21(1) of the Act for constitution of S.H.R.C. realising the extremely grim condition of law and order problem in the State; the former C.J.I. Sri R.N. Misra, after he became a Member of Rajya Sabha, revealed on 22.7.1998 on the floor of the Rajya Sabha of the fact aforementioned which is evident from the report published in the Newspaper "Times of India" 23.7.1998 Edition appended as Annexure –2; Respondent no.3. in its Annual Report 1996-97 stated that "a country of the size and diversity of India needs Human Right Commission at the state level, the reasons are obvious, the redressal of grievance must be swift and inexpensive, the message of human rights must reach the gross-root level in the languages of the people of the country, the federal character of our Constitution must be respected . the nation-wide challenge need an army of activist in each State and in each district, if societal and attitudinal changes are to be brought about"; State Human Rights Commissions have been established in the States of West Bengal, Himachal Pradesh, Assam, Punjab and Tamil Nadu; Respondent no.3 had received8497 complaints from our State out of Total number of 20833 in 196-97; Sri Kalyan Singh the present Chief Minister had openly said in a press conference and in his interview with Sri Rajesh Joshi, special Correspondent of "Out Look" that a criminal should have no human rights, he should either be in jail or dead; according to press report as many as 156 criminals have been killed in encounter with the police; it is common knowledge that the State is also prone to communal disturbances about which this court should take Judicial notice; the Parliamentary

Affairs Minister Sri Hukam Singh on 23.7.1998 made a statement on the floor of the Assembly that the government has taken a decision that there is no need of constitution of a State Human Rights Commission for the reasons mentioned in his speech and hence this writ petition.

3. This writ petition came up for consideration before one of us (Binod Kumar Roy, J) and Hon'ble Mr. Justice R.K. Mahajan, since retired, on 10.8.98. After submissions were made by Sri Ravi Kiran Jain, the learned Senior Counsel appearing on behalf of the petitioner, time was granted to Sri. H.R. Misra, Learned Standing Counsel with an observation, interalia., that the writ petition is likely to be disposed of at the Stage of admission itself and that a copy of the counter affidavit, if any, must be served on the petitioner by 21.8.98.

4. Counter affidavit was filed on behalf of Respondent nos. 1 and 2, sworn by Secretary (Home), Government of U.P. on 21.8.98. It was stated interalia, therein that the State attaches utmost importance to the human rights and a Human Right Cell has been constituted (I) in the Home Department, and (ii) in the Police Organisation under the direct supervision of D.G.P., U.P. and an officer of the rank of A.D.G. is its Incharge; the State Government is endeavoring to protect the fundamental rights and human rights of the person and is taking all precautions to ensure that no violation of human rights or abatement thereof or negligence in the prevention of such violation by any one should take place; the State is taking all actions necessary to prevent the abuse, violation, abatement of human rights as well as any negligence to prevention of such violation; it has already constituted Minority Commission, Backward Caste Commission and Schedule Caste Schedule Tribe Commission; any violation of human rights or abatement thereof or negligence in the prevention of such violation with regards to women, minorities, backward casts, scheduled casts and scheduled tribes are being enquired into, intervened. Investigated upon and reviewed; the factors and safe guards provided by or under the Constitution or any law for the time being in force and for protection of rights are being looked into by the respective Commissions; it is mandatory for the officer Incharge of any Police Station to report about every arrest to concerned District Magistrate, who can make an enquiry with regard to any arrest with or without warrant; section 58 of the Code of Criminal Procedure has sufficient checks on any violation of human rights in the police custody; under section 176 of the Code of Criminal Procedure whenever any death occurs in police custody or a person dies in a police encounter a Magisterial enquiry can be ordered to bring about correct facts; whenever any report is made under the aforementioned sections the Magistrate takes all necessary action in accordance with law to safeguard the person in police custody and ensures that no violation of any fundamental right and human right of the person takes place; enlightened citizens keep invoking these provisions to ensure that the human rights are not violated by the police; and in view of the aforementioned facts and circumstances on 16.6.98 the State decided not to constitute the State Human Rights Commission at this stage, the constitution of which is also not mandatory as Act has left a decision to be taken by the State Government in this regard; the figures as obtained from the Annual report 1996-97 of the National Human Rights Commission showed that 2900 were the number of total cases registered during1995-96 and 8728 during 1996-97; the State Government attaches utmost importance to maintenance of law and order and the contention that they are extremely grim is denied; the Notification dated April 4, issued by the State Government with a view to honour the suggestions made by this Court during the Presidential Rule and the contention that it was issued on account of ' extremely grim law and order situation' is not

correct; it would be wrong to conclude that only S.H.R.C. could address to the public grievance; the popular government would directly handle all matters relating to violation of human rights, if any, and through the legislature, which is the supreme body before which matters relating to human rights violation are brought up and debated; beside Judicial Officers are competent to take cognizance where someone has suffered due to wrongful act; rapid rise in the number of complaints received by the N.H.R.C. is a pointer of increasing awareness regarding human rights as well as its activities; N.H.R.C. is based in Delhi, adjacent to the State of U.P. which is the most populous and its citizen find it convenient to address the grievances to it due to its proximity which is the prime factor responsible for origin of maximum complaints; as per Annual Report 1996-97 N.H.R.C U.P. accounts for 42.17% of total cases out of which 8048 cases (42.8%) were dismissed in limine during 1996-97 out of 2722 cases disposed of with directions U.P. accounted for 56.99% and out of 6503 cases considered/admitted for disposal during 1996-97 U.P. accounted for 40.38%; the statements made in paragraph 37, 38 and 39 (pertaining to the statements made in a press conference and in the interview by the Special Correspondent out Look) are false and frivolous and are denied and it is submitted that the statement should be read with reference to context " clamping down the illegal activities of criminals in order to maintain "law and order" and emphasizes that the police should not give up its fight against offenders of law and human rights and in safeguarding the law abiding citizens; there is complete communal harmony at present; even the long standing Shia-Sunni dispute at Lucknow has been resolved amicably recently; the direction of the state Government to the police is to improve law and order situation by clamping down heavily on the criminals and to make the society a safe place for law abiding citizen and in pursuance of this objective stringent measures have been taken by the police; in some hot pursuit there have been exchange of fire between the police and the criminals in which at times police men and /or criminals fall victim which are commonly termed as 'encounter', though it is well within the ambit of law for the police to fire in exercise of its right of self-defence and to term this as extra judicial killings of the criminal is distortion of fact.

5. To the aforementioned Counter Affidavit a Rejoinder was filed by the Petitioner stating following facts:- There has been concealment of a very material fact that the Chairperson of National Human Rights Commission wrote a letter on 30.7.1998 (appended as Annexure –RA1) to the Respondent no.2 referring to the Notification for setting up of a State Human Rights Commission after taking into consideration of his suggestions and the view of the Division Bench of this Court telling that a logical sequence would have been a final Notification under section 21 (2) of the Act; the letter further indicated that substantial percentage of the complaints received in his office pertain to this State and a State Commission will obviate the need for the aggrieved parties to approach Courts and burden the already heavy docket of the courts of law; yet another Division Bench of this Court in Hari Krishna Maheshwari @ Hari Maheshwari Vs. State of U.P., 1996 J.I.C. 1034. had made request to the State Government to constitute a State Human Rights Commission and Human Rights Courts as provided under the Act as early as possible; in a matter like this in which extremely serious allegations of violation of human rights were made against him, the Chief Minister himself should have filed his counter affidavit; in regard to the press reports the petitioner shall place the clipping of the newspapers and news magazine containing the reports; according to the press report the greatest form of human rights violations are occurring in U.P. these day, like of which might not have been found in any democratic

country at any point of time in the human history; in D.K. Basu V. State of West Bengal, decided by the Supreme Court on 18.12.96, it took judicial notice of the fact that custodial torture could be ascertained by reading morning newspapers and High Court may also take notice of the relevant reports through press; despite request of National Human Rights Commission and by this Court through its two Division Bench judgments the decision of the State Government not to constitute a State Human Rights Commission shows that it has no regard to human rights and no concept in regard to what the human rights are and why such a Commission is required and its disregard in that regard requires passing of a very severe stricture by this Court against the present Government.

6. On 25.8.1998 the case was heard further by the earlier Division Bench, as stated above comprising one of us. The learned advocate General came up with a prayer for adjournment on the ground that some new facts have been stated in the Petitioner's Rejoinder. The Bench repeatedly asked as to whether the State Government has any real intention to constitute a State Human Right Commission or not in regard to which the learned Advocate General took up a stand that this will require some further consultation with the Government. The Bench also reiterated that the Court intends to dispose of this writ petition at the stage of admission itself.

7. On 9.9.1998 this case was placed before a Division Bench consisting one of us (Binod Kumar Roy, J) and Hon'ble Mr. Justice J.C. Mishra. The case was heard directing the State Government to produce the entire records to know as to what action it has taken in regard to the directions made by the Court earlier in the two cases (Uttarakhand and H.K. Maheshwari) and in regard to the request made by the chairperson of National Human Rights Commission. The National Human Rights Commission was permitted to be impleaded as Respondent no.3.

8. The case was again listed before the aforementioned Bench on 22.9.1998 and Sri Shahshi Kant Agarwal, learned counsel appearing on behalf of Respondent no. 3 informed the bench that he has instructions to state that the Chairperson of Respondent no 3. Has already twice recommended to the state Government for setting up of a State Human Rights Commission at Lucknow as also in districts at the earliest and that Respondent no.3 stands by recommendation aforementioned made by its Chairperson.

9. On 24.9.1998 the Bench was informed by the learned Advocate General that the two Mandamus issued earlier by the Court were considered by the Cabinet which, however, took a decision not to constitute a State Human Rights Commission as it was considered not beneficial. On that day an affidavit was filed, sworn by the Under Secretary (Home), stating that the letter sent by the Chairperson of National Human Rights Commission has not been received. The learned Advocate General further informed the Bench that there will be every likelihood of inclusion of an agenda in the next meetings of the cabinet for consideration in regard to the desirability of constitution of a State Human Rights Commission. In this view of the matter the case was adjourned noting in its order dated 24.9.1998 that the letter of the Chairperson of National Human Rights Commission has already been reproduced in Court's order dated 9.9.1998 and since the Court after pooja holiday will reopen on 5.10.1998 the case is adjourned to 27.10.1998 hoping and trusting that the two mandamus issued by the Court earlier and the letter of the Chairperson of National Human Rights commission shall be considered by the Cabinet further stating that it is needless to clarify what the word "considers" means.

10. On 27.10.1998 this case was listed before a Division Bench comprising M. Katju and S.L. Saraf, J. but it was directed to be placed before a Bench of which Hon'ble Mr. Justice M. Katju is not a member. The then Hon'ble the Chief Justice vide his order dated 6.11.1998 directed this case to be placed before a Bench presided over by one of us (Binod Kumar Roy, J). That is how this case was placed before this Bench.

11. An affidavit of General Secretary, Home Department, U.P. Government was filed stating that the question of desirability of constituting State Human Rights Commission was considered in extenso by the State Cabinet and it was decided that as the existing institutional frame work for redressal of human rights related grievances are adequate, therefore, its constitution is not necessary; and that pursuant to the aforesaid decision of the Cabinet, vide Notification no. 2238/6-H.R./98 dated October26,1998 (copy enclosed as Annexure –1 to this affidavit) the earlier Notification no. 2254 KHA/6-496 dated April 4,1996 has been rescinded

12. We heard Sri R.K. Jain, learned Senior counsel in part, who drew our attention to the fact that the direction in regard to production of the entire records by the State was not complied with. His submissions will be referred to, later. We adjourned this case for further hearing reiterating the earlier order of the court for production of the records by the State.

13. On 16.11.98 the petitioner filed an application under Article 215 of the Constitution of India for taking suo motu action of contempt against Sri Kalyan Singh, the Chief Minister and his Cabinet colleagues for the reasons stated in the accompanying affidavit.

14. On 20.11.98 Sri Yatindra Singh, the learned Additional Advocate General filed documents in a sealed cover but indicated that the State claims privilege and intends to file an appropriate application supported by an affidavit.

15. On 1.12.98 an application was filed on behalf of the State praying to recall the order summoning the records and uphold the privilege and protection of the records and for return of the documents on the grounds inter alia that apart from the fact that those documents are not required for decision of the case, they cannot be looked into in view of Article 163(3) of the constitution and are also privileged documents under section 123 of the Evidence Act. In the affidavit supporting the said application it has been added that the records are unpublished official records relating to the affairs of the State, which include papers prepared for the submission to the cabinet for taking a decision about establishment of the State Human Rights Commission, Cabinet meetings, Cabinet papers and high level documents relating to framing of policy which are confidential as well as of sensitive nature; and that the public interest will suffer by their disclosure.

16. An objection was filed by the petitioner in regard to the application aforementioned stating interalia, that it is a result of an after thought; the claim of privilege and protection is manifestly misconceived; the submission that the public interest will suffer by the disclosure of the documents, and as such production is withheld, is of the deponent of the affidavit and not based on the legal advice of the Advocate General or some State Law Officer; the State has come out for the first time at the advanced stage of hearing that they are entitled to privilege; by no stretch of imagination it can be conceived that the disclosure of documents will be against public interest rather non-disclosure of the documents is injurious to the public interest.

17. Thereafter Sri S.K. Agrawal, learned counsel for Respondents no.3 was heard on

4.1.1999 and 5.1.1999. On 5.1.1999 Sri Agrawal informed us that a writ petition was filed earlier before the Lucknow Bench of the Court in this regard but details thereof is not available with him and he was requested to furnish details thereof. Sri S.K.Agrawal, had contended as follows:- The Notification under section 21(1) of the Act constituting State Human Rights Commission having been made, the only issue before this Court was to command the Government of U.P. to (a) nominate the Members of the Commission in terms of section 21(2) of the Act and (b) appoint necessary staff in accordance with section 21(3) of the Act and we are very much competent to issue such a direction. Reliance in this regard was placed by him on the observations made by the Supreme Court in paragraph 631, 734,735 and 1251 to 1253 of S.P. Gupta Versus Union of India A.I.R 1982 S.C. 149. The direction of this Court in its order 24.4.1998 for consideration of the matter has really not been obeyed and the circumstances clearly unfold the capricious and malafide conduct of the State Government. In the garb of consideration of the issues it was not open for the Government to recall the Notification constituting the State Human Rights Commission itself inasmuch as the Court never meant nor had it permitted the government to do so. National Human Rights Commission stands by every word written through its Chairperson to the Chief Minister advising him for constitution of State Human Rights Commission which, if constituted, would even reduce the workload of the High Court in entertaining writ petitions concerning the subjects touching human rights. The claim of privilege was made by the State much after passing the order for production of the documents so that we could not peruse them through the affidavit which is not in terms of the decisions of the Supreme Court in State of Punjab V Sodhi Sukhedeo Singh A.I.R. 1961 S.C. 493 and Amar Chand Butail A.I.R. 1964 S.C. 1658. It does not involve any policy decision but the matter being of considerable public importance touching the constitutional safeguards provided to its citizens as well as non-citizens both, it would be in the interest of Justice to overrule the privilege and peruse the records so as to find out as to whether the stand taken by Respondent nos. 1 and 2 are borne out of the records and are correct or not. The explanation given in the Counter are merely eye-wash and highly capricious.

18. Thereafter Sri Yatindra Singh, learned Additional Advocate General was heard. The learned Additional Advocate General, on the other hand, contended as follows:- The reasons advanced for non constitution of State Human Rights Commission are valid; though the State has no objection to the perusal of the records, which were produced but nevertheless privilege is being claimed having regards to the sensitivity etc.; It is a question of policy which is neither arbitrary nor unreasonable hence it cannot be quashed by placing reliance on K.Kakkanath V State of A.I.R. 1997 S.C. 128; Indian Railways V. D.R.T.S.A. 1993 Supp. (4) S.C.C. 474 and State of Punjab V R.L. Bagga 1998 (4) S.C.C. 117. The High Court cannot issue a Mandamus for constitution of State Human Rights Commission which is a policy matter of the Government. Reliance was placed on A.K. Roy V. Union of India A.I.R. 1982 S.C. 710; Aeltemesh Rein Vs. Union of India 1988 (4) S.C.C. 54 (=A.I.R. 1988 S.C.1768); Bar Counsel of U.P. V. Union of India 1997 (3) U.P.L.B.E.C. 1551; Misbah Alam Sheikh V. State of Maharashtra 1997 (4) S.C. C.528 and Tata Cellular V. Union 1994 (6) S.C.C. 651. No reliance can be placed on the newspaper report which are inadmissible. No contempt was committed by the Chief Minister Sri Kalyan Singh or his Cabinet colleagues and the contempt petition being thoroughly misconceived is fit to be dismissed summarily.

19. By 12.1.1999 Mr. Jain concluded his replies who also pressed the petition filed for initiation of proceedings in contempt against the cabinet including the Chief Minister of the

State. He also addressed us in regard to the petition dated 12.1.1999 filed for impleadment of Sri Kalyan Singh as one of the respondents 'for the facts and reasons disclosed in the accompanying affidavit' but without serving a copy on Sri. H.P. Misra, learned Standing Counsel for the State and the Chief Minister. In the affidavit accompanying the application seeking impleadment reference was made to several killings in the State and several X-rox copy of paper clippings were also produced and referred to.

20. The judgement was reserved by us on 12.1.1999. Thereafter we tried our level best to locate the reference of the case said to have been filed before the Lucknow Bench but could not succeed partly due to the reason that Sri S.K. Agrawal, learned counsel for Respondent no.3 was elevated to the Bench in February, 1999. Thereafter we learnt from newspapers that some of the aspects touching this case had been pressed before another Bench by Sri Jain and in another writ petition before the Lucknow Bench. Before we could deliver the judgement Sri Jain desired to be heard further and the case was brought up for further hearing giving further opportunities to him as well as learned Advocate General.

20.1 Sri Jain contended interalia that as serious allegations have been made by the Petitioner against the Chief Minister Respondent no. 2 in view of the decision of the Supreme Court in R.P Kapoor V. Sardar Pratap Singh Kairon A.I.R. 1961 S.C. 1117, he owed a duty to file an affidavit stating the correct position regarding the allegations and not to leave their refutation to the Secretary of the Departments who could speak only from the Records and thereby the allegations be accepted by us; that the Commissions referred to by the Learned Advocate General/ Additional Advocate General are no substitute of State Human Rights Commission at all, which has to consist of a former Chief Justice of a High Court, a member who has been or is a Judge of a High Court, another Member who has been or is a District Judge of our State and two Members to be appointed from amongst persons having knowledge of, or practical experience in matters relating to human rights and thereby an expert body. At the time when this Court had passed its order for production of records no privilege was claimed; nothing has been produced by Respondent nos. 1 and 2 to show that the two requests made earlier by the Court and the interim Mandamus issued even by us have been 'considered'. The attitude of Respondent no.2 the Chief Minister from his statements that criminals have no rights etc. made to the journalists from time to time, which are on the record, and which were not denied by filing of any counter by him personally, is crystal clear that he and/or his government does not want to fulfil the legislative intention enshrined in Section 21 of the Act by constituting State Human Rights Commission. Even resort to falsehood has been taken in the Counter filed on behalf of Respondents nos.1 and 2 in stating that since the decision was taken to constitute State Human Rights Commission at a time when the popular government was not in power but when the state was under the presidential Rule inasmuch as after the decision taken by the Government, had in fact taken a decision for constitution of State Human Rights Commission which because of mere obstinity of Sri Kalyan Singh is not being followed up to its logical end. The defence taken in regard to financial crunch is also of no significance at all because the Chief Minister has formed a Zumbo Cabinet burdening the State exchequer unnecessarily and the attitude of the State Government in regard to non-constitution is apparently callous and condemnable. He is seriously pressing the petitions filed for initiating proceedings in contempt against the then Chief Minister Sri Kalyan Singh and his Cabinet colleagues as well as the application seeking impleadment of the former.

21. The learned Advocate General appearing on behalf of Respondent Nos. 1 & 2 repeated the arguments made earlier by Sri Yatinder Singh, the learned Additional Advocate General, who in the meantime was elevated to the Bench. He contended that no contempt was committed by the then Chief Minister and his cabinet colleagues. The petition seeking impleadment of the Chief Minister is infructuous due to his resignation and formation of the new Government under the Chief Ministership of Sri Ram Prakash Gupta which, however, is of the same view in regard to non constitution of S.H.R.C.. he informed us that under section 30 of the Act almost in every district Human Rights Courts have been established. In this regard Sri Jain took up a stand that those courts are not functional, to which the learned Advocate General stated that those courts will be made functional expeditiously even by specifying the Special Public Prosecutors as contemplated under section 31 of the Act.

22. <u>Our Findings</u> :-

22.1 The purpose of the Act reads thus:-

"An Act to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto."

From this the intention of the Parliament is crystal clear that S.H.R.C. is for better protection of human rights.

22.2 Section 12 of the Act enumerates the functions of the commission, which reads as follows:- "Functions of the Commission – The Commission shall perform all or any of the following functions, namely: -

(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of –
(i) violation of human rights or abetment thereof; or
(ii) negligence in the prevention of such violation,
by a public servant;

(b) intervene in any proceedings involving any allegation of violation of human rights pending before a court with the approval of such court;
(c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;

(d) review the safeguards provided by or under the constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) Study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) Spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
(i) encourage the efforts of non-government organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the promotion of human rights.

22.3 Section 13 of the Act states the powers of the Commission relating to the enquiries into the complaints made under the Act and section 14 confers powers on it to utilise the services of any officer or investigating agency of the State with its concurrence, as the case may be.

22.4 Sections 21 of the Act deals with the constitution of State Human Rights Commission, which reads thus :-

"Constitution of State Human Rights Commission – (1) A state Government may constitute a body to be known as …..(name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.

(2.) The State Commission shall consist of --
(a) a chairperson who has been a Chief Justice of High Court;
(b) One Member who is, or has been, a Judge of a High Court;
(c) One members who is, or has been, a district Judge in that State;
(d) Two members to be appointed from amongst experience in, matters relating to human rights.

(3) There shall be a Secretary who shall be the chief Executive Officer of the state Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.
(4) The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.
(5) A State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitutions:

Provided that if any such matter is already being inquired into by the Commission or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter:

Provided further that in relation to the Jammu and Kashmir human Rights Commission, this sub- section shall have effect as if that for the words and figures 'list II and List III in the Seventh Schedule to the Constitution", the words and figures " List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir and in respect of matter in relation to which the Legislature of that State has power to make laws" had been substituted".

The Supreme Court in Premjit Kaur V. State of Punjab J.T. 1998 (6) S.C.338 had held N.H.R.C. to be a unique expert body in itself which is also a body sui juris created under the Central Act for examining and investigating the question and complaints relating to violation of human rights, as also the negligence on the part of any public servant in preventing such violation. In our view the same distinction has to be conferred on S.H.R.C. also.

22.5 Section 22 of the Act deals with the appointment of the Chairperson and other members of the State Human Rights Commission on the recommendation of a committee consisting of persons enumerated therein, which reads thus :-

"Appointment of Chairperson and other members of the State Commission – (1) The Chairperson and other Members shall be appointed by the Governor by warrant under his hand and seal :

Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of, -

(a) the Chief Minister - Chairperson;

(b) Speaker of the Legislative Assembly- Member
(c) Minister in-charge of the Department of Home in that State Member
(d) Leader of the opposition in the legislative Assembly - Member

Provided further that where there is a Legislative council in a State, the Chairperson of that Council and the Leader of the Opposition in that Council shall also be members of the Committee:

Provided also that no sitting Judge of a High Court or a sitting district judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned state.

(2) No appointment of a Chairperson or a Member of the State Commission shall be invalid merely by reason of any vacancy in the committee."

22.6 Section 29 of the Act talks of jurisdiction/power of the S.H.R.C. to deal with complaints by applying Sections 9,10 & 12 to 18 with suitable modification.

23. We take up Prayer no.2 of the petitioner first in view of the stand taken regarding Section 30 of the Act.

23.1 In view of the fair Stand of the learned Advocate General noted in paragraph no.21 supra we dispose of prayer no. 2 of the petitioner as follows :- Let further steps be taken by the State Government for specifying for each district a Court of Sessions to the Human Rights Courts in terms of Section 30 of the Act expeditiously within three months from today and specify a Special Public Prosecutor or appoint an Advocate as a Special Public Prosecutor for the purposes of conducting cases of Human Rights Courts aforementioned within 8 (Eight) weeks from today under section 31 of the Act.

24. Now we take up the submissions made by the learned counsel in regard to the prayer no.1 of the petitioner i.e. for constitution of U.P. State Human Rights Commission as envisaged under section 21 of the Act.

25. We do not want to make our order bulky by referring to various decisions cited at the Bar by one or the other learned counsel which were read out before us.

25.1 According to the learned Additional Advocate General Misbah Alam Sheikh (1997) 4 S.C.C. 528 is a direct decision where it was held that no Mandamus can be issued in Policy matters to constitute a commission. A perusal of the judgement shows, interalia, following things:- (I) A writ petition filed challenging the abolition of Minority Commission set up by the State Government was dismissed by the Bombay High Court (ii) On appeal a notice was issued by the Supreme Court why the National Commission should not take up the issue of protecting the interest of the minorities in the State of Maharashtra . (iii) The Central Govt. filed an affidavit that it had undertaken to establish branch of the National Commission at Mumbai. (iv) Due to want of statutory compulsion the State cannot be directed by a mandamus to constitute Commission or to reconstitute it once abolished. (v) Under these circumstances no compelling reason was found warranting interference.

25.2 Here the position is somewhat different. A Chief Minister because of his position as leader of the Party in power is expected to influence his Cabinet to accept his views. The allegation made by the petitioner against the Chief Minister (Respondent no.2) have not been denied by him in terms of the decision of the Supreme Court in Kairon's case A.I.R 1961 S.C. 1117 as rightly argued by Mr. Jain. The legal position is that facts not disputed are so deemed to have been admitted though it is open for a person to show that the

allegations are so absurd that they should not be believed. Here there is section 22 of the Act under which S.H.R.C. is required to be constituted by a State Government though in its discretion whereas under the National Commission for Minorities Act, 1992 there is no such provision enabling the State Government to constitute Minority Commission. The State Government was party to 'Uttarakhand' & Maheshwari' and the requests made therein by this Court could not be lightly taken. It did not go up before the Supreme Court against the directions issued by the High Court. It cannot lightly brush aside or ignore the Mandamaus already issued. This decision is thus, of no help to Respondent nos. 1 and 2.

26. Human Rights jurisprudence is of recent growth. We do not want to make our order more bulky by referring to various aspects pointed out in several books and Article published in our Country as well as in other Countries highlighting the necessity of protection of such rights. Relevant in this regard is the very purpose stated in the very beginning of the Act itself stated earlier.

27. On the spectrum of Human Rights, which are the very essence of human life, there are manifold subjects enumerated in list II/III of the Seventh Schedule of the Constitution. Some of the general topics are 'Inhuman Existence', Freedom of Religion', Right to privacy and Information', 'Legal Aid', 'Clean and wholesome Environment', 'Custodial violence', 'Torture,' 'Terrorism, 'Gangestorism', 'Prisoner's right/Prison Justice,' 'Capital Punishment,' ' Atrocities against Women', 'Child Abuse,' 'Right of Child,' Atrocities of Scheduled Caste and Scheduled tribes,' 'Right of Minorities,' 'Right of Juveniles'. The S.H.R.C. is vested with the power to enquire into violation of human rights in aspects of matters reliable to any of the entries enumerated in list II and List III in the Seventh Schedule of the Constitution. Can they be dealt with effectively by the four Commissions created by our State as strenuously urged by the learned Advocate General/Additional Advocate General in preference to S.H.R.C. Our answer is a definite no. The reason is obvious. Under section 21 of the Act S.H.R.C. is manned by its Chairperson who has to be an Ex-C.J. apart from 4 Members out of whom one has to be sitting or an Ex – High Court Judge, the other has to be a sitting or an Ex-District Judge and the remaining two having knowledge of, or practical experience in matters relating to human rights, which as held by the Supreme Court, is an expert body. The 4 Commissions and the Lokayukt can by no stretch of imagination be equated with S.H.R.C. Thus, it can not be said that the existence of the 4 commissions aforementioned and the Lokayukt obviated the need of S.H.R.C.

28. True it is that Article 166(3) of the Constitution forbids an enquiry in regard to the advice tendered by the Cabinet to the government. We were/ are not interested in regard to that advice. No one suggested either. Thus such is not a case here at all. The law permits us overruling of privilege claimed and perusal of government records, barring advice part, in a given case in public interest. (See State of Punjab V Sodhi Sukhdeo Singh A.I.R 1961 S.C. 493; Amar Chand Butail V Union of India A.I.R 1964 S.C.1658 and S.P Gupta V. Union of India A.I.R. 1982 S.C. 149). The facts and circumstances including the public interest involved for constitution of S.H.R.C. compels us to look to the government records. We accordingly, reject the petition claiming privilege and perused the two records. After perusal we find that unfortunately the records have not been produced in their entirety inasmuch as we do not find on the record as to how the matter was considered by the Cabinet and what had happened allegedly on 22.10.1998 in the Cabinet meetings or thereafter so as to have a judicial review of the decision of the government.

28.1 Be that as it may, the material constituting the records of the Government discloses, interalia, the following facts :-

(i) Pursuant to the orders passed by the High Court in CM.W.P. No 32984 of 1994 Uttarkhand Sangharsh Samiti, Mussoorie Versus State of U.P. State Human Rights Commission was constituted.

(ii) A committee was also constituted by the State Government under section 22 of the Act for the purpose of appointment of Chairperson and 4 Members of the commission as required under section 21 of the Act by a popular Government of which Miss Mayawati was the Chief Minister on 10.5.1997. Even letters were issued to the Members of such Committee.

(iii) The then Chief Mister Miss Mayawati vide her order dated 12.6.1997 directed production of records along with the list of suitable persons for appointment of the Chairperson and the Members of the S.H.R.C.

(iv) Even the then Home Minister of the Govt. of India Sri Indrajit Gupta had written letter dated 15.1.1998 to the Chief Minister Sri Kalyan Singh for constitution of the State Commission.

(v) In regard to this writ petition it was noted that keeping in view the financial reasons etc. of the State, where there are already Schedule Caste/Schedule Tribes Commission, Backward Commission and Minority Commission, constitution of State Human Rights Commission will not be of special advantage.

(vi) The topic for discussion was included in the agenda of the Cabinet Meeting to be held on 22.10.1998, but in the absence of any material it is not known whether it was in fact discussed or not.

29. Apparently the 2nd request made by the Court in 'H.K. Maheshwari', to which the State Government was a party, for constitution of State Human Rights Commission has not at all been considered as it appears from the Records as produced. How and in what circumstances the Court had proceeded to make repeated requests stands fully discussed in the judgement in 'Uttarkhand' and 'H.K. Maheshwari' which need not be repeated by us. We gave opportunity to the State to consider the matter. The word 'consider' has been explained by the Supreme Court in a number of decisions. One of such decision is Ram Chander V. Union of India A.I.R. 1986 S.C. 1173 in which it was held to mean an objective consideration after due application of mind which implies giving of reasons for its decision.

30. Following the 1st Mandamus issued by this court in 'Uttarkhand' a Notification was made under section 21 of the Act during the President's Rule which was succeeded by Miss Mayawati's Government supported by the B.J.P. Miss Mayawati's government was thus a popular government which had even proceeded to take steps in terms of Section 22 of the Act. Thus it was wrong on the part of Respondent nos. 1 and 2 to take up a stand in the Counter and during submission that since the decision was taken during the Presidential Rule and Thus after the popular government came in power it rightly proceeded to consider the desirability of constitution of State Human Rights Commission and came to a conclusion that it will not be beneficial to do so. It is not even for a moment suggested that it was not open for Sri Kalyan Singh's government to reconsider the decision taken by his predecessor Miss Mayawati's government which had proceeded to constitute State Human Rights Commission under section 21(1) of the Act and a Committee under section 22(2) of the Act.

31. In Union of India V. S.P. Anand (1998) 6 S.C.C. 466 the Supreme Court held that a question regarding justifiability can arise only in respect of an action that has been taken under the Constitution or a law. In Supreme Court Advocate on Record V. Union of India 1993 (4) S.C.C. 441 it was held by the Supreme Court that direction can be issued to fulfil the State obligation of providing speedy justice. Even in Altemesh Rein relied upon by Sri Singh the Supreme Court went to the extent of holding that every discretionary power vested in executive should be exercised in a just, reasonable and fair way and that Court cannot allow the Government to leave the matter to lie without applying its mind to the question. Tata Cellular, Strongly relied upon by the learned Additional Advocate General, also laid down to the effect that the Government is the guardian of the finances of the State and is expected to protect its financial interest yet the Courts concern regarding its power of judicial review should be whether it committed an error of law and abused its powers. Thus, we hold that the decision of the State Government under Section 22 of the Act not to constitute S.H.R.C. is justiciable.

32. As laid down by the Supreme Court in H.C. Suman V. RENEC Home Building Society A.I.R. 1991 S.C. 2160 rescinding of an earlier Notification made pursuant to a judicial order cannot be done in an arbitrary manner. The common Judgement dated 18.12.1996 of the Supreme Court in Writ Petition (Crl) No. 539 of 1986 D.K. Basu V. State of West Bengal and Writ Petition (Crl.) No. 592 of 1987 Ashok K. Johri V. State of U.P. arising out of our own State reported in A.I.R. 1997 S.C. 610 belies the tall claim made by Respondent Nos. 1 & 2 in their counter in regard to the following of the provision of Code of criminal Procedure etc. We accept the entire arguments of Sri S.K. Agarwal in this regard and hold that rescinding and / or nullifying the earlier Notification under section 21(I) of the Act was in any event not fair and /or proper. It was well known to the Government that the only question till then was as to whether the Government should proceed to obtain the recommendations of the committee already constituted under section 22 (1) of the Act and proceed to make the already constituted U.P. State Human Rights Commission functional which was not made known to us. The State cannot act as an ordinary litigant and in the words of the present Hon'ble C.J.I. the action of the State, however, must be right, just and fair vide his speech made on September 27,1999 at Vigyan Bhawan Printed in 1999 (3) S.C.C. journal 10. This Court will be failing in its duty in not correcting the acts/ omissions/commission of the State Government if it refuses to act as per the constitutional mandate and /or the other Acts/laws. Even conceding that the state government possessed powers to nullify the earlier Notification, we in the peculiar facts and circumstances are of the view that it was done arbitrarily. Beyond this we do not want to say in this regard. We are of the view that the State Government should have taken the repeated requests of this Court seriously and the views expressed by the Chairperson of N.H.R.C. not lightly and refused to constitute the State Human Rights Commission, an Expert Body, the avowed object for which it was required to be statutory constituted. We find in this context that the state is blowing hot and cold in the same breath inasmuch as on the one hand it had proceeded to specify Human Rights courts almost in every district by now under section 30 of the Act but on the other hand refuses to constitute State Human Rights Commission for the State under Section 20 of the Act. We also note that much was convassed about the word 'may' used in section 21(1) of the act by the learned counsel but having regard to the peculiar facts and circumstances we are of the view that it cannot refuse to exercise its discretion arbitrarily and discriminatory. We are anguished to make such remarks but we are left with no option. We find an apparent

fallacy in the main defence that there being several Commissions, Lokayukt and as the departments in Home/Police are looking into Human Rights violations, there is no necessity to have S.H.R.C. The other ground namely. Financial crunch also does not appeal to us. Both defences are thus rejected. Its decision is not only arbitrary but discriminatory which is writ large.

33. The present State Government has taken a stand before us that it is also not in favour of constituting S.H.R.C. it was thus rightly contended by Mr. Jain that thus no useful purpose will be served for directing it to consider this matter and this Court cannot remain a silent spectator; and it is required to create new tools and avenues to achieve the avowed objects regarding Human Rights. In fact in Neelabati Behra V. State of Orissa A.I.R. 1993 S.C. 1960 the Supreme Court has held that as a protector of Human Rights it is the Constitutional object of the Supreme Court and the High Court to forge new tool and invent new remedies to grant relief of enforcement of Fundamental Rights. The judgment of the Supreme Court in Common Cause V. Union of India 1992 (1) S.C.C. 707 cannot be said to be irrelevant where directions were issued for establishing consumer Forums under the Consumer Protection Act. The 9 Judges Judgment of the Supreme Court in the Judges case A.I.R 1994 S.C. 268 that a writ could be issued for fixation of judges strength in the High Court and its justiciability is also relevant. The decisions relied upon by the learned Additional Advocate General on the other hand are distinguishable.

34. We, accordingly, exercising our constitutional powers enshrined under Article 226 of the Constitution of India quash the Subsequent Notification nullifying the First Notification as contained in Annexure –1 to the Affidavit of the General Secretary (Home) and direct the State Government to take expeditious steps within three months from today for obtaining the recommendations of the statutory Committee constituted under section 22 (1) of the Act and to proceed to make the appointment in terms of section 21 (20) and (3) of the Act within three months from today.

35. The Word 'contempt' stands defined under the Contempt of Court Act. Having regard to the peculiar facts and circumstances we are of the view that no contempt at all was committed by the then Chief Minister Sri Kalyan Singh who has also resigned, and his Cabinet Colleagues, who have also not been impleaded and that no useful purpose will be served by his impleadment more so when this case has been heard and re-heard to its full extent. Accordingly, the petitions, seeking initiation of proceedings in contempt under Article 25 of the Constitution of India against the then Chief Minister Sri Kalyan Singh and his Cabinet colleagues and impleadment of Sri Kalyan Singh, both are dismissed.

36. This writ petition is disposed of accordingly but without cost.

37. Let the records produced by the State Government be returned forthwith to the learned Advocate General and / or the learned Standing Counsel Sri H.R. Mishra.

38. The Office is directed to hand over a X-rox or Computerised copy of this order latest by tomorrow dated 13th January, 2000 to the learned Advocate General and /or Sri H.R. Misra, the learned Standing Counsel of the State for its intimation to and follow up action.

39. The office is also directed to dispatch a similar copy to Respondent no. 3 by Post within one week, as its learned counsel Sri S.K. Agrawal with his elevation to the Bench has ceased to be its counsel.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 23, 1999

BEFORE
THE HON'BLE R.R.K. TRIVEDI, J.
THE HON'BLE M.C. JAIN, J.

Special Appeal No. 619 of 1999

Committee of Management, Jagdish Saran Rajwanshi Kanya Inter College, Meerut and another ...Appellants.
Versus
Joint Director of Education, Ist Region, Meerut and Other's ...Respondent

Counsel for the Appellants:
Shri G.K. Singh
Shri A.P. Sahi
Shri R.N. Singh
Shri Arun Tandon

Counsel for the Respondents:
Shri W.H. Khan
Shri K.P. Bajpai
S.C.

Regulation 21 of the Intermediate Education Act-Once a teacher has attained the age of superannuation , he has no vested right to continue in service. The order of appointment cannot be issued in favour of such teacher though selected for the post by the commission after attaining the age of superannuation. The educational authority as well as the committee of management were not justified in issuing the letter of appointment in favour of a teacher for the post of principal who had already attained the age of superannuation.
Held-
Once a teacher has attained the age of superannuation, in other words age of 60 Years or 58 Years, as the case may be, he has no vested right to continue in service. The order of appointment, thus, could not be issued in favour of such teacher though selected for the post by the commission, after attaining the age of superannuation. In our opinion, the educational authorities as well as committee of management were not justified in issuing the letter of appointment in favour of teacher for the post of principal who had already attained the age of superannuation. para 11

By the Court

1. As in both the aforesaid special appeals the controversy involved is similar, they can be disposed of by a common order against which learned counsel for the parties have no objection. Special appeal no. 619 of 1999 shall be the leading case.

2. The facts, in short, giving rise to special appeal no. 619 of 1999 are that the post of principal of Jagdish Saran Rajvanshi Kanya Inter College, Meerut (hereinafter referred to as the college) fell vacant on account of retirement of Smt. Sarala Bansal. This vacancy was communicated to the U.P. Secondary Education Service Commission under the provisions of U. P. Secondary Education Services and Selection Boards Act, 1982 (hereinafter referred to as the Act) and the rules framed thereunder. The commission in its turn advertised the post inviting applications vide advertisement no.1, 1995-96. Large number of persons applied in pursuance of the aforesaid advertisement. The commission having interviewed two senior most teachers of the institution and also the candidates who had directly applied and after completion of the selection proceedings notified the panel of selected candidates on 15.4.1997. The panel recommended by the commission was as under:

➢ Maya Rani Goel (respondent no. 3 in appeal),
➢ Smt. Shashi Sharma (respondent no. 4 in appeal), and
➢ Smt. Harishwati Yadav.

3. The office of principal of S.S.D. Balika Inter College, Lal Kurti, Meerut also fell vacant on account of retirement of Smt. Shail Singhal on 30.06.1991. This vacancy was also intimated to the commission as per rules and was also advertised by advertisement no.1, 1995-96 and after selection proceedings a

panel was recommended on 15.4.1997 of following three names:-

➢ Smt. Santosh Khurana,
➢ Smt. Saroj Yadav (appellent in special appeal appeal no 539 of 1999), and
➢ Smt. Shashi Sharma (respondent no. 4 in special appeal no. 619 of 1999).

4. It is not in dispute that on account of various interim orders passed by this Court in writ petitions, some of which were of general in nature, prohibiting the implementation of panel dated 15.4.1997 the authorities did not take any action as required under the Act and the rules for implementation of appointment of selected candidates from the panel dated 15.4.1997. In the above circumstances the committee of management vide resolution no. 7 of 20" June, 1997 authorised Smt. Maya Rani Goel to work as officiating principal .Though, the committee also took notice of the fact that she had been selected by the commission for appointment as regular principal and her name is at serial no. 1 in the panel. It was also said in the resolution that after completion of legal formalities she will ultimately get the aforesaid office. In pursuance of the aforesaid resolution Maya Rani Goel, respondent. No. 3 started discharging functions of the principal w.e.f. 1st July, 1997. She attained the age of superannuation on 7.8.1998 but she was allowed to continue in the office in view of the regulation 21 of Chapter 3 which provides that age of superannuation for principal and teachers and other employees shall be 60 years but if the date of superannuation falls between 2nd July and 30 June then there will be automatic extension of service up to the close of academic session i.e. 30th June so that alternative arrangement may be made by the committee of management during summer vacation for the new academic session commencing from the month of July. By virtue of the aforesaid regulation Maya Rani Goel continued in the office upto 30th June , 1999.

In respect of S.S.D. Balika Inter College, Lal Kurti, Meerut Smt. Shantosh Khurana who was recommended at serial no. 1 in the panel for the post of principal attained the age of superannuation on 15.12.1998. It may be clarified that her date of birth was 15.12.1940 but she was to attain the age of superannuation after completing 58 years of age on account of option exercised by her earlier.

5. The writ petitions and special appeals challenging the panel dated 15.4.1997 were considered and decided finally by this Court by the Judgment dated 6th October, 1998 reported in (1998) 3 UPLBEC 989, Balak Singh Kushwaha vs. State of U.P. & others. About panel prepared and notified by the commission following order was passed:-

"The selection made by the commission and the panel prepared and notified on 15.4.1997 is not affected in any way by the Government notification dated 17.4.1997. The panel shall be implemented by the educational authorities in accordance with law without further delay. The writ petitions of group 3 seeking implementation of the aforesaid panels are thus, allowed and decided accordingly. The writ petitions belonging to the 4th group challenging the panel dated 15.4.1997 are dismissed.

6. After the Judgment dated 6.10.1998 a letter dated 21.8.1999 was written by the District Inspector of Schools to the manager of the college for making appointment of the selected candidate namely Smt. Maya Rani Goel. Thereafter committee of management on 30.1.1999 issued letter of appointment in favour of Smt. Maya Rani Goel appointing her principal on regular basis on the basis of the selection made by the commission. Aggrieved by the aforesaid orders of District Inspector of School and the committee of management respondent no. 4, Smt. Shashi Sharma who was placed at serial no. 2 in the panel filed writ petition no. 12607 of 1999

challenging the appointment of respondent. No. 3, Smt. Maya Rani Goel on the ground that as she had already attained the age of superannuation the order of appointment could not be issued in her favour and she being shown at second place in the panel should have been appointed as regular principal. Learned Single Judge disposed of this writ petition by the order dated 28.7.1999 directing that the petitioner who has been selected for the post of principal shall be permitted to function as principal of the institution in question. Learned Single judge also gave liberty to committee of management to make representation before the Director of Education in respect of their contention that respondent no. 4, Shashi Sharma was not qualified for the post. Aggrieved by this Judgment of learned Single Judge committee of management and manager of the college have filed special appeal no. 619 of 1997.

7. The management of S.S.D. Balika Inter College Lal Kurti, Meerut also issued order of appointment in favour of Smt. Santosh Khurana on 2.2.1999 though she had already attained the age of superannuation. The appellant, Smt. Saroj Yadav aggrieved by the aforesaid action filed writ petition no. 18232 of 1999 in this Court in which interim order was passed and order of appointment dated 2.2.1999 in favour of Smt. Santosh Khurana was stayed. This interim order was further extended on 25.5.1999. However during pendency of the aforesaid writ petition respondent no. 1, Smt. Madhu Chaurasia field writ petition no. 30304 of 1999 and obtained interim order dated 23.7.1999 which reads as under :-

"Until further order petitioner shall be permitted to function as adhoc principal in the institution in question."

Aggrieved by this order of learned Single judge special appeal no. 539 of 1999 has been filed,

8. We have heard Shri R.N. Singh, learned Senior Advocate for the appellant in special appeal no. 619 of 1999 and Shri W.H. Khan, learned counsel appearing for respondent no. 4 and learned standing counsel. We have also heard Shri Arun Tandon for the appellant in special appeal no. 539 of 1999 and Shri K.R. Bajpai and learned standing counsel for the respondents.

9. After hearing counsel for the parties, in our opinion, the short but interesting question which is required to be determined in these appeals is as to whether an order of appointment could be legally issued in favour of the candidate shown at serial no.1 in the panel after she had attained the age of superannuation. The facts are not much in dispute in both the aforesaid cases. For answering the aforesaid legal question it is necessary to consider the nature of right to continue in the office even after attaining the age of superannuation under regulation 21 of chapter of the Regulations framed under the Intermediate Education Act. The regulation 21, which is in Hindi, is being reproduced Below;

8"21. आचार्य /प्रधानाध्यापक, अध्यापक तथा अन्य कर्मचारियों का अधिवर्ष 60 वर्ष होगा । यदि किसी आचार्य/ प्रधानाध्यापक अथवा अध्यापक का उपर्युक्त अधिवर्ष वय 2 जुलाई और 30 जून के मध्य में किसी तिथि को पडता है तो उसे उस दशा को छोडकर जबकि वह स्वयं सेवा विस्तरण न लेने हेतु लिखित सूचना अपने अधिवर्ष वय की तिथि से 2 माह पूर्व दे दें 30 जून तक सेवा विस्तरण स्वयंमेव प्रदान किया या समझा जायेगा ताकि ग्रीष्मावकाश के उपरान्त जुलाई में प्रतिस्थानों की व्यवस्था हो सके इसके अतिरिक्त सेवा विस्तरण केवल उन्हीं विशिष्ट दशाओं में प्रदान किया जा सकेगा जो राज्य सरकार द्वारा निर्धारित की जाय ।

XXXXXXXXXXXXXXXXXXXXX"

10. From the perusal of the aforesaid regulation 21 it is apparent that the object behind granting automatic extension of service up to the end of academic session is to protect the academic interest of the students of the institution. But for such arrangement there

could be absence of teacher during the academic session which may cause loss to the students as the management may not be able to make arrangement so swiftly. The regulation itself contemplates that during summer vacation alternative arrangement could be made for the next academic session commencing from 1st July. Thus, it is the benefit conferred on the teacher in the interest of students and the institution and it does not create any vested right or lien against the post. The Division Bench in the case of R.L. Prasad vs. State of U.P. and others, 1987 AWC 1314 after considering the legal position in respect of such extension of service held under :-

"We respectfully agree with the decision given in the case of D.N. Dhar (supra). The mere fact that after the date of superannuation an extension has been granted under the regulations to the teachers in the interest of students, no vested right is created in the teachers to continue in service till a particular date."

11. From the aforesaid discussions it is clear that once a teacher has attained the age of superannuation, in other words age of 60 years or 58 years, as the case may be he has no vested right to continue in service. The order of appointment, thus, could not be issued in favour of such teacher though selected for the post by the commission, after attaining the age of superannuation. In our opinion, the educational authorities as well as committee of management were not justified in issuing the letter of appointment in favour of teacher for the post of principal who had already attained the age of superannuation. Under no provision of the Act or the Regulations such action can be justified as the panel became ineffective and it was not required to be implemented in respect of candidate who had already attained the age of superannuation. The only step required by the authorities of the education department and the committee of management was to issue the letter of appointment in favour of the next candidate shown in the order of preference.

12. The submission of learned counsel for the appellant is that on the letter of appointment issued in favour of the candidate shown at serial no.1 in the panel recommended by the commission, the panel exhausted and it could not be used for giving appointment to the next candidate mentioned in the panel in order of preference. In our opinion, the submission cannot be accepted for more than one reason. Firstly, as discussed above, after the teacher attained the age of superannuation a letter of appointment could not be issued by the management and this exercise of issuing letter of appointment in favour of such teacher was futile exercise and void ab initio and could not affect the panel in any manner. This Court in the case of Kishori Raman Shiksha Samiti, Mathura vs. Regional Deputy Director of Education, Agra, (1994) 1 UPLBEC 248 considered in detail the circumstances in which the panel shall survive for the benefit of next candidate shown in the order of preference. The relevant paragraph 11 of the judgment is being reproduced below:-

"11. Thus for ascertaining the true legislative intent the meaning of the words has to be understood with the context and reference in which the provisions have been made. Sub-section (5) of Section 11th of the Act contains the provision dealing with situation which has given rise to the present dispute. There is no dispute so far as first situation contemplated under sub Section (5) of Section 11 of the Act is concerned and if the candidate failed to join the institution within the time allowed or even within such extended time which the management may allow in this behalf, the authorities could direct management to issue letter of appointment in favour of candidate mentioned at second place in panel. However, so far as the second situation where such candidate is otherwise not available for appointment as a

teacher, is material for resolving the present controversy. The scheme and object for which Section 11 of the Act exists in the Statute book is to make available the selected candidate for appointment on the post of principal or Teacher in educational institution. The aforesaid provision or sub Section (5) the phrase " where such candidate is other wise not available for appointment as such teacher" contains some words of very wide meaning and also some words of narrow meaning. The words " other wise not available" have very wide meaning, meaning, covering all kinds of situation including death and other physical injury which may render candidate not available to the institution for appointment as teacher. However, the word "appointment" contains narrow meaning. The question is whether the word" appointment" used in the aforesaid phrase should be given its plain meaning or it should also be given a wider meaning. The maxim "noscitur a sodis" will have to be applied in such circumstances to ascertain correct legislative intent, which means that the meaning of word should be judged by the company it keeps. In my opinion, in sub Section (5) as the word 'appointment' denotes to make available for the work of teaching, and as it has been used with words 'other wise not available,' having for wide meaning it should also be given and understood, in wider sense so as to include situation where candidate is not available for work as teacher. This phrase thus may be interpreted and construed so as to cover even the situation where the teacher is not available to work even after appointment and joining the post on account of death etc. Such interpretation can be given to the aforesaid phrase without causing any violence to the scheme and object of the Act and the context and reference in which it has been used.

13. If the present controversy is considered in the light of the aforesaid judgment the phrase 'where such candidate is other wise not available for appointment as such teacher', shall cover the situation where the candidate attains the age of superannuation and as the candidate shown at serial no.1 could not be made available for appointment for the reason of her attaining the age of superannuation the only course open could be to offer appointment to the next candidate mentioned in the panel. The aforesaid view was confirmed by the Division Bench in special appeals reported in (1994) 2 UPLBEC 1320. Paragraph 13 of the judgment is being reproduced below :-

"13. Looking to the over all facts and circumstances of the case, specially the fact that Smt. Kusum Srivastava died within five days of her joining and that the name of Smt. Zubairi finds place at Serial no. 2 in the panel which was prepared for the same post, we do not think that it is a fit case where we should exercise jurisdiction under Article 226 of the Constitution of India on purely technical grounds which have been raised to thwart the orders passed by education authorities to deprive Smt. Zubairi of the right to work as principal of the College. The affect of accepting the contention raised by the appellant would be that the institution would continue to be headed by an adhoc or officiating principal for a long period who would be appointed at the sweet will of the management and such an appointment would not be conducive for maintaining proper academic atmosphere in the institution. An institution is run for imparting education to large body of students and it is their interest which is supreme and not the remote chance of a lecturer to work as principal."

14. It is also not disputed that aforesaid judgments of this Court were challenged before Hon'ble Supreme Court but Special Leave petition was rejected by the Apex Court. The judgment of Division Bench of this Court in the case of Nagar Palika Inter College, Jaunpur vs. Dr. Havaldar Singh and others, 1996 (1) ESC 252 (Allahabad) and the judgment of Hon'ble Supreme Court in the case of Uma Kant vs. Bhika Lal Jain and others, (1992) 1 SCC 106 may also be quoted

with advantage Hon'ble Supreme Court in the case of Uma Kant (supra) held in para 7 as under :-

"7 xxxxxxxxxxx It is not in dispute that the main list and the reserve list prepared by the Selection Committee on June 20, 1989 were approved by the Syndicate. We agree with the contention of the university that a reserve list is always prepared to meet the contingency of anticipated or future vacancies caused on account of resignation, retirement, promotion of otherwise. This is done in view of the fact that it takes a long time in constituting a fresh Selection Committee which has a cumbersome procedure and in order to avoid adhoc appointments keeping in view the interest of the student community. Xxxxxxxxxxx"

15. Thus, the contention raised on behalf of the appellant considered from every angle cannot be accepted. In the present case it is undisputed that the panel prepared and notified by the commission on 15.4.1997 could not be given effect on account of various interim orders passed by this Court in writ petitions. Only after the judgment dated 6.1.1998 the authorities could initiate action for implementation of the panel under Section 11 of the Act. Before the steps could be taken the candidate mentioned at serial no. 1 in the panel in both the cases, had already attained the age of superannuation. Thus, the only course open was to offer appointment to the candidate next in the order.

16. For the reasons stated above, the special no. 619 of 1999 filed by the committee of management and the manager has no merit and is accordingly dismissed. Respondent no.1, Joint Director of Education, 1st Region, Meerut, respondent no. 2, District Inspector of Schools, Meerut and committee of management shall take immediate steps to appoint Smt. Shashi Sharma as the principal of the college for which she was selected and recommended by the commission.

17. So far as special appeal no. 539 of 1999 is concerned, it is not disputed that Smt. Madhu Chaurasia was considered by the commission for appointment as principal as senior teacher but was not selected. Smt. Santosh Khurana, admittedly, attained the age of superannuation on 15.12.1998. Thus, the appellant, Smt. Saroj Yadav selected and recommended by the Commission and shown at serial no. 2 in the panel became entitled for appointment and her appointment could not be stayed at the instance of Smt. Madhu Chaurasia in view of the order of Hon'ble Supreme Court has passed in Special Leave petition no 19035- 38 of 1998, and 19178 of 1998. The order of Hon'ble Supreme Court reads as under :-

"ORDER"

Issue notice.

Mr. E.C. Vidya Sagar, learned counsel accepts notice on behalf of the respondents/ Caveator in S.L.P. (c) Nos./ 19035-38,19178 & 20225 of 1998.

Three weeks time is granted to the respondents to file counter affidavit. Two weeks there after is granted to learned counsel for the petitioners to file rejoinder List in the last week of January, 1999.

It is specified that all those petitioners whose names were sent to the U.P. Secondary Education Services Commission and who were not found fit and were not selected are not being granted any interim relief. The appointment, if any made, in the meantime in pursuance of the recommendation of the commission, shall be subject to the ultimate decision of these S.L.Ps.

It is also clarified that adhoc principal working in colleges for which no selected candidate has been made available by the commission shall be allowed to continue until further orders."

18. In view of the aforesaid order of Hon'ble Supreme Court Smt. Madhu Chaurasia was not entitled for any interim order from this Court. As she has not been selected by the commission she has no right to resist the claim of Smt. Saroj Yadav who has been selected and recommended for appointment as principal of S.S.D. Balika Inter College, Lal Kurti, Meerut. The special appeal no 539 of 1999 is accordingly allowed. The order dated 23.7.1999 passed by the learned Single Judge is set aside. Respondent no. 2 District Inspector of Schools, Meerut, respondent no. 3, Joint Director of Education 1st Region, Meerut and respondent no. 5, committee of management, S.S.D. Balika Inter College, Lal Kurti, Meerut are directed to give appointment to Smt. Saroj Yadav without any further delay.

19. However, in both the appeals there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 30.11.1999.

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Substitution Application No. 51605 of 1999
In
Testamentary suit No. 6 of 1994

H.S. Bhatnagar ...Plaintiff

(In the matter of property of Shri Jyoti Swaroop Bhatnagar)

Counsel for Appellant:
Mr. Ajit Kumar

Counsels for Respondents:
Mr. Vinit Saran
Mr. R.K. Rajwanshi

Indian Succession Act 1925 Section 222 - Probate can be granted only to the person who has been named under the will under section 222 of the Successions Act. In case the Executor has not been appointed, the letters of Administration is to be granted to an universal or residuary legatee under section 232 of the Act.

Held-

The probate is granted only to an executor appointed by the will as provided under section 222 of the Act. In case the executor has not been appointed the letters of administration is to be granted to an universal or residuary legatee under section 232 of the Act. In case the person who had applied for probate/letters of administration dies, there are two courses open either the proceedings be dropped or permitted to be continued by a person who shall otherwise be entitled for probate/letters of administration. Para 4

By the Court

1. This is an application for deletion of the name of Sri Hemendra Swaroop Bhatnagar, the plaintiff and substitute the name of M.S. Bhatnagar in his place and there is a further prayer to substitute the name of Satyendra Kumar Bhatnagar also in addition to M.S. Bhatnagar.

2. Briefly stated, the facts are, that Jyoti Swarup Bhatnagar had no issue. He had one brother Har Swarup Bhatnagar. Har Swarup Bhatnagar expired in the year 1923 leaving behind him five sons namely Gyan Swarup Bhatnagar, Sachida Nand Bhatnagar, Brahm Swarup Bhatnagar, Brijendra Swarup Bhatnagar and Hemendra Swarup Bhatnagar. Hamendra Swarup Bhatnagar filed testamentary petition no. 13 of 1984 for grant of probate/letters of administration in the matter of goods and property of deceased Jyoti Swarup Bhatnagar on the allegation that he had executed a Will on 22.4.1920 which provided that till the life time of Har Swarup he will administer the property of Sri Jyoti Swarup Bhatnagar in accordance with the testament dated 22.4.1920 and after his death, the property shall be administered by the sons

of Sri Har Swarup Bhatnagar. Har Swarup Bhatnagar expired in the year 1923 and out of his five sons except the petitioner Hamendra Swarup Bhatnagar, all expired and thus he claimed that he was only surviving executor of the Will of deceased Jyoti Swarup Bhatnagar. On his petition, the notices were issued and on an objection being filed by the contesting opposite party, it was treated as contentious and registered as testamentary suit no. 6 of 1994.

3. Before the Will could be proved, the petitioner Hamendra Swarup Bhatnagar expired on 14.6.1999. An application was filed by M.S. Bhatnagar son of Brijendra Swarup Bhatnagar that he may be permitted to be substituted. Another application has been filed by Satendra Kumar, one of the sons of the petitioner Hamendra Swarup with the prayer that he may be substituted along with M.S. Bhatnagar. The opposite party, Ajay Kumar has filed objection to the application for substitution.

4. The core question is whether after the death of the petitioner in a testamentary suit his heir or any other person is entitled to be substituted in his place and if so, who shall be entitled to be substituted or in other words, to continue the proceedings for grant of probate/letters of administration under the provisions of Indian Succession Act 1925 (in short 'the Act'). The probate is granted only to an executor appointed by the Will as provided under Section 222 of the Act. In case the executor has not been appointed the letters of administration is to be granted to an universal or residuary legatee under section 232 of the Act. In case the person who had applied for probate/letters of administration dies, there are two courses open either the proceedings be dropped or permitted to be continued by a person who shall otherwise be entitled for probate/letters of administration.

Where any suit is filed in the Civil Court, on the death of the plaintiff the suit shall not abate if the right to sue survives. On the death of the plaintiff, the Court can permit a legal representative of the deceased plaintiff to be made a party under Order 22, Ruled 3 of the Code of Civil Procedure. Similarly, if the defendant dies, his legal representatives can be substituted under Rule 4 of Order 22 C.P.C. The Code of Civil Procedure was amended in 1976 and Order 4-A was added which provides that if, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in absence of the person representing the estate of the deceased person, or may by order appoint the administrator general, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit.

5. There is a difference between the proceedings of a suit and that of proceedings for the grant of probate/letters of administration. On the death of the plaintiff the Court allowed the application for substitution. The Court on an application of the legal representative of the deceased plaintiff shall make him a party in the suit if the right to sue survives. The Court has to examine whether such an applicant is entitled to be substituted in relation to the cause of action in the suit and the relief claimed. A petition for probate/letters of administration is filed on the allegation that the petitioner is entitled to probate or letters of administration under the provisions of the Act. One view is that the right to claim probate/letters of administration is personal and on the death of the petitioner the right to obtain probate/letters of administration does not devolve on his heir. In one case, the suit is decreed on the basis of the relief claimed in the suit but in the other case probate/letters of administration is granted under the provisions of the Indian Succession Act. But in that respect he has to establish that he is entitled to

such grant being an executor universal or residuary legatee under the Will.

6. The Calcutta High Court in Sarat Chandra Banerjee vs. Nani Mohan Banerjee, (1909) 36 Cal. 799, where executor claiming right of probate on the basis of Will, having died during the pendency of the probate proceedings, his widow sought to be substituted as being his heir, Harrington, J. rejected the application holding that the executor's right to sue did not survive. This decision was followed in Hari Bhushan Datta vs. Manmath Nath Datta, A.I.R. 1919 Cal. 197. In this case one Him Bhushan Datta applied for grant of letters of administration with a copy of the Will annexed to the estate of the deceased. He died leaving Hari Bhushan Datta as his heir and legal representative. Greaves, J. held that the right for grant of letters of administration was a personal right and this right did not devolve on his heir. It was, however, observed that the applicant may apply for grant of letters of administration and adopt such material proceedings as had been taken in the testamentary suit filed by his father. These two decisions came up for consideration before a Division Bench of Patna High Court in Mst. Phekni vs. Mst. Manki, A.I.R. 1930 Pat. 618. Fazl Ali, J. (as he then was), noted that the view taken by Greaves, J. will cause considerable hardship when the applicant, after death of the petitioner may be entitled to obtain letters of administration. The facts in this case were that an application was filed for letters of administration on the basis that the applicant was legatee under the Will. The application was resisted by the widow of the deceased. The District Judge rejected the application on the finding that the Will was not proved to his satisfaction. Against this decision the applicant filed appeal. During the pendency of the appeal the applicant died. An application for substitution was filed by his heir. It was resisted by the respondent on the ground that the right to obtain letters of administration was personal and the applicant could not be substituted. The Court repelled the contention with the following observation:-

"But it is not so clear why a person who has, admittedly, under the law, right to apply for letters of administration, and who derives this right from the legatee by virtue of being an heir of the legatee, should be debarred from carrying on the proceedings if the legatee happens to die after he had applied for letters of administration and before the letters have been granted."

7. In Chandramani Maity vs. Bipin Bihari, AIR 1932 Cal. 206, a distinction was drawn that though right to obtain probate of Will does not survive, in an appeal in a case where the judgment appealed against may operate as one in rem, different consideration will arise and substitution should be allowed. The above noted decisions of the Calcutta High Court were also discussed in P. Ram Naidu and others vs. Rangayya Naidu and others, A.I.R. 1933 Mad. 114 and were dissented from. The Division Bench of the Madras High Court took the view that an executor named under the Will, acts in a representative capacity, i.e., for the benefit of whole class of persons including himself, interest in having the Will established. The concept that the right to obtain a probate/letters of administration is limited to a person who has applied for, was not taken as correct because if the Will is proved and probate/letters of administration is granted, it will benefit not only him but others who are equally interested in it. Any person interested in the matter can intervene in the proceedings. The position of a petitioner for probate was taken as that of a plaintiff under Order 1, Rule 8 C.P.C. It is based on the principle that one of the necessary incident of a representative suit is that any person for whose benefit it is instituted may intervene and ask to be made a party under Order 1, Rule 8(3) C.P.C. The petition for probate stands on a footing similar to that of a representative suit. It was observed that if the

petition for probate stands on the footing similar to that of a representative suit, it is a right in principle to extend the analogy and hold that any legatee or beneficiary may, on a proper case being made intervene at any stage and claim to come on the record.

8. The above noted decisions were surveyed in detail in Jadeja Pravinsinhji Anandsinhji vs. Jadeja Mangalsinhji Shivsinhji and others, A.I.R. 1963 Guj. 32. The view taken by the Madras High Court in Rama Naidu's case (supra) was followed. Mehta, J. did not agree with the view taken by Justice Harington in Sarat Chand's case (supra). It was held that on the death of the executor before having proved the Will, the residuary legatee who claimed to be beneficiary under the Will is entitled to continue the proceedings on the principle that an executor named under the Will and who may happen to be beneficiary under the Will, in applying for probate does not fight a personal action but fights for the interest of all the beneficiaries under the Will.

9. The action of an executor in applying for probate is not in substance a personal action. There is no reason that after his death the person claiming the benefit under the Will cannot apply to continue the proceedings. On the other hand, to ask the applicant to file another application for probate/letters of administration, will unnecessarily cause hardship and it will spoil all the proceedings which have already been taken.

10. Learned counsel for the respondent relied upon the decision in Edward Waston Coleston vs. Mrs. Theresa Chitty and others, A.I.R. 1934 All. 1053. In this case the learned Judge had granted probate to the Administrator General as the executor named under the Will was not in sound financial position, this Court held that the probate can be granted only to the person who has been named under the Will under Section 222 of the Succession Act and not the Administrator General who was not named under the Will. The proper course to adopt would be to take proceedings under Section 232 of the Act, under which when an executor dies, after having proved the Will, but before having administered all the estate of the deceased, a universal or a residuary legatee may be admitted to prove the Will and letters of administration with the Will annexed may be granted to him of the whole estate or so much thereof may be administered. It was not a case whether an executor had died and the heirs had applied for substitution.

11. Hamendra Swarup, who had applied for probate/letters of administration, claimed that Jyoti Swarup had appointed his brother Har Swarup as executor and after his death his sons and at the time he applied for probate/letters of administration, he was only entitled to apply for the same. He died leaving behind him two sons namely Satendra Kumar and Ajai Kumar. Ajay Kumar has not filed an application to continue the proceedings. M.S. Bhatnagar, son of Brijendra Swarup (nephew of Hamendra Swarup), has also applied for substitution. Brijendra Swarup had not applied for probate/letters of administration. He does not claim any independent right to apply. Satendra Kumar, being the legal representative of Hamendra Kumar, is entitled to continue the proceedings.

12. In view of the above, the application of Satendra Kumar is allowed and the application of M.S. Bhatnagar is rejected.

I order accordingly.

ORISINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: NOVEMBER 26, 1999.

BEFORE
THE HON'BLE S.R.SINGH, J.
THE HON'BLE D.R. CHAUDHARY,J.

Civil Misc. Writ Petition No.523 of 1999.

Abdul Rahman Jafri S/O Abdul Mannan Jafri ...Petitioner.
Versus
The State of U.P. through the Ministry of Home Affairs and other ...Respondents

Counsel for the petitioner:
Mr. S. S. Tyagi

Counsel for the Respondents:
G.A.
Dr. Lal Bahadur (In person)

Prevention of Corruption Act Section 31- The petitioner cannot be prosecuted under section 161 and 165 A of I.P.C. which have been omitted vide section 31 of prevention of Corruption Act.
Held --
The petitioner cannot be prosecuted under section 161 and 165 A of Indian penal Code which have been committed vide section 31 of the prevention of Corruption Act. There cannot be any prosecution of any person under the aforesaid sections and the learned Trial Judge has erred in law in directing that the accused Abdul Rahman Jafri Shall be charged under Section 161 and 165-A I.P.C. The 'Sanction' implies application of mind. Exercise of power to sanction prosecution sans application of mind is bad in Law and invalid . In the circumstances, therefore, the petition deserves to be allowed. (Para 9)

By the Court

1. The petitioner, Abdul Rahman Jafri, a Class III employee in the Family Court, Allahabad has instituted the present writ petition seeking issuance of writ in the nature of certiorari quashing the part of the order dated 22.12.1999 (annexure no.5) where by the second respondent has ordered that the petitioner "Shall be charged under section 161 and 165-A of I.P.C."

2. Before proceeding further it may be mentioned here the petition was entertained initially by a Single Judge Bench but on an application moved by the complainant Dr. Lal Bahadur, the Bench consisting of Hon'ble the Chief Judge and Hon'ble M. Katju, J. by order dated 13.9.1999 directed that the matter be placed before a bench presided over by one of R. Singh, J.) and it was pursuant to the said order that the matter was listed before this Bench .

3. We have Heard Shri S. S. Tyagi for the petitioner and Government Advocate for Sate and Dr. Lal Bahadur, the complainant who appeared in persons.

4. It transpires from the record that a F.I.R. was lodged by Shri Surendra Pratap Mishra , Judge Family Court , Allahabad against the petitioner and four others under Section 161 and 165 -A of the Indian Penal Code. The F.I.R. was lodged on the basis of a complaint made by Dr. Lal Bahadur to the Hon'ble the Chief Justice that Brij Bhushan Pandey, Mohd. Shakil, Manglesh and Abdul Rahman Jafri working as class III employees in the Court of Judge, Family Court Allahabad took illegal gratification of Rs. 150/-- on 4th and 5th February , 1997 for issuing copy of an order. The F.I.R. Was lodged at Police Station Colonelganj., Allahabad. On the basis of of the aforesaid F.I.R. , Case Crime No. 139 of 1997 was registered at Police Station Colonelganj, Allahabad and on comprehended by Section 19 of the Prevention of Corruption Act, 1988. The District and Sessions Judge acting as Incharge Judge Family Court , Allahabad. By his order dated 27.7.1998 accorded permission for prosecution of the petitioner and Mohd. Shakil in case crime no. 139 of 1997, Police Station Colonelganj, Allahabad under Sections 161 and 165-A I.P.C. and

Section 7 and 13 (1)(a) of the Prevention of Corruption Act , 1988. Earlier the Judge Family Court , Allahabad by his order dated 3.6.98, being annexure no.2 to the writ petition, had accorded sanction for prosecution of co-accused Brij Bhushan Pandey and Manglesh Singh in the self same case under Section 7 and 13 (1) (a) of the Prevention of Corruption Act, 1988. According ly the cognizance was taken by the competent court and criminal case no.4 of 1998 State Versus Brij Bhushan Pandey and others was registered against the petitioner and four others.

5. The petitioner moved an application being annexure no.4 to the Writ Petition before the Trial Judge praying for quashing of his prosecution on the ground that the sanction accorded vide order dated 27.7.1998 was invalid and without jurisdiction. The learned Trial Judge by the impugned order dated 22.12.1998 held that the District & Sessions Judge acting as Incharge Judge, Family Court was not competent to grant sanction of the petitioners prosecution. Accordingly the petitioner was held "liable to be discharged under Section 13(2) of the prevention of Corruption Act,1988". But at the same time the learned Trial Judge directed that the petitioner be charged under Section 161 and 165-A of the Indian Penal Code. Relevant part of the impugned order dated 22.12.1998 reads as under :

"Since the court has been prohibited to take cognigance for want of valid sanction thus the case cannot proceed against accused Abdul Rahman Jafri and he is liable to be discharged under Section 13(2) of Prevention of Corruption Act. 1988.

As for Section 161 I.P.C. and Sec. 165-A I.P.C. is concerned no previous sanction is required under Section 19 of Prevention of Corruption Act. 1988.

Previously under section 6of the Prevention of Corruption Act. 1947, previous sanction was required for prosecution under Section 161 and 165 of I.P.C. also but the act has been repealed and replaced by Prevention of Corruption Act.1988, in which no previous sanction is required for prosecution under Section 161 and 165 of I.P.C. and as such accused Abdul Rehman Jafri shall be charged under Section 161, 165-A of I.P.C.

It is made clear that if prosecution obtains valid sanction from Competent Authority mentioned under section 19 of Prevention of Corruption Act 1988, accused shall be tried for that offence under Section 13(2) of Prevention of Corruption Act.

As discussed above the accused Abdul Rehman Jafri shall be charged under Section 161 and 165-A of I.P.C.

Fix 5.1.99 for fixing of charge. All accused should appear an that date for framing of charge.

6. It is not disputed that the Judge, Family Court is the authority competent to remove the petitioner. Section 19 of the Prevention of Corruption Act , 1988 Provides that no Court shall take congnizance of offence punishable under Section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant , except with the previous sanction of authorites referred to in clauses (a) , (b) and (C) of sub Section (I) of Section 19 of the Prevention of Corruption Act Which are quoted below.

"(a) In the case of a person who is employed in connection with the affairs of the Union and is not removable from his offence save by or with the santion of the Central Govt. of that Government ,

(b) In the case of a person who is employed in connection with the affairs of a State and is not removble form his offence save by or with the sanction of the State Government of that Govt., or with the

sanction of the State Government , of that Government,

(c) In the case of any other person of the authority competent to remove him from his office."

7. The petitioner's case is covered by clause (c) of Sub Section (1) of Section 19 of the Prevention of Corruption Act, 1988. The District and Sessions Judge being not the authority competent to remove the petitioner as held have no jurisdiction to grant sanction for offence punishable under Section 13 of the said Act . This part of the order has not been challenged. We there fore, do not consider it necessary to express our opinion as to correction otherwise of the view so taken by the Trial Judge or examine the effect of "any error" in the sanction dated 27.7.1998 as stipulated in Section 19(2) of the read with clause (a) of the Explanation appended to Section 19.

8. It would be evident from the order aforestated that the sanction accorded by the District and Sessions Judge in his capacity as Incharge Judge, Family Court, Allahabad has been set at naught by the order impugned herein but in so far as it relates to prosecution under Section 161 and 165-A of Indian Penal Code it has maintained. The submission made by the learned counsel appearing for the petitioner is that Section 161 to 165-A of the Indian Penal Code (both inclusive) have been omitted vide Section 31 of the Prevention of Correction Act,1988 reads as under :

"31. Omission of certain section of Act 45 of 1860 Section 161 to 165-A (both inclusive) of the Indian Penal Code shall be omitted, and Section 6 of the General Clauses Act , 1897(10 of 1897), shall apply to such omission as if the said sections had been repeaied by a central Act."

9. The alleged incident of taking illegal gratification is of February 4/5, 1997 . The F.I.R. was lodged under Section 161 and 165-A of Indian Penal Code read with prevention of Corruption Act and the sanction too appears to have been granted for prosecution in case crime no.139 of 1997 Police Station Colonelganj, Allahabad under Section 161 and 165-A I.P.C. read with Section 7/13(1) (a) of Prevention of Corruption Act but the fact remains that the petitioner cannot be prosecuted under Section 161 and 165-A of Indian Penal Code which have been omitted vide Section 31 of the Prevention of Corruption Act. The order dated 27.7.1998 of the District and Sessions Judge passed in his capacity as Judge, Family Court, Allahabad according permission for the prosecution of the petitioner under Section 161 to 165-A I.P.C. (both inclusive) appears to have been passed of the provisions contained in Section 31 of Prevention of Corruption Act, 1988 which provides that be any prosecution of any person under the aforesaid sections and learned Trial Judge shall be charged under Section 161 and 165-A both inclusive have been omitted . There cannot be any prosecution of any person under the aforesaid sections and learned Trial Judge has erred in law in directing that the "accused Abdul Rahman Jafri shall be charged under Section 161 and 165-A I.P.C. " The "Sanction" implies application of mind is bad in law and invalid . In the circumstances, therefore, the petition deserves to be allowed.

10. Accordingly the petition succeeds and is allowed. The impugned order dated 22.12.1998 in so far as it directs that the "accused Abdul Rahman Jafri shall be charged under Section 161 and 165-A I.P.C." is quashed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD :14.12.1999

BEFORE
THE HON'BLE G.P.MATHUR,.J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 25666 of 1999.

M/s S. U. Builders, Allahabad and another ...Petitioners.
Versus
Vice Chairman, Allahabad Development Authority, Allahabad & others...Respondents.

Counsel for Petitioner:
Sri. C.B. Yadav.

Counsel for Respondents:
Sri. A.K. Misra
Sri Bhagwati Pd.

Constitution of India Article 226- the award of the contract is purely administrative matter. Modern trend points to judicial restrain while reviewing administrative decisions relating to contractual power of Govt. case law referred AIR 1996 SC page 011, AIR 1999 SC page 397 & AIR 1999 SC page 1153.
Held- para 15
The respondent nos. 5 & 6 have been awarded the contract on the basis that they offered the lowest rate for the work. The award of the contract is purely administrative matter. The Scope of enquiry in judicial review of an administrative action has been considered. (modern trend points to judicial restrain while reviewing administrative decisions relating to contractual power of Government.)

By the Court

1. The petitioners by means of this writ petition under Article 226 of the Constitution seek indulgence of this court for issuing a writ nature of certiorari quashing the tender proceedings, which tool place pursuant to the tender notice dated 18.8.1998 published in local News paper "Dainik Jagran". Further seeking a writ of certiorari that the work order regarding High Tension, Low Tension line and Street Light of Trivenipuram Avas Yojana in favour of the respondent nos. 5 & 6 may also be quashed. It is further prayed that the respondents may be commanded by a writ or order in the nature of mandamus to negotiate with the petitioners who have offered over all lowest tender in pursuance of the tender notice dated 18.8.1998.

2. Allahabad Development Authority (hereinafter referred to as the Authority) floated the tender notice inviting the offers from the contractors who were registered with the Authority and were having certificate from the Director Electrical Safety Directorate, State of UP Lucknow as Class-A approved contractors. Considering it a sensitive and specialised technical work the Authority gave priority to those contractors who posses requisite know how, technical competence and the equipment's, capital etc. to undertake such specialised work and therefore, required the tenderers to submit a technical offer and financial offer as well. Among the tenderers only 5 could fulfil the requirements, hence they were allowed to tender their offer. The tenders were opened on 28.9.98. The Executive Engineer, considering the rates offered by respondent no.5 for the HT & L.T. line work, being the lowest, started negotiation vide his letter dated 11.12.1998 suggesting the respondent no.5 to reduce the rate offered by him. The respondent no.5 vide his letter dated 18.12.1998 showed his willingness to reduce his rate by 0.15 %. The Executive engineer was not satisfied with such an offer in reduction of the rate, therefore, he wrote again a letter on 27.1.1999 to respondent no.5 to further reduce his rate. On this the respondent no.5 by his letter dated 28.1.1999 offered to reduce the rate to 12.49 % above the scheduled rate. The petitioner on having information about the reduction of the rates by the respondent no. 5 wrote a letter dated 4.2.1999 contained in Annexure-6 to the counter affidavit of Shailendra Singh offering to work at the rates submitted by respondent

no.5. So, the other tenders also expressed their willingness to reduce the rate to the extent offered by the respondent no.5. In pursuance to the offers made by the tenderers and also having regard to the fact that the work has to be completed within a period of 8 months, a Committee consisting of Executive Engineer, Superintending Engineer, Chief Accounts Officer and the Secretary of the Authority was constituted. The Committee submitted its report dated 18.2.98 recommending the distribution of work among all the tenderers. The Secretary of the Authority dissented with the recommendation. He refused to sign the report. Consequent upon this report into consideration by the higher authorities. However, the tender which was opened on 28.9.98 was accepted on 4.6.99 and by work order dated 5.6.99 the respondent no.5 was directed to carry out the work and submit the stamp papers for agreement. The respondent no.5 executed deed on 7.6.99 and then completing the formalities the respondent no. 5 started work.

3. We heard Sri C.B. Yadav, learned counsel appearing for the petitioner and Sri A.K. Misra, learned counsel appearing for the respondent nos. 1 to 4 and Sri Bhagwati Prasad, learned counsel appearing for the respondent no.5.

4. The contention of the learned counsel appearing for the petitioner is that the tender notice was floated for the combined work of H.T. & L.T. Line and the Street light work. There has been no bifurcation of the work in two parts. Subsequently, with the object to defeat the interest of the petitioner the work has been bifurcated. Petitioner had offered lowest rate for the work of H.T.& L.T. line and Street Light to the tune of Rs.1,59,16,451.78 while respondent no. 5 had offered second lowest rate to the tune of Rs.1,59,16,461.03. Thus, the petitioner tendered the lowest rate for the execution of the work, that the negotiation ought to have been done between the lowest tendered and the Authority, whereas, the negotiation has been made with the respondent no.5, who is the second lowest tendered, that the tender of respondent no.5 has been illegally, arbitrarily and unreasonably by the Tender Committee, without showing any cogent reason. It is further contended that the Authority has not framed any rule / policy regulating the contract.

5. On the other hand, the learned counsel appearing for the respondents urged that the work was divided into two parts. One relates to the laying of H.T.& L.T. line and other for Street Light and a schedule of the work was furnished in advance with the tender form. The petitioner and other tenderers thus were aware of the division of the works in two parts. So also all the tenderers, including the petitioner and the respondent no.5 & 6 have furnished rates for the execution of the work separately under two heads i.e. H.T.& L.T. and Street Light. The petitioner himself offered to complete the work of H.T. & L.T. for Rs.1,45,34,713.28 and to complete the work of street light for Rs.13,81,738.50. The petitioner is, therefore, stopped from raising plea that the work has been bifurcated detrimental to his interest. Besides that all tenderers tendered the costs of works H.T. & L.T. line and street light separately.

It is further urged that the petitioner offered the cost of Rs.1,45,34,713.28. for the work of H.T.& L.T. whereas, the respondent no. 5 offered Rs.1,45,33,454.88. Thus, the rate of the respondent no.5 was the lowest among the tenderers and the rate of the petitioners was next lowest rate. For the work of street light the petitioner tendered to execute the work for Rs.13,81,738.50, whereas the respondent no.6 offered to complete the work of Street Light for Rs.13,79,203.20. Thus, the petitioner can not claim to be lowest tenderer on both the items. The rate tendered by the petitioner was Rs.1,59,16,451.78 where as rates tendered by the respondent no.5 & 6 for the completion of

both the works comes to Rs.1,59,12,658. On negotiation the respondent no.5 had agreed to work at the rate of 12.49 % above the schedule rate. Thus, both the works are to be completed for Rs.1,55,35132/-. Thus, the petitioner cannot be said to be lowest tenderer. In regard to the third contention it is urged by the counsel for the respondent that it may be stated that the negotiation could only be entered into by the Authority with the lowest tenderer and not with any other tenderer. The Authority therefore has not acted unreasonably, arbitrarily or illegally.

6. We perused the relevant papers on record. The respondents have filed the Tender Forms supplied to the petitioner and the respondent nos.5 & 6 and other two tenderers. The Tender Forms indicate that the work proposed to be completed by the contractors, was bifurcated in H.T. & L.T. line and Street Light. The Scheduled rates have been indicated therein. A comparative table of the financial rates offered by the technically qualified tenderers for the contract was prepared as below :-

Sl. No.	Name of Contractor	H.T. & L.T.	Street Light	Total
1.	M/s Shree Bhawani	15.49%(above) Rs.1,45,33,454.88	9.1 (above) Rs.13,83,006.15	Rs.1,59,16,461.03
2.	M/s S.U. Builder	15.5% (above) Rs.1,45,34,713.28	9.0% (above) Rs.13,81,738.50	Rs.1,59,16,451.78
3.	M/s R/G Traders	17.5%(above) Rs.1,47,86,396.68	8.8%(above) Rs.13,79,203.20	Rs.1,61,65,599.88
4.	M/s Rajesh Electricals	18%(above) Rs.1,48,49,317.48	10%(above) Rs.13,94,415.00	Rs.1,62,43,732.48
5.	M/s Vilayti Ram Mittal	20.7%(above) Rs.1,51,89,089.98	20.7%(above) Rs.15,30,053.55	Rs.1,67,19,143.33

7. In the above table the contractors have offered district rates for the two separate works. It is all indicative of the facts that the entire work was bifurcated in two parts. The contention of the petitioner's counsel is that the work was bifurcated later to give benefit to the respondent nos. 5 & 6 and to defeat the interest of the petitioner, is not sustainable.

8. The rates offered by the petitioner and the respondent nos. 5 & 6 are compiled in the above table. Which demonstrates that the petitioner offered to complete the work of HT & LT line for Rs.1,45,34,713.28, whereas the respondent no.5 offered to complete the same work for Rs.1,45,33,454.88. Thus, the rate offered by the respondent no. 5 for completion of the work of HT & LT line was lowest among the offers made by the petitioner and the other contractors. The table further demonstrates that the petitioner offered to complete the work of Street Light for Rs.13,81,738.50, whereas the respondent no. 6 agreed to complete the same work for Rs.13,79,203.20. The rate offered by respondent no.6 is lowest among the offers made by the other contractors including the petitioner. The total amount for completion of the work offered by the respondent nos.5 & 6 was Rs.1,59,12,658. Therefore, the Authority committed no irregularity or illegality in considering the rates offered by the respondent nos. 5 & 6 which were the lowest. Apart that the respondent no.5, on have negotiations with the Executive Engineer,

agreed to complete work of H.T. & L.T. line at the rate 12.49 % above the schedule rates. Thus, both the works are to be completed by the respondent nos. 5 & 6 for Rs. 1,55,35,132. The petitioner, therefore, cannot be said to be the lowest tenderer. As for contention of the petitioner's counsel that the petitioner also offered to complete the work at the rate, offered by the respondent nos. 5 & 6. In para 18 of the writ petitioner himself admits that Article 364 of the Financial Hand Book Vol. VI Chapter 12 provides that-

"Usually the lowest tender should be accepted, unless there be some objection to the capability of the contractor, the security offered by him, or his execution of former work. At the same time acceptance or rejection of tenders is left entirely to the discretion of the whom the duty is entrusted, and no explanation can be demanded of the cause of rejection of his offer by any person making a tender. In cases where the lowest tender is not accepted, reasons should, however, be recorded confidentially....."

In para 19 of the writ petition the petitioner has admitted that negotiations take place with the lowest tenderer only. We are, therefore, of the view that the respondent no.1 has rightly with all diligence executed its contractual power considering the rates offered by the respondent nos. 5 & 6 as lowest and has reasonable without detrimental to the interest of any body has negotiated with the respondent no. 5 as far relates to the work of H.T.& L.T. line.

9. It may also be mentioned here that the Executive engineer did not negotiate with the petitioner perhaps for the reasons; firstly, that the tender submitted by the petitioner was not lowest; secondly, because, as stated in the affidavit filed by Sri B.K. Singh on behalf of the respondent nos. 1 to 4 that in the past under Agnipath Scheme the petitioner was awarded a contract work of L.T. line. He could complete a part thereof, even despite of the expiry of the extended time allowed to him for the completion of the work. The petitioner has not controverted this fact in his rejoinder affidavit.

10. In the case of **G.B.Mahajan Vs. Jalgaon Municipal Council AIR 1991 SC 1153** Hon'ble Supreme Court has observed that :-

"while it is true that principle of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked."

11. In the present case, the material placed before the Court does not indicate that the authorities have accepted the tenders of respondent nos. 5 & 6 for irrelevant consideration or on self misdirection or violated the public law in the contractual decision. Hence the administrative exercise of power by the respondents does not fall within the purview of the judicial review.

In **Raunaq International Ltd. V. I.V.R. construction Ltd. AIR 1999 SC 397** the Hon'ble Supreme Court held that-

"When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial

transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that is a substantial amount of public interest, or the transaction is entered into malafide, the Court should not intervene under Article 226 in disputes between two rival tenderers."

12. In the instant case it is neither pleaded that in this case public interest is involved nor from the impending circumstances it may be inferred that public interest is involved in awarding the contract in question. On the contrary the Authority under took the housing project known as Trivenipuram Housing Scheme, wherein approximately 1438 plots were carved out for construction of residential houses. A number of residential houses have already been constructed and residents have been constantly pressing their demands of electrification of the area at the earliest possible. So in the public interest and also undertaking given by the respondent no.5 to complete the work at the earliest possible, the contract has been awarded to him. We do not find illegality or arbitrariness in the action of the Authority in exercising contractual power by awarding contract to respondent no. 5 & 6.

13. It is pertinent to mention here that Sri Om Chand in the supplementary counter affidavit has stated that in pursuance of contract awarded on 5th June, 1999 the respondent no.5 has already completed substantial work of the project and about half of the work on the spot has already been completed. As against the total sanctioned amount for HT & LT Line the Authority had already paid a sum of Rs. 36.75 lacs to the respondent no.5. Therefore, any intervention by the court, the proposed project, may be considerably delayed escalating cost and public interest would be marred.

14. In the Raunaq International Ltd. case (Supra) The Hon'ble Supreme Court has further observed that-

"It is also necessary to remember that price may not always be the sole criterion for forwarding a contract. Often when an evaluation committee of experts is appointed to evaluated offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderers, the quality of the goods or series which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a low price. The Court should not substitute its own decision for the decision of an expert evaluation committee."

15. The respondent nos. 5& 6 have been awarded the contract on the basis that they offered the lowest rate for the work. The award of the contract is purely administrative matter. The Scope of enquiry in judicial review of an administrative action has been considered in Tata Cellular case, AIR 1996 SC 11 (paragraphs 85 & 112) and it has been observed that- (modern trend points to judicial restrain while reviewing administrative decisions relating to contractual power of Government.)

16. In view of above factual and legal position, we have no other option except to dismiss the petition.

17. The petition is, accordingly, dismissed. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD DECEMBER 10. 1999

BEFORE
THE HON'BLE S.K. AGRAWAL, J.

Criminal Misc. (482) Application No. 2376 of 1999

Dilip Kumar ...Applicant.
Versus
Family Court, Gorakhpur and others ...Opp.parties.

Counsel for the Applicant:
Sri Raj Karan Yadav

Counsel for the Opposite parties :
A.G.A.
Sri Shankar Suan

Section 125 (3) of Cr.P.C.- the family judge had passed a consolidated order for 12 months confinement of the applicant in one stroke no composite confinement can be directed by the court. Confinement can extend to only one month. If even after expiry of one month the husband does not make payment, the wife can approach the Magistrate again for similar relief. The case law referred (1999) V SCC page 672.
Held—Para 5
That the person can be kept under confinement for each month's default and the confinement can be only for a period of one month. The subsequent part "until payment if sooner made" further clarifies the situation to the extent that such a husband can be confined to a period of one month even if the default is of more than a month and he can be allowed to come out of jail if the payment is made earlier at any point of time within this period. The court cannot keep him in confinement any further beyond a period of one month by one stroke of pen.

By the Court

1. Heard learned counsel for the applicant, Sri Shankar Suan, learned counsel for the opposite party, and also learned A.G.A. for the Stated.

2. On the last date while admitting this application, clear direction was given to the State counsel that he shall also prepare himself on the question whether any court deciding an application for recovery of the amount due under section 125 Cr.P.C. to the wife from the delinquent husband can pass an order of his confinement for a period of one year competitively or any other consolidated period.

3. A perusal of Section 125 (3) Cr.P.C. very clearly indicates that no such order can be passed by any court be it a Family Court or a court of a Judicial Magistrate. The courts are entitled to pass an order against any delinquent husband, who has not made the payment and allowed the wife to lead a destitute life, in the absence of such payment, to a confinement or imprisonment for a term which may extend to one month or until payment it sooner made. The earlier portion of this sub-section clearly shows that this confinement or imprisonment will be against each month's default section 125 (3) Cr.P.C. is quoted below:

"(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may for every breach of the order issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

4. Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the

Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if ;such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing"

5. From these it is clearly available that the person can be kept under confinement for each month's default and the confinement can be only for a period of one month. The subsequent part 'until payment if sooner made' further clarifies the situation to the extent that such a husband can be confined to a period of one month even if the default is of more than a month and he can be allowed to come out of jail if the payment is made earlier at any point of time within this period. This very clearly indicates that if the payment is made within this period on any date his confinement will come to an end. The purpose behind this enactment of provision for confinement is to put to an end to the sufferings of the wife by compelling the husband to pay the maintenance amount. The court cannot keep him in confinement any further beyond a period of one month by one stroke of pen, in the present case an application was moved by the wife for the recovery of the arrears amount, which appears to be for several months. The Family Judge has passed a consolidated order for 12 months' confinement of the applicant, i.e. for the total period of default. The applicant is the husband, who has failed to make payment of the maintenance amount allowed not only to the wife but also to his children. He has failed to discharge this obligation. The court is vested with this extensive power with this extensive power with this interest in mind, i.e. compelling the husband to discharge his obligation imposed upon him by an order of a competent court.

6. In view of the discussions made above, the order of the learned Family Judge is wholly unsustainable. I am fortified in my view by a latest decision of the Apex Court reported in (1999) 5 S.C.C. 672 (Shahada Khatoon and others v. Amjad Ali and others). The Apex Court has gone to the extent of saying that the confinement can extend to only one month and if even after the expiry of one month the delinquent husband does not make the payment of arrears then the wife can approach the Magistrate again for a similar relief but the confinement of the husband must be only of on month. In the own words of the Apex Court 'By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month'. Thus, this latest decision of the Apex Court further lays down a fetter in the exercise of this power by the Judicial Magistrate or the Family Judge to the extent that only a confinement for a period of one month can be passed on an application whether the amount claimed by the wife as arrears is for more than one month or for only a month. In one stroke no composite confinement can be directed by the court. It very clearly flows from the above decision. This power can be exercised only after a warrant for recovery of the unpaid maintenance allowance is issued by the court. This warrant is to be executed like any warrant of recovery of fines. This fine can be recovered like any land revenue arrears. Unless that exercise is first adhered to, this power of confinement to jail for his failure can not be resorted to by any court.

7. Accordingly, this 482 application is allowed and the order passed by the Family Judge on24.4.1999 is hereby quashed. However, it will be open for the Family Judge to pass a fresh, proper ;and judicial order in accordance with the provisions of law and as decided by the Apex Court in the aforesaid

case in case if any application is moved by the wife.

Application Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.12.1999

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE S.R. SINGH, J.

Special Appeal No. 1265 of 1999

Pushpendra Singh ...Appellant.
Versus
Regional Manager, U.P. State Road Transport Corporation, Aligarh &another...Respondents

Counsel for the Appellant:
Shri Dhan Prakash

Counsel for the Respondent:
Shri Samir Sharma

Dying in Harness Rules- Employee died in harness on 21.8.84-Application for giving appointment on compassionate ground was moved by his son on attaining majority on 12-12-1998- the compassionate appointment cannot be given after a lapse of reasonable period and after the crises is over. However, a direction was issued to the respondents to consider his application for temporary appointment if the family is still feeling under the financial crises. The case law referred (1999) IV SCC page 138, (1996) I S.L.R. page 007, 1996 S.L.R. page 011.
Held—Para 6
By reason of reliance upon the said observations as also upon the Rules which envisage consideration of an application for compassionate appointment made even after five years of the death of the employee if the circumstances so warrant, the appeal is disposed of post-fixed with the observation that in case an application is moved, the respondents may reckon with the feasibility of a temporary appointment if the family is still reeling under financial straits.

By the Court

1. Appeal on hand stems from the judgment and order dated 4.11.99 passed in Writ Petition No.46695 of 1999 thereby dismissing the writ petition in limine. The facts constitutive of the grievances of the appellant is that the appellant's father who was serving in the U.P. State Road Transport Corporation, died in harness on 21.8.1984. At the time of the death of his father, the appellant was minor and he attained majority on 12.12.98. He applied for compassionate appointment on 23.2.99 permissible under the provisions of the U.P. (Recruitment of Government Servants) Dying in Harness Rules, 1974. The claim of the appellant for compassionate employment under the Dying in Harness Rules met the fate of rejection at the end of Regional Manager U.P. State Road Transport Corporation, Aligarh vide order dated 30.6.1999 premised on the ground that the application was not moved within five years of the death of the employee.

2. The learned Single Judge dismissed the writ petition. The quintessence of the order dismissing the writ petition is that after such a long time of death of the deceased, the right of the claimant stood extinguished.

3. We have heard **Sri Dhan Prakash,** learned counsel for the appellant and **Sri Samir Sharma,** counsel appearing for the respondent no. 2.

4. The rule of compassionate is an exception to the general mode of appointment strictly on the basis of open invitation of applications on merits. It is born of pure humanitarian consideration and interest of justice, reckoning into consideration the fact that unless some source of sustenance is provided the family would not be able to fend for itself on its own. 'The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis'- **Umesh Kumar Nagpal v. State of Haryana and Others**[1]**.** In the said case, the Supreme Court has held the view that that mere death of an employee in harness does

[1] (1994) 4 SCC 138

not entitle a family to get employment as of right irrespective of "the financial condition of the family of the deceased". "The compassionate appointment", it has further been held, "cannot be granted after a lapse of reasonable period which must be specified in the rules. The consideration for such employment is not a vested right, which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole bread winner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

5. In **Jagdish Prasad v. State of Haryana**[2] the question of appointment on compassionate ground to an applicant who was four years old at the time when his father, an ex-employee died in harness came up for consideration before the Apex Court. It was contended that since the appellant therein was minor when the father died in harness, the compassionate circumstances having continued till the date he made an application for appointment, he was entitled to be appointed on compassionate ground. The contention was met with disapproval by the Supreme Court in the following words.

"The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year, the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of a deceased Government servant which cannot been encouraged, dehors the recruitment rules."

6. The view taken in **Haryana State Electricity Board** v. **Naresh anwar**[3]**,** reliance on which has been placed by Sri Dhan Prakash during the course of his arguments is not in any manner disparate with the view taken by the Apex Court in the cases referred to supra. The observations made in para 11 of the report that if a representation is made, the concerned authority namely, the Haryana State Electricity Board would consider the same with such benignity as the applicant therein might deserve in the facts of the case, was not a declaration of law extending coverage of Art. 141 of the Constitution. The impugned decisions do not suffer from the blemish of any infirmity. As a result of foregoing discussion the appeal is bereft of merits. However, by reason of reliance upon the said observations as also upon the Rules which envisage consideration of an application for compassionate appointment made even after five years of the death of the employee if the circumstances so warrant, the appeal is disposed of post-fixed with the observation that in case an application is moved, the respondents may reckon with the feasibility of a temporary appointment if the family is still reeling under financial straits.

Petition disposed of.

ORIGINAL JURISDICATION
CIVIL SIDE
DATED: ALLAHABAD: 29.11.1999

BEFORE
THE HON'BLE S.H.A. RAZA,.J.
THE HON'BLE KRISHNA KUMAR,.J.

Civil Misc. Writ Petition No. 15144 of 1981

The sole petitioner Suraj Bali Katiyar has been died on 26.4. 87 and after him the names of:
Smt. Satyawati Katiyar & others...Petitioner.
Versus
State of U.P. & another ...Respondent.

[2] 1996 (1) SLR 7

[3] 1996(2) SLR 11

Counsel for the Petitioner:-
Shanti Swaroop Bhatnagar.

Counsel for the Respondent:-
S.C.

2. Article 226 and 235 of the Constitution of India- High Court under Article 235 is vested with control of the Subordinate Judiciary. High Court ought not to have asked State Govt. to held the inquiry through the Administrative Tribunal. High Court failed to discharge its duty of preserving its control. The case law referred A.I.R. 1975 S.C. page 613, A.I.R. 1974 S.C. page 2192.
Held-para 6
It was the duty of the High Court to have conducted the enquiry preferably through the District Judge and thereafter would have recommended to the State Government for any appropriate action.

By the Court

1. The fate of this writ petition hinges on the reply to the question as to whether an enquiry conduct by the Administrative Tribunal against the judicial officer, an order of deduction of 50% of pension under Rule 351-A of Civil Services Rules, can be passed by the Governor of the State.

2. Before dealing with this question, it is pertinent to have a glance over the factual matrix of the case as set out in the writ petition by the deceased petitioner Suraj Bali Katiyar, who expired on 26.4. 1987 and in his place his wife, there sons and two daughters were substituted as petitioners.

3. Late Shri Suraj Bali Katiyar was appointed as a Judicial Officer under the provisions of U.P. Judicial Officers Service Rules, 1948 in the years 1955. On 30th September 1967 in pursuance of the provisions of Clause (3) of Article 348 of the Constitution of India, the Governor was pleased to order the publication of Notification No.P-7479/II-C-54/1961 in exercise of powers conferred by Article 237 of the Constitution of India.

4. It has been averred that on 27.5.1971 one Pandit Triveni Sahai, M.L.A. and one Radhey were shot dead in town of Dataganj , Dudaun , His Younger brother Radhey Shyam was the Deputy Inspector General of Police and Director of Vigilance, U.P. On 29.5.1971 one Balak Ram surrendered in the Court of late Shri Katiyar and preferred an application, in which it was mentioned that men of the complainant party and the police were hunting him out and if he would not be taken into custody, he would be killed. Late Shri Suraj Bali Katiyar ordered that accused Balak Ram be taken into custody and he was sent to jail.

5. Late Shri Suraj Bali Katiyar in this writ petition averred that Shri Radhey Shyam Sharma, Deputy Inspector General of Police and Director of Vigilance was very much annoyed to him due to that reason and he made a complaint to the Secretary to the Government of U.P. Vigilance Department leveling certain allegations against late Shri Katiyar and Shri Mahabir Prasad , the then District Judge, Budaun.

6. On 26.3.1973 Dr. Manohar Lal Gupta, Deputy Secretary to Government of U.P. requested the Registrar of this Court for initiating proceedings at the behest of Shri Radhey Shyam Sharma, Deputy Inspector General of Police, Who made a complaint.

7. On 27.11.1974 an order of suspension was passed against late Shri Suraj Bali Katiyar under the signature of late Shri Gulam Husain Commissioner and Secretary to the State Government, wherein it was indicated that under the order of the Governor, the case of the petitioner will be referred to the Administrative Tribunal under Rule 4(1) of the U.P. Disciplinary proceedings (Administrative Tribunal) Rules, 1947. The said letter also contains a copy of the charge – sheet and late Shri Suraj Bali Katiyar was directed to submit an explanation against the charge sheet. The Additional Registrar of the

High Court, Allahabad was asked to relieve late Shri Suraj Bali Katiyar from the charge of the judicial magistrate.

8. On 10.12.1974 late Shri Suraj Bali Katiyar submitted his reply to the Administrative Tribunal and submitted that he should be furnished with the copies of the document upon which the imputation of charges were based.

9. On 20th January, 1974 late Shri Suraj Bali Katiyar, after attaining the age of superannuation, was ordered to be retired with effect from 31.12.1976.

10. After late Shri Suraj Bali Katiyar was furnished with the copies of the document upon which the imputation of charges were based, on 9.4.1975 he submitted his detailed explanation to the charge sheet. On 18.7.1975 the Ad hoc Administrative Tribunal, Lucknow informed that the Governor Vide Notification No. 1775/39-1-2-M dated 5.7.1975 transferred the petitioner's (late Shri Suraj Bali Katiyar) matter from Administrative Tribunal IInd to Administrative Tribunal Ad hoc, comprising two members namely, Shri P.C. Pandey, I.A.S.(Chairman) and Shri A.P. Agarwal, Member, U.P. Administrative Tribunal IInd.

11. The contention of the learned counsel appearing on behalf of the petitioners is that the Tribunal was not properly constituted in accordance with Rule 3(7) of the Disciplinary proceedings (Administrative Tribunal) Rules, 1947 and the Governor could not make reference under Section 4(1) of the aforesaid Rules against a judicial magistrate under the control of the High Court in view of the notification dated 30.9.1967 under article–237 of the Constitution of India for the reason that the High Court was vested with a power to hold disciplinary proceedings in relation to the members belonging to U.P. Judicial Officers Service Rules as well as under Article 235 of the Constitution of India.

12. It was further contended by the learned counsel for the petitioners that neither the enquiry report was the petitioners that neither the enquiry report was submitted nor the recommendation of the Administrative tribunal was furnished to late Shri Suraj Bali Katiyar. On 25.3.1977 the District Judge, Etah sent a letter to late Shri Suraj Bali Katiyar asking him to show cause as to why he be not dismissed from service as recommended by the Administrative Tribunal .

13. The thrust of the learned counsel for the petitioners is that District Judge was not competent to issue show cause notice under Rule 10 of the Disciplinary proceedings (Administrative Tribunal) Rules, 1947. It was mandatory for the Governor to send the Tribunal's recommendation to the High Court and after receiving the decision of the High Court, the Governor could have passed the order of dismissal, removal or compulsory retirement or any other penalty.

14. Taking a cue from the decision of Hon'ble Supreme Court in Shamsher Singh Vs. State of Punjab , (A.I.R. 1974 SC 2192,) it was submitted that petitioner (Late Shri Suraj Bali Katiyar) was a Judicial Officer under the control of the High Court and as such enquiry through Vigilance department and by one member of Administrative Tribunal without consultation and recommendation of the High Court was void abinitio and without jurisdiction.

15. However, on 24.9. 1977 another show cause notice was received from the State Government, Which was served upon late Shri Suraj Bali Katiyar through the District Judge, Etah containing a notice dated 12.09. 1977, wherein it was indicated that the Administrative Tribunal vide its enquiry report dated 18.12.1976 found charges No.1 and 2 proved and exonerated from charge No.3 and since the Petitioner (Late Shri Suraj Bali Katiyar) had retired from Service with effect from 31.12.1976, the Governor directed

the State Government to issue a show cause notice as per the report of the Tribunal that as to why 50% of the pension may not be deducted under the provisions of Article 351-A of the Civil Service Regulation. Late Shri Suraj Bali Katiyar submitted his explanation against the show cause notice.

16. Charge no.1 mentions that on April 15, 1971, the deceased petitioner had taken a sum of Rs. 10,000/= at his residence from one Hifzul Hasan, Son of Daud Ali, residence of village Gabhiyai, P.S. Allapur, district Buduan as illegal gratification for granting bail to the nine persons case crime No. 77 of 1971, P.S. Allapur, under Sections 147/148/307/452/436 I.P.C. (S.T.No.292 of 1971. Although the deceased petitioner had rejected the bail applications of two accused on 15.4.1971. The deceased petitioner was also charged with a view to minimize the gravity of the charges leveled against the accused. The deceased petitioner in his order dated 16.4.1971 granted bail by indicating that co-accused Ameer Hasan had fired with a Tamancha and Monis Ali Khan had fired in the air.

17. Charge No.2 indicates that the deceased petitioner in the month of October, 1971 had taken illegal gratification, of which, two bottles of liquor, 15 Kg. Of kalmi Mangoes, 2 Kg. of sweet as well as meat and Rs. 1,000/- cash from the complainant Shri Makhan Lal to show him favour in complaint case No. 717 of 1970, in re: Makhan Lal Vs. Deep Chand, under Section 379/215 I.P.C. In the same month the deceased petitioner further took Rs.6,00/- from Deep Chand, accused in that case for acquitting him and obtaining an order for the return of the alleged stolen property, i.e. a camel.

18. As stated earlier the enquiry report of the Administrative Tribunal, IInd, U.P. Lucknow was sent along with a copy of the letter of the Additional Registrar of the High Court and the deceased petitioner was asked to submit a reply against the same.

19. In his reply, which late Shri Suraj Bali Katiyar submitted on 15.6.1980, it was mentioned that the entire proceedings were vitiated due to non furnishing of the report of the tribunal and denial of opportunity to show cause against the said notice inasmuch as after his retirement the petitioner (late Shri Suraj Bali Katiyar) was lying on his death bed. It was also stated that the proceedings suffer from colourable exercise of powers inasmuch as enquiry was initiated at the behest of Shri Radhey Shyam Sharma, Deputy Inspector to be the brother of Pandit Triveni Sahai, Who was murdered and the petitioner (late Shri Suraj Bali Katiyar) allowed the application of the accused for surrender and remanded him to judicial custody.

20. The first question which falls for consideration before this Court is as to whether the petitioner (Late suraj Bali Katiyar) could be subjected to investigation by the vigilance department and thereafter proceeded with in an enquiry by the Administrative Tribunal and the Governor of the State without the decision of the High Court under Article 235 of the Constitution of India can pass the impugned order under regulation 351-A of the Civil Service Regulations deducting 50% from the pension of the petitioner (Late Shri Suraj Bali Katiyar).

21. Article 235 of the Constitution of India with the control of the High Court over the Subordinate Courts, which reads as under:
"235. Control over subordinate courts:-- The control over district court and courts and courts subordinate there to including the posting and promotion of and the grant of leave to , persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court , but nothing in this

article shall be construed as taking away from any such person any right of appeal under such Law:

22. In State of West Bengal Vs. Nripendra Nath A.I.R. 1966 SC 447, a Constitution Bench of Hon'ble Court observed in para 13 of the report:

" We do not accept this contention. The word "Control" is not defined in the Constitution all. In part XIV which deals with Services under the Union and the State the word "disciplinary control" or " disciplinary jurisdiction" have not at all been used. It is not to be thought that disciplinary jurisdiction of services is not contemplated. In the contest the word "control" must, in our judgement, include disciplinary jurisdiction. In deed, the word may be said to be used as a term of art because the Civil Service (Classification, Control and Appeal) Rules used the word "Control" and the only rules which can legitimately come under the only rules which can legitimately come under the word " control" are the Disciplinary Rules. Further, as we have already show, the history which lies behind the enactment of these articles indicates that " Control" was vested in the High Court to effectuate a purpose namely, the securing of the independence of the subordinate judiciary and unless it included disciplinary control and unless it included disciplinary control as well the very object would be frustrated. This aid to construction is admissible because to find out the meaning of a law, recourse may legitimately be had to the prior Sate of the Law, The evil sought to be removed and the process by which the law was evolved. The word "control" as we have seen, was used for the first time in the Constitution and it is accompanied by the word "vest" which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary. Control, therefore, is not merely the power to arrange the day to day working of the court but contemplates disciplinary jurisdiction over the presiding Judge. Article 227 gives to the High Court superintendence over these courts and enables the High court to call for returns etc. The word "Control" in Article 235 must have a different content. It includes something in addition to merd superintendence. It is control over the conduct and discipline of the judges. This conclusion is further strengthened by two other indications pointing clearly in the same direction. The first is that the order of the High court is made subject to an appeal if so provided in the Law regulating the conditions of service and this necessarily indicates as order passed in disciplinary jurisdiction, Secondly, the words are that the High Court shall "deal" with the judge in accordance with his rules of service and the word administrative jurisdiction."

It was further held in para 18 of the report"

"There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. In our judgement, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiry's, impose punishments other than dismissal or removal, subject however, to the conditions of service, and a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this circumstances."

23. In Samsher Singh Vs. State of Punjab and another;

A.I.R. 1974 SC 2192 a Constitution Bench Hon'ble Supreme Court observed in para 76 of the report "The High Court under Article 235 is vested with the control of subordinate judiciary. The High Court according to the appellant failed to act in terms of the provisions of the Constitution and abdicated the control by not having an inquiry through judicial officers subordinate to the control of the High Court but asking the Government to enquiry through the vigilance department."

It was further indicated in para 78 of the report:

"The High Court for reasons which are not Stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the vigilance department. The members of the subordinate judiciary are not only under the care and custody of the High Court, but are also under the care and custody of High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse. The Governor will act on the recommendation of the High Court. That is the broad basic of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of article 235 by asking the government to enquiry through the Director of Vigilance."

24. In Punjab and Haryana High Court Vs. State of Haryana, A.I.R. 1975 SC 613, the Constitutional bench of Hon'ble Supreme Court after Considering Samsher Singh (Supra) held in para 47 of the report.

25. The Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High court. The High Court of course under this control cannot terminate the services or impose any punishment on District Judges by removal or reduction. The control over District Judges is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceedings any District Judge is to be removed from service or any punishment is to be imposed that will be in accordance with the conditions of service."

26. It was further held in para 50 of the report:

" This Court in the majority view in Shamsher Singh Vs. State of Punjab (C.A. No.2289 of 1970) and Ishwar Chand Agarwal Vs. State of Punjab, (Civil) Appeal No. 632 of 1971) decided on 23rd August , 1974 (reported in A.I.R. 1974 SC 2192) pointed out that the High Court is to hold the enquiry preferably through District Judges . The members of the subordinate judiciary look up to the High Court for discipline and dignity. The enquiry conducted by the Director of Special Enquiry was unconstitutional."

27. There is no necessity for this Court to over burden the judgment by multiplying the authorities on this question, suffice to say that there are catina of decisions of Hon'ble Supreme Court, wherein it has been observed that under Article 235 of the Constitution of India the control is vested with the High Court over the subordinate courts in all matters including the disciplinary proceedings and the powers of the Chief Justice the High Court under Article 229 includes the powers to suspend, dismiss, remove or compulsory retire

from service an officer of subordinate judiciary.

28. In view of the reasons mentioned in the fore going paragraphs, we are of the view that the entrie disciplinary proceedings commencing from suspension order dated 27.11.1974 passed by the State Government, issuance of the charge sheet under the signature of Secretary to the State Government, order of the Governor referring the matter to Administrative Tribunal to hold the enquiry against the petitioner (Late Shri Suraj Bali Katiyar) under Rule 4(1) of the U.P. Disciplinary proceedings (Administrative Tribunal) Rules,1947. The enquiry report dated 18.12.1976 submitted by the Administrative Tribunal, issuance of show cause notice dated 25.3.1977 by the District Judge Etah asking the petitioner (Late Shri Suraj Bali Katiyar) to show cause, even when he retired on 31.12.1976, as to why in pursuance of the recommendation of the Administrative tribunal he will not be dismissed from service under Rule 10 of the Disciplinary proceedings (Administrative Tribunal) Rules, 1947, issuance of another show cause notice dated 12.9.1977 by the State Government to the effect that the Administrative Tribunal in its enquiry report dated 18.12.1976 found charges No.1 and 2 proved and as the deceased petitioner retired from service with effect from 31.12.1976 and the Governor has directed the State Government to issue show cause notice as per the report of the Administrative Tribunal as to why 50% of the pension may not be deducted under the provisions of Regulation 351-A of the Regulations and the report of the Administrative Tribunal passed by the State Government in the name of the Governor of U.P. deducting 50% of the pension of the deceased petitioner under Regulation 351-A of Civil Service Regulations, are totally vitiated and are liable to be set aside.

29. The impugned order dated 19.11.1981 reveals that late Shri Suraj Bali Katiyar, while he was working as Judicial Magistrate at Budaun, the Vigilance Department of the High Court found certain allegations prima facie to be correct against him. There after, with the consultation of the High Court, the matter was referred for enquiry by the Administrative Tribunal, IInd. The Tribunal after completing the enquiry found two charges stood proved against the petitioner (deceased). The consent/ concurrence of the High Court was obtained on the report of the Administrative Tribunal. In the meantime the petitioner (deceased) retired on 31.12.1976. As even against a retired officer action under Regulation 351-A could be taken, hence the question of deduction of pension was passed. Thereafter, furnishing with a copy of the decision of Administrative Tribunal, a show cause notice was issued to the petitioner (deceased), in which it was proposed that 50% of his pension be deducted. The petitioner (deceased) submitted a reply against the show cause notice, which was considered by the Administrative Committee in its meeting dated 5.5.1979. The Administrative Committee rejected the representation of the petitioner (deceased) and had recommended deduction of 50% of pension of the petitioner (deceased). The State Government after considering the recommendation of the High Court took a decision to accept the recommendation of the High Court, thereafter the Governor of U.P. exercising his powers under Regulation 351—A and Rule 28 of the U.P. Judicial Officers Service Rules directed that from the pension of petitioner (deceased), deduction of 50% be made.

30. In view of the provisions contained in Article 235 of the Constitution and Section 28 of the U.P. Judicial Officer Rules, the powers is vested with the High Court to initiate and conduct and enquiry against an officer belonging to subordinate judiciary. After coming into force of the notification dated September 30, 1967, the petitioner (deceased)

became the member of the subordinate judiciary and only the High Court, under Article 235 of the Constitution of India, could hold the enquiry, but unfortunately the High Court abnegated its control by holding the enquiry against the petitioner (deceased).

31. We are of the view that the High Court under Article 235 is vested with the control of the subordinate judiciary, ought not to have asked the State Government to hold the enquiry through the administrative Tribunal. It appears that the High Court failed to discharge its duty of preserving its control. It was nothing, but an act of abnegation of its powers of control. If the High Court would have conducted the enquiry through any officer subordinate to it and recommended to the State Government for the deduction of the pension of the petitioner (Late Shri Suraj Bali Katiyar), then the State Government could have been perfectly justified in passing the said order, but in the instant case the Administrative Tribunal conducted the enquiry, submitted its report and the High Court on the basis of the said report, recommended for deduction of 50% of the pension of the petitioner (Late Shri Suraj Bali Katiyar) under Regulation 351—A of Civil Service Regulations and the State Government passed the impugned order.

32. As we have state earlier, it was the duty of the High Court to have conducted the enquiry preferably through the District Judge and thereafter would have recommended to the State Government for any appropriate action.

33. In view of our observations indicated in the foregoing paragraphs, as a result of which this writ petition succeeds, we have not delved into the other points raised in this writ petition regarding malafide and denial of reason of reasonable opportunity.

34. In view of what has indicated herein above the writ petition succeeds and is allowed. A writ in the nature of certiorari quashing the impugned order of the Government directing 50% deduction from the pension of the petitioner (Late Shri Suraj Bali Katiyar), the order of the Government dated 27.11.1974 suspending the petitioner (Late Suraj Bali Katiyar) pending enquiry and the report of the Administrative Tribunal dated 18.12.1976, is issued. The respondents are directed to make the payment of full pension to the substituted heirs and legal representatives of the deceased petitioner and grant family pension to his wife in accordance with rules form the date of death of the deceased petitioner.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2000

BEFORE
THE HON'BLE A.K. YOG, J.

Civil Misc. Writ No. 26007 of 1997

Sri Gopal Singh ...Petitioner.
Versus
Executive Engineer, Construction and another ...Respondents.

Counsel for the Petitioner:
Shri P.S. Adhikari

Counsel for the Respondents:
Shri K.S. Kushwaha,
S.C.

Financial Hand Book- Rule 56 (c)- Retirement age- appointment as muster roll employee since 1970- worked as Incharge Belder on 19.02.88 on temporary basis- subsequently regularised with rest respective effect- whether entitled to work up to the age of 60 years – maxed question of law and facts- required to be decided by the authorities concerned.

Held – Para 16 and 17

The controversy in hand apparently will require perusal of original record and

relevant materials, parties may like to adduce evidence before the question- which involves both mixed questions of fact and law, have to be adjudicated in the back ground of the circumstances in which the authority passed impugned order and whether the case of the petitioner is governed by amended Rule 56 fed under provision.

Consequently, it will be appropriate that Petitioner be directed to file a representation before the concerned authority for deciding the question in accordance with law, to determine the question as to when petitioner was recruited and thereafter the applicability of Rule 56 as a whole- at relevant time.

Case law discussed.

AIR 1991 SC- 2010
AIR 1999 SC- 3265
AIR 1979 SC-75
AIR 1980 SC- 840
1998 (78) FLR 530
AIR 1991 SC- 1490
1998 (C) UPLBEC 304 (DB)

By the Court

1. Gopal Singh, Petitioner, has impugned order dated January 16. 1997, passed by Executive Engineer Construction Division (Nirman Khand) Lok- Nirman Vibhag, Bageshwar District Almora (now reconstructed District Bageshwar)/ Respondent no.1 (Annexure-2 to the Writ Petition) whereby the said authority gave one month's notice to the petitioner on purported attainment of age of superannuation under Rule 56 (c) of Financial Handbook – Vol. 2 to 4 in public interest.

Rule 56(a) (b) and (c) which came in existence in the year 1975 is reproduced below:

56(a) Expect as otherwise provided in this Rule, every Government servant other than a Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government of public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

(b) A Government service in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date, except in very special circumstances and with sanction of the Government.

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

2. The aforesaid Rule was, however, amended by U.P. Fundamental (Ist Amend Rules, 1987 vide Government Order dated 28.7.1987 (enforced retrospectively, w.e.f. 5.11.1985) and reads:

56(a) Except as otherwise provided in other clauses of this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service on the after the date of retirement on superannuation, with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances:

Provided that a Government servant, recruited before November 5,1985 and holding the Group 'D' post shall retire from

service on the afternoon of the month in which he attains the age of 60 (Sixty) years.

Explanation.- The above proviso shall not be applicable in those case where the status of a post/posts referred to in the above proviso, has been changed after February 27, 1982 an categorized in higher Group of post/post.

3. Learned counsel for the petitioner initially argued that correct date of birth of the petitioner was February 14, 1942 as per horoscope; a copy of which has been filed as Annexure 3 to petition.

Learned Standing Counsel Sri K.S. Kushwaha placed reliance on Rule 2 of Uttar Pradesh Recruitment to Service (Determination of Date of Birth) Rules 1974. The relevant Rule 2 reads:-

2. Determination of Correct Date of Birth or Age*. The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for Correction of such date of age in any circumstances whatsoever.*

4. Apart from the legal position that the Date of birth recorded in service book could not be disputed, this Court required learned counsel for the petitioner to produce original horoscope for perusal. The original horoscope has been placed for perusal but it is found that alleged original horoscope has been copied by someone (hand written) on plane paper and said copy has been pasted upon the so-called original horoscope making it impossible for any one to peruse the contents of original document.

5. In view of the above, this Court is of the opinion that petitioner has no locus standi or case on merit to dispute the date of birth recorded in his service record which continued throughout and exists as on date.

6. Learned counsel for the petitioner, in the alternative, submitted that assuming the date of birth recorded in financial hand book to be correct, petitioner could not be retired before attaining age of 60 years and he should have been allowed to continue up to 30th June, 1999. According to petitioner the impugned order is arbitrary and the concerned authority was not competent to pass the same in view of the fundamental Rules 56 (b) (before Amend Rule 1987 came in force) as the concerned authority itself did not refer to the amended Rule 1987.

7. In para 2 of the petition it is stated that petitioner is an illiterate person residing in remote part of hill area of the Sate of U.P. He was appointed as a Muster Roll Labour in the year 1970. Learned counsel for the petitioner claims that petitioner was working in the establishment on or before 19th February, 1988 as 'Incharge Beldar' in temporary establishment on the basis of District seniority and he was regularised against sanctioned posts of Beldar- which were vacant vide order dated 19th February, 1988 (to be operative w.e.f. 26th February, 1988); true copy of which has been filed as Annexure 1 to the petition.

8. It is argued by the learned counsel for the petitioner that petitioner was in 'inferior service' and hence he was entitled to continue up to the age of 60 years as contemplated in Rule 60 (b)- which existed prior to July 1987 (and appears to have been relied upon in the

impugned order- Annexure-2 to the Writ Petition).

9. On behalf of the petitioner it is contended that Petitioner was recruited before November 5, 1985 (see proviso of amended Rule 56)- as also apparent from Annexure 1 to the petition. On this basis it is argued that petitioner was entitled to continue up to the age of 60 years and no notice could be given at 58 years. It is further submitted that it was not within the competence of concerned authority to retire the petitioner at the age of 58 years.

10. Learned counsel for the Respondent on the other hand referred to amended Rule 56 and submitted that no reliance can be place on nonexistent 'rule' and reference in impugned order to said Rule has to be referred to the existing rule. According to the respondents, petitioner was regularised after November 5, 1985 and hence he cannot claim to have been recruited prior to the date of regularisation given in the concerned order, i.e. Annexure- 1 to the Writ Petition.

11. Respondent laid emphasis on the word 'recruitment' used in the proviso to amended Rule 56. Learned counsel for the petitioner on the other hand places reliance on the expression used in the regularisation order date 19- 1988 (Annexure-1 to the Writ Petition) and submits that the petitioner was recruited and working in 'temporary establishment' prior to regularisation and it shows that he is covered by the proviso to the amended Rule 56. It is argued that in absence of necessary pleadings and grounds on this aspect the respondents were not aware of the exact issue to be determined in this case and hence the respondents are handicapped.

12. Learned Standing Counsel, had no opinion but to concede that the impugned order was passed in ignorance of amended Rule and /or reference to the un-amended rule in the impugned order is due to inadvertent clerical mistake. Be that as it may be, the impugned order has to be read as it stands since there is no explanation on record by the concerned authorities.

13. As the record stands today, un-amended rule did not exist when the impugned order was passed and the validity of he said order is to be considered in the light of the amended rule. This position is not disputed by e learned counsel for the Respondents.

14. Concerned Authorities and the parties, it appears, were not alive to the Amendment in the Rule. The parties thus had no opportunity to consider the applicability of amended Fundamental Rules 56, i.e. whether the proviso of the amended rule shall be applicable to the facts of the case of the petitioner or not.

15. No one dealing with the matter attempted to ascertain the date of recruitment of the petitioner, i.e. – to find out the exact extent and scope of the expression "Recruitment. In other words – whether expression "Recruitment" in the proviso to Fundamental Rule 56 include or exclude temporary appointment or it only means the date of regular/substantive appointment.

In this context – it will be useful to have Definition of the word – "Recruit/Recruited" or Recruitment" as given in some of the Dictionaries:-

THE NEW LEXICON WEBSTER'S DICTIONARY

(Vol.2) Encyclopaedia Edition Particular page 834

RECRUIT ;" - to enlist men for (an army)

-Newly enlisted member of the armed force.

-A member or supporter of a society, cause, etc."

MUKHERJEES THE LAW LEXICON-

(Vol. II) Second Edition. 1977 – page 406

RECRUITMENT :-

- *the dictionary meaning of the word 'Recruit.*

- *Fresh supply of number of persons either as additional or to -make up for deceased so 'recruitment' is only for purpose of making up deficiency which occurs in the Cadre while 'appointment' means an actual act of posting a person to a particular.*

- *the term 'recruitment' and appointment ' are not synonymous and cannot different meanings.*

- *the term recruitment signifies enlistment, acceptance, selection or approval for appointment and no actual 'appointment or positing in service while of 'appointment' means and actual act of posting a person to a particular office.*

AIR 1969 Punjab & Haryana 178 (181)

THE LAW LEXICON :- by Pramanatha Aiyer
Reprint Edition 1987 (Wadhya & Company)

RECRUIT :-

- is a newly enlisted and not trained soldier ; a person who newly joins a society or organisation.

THE RANDOM HOUSE – DICTIONARY OF ENGLISH LANGUAGE –*College Edition (1972) – (Published in India)*

RECRUIT –
" …….. a new mention of group, organisation or the like
……. To raise or increase (a force) by enlistment ……. to engage or hire (new employees, members etc.)"

Expression "recruitment" is wider in scope as compared o the term "appointment" in service jurisprudence.

16. The controversy in hand apparently will require perusal of original record and relevant materials, parties may like to adduce evidence before the question – which involve both mixed questions of fact and law, have to be adjudicated in the back ground of the circumstances in which the authority passed impugned order and whether the case of the petitioner is governed by amended a Rule 56 fed under provision.

17. Consequently, it will be appropriate that Petitioner be directed to file a representation before the concerned authority for deciding the question in accordance with law, to determine the question as to when petitioner was recruited and thereafter the applicability of Rule 56 as a whole –at relevant time.

18. Learned counsels for the a parties are in agreement that petitioner has already completed 60 years and thus, he has attained the age of superannuation (according to the sate of birth mentioned in his service book). It is, therefore, submitted that Petitioner has no claim to be reinstated in the service. The only relief, which survives, is regarding payment of salary for the disputed period.

In view the above the impugned order January 16,1997, passed by Executive Engineer Construction Division (Nirman Khand) Lok Nirman Vibhag, Badeshwar District Almora (now reconstructed District Bageshwar)/Repondent no.1 (Annexure-2 to the Writ Petition) is set aside subject to the condition that petitioner files a comprehensive representation containing his grievance on the aspect referred to above in the judgement (along with a certified copy of this judgement) within six weeks from today. Petitioner will not be entitled to re-open controversy on the ground of horoscope or

entry not being correctly recorded in service record. The concerned authority shall decide the said representation within three months by giving opportunity to the petitioner in accordance with law and shall a reasoned order which shall be communicated within two weeks of its being passed by Registered post acknowledgement due apart from any other mode to the Petitioner.

It is made clear that none of the observation made above shall effect the discretion of the concerned authority in deciding the issue before him. If it is found that petitioner was entitled to be continued up to the age of 60 years, the question of payment of arrears of salary on the basis of full wages shall be decided by concerned authority taking into account relevant circumstances (keeping in mind-employee in the instant case has not refused to work) on the basis of criterion pointed out in several decisions of this Court as well as Apex Court, whether employee was gainfully employed or not etc., during relevant period in question. See AIR 1991 SC 2010 (Union of India versus K.V. Jankiramna):AIR 1999 SC 3265; AIR 1979 SC 75; AIR 1980 SC 840 (para 18 and 19); 1998 (78) FLR 530(SC); AIR 1991 SC 1490 and 1998 (1) UPLBEC 304 (DB) All. H.C.

Writ petition stands allowed subject to the direction and observations made above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: Jan. 24, 2000.

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE D.B.CHAUDHARY, J.

Civil Misc. Writ Petition No. 5337 of 1998.

Suresh Singh ...Petitioner.

Versus

Director, North Central Zone and others ...Respondents.

Counsel for the Petitioner:
Shri A. Kumar
Shri S.P. Singh

Counsel for the Respondent:
S.C.
Sri Vineet Saran
Sri U.N. Sharma
Sri Prabodh Gaur
Shri Tej Prakash
Shri Tauja Somvanshi

Constitution of India, Article 311 (2)- termination order- based on abolution of post- Contractual appointment- petitioner has no right to continue even if the appointment was permanent basis- abolution or creation of post is a policy matter- protection Article 311 (2) not available.
Held – Para 12
Since the decision of the Centre of abolish the post appears to have been passed on administrative and financial grounds this Court cannot interfere with the same. There is a financial crisis in the country and the court should not interfere in the authorities endeavour be bring down expenses.
Case law discussed.
AIR 1999 SC 923
AIR 1980 SC – 1255
AIR 1973 SC – 2641

By the Court

1. This writ petition has been filed against the impugned orders dated 13.1.1998 Annexure 25 and 26 to the petition. By the order dated 13.1.1998 Annexure 25 to the petition the post of Deputy Director (Public Relation) in the North Central Zone Cultural Centre, Allahabad was abolished. By the second order of the same date (Annexure 26 to the petition) the petitioner was given contractual appointment for two years from 1.12.1993 terminable at any point of time without any prior notice. It was also provided therein that on the expiry of the contract period it will be in the sole discretion of the Executive Board of the North Central Zone Cultural Centre, Allahabad to determine

whether the contract should be renewed or not.

Heard learned counsel for the parties.

2. The North Central Zone Cultural Centre, Allahabad (hereinafter referred to as 'the Centre') was set up a view to promote and preserve the cultural heritage of India. It is registered as a Society under the Societies Registrar Act. Its governing body consists of several persons mentioned in paragraph 2 of the petition. The finance of the centre is provided by the Central Government and participating State Government. The Director is an I.A.S. officer.

3. It is alleged that the petitioner was a confirmed/regular employee working as Administrative Officer in the U.P. Panchayat Raj Vitta Evam Vikas Nigam Ltd. (hereinafter referred to as the Nigam) a Government of U.P. undertaking and he was sent on deputation by the Nigam to the Centre. True copy of the letter appointing him on deputation is Annexure 2 to the writ petition. The petition. The petitioner took charge on 2.12.1991 vide Annexure 3. It is alleged in paragraph 17 of the writ petition that while working in the Centre the petitioner retained his lien in the Nigam. In paragraph 18 it is alleged that the petitioner was appointed as Deputy Director (Public Relations) by the order dated 19.1.1993 in the Centre vide Annexure 4. He was given pay scale of Rs. 3000-4500. It is alleged in paragraph 21 that on the assurance given by the respondent no.1 that he would be absorbed in the Centre he resigned from the Nigam. True copy of the petitioner's application dated 13.7.1993 is Annexure 5 to the petition. True copy of the resignation letter is Annexure 6 to the writ petition. The resignation was accepted by the Nigam w.e.f. 1.12.1993 vide Annexure 8. In paragraph 28 it is alleged that the Executive Board of the Centre by the resolution dated 4.3.1994 resolved that the post of Deputy Director (Public Relations and Publications) be re-designed as Deputy Director (public Relations) and the petitioner be appointed on the pay scale of Rs.3000-4500 for three years from 1.12.1992. It was resolved by the Executive Board that the petitioner be treated as an officer on contract employment. By the order dated 3.6.1996 the petitioner was allowed to continue to work in continuation of his previous service till such time as the next meeting of the Executive Board/Governing body. The petitioner made a representation for absorption. True copy of the representation dated 24.1.1997 is Annexure 10 to the petition. By the order dated 26.4.1997 vide Annexure 11 to the petitioner's contractual appointment was extended till 30.4.1997. it was mentioned therein that if the petitioner failed to extend his contract till 30.4.1997 the letter dated 24.1.1997 will be considered as notice of termination of employment as per contract. The petitioner submitted a representation 29.4.1997 against this order vide Annexure 12. In reply the office memo dated 3.5.1997 was sent to him vide Annexure 13. The petitioner signed the counteract referred to in the office memo as stated in paragraph 50 of the writ petition. He then moved an application dated 10.10.1997 for reconsidering of the decision vide Annexure 14. In paragraph 54 of the petition it is alleged that the petitioner was not paid salary for the months of November and December 1997. The petitioner filed a writ petition no. 43718 of 1997 before this court which was disposed of by the order dated 13.1.1998 vide Annexure 24 to the writ petition in which the respondents were directed to pass appropriate orders on the representation of the petitioner. It is alleged in paragraph 73 that consequent to this order the Director get annoyed and abolished the contract vide Annexure 25. Hence this petition.

4. A counter affidavit has been filed by the respondents. It is stated in paragraph 32 of the counter affidavit that the post on which the petitioner was working has been abolished and no direction could be given in favour of

the petitioner. This was a policy decision in the interest of the Society. In paragraph 29 of the counter affidavit it has been stated that the Executive Board of the Society decided on 15.12.1997 that the Centre does not need the post of Deputy Director (Public Relations) and there is no need to renew the contract of the petitioner. Hence the contract was not renewed and his service was terminated. In paragraph 37 of the counter affidavit it is denied that the Society is an instrumentality and agency of the Central Government.

5. In paragraph 13 of the counter affidavit it is stated that the petitioner had fraudulently tendered his resignation from his parent department, namely, U.P. Panchayat Raj Vitta Evam Vikas Nigam Limited, Lucknow. In paragraph 18 it is stated that the administrative expenditure of the Society exceeded 20% of the total outlay of the Society and hence the Governing Body of the Society in its meeting on 15.12.1997 decided that efforts should be made by the Society to bring its administrative expenditure to 20% of its total budget. Hence it was decided that the service of those on contractual basis may not be renewed after expiry of the contract. It was also decided to abolish the post of Deputy Director (Public Relations). In paragraph 20 of the counter affidavit it is stated that there was connivance between the petitioner and the Officiating Director Sri Prayag Ram Mishra. It is alleged that the petitioner and Sri Mishra were in the knowledge of the decision of the Executive Board Governing Body and hence the petitioner and Sri Mishra cannot claim ignorance about such resolution. True copy of the resolution dated 9.10.1992 is Annexure C.A. 4 to the counter affidavit. It is alleged in paragraph 20 to the counter affidavit that it was amazing that just after the minutes of the said meeting of the Executive Board held in Lucknow on 25.6.1993 the officiating Director Sri Mishra moved a note dated 13.7.1993 for regulation of the service of the petitioner. Moreover, the Executive Board of the Society did not recognize the authority of the officiating Director for the purposes of service matters and he had no jurisdiction to regularize the service of the petitioner. There was indecent haste in the matter and the decision of Sri Mishra to regularize the service of the petitioner was illegal and for extraneous consideration. The Executive Board did not want to add any more to the staff of the Society since the Society was spending more than 20 % of its income on payment of pay and allowances. In paragraph 66 of the counter affidavit it is stated that there was no promise or assurance given by any competent authority of the Society for absorption regulation of the petitioner in the service of the Society. The petitioner resigned from his parent department voluntarily on his own and no competent authority of the Society asked him to do so. The petitioner and the then Joint Director Sri R.P. Mishra connived in sending a fraudulent letter to the parent department of the petitioner. In paragraph 74 of the counter affidavit it is alleged that the Society never gave any assurance as alleged in the application of the petitioner dated 13.7.1993.

The detailed facts have given in the counter affidavit and in the other affidavits but it is necessary to go into the same.

6. The question whether to abolish a post is a policy matter and it is for the Management of the Society to decide this and this Court cannot interfere in the decision of abolition of a post. Moreover the allegation of the petitioner that he was given assurance for absorption in the Society has been strongly refuted in the counter affidavit. These are disputed questions of fact and we cannot go into it in writ jurisdiction.

7. It is obvious that the Centre wanted to reduce its administrative expenses and this approach cannot be faulted by the Court. Obviously there has been overstaffing in the Centre and there is nothing wrong in remedying this situation.

8. In Rajendra vs. State of Rajasthan and others AIR 1999 SC 923 the Supreme Court held that where a decision to abolish the post is taken which is bona fide based on administrative and financial consideration, the employer cannot be directed to continue a disped person in service. The Supreme Court considered several of its own earlier decisions and held that the Court cannot interfere in such matters.

9. In the present case it cannot be said that the decision of the respondent to abolish the post was mala fide. Rather, the factual position appears to be that the matter of appointment of the petitioner as Deputy Director was placed on 25.6.1993 before the Executive Board and the Board decided that the matter should await decision till the permanent/ regular Director of the Centre was appointed. No doubt Sri J.P. Rai, I.A.S. was appointed as regular Director of the Centre by the letter dated 7.7.1993 but that letter states that the appointment will take effect from the date of his joining, and Sri Rai joined as regular Director of the Centre on 21.7.1993. It appears that in between i.e. before the joining of Sri Rai on 21.7.1993 the petitioner gave an application on 13.7.1993 to the Director Sri P.R. Misra that if he is absorbed in the service of the centre he shall resign from his parent department. On the same date the petitioner submitted his resignation letter dated 13.7.1993 to be forwarded to his parent department and on the same date i.e. on 13.7.1993 Sri P.R. Misra wrote to the parent department of the petitioner (Panchayat Raj Nigam) forwarding the resignation letter of the petitioner. All these acts were done in a hurry and in one single day although the officiating Director had no authority or power to give approval or assurance for absorption to the petitioner or to forward his resignation letter to the parent department. In our opinion, Sri R.P. Misra should have awaited for the regular Director Sri Rai to join but he acted in great haste and against the resolution of the Executive Board dated 25.6.1993 wherein it was stated that the matter should await the appointment of the permanent Director. On 4.3.1994 the Executive Board of the Centre in its meeting at Jaisalmer passed a resolution that if the petitioner wants to continue in the Centre his employment from 1.12.1993 shall be purely on contractual basis on the condition that the petitioner should execute a deed of contract. The first contract of service was executed on 21.4.1994 whereby the petitioner was appointed on purely contract basis for a period of two years from 1.12.1993 and terminable at any time without notice and after the expiry of the contract period it was the sole discretion of the Executive Board to renew the contract or not. On the request of the Director of the Centre the U.P. Governor gave permission for extension of the contract for a period of six months i.e. up to 31.5.1996 and hence a second contract of employment was executed on the same terms as in the first contract vide Annexure C.A. 12 to the counter affidavit. Since no meeting of the Executive Board was held hence with the approval of the Governor of U.P. (who is Chairman of the Centre) the contract between the petitioner and the Centre was extended till 31.5.1996 on the same terms as the precious two contracts. Another contract was signed on 26.4.1997 extending the period to 30.4.1997 vide Annexure C.A. 13 to the counter affidavit and again another contract was signed on 3.5.1997 extending the petitioner's contract till the next meeting of the Executive Board or specific order issued in this regard which ever was earlier vide Annexure C.A.14 to the counter affidavit. Ultimately on 15.12.1997 the Governing Body of the Centre resolved to abolish the post of Deputy Director (Public Relation) besides down grading various other posts. This decision was apparently taken with a view to bring the administrative expenditure of the Society to 20 % of its total budget. Consequent to the aforesaid resolution the Executive Board passed another resolution stating that the Centre does not require the post of Deputy Director (Public Relations). In pursuance of the aforesaid two resolutions the

Director of the Centre issued two orders dated 13.1.1998 abolishing the post and terminating the contractual appointment of the petitioner.

10. In N.C. Singh vs. Union of India, AIR 1980 SC 1255 the Supreme Court observed (vide paragraph 18): "Creation and abolition of posts is a matter of government policy, and every Sovereign Government has this power in the interest and necessity of internal administration. The Creation or abolition of a post is dictated by policy decision, exigencies of circumstances and administrative necessity (see M. Ramanatha Pillai vs. The State of Kerala, AIR 1973 SC 2641)".

11. In K. Rajendran vs. State of Tamil Nadu, AIR 1982 SC 1107 it was held that abolition of a post did not involve punishment, and hence Article 311(2) was not attracted. In Mathuresh Chand vs. U.P. Public Service Tribunal, 1999(81) FLR 322 a division bench of this Court held that abolition of a post is a valid ground for termination of service of even a permanent employee.

12. Since the decision of the post appears to have been passed on administrative and financial grounds this Court cannot interfere with the same. There is a financial crisis in the country and the court should not interfere in the authorities endeavour to bring down their expenses. Hence this is not a fit case for interference under Article 226 of the Constitution.

13. We are not going into question whether the Centre is an instrumentally of the State under Article 12 of the Constitution or not as we are dismissing the petition on the ground mentioned above.

However, we recommend to the petitioner's parent department (the Nigam) to re-employ the petitioner considering the fact that his post in the centre has been abolished.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 20.12.1999

BEFORE
THE HON'BLE RAVI S.DHAVAN, J.
THE HON'BLE A. CHAKRABARTI,J.

Special Appeal No. 824 of 1995

Suresh Chandra Mishra ...Appellant.
Versus
The District Inspector of Schools, Jhansi and others ...Respondents

Counsel for the Appellant:
Shri K.R. Singh.

Counsel for the Respondent :
S.C.
Shri R.N. Rai.

Intermediate Education Act- 1927- appointment substantive vacancy of lecturer caused due to retirement of permanent encumbant- short term vacancy-whether the appointment should be made through promotion from the senior most eligible L.T. grade teacher or by direct recruitment ?
Held- the management to find out first about the eligible candidate from enternal candidates- if no one eligible Teacher is available- only after recording this finding the direct appointment can be made till the regular candidate join the post in question.
Held- para 12
In the present case, it would be appropriate that the record be remitted to the Committee of Management for its decision to come to a conclusion whether an eligible candidate within the Institution was available or not available, at the relevant time. If the Committee of Management comes to the conclusion that there were no eligible candidates available for promotion within the institution, then, the appointment so made shall be retained.
Case Law discussed.
1994 (3) UPLBEC-1551

By the Court

1. This special appeal has been filed against the order dated 18 September 1995, in

writ petition no. 29083 of 1991:Krishna Dutt Mishra v. The District Inspector of Schools and four others. The contesting respondent in the writ petition, respondent no.4, is Suresh Chandra Mishra, appellate before this court. The memorandum of writ petition described him as an "illegally appointed as Lecturer in Civics in Sri Laxman Das Inter College, Jhansi."

2. In so far as the issue on facts is concerned, it is clear. On the post of Lecturer in Civics there was a vacancy on 30 June 1990. This was one Dwarika Prasad Sarawagi. The process of intimating the vacancy to the Commission had been made by the Committee of Management, but no communication had been received within one stipulated period. Thus, the Committee of Management set about to fill the post on ad hoc basis until a candidate duly selected was returned by the Commission. On whoever may be appointed until a candidate from the Commission arrives, his status would be ad hoc. On this aspect, also, there is no issue.

3. Between the appellant, who was the contesting respondent in the writ petition, Suresh Chandra Mishra, and the petitioner, Krishna Dutt Mishra (respondent in this appeal), there is an issue. The contention on behalf of the appellant as raised by Mr. Ashok Khare Advocate, is that the process of filing a vacancy in the circumstances, as in the present case, permits the Committee of Management to fill the post by promotion or from the outside. This contention is disputed by counsel for the petitioner-respondent, Dr. R.G. Padia, whose contention is that the post can be filled only by promotion. The order of the learned Judge and the direction issued is also, to the effect, as has been contended by the petitioner- respondent. The Court considers it appropriate that the order of the learned Judge be reproduced :

"This writ petition has been filed against the impugned order darted 24.1.1991 (annexure 10 to the writ petition).

4. I have heard Dr. R.G.Padia, learned counsel for the petitioner and Sri A.D. Tiwari, learned counsel for the respondents No.4. The short controversy in this case is regarding appointment of lecturer in Sri Laxman Das Damelay Inter College, Mauranipur, District Jhansi. The college has appointed respondent No.4 by direct recruitment on the said post. The contention of the petitioner is that this post has to be filled up by promotion. The Full Bench of this court in Radha Raizada Vs. Committee of Management 1994(3) UPLBEC 1551 has held that so far as adhoc appointment is concerned, it should be by filling up by promotion from the lower post not by direct recruitment. Since petitioner was admittedly in the L.T. Grade Teacher and was eligible and he should have been considered for promotion as Lecturer in Civics in the college and the respondent No. 4 could not have been validily appointed by direct recruitment.

5. In the circumstances this writ petition is allowed and the impugned order dated 24.1.1991 of the D.I.O.S. approving the appointment of respondent No. 4 is quashed. The Committee of Management should know consider the petitioner as well as other eligible candidates for promotion in the institution for the post of Lecturer in civics and forward the papers to the D.I.O.S. for grant of approval within six weeks from the date of production a certified copies of this order before him after hearing the parties concerned. Petition is allowed. No. order as to costs."

6. On both sides, whether the appellant or the respondent in this appeal, reliance is placed on the same case. While the appellant contends that, a candidate from the Commission has yet to arrive, recruitment can be made both ways, internally and externally. On behalf of the respondent, it is emphatically

argued that an outsider has no place and the vacancy can be filled by promotion only.

7. The only aspect which is to be resolved is whether the learned Judge, on the case which had been cited, had left the field open or had taken the view that this vacancy is closed for recruitment by promotion only.

In the judgement which has been impugned, it is the later aspect.

8. The case which is relied upon by learned counsel for the parties is the Full bench decision in re. Radha Raizada and others v. Committee of Management, Vidyawati Darbari Girls Inter College and others.[1] Reliance is placed on behalf of the petitioner-respondent on paragraph 39. Reliance is also placed by counsel for the appellant on the same paragraph with the contention that the entire perspective may be seen in objectivity.

9. In the circumstances, this Court is reproducing paragraph 39 :

"39.Paragraph 5 of the First Removal of Difficulties Order provides that where any vacancy cannot be filled by promotion under paragraph 4 of the order, same may be filled direct recruitment. Thus, it is mandatory on the part of the Management to first up the vacancy by promotion on the basis of seniority alone. This method has to be has to be resorted to as the teachers are available in the institute and any other method of recruitment may cause disturbance in teaching of the institution which may affect the career of students. Another reason why the vacancy has to be filled by ad hoc appointment by promotion is that it is a short term appointment in the sense that shortly a duly selected teacher would be available for appointment against the said vacancy. So long the posts can be filled under paragraph 4 of the Order by promotion, it is not to the Management to take resort to the power to appoint ad hoc teacher by direct recruitment under paragraph 5 of the First Removal of Difficulties Order. In Charu Chandra Tiwari v. District Inspector of Schools, 1990 UPLBEC Page 160, it was held that the Management has to fill the vacancy by ad hoc promotion of a senior most teacher of the same institution qualified for such appointment and ad hoc appointment through direct recruitment is permissible only in case no such teacher in the institution is available. This according to me lays down the correct view of law. I am, therefore, of the view that the existing substantive vacancy which has been notified to the Commission and the condition provided under Section 18 of the Act is present, the vacancy has to be filled up firstly by promotion from amongst senior most teacher in next lower grade."

10. The full Bench was itself relying on an earlier decision of the Court Chandra Tiwari v. District Inspector of Schools. What is relevant is on what the Full Bench has noticed towards the end of the paragraph. The Full bench has laid down that a vacancy, in the circumstances as the present one, has to be filled up first by promotion from amongst the senior most teachers in the next lower grade. The emphasis is on an exercise of filling a vacancy initially from amongst the candidate available at the institution itself by promotion. The Full Bench adopts the reasoning (in the case referred to) that an ad hoc appointment by direct recruitment is permissible only if an eligible teacher at the institution is not available. In that case, recourse can be resorted to by making an appointment through direct recruitment. Suffice it to say either way the appointments, as may be made, given the exigencies of the situation, would have the status of being ad hoc. Consequently, there is no rigidity that a vacancy, in context, will be filled with promotion of an in-house candidate. This position has been clarified by the Full Bench by laying down that first the Committee of Management will assess on the

[1] (1994)3 UPLBEC

eligible candidates being available within the institution so as to maintain standards of teaching, thus, the reference to eligible candidates. If eligible candidates are available, then, an appointment will be made on an ad hoc capacity from within the institution until a duly selected candidate is returned from the Commission.

11. But if there be no eligible candidate within the institution and this will need to be placed on record, then, nothing stands in the way of the Committee of Management to take recourse to make a direct recruitment as an alternate, on an ad hoc basis.

To that extent there is an error in the judgement of the learned Judge.

12. In the present case, it would be appropriate that the record be remitted to the Committee of Management for its decision to come to a conclusion whether an eligible candidate within the institution was available or not available, at the relevant time. If the Committee of Management comes to the conclusion that there were no eligible candidates available for promotion within the institution, then, the appointment so made shall be retained.

13. This Court is not going into the rival merits of the candidates, whether they should be in-house or by direct recruitment as this matter has yet to be examined by the Committee of Management.

The appeal is allowed. The order of the learned Judge, dated 18 September 1995 on the writ petition is set aside.

No order on costs.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD JAN. 24, 2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 31903 of 1999

Pramod Kumar Rai & others ...Petitioners.
Versus
Life Insurance Corporation of India and others ...Respondents.

Counsel for the Petitioner:
Shri T. P. Singh
Shri Sudhir Agarwal

Counsel for the Respondents :
Shri P. Padia

Constitution of India, Article 225- Judicial Review High Court can not act as appellate or Revisional authority – it has no concern with the decision of the authority but to consider the decision making process serious complaint against selection including bribery, favourism – vigilance enquiry pending against the responsible authority – decision canceling the entire selection of the concern zone – High Court declined to interfere.

Held – Para 9 and 10

In the light of the above decisions of the Supreme Court in Tata Cellular's case and other cases. We are of the opinion that it cannot be held that the authorities acted arbitrarily in the matter by cancelling the examination. In such matters this Court should not ordinarily substitute its sown wisdom for that of the administrative authority.
In the similar circumstances a Division Bench of this Court in Union of India Vs. Akchhay Kumar Singh 1999 (4) A.W.C. 3564 refused to interfere in the cancellation of the examination of selection in railways. This Court relied on de Smith's Judicial Review of Administrative Actions and has held that all that is required by the authority is that it should act in good faith and its decision should not be influenced by any extraneous

consideration. We do not find any bad faith in the authority in the present case, nor any extraneous consideration.

Case Law discussed.
1993 (2) JT-688,
1995 (2) UPLBEC-985
AIR 1993 SC - 796
AIR 1991 SC – 1612
AIR 1996 – SC – 11
(1982) 3 ALL E.R 1410
AIR 1997 Sec. (L 805) 1806
1985 (1) AC 374

By the Court

1. This Writ petition has been filed for a writ of certiorari to quash the fax message dated 26.7.1999 Annexure 7 to the writ petition and for a mandamus directing the respondents to appoint the petitioners on the post of Apprentice Development officers after declaring the final result of the selection held in pursuance of the employment notice dated 25.1.1999.

We have heard the learned counsel for the parties.

2. It is alleged in paragraph 3 of the petition that as per L.I.C. circular dated 20.1.1999 recruitment of Apprentice Development Officer is to be made from certain sources which are mentioned in that paragraph. In paragraph 4 of the petition it is alleged that by employment notice dated 21.1.1999 issued by the Zonal Manager, North Central Zone office, L.I.C. Kanpur recruitment of 300 posts of Apprentice Development Officer was notified for various divisional offices and for Varanasi Division the number of vacancies notified were 38. True copy of the employment notice dated 21.1.1999 is Annexure 2 to the writ petition. In Paragraph 5 of the petition it is alleged that the Petitions are working as Agents in the Respondents Corporation and satisfy the eligibility requirements for being considered for 50% quota meant for the Agents of the corporation. On 25.4.1999 a written test were held in which the petitioners also appeared. Thereafter the result was declared in May 1999 in which the petitioners were awaiting publication of the final result. In paragraph 14 of the petition it is alleged that the final result with respect to selected candidates of Agra, Aligarh, Allahabad, Kanpur, Haldwani, Lucknow and Meerut Divisions were published in July 1999 vide Annexure 6. However, The result was not declared for Varanasi Division and hence writ petition no. 28914 of 1999 was filed in this Court. This Court directed that the result should be declared or the respondents should show cause vide order of this Court dated 16.7.1999. In paragraph 18 of the writ petition it is alleged that instead of showing cause the respondents have arbitrarily issued the impugned fax message dated 26.7.1999 cancelling the entire selection for Varanasi Division besides three divisions and ordered fresh selection. True copy of the fax message is Annexure 7 to the writ petition. The petitioner relied on the decision of the Supreme Court in Asha Kaul vs. state of Jammu and kashmir 1993 (2) J.T. 688 and some other decisions e.g. Ram Prasad Rai and others vs. State of U.P and others 1995 (2) UPLBEC 985

3. A Counter affidavit has been filed by the respondents. In paragraph 5 of the same it has been stated that a large number of complaints were made by several persons regarding the selection test complaining about gross irregularities including bribery / favouritism. True copy of the compliant filed by ten candidates addressed to the Chairperson L.I.C. is Annexure C.A. 1 to the counter affidavit. True copy of the compliant made to the Executive director (Vigilance) is Annexure C.A. 2 to the counter affidavit. True copy of the compliant made by the L.I.C. Agents Federation of India to the Chairperson of the L.I.C. is Annexure C.A. 3. In paragraph 9 of the counter affidavit it is alleged that the Chairperson of L.I.C. as well as the Executive Director (Vigilance) took the

matter and the complaints very seriously and a fax messages was sent to the Executive Director to the Zonal Manager, Kanpur dated 21.5.1999 directing him to get the matter investigated through some responsible officer and to send the report to the Central Office at Bombay. True copy of the fax messages alongwith the complaint is Annexure C.A. 4 to the counter affidavit. In paragraph 10 of the counter affidavit it is stated that an order dated 27.5.1999 was passed by the Vigilance Secretary, L.I.C. in which the Senior Divisional Manager Varanasi has been named and it was pointed out to the Zonal Manager, Kanpur that in the written test various irregularities were alleged and it was directed that an investigation be made through some responsible officer. True copy of the order of the Vigilance Secretary dated 27.5.1999 is Annexure C.A. 5 to the counter affidavit. In paragraph 11 it is stated that an order was passed on 27.5.1999 directing for holding the enquiry. True copy of the same is Annexure C.A. 6. The investigation report submitted by the regional manager dated 21.6.1999 and 25.6.1999 is Annexure C.A. 7 and C.A. 8 to the counter affidavit. The Zonal Manager then passed the order dated 15.7.1999 for annulling the examination vide Annexure C.A. 1) was issued. In paragraph 17 of the counter affidavit it is alleged that a person whose name is on the select list is not entitled to be appointed. In paragraph 19 of the counter affidavit it is stated that out of the 11 divisions in which the examination was held, cancellation was made only for four divisions in respect of which there were specific complaints and enquiries. In paragraph 20 of the counter affidavit it is alleged that a Vigilance enquiry is pending against the Senior Divisional Manager, Varanasi Division. In paragraph 21 it is stated that a fresh selection is going to be held in Varanasi Division.

Sri T.P. Singh learned counsel for the petitioner submitted that as per Annexure C.A. 7 and C.A. 9 there was no irregularity in the examination. He also submitted that out of 38 posts only seven selected candidates were relatives of officials. He has also relied on Annexure C.A. 8 for this submission.

4. In our opinion, this is not a fit case for interference under Article 226 of the constitution. The Authorities have come to the conclusion that there were serious irregularities in the examination and hence it is not proper for this Court to interfere. In Union Territory of Chandigarh vs. Dilbagh Singh A.I.R 1993 SC 796 the Supreme Court held that no opportunity of hearing need be given for cancelling the examination on the ground of irregularity. The Supreme Court further observed that the cancellation order cannot be vitiated on the ground that direct evidence about the corruption charges was not available. In the present case there appear to have been several complaints regarding bribery /favouritism and a vigilance enquiry is going on against the Senior Divisional Manager , Varanasi. In S. Dash vs. Union of India A.I.R. 1991 SC 1991 SC 1612 the Supreme Court held that a successful candidates does not acquire infeasible right to be appointed. Th only requirement is that the State should not act in an arbitrary manner and should ac bona fide. In the present case it appears that a large number of complaints have been made regarding the test for Varanasi Division and three other divisions. It is for the authorities to decide whether there should be a fresh examination or not and this Court has only limited power of judicial review in such administrative matters. We do not think that the authorities acted arbitrarily in this matter. Moreover in the fresh selection which has been ordered the petitioners can also appear.

5. The Scope of Judicial review in administrative matters has been discussed in great detail by the Supreme Court in Tata Cellular vs. Union of India A.I.R 1996 SC 11 vide paragraph 86 to 113. It has been held therein that the judicial review of

Administrative decisions is not concerned with reviewing the merits of the decision but the decision making process itself. As held by Lord Brightman in North Wales Police vs. Evans (1982) All ER 141:

" Judicial review, as the words imply is not an appeal from a decision, but a review of the, manner in which the decision was made. Judicial Review is concerned, not with the decision, but with the decision making process."

6. The same view has been taken in several other decisions also e.g. Union of India v. G. Ganayuthan, 1997 S.C.C. (L&S) 1806. The supreme Court in Tata Cellular's case (Supra) referred to the Wednesbury principle of unreasonableness. The Supreme Court referred to several decisions of British, American and Indian Courts wherein it was held that the words unreasonable had several meanings. The Court should not interfere merely because it takes a view from that of the administrative authority, and it can interfere only if the decision is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it vide lord Diplock's judgement in Council of Civil Service Unions Vs. Minister for the Civil Service 1985 (I) AC 374.

7. In Associated Provincial Picture houses limited vs. Wednesbury Corpn. (1947) 2. ALL ER 680 the Wednesbury principle was defined by Lord Greene in the following manner"

"The decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it."

8. In Tata Cellular's case the Supreme Court also referred to the views of eminent jurists like Schwartz who emphasized judicial restraint in judicial review in administrative matter, since judges were not experts. The court will only interfere if the authority acts unfairly and in violation of law. If the decision making body is influenced by considerations which ought not influence it, or fails to take into account matters which it ought to take into account, the Court will interfere. Similarly, if the decision making body comes to its decision on no evidence or comes to finding so unreasonable that no reasonable person would have come to it the court can interfere. However, the court should not substitute its judgement for the judgement of the administrative authority unless that judgement is wholly perverse. As observed by Prof. Wade in his ' Administrative Law'. "The point to note is that a thing is not unreasonable in the legal sense merely because the court thinks it is unwise. The administrative test of reasonableness is not the standard of a reasonable man in Tort Law."

9. In the light of the above decisions of the Supreme Court in Tata Cellular's case and other cases we are of the opinion that it cannot be held that the authorities acted arbitrarily in the matter by cancelling the examination. In such matters this court should not ordinarily substitute its sown wisdom for that of the administrative authority.

10. In similar circumstances a Division Bench of this Court in Union of India Vs. Akchhay Kumar Singh 1999 (4) A.W.C. 3564 refused to interfere in the cancellation of the examination of selection in the railways. This Court relied on de Smith's judicial Review of Administrative Actions and had held that all that is required by he authority is that it should act in good faith and its decision should not be influenced by any extraneous consideration. We do not find any bad faith in

the authority in the present case, nor any extraneous consideration.

Hence there is no force in this petition and it is dismissed accordingly.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.99

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE D.R.CHAUDHARY, J.

Civil Misc. Writ Petition No. 42518 of 1999

Radhey Shyam Pandey ...Petitioner
Versus
The State of U.P. and another ...Respondent

Counsel for the Petitioners:
S.C.Tewari
Dr,Ram Shanker Dwivedi

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Stay of Departmental Proceeding- Criminal Case is going on the same facts- serious charges about embezzlement of Rs. 34,98622/- offence of murder is personame while the offence of embezzlement effect the interest of common people of society- No reason disclosed in Departmental Enquiry shall prejudice the trail of criminal case- both proceeding may go on simultaneously.
Held-
In our opinion, in the present case when there are grave charges against the petitioner and his associates of embezzling huge amount of public funds the disciplinary proceedings should not be stayed. In our opinion, in deciding whether to stay the departmental proceedings the nature of the charges has to be carefully. However, there are different kinds of serious charges and the same course of action cannot be followed for all them. The charge of murder is a serious charge, but so is the charge of embezzlement of huge amount of public funds. In our opinion while there should be stay in the departmental proceeding till the pendency of the criminal charge in the former case (while keeping the accused under suspension), there should be no stay of departmental proceeding in the letter case. In our opinion the observation of the Supreme Court in certain decisions that where the criminal proceeding and departmental proceeding are grounded upon the same set of facts absolute rule.
In the present case, as already mentioned above, there are allegations regarding embezzlement of huge amount of public funds by the petitioner and his associates. A perusal of the charge sheet which is almost 100 pages long and contains as many as 46 charges shows that serious allegations of huge financial embezzlement and misappropriation of public funds have been made against the petitioner and his associates. In State of Rajsthan Versus B.K. Meena also there were grave charges pertaining to misappropriation of huge amount of public funds and this was a factor which the Supreme Court took into consideration while refusing to stay the departmental proceeding. (para 9 & 13)
Case law discussed.
1999 (2) ESC 1009
AIR 1960 SC-806
AIR 1965 SC-155
AIR 1988 SC- 13
AIR 1997 SC 2232

By the Court

Heard learned counsel for the parties.

1. The petitioner was appointed as a Junior Engineer in the Rural Engineering Services of the U.P. Government and was promoted as Assistant Engineer and subsequently given charge of Executive Engineer from 14.7.1997. He was placed under suspension by the order dated 22.12.1998 on grave charges of financial irregularities alongwith others. An F.I.R. was also filed against him and others at police station, Kotwali, Ballia on 19.2.1998 vide Annexure1 to the petition. The petitioner has been charged for embezzlement of an amount of Rs. 34,98,622/-. True copy of the F.I.R. is Annexure 2 to the petition. True copy of the suspension order dated 22.12.1998 is

Annexure 3 and true copy of the charge sheet is Annexure4to the writ petition. Thus both, criminal and departmental proceedings are going on against the petitioner.

2. It is alleged in paragraph18 of the writ petition that both criminal and departmental proceedings are based on identical and similar facts and hence the departmental proceedings should be stayed till the completion of the criminal case. In paragraph 20 of the petition it is alleged that if departmental proceeding is allowed to continue that will prejudice the petitioner in the criminal case. In paragraph 21 it is alleged that in the criminal proceeding the charge sare to be proved by the prosecution without compelling the accused to give his version while in the departmental proceeding the petitioner is bound to disclose his version and that will prejudice the petitioner in the criminal case. The petitioner has relied on the decision of the Supreme Court in Capt. M.Paulk Anthony Vs. Bharat Gold Mines Limited and others 1999 (2) ESC 1009 and has prayed that departmental proceedings be stayed.

3. After hearing the learned counsel for the parties and considering the facts in great detail we are not inclined to stay the departmental proceeding.

4. The question whether the departmental proceedings should be stayed when a criminal case is going on the same facts has received the attention of the Supreme Court in several decisions, many of which have been referred to in M. Paul Anthony's case (Supra).

In Delhi Cloth and General Mills Ltd. vs. Kushal Bhan AIR 1960 SC 806 the Supreme Court observed:

"We cannot say that principles of natural justice require that on employer must wait for the decision at least of the criminal trial Court before taking action against an employee- We may, however, say that if the case is of a grave nature, or involves questions of law or fact which are not simple, it would be advisable for the employer to await the decision of the trial court so that the defence of the employees in the criminal case may not be prejudiced."

Similarly in Tata Oil Mills Company Ltd. vs. Workmen AIR 1965 SC 155 the Supreme Court observed:

"It is desirable that if the incident giving rise to a charge framed against a workmen in a domestic enquiry is being tried in a criminal court, the employer should stay the domestic enquiry pending the final disposal of the criminal case and it would be particularly appropriate to adopt such a course where the charge against the workmen is of grave character because in such a case it would be unfair to compel the workman to disclose the defence which he may take before the criminal court. But to say that domestic enquiry in spite of the fact that the criminal trial is pending the enquiry for that reason alone is vitiated and the conclusion reached in such an enquiry is either bad in law or malafide"

In Kusheshwar vs. M/s Bharat Cokins CoalLtd. AIR 1988 SC 2118 the Supreme Court observed:

"There could be no legal bar for simultaneous proceedings being taken yet, there may be cases where it would be appropriate to defer disciplinary proceeding awaiting disposal of the criminal case. Whether in the fact and circumstances of particular case there should or should not be such simultaneity of the proceedings would then receive judicial consideration and the Court will decide in the given circumstances of a particular case as to whether the disciplinary proceedings should be interdicted pending criminal trial. It is neither possible nor advisable to evolve a hard and fast, strait jacket formula valid for all cases and of

general application without regard to the particularities of the individual situation."

The Supreme Court further observed in the same case:

"In the instance case, the criminal action and the disciplinary proceedings are grounded upon the same set of facts. We are of the view that the disciplinary proceedings should have been stayed and the High Court was not right in interfering with the trial court's order of injunction which had been affirmed in appeal."

In State of Rajasthan vs. B.K. Meena A.I.R. 1997 SC 13 the Supreme Court observed:

"It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in a certain situation, it may not be desirable, advisable or appropriate to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceeding, it is emphasized is a matter to be determined having regard to the facts and c circumstances of a given case and no hard and fast rules can be enunciated in that behalf. The only ground suggested in the above decisions as constituted a valid ground for staying the disciplinary proceedings is that the defence of the employee in the criminal case may not be prejudiced. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability'; 'desirability' or properly, as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. The ground indicated in DCM (AIR1960 SC 806) and Tata Oil Mills (AIR 1965 SC155) is also not an invariable rule . It is only a factor, which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending consideration is that the disciplinary enquiry cannot be – and should not be – delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion. That is the reality in spite of repeatedly advice and admonitions from this court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand undesirable elements are thrown out and any charge of misdemeanor is enquired into promptly. The disciplinary proceedings are meant not realty to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of the delinquent officer also has in a prompt conclusion of the disciplinary proceeding. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanor should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. While it is not possible to enumerate the various factors for and against the stay of disciplinary proceedings. We found it necessary to emphasize some of the important considerations in view of the fact that very

often the disciplinary proceedings are being stayed for long periods pending proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view of the various principles laid down in ;the decisions referred to above."

5. In Depot Manager vs. Mohd. Yousuf Miyan AIR 1997 SC 2232 it was held that there is no bar to proceed simultaneously with the departmental enquiry and trial of a criminal case unless the charge in the criminal case is of a grave nature involving complicated questions of fact and law.

6. In M. Paul Anthony's case (Supra) the Supreme Court framed the following conclusions from the aforesaid decision:

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceeding and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and facts, it would be desirable to stay the departmental proceeding till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of facts and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and matter collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty, administration may get rid of him at the earliest."

7. We have carefully considered all the aforesaid decisions of the Supreme Court, As observed in some of the decisions, each case has to be seen on its own facts and no hand and fast general guidelines can be laid down.

8. In the present case the allegation against the petitioner is of embezzlement of an amount of about Rs.35,00,000/- as a evident from both the F.I.R. as well as the charge sheet, which runs into almost 100 pages and contains as many as 46 charges. A perusal of the same shows that the allegation against the petitioner and his other associates are very serious of embezzling a huge amount of government money which may run into crores of rupees. The F.I.R. was filed as far back as in 1998 and as yet it appears criminal proceedings are still going on.

9. In our opinion, in the present case when there are grave charges against the petitioner and his associates of embezzling huge amount of public funds the disciplinary proceedings should not be stayed. In our opinion, in deciding whether to stay the departmental proceedings the nature of the charges has to be carefully for example, if an employee is accused of murder then it may be advisable stay the departmental proceeding (keeping the accused under suspension) till the conclusion

of the criminal trial. Similarly in cases of offences such as dacoity and assault the same course of action may be followed. However, there are different kinds of serious charges, and the same course of action cannot be followed for all them. The charge of murder is a serious charge, but so is the charge of embezzlement of huge amount of public funds. In our opinion while there should be no stay in the departmental proceeding till the pendency of the criminal charge in the former case (while keeping the accused under suspension), there should be no stay of departmental proceeding in the latter case. In our opinion the observation of the Supreme Court in certain decisions that where the criminal proceeding and departmental proceeding are grounded upon the same set of facts the latter should be stayed cannot be said to be a universal or hard and fast absolute rule. As observed by the Supreme Court itself in several decisions e.g. in Kusheshwar's case (Supra), there cannot be a strait jacket formula for all cases. In our opinion, in the case of embezzlement or huge financial irregularity the departmental proceeding should not be stayed because in the cases of embezzlement of huge amount of public funds the entire economic and social system of the country is adversely affected. Everyone knows that there is corruption and financial irregularity on a large scale in our country and this is playing havoc with our economy. On the other hand, offences such as murder, assault, etc. are of a personal nature and do not affect society or the economy as a whole. Hence the observation of the Supreme Court that if there are grave charges the departmental proceedings should be stayed pending the criminal trial on the same set of facts cannot be understood to relate to charges like embezzlement of huge amount of public funds or large scale financial irregularities. Any kind of leniency in the latter cases will be wholly misplaced and uncalled for.

10. Moreover, we do not see how the defence of the petitioner in the criminal case will be prejudiced if he is compelled to disclose his defence in the disciplinary proceeding. In our opinion in such cases of embezzlement of huge amount of public funds it cannot be said that if the departmental proceedings will go on the criminal trial will be prejudiced.

11. As observed by the Supreme Court in Kusheshwar's case (Supra) there cannot be a hard and fast strait jacket formula valid for all cases and hence the observation in some cases that departmental proceeding should be stayed if there are grave charges and a criminal trial is pending on the same set of facts cannot be treated as a hard and fast rule applicable in all circumstances. The observations in certain decisions of ;the Supreme Court that the departmental proceedings should be stayed if there are grave charges and complicated questions of law and facts are involved is not a hard and fast rule. As observed by the Supreme Court in State of Rajasthan vs. B.K. Meena (Supra), the interest of administration and that undesirable elements are thrown out after a prompt enquiry. Moreover, as observed in the same case, criminal cases often drag on endlessly and this is also a factor for not staying the departmental proceeding. In the present case the F.I.R. was filed on 19.2.1998 and it may take years for the criminal case to be decided.

12. The observations in certain decisions of the Supreme Court that the departmental proceeding should be stayed where both the proceedings are on the basis of the same facts and allegations cannot be treated as an absolute legal proposition, and it is merely one of the factors which may be taken into consideration by the court in deciding whether to stay the departmental proceeding. After all, the question whether to stay the departmental proceedings when a criminal case is pending is a question that arises when both the proceedings relate to the same set of facts. Hence the decision in M. Paul Anthony's case (Supra) cannot be treated to lay down

universal hard and fast rules as to when the departmental proceeding should be stayed.

13. In the present case, as already mentioned above, there are allegations regarding embezzlement of huge amount of public funds by the petitioner and his associates. A perusal of the charge sheet which is almost 100 pages long and contains as many as 46 charges shows that serious allegations of huge financial embezzlement and misappropriation of public funds have been made against the petitioner and his associates. In State of Rajsthan vs. B. K. Meena. also there were grave charges pertaining to misappropriation of huge amount of public funds and this was a factor which the Supreme Court took into consideration while refusing to stay the departmental proceeding.

In our opinion it will not be in the interest of justice to stay the departmental proceeding on the facts of the present case. We are not inclined to exercise our discretion under Article 226 of the Constitution in the present case.

The petition is dismissed.
