ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.1999

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No. 37374 of 1999

Ms. Nidhi Singh ... Petitioner
Versus
The Chairman, C.P.M.T. 99, CPMT Examination Centre, University of Roorkee, Roorkee & others ...Respondents

Counsel for the Petitioner:
Shri Surendra Pratap Singh
Shri W.H. Khan

Counsel for the Respondents:
S.C.
Shri Dinesh Kakkar
Shri Ashutosh Srivastava

Constitution of India, Article 226- Court's Jurisdiction and Power under- Exercise of.
Held -

This court is loath to interfere with the decision taken by the experts in the field and the Courts should give due regard to the interpretation of educational authorities. Academic freedom demands responsibility on the part of the academicians to raise high standards of education. If the academic community does not fulfil the responsibility it invites interference by Courts. The courts have been cautious enough in upholding academic freedom and the autonomy of the educational institutions, particularly, imparting professional courses and, therefore has shown great reluctance to interfere with the decisions of the experts in the field, as would be evident from the series of decisions of the apex court. A reference may be had to recent decision of the apex court in Admission Committee, CII 1995 V. Anand Kumar (1998) 8 SCC-333. It is thus settled and firm proposition of law that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience in the field. In the conspectus of the facts narrated above, it is well established that the petitioner has resorted to unfair means. The faint and bald allegation of mala fide on the part of the Selection Committee remains unsupported by any tangible evidence. It is merely an ornamental plea. The case fails both on legal and factual matrix. (Paras 14 & 15)

Held (para 14 & 15)
Case Law referred
(1998) 8 SCC 333
AIR 1985 SC 567
AIR 1984 SC 186
1979 Lab.I.C. 296
AIR 1966 SC 707

By the Court

1. Km. Nidhi Singh, a resident of Allahabad appeared in Combined Pre Medical Test, 1999 (for short 'CPMT') conducted by University of Roorkee, Roorkee. An admit card was issued to her bearing Roll No. 511694. She appeared on 11.7.1999 at St. Fidelis College, Vikas Nagar, P.O. Vishnupuri Colony, Church Road, Lucknow, which was her centre for CPMT. She was unsuccessful as per result declared by the respondent no. 1.

2. The case of the petitioner is that she had obtained 489 marks while the candidates, belonging to the general category and obtaining minimum 462 marks, have been called for counselling, which had commenced from 5.9.1999 for admission to M.B.B.S. Ist year course. According to the petitioner, though she was entitled for counselling and admission in the M.B.B.S. Ist year course, the respondent no. 1-Chairman, CPMT- 99, CPMT Examination Centre, University of Roorkee, Roorkee, has issued a letter dated 14/16.8.1999 canceling her test for the alleged adoption of unfair means. For the better appreciation and understanding of the case, the grounds specified in the aforesaid letter are reproduced below:

"Whereas you appeared vide Roll no. 511654 from St. Fidels College, Vikas Nagar,

Lucknow (Centre of Examination) for the CPMT 99 held on 11.7.1999.

Whereas during the process of evaluation of your OMR Answer Sheet, it was detected that you have deliberately adopted unfair means with an intention to get undue advantage under a well planned conspiracy.

Whereas you have initially entered the correct number of Question Booklet No. in both the papers (paper-I and II) issued to you in fact, on your answer OMR sheets respectively, but after it was initialled by the invigilators in the examination room, you have changed the booklet numbers on the OMR answer sheets and thus the actual code number printed on the question booklets issued to you do not match with the number you have written on the OMR sheet.

Whereas you were in fact issued the Question Booklet No. A 711249199 R (as acknowledged by you on the front page of the aforesaid Question Booklet) you have written another Booklet No. A 7112194599 R on your answer sheet in the column provided for it, which was never issued to you in Paper- I. This has been done by you with mala fide intention.

Similarly, whereas you were in fact issued the Question Booklet No. A 711249199 R as acknowledged by you on the front page of the aforesaid Question Booklet, but you have written another Booklet No. B 1173197299 R on your OMR answer sheet in the column provided for it, which was never issued to you in Paper-II. This has been done by you with a mala fide intention.

Whereas the Question Booklet No. A 711249199 and B 7113101299 R (as per your acknowledgement on the front page of the question Booklet actually issued to you) were of English version, but the Question Booklet Nos. A 7112194599 R and B 1173197299 R written by you on the answer sheet are Question Booklets of Hindi version which were never issued to you.

Whereas the very Booklet Nos. A 7112194599 R and B 1172197299 which have been mentioned by you on the OMR Answer Sheets have also been repeated by several other candidates in contradiction to the actual booklet no. issued to them, it is thus proved to be an act of adopting unfair means in the examination in a planned manner.

Whereas after detection of the above abnormal conduct on your part, the matter was thoroughly considered and investigated by an investigation committee and the said committee is fully convinced that you have deliberately adopted such unfair means to get undue advantage in the said examination."

3. By means of this writ petition, it is prayed that the order dated 14/16.8.1999 through which the result of the petitioner of CPMT 1999. Annexure 5 to the writ petition has been cancelled, be quashed and the respondents be commanded to declare the result of the petitioner of the said test and to admit her in M.B.B.S. Ist year course in some Medical College, after necessary counselling.

4. When this petition came up for admission before this court on 6.9.1999, an interim order was passed directing the respondents to call the petitioner for counselling, which was, however, subject to ultimate outcome of the present petition. The parties were also directed to exchange affidavits. Counter and rejoinder affidavits have been exchanged. Heard Sri S.P. Singh, learned counsel for the petitioner Sri S.N. Verma, learned counsel for the respondent University of Roorkee assisted by Sri Dinesh Kakkar and Sri Ashutosh Srivastava, learned counsel for the respondent no. 3- Director General, Medical Education and Training U.P., Lucknow.

5. In the counter affidavit filed on behalf of the respondent no. 1 which has been sworn by Dr. A.M.C. Srivastava, who himself happened to be a member of CPMT-99 committee, it has been stated that the candidates appearing in the CPMT-99 were given option to write their answers either in Hindi or English language. The question

papers were printed in English and Hindi languages and issued to the candidates in accordance with their choice in their allocated centres of examination. The **Optical Mark Reader** (for short 'OMR') answer sheet in duplicate was also separately issued to the candidates on which they were required to mention the actual question Booklet code number issued to them. Four sets each of the question papers in Chemistry and Physics in English and Hindi versions and four sets each in the IInd paper, i.e. Zoology and Botany in English and Hindi version were got printed, chart whereof is Annexure C.A. 1 to the counter affidavit. When the answer sheet submitted by the candidates were scanned by the OMR, to check the discrepancies, the following instructions were fed to the computer:

(i) to check whether the question Booklet code numbers marked by the candidates on their answer sheet tallied with the question Booklet code numbers issued to that centre and,

(ii) to check whether the question Booklet code number marked by the candidates tallied with valid (actual) question booklet code numbers.

6. According to the respondents, the computer brought out all such cases where the above discrepancies were found. These cases of discrepancies included the cases of 32 candidates, including the petitioner and on examining the matter thoroughly, it was found that the petitioner and other 20 candidates in the first paper and the petitioner as well as 25 other candidates in the second paper had mentioned the question Booklet number which was not actually issued to them. A copy of the report of Unfair Means Committee has also been brought on record in the form of Annexure C.A. 2. According to the respondents, after the question booklets were handed over to the candidates at the time of examination, one of such booklets (Hindi version) in each session was managed to go outside the examination hall. The question paper, having been brought out of the examination hall, was solved by those who conduct coaching classes and smuggled back the same to the examination centers where petitioner and other such candidates copied the same and mentioned booklet number for which the answers were made available to them irrespective of the actual booklet numbers issued to them. It has been further stated that the University only appoints Centre Superintendent for particular centre and the remaining staff, such as, Assistant Superintendent, Invigilators, etc., is appointed by the Centre Superintendent according to his own choice. Since the centres are usually educational institutions, normally the Principals are appointed as Centre Superintendents. Another counter affidavit has been filed by the State Government (Medical Department) wherein more or less, the averments made in the counter affidavit of the University of Roorkee have been reiterated. The petitioner has also filed rejoinder affidavits, denying the averments made in the counter affidavits.

7. It is an admitted fact that there were two types of question booklets one meant for the examinees, who opted to give their answers in English and the other for those, who opted Hindi. Question booklet nos. A 7112491999 R and B 7113101299 R were issued to the candidates who opted English and A 7112194599 and B 1173197299 R were issued to the candidates who opted Hindi, as their medium of language to give answer. It is also admitted fact that the petitioner had opted for English language as medium for giving answer to the question papers whereas she mentioned A-712194599 R in her answer sheet, which was not allotted to her and which is a number allotted to the candidates who opted for giving answer in Hindi language.

8. In view of aforesaid admitted factual position, the core question for consideration, on which turns the ultimate fate of the

petitioner depends, is: whether mere mention of different question booklet number in the answer sheet, instead of mentioning the actual question booklet number allotted to her, will amount to adoption of 'unfair means'. To arrive at a proper conclusion, it has to be considered as to what is the significance of allotting different questions booklet numbers to the candidates giving their answers in Hindi and English as also the impact on marks obtained by a candidate if he/she has described the question booklet number differently than the one actually allotted.

9. A perusal of Question booklet codes, contained in Annexure C.A. 1 to the counter affidavit of the Roorkee University shows that different codes have been allotted for each of the four sets of question paper booklets in Hindi as well as English languages. In paragraph 19 of the Counter Affidavit, Dr. A.M.C. Srivastava, deponent, has averred that the question booklets were packed in bundles of 50 each. All these bundles had either four sets of papers in English language or in Hindi language. All the four sets (say A,B,C,D) were inter-mixed in the sequence A,B,C,D, A,B,C,D …so on) and were issued to the candidates just 15 minutes before the actual time of start of examination at random. All the 100 questions in both papers were common in all the Booklets, though the order and the setting of the questions in all the four sets in each question paper was quite different. For example, in one set of booklets, the particular questions were from serial numbers 1 to 25. In the different set of booklets, the same questions may be from serial numbers 26 to 50, 51 to 75 or 75 to 100, or in any other sequence. The sole purpose for doing so obviously was to ensure that no unfair means are adopted. A candidate sitting in one room may have a paper in which the question may be at Sl.no. 1 whereas the candidates sitting behind him could have the same question at Sl.. No. 47. The candidate sitting in the next row may have a booklet number in which that very question is at Sl. No. 11. Since the candidate has only to mark the answer by darkening the printed circle by ink, in the computerized column, it ensures that the candidates sitting immediately behind or in front or by his sides, cannot copy from each other. The aforesaid procedure makes it virtually impossible to copy the answers since a candidate cannot possibly have an idea as to what series of question paper has been handed over to the other candidates.

10. The case of the respondents is that although the top candidates selected for first counselling have got about 77% marks, the petitioner as well as all the candidates who have engaged themselves in the adoption of unfair means would secure 80% or more, if evaluated on the basis of question booklet code fraudulently mentioned in their answer sheets different from the one actually allotted to them.

11. The petitioner had opted for papers in English language. She was given the papers in the same language. The group of candidates who opted English language were made to sit at a place different from that meant for the candidates who opted papers in Hindi language. It passes beyond one's comprehension as to in what circumstances the petitioner came to know of the Booklet Code Number to be used by candidates who opted for papers in Hindi language and wrote a different question booklet number, which was never allotted to her. It is possible that a candidate, on account of inadvertence, may write wrong roll number or question booklet number, by misquoting a particular figure but to write a question booklet no. which is allotted to another candidate, who has opted to write his/her answers in Hindi, by the petitioner raises serious doubt and suspicion. During the course of arguments, it was urged on behalf of the respondents that the examination centre, namely, St. Fidelis college, Vikas Nagar, Lucknow, wherefrom the petitioner appeared in the CPMT, was in the grip of use of unfair means. From this

centre, as many as 21 candidates in the first group and 26 candidates in the second group, have been found using unfair means. It was maintained that what happened was that huge amount from the candidates, wishing for admission by unfair means in CPMT 99, was taken by some persons, who formed a racket in connivance with the invigilators at the aforesaid Centre and other concerned staff. They smuggled out a question sheet, prepared the answer with the help of some well qualified teachers who run their Coaching classes, and managed to send the same in the examination hall. This answer sheet was copied by the petitioner and such other candidates. However, in doing so, they committed a glaring and fatal mistake. Booklet number belonging to candidates, who opted papers in Hindi language, was deliberately mentioned in the English group of papers, instead of quoting the originally allotted Booklet number. Had the petitioner been the only candidate using a different question booklet number, (which was allotted to those who opted to write their answer in Hindi language), her version could have been believed, but there are as many as 25 other candidates who have done the same thing, which was a deliberate act and not a bona fide mistake, all in pursuance of a design calculated to confer undue advantage and with an avowed object of securing maximum marks to march over the other candidates in the matter of selection.

12. In the alternative, even if the case of the petitioner that she used the wrong Question Booklet Number accidentally on the answer sheet is accepted and her sheet is examined with English Booklet Number command, the result would still be worse for one simple reason that she answered the sequence of questions contained in the Hindi answer sheet.

13. There is considerable force in the submission made on behalf of the learned counsel for the respondents. The over all facts and circumstances of the present case reveal very sordid tale of affairs happening in our educational institutions. The petitioner, no doubt, is a meritorious girl. She is throughout first class candidate. But she was certainly lured to resort to unfair means instead of exhibiting her merit in the test. From the material brought on record, this court is not persuaded to accept the contention of the petitioner that her result has been wrongly withheld. For the reasons stated above, there is sufficient material available with the respondents to probe the matter and unearth the truth. During the course of arguments, it was pointed out that the matter has already been entrusted to the C.B.I./Vigilance. If it is correct, then it would not be proper for this court to touch the merits of the case as the same may deflect the course of investigation. For the purpose of this case, suffice it to say that the CPMT-99 committee constituted by the University of Roorkee consists of eminent academicians. They are experts in the field. They have formed an opinion against the petitioner that she has used unfair means in the aforesaid examination. This opinion or conclusion is well founded.

14. This court is loath to interfere with the decision taken by the experts in the field and the Courts should give due regard to the interpretation of educational authorities. Academic freedom demands responsibility on the part of the academicians to raise high standards of education. If the academic community does not fulfil the responsibility it invites interference by Courts. The courts have been cautious enough in upholding academic freedom and the autonomy of the educational institutions, particularly, imparting professional courses and, therefore, has shown great reluctance to interfere with the decisions of the experts in the field, as would be evident from the series of decisions of the apex court. A reference may be had to a recent decision of the apex court in **Admission Committee, C.I.I. 1995 V. Anand Kumar** (1998)8 **SCC-333** wherein it

has been held that in the absence of mala fide or any other material, High Court should have preferred to accept the Selection Committee's version and to require the Selection Committee to justify each and every selection made by it, amounts to imposing an impossible burden on it. In ***Jawahar Lal Nehru University Students' Union V. Jawaharlal Nehru University and another*** (A.I.R. 1985 S.C.-567), the apex court held that court should not interfere with academic policy which has a rational basis and is not arbitrary. In ***Krishna Priya Ganguly etc.etc. V. University of Lucknow and others*** (A.I.R. 1984 S.C.-186), the apex court laid down guideline to the effect that High Court, in its extraordinary jurisdiction under Article 226 of the Constitution of India, cannot devise its own criterion and has no jurisdiction to introduce its notions in academic matter. The High Court was not competent to do so and had no jurisdiction to import its own ideology. Similarly, in **Dr. M.C. Gupta V. Dr. A.K. Gupta** and others (1979 Lab.I.C.-296), Hon'ble Supreme Court held that when selection of a candidate is made by a Commission aided and advised by experts having technical experience and high academic qualifications in the specialized field probing teaching/research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegation of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems the face than the Courts generally can be. To the same effect was the view of apex court way back in 1966 in **Principal Patna College, Patna and others V. Kalyan Srinivas Raman** (A.I.R. 1966 SC-707), wherein it held that in dealing with matters relating to orders passed by authorities of educational institutions, the High Court should normally be very slow to intervene under Article 226 of the Constitution because the matters falling within the jurisdiction of the educational authorities should normally be left to their decision and the High Court should interfere with them only when it thinks it must do so in the interest of justice. It is thus settled and firm proposition of law that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience in the field.

15. In the conspectus of the facts narrated above, it is well established that the petitioner has resorted to unfair means. The faint and bald allegation of mala fide on the part of the Selection Committee remains unsupported by any tangible evidence. It is merely an ornamental plea. The case fails both on legal and factual matrix.

16. Before parting it may be observed that the Director General, Medical Education, Ministry of Health, U.P. Government, Lucknow – respondent no. 3 shall move the State Government to ensure that a full fledged enquiry into the matter is conducted by C.B.I./Vigilance so that the truth may be unearthed and appropriate action can be taken against the recalcitrant Centre Superintendent and other members of the staff as well as the concerned Coaching Institute.

17. The writ petition is accordingly dismissed. The interim order dated 6.9.1999 is discharged. Parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.99

BEFORE
THE HON"BLE G.P. MATHUR, J
THE HON"BLE BHAGWAN DIN, J.
Special Appeal No.540 of 1999

Daya Shanker Tiwari ...Petitioner
Versus
Chief of the Army Staff Army Head Quarter, New Delhi and others ...Respondents

Counsel for the Appellant:
Daya Shanker Tiwari
(In person)

Counsel for the Respondents
Shri A.K.Gaur

Army Act readwith Defence Service Regulation, 1962, Paras 143 and 361 (4) (b)- Appellant enrolled in 1977 as Sepoy/Driver (MT)- Medically boarded out and discharged from service in1987-Pursuant to High Court order re-enrolled as driver (MT) in SC (NT) w.e.f. 10.4.1993 as per Reg. 143 of Army Act- In another writ petition appellant challenged validity of his discharge by order dated 14.8.95 w.e.f. 31.8.96-Appellant having completed 40 years of age, the petition was dismissed- Hence the present Special Appeal Held, the Appellant before being discharged in normal manner was OR therefore, he could have been retained in service only for a period of 10 years and could be in all circumstances be discharged on completion of his retiring service limit. However, extended limit of discharge of such personnel as laid down in AO 13 of 1977 shall not be allowed to be availed.

There is nothing in the Instruction No. 1/S/76 or in para 143 of the Regulations or in the letter No. A/32395/VII/Org-2 MP ©/71 S/A/D (AG), dated 10.5.1977 indicate that the intervening period between the date of discharge and re-enrolment shall be counted for reckoning the pensionary benefits. Held (Para 16)

By the Court

1. This Special Appeal has been preferred against the judgement and order passed by single Judge dismissing the writ petition no.13165 of 1996 on the ground that there is no provision of counting the intending period from the date of discharge to the date of re-enrolement towards qualifying service to earn minimum pension and the seniority of the appellant may be counted w.e.f. 10.4.93, the date on which the claim rested has been cited, that the appellant may be allowed to continue in service even after attaining the age of 40 years to complete the qualifying service to earn minimum pension.

2. The events and the circumstances constituting the facts having bearing on the decision of this appeal, are that the appellant was enrolled in June, 1977 as Sepoy/Driver (MT) in Army service Corps.and after requisite training he was posted as Class -III Driver. As the luck would have he met with an accident in August, 1980.He sustained severe injuries, resulting in fracture of mid shaft femur. Because he met with the accident when he was on bonafide Government duty, he was allowed to continue in army service and was treated at various military hospitals.. After completion of the treatment his disability was surveyed and classified in category "BEE" with disability less than 20%. He was, therefore, discharged from the service in ;the month of September, 1987. With a view to ventilate grievance, he filed Civil Misc.Writ Petition no.21823 of 1987. The said writ petition was heard and disposed of by judgement and order dated 28.1.1992 with the observation that-

" In the circumstances of the case, if the petitioner is still entitled to get the benefits of the above provisions and he makes appropriate application for it within a month from today, his application shall be considered and decided according to the Rules within a period of three months from the date of its receipt and the decision taken thereon will be intimated to him"

3. In pursuance to the above order the appellant moved an application for re-enrolment and mustering as JCO (RT) Religious Teacher (Pandit). The appellant was re-enrolled as Driver (MT) in SC (NT) w.e.f. 10.4.93 in terms of the provisions contained in Regulation 143 of the Army Act. However, the claim of the appellant for his mustering as JCO (Pandit) was rejected by the authority concerned. Consequent upon he filed another Civil Misc.Writ Petition No. 13885 of 1995

before this court. This petition was disposed by the judgement and order dated 27.11.1996 with the observation that -

" So far as the claim for posting as JCO (RT) is concerned, in paragraph 21 of the counter affidavit it has been pointed out that the post of JCO (RT) is a Commissioned post of junior officer, for which certain requisite qualifications are necessary. The petitioner do not possess requisite qualification, therefore, he cannot be considered for the same. Admittedly, the petitioner was a Sepoy which is the lowest rank in Army. On re-enrolment he cannot be posted in a post higher than the post he had held. From the Army Instruction no. 204 it appears that the recruitment in the post of JCO (RT) is made direct from the rank of Jamadar or Naib Subedar in the ratio of 3.1 provided they fulfil age limit of 25-35 years and are found medically fit in the category "AYE" and possess the educational qualification provided in paragraph 5 thereof and are selected in the manner provided in paragraph 6 by the Recruiting Officer in consultation with Commanding Officer of the unit concerned. Thus, it appears that the petitioner being the Sepoy cannot come within the ambit of consideration for recruitment to the said post.. Therefore, the said claim cannot be maintained by the petitioner."

4. The appellant was not satisfied with the above order, therefore, he moved a review application which also met the same fate. Ultimately he filed Special Appeal Nos. 132 of 1997 and 154 of 1997. Both of them have been dismissed by a Division Bench of this Court on 1.9.1997. The appellant refused to leave the field and accept his defeat in the fight with the respondents. He filed another Civil Misc.Writ Petition No. 13165 of 1996 before this court and also SLP Nos. 14190 and 14191 of 1998 before the Apex Court. Both the SLPs were dismissed as withdrawn primarily on the ground that petitioner was pursuing his remedy in the writ petition no. 13165 of 1996 pending in the High Court.

5. In the writ petition No. 13165 of 1996 the appellant challenged the validity of the order dated 14.8.95 discharging him w.e.f. 31.7.96 basically on the ground that immediately after the notice of discharge was served on him, he ,lodged a complaint dated 19.9.95 before the respondent no. 1 for cancellation of the discharge order, to be given effect from 31.7.96. The respondent no. 1 ought to have decided the same within the period of90 days as provided in sub-clause 4(b) of para 361 of the Defence Service Regulation which he did not and has illegally discharged him from the service. He, therefore, prayed for issue of writs:

(a) in the nature of certiorari quashing the order dated 14th August, 1995 discharging him in the after noon of 31st July, 1996.

(b) In the nature of mandamus commanding the respondents not to discharge him and not to give effect of the order dated 14.8.95, prior to a decision on the statutory complaints dated 19..9.95 pending before the respondent no.1

(c) In the nature of mandamus commanding the respondents to issue identity card, pay books kit. etc. to the petitioner and also to give all consequential service benefits to him.

6. From the records it appears that the petitioner was offered to receive his identity card, pay book kits etc. and also pension papers from the army Head Quarter which he refused to collect there from. Seemingly for this reason the last relief has not been pressed by the petitioner before the Single Judge. The petitioner contended only for quashing the order, discharging him until the complaint against his discharge pending before respondent no. 1 and also that the order discharging him from service is illegal and not in consonance with the Rules and Regulations.

7. The learned Single Judge on the view that the petitioner had completed 40 years of age on 31.7.96 and in no case he could serve in the Army beyond the age of 40 years and therefore, of necessity, he was to stand discharged in the afternoon of 31.7.96. So also no rule could be cited for counting intervening period from the date of discharge in the year 1987 till the date of re-enrolment towards qualifying service pension and claim for seniority, dismissed the petition. Not being satisfied with the judgement and order of the learned Single Judge the petitioner preferred this Special appeal

8. It is submitted by the learned counsel for the appellant that the petitioner was engaged in regular Army in 1977 and medically boarded out and discharged from the services in September, 1987. Thus he remained engaged in the service for a period of 10 years. In pursuant to the order of this Court, he was en-enrolled on 10.4.1993 and again discharged on 31.7.1996 and thereby could get re-enrolment in the Army for a period of three years only. The total period of his engagement in the colour service was thus for a period of thirteen years. He contends that according to the Instruction No. 1/S/76 the duration of engagement of the persons enrolled under Army Act is15 years (now 17 years) service with colours and two years in reserve or till the attainment of age of 40 years which ever is earlier. He further contends that para 143 of the Defence Service Regulations provides that duration or engagements of the persons re-enrolled for the full period of combined colour and reserve service, if has not completed minimum period of colour service, he will be allowed to continue his engagement until completion of 15 years' service with colours and two years in reserve. Thus the petitioner is entitled to complete seven years' more of his service with colours and two years reserve service. It is urged that the learned Single Judge has failed to appreciate the difference between the conditions of enrolment and re-enrolment, as provided in the Instructions and Regulations cited above and thereby the decision of the learned Single Judge suffers from inherent error and illegality and deserves to be set aside.

9. We have also heard the learned counsel appearing for the respondents. The Army instructions 1/S/76 dated January 14, 1996 relates to the duration of the engagement of the persons enrolled under the Army Act. It provides that the period of engagement of Group-1 personnel shall be 15 years service with the colours 2 years in reserve or till the attainment of 40 years of age, which ever is earlier . The para (2) of the instruction provides that, all the personnel, discharged from service at their own request before completion of the colour service referred to above will also carry reserve liability for a period of 2 years or till attainment of 40 years of age in the case of Group-1 categories and 46 years of age in the case of Group-II categories, which ever is earlier. The appellant since was enrolled in group-1 and never mustered or promoted in Group-II. So also petitioner could not have the continuous engagement. He was discharged in 1987 on medical ground and subsequently re-enrolled on 10.4.1993 in view of the provision of para 143 of Defence Service Regulations, therefore, the instruction no. 1/S/76, as depicted above, is not applicable and is of no gain sake for the petitioner.

10. As we have mentioned above that the petitioner was boarded out and discharged from the service in 1987 and later on re-enrolled in 1993 in view of the provisions of para 143 of the Regulations, therefore, the case of the petitioner is squarely governed by the para143 of the Regulations, The perusal of this para is, therefore, essential for the correct decision in appeal.

The para-143 is reproduced below:-

143 (a)'Ex-Servicemen., who are in receipt of disability pension, will not be accepted for re-enrolment in the Army'

(b) Ex-Servicemen, medically boarded out without any disability pension or those whose disability pension have been stopped because other disability having been reassessed below 20% by the Re-Survey Boards, will be eligible for re-enrolment, either in combatant or non-combatant (enrolled) capacity in the Army, provided they are re-medically boarded and declared fit by the medical authorities. If such an ex-servicemen applies for re-enrolment and claims that he is entirely free from the disability for which invalided, he will be medically examined by the Rtg MO and if he considers him fit, the applicant will be advised to apply to officer-in -charge, Records Office concerned, on receipt of the application, will arrange for his medical examination at a Military Hospital nearest to his place of residence. The individual concerned will have to pay all his expenses, including that on accommodation and journey to and from the place of medical examination.'

11. The appellant had been re-enrolled under para 143 of the Army Regulations hence the terms of para 143 shall be applicable for counting the period for pensionary benefit. The para 143 of the Army Regulations lays down that if the individual is found fit and re-enrolled on regular engagement, he will be enlisted for the full period of combined colour and reserve service, subject to the following conditions-

(I) if he had not previously completed the minimum period of colour service after which he could be transferred to the reserve he will rejoin the colours and his previous colour service will count towards the minimum service required for transfer to the reserve.

(II) if he had previously completed the minimum period of colour service required for transfer to the reserve and is fully trained and suitable in all other respects, he may be re-enrolled, provided a vacancy in the reserve exists, and be immediately transferred to the reserve.'

12. The para 143 envisages certain conditions for the enrolment of discharged army personnel. The condition no.1 is that he had not completed 15 years' of colour service and his previous colour service will be counted towards the minimum service required for transfer to reserve. The condition no. 2 is that in case the personnel had already completed the colour service, he will be re-enrolled and transferred to reserve service provided vacancy is available in reserve service. This para does not provide that the intervening period between the date of discharge and the date of re-enrolment will be counted for transfer to reserve service, and also that that period shall be reckoned for the purpose of pensionary benefits.

13. In this context, a reference to letter no. A/32395/VII/Org 2 MP (c)/713-S/A/D (AG) dated 10 May, 1977 issued in supersession of the Ministry's letter no. A/18219/V/AG/Org 2 (MP) (c)/3298/D(AG-II), dated 18 Jun, 1971 may also be made. In this letter it is indicated that President of India was pleased to decide that in respect of JCOs and OR who are placed permanently in a medical category lower than 'A' every effort would be made to provide alternative employment in their own trade category commensurate with their medical categorisation, provided it is in the public interest to do so. The competent administrative authority should consider each case on merits and record a certificate in ;the individuals service documents that his continued retention in service is in the public interest. In the event of retention, any person willing to remuster in other Arm or Branch will not be denied the opportunity of such a transfer, if it is possible to try him out in the new Arm/Brach despite his low medical category. Their pay on remustering will be fixed as for surplus personnel in accordance

with AI 169/59 for JCOs and AI 4/S/55 for OR as amended.

14. Retention in service in alternative employment, in terms of para 1 above, will ordinarily be for a period of 15 years in the case of JCOs and 10 years for OR. On completion of the aforesaid period of service, personnel will be discharged with all convenient speed. However, personnel placed in permanent low medical category may continue to be retained beyond the periods specified above, until they become due for discharge in the normal manner, subject to their willingness, provided they can be employed in sheltered appointments, their retention is in public interest and their retention will not exceed the sanctioned strength of regiment/cops.

15. General provision for retirement is that ordinarily low medical category personnel will be retained in service till completion of 15 years service with colours in the case of JCOs and 10 years in the case of OR (including NCOs). However, such personnel may continue to be retained in service beyond the above period until they become due for discharge in the normal manner subject to their willingness and the fulfilment of the stipulation laid as above. The para 3 of the letter referred to above consist a condition that all personnel retained in service in terms of para 2 above will under all circumstances, be discharged on completion of their engagement periods/retiring service limits. For this purpose, NCOs and JCOs will be treated as under -

(a) NCOs will be discharged on completion of the retiring service limits appropriate to their ranks as opposed to the extended limits laid down in AO13/77. However, their retention beyond the contractual period of engagement will be regulated under the provisions of paras 144 to 147 of Regulations for the Army 1962.

(b) JCOs will be discharged on completion of the normal retiring service limits as opposed to the extended limits laid down in AO 13/77.

16. The appellant admittedly has been re-enrolled in evidence of the Courts order on the terms and conditions given in the letter referred to above and as provided in para 143 of the regulation. In terms of the Government of India, Ministry of Defence letter no. A/37/395/A/2 (MP) (c) 713-S/A/D dated 10 May, 1977, the personnel with permanent low medical category will be retained in service till the completion of 15 years in the case of JCOs and 10 years in the case of OR. They may however be allowed to continue in service beyond the above period until they became due for discharge in normal manner. The appellant before being discharged in normal manner was OR, therefore, he could have been retained in service only for a period of 10 years and could in all circumstances be discharged on completion of his retiring service limit. However extended limit of discharge of such personnel as laid down in AO13 of 1977 shall not be allowed to be availed. Besides the above, regularisation and terms and conditions laid down by the instructions issued time to time, no other Rule, Regulation or the Instruction has been cited and referred which provides that even after completion of the retiring age limit the re-enrolled personnel may be retained with a view to complete the period of service in colours and service in reserve. There is nothing in the Instruction No. 1/S/76 or in para-143 of the Regulations or in the letter no.A/32395/VII/Org-2 MP (c) 713 S/A/D (AG) dated 10.5.1977 to indicate that the intervening period between the date of discharge and re-enrolment shall be counted for reckoning the pensionary benefits.

17. It is not disputed that complaint filed by the appellant before respondent no. 1 was not disposed of prior to his discharge from service. However, the contention of the appellant's counsel that the respondent no.1 could not discharge the petitioner until the

disposal of his complaint is without substance for two reasons, first that there is no regulation dealing with such situation and providing that the Army personnel shall not be discharged before disposal of a complaint if it is so made, second that the confirmation of the order dated 14,.8.1995 and discharge of the appellant amounts to an automatic rejection of his complaint.

18. For the above reasons, we are of the definite opinion that the learned Single Judge committed no error in dismissing the writ petition and refusing to grant relief as prayed by the appellant. The appeal is without merit and deserves to be dismissed.
It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.11.1999

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

Civil Misc. Writ Petition No. 10058 of 1994.

Lalit Mohan Upadhyay ...Petitioner
Versus
ThePrincipal, Kumaon Engineering College, Dwarhat, Almora & others ...Respondents

Counsel for the Petitioner:
Shri Sudhanshu Dhulia

Counsel for the Respondents :
S.C.
Sri B.D. Upadhaya
Shri B.D. Shukla

Model Bye Laws for Engineering College/Institutes of U.P. – Bye Law No. 3 – Appointment as lecturer by Board of Governors – Resignation – Subsequent withdrawal of resignation before its acceptance by Principal and State Government – Effect.
Held that resignation is not complete until it is accepted by the proper authority. In the present case since the petitioner's resignation was withdrawn before it was accepted hence in our opinion the withdrawal of the resignation was valid and acceptance of the resignation was illegal.
(Para 6)

Case Law referred.
AIR 1978 SC 694
AIR 1990 SC 1808

By the Court

1. Heard Sri Sudhanshu Dhulia learned counsel for the petitioner and Sri B.D.Shukla learned counsel for the respondent no. 1 as well as learned standing counsel.

2. The petitioner was lecturer in Mathematics in Kumaon Engineering College, Dwarhat, District Almora. He submitted his resignation dated 6.9.9.3 vide Annexure-8 to the writ petition, but he has alleged in paragraph 17 of the writ petition that he withdrew that resignation by Registered letter dated 10.9.93 Annexure-9 to the writ petition. It has been further alleged in paragraph 27 of the writ petition that the resignation was accepted on 17.1.94. The allegation in paragraph 17 of the writ petition that the petitioner has withdrawn his resignation letter dated 6.9.93 by his subsequent letter dated 10.9.93 is not denied. In paragraph 16 to the counter affidavit all that is stated is that paragraphs 17 and 18 of the writ petition are matters of record and hence need no reply. Thus the short submission of the learned counsel for the petitioner is that the petitioner had withdrawn his resignation before it was accepted.

3. Learned counsel for the petitioner has shown us the Model Bye Laws for Engineering College/Institutes of U.P. In Bye Law No. 3 of the same it is provided as follows :-

"3. APPOINTMENTS :

(1) All appointments to posts under the College/Institute shall be made:

(2) By the Principal/Director, If the maximum of the scale does not exceed Rs. 3500/-

and

(3) By the Board in other cases."

4. .In Annexure –2 to the writ petition it is mentioned that the pay scale of the petitioner was Rs. 2200-4000. Thus his maximum pay scale was above Rs. 3500/- and hence according to the Bye Law No. 3 the petitioner's Appointing Authority was the Board of Governors. Hence it is submitted that only the Board of Governors can accept the petitioner's resignation. Annexure-2 to the counter affidavit shows that the petitioner's resignation letter dated 6.9.93 was accepted by the Principal on the same date, but the Principal forwarded the matter to the Board of Governors with the following endorsement: -

"Although usually one month's notice is required to be given by the employee while resigning, it is upto the Board of Governors to accept the resignation with immediate effect and to waive the notice period."

5. In our opinion the Principal had no authority or jurisdiction to accept the petitioner's resignation as the petitioner's Appointing Authority is the Board of Governors and hence only the Board of Governors can accept his resignation. In fact the Principal has recognized this legal position as he forwarded the papers to the Board, but there was no acceptance by the Board of Governors and instead it was the State Government which accepted the resignation on 17.1.94 i.e. long after the petitioner had withdrawn his resignation.

6. In **Union of India V. Gopal Chand Mishra (AIR 1978 SC 694)** it has been held that resignation can be withdrawn at any time before it become effective. In the case of employees for whom acceptance of resignation is necessary obviously the resignation becomes effective only when it is accepted. Similarly in **M/S J.K. Cotton Spinning & Weaving Mills Co. Ltd. Kanpur V. State of U.P. and others (AIR 1990 SC 1808)** it has been held that resignation is not complete until it is accepted by the proper authority. The same view has been taken in several other decisions. In the present case since the petitioner's resignation was withdrawn before it was accepted hence in our opinion the withdrawal of the resignation was valid and acceptance of the resignation was illegal.

7. Hence we set aside the impugned order dated 27.1.94 (Annexxure-22 to the writ petition) and hold that the petitioner validly withdrew his resignation. The petitioner will be reinstated in service within six weeks from the date of production of a certified copy of this order before the authority concerned and shall be treated in continuous service as if his service had never come to an end. He will get seniority and all consequential benefits and also arrears within three months from the date of production of a certified copy of this order. No. order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.1999

BEFORE
THE HON'BLE V.M. SAHAI, J.

Civil Misc. Writ Petition No. 37219 of 1991.

Sri Devi Sharan Sharma ...Petitioner
Versus
District Magistrate & others ...Respondents

Counsel for the Petitioner:
Shri P.K. Singh
Miss Rollie Kauser

Counsel for the Respondents :
Sri V.K. Rai
S.C.

Constitution of Inida , Article 226 readwith Financial Hand Book, Volume II r. 56-C- Compulsory Retirement- Petitioner-Class IV employee-punishment of adverse entry awarded due to absent without leave- from 86 to 91 the performance found good – whether on the basis of one adverse entry the petitioner can be compulsorily retired? held 'No'

Held -

In the case of petitioner he was found absent from duty for few days. The respondents had taken action against him. He was reinstated. But he was given adverse entry. This entry in absence of any other material either before or after was not sufficient to warrant the conclusion in rule 56 (C) that it was in public interest to retire the petitioner from service. (Para 3)
Case law discussed.

Orissa (1994) vol. 28 Administrative Tribunal Cases 443

By the Court

1. The petitioner was appointed on 1.4.1976 as peon in Collectorate, Meerut. He was regularised/confirmed with effect from 1.8.1972. Since he was a class IV employee his age of superannuation was sixty years. His date of birth being 28.4.1940 he was due to retire in August, 2000. He was suspended on 28.2.1985 and remained under suspension till 18.3.1985. Thereafter, he was reinstated in service. An adverse entry was awarded to him on 25.6.1985. The respondent no. 1 by his order dated 26.11.1991 compulsorily retired the petitioner/ It is this order which is under challenge in the instant writ petition.

2. I have heard Miss Rollie Kauser, learned counsel for the petitioner and Sri V.K. Rai, brief holder, State of Uttar Pradesh appearing for the respondents. Learned counsel for the petitioner has urged that on the basis of one adverse entry the petitioner could not be retired compulsorily and there was nothing against the petitioner from the year 1986 to 1991. On the other hand learned counsel for the respondents supported the impugned order of compulsory retirement and produced the report of the screening committee before this court. The relevant part of the report of the screening committee so far as t relates to the petitioner is quoted below :

"43- श्री देवीशरण,चपरासी सदर नजारतः- इन्हें दिनांक 25.6.85 को एक प्रतिकूल प्रविष्ट मिली है जिसमें दिनांक 28.2.85 को 18.3.85 तक बिना अवकाश स्वीकृत कराते हुए अनुपस्थित रहने का दोषी पाया गया है तथा अपने स्पष्टीकरण में अधिकारी के प्रति झूठी बातें लिखी गई हैं । उक्त प्रवृति के कर्मचारी को सेवा में बनाये रखना जनहित एवं कार्य हित दोनों में ही उचित नहीं है । अतः कमेटी इन्हें अनिवार्य रूप से सेवा निवृत्त किये जाने की संस्तुति करती है ।"

3. The report of the screening committee demonstrates that the petitioner was compulsorily retired on the basis of one adverse entry awarded to him on 25.6.1985 as he was under suspension for about twenty days and he made incorrect allegations against his officers. No material has been produced by the counsel for respondents to show that the petitioner was awarded any other adverse entry. The question, therefore, that arises for consideration is whether one adverse entry by itself is sufficient for the appointing authority to exercise his discretion that the retention of an employee was not in public interest. The compulsory retirement under rule 56 (c) of Financial Hand Book Volume II, Part II to IV, is not a punishment but it affects the employee injuriously,. That is why the exercise of power is subject to public interest. It can arise when the continuance of employee is not in the interest of the service. The objective of the rule is obviously to weed out the dead wood. In other words the employee should have become of no use for the service. For arriving at such a decision adverse entry of one year, ordinarily, cannot furnish material to decide that the employee deserved to be weeded out. The record must establish that the retention of the employee was not in public interest. In the case of petitioner he was found absent from duty for few days. The respondents had taken action against him. He was reinstated. But he was given adverse

entry. This entry in absence of any other material either before or after was not sufficient to warrant the conclusion in rule 56 (c) that it was in public interest to retire the petitioner from service.

4. The petitioner was retired in public interest. This expression has been explained in various decisions. For instance in **S. Ramachandra Raju v State of Orissa (1994) Vol 28 Administrative Tribunal Cases 443** the apex court held that an order of compulsory retirement based on one adverse entry followed by subsequent good reports makes the exercise of power arbitrary. In absence of any material that the work of the petitioner after 1985 was such that he deserved to be weeded out the order is arbitrary.

In the result this petition succeeds and is allowed. The order dated 26.11.1991 passed by respondent no. 1, Annexxure-1 to the writ petition is quashed with all consequential benefits of service to the petitioner. The respondents are directed to reinstate the petitioner and pay his entire arrears of salary within a period of two months from the date a certified copy of this order is produced before them.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD NOVEMBEER 2, 1999

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

Criminal Contempt Case No. 17 of 1998.

State of U.P ...Petitioner
Versus
Kamal Narayan Singh ...Respondents

Counsel For the Applicant:
Shri Sudhir Mehrotra
Addl. Government Advocate (A.G.A.)
Miss. Nahid Moonis

Counsel for the Respondents :
Sri J.N. Tiwari

Criminal Contempt – Proceedings of Criminal Contempt were intitiated against two Advocates as a suo motu review by the Bench which had disposed of the contempt cases.

Held –

The power of contempt is meant to be used and exercised to preserve the authority of the Court and not wreck personal vengeance against any individual nor the exercise of this special jurisdiction should be suggestive of any witch – hunting. In the fact situation of he present case we are of the considered view that further continuance of the proceeding would be tentamount to witch hunting and lead the court to lose its own channel of administration of justice. We are of the considered view that it would be in furtherance of justice that the chapter is closed sooner the better. (Para 9)

By the Court

1. The proceeding before us is apparition of the three contempt cases In Re : Kamal Narain Singh, referred to above. Having emerged from the graveyard in which the composite corpus of the three cases were buried with contemner's comeuppance in each of the three cases disposed of by a common judgment dated 28.5.1999, the ghost is chasing two Advocates namely Sri V.C. Mishra, Senior Advocate and his Advocate son Sri Vivek Mishra, besides some officials of the Copying Section of this Court and the contemner Kamal Narain Singh himself by using the vehicle of contempt of court jurisdiction of this Court. The proceeding, it appears, has been initiated as a suo motu review by the Bench which had disposed of the contempt cases as aforestated. It is neither necessary nor desirable to speak of the circumstances under which the proceeding

was withdrawn from the concerned Bench and placed before this Bench for disposal.

2. It so happened that one Kamal Narain Singh filed a writ petition being Criminal Misc. Writ Petition 91 of 1998 for quashing of the first information report in Case Crime No. 376 of 1997 registered against him under Section 3(1) of the U.P. Gangsters and Anti Social Activities Act, 1986, P.S. Mohammadabad, District Farrukhabad on 30.12.1997. The said writ petition was grounded on the allegations that the petitioner therein happened to be a political worker belonging to Samajwadi Party and the case crime aforestated was registered against him at the instance of members belonging to the B.J.P. – ruling party. In support of his contention that he belonged to Samajwadi party the petitioner Kamal Narain Singh placed reliance on certain documents, which purported to have been issued under the signature of Shri Malayam Singh Yadav, the National President of Samajwadi Party. The court found the documents to be forged and fictitious and accordingly dismissed the writ petition vide judgement and order dated 11.2.1998. Criminal Contempt case no. 17 of 1998 came to be registered against Kamal Narain Singh for his having produced the "forged and fictitious document for the purpose of obtaining a Rule". Relevant portion of the order date 11.2.1998 is quoted below :

" Since the petitioner has produced before us a forged and fictitious document to his knowledge for the purpose of obtaining a Rule, we are of the view that he has committed not only contempt of this Court but also offence punishable under the provisions of the Indian Penal Code. Issue notice to him as to why appropriate orders in that regard be not passed against him. Since Mr. Katiyar learned counsel for the petitioner States that he has instructions only to appear in the case, which has been dismissed, let office issue a notice to the petitioner on the address given in the writ petition and the supplementary affidavit making the Rule returnable on 25th March, 1998. The notice to be registered as a separate criminal contempt case.

Sd/- B.K. Roy,J
Sd/- P.K.Jain, J

3. The contemner Kamal Narain Singh did not appear in pursuant to court's order dated 11.2.1998. However, on 15.4.1998 Sri V.C.Mishra, Senior Advocate and Sri Vivek Mishra, Advocate, put in appearance for the contemner Kamal Narain Singh and submitted that since the contemner had not been served with the notice, he could not know if he had to appear personally before the Court. The case was adjourned to 28.4.1998 awaiting the appearance of the contemner and for the reasons recorded in the order dated 15.4.1998, the court directed that another Criminal Contempt Case be registered against the contemner, Relevant part of the order reads as under :

"We had not exempted his personal appearance from his criminal contempt proceedings and under the Rules of the Court he was expected to appear personally today the date fixed from before. We accordingly further charge man as to why he should not be punished for not personally presenting himself today and for that purpose we issue another notice to him fixing 10 A.M. of Tuesday dated 28th April, 1998. Since Mr. Misra, learned counsel states that he has no instructions to receive notice of this second criminal contempt proceedings we direct the office to dispatch another notice to the contemner at the address mentioned by him in his writ petition as well as supplementary affidavit including the Vakalatnama which has been filed today. We reserve our further comments in this regard awaiting his appearance on 28th April, 1998 alongwith his show cause in the first criminal contempt proceedings as well as the second criminal contempt proceedings which we have initiated which has to be registered separately by the

office and put up together on the adjourned date."

4. On the basis of the order aforesaid Criminal Case No. 35 of 1998 came to be registered against the contemner Kamal Narain Singh. It appears that during the pendency of the aforesaid two contempt proceedings it was brought to the notice of the Court that even though Criminal Misc. Writ Petition No. 91 of 1998 filed by the contemner had been dismissed vide order dated 11.2.1998, the contemner filed yet another Criminal Misc. Writ Petition No. 1236 of 1998 grounded on the same cause of action and obtained interim order of stay of his arrest dated 9.4.1998 in crime case no. 376 of 1998, P.S. Mohammadabad, District Farrukhabad under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986. The fact that the earlier petition had been dismissed was not disclosed in the subsequent writ petition and in the affidavit it was stated that the writ petition namely the second one was the first writ petition with regard to the criminal proceedings sought to be quashed therein. 'When this fact was brought to the notice of the Court, the third criminal case was ordered to be registered against the contemner Kamal Narain Singh vide order dated 10.7.1998 on the basis whereof Criminal Contempt Case No. 59 of 1998 In Re : Kamal Narain Singh came to be registered. Since the contemner was not present in Court, directions were issued to the police authorities to apprehend and produce him before the Court. The case was adjourned to 24.7.1998 awaiting production of the contemner. It appears that the police submitted a report that the contemner was absconding and concealing himself whereupon the Bench by its order dated 24.7.1998 directed attachment of immovable properties of the contemner. Ultimately the contemner could be apprehended on 19.5.1999 and an application dated 21.5.1999 was moved by the learned Additional Government advocate praying therein that appropriate orders be passed in respect to detention of the contemner as well as his production before the court. On 22.5.1999 the Court directed that the said Criminal Misc. Application be placed after registering its number alongwith records of Criminal case no. 17 of 1998 on 24.5.1999 at 1.45 P.M. in Chambers of one of the Hon'ble Judges constituting the Bench. Pursuant to the said order the contemner was produced in Chambers on 24.5.1999 on which date the contemner is said to have given a statement that on 11.2.1998 he was personally present in court when the writ petition was dismissed but Sri V.C.Mishra, Senior Advocate advised him to leave the court room and see him in his chambers. The contemner, it appears, made further statement to the effect that his signature was obtained by Shri V.C. Mishra on a Vakalatnama for moving the Supreme Court against the orders dismissing the writ petition and further that he has handed over Rs. 20,000/- in cash to Sri V.C.Mishra for the purpose of filing the case in the Supreme Court. The Bench seized of the matter felt that the facts stated by the contemner, prima facie, made out a case of criminal contempt as against Sri V.C.Mishra and Sri Vivek Mishra but before saying anything in this regard it considered imperative on its part to give an opportunity to the aforementioned Advocates to have their say in the matter and accordingly adjourned the three criminal contempt proceedings to 26.5.1999. The order dated 24.5.1999 contained the following directions to the Copying Section of the Court:

"The Copying Section of the Department of the Court is directed to furnish particulars of the application/applications for whom they have been filed and to whom they were handed-over for supplying certified copy of the orders passed in the writ petition as also in the contempt proceedings."

5. A copy of the order dated 24.5.1999 was served on Sri V.C. Mishra, Senior Advocate and Sri Vivek Mishra, Advocate on

25.9.1999 alongwith a complete copy of the order sheet and relevant papers. Sri V.C. Mishra and Sri Vivek Mishra appeared in person on the date fixed. They submitted that the statement made by the contemner was wholly false, frivolous and motivated for the purpose of damaging their integrity and reputation at the instance of their enemies. They accordingly prayed for permission to withdraw their appearance from the first Contempt Case No. 17 of 1998 in which alone they had entered appearance earlier. After hearing learned Additional Government Advocate appearing for the contemner and Sri V.C.Misra, Sri Vivek Mishra, their counsel Shri J.N. Tiwari and Sri Jagdish Tiwari, Government Advocate, the Bench reserved its order and deferred its delivery to 28.5.1999. The contemner was directed to be produced in Chambers on 28.5.1999 and in the meantime he was ordered to be kept with Civil Lines Police Station, Allahabad.

6. Judgment was delivered on 28.5.1999 whereby the contemner Kamal Narain Singh was held guilty of committing contempt of court and sentenced in each case to undergo imprisonments and to pay fines as indicated in the order. For the purpose of this case it is not necessary to go into details of the punishment inflicted on the contemner Kamal Narain Singh. The main Judgment was delivered by P.K,.Jain, J. So far as Sri V.C. Misra and Sri Vivek Mishra, Advocates are concerned it was held that the statement of the contemner against them had been, "in all probabilities given by the contemner in order to save his skin from punishment that may be awarded to him in the contempt proceedings". It was accordingly held that :

"In our view the statement of contemner which is not supported by any corroborative material and possibility of which being false in the circumstances stated above cannot be ruled-out, cannot be accepted. In the circumstances stated above we also permit Sri V. C. Mishra and Sri Vivek Mishra to withdraw their appearance from Criminal Contempt Case No. 17 of 1998, in which alone they had entered appearance on behalf of the contermner'.

7. B. K. Roy, J., while agreeing with the opinion of P.K. Jain, J., passed an additional order with reference to the conduct of Sri V. C. Mishra but the conclusion arrived at by P. K. Jain, J. that the contemner had made false statement against Sri V. C. Mishra and Sri Vivek Mishra in order to save his skin from punishment remained undiluted.

8. We have heard Sri J. N. Tiwari appearing for Sri V. C. Misra and Sri Vivek Mishra and Miss Nahid Moonis, Additional Government Advocate and perused the entire record including the "Minutes" dated September 24, 1999. Judicial discipline forbids us from making any comment with respect to the "Minutes" dated September 24,1999 recorded in the Criminal Contempt Case No. 59 of 1999 and as stated earlier in this judgment it is neither necessary nor desirable to go in to the circumstances in which the so called "part heard case " stated to be "at the hearing stage of review " were directed to be placed before this Bench. On a conspectus of judgment and order dated 28.5 1999 we veer around the view that the notices issued to Sri V. C. Misra and Sri Vivek Misra to explain their conduct in the backdrop of the statement made by the contemner which in the opinion of the Bench made out a "prima facie" case of criminal contempt as against Sri V. C. Misra and Sri Vivek Misra stood discharged on Sri V. C. Misra and Sri Vivek Misra being given a clean chit vide order dated 28.5.1999. Thereafter there appears no justification for initiating a suo motu review proceedings and giving , notice of the same to Sri V. C. Misra and Sri Vivek Misra. We are also of the view that the contemner Kamal Narain Singh having been convicted and sentenced in criminal contempt cases, referred

to above, there is no justification to review the matter.

9. So far as the proceeding against the officials of the Copying Section of this Court is concerned, it appears, that officials of the Copying Section failed to furnish, " particulars of the application /applications for whom they have been filed and to whom, they were handed over, for supplying certified copy of the orders passed in the writ petition as also in the contempt proceeding", as per order of the Court dated 24.5.1999. However, by order dated 12.7.1999 the Registrar of the Court has been directed to institute an enquiry into "*unfortunate lapse of the Copying Section of the Court" and take "suitable action against erring person/persons*" and in such view of the matter we find no justification to simultaneously proceed on judicial side in exercise of contempt of court jurisdiction which is a special jurisdiction to be "*used cautiously and exercised sparingly*" to uphold the dignity of the Court and the majesty of law. The idea behind conferral of such jurisdiction in superior courts of record is that cautious exercise of the special jurisdiction to punish for contempt would help establish the 'reign' of law. 'Reign of law', it may be observed, is the mind and will of God and administration of justice', in true sense of the term, is the pursuit of truth, goodness and beauty. "*Satyam Shivam Sundaram"* – and from that reckoning, it is a divine task. In its pursuit of truth, goodness and beauty, the court ought to bear in mind, with Sir Edward Coke, that "if a river swell beyond its banks, it loseth its own channel". It need hardly be said that the power of contempt is meant to be used and exercised to preserve the 'authority of the Court' and not to wreck personal vengeance against any individual nor the exercise of this special jurisdiction should be suggestive of any witch – hunting otherwise, we are sure. "it will instantly lose all its authority; and the power of the Court will not long survive the authority". In the fact situation of the present case we are of the considered view that further continuance of the proceeding would be tantamount to witch-hunting and lead the court to lose its own channel of 'administration of justice'. We are of the considered view that it would be in furtherance of justice that the chapter is closed sooner the better.

10. In the result the proceeding originating from the order dated 12.7.1999, copy of which was ordered to be served to Sri V.C. Misra, Senior Advocate and Sri Vivek Misra, Advocate, i.e. the so called review proceedings are dropped. Let the record be consigned to record room.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.1999

BEFORE
THE HON'BLE B.K.RATHI, J.

Criminal Misc. Application No. 4934 of 1999.

Bobby @ Premveer & another...Applicants
Versus
State of U.P ...Opposite party

Counsel for the Applicants:
Shri Raghuraj Kishore

Counsel for the Opposite party :
A.G.A.

Cr. P. C. S.267 – The question "whether an order u/s 267 Cr. P.C. in Form No.36 of Second Schedule of Cr. P. C. can be issued on the request of the police during investigation of some offence even if no inquiry or trial or proceedings are pending in the Court" is referred to for the decision of Division Bench.

Held,
The Investigation of the offence by the police u/s156 Cr. P. C. is also a proceeding under the Code and for that purpose a Magistrate can exercise power u/s 267CR. P. C. to issue an order in Form No. 36,if the person is detained in some other prison. (Para 13)

By the Court

1. This is an application under Section 482 Cr. P. C. to quash the order dated 30.8.99, Annexure-4 to the petition, passed by Chief Judicial Magistrate, Mathura under Section 267 Cr. P. C. issuing warrant 'B' against the petitioners in Crime No.88 of 1999 under Section 395 and 412 I.P.C., P.S. Govind Nagar, District Mathura.

2. In brief , the relevant facts are that both the petitioners are presently lodged in District Jail Ghaziabad. An application was moved before C.J.M., Mathura by the police of P.S. Govind Nagar, Mathura that the petitioners are wanted in Crime No. 88 of 1999 under Sections 395 and 412 I.P.C and therefore, they may be summoned under Section 267 Cr. P.C. from District Jail, Ghaziabad. The learned C.J.M. has issued notice under that section in Form No.36 to the Jail Superintendent, Ghaziabad to transfer the petitioners to District Jail, Mathura. This order dated 30.8.99 Annexure-4 to the petition has been challenged before me. It has been argued that the order is illegal as no inquiry, trial or proceeding is pending in the court of C.J.M,. Mathura and therefore, an order u/s 267 Cr.P.C. cannot be passed. The learned counsel, in support of his argument, has referred to the case of "Mukesh and others Vs. State of U.P. and others, 1998 A.C.C. page 434," decided by Hon'ble J.C.Gupta. J. The Hon'ble Judge considered Section 267 Cr.P.C. and also Form No.36 prescribed in the Cr.P.C. It is proper to reproduce below sub-clause (1) and its clause (a) of Section 267 Cr.P.C. The same read as under:

"267. Power to require attendance of prisoners-

(1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court-

(a) that a person confined or detained in a prison should be brought before the Court for answering to a change of an offence, or for purpose of any proceeding against him, or …

3. After considering this provision and Form No. 36, the learned Single Judge observed that the expression "other proceeding under this Code" read with Form No. 36 leaves no room of doubt that it would mean only such proceeding as may be pending in a court. He further held that "other Proceeding" does not include the investigation by the police and the investigation of the offence by the police and interrogation cannot fall under other proceedings under the Code for the purposes which are included in Section 267 Cr.P.C.

4. With great respect to the Hon'ble Single Judge, I am of the view that the words "other proceeding under this Code and prescribed Form No. 36" have not been properly interpreted. The words "other proceeding under this Code" Cannot be interpreted to mean that the proceeding should be in the Court. It means any proceeding under the Code of Criminal Procedure. Had the intention of the Legislature been as interpreted by the Hon'ble Judge, the words used would have been "other proceeding in the Court." The Legislature in its Wisdom has not been used the word 'court'. On the other hand, the words used are other proceeding under this Code". Therefore, the same cannot be interpreted to mean only the proceeding of the court and excluding proceedings under any other provision of the Cr. P.C., such as recording of F.I.R., investigation, arrest, summoning of the accused for interrogation, search etc. In my opinion the proceedings concerning investigation are also proceedings under the Code of Criminal Procedure.

5. My view gets support from the other provisions of the Cr.P.C. The preamble of this Act is "An act to consolidate and amend the laws relating to Criminal Procedure." As

against this in C.P.C. of 1908 the preamble is "An act to consolidate and amend the laws relating to the procedure of the court of Civil Judicature. The words "procedure of court of civil Judicature" have been intentionally omitted by the Legislature in preamble of Cr.P.C. and "procedure of the court of Criminal Judicature" has not been mentioned. This cannot be said as omission, But it appears that the words have intentionally been omitted. The C.P.C, applies to the proceedings of the Court only as it speaks; whereas the entire criminal proceedings under Cr.P.C. whatever may be the stage, are the proceedings under the Code.

6. It will also be useful to mention some other provisions of Cr.P.C. Definitions have been given in Section 2. Clause (h) of Section 2 reads as follows:

"(h)""investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf:"

7. This definition of investigation does not leave any room of doubt that the investigation is a proceeding under the Code within the meaning of Section 267 Cr.P.C.

8. The other relevant provision, in my opinion, for the purposes of controversy in issue is Section 156 Cr.P.C which confers power to the police Officers to investigate the cognizable case. Clause (2) of Section 256 Cr.P.C. is relevant and is reproduced below:

"156 Police Officer's power to investigate cognizable case
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate."

This clause also shows that the proceedings of investigation before the police officer are also the proceedings under the Code. The heading of Section 157 Cr.P.C. is "Procedure for investigation."

9. All these provisions show that the investigation of an offence is also a proceeding before the police Officer under the Code of Criminal Procedure and there can be no reason for limiting the interpretation of the words used in Section 267 Cr.P.C. to the proceedings in the court only.

10. For the sake of clarity and removal of doubts it may also be mentioned that the argument that the Magistrate cannot interfere in the investigation and therefore, he should not pass any order u/s 367 Cr. P. C. during investigation, also does not hold good. There are many provisions in the Cr. P. C. for providing assistance by the Magistrate in the investigation of the cases by the police. For example, a Magistrate u/s 82 Cr. P. C. can issue proclamation in respect of absconding accused,; under Section 83 Cr. P. C. he can order for attachment of the property of the absconding accused, under Section 94 Cr. P. C. he can issue a warrant empowering the police to search any place, under section 97 Cr. P. C. he can issue search warrant for a person wrongly confined, under section 156(1) Cr. P. C. he may permit the investigation of a non-cognizable offence, under Clause (3) of this section he may direct the police to register a case and to investigate, under Section 164 Cr. P. C. he can record statement and confession and can conduct test identification, and under Section 167 Cr. P. C. he may remand the accused to judicial custody and even to the police custody for interrogation and recovery. All these powers can be exercised on the request of the police Officer investigating the offence and to aid and assist the investigation. The Magistrate can also order for inquiry by the police regarding any matter under Section 202 Cr.P.C. and may also release the accused

persons on bail during investigation under Section 437 Cr.P.C. All these provisions in the Cr.P.C. have been incorporated for providing assistance to the police in investigation under the supervision of the Magistrate. Similarly in a case where there is allegation against a person that he is in possession of stolen goods, which may be recovered on an interrogation, or the complicity of certain persons in the crime can be ascertained by conducting test identification parade, there can be no reason as to why the Magistrate cannot provide assistance to the police in calling the accused to the jail concerned if the person is detained in prison in some other district or State. Section 267 Cr. P.C provides remedy for such a situation for the crime and interrogation, recovery of stolen or incriminating articles etc.

11. For the above reasons, with great respect I think that the narrow interpretation of the words "other proceeding under this Code" as meaning only the proceeding in the court is not a correct interpretation and the investigation of the offence by the police u/s 156 Cr. P.C. is also a proceeding under the Code and for that purpose a Magistrate can exercise power u/s 267 Cr.P.C. to issue an order in Form No.36,if the person is detained in some other prison.

12. I, therefore, respectfully differ with the view taken by the Hon'ble J.C.Gupta, J. in the above case and the following point is referred to for the decision by the Division Bench "whether an order u/s 267 Cr.P.C. in Form No. 36 of second schedule of Cr.P.C. can be issued on the request of the police during investigation of some offence, even if no inquiry or trial or proceedings are pending in the court"

13. Let the record be placed before the Hon'ble The Chief Justice for nominating a Bench for the decision of the above question at an early date, as this question is of very vital importance for investigation of offences.

14. This petitions shall be disposed of after the question is answered.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.11.1999

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

Civil Misc. Writ Petition No. 21596 of 1997

Sri Awadhesh Kumar Yadav ...Petitioner
Versus
Divisional forest officer (D.F.O.) Social forestee division, Mainpuri. and others ...Respondents

Counsel for the Petitioner :
Shri Ranjit saxena
Shri A.K.Saxena

Counsel for the Respondents: .....S.C.

Constitution of India Article 226- Regularisation Admittendly the petitioner has been continuously working for 18 years on adhoc basis- the action of the State Government in doing so is arbitrary and is violative 14 of the constitution.
Held,

State Government cannot act arbitrarily.as arbitrariners violates article 14 of the constitution to keep a person on daily wage basis for 18 year is wholly arbitrary. The petitioner be regularise d within a month from the date of production of certified copy of the order and he shall be paid regular salary thereafter.
(Para 3)

By the Count

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

2. The petitioner has prayed for prayed for. Regularisation of the service as

Stenographer. Admittedly, the petitioner was appointed as Stenographer on daily wage basis in March 1981, and he has been in continuous service since then i.e. for more then 18 years.

3. In our opinion, the state government cannot act arbitrarily in the matters relating to temporary or daily wage employees. No doubt there is a principle in service law that a temporary employee has no right to the post, but this principle has to be considered along with the other legal principle that the State cannot act arbitrarily. In the case of Smt. Maneka Gandhi Vs.Union of India and another ,AIR 1978 SC 597 it has been held by a7 judge constitution Bench decision of the supreme court that the State Government can not act arbitrarily as arbitranuons violates Art.14 of the constetion. In our opinion to keep a person on daily wage basis for 18 year is wholly arbitrary, Hence on the facts and circumstances of the case, we direct that the petitioner be regularised within a month from the date of production of the certified copy of this order and he shall be paid regular salary thereafter.

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

Petition disposed of.

ORIGINAL JURISAICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.1999

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ petition no.2766 of 1995

Sharda Prasad Mishra ...Petitioner
Versus
Assistant General Manager, Union Bank of India, Central office personal Deportment, 239 Vidhan Sabha Marg, Nariman point, Bombay / Appellate Authority and others ...Respondents.

Counsel for the petitioner:
Shri Awadhesh Kumar Singh
Shri S.N. Singh
Shri K.P. Agrawal

Counsel for the Respondents:
S.C.
Shri Samir Sharma
Shri V.R. Agrawal

Constitution of India Article 226 -The enquiry officer completely exonerated the petitioner but the impugned order was passed by the Disciplinary Authority without recorded any reasons as to why it is differing from the report of the Enquiry officer.

Since the Disciplinary Authority has not recorded any reason for differing from the reports submitted by the Enquiry officer exonerating him of the charges, and had proceeded to impose the penalty of reduction of his spay by one stage in the time scale of pay applicable to him, its validity cannot be sustained.
Held (4)

By the court

A number of prayers been made in this writ petition, but having gone through the pleadings of the parties and heard Sri K.P. Agarwal learned counsel appearing on behalf of the petitioner and sri V.R. Agrawal learned counsel appearing on behalf of the Respondent, we find that the real question is as to whether that memorandum, as contained in Annexure-15 to the writ petition, which reads as follows should be should quashed by us or not:-

"This has reference to the explanation date 28.12.1993 submitted by Shri S. P. Mishra in reply to memorandum no CO:IRD:9034/93 dated 20.12.93.

The aforesaid explanation dated 28.12.93 submitted by Shri Mishra is not found satisfactory and convincing. I, therefore, hold Sri Mishra guilty of the resons enumerated in memorandum no CO: IRD: 9034/93 dated 20.12.93:

1. Failure to discharge his duties with utmost devotion and diligence.

2. Failure to ensure and protect the interest of the Bank.

3. Doing acts unbecoming of a Bank officer.

Looking to the nature and gravity of the misconduct /allegations levelled and power against. Shri S.P.Mishra as also huge outstanding in the relevant accounts. I am of the opining that the ends of justice will be met by imposing upon him the penalty of reduction of his pay one stage in the time scale of pay. Accordingly, by virtue of the power vested in me in terms of regulation 7 of the Union Bank of India Officer Employees' (Discipline & Appeal) Regulations, 1976, I hereby pass the following order:

ORDER

"The penalty of reduction of his pay one stage in the time scale of pay applicable to him be and is hereby imposed upon Shri S.P. Mishra''

Sd/-

Disciplinary Authority'' 2. The main thrust of the submission of the learned counsel for the petitioner that the Enquiry officer has completely exonerated the filing of the charges framed against him but without recording any reasons whatsoever as to why the Disciplinary Authority is differing from his findings it has proceeded to pass the order impudned a fore mentioned.

3. Learned counsel for the Respondent, after some arguments very fairly concedes that true it is that the Disciplinary Authority had not recorded any reason as to why it is differing from the report of the Enquiry Officer but having regard to the entire facts and circumstances explained in the counter affidavit the petitioner is not entitled to the grant of discretionary relief prayed for by him from this Court under Article 226 of the constitution of India .

4. Having gone through the relevant pleading and appreciated the submissions made by both learned counsel, we are of the view that since the disciplinary Authority has not recorded any reason for differing from the reports Submitted by the Inquiry Office exonerating him of the charges and had proceeded to impose the penalty of reduction of his spay by stage in the time scale of pay applicable to him, its validity cannot be sustained

5. The order passed by Disciplinary Authority is held to be illegal and is quashed .As a necessary corollary the order passed by the appellate authority as contained in Annexure-17 is also qiashed.

6. It is clarified that it will be open for the Disciplinary Authority concerned to pass fresh order in accordance lay.

7. In view of the fair stand taken by Sri V.R. Agrawal learned counsel for the Respondents, we make no order as to cost

8. This write petition is disposed of accordingly.

9. The office is directed to hand over a copy of this order within one week to Sri V.R.Agrwal learned counsel for the Respondent for its communication to and follow Up action by the Respondent concerned.

Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.1999
BEFORE
THE HON'BLE B.DIKSHIT, J.
THE HON'BLE ALOK CHAKRABARTI, J.

Civil Misc.Writ Petition No 31454 of 1997

Sunil Kumar Sharma, and another ...Petitioners

Versus

Chairmain ,Muzaffar Nagar Kahetriya Gramin Bank 158,South Civil Lines, Muzaffar Nagar,a Bank Sponsored by Punjab Nationals Bank and others ...Respondents

Counsel for the Petitioners:
Shri A.A.Srivastava

Counsel for the Respondent:
Shri K.L, Grover

Constitution of India Article 226 – claim regarding seniority rejected in 1993 but did not challenge before any court of Law fresh seniority list was published in 1997, the petitioner can not be allowed to challenge the same.
Held-

Prior to the said circular, the post of Field supervisor were subordinate to the post off officers and therefore upon merger, the Field supervisor got benefit of promotion and in such circumstances in the seniority list they had been shown as junior to the private respondent who ware admittedly officers.
(Para 10)

By the Court

1. Petitioner have challenge the seniority list and relief in respect of their seniority position .

2. Contentions have been made in the writ petition that the petitioners were appointed in the year 1985 as Field Supervisor and respondent nos. 4 to 17 (hereinafter referred as private respondents) were appointed as Officer in the year1989. At the time of appointment of petitioners their service conditions were government by Muzaffar Nagar Kshetriya Gramin Bank (staff) Service Regulation, 1984 and in terms of definition of "Officer'' Field Supervisors and Officers both were include and therefore they belong to the same cadre .relevant two seniority lists dated 01.06.1992, one for field Supervisor and other for Officers have been annexed to the writ petition at Annexure no.2and3 to the writ petition .After the Circular dated 25.03 1991 was issued following the award of the National Industrial Tribunal , the posts of field Supervisors and Officers were merged with effect from 01.09.1987. Following the same, a combined seniority list (Annexure no.4to the write petition) was published in year 1993 wherein petitioner nos.1 and 2 Were shown at serial nos. 24 and 30 respectively, the positions below the private respondents. The petitioners field their objection but no relief was granted. Again in year 1997 a further combined seniority list was published, a copy of witch is enclosed at Annexure no.6 to the writ petition, showing the petitions, position further down at serial nos.33 and 39. It is contended that a Circular dated 20.03.1993 (Annexure – 8 to write petition) was issued on the basis of aforesaid award.

3. Respondents filed counter affidavit and supplementary counter affidavit and rejoinder affidavit was also filed.

4. Mr. A..K. Srivastava, learned counsel for the petitioners contended that the authorities have fixed seniority putting the petitioners below the private respondents on a wrong interpretation of Circular dated 20.03.93 as would appear from paragraph no.25 thereof. It is contended on behalf of the petitioners that the side provision was made only for interregnum period between 01.09.1987 and 22.02.1991 and therefore did not apply to the petition who admittedly were appointed in your 1985. It is contended that in respect of aforesaid position, applying the provision of Regulation 13(1)the petitioners being senior to the private respondent by reason of earlier appointment, can not be placed below the said respondents in the seniority list. Law has been referred to in the connection as decided I n the case of Ram Janam Singh Vs. State of U.P. reported in 1994(1)UPLBEC 216,Union of India Vs.S.S.Uppal reported in AIR 1996 SC 2340, State of Maharastra Vs. Purusottam reported in AIR 1996 SC 2228,S.jamaluddin Vs. High court of madras reported in AIR 1997 SC 3780 for the deciding seniority , Rules are to be followed Reference was also maid to the case of B.V. Sivaiah and others Vs. K. Addanlo Babu reported in JT 1998(5)SC 96 for showing the principles relating to

promotion when criterion is seniority-cum-merit .

5. Mr. K.L. Grover, learned counsel of the respondent Bank authorities contended that he dose not dispute the proposition of law relied on by the petitioners.

6. On behalf of respondents it has been stated that field Supervisor were the posts below the Officers prior to the Award and Circular issued and promotions were to be made from the posts of Field Supervisor to the to the Officer. In support of such contention reliance has been placed on paragraph 8 of the writ petition.

7. It is also contended that the position is clear that the posts of find Supervisor were below the Officers according to the staffing pattern before award and Circular and merger of posts of Field Supervisor with the posts of Officers. In terms of said award and circular, Field supervisor are to be en block junior to the Office as benefit of their past services have already been given when they were promoted and no further benefit as regards seniority is available. It is further contended that such seniority position was provided in the list published in year 1993 and petitioners neither protested nor moved any court of laws seeking their relief.. Therefore, further seniority list in year 1997 dose not entitle the petitioners to any relief.

8. We have considered the contentions of the respective parties. The facts that the petitioners were appointed as Field Supervisor in the year 1985 and private respondents were appointed as Officers in the year 1989 are admitted. The petitioners claim that the seniority lists of 1993 and 1997 have been wrongfully prepared putting them below the private respondents as paragraph no.25 of the Circular has been wrongly interpreted. It is contended that the said paragraph dealt with the appointments of supervisors and Officers in the interregnum period between 1.9.1987 and 22.2.1991 and it could not be applied in case of petitioners appointed earlier. The respondents denied the same. A perusal of the said circulars clearly indicate that in paragraph 6 of the circumstances prevailing earlier had been narrated. It appears that in April, 1980 the post of Accountants and Field Officer were merged with that of Branch Manager and created one combined post of Office And post of Field Assistant were merged with Field Supervisor.

9. Staffing pattern in the Regional Rural Bank is appearing from the said circular of 1991 at Annexure no.1 which indicates that prior to the said award in the category of 'Officers staff ' there were three categories viz. Field Supervisor, Officers/Branch Manager and Area Manager/Senior manager. Admittedly, after the award and the circular the posts of Field Supervisor and officers were merged as OJM-I. Therefore, there were two different cadres before such merger, one having Field supervisor and other having the officers From paragraph 6 of the Circular, we are convinced that change was brought in April, 1980 for having one cadre of Officer wherein Accountant, Field officer and Branch Manager were merged and other cadre of Field Supervisor on merger of Field Assistant with field Supervisors. It also appears from paragraph 25 of the circular that prior to circular and award there promotion from Field Supervisor to Officer. This indicates that Field Supervisor were to subordinate to Officer. We also find from paragraph 17 of the circular that such merger resulted in promotion of field Supervisors to Officers and principle has been laid down that the services rendered by the Field Officers in the lower cadre before such promotion has been rewarded by promotion it self and their past services can not once again be taken into consideration for the purpose of fitment.

10. From the aforesaid materials, we are convinced that prior to the said circular, the post of find Supervisor were subordinate to the post of Officers and therefore we are of

the opinion that upon merger, the Field Supervisor got.

11. Moreover, changes in 1993 were reflected in seniority list of 1993 and petitioner admittedly did not challenge the some before any court of low. Therefore, when fresh seniority list was published in 1997, the petitioners can not be allowed to challenge such seniority originally fixed in the year 1993.

12. In view of aforesaid finding, we do not find any irregularity in the matter of seniority list complained against. The writ petition is therefore dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.1999

BEFORE
THE HON'BLE PALOK BASU, J.
THE HON'BLE R.K. AGARWAL, J.

Civil Misc. Writ Petition No. 23884 of 1999

Uma Stone Crushing Co. & Others ... Petitioners
Versus
State of U.P. & others ... Respondents

Counsel for the Petitioners:
Shri S.P. Singh
Shri Y.K. Saxena
Shri C.L. Pandey
Shri Sanjay Kumar
Shri D. Mukherjee
Shri Ramesh Upadhyay
Shri M.P. Yadav
Shri Mukesh Prasad

Counsel for the Respondents:
Vishnu Pratap
Standing Counsel.

Constitution of India Article 226 - Government order bringing into New Mineral Policy 1998 challenged G.O. does not take away the principle behind rule 9 A of MMC Rules –the State proposes to raise revenue earning from major mining activities in the State and at the same time draw balance for the minor minerals and protect these persons who are engaged in river bed activities of mining-
Held-
The principles and the policy applicable through Rule 9 A of MMC Rules will be applied with regard to settling of lease rights even if Chapter IV is applied by the State Government. The mineral policy 1998 may not be affected at all if settlement is done with regard to river bed minerals by resorting to provision of Chapter II while adhering to the auctioning method for other minerals through Chapter IV.
Held (Para 44)

By the Court

1. Undisputedly, policy decisions relating to matters which involve betterment of the polity and of the masses are within the exclusive jurisdiction of the respective Government, subject to judicial scrutiny if the policy is challenged on the ground of contravening fundamental rights or disturbing the basis structure of the governance through the Constitutional provisions, whether or not the policy decision sought to be conveyed through G.O. dated 16.3.1999 issued by the State of U.P. conforms with the directive principles and the fundamental rights of citizens enumerated under the Constitution are the two basis issued raised by the petitioners in this bench of writ petitions. The Govt. Order dated 16.3.99 which is under challenge, has been issued by the State of U.P. in exercise of power conferred by the provisions of the Uttar Pradesh Minor Minerals (concession) Rules, 1963 (in short, M.M.C.RULES) which have been framed in pursuance of the provisions contained under the Mines and Minerals (Regulation and Development) Act, 1957.Section 15 of the said Act authorises the State Government to make Rules in respect of Minor and Minerals vide Section 1-A.

Clause(E).

2. When the writ petition was filed the arguments were advanced as a result of which counter affidavit was called. In due course of time the other petitions in the bunch came to be filed and in some of them counter affidavits were again called which have been filed to which Rejoinder Affidavit have also been filed.

3. As prayed by the learned counsel for the parties this bunch of the writ petitions was taken up on priority basis under the order of the Chief Justice because practically whole length and breadth of the State is covered by the State Notification dated 16.3.1999 in so far as the mode, method and procedure of auctioning the mining rights with regard to minor minerals is concerned.

4. Shri S.P. Singh, Shri Y.K. Saxena, Sri C.L. Pandey, Shri Sanjay Kumar, Shri D. Mukherjee, Shri Ramesh Upadhyaya, Shri M.P. Yadav and several other counsels who appeared on behalf of the petitioners. On behalf of the Respondents Shri Vishnu Pratap Standing Counsel has been heard. As jointly requested all the petitions are being disposed of finally at this stage under the Rules of the Court.

5. Before adverting to the arguments advanced relating to the validity of the aforesaid Govt. Order a few provisions have to be noted here in order to comprehend the arguments in pith and substance The Parliament has brought the Minor and Minerals (Regulation and Development) Act 1957, Act No.67 of 1957 with effect from 1st June, 1958 in order that the Union should take in its control the regulation of Mines and the Development of Minerals to the extent hereinafter provided (vide Section 2 thereof). In so far as the Minor Minerals are concerned, the Central Government has left the field open for the State Government and Section 15 provides that State Government by Notification in the Official Gazetter make rule for regulating the grant of quarry leases and Mining leases or other Mineral concession in respect of Minor Minerals and for the purposes connected therewith. State Rules may provide for the procedure for obtaining quarry leases, Mining leases or other mineral concession and fixing of collection of rent royalty fees, fine of other charges and the time within which and the mining in which fees shall be done and be payable (See 1-A sub clause (e) and (g) respectively); Armed with the aforesaid powers the State of U.P. came out with a comprehensive set of rules known as U.P. Minor and Minerals (concession) Rules, 1963. (M.M.C. Rules) which make it clear that those shall apply to all the Minor Minerals available in the State vide sub-Rule 4 of Rule 1 of the M.M.C. Rules. By Rule 3 thereof it has been provided that no person shall undertake any mining operations in any area within the State, of any minor minerals to which these rules are applicable except under and in accordance with the terms and conditions of mining leases or mining permit granted under these rules;

6. Proviso provides that nothing shall effect any mining operations undertaken in accordance with the terms and condition of a mining lease or permit duly granted before the commencement of these rules. It further provides that no mining lease or mining permit shall be granted otherwise than in accordance with the provisions of M.M.C. Rules.

7. For the purpose of effective understanding in order to decide this bunch of petition, it may be mentioned that the State of U.P. through a Govt. Order dated 4.10.91 brought the entire area in the State under Chapter IV of the M.M.C. Rules. It may be pointed out that Chapter IV of the M.M.C. Rules is captioned as “auction lease-17 amendment”. It consists of provisions made in Rules 23-30. Persons who were aggrieved even by the aforesaid Government Order

dated 4.10.91 preferred several writ petitions including the leading one being C.M. Writ Petition No.28796 of 1991 M/s Bundelkhand Minerals and Alkali Private Ltd. Vs. State of U.P. and others. A Division Bench of this Court considered all the phases of argument and ultimately concluded that:-

8. "We have already held above that against notice issued by the District Officers amount to declaration under sub-Rule 1 of Rule 23 of the Rules. We have also held that the Government Order issued by the State Government on November, 16, 1990 amounts to declaration with regard to the entire area of Minor minerals in the State of U.P. thus it cannot be held that no declaration has been made with regard to the two villages as required by sub-rule 1 of Rule 23 and the contention raised by the learned counsel for the petitioner has no substance."

9. Then comes the G.O. dated 27.8.94 issued by the State Government declaring all the areas which previously was covered within rule 23 for the auction lease under Chapter IV, to be covered thereafter by the provisions contained in Chapter II. This Chapter II of the M.M.C. Rules is captioned" grant of mining lease". The said Govt. Order dated 27th August, 1994 provides that District Magistrate will be empowered to notify the areas, call applications and grant lease to the persons in accordance with the provisions contained in the said Chapter II.

10. While issuing the aforesaid Govt. Order dated 27.8.94, the State of U.P. came out with procedural amendment in the provisions contained in the entire M.M.C. Rules wherever necessary in order to give effect to its policy decision which may have been formulated then. mention should be made to new additional provisions brought about after 20th amendment in the M.M.C. Rules. Rules 9-A was added, Rule 23 was amended and Rule 27-A and 27-B were added, and likewise Rule 53-A was added in Chapter IV of the M.M.C. Rules which is captioned as 'Mining Permit'.

The State amendment, whether brought by 17th amendment or 20 amendment ensured that: -

11. Whenever matter was to be dealt with in Chapter II and the area in question called for the applicability of the provisions in Rule 9 and 9-A or Rule 53 or 53-A of Chapter-6, adherence shall be made to the provisions contained in 9-A and 53-A of the Rules.

12. The declaration of an area deemed to be covered thereafter under Chapter IV was no more required to be published by Notification in the Official Gazette, because the State Government was, by the amendment Rule 23 of M.M.C. Rules, empowered to issue general or special order declaring the area of areas which may be leased out by auction or by tender or by auction-cum-tender.

13. The preferential rights conferred by Rule 9-A was applicable to mining lease for sand or morrum or Bajri or boulder or any of these in mixed state exclusively found in the river bed.

14. Rule 9-A further provides that the preferential rights to persons "belonging to socially and educationally backward and citizens engaged in carrying on occupation of excavation of sand or morrum as a provision and/or residents of the same District in which the lease is applied for, or have established or intended to establish a minor mineral based industry in the State" shall be followed and the "explanation" mentioned some castes also. Rule 10 provides that no person shall acquired in respect of any minor minerals one or more mining leases exceeding total at a of 30 acres. But simultaneously it reserved the right of State Government that in the interest of mineral Development, it is necessary so to do so, it may for reasons to be recorded, permit any person to be allotted one or more mining

leases covering an area in excess of the aforesaid maximum of 30 acres. Moreover under Rule 68 of the M.M.C. Rules the State Government may if it is of the opinion that in excess of mining development it is necessary so to do, by order in writing and for reasons to be recorded authorises in any case the grant of any mining lease or working of any mining for the purposes of winning in mineral on terms and conditions different from those laid down in this rules." Chapter VI which is captioned as "Mining Permit" contains the provision in Rule 51 that no permit shall be granted to a person who is not an Indian National or for a period more than 5 months. As stated above the newly added rule 53-A as brought out by 20th amendment permitted preference to be given in accordance with the provisions contained in Rule 9-A and has laid down that the explanation of Rule 9-A shall apply for the purpose of granting permit under Rule 53-A.

15. It would be relevant to note here that even when Chapter IV i.e. the Chapter dealing with "auction lease" is applied, a clear cut distinction has been made under the M.M.C. Rules with regard to river-bed-mineral-deposits. In this connection sub-rule 2 of Rule 23 should be mentioned here with provides that subject to the direction issued by the State Government from time to time in this behalf no area or areas shall be leased out by auction or by tender or by auction-cum-tender for more than 5 years at a time provided that period in respect of In Situ rock type mineral deposit shall be 5 years and in respect of river bed minerals deposit shall be one year at a time.

(Emphasis by Court).

16. It is permissible for the State Government to make a declaration withdrawing any area or areas declared under sub-rule 1 of Rule 23 and in that event, the provisions of Chapter II, III and VI of these rules shall be applicable to said area of areas.

(Emphasis by Court)

Likewise sub-rule 3 of Rule 23 says that on the declaration of the area or areas under sub-rule 1, the provisions of Chapter II, III and VI of these rules would not apply to the area of areas in respect of which the declaration has been issued and that—

"SUCH AREA OR AREAS MAY BE LEASEDOUT ACCORDING TO THE PROCEDURE PRESCRIBED IN THIS CHAPTER.

(Emphasis by Court)

17. Having noticed the aforesaid provisions, the effect of Govt. Order dated 16.3.99 may now be examined. The subject of this G.O. translated in English would read as under: -

"Subject – In accordance with U.P. Mineral Policy 1998 applying an auction lease method granting lease of minor minerals in the areas concerned."

18. The contents of G.O. start by excluding limestone granite, morrum stone and clay for making bricks and applies Chapter IV to the entire area wherever minor minerals are found in the State of U.P. except the exceptions indicated above.

19. Before proceeding it should be noted that the said G.O. was not to apply as per the proviso in clause II of para 2, to the rivers which were coming out of Forests areas and made some exception to those areas. Clause 4 and 5 of paragraph 2 of the said G.O. translated into English would read as under: -

(4) Rule 23(2) of Rules 1963 provides that subject to directions of the State Govt. no area under auction/auction-cum-tender system shall be leased out for more than five years and it has also been clarified in the proviso of the same rule that, at a time lease period for in situ rock type mineral deposit shall be five years and in respect of river bed mineral the period of lease shall be one year. Therefore

while making declaration for granting lease under the auction/auction-cum-tender system the insertion of the above mentioned proposed period should be taken care of.

(5) Such area's on which already leases or permits are granted shall continue till expiration of their period but as soon as the period of lease/permit expires, declaration shall be issued under rule 23(1) of Rule 1963 for granting lease under auction/auction-cum-tender system and the period of the lease shall be fixed so far as it is possible, so that the lease in respect of river bed minerals to expire in the month of September, and for in situ rock type mineral to expire according to financial year."

20. Before proceeding further it may be noted here that Clause 6 of paragraph 2 specifically provided that new areas or vacant areas may be declared forthwith for settlement of lease in accordance with the provisions of Chapter IV. Likewise, Clause 9 of para 2 provides that 15% enhanced rent/royalty should be ensured while making settlement. Rest of the Clause 2 of paragraph 2 of remaining paragraph and the said G.O. are not relevant for the purpose of present discussion.

21. Learned counsel for the petitioner objected to the aforesaid G.O. on three grounds. First, the G.O. is ineffective as no where does it refer to having been issued by Secretary and shall not have the force of law. In this connection provision of Article 166 of Constitution of India read with the provision of Chapter IV were read out, along with reference of two decided case of the Hon'ble Supreme Court. Second, by present policy decision declared through the aforesaid G.O. the State Government was not authorised to interchange chapter II to Chapter IV and in this connection it was emphasised that because of the absence of objects and reasons, and unless special reasons were disclosed as provided in Rule 68, it was not permissible for the State Government to issue the aforesaid Government Order. The third criticism is that the aforesaid Govt. Order contravenes provisions of Article 37, 38 and 39 of the Constitution of India read with Article 14 and 19 thereof particularly because the changes brought out by Rules 9-A and 52-A are not perhaps going to be adhered to by the Government in view of this G.O. and therefore it should be struck off.

22. During the course of argument Shri Vishnu Pratap was afforded opportunity to produce the record in order that first argument of the learned counsel for the petitioner may be met if possible. There is no denial of the fact that the G.O. itself does not show that it is issued in the name of the Governor whereas Article 166 of the Constitution of India provides that all Executive matters of the Govt. of a state shall be expressed to be taken in the name of Governor.

23. Shri Vishnu Pratap produced three records. From the first record it appears that the Chief Minister of U.P. passed an order for keeping the consideration of the Industrial policy as item of agenda in the Cabinet meeting. The second record shows that the policy decision was formulated as per paragraph 6 of the recommendation of the Secretariat. The Mineral policy 98 has been published in the Form of book-let, copy of which has been furnished to the Court which will form part of the record. The third record shows that principal Secretary of the Industrial Department has issued directions along with copy of the cabinet decision taken on the 1st December, 1998 and that letter of the Joint Secretary (Cabinet) was issued on behalf of the Chief Secretary which is dated 4th December, 1998. As to the examining the controversy whether the Constitutional guidelines have been followed, by the court making judicial scrutiny of the policy decision challenged through these writ petitions, Shri Vishnu Pratap relied upon the said three records and then adverted to three rules namely 1. U.P. Rules of Business 1975.

24. U.P. Business (Allocation) Rules, 1975. 3. U.P. Abhipramanikaran (Adesh Abhilikhit Niyamawali) 1975, he also placed reliance upon two decisions of the Supreme Court in R. Chitralekha 1964 Supreme Court page 1823 and also A. Sanjeev Naidu reported in AIR 1970 Supreme Court Vol. I Supreme Court page 443.

25. It was specifically pointed out by the learned counsel for the petitioner that the govt. Order was issued under the signature of the Secretary and therefore at best it could be said as emanating from the Secretary alone. Apparently the order should have stated that it was being issued in the name of the Governor which is not existing in the order but in view of the record produced by the Standing Counsel there can possible no doubt whatsoever that G.O. has been issued after Government decision has been taken on the policy matter endorsing what is known as Minerals Policy 1998.

26. It should be stated here that the provisions contained in Sub-Article 1 of Article 166 of the Constitution need not be held mandatory from the point of view of the publication of the notice or order in case it is found that the record duly validates the issuance of the order. The net result of the discussion is that the first challenge to the order fails and it is hereby held that G.O. dated 16.3.99 is a validly issued G.O.

27. Coming now to the question as to whether objects and reasons behind the policy decision has been disclosed or not, it is apparent that G.O. itself refers under the heading ”subject” to the policy decision which was taken by the Government and endorsed by the Cabinet in the meeting held on 1st December, 1998, stood communicated under the letter of the 4th December, 98 shown from the three record produced by Vishnu Pratap Standing Counsel. The copy of the mineral policy 1998 has already been filed in the court and is now a part of the record. Therefore, there is full application of mind and objects and reasons are already formulated and delineated in the mineral policy 1998 therefore second argument also is without any basis and is hereby rejected.

28. The State Government has, with regard to entire mineral available in the State a new policy shown in the booklet as Mineral Policy 1998. The third argument is a mixed question of fact and law and has to be addressed as such. The policy applies to minor mineral in river bed, for which several provisions exist in M.M.C. Rules which have been in vogue and are already saved by paragraph 5 of the aforesaid Government Order. The point to be reconsideration is that the limited type and amount of minor mineral found by the river bed was already included in the earlier policy decisions and can it be said that the present policy makes a departure or deviates from the same?. Before discussion further it should be at once stated here that by and large mineral can be classified into two heads, major and minor minerals. Again, minor Minerals may be classified into further several heads few of which will be “sand, or morrum or Bajri or boulder or any of these in mixed state exclusively found in the river bed.” One may see the special provisions of these types of minor minerals formulated under Rule 9-A and also see the proviso to sub-rule 2 of Rule 23 of the M.M.C. Rules.

29. The most crucial aspect of the case now emerges –what is the distinction between Chapter II and Chapter IV ?. How is the resent policy decision going to adversely affect the special provisions enacted in 9-A of the Rules which remain in the statute book. What is going to be the effect of the G.O. with regard to minor minerals found in the river bed ?. How and in what manner the declaration under Rule 23 does away with the policy or need and necessity with regard to the minor mineral and also the reserved

classes of persons recovered by the provisions of Rule 9-A ?.

30. As noted above, through Rules 3 and 4 in Chapter II and Rules 23 and 24 in Chapter IV the mining leases are brought about. In fact the M.M.C. rules authorises the State Government to part with the mining rights to some person or firm or company only by two major modes-1. Lease 2. Licence. Chapter VI is a temporary measure for a permit for a very short period which will never extended beyond 6 months. Chapter VI which has been considered while dealing with the provisions regarding permits, allows applicability of the principle behind 9-A. Whenever an area is made available under Chapter II the District Magistrate issues notice calling applications when application are filed they have to be dealt with in accordance with the provisions contained in Chapter II, but ultimately it is only "lease" which is going to be granted to the person who applied in response to the District Magistrate notice. Likewise, the District Magistrate calls for tender or notifies area or areas for tender auction or auction-cum-tender as the case may be, whenever the District Magistrate has no settle the "lease of the mining are in accordance with the provisions of Chapter IV of the M.M.C. Rules. Again, the District Magistrate, while granting lease whether under Chapter II or Chapter VI acts for the State Government and on its behalf the lease deed is executed in favour of the person found entitled to the lease as compared to another applicant.

31. The Government policy 1998 as noted above makes a long discussion of what the State Government proposed to do regarding mining industry. It says:-

1. To expedite investigation of new mineral deposits for development by adopting modern exploration techniques.

8. To ensure economic prosperity in the distant and backward areas of the State through mineral development.

11.To help the people traditionally engaged in mining works with a view to encourage social justice and increase in employment opportunity in mineral sector.

12.To provide for safety and welfare of the people engaged in mining activities.

In the said booklet, the following proposals also exist:

SOCIAL JUSTICE, SAFETY & WELFARE:

32. For remote and backward areas of the State, where mining is the main activity, thrust will be given in the Policy to involve local people, especially of socially and economically backward community. Safety and welfare of workers engaged in mining activity will be constantly monitored.

33. For persons of Mallah community, who are traditionally engaged in the mining of sand and merrum, welfare schemes will be initiated , such as training centre, school, dispensary etc. whose expenses would be met from the Khanij Vikas Nidhi. For considering these proposals a committee will be constituted under the chairmanship of the Commissioner in which suitable representation will be given to the people of this community. The above committee would also monitor, the implementation of these welfare schemes. In addition employment to the local persons of this community would also be provided.

KHANIJ VIKAS NIDHI (MINERAL DEVELOPMENT FUND):

34. To achieve the twin objectives of promoting exploration and mineral development, funds will be required for the following:-

1. For procurement of modern equipment for exploration and testing.

2. For preparation of a computerised data base and feasibility reports for the use of entrepreneurs.

3. For building/ strengthening of infrastructure and creation of Mineral Estates.

4. For compensatory afforestation and reclamation of mined out lands.

5. For operating the welfare schemes for the Mallah Community.

35. To meet these requirements the State Government will create a "Khanij Vikas Nidhi" by providing five percent of the revenue collection. For approval of the utilisation of the money collected in the said fund, a committee will be constituted consisting of Industrial Development Commissioner as its Chairman and Secretary, Industrial Development, Principal Secretary/ Secretary Finance, Secretary Planning, Managing Director, PICUP, Managing Director, UPSIDC, Director-Geology & Mining and concerned officers will be its members."

36. Inspite of hearing the learned counsel for the petitioner at more than sufficient length the court could not find any force in the argument that the aforesaid Govt. Order takes away the principle behind Rule 9-A by bringing into new mineral policy 1998. It is more than obvious that the State proposes to raise revenue earning from major mining activities in the State and at the same time draw balance for the minor minerals and protect these persons who are engaged in river bed activities of mining as was envisaged through the 20th amendment by incorporating Rule 9-A.

37. The Court is thus called upon to make a harmonious constructions so that the welfare provisions are not lost in the search of revenue procurement. In this connection one may refer to the decision of the Supreme Court in Pondicheri vs. Mohd. Hussain reported in 1994 (6) S.C.C. page 121 wherein it has been held: -

"We cannot lose sight of the fact that the Act is itself a legislation enacted with a view to achieve a more equitable distribution of land so as to support the directive principle contained in Article 59 of the Constitution of India. The provisions of such a legislation have to be so interpreted as to further the object of the legislation and not defeat the same."

38. The court finds enough support and strength from the aforesaid observations of the Supreme Court on the provisions of the said Act as furthering the object of the act and the court does not find any indirection in the provision of the Act which justify placing such an interpretation of the present Mining Policy which will defeat the policy behind Rule 9 (A) of the M.M.C. Rules.

39. It has already been noted above that M.M.C. rules are similar to subordinate legislation and therefore if an interpretation put to it results beneficial for all sections of the society and also ensures the economic development of weaker class of society, compulsorily such an interpretation must be applied.

40. A reference has already been made to Clause 5 of para 2 of G.O. dated 16.3.99. It has saved the leases about which period has not expired. It is specifically provided in the aforesaid Clause that on expiry of period of lease, those areas will be declared under Chapter IV. Therefore, the G.O. dated 16.3.99 is not a declaration with regard to areas covered by those lease deeds.

41. The aforesaid provisions in Clause V left out of the para 2 of the G.O. mining area wherever lease was existing and continuing on 16.3.99. The District Magistrate are required to declare by notification that these areas are to be covered by Chapter IV by

issuing a declaration under Rule 23 of M.M.C. Rules. A number of petitions have been filed where the are was continuing to be under lease executed in favour of lease under Chapter II by applying 20th amendment of the M.M.C. Rules. Consequently all those areas are yet to be notified by the District Magistrate of the concerned areas. In this respect unless a lawful notification is issued by the District Magistrate, the G.O. is not going to cover those areas. To this extent therefore it is hereby held that the instant G.O. has not yet covered those areas where lease was in continuation on 16.3.99 and unless a declaration under Rule 23 is issued, Chapter IV of M.M.C. Rules will not apply and Chapter II continues to apply.

42. In order to extend preferential rights under Rule 9-A the matter has to be considered by the State Government. Shri Vishnu Pratap learned Standing Counsel argued that in view of the provisions contained in Rule 23 and 24 respectively, the declaration of an area for one chapter i.e. IV excludes the provision of Chapter II and where Chapter II provisions are attracted it may exclude provisions of Chapter IV. With these provisions in mind he argued that the applicability of Rule 9-A will not be permissible with regard to any of the area which now falls under Chapter IV. On the other hand the point conversed by some of the counsel for the petitioner is that Rule 9-A is a benevolent policy which is in no way contradicted by the policy decision of 1998, therefore, the distinction of the chapters should be removed and the principle behind Rule 9-A should be applied to lease deeds which will be executed under Chapter IV because, whether, it is Chapter II or it is Chapter IV, it will always be a lease deed which will have to be executed by Govt. for settling mining right with citizens.

43. The propositions and the respective contentions have been put to severe test. The court does not find favour with the argument of some of the learned counsel for the petitioners that the present policy is designed in any manner to undo the prospective economic good which was brought into being for certain section of the society. The economically and educationally backward classes of our society particularly those living in River sides and earn through the river bed minor minerals and also for the persons living in the said District are designed to be protected by those special provision. As already discussed above, one of the objective of any democratically elected Government will be to uplift the down trodden.

44. It is hereby held that the principles and the policy applicable through Rule 9-A of M.M.C. Rules will be applied with regard to settling of lease rights even if Chapter IV is applied by the State Government. The Mineral policy 1998 may not be affected at all if settlement is done with regard to river bed minerals by resorting to provision of Chapter II while adhering to the auctioning method for other minerals through Chapter IV. Thus this is a matter which has to be considered by the State Government and the court is not inclined to force any decision on this issue except to the extent noted above that even while applying Chapter IV, the Rules in Chapter II may be applied particularly the special provisions existing for socially and educationally backward citizens engaged in carrying the occupation and excavation of sand or morrum and are resident of same district.

45. Since admittedly all area which are notified under Chapter IV by the Govt. Order would not cover are with regard to which lease deeds were in existence on 16.3.99 and the District Magistrate may not have made separate notifications, those have to be advertised by the District Magistrate in accordance with the provisions of Chapter IV in view of what has been contained in Clause 5 of para 2 of the G.O. dated 16.3.99.

46. It is after sufficient argument that the court had granted and issued a complete stay order with regard to auction to mining rights. The stay order therefore will cease with the writ petition being disposed of but the State Government shall take decision at the earliest convenience so that the policy decision behind Rule 9-A and the decision which is taken with regard to the Mineral in the State as envisaged through the Mineral Policy 1998 are combined for all round development of the State of Uttar Pradesh.

47. During the course of argument it was pointed out that whether or not Rule 9-A is intravires has been subject matter of a reference by a Division Bench in the Lucknow Bench and a Full Bench has been constituted and perhaps arguments have been heard. Be that as it may, in the instant case the vires etc. was never touched by either side. That apart, this Court has already expressed in writ petition No.35895 of 1999 relying upon the decision of another Division Bench in case reported in 1997 2 A.W.C. page 618 that the aforesaid rule 9-A is well protected by the Constitution provision and is intravires.

48. In view of the aforesaid discussion, the writ petitions partly succeed. They are disposed of with the direction that each one of the petitioner's claim shall be adjudged by the official under the M.M.C. Rules in accordance with the direction which may be issued by the State Government in pursuance of this judgement which preferably may be issued within a period of 2 months from today. For the reasons aforesaid the parties will bear their own costs.

49. Before parting with the case the court places on record appreciation for the sincere assistance which came through the learned counsel for the petitioners in deciding these bunch of writ petitions and also for Shri Vishnu Pratap, learned Standing Counsel who argued the matter brilliantly.

Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.1999

BEFORE
THE HON'BLE S.H.A. RAZA, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 9035 of 1999.

Private Secretaries/Personal Assistants Brotherhood, High Court through its Vice-President Sri K.K. Banerji and another ...Petitioners

Versus

The State of U.P. through Judicial Secretary, & L.R. Govt. of U.P. Vidhan Bhawan, Lucknowand another ... Respondents

Counsel for the Petitioners:
Shri Ashok Kumar
Shri Ashok Bhushan

Counsel for the Respondents:
S.C.
Shri Sunil Ambawani

Constitution of India, Article 226-Telephone facility-Private Secretaries / Personal Assistant, to Hon'ble Judge, of Delhi High Court already getting this facility-recommendation of the Chief Justice-cannot be lightly brush aside-direction issued to install the telephone connection at the residence of the Private Secretaries by forthwith Government to grant necessary funds within the period of six weeks.
The status of the Judges of this Court is much above the status of the Secretaries to the State Government. It is even higher in comparison to the Secretaries to the Central Government. There existed no reason as to why the Private Secretaries attached to the Judges of this Court, who discharge their difficult duties under the umbrella of the Chief Justice, be denied a facility which is available to their counter-parts in the U.P. Secretariat.
Held (Para 31).

By the Court

1. "Separation of powers" amongst three limbs of the State, the executive, the

legislature and the judiciary in all hall marks of the Constitution of India, which is held to be "basic structure" of India. The edifice of the Constitution is based on "separation of powers". If the independence of each limb of the State, in any way is affected, there would be a break down of the Constitution.

2. With this prelude, we have to examine the case of the Private Secretaries of this Court, who are drawing the pay scale of Class I Officer, i.e.Rs.10,000-15,200/- and stakes the claim in the present writ petition for being provided the telephone connections at their residence.

3. It is pertinent to mention here that in the year 1988 the State Government decided that the employees of the State Government would be given the pay scale available to the corresponding status employees under the Central Government. In order to execute the said decision an Equivalence Committee was constituted by the State Government, which submitted its report on 30.4.1989.As there existed various normalise in the pay structure and the State Government felt difficulties in implementing its decision to equalize the pay scale of the State employees with that of the Central Government, an Anomaly Committee was constituted, which submitted its report. The State Government itself took a policy decision "vide Adhyay 2 Adhikar Adesh" to pay central pay scale to the staff of the Allahabad High Court with the approval of the Governor.

4. The Private Secretaries and Personal Assistants Brotherhood filed a writ petition bearing No.1408 of 1993 claiming pay parity with the corresponding employees of the Delhi High Court. The main thrust of the petitioners of that writ petition was that their case was covered by the decision of Delhi High Court, rendered in Civil Misc. Writ Petition No.289 of 1991 in re: A.K. Gulati and another Vs. Union of India and others, decided on 7.5.1991.

5. In A.K. Gulati (Supra), a Division Bench of the Delhi High Court, while allowing the writ petition, issued a writ in the nature of mandamus commanding the respondents to fix the salary of the petitioners and other Private Secretaries, who are working with the judges of the Delhi High Court in the appropriate stage, in the pay scale of Rs. 3000-4500 with effect from 1st January, 1986. The salary of the petitioners and other Private Secretaries should be fixed within three months from that date and the arrears, if any, should be paid to the petitioners within one month thereafter.

6. In A.K. Gulati (Supra) the Delhi High Court was of the view that there was a parity of the pay scale between the Private Secretaries of the Judges of the Court and the Private Secretaries to the Secretaries to the Government of India and the Chief Secretary, Delhi Administration. When the pay scale of the Private Secretaries to the Secretaries to the Government of India was revised, there was no reason as to why similar upward revision of the pay scale of the Private Secretaries attached with the judges of the High Courts should not be made because the salary of the Judges of the High Court was the same to that of Secretaries to the Government of India. The Delhi High Court also expressed a view that the status and allowances, which are received by the Judges of the High Courts are much above than those of the Secretaries to the Government of India an addition thereto, the work, which is performed by the Private Secretaries to the Judges, is not less, and in fact more onerous, arduous and confidential in nature.

7. Special Leave Petition, which was filed before the Hon'ble Supreme Court, against the decision of Delhi High Court, was dismissed on 26.8.1991.

8. The Writ Petition bearing No.1408 of 1993 in re: Private Secretaries and Personal Assistants Brotherhood Vs. State of U.P. and another, was allowed on 21.12.1993 by a Division Bench of this Court.

9. Special leave petition was filed before the Hon'ble Supreme Court against the judgement of the Division Bench of this Courts which was dismissed.

10. It is really surprising that while Private Secretaries working in U.P. Secretariat have been provided with official telephone at their residences, but that facility was denied to the petitioners in spite of the fact that the Chief Justice of this Court urged the State Government for the same in the year 1989.

11.The Chief Justice, before recommending the case of the Private Secretaries of this Court, was pleased to make a query from the State Government as to whether the official telephones were provided at the residences of the Private Secretaries, working in U.P. Secretariat or not and the State Government informed the Court that official telephones have been provided at the residences of Private Secretaries, working in the U.P. Secretariat. Only then the representations made by the Private Secretaries dated 30.10.1989 and 27.2.1989 were recommended.

12. By means of the D.O. No.5550 DR(P) dated April 30, 1990, Sri A. S. Tripathi, the then Registrar of the High Court sent a letter to the Judicial Secretary and L.R. to Government of U.P., asking him to get Rs. 5,70,000/- sanctioned for installation of telephone connections at the residences of Private Secretaries.

13. Installation of official telephone connections, at the residences of the Private Secretaries, is not only to the advantage of the Private Secretaries only, but it is for the advantage of Judges as well, as it will be easier for them to call their Private Secretaries on telephone to come to their residences for dictation of the judgements or other official work. After the office hours are over, the Judges feel difficulty in contacting their Private Secretaries in discharge of their duties and the work of the Court suffers.

Installation of telephone connections at the residences of Private Secretaries will also add to efficiency of the Judges in discharge of their duties to dispense with justice.

14. It is really surprising that the Private Secretary attached to the Registrar of this Court, since long had been provided with official telephone at his residence and the High Court had been paying the bill from the High Court fund, but the Private Secretaries attached to the Judges, have not been provided that facility.

15. Thirty four Private Secretaries of this Court themselves have got telephones installed at their residence in order to facilitate convenience to the Judges for the purpose of carrying out the instructions of Judges on telephone and complied with their orders and instructions.

16. The Charges for installation of telephone connections, which the thirty four Private Secretaries have incurred, may not be paid either by the High Court or by the State Government. The maximum number of calls, which the Private Secretaries can make, can be regulated by the Chief Justice and the bill can be paid by the High Court from the funds, which may be made available to the High Court by the State Government. The petitioners themselves stated in the writ petition that although the S.T.D. facility should be made available to them on payment of charges.

17. In view of the submission, which the petitioners have made, the expenses in installation of the telephones connections at

the residence of the Private Secretaries, who did not get the telephones installed at their residences, has been reduced to a considerable strength.

18. It was contended from the side of the petitioners that the work which they perform is not less in comparison to the Private Secretaries to the Secretaries to the State Government, Central Government and Registrar of this Court, but in fact the work of the Private Secretaries of this Court are more arduous and confidential in nature, but they have been discriminated.

19. On 17.5.1999 a Division Bench of this Court, considering the alleged discrimination meted out to the petitioners, issued an interim mandamus in the following words"

"We are prima facie in agreement with the prayer of the petitioners. It is no doubt true that the functioning of the Hon'ble Judges is difficult without providing telephone connections to the Privcate Secretaries at their residences from High Court funds, since the Hon'ble Judges often have to contact their Private Secretaries in connection with various matters after Court hours and on holidays.

In the circumstances we issue an interim mandamus to the respondents to provide official telephone connections to the Private Secretaries of the Hon'ble Judges of this Court at their residences from the High Court funds and to make regular payment of bills thereof or show cause within six weeks. The respondents may file counter affidavit within six weeks."

20. It was urged that grant of telephone facility at the expenses of the State Exchequer involves financial implication. No Rule has been framed by the Chief Justice of this Court in exercise of the powers conferred under Article 229 of the Constitution of India, therefore, in absence of the same there was no occasion for the grant of the approval upon the same by the Governor of U.P. under Article 229(2) of the Constitution of India, hence the writ petition is liable to be dismissed on that ground alone.

21. It was also averred in the counter affidavit that the petitioners have nowhere pleaded in the writ petition that any expert body or committee duly constituted in accordance with law either by the State Government or by the Chief Justice of this Court has ever gone into the various aspects of the matter, therefore, unless and until the demand put forth by the petitioners was duly considered by the expert committee or body constituted in accordance with law, the writ petition is not maintainable.

22. Reference has been made by the State Government to an old Government Order dated 18.12.1998, wherein it has been provided that any officer, who is having the pay scale of less than Rs.3700-5000 (revised as Rs.12000-16500), like the petitioners in the present case, who are having the pay scale of Rs.3000-4500 (revised Rs.10000-15200) only, are not entitled to the official telephone facility at their residence except in exceptional, extraordinary and unavoidable circumstances.

23. We fail to understand as to what would be the more extreme and exceptional case than the case of the petitioners. The Private Secretaries in performance of their duties to carry out the instructions of the Judges of this Court, have to make a response by informing them on several matters. Due to non-availability of the official telephone connections, not only their efficiency is marred, but the cause of dispensation of justice by the Judges also suffers. The installation of telephone connections at the residence of Private Secretaries shall be to the advantage of the Judges also, which will help the Judges to dispense with justice.

24. Furthermore, it has nowhere been indicated in the counter affidavit as to what were the extreme and exceptional circumstances, in which the Private Secretaries attached to the Ministers and the Secretaries to the Government of India have been provided official telephones. The Private Secretaries to the Secretaries to the Government of U.P. have been provided the facility of official telephone connections for the purpose of administrative convenience and efficiency. Why the State Government appears to be more concern with the convenience of the Private Secretaries attached to the Secretaries to the State Government and why that extent of concern has not been shown towards the Private Secretaries of the other limbs of the State, i.e. judiciary, particularly when the expenditure which the State Government will incur would not be more than few lakhs of rupees. There is no reason as to why the Private Secretary attached to the Registrar should have the facility of the official telephone connection, but the Private Secretaries attached with the Judges of this Court should have no such facility. Denial of such facility, to the Private Secretaries attached with the Judges of this Court, is a clear cut case of discrimination, which appears to be a writ at large.

25. It is really unfortunate that the recommendation made by the Chief Justice of this Court was lightly brush aside and ignored by the State Government. The majesty of high office, which the Chief Justice holds, cannot be allowed to impair. It was expected from the State Government that the recommendation of Hon'ble the Chief Justice, who happens to be the highest functionary of the State on the judicial side ought to have been respected and given due weightage. But it was really unfortunate that minimum courtesy, which expected from the State Government to send the reply to Hon'ble the Chief Justice, was not shown. The State Government slept over, on the recommendation of Hon'ble the Chief Justice for about nine years, which compelled the petitioners to approach this Court on judicial side.

26. It is a matter of great concern that the recommendation of the Chief Justice of the High Court was not given due weightage and utmost consideration by the State Government.

27. It is true that the Governor under Article 229(2) of the Constitution of India cannot be compelled to grant approval to the Rules framed by the Chief Justice relating to salaries, allowances, leave or pension, but the present matter does not relate to salaries, allowances, leave or pension. It pertains only to a facility, which is provided by the State Government to the Private Secretaries attached to the Secretaries to the Government to U.P.

28. Before making a recommendation to the State Government to provide the facility to official telephone connections to the Private Secretaries to the judges, the Chief Justice inquired from the State Government as to whether such a facility has been provided to the Private Secretaries to the Secretaries to the State Government. When the answer was in affirmative, only then the Chief Justice of the High Court, the highest dignitary of the third limb of the State through its registrar made a recommendation. So the discrimination, which was writ at large, in the case of the Private Secretaries attached with the Judges of this Court may be avoided, but the recommendation was not honoured and without indicating any reason the State Government came forward with a lame excuse of dearth of finances as told to this Court by the Advocate General of the State Government on 12.10.1999.

29. We take judicial notice of the fact that the Ministers of the State Government as well as the Chief Minister have been ordering for the provisioning the fund to install statues and memorials in the name of erstwhile

politicians, but the State Government has been shirking in its responsibility to provide few lakhs of rupees for providing official telephone connections to the Private Secretaries attached with the Judges of this Court.

30. We are of the view that it was not at all necessary for the Chief Justice to have framed a Rule in that regard and send it for the approval of the Governor as the matter did not pertain to salary, allowances, leave or pension. In the instant case approval of the Governor was not at all necessary for the simple reason that the matter pertains to provision of a facility, which is being enjoyed by the Private Secretaries attached with the Secretaries of the Government of U.P. and which is necessary for the cause of dispensation of justice.

31. The status of the Judges of this Court is much above the status of the Secretaries to the State Government. It is even higher in comparison to the Secretaries to the Central Government. There existed no reason as to why the Private Secretaries attached to the Judges of this Court, who discharge their difficult duties under the umbrella of the Chief Justice, be denied a facility which is available to their counter-parts in the U.P. Secretariat.

32. In view of what has been indicated herein above, the writ petition succeeds and is allowed. A writ in the nature of mandamus is issued commanding the respondents to immediately provide the official telephone connections to the Private Secretaries, attached to the Judges of this Court, at their residences and the telephone bills be paid from the High Court funds. The State Government is directed to provide funds for that purpose within a period of six weeks from the date of production of a certified copy of this order.

33. However, it is provided that the expenses, which the Private Secretaries have incurred in installation of telephone connections be not paid from the High Court funds, but their telephone bills will be paid by the High Court. The Chief Justice of the High Court may fix number of calls, which the Private Secretaries will make. The S.T.D. facility may be provided to the Private Secretaries, but the charges of S.T.D. calls may be paid by the Private Secretaries, if Hon'ble the Chief Justice so desires.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 18.11.1999
BEFORE

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

Civil Misc. Writ Petition No. 17456 of 1999

Kalu Ram ...Petitioner
Versus
State of U.P., through Secretary Rural Engineering Services, Lucknow & another ... Respondents

Counsel for the Petitioner:
Dr. H.N. Tripathi

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service Law- termination order -passed on the ground while at the time of getting the job the diploma certificate was produced from a body not recognised either by the State or Central Government- after laps of 36 years the validity of Diploma Certificate can not be examined- termination order illegal.
Held-
In our opinion the validity of the petitioner's Diploma should have been considered at the time of appointing him in the year 1963 or within a reasonable period thereafter, but this matter cannot be examined after a gap of 35 or 36 years as that would be wholly arbitrary.

(Para 3)

Case law discussed.
AIR 1978 SC 597
AIR 1990 SC 371

By the Court

1. Heard learned counsel for the petitioner and learned standing counsel.

The petitioner is challenging the impugned termination order dated 7.4.99(Annexure 12 to the writ petition). The petitioner was appointed in the year 1963 as Junior Engineer in Minor Irrigation Department, Uttar Pradesh Government. At the time of termination of service he was working as Executive Engineer. Thus the petitioner has put in about 36 years service. Now the impugned termination order dated 7.4.99 has been passed in which it has been stated that the petitioner did not possess a Diploma from a recognised institution and hence his initial appointment in the year 1963 was illegal. The Diploma, which the petitioner has, is from Asia Engineering Institute, New Delhi and it is alleged that this body is not recognised by the Central or State Government.

2. In our opinion it is not open to the respondents to suddenly wake up after a gap of 35 years and declare that the petitioner's certificate which he obtained before entering service in the year 1963 was not a recognised certificate, and hence the petitioner's initial appointment in the year 1963 is invalid. The petitioner has been working since the year 1963 onwards until the date of the termination order and thereafter he was working in pursuance of the order, of this Court dated 26.4.99, but he has not been paid his salary after the date of termination.

3. In our opinion the validity of the petitioner's Diploma should have been considered at the time of appointing him in the year 1963 or within a reasonable period thereafter, but this matter can not be examined after a gap of 35 or 36 years, as that would be wholly arbitrary. As held by the Supreme Court in **Maneka Gandhi V. Union of India (AIR 1978 SC 597**) arbitrariness violates Article 14 of the Constitution of India. The view we are taking also finds support from the decision of the Supreme Court in **Smt. Bhagwati Devi and others Vs. Delhi State Mineral Development Corporation (AIR 1990 SC 371, vide paragraph 6)**

On the facts and circumstances of the case we allow the Petition and quash the impugned order dated 7.4.99. The petitioner shall be paid his arrears of salary within three months from the date of production of a certified copy of this order.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.1999
BEFORE

THE HON'BLE S.H.A.RAZA, J.
THE HON'BLE D.R.CHAUDHARY, J.

Civil Misc. Writ Petition No.21680 of 1999.

Bhola Nath Yadav ...Petitioner.
Versus
State of U.P. through Law Secretary, U.P. Lucknow and others ...Respondents.

Counsel for the Petitioner:
Shri W.H.Khan.

Counsel for the Respondents:
S.C.

Constitution of India, Article 14 and 226, readwith code of Criminal Procedure Section-24-Appointment of D.G.C. (Criminal)-renewal of term refused by the Government-No reasons assigned either in counter affidavit or from the record-held arbitrary.
Held-
In view of the aforesaid reason we are of the view that although the State is free to choose its counsel either on criminal or civil side and the lawyers cannot claim their appointment or renewal as Government

counsel, but while doing so, if it appears that the action of the State smacks from the vice of arbitrariness, meaning thereby that it appears to be unfair, unjust and unreasonable, the Court can intervene.(Para 14)

Case law discussed.
1991 Sec. 212
1993 (3) Sec. 552
AIR 1996 SC-864
AIR 1991 SC-537
1997 (15) L.C.D.-1046.

By the Court

1. The present writ petitions have been filed by one Bhola Nath Yadav and other by Prabhat Kumar Mukherji who were working as District Government Counsel (Crl.) and Addl. District Government Counsel (Crl.) in the district of Sonbhadra. Being aggrieved against the order of non-renewal of their postings on the designation, which they had held they knocked the door of this Court.

2. Bhola Nath Yadav was initially appointed on the post of A.D.G.C. (Crl.) Sonbhadra on 26.2.1991 and worked as such till 1995, as his term was renewed from time to time. In the year 1995 the post of D.G.C.(Criminal) fell vacant, in pursuance of which he applied for his appointment and he was selected and appointed by the State Government as D.G.C. (Criminal) Sonbhadra on 16.12.1995. On a recommendation being made by the District Judge and the District Magistrate his term as D.G.C. (Criminal) was renewed by the State Government on 24.6.97. When the process for renewal of the term of the petitioner was again started in the year 1998, the District Judge as well as the District Magistrate recommended the case of the petitioner for renewal by separate papers dated 25.5.98 and 6.2.98 respectively. But his term was not renewed by the State Government. Sri Prabhat Kumar Mukherji was selected and appointed on the post of A.D.G.C. (Criminal) Sonbhadra on 16.12.1995. On 24.6.1997 his term was renewed. Again on 25.5.1998 the District Judge recommended the renewal of the term of Sri Prabhat Kumar Mukherji. On 6.6.98 the District Magistrate also recommended the name of Sri Prabhat Kumar Mukherji for renewal. But on 30.4.99 the State Government has refused to renew the term of Sri Prabhat Kumar Mukherji and ordered him to be relieved from the said post.

3. Both the petitioners have assailed the order of the State Government refusing to renew their terms on account of political bias. They alleged that the State Government wanted to appoint its own men in place of the petitioners. They asserted before this Court that in view of the recommendations which were made by the District Judge as well as District Magistrate their term ought to have been renewed.

4. On behalf of the State Government counter affidavit was filed. The learned Chief Standing Counsel also produced the relevant record before this Court. Counter affidavits filed in both the cases do not disclose any complaint against the petitioners. What has been asserted in the counter affidavit is that prerogative of the State to choose its lawyer. It was vehemently argued by the learned Chief Standing Counsel that the petitioners have no right to be appointed as Government Counsel on the criminal side. The State should be left free to choose its counsel in the same manner as a private individual. The record, which was produced, does not disclose that there exist any complaints against the petitioners. Undoubtedly there exist a letter of a political party, which was on record. Certain allegations have been made to the effect that the petitioners have leaning in favour of particular leader and a particular party. But there seems to be no allegation that they actively indulged themselves into any political activity. In the light of the aforesaid facts and circumstances of the case we have to examine as to whether the term of the petitioners for the office which they held ought to have been

renewed by the State Government or not and if the State Government did not renewed their terms, the action of the State can be said to be arbitrary or not.

5. It is well settled that even in administrative matters the State is bound to disclose reasons for taking any action.

6. In **Sri Lekha Vidyarthi Vs. State of U.P. (1991) S.C.C. page 212** Hon. Mr. Justice Ram Manohar Sahai (as he then was) observed:

"The expression "without assigning any cause" means without communicating any cause to the appointee whose appointment is terminated and is not to be equated with "without any existence of any cause" it merely means that the reasons for which the termination is made need not be assigned or communicated to the appointee, though the decision has to be communicated. The non-assigning of reasons or no communication thereof may be based on public policy, but termination of appointment without the existence of any cogent reason in further once of the object for which the power is given would be arbitrary and therefore against the public policy."

7. The principle laid down by the Supreme Court was applied in the case of termination of the services, also apply for non-renewal of the term of the office which a person holds.

8. Section 24 of the Criminal Procedure Code deals with the appointment of Public Prosecutor, which reads as under: -

"24. Public Prosecutors-(1) For every High Court , the Central Government or the State Government shall after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor for the district.

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No personal shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre or Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor, only from among the persons constituting such cadre :

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public

Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

9. Section 24 of the code does not speak about the extension or renewal of the term of the Public Prosecutor or Additional Public Prosecutor. But after the expiry of the term of the appointment of persons concerned, it requires the same statutory exercise, in which either new persons are appointed or those who have been working as Public Prosecutor or Additional Public Prosecutor, are again appointed by the State Government, for a fresh term.

In **Harpal Singh Chauhan and others Vs. State of U.P. (1993) 3 Supreme Court cases 552,** it was held by the Hon'ble Supreme Court that the procedure prescribed in the Manual (L.R. Manual) to the extent it is not in conflict with the provisions of Section 24, shall be deemed to be supplementing the statutory provisions. However, if there is any conflict, then Section 24 of the Code being statutory in nature will override the procedure prescribed in the Manual.

10. It has been well settled since long that the lawyers appointed by the State Government to conduct its case cannot claim as a matter of right that their term should be extended or they should be appointed against the vacancies. But as held by Hon'ble Supreme Court in Harpal Singh Chauhan (Supra) they can certainly, raise a grievance that either they have not received the fair just and reasonable treatment by the appointing authority or that the procedure prescribed in the Code and in the Manual, have not been followed. Although power has been vested in a particular authority, in subjective terms, still judicial review in permissible.

11. It was further observed by Hon'ble Supreme Court in Harpal Singh Chauhan (Supra) that while exercising the power of judicial review even in respect of appointment of members of the legal profession as District Government Counsel, the Court can examine whether there was any infirmity in the "decision making process", Of course, while doing so, the Court, cannot substitute its own judgement, over the final decision taken in respect of selection of persons for those posts. But the Court can interfere if it is satisfied that there is patent infraction of the statutory provisions of the Code.

12. The quality of the work which is assigned to Government counsel is to be judged and assessed by the District and Sessions Judge and the District Magistrate in consultation with the Sessions Judge, prepare a panel of the persons who was, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutor for the district; meaning thereby; that the District Magistrate has not been given a free hand to prepare a panel of the persons, who in his opinion is fit to appoint as Public Prosecutor or Additional Public Prosecutor in the district. The exercise of such a power must be in consultation with the District Judge. The recommendation so made in consultation with the District Judge is to be taken into account by the State Government while appointing Public Prosecutor or Additional Public Prosecutor or renewal of their terms.

13. The scope of judicial review in the matter of appointment or renewal of Public

Prosecutor or Additional Public Prosecutor is limited to the extent that if the Court find that in the "decision making process" the State Government has acted arbitrarily; meaning thereby; that if its decision is not in conformity with Article 14 of the Constitution, which is the sworn enemy of arbitrariness appear to be unjust, unfair and unreasonable then the Court can set at naught such a decision.

14. In view of the aforesaid reason we are of the view that although the State is free to choose its counsel either on criminal or civil side and the lawyers cannot claim their appointment or renewal as Government counsel, but while doing so if it appears that the action of the State smacks from the vice of arbitrariness, meaning thereby that it appears to be unfair, unjust and unreasonable, the Court can intervene.

In State of U.P. Vs. Ramesh Chandra Sharma and others A.I.R. 1996 Supreme Court 864, Hon'ble J.S.Verma, J. speaking for the Bench observed: -

In view of the clear provision in clause (3) of para 7.06 that 'appointment of any legal practitioner as a District Government Counsel is only professional engagement', it is difficult to appreciate the submission for which sustenance is sought from the provisions contained in the same Manual. The appointment being for a fixed term and requiring express renewal in the manner provided in the Manual, there is no basis to contend that it is not a professional engagement of a legal practitioner but appointment to post in Government service which continues till attaining the age of superannuation. In the earlier decisions of this Court including Shrilekha Vidyarthi (A.I.R. 1991 S.C. 537) (Supra), the appointment of District Government Counsel under the Manual has been understood only as a professional engagement of a legal practitioner. This contention is, therefore, rejected.

It was further observed:

"The High Court has granted relief to respondents Nos.1, 2 and 3 on the ground that the action was arbitrary. It cannot be disputed after the decision in Shrilekha Vidyarthi (A.I.R. 1991 S.C. 537) (Supra) and those following it, that the State action of refusing renewal can be quashed if it is arbitrary. The only question, therefore, is whether it is so as found by the High Court. The High Court has reached the conclusion that the only reason disclosed by the State Government for refusing to consider the case of these respondents for renewal of their terms were non-existent or extraneous. In substance, the action was supported by the State Government on the ground that there was no recommendation made by the District authorities for making the renewal as required by para 7.08. This is the only ground on which the action was supported by the State Government. However, the High Court found that the report of the District Officer was favourable to these respondents and the District Judge had really recommended renewal of their term. Admittedly, the only ground on which the State Government sought to support its action is found to be non-existent in the record. This leads to the inescapable conclusion that the action of refusing renewal to respondents Nos.1, 2 and 3 by order dated 1.10.1992 was arbitrary and on a non-existent ground. This view taken by the High Court cannot, therefore, be faulted."

If, we in the light of the observation of Hon'ble Supreme Court examine the facts of this case, we would find that neither in the counter affidavit filed in these cases, anything adverse against the petitioners has been said nor the record discloses any reason as to why their term be not renewed. The record which has been produced before us also does not disclose any reason as to why the term of the

petitioners were not extended or renewed. Thus this is a case of assigning no reason.

We need not cite several other cases which have been placed before us by Shri W.H. Khan, learned counsel appearing on behalf of petitioners. Suffice to say we refer only one judgement of Allahabad High Court in P.N. Sethi Vs. State of U.P. and others 1997 (15) LCD 1046; where it was observed after considering the provisions contained in para 7.08 of the L.R. Manual that the counsel in the districts are treated as Law Officers of the State who are holders of an 'Office' or 'Post'. The aforesaid provision in the Chapter VII (L.R. Manual) reporting to appointment and condition of engagement of District Government counsel that the appointments are to be made and ordinarily renewed on objective assessment of suitability of the person, based on the opinion of the District Officers and the District Judges and Character Roll is maintained for keeping a record of the suitability of the appointee to enable an objective assessment for the purpose of his continuance as a law officer in the district.

If it is assumed that such engagement are only professional in nature and that the appointment or renewed which is made by the State Government pertains to subjective satisfaction of the State Government, but it should be based on certain materials. There was no objective material before the State Government to arrive at a conclusion that their term may not be renewed. The only relevant material before the State Government was the report of the District Judge and the District Magistrate, which was brushed aside, without indicating any reason. There exist nothing on the record to indicate that the petitioners have suffered from any disability, meaning thereby; that there was any defect in their Character Roll or they were not suitable for the post in question. The District Judge who is best authority to assess and evaluate the working of the petitioners submitted his report in favour of the petitioners. The District Magistrate also did not find that the petitioners were not suitable for the posts, which they held. Hence there was no material before the State Government which can be said to be adverse against the petitioners. The order passed by the State Government does not indicate any reason as to why their term was not renewed, when in accordance with the instructions contained in para 7.08 their term could be renewed by the State Government.

In view of what we have indicated herein above both the writ petitions succeeds. A writ order in the nature of certiorari quashing the order of Government dated 30.4.99 refusing to renew the term of the petitioners is issued and the State Government is further directed to consider the cases of the petitioners in the light of the recommendation made by the District Judge and the District Magistrate as well as the observations of this Court. Till the State Government takes its final decision the petitioners will continue to discharge their duties which were assigned to them.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 27.10.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 11533 of 1980

Sri Shamsad Ahmad ...Petitioner
Veruse
The District Judge, Dehradun. and others Respondents

Counsel for the Petitioner :
Shri L.P.Naithani
Shri Rajesh Tanoon

Counsel for the Respondents :
S.C.
Sri H.S. Nigam

U.P. Urban Buildings (Regulation of letting , Rent and Eviction) Act, 1972, ss. 17 (1), 12,15 and 16- expected vacancy – Intimation by Land lord to R.C. & E.O.with request to allot the accommodation to his nominee R.C. & E.O. allotted the accommodation to other person ignoring Land lord's nominee- held S. 17 (1) applicable- order of R.C. & E.O. set aside.

Held -

Section !7 (1) of the act dose not make any distinction between the physical vacancy and deemed vacancy . In both the cases the District Magistrate is entitled to pass the order of allotment under sub – section (1) of section 16 of the Act which provides that the District Magistrate by order require the land lord to let any building which is or his fallen vacant. Hi will have jurisdiction to pass allotment order in case there is a deemed vacancy under section 12 of the Act. The land lord can intimate to the District Magistrate / Rent control and Eviction officer about the vacancy whether it is actual vacancy, deemed vacancy or expected vacancy.

Secondly, In the presents case the tenant himself has intimated the date of expected vacancy to the land lord and the land lord in pursuance of the said intimation had given notice to the District magistrate .the intimation given by the land lord is fully covered under section 15 (1) of the act.
In view of the above the write petition is allowed. (para 9,10,11)
Case referred .
1994 (2) ARC 37

By the Court

1. This writ petition is directed against the order dated 14.10.1980 passed by the Rent Control and Eviction Officer allotting the accommodation to respondent no3 and the order of respondent no1 dismissing the revision against the said order no19.12.1980.

2. Briefly the facts are that one Harbans Lal was tenant of Premises no.64 Munnugang, Dehradun , of which the petitioner is landlord. He constructed is oven house at Keshav Nager , Dehradun and intimated to the landlord on 16.6.1980 that would vacate the house in the lost week of the month and will hand over its possession. On the basis of this information, the petitioner intimated to the District Magistrate under Section 15(1) of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the Act) that Harbans Lal, the tenant, is to vacate the accommodation. In the prescribed form in column the actual or expected date of vacancy he mentioned the date of vacancy as 24.6.1980. The Rent Control and Eviction Officer, on receiving this intimation, asked the Rent Control Inspector to submit a report. The Inspector made a local inspection. The tenant informed him that he has constructed his house at Keshav Nagar and is likely to vacate within two or three days. The Inspector submitted a report on 10th July 1980 to the Rent Control and Eviction Officer. The Rent Control and Eviction Officer declared the accommodation in question as vacant.

3. The petitioner on 16th July 1980 nominated Sri Datar Singh, respondent no .4, for the purpose of allotment under section 17(1) of the Act. Sri Datar Singh applied for allotment of the premises. Respondent no3 also made an application for allotment of the premises. The Rent Control and Eviction Officer vide order dated 14.10.1980 held that section 17(1) of the Act was not applicable inasmuch as the vacancy was not notified under Section 17(1) but under Section 12(3)of the Act and therefore the premises in question could not be allotted to the nominee of the petitioner. He allotted the accommodation in question in favour of respondent.no3 Against this order the petitioner and Datar Singh filed separate revision. Respondent no.1 has dismissed the revision on 19.12.1980

4. I have heard Sri Rajesh Tandon, learned counsel for the petitioner, and Sri H.L. Nigam, learned counsel for respondent no3.

5. The core question is whether on the facts and circumstances of the case the Rant Control and Eviction officer was justified in ignoring the nomination made by the landlord on the ground that if the vacancy is notified in a case of deemed vacancy which is covered by Section 12(3) of the Act, the nomination shall be treated as invalid under Section 17(1) of the Act. In this context the provision of Section 15 as well under Section 12 of the Act. The vacancy may arise in three ways :

i. When the tenant or the landlord ceases to occupy the building i.e. physical vacancy;

ii. When the tenant or landlord is likely to vacate the building; and

iii. When the tenant continues to occupy it but it shall be deemed as vacant under Section 12of the Act.

6. Under Section 12 (1) the landlord or tenant of a building shall deemed to have ceused to occupy the building or a part thereof, if, (a) he has substantially removed his effect therefrom; (b) he has allowed it to be occupied by any person who is not a members of his family (c)in a case of residence building he as well as the members of his family have taken up residents not being temporary residence elsewhere.

7. Sub- section 12 provides that in the case of non residential building ,where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building. Sub section (3) further provides that in the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy .

8. Section 15 (1) of the Act provides that every landlord, shall on a building falling vacant by his ceasing to occupy it or by the tenant vacating it o by release from requisition or any other manner whatsoever gives notice of the vacancy in writing to the District manager not later then seven day after the occurrence of such vacancy, and such notice many at the option of the landlord be given before the occurrence of the vacancy. The duty is also cast upon the tenant under Sub-section (2) to give notice in writing to the District Magistrate and also to the landlord not lees then fifteen days before the vacancy .Section 2 of the Act contemplates deemed vacancy where the tenant or landlord has not left possession. In one case the cessation of the vacancy is a fact and in other case it is a deemed cessation of vacancy. The effect in both case the same i. e. vacancy of the building by the landlord or tenant. Section 17 of the Act takes into account the vacancy and the expected vacancy both. Section 17(1) reads as under:-

"17(1). Where the District Magistrate receives an intimation, under Sub-section (1) of section 15, of the vacancy or expected vacancy of building any allotment order in respect of the building shall be made communicated to the landlord within twenty – one days from the date of receipt of such intimation, and where no such order is so made or communicated within the said period, the landlord many intimate to the District Magistrate the name of a person of his choice, end thereupon the District Magistrate shall allot the building in favour of the person nominated unless for special and adequate reason to be recorded hie allots it to any other person within ten days from the receipt of intimation of such nomination :

Provided that were the landlord has made an application under clause (b) of Sub-section (1) of section 16, for the release of the whole or any part of the building or land appurtenant thereto in his favour, the said period of twenty- one days shall be computed from the

date of decision on that application or where an application for review or on appeal is filed against such decision, from the date decision on such application or appeal."

9. Section 16 of the Act which provides that the District Magistrate by the order require the landlord to let any building which is or has fallen vacant or is about to fall vacant. He will have jurisdiction to pass allotment order in case there is a deemed vacancy under section 12 of the Act. The landlord can intimate to the District Magistrate/Rate Control and Eviction Officer about the vacancy whether it is actual vacancy, deemed vacancy or expected vacancy. In, Irshad Ahmad Vs. VII Additional District Judge. Aligarh and others, 1994(2) ARC37, it was held that the intimation can be given by the landlord in regard to deemed vacancy as contemplated under section 12 of the Act.

10. Secondly in the present case the tenant himself has intimated the date of expected vacancy to the landlord and the landlord in pursuance of the said intimation had given notice to the District Magistrate. The intimation given by the landlord is fully covered under the section 15 (1) of the Act.

11. In view of the above the writ petition is allowed. The order passed by the Rant Control and Eviction Officer dated 14.101.980 and the order passed by respondent no.1 dated 19.12.1980 are hereby quashed. The Rate Control and Eviction Officer shall now decide the allotment application in accordance with law taking into account the nomination made by the landlord. Considering the facts and circumstances of the case the parties shall bear their own costs.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Second Appeal No. 48 of 1999

Babu Lal ...Appellant
Versus
Sri Brij Gopal and others ...Respondents

Counsel for the Appellant :
Sri Pankaj Mithal
Sri Madan Mohan

Counsel for the Respondents:
Sri A. N. Rai
Sri S.N. Singh

Hindu Succession Act, 1956 readwith C.P.C.,S. 100-Hindu Law- Partition-concurrent findings that plaintiff-respondent, the next reversioner, has been in possession since date of execution of Bakshishnama in his favour-Appellant having not filed any suit for possession against him within limitation, held, cannot now claim exclusive ownership- Estoppel-Evidence Act, 1872, S. 115.

Held (para 10)

The courts below have recorded concurrent findings that the plaintiff- respondent has been in possession over the property since the date of execution of Bakshishnama in his favour. The appellant having not filed any suit for possession against him, during the period of limitation for ejectment, cannot claim that he is now exclusive owner of the property in dispute.

Case Law discussed.
(1879) 6 IA 15
(1881) 8 IA 99
ILR (1978)1 All. 608
ILR (1886)8 All. 365
AIR 1971 SC. 1041
AIR 1972 S.C. 2069
Mulla's Principles of Hindu Law (14th Edition) pr.197

By the Court

1. This defendant's second appeal is against the partition decree passed by the trial court and affirmed by subordinate appellate court.

2. The following relevant pedigree will make position clear as regards the rights of the parties in the property in dispute:-

Ghasi Ram
Widow- Maharani
/

/ /
(Daughter) (Daughter)
Vidya Bai Bunda Bai
/
(son)
Brij Gopal
(Plaintiff)

3. Ghasi Ram had purchased the property in dispute from one Lala Gopal. He died leaving behind him his widow Maharani and two daughters, namely, Vidya Bai and Bunda Bai. On death of Maharani, her two daughters inherited the property in dispute. Bunda Bai died some times in the year 1950. She was succeeded by his son Brij Gopal.

4. Brij Gopal filed Suit No. 64 of 1991 for partition against Babu Lal, Ram Kishan and Mahipal on the allegations that Maharani died leaving behind her two daughters. They equally inherited the rights in the property in question. He is son of Bunda Bai and is entitled to half share in the property. An application for amendment of the plaint was filed alleging further that Vidya Bai had executed a Bakshishnama on 2.1.1946, whereby she made gift of her entire property in his favour. The suit was contested by the defendants. Babu Lal defendant appellant alleged that Bunda Bai had only life interest and as she died prior to the year 1956, her right and title were inherited by Vidya Bai, who was the next reversioner and the plaintiff did not get any right in the property in dispute. She became absolute owner of the property in the year 1956 after enforcement of Hindu Succession Act, 1956. She had sold the property in question to one Chandra Bhan on 19.9.1996. Chandra Bhan sold it to Babu Lal, the appellant on 31.1.1969. He has been in possession of the property in dispute. It was denied that Brij Gopal was son of Bunda Bai and the defendants second set, namely, Ram Kishan and Mahipal based their claim that they had obtained 'patta' from the Gaon Sabha in respect of the disputed land and the plaintiff has no right and title to the property in question.

5. The trial court framed various issues and held that the plaintiff was son of Bunda Bai. On the death of Maharani her both the daughters, namely, Bunda Bai and Vidya Bai inherited the Rights in the property and the plaintiff is entitled to half share in the property. The suit was, accordingly, decreed for partition. The claim of defendant Nos.2 and 3 was rejected on the finding that Gaon Sabha had no right to execute any 'patta' in favour of defendant nos. 2 and 3. Babu Lal filed an appeal against the judgment of the trial court. The appellate court has dismissed the appeal on 28.11. 1998.

6. It is undisputed that the two daughters succeeded to their mother but their interest was limited under Hindu Law. Bunda Bai died prior to the enforcement of Hindu Succession Act, 1956. On her death her rights will not be inherited by her son Brij Gopal but the next heir of her father, namely, her sister Vidya Bai in accordance with the principles of succession under Hindu Law (vide (1879) 61A 15 Chotey Lall Vs. Chunno Lall, (1881) 8 I.A 99 Mutta Vs. Dorasinga Tevari I.L.R. (1878) 1 All. 608 baijnath Vs. Mahabir and I.L.R. (1886) 8 Allahabad 365 Sant Kumar Vs. Deva Saran.

7. The core question is the effect of the execution of Bakshishnama executed by Vidya Bai, the next reversioner in favour of Brij Gopal son of Bunda Bai. A Presumptive reversioner is entitled to enter into a compromise or relinquish his share in favour of the next reversioner. Brij Gopal, after the death of Bunda Bai, his mother was the next reversioner in respect to the estate of Vidya Bai. Vidya Bai having executed a Bakshishnama in favour of Brij Gopal and having put him in possession, the transferee from Vidya Bai is estopped from challenging the same. In Krishna Behari lal Vs. Gulabchand and others, AIR 1971 Supreme Court, 1041 it was held that where under a compromise the presumptive reversioners purported to give a portion of the suit properties absolutely to the widow in consideration of her giving up her claim in respect of the other properties, they would be estopped from contending that they are entitled to succeed to the properties given to the widow. The Apex Court in S. Shanmugam Pillai and others Vs. K Shanmugam Pillai and others, AIR 1972 Supreme Court 2069 clarified that there are three classes of estoppels that may arise for consideration in dealing with reversioner's challenge to a widow's alienation. They are(1) that which is embodied in Section 115 of the Evidence Ac, (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction and (3) ratification i.e. agreeing to abide by the transaction. A presumptive reversioner coming under any one of the aforesaid categories is precluded from questioning the transaction, when succession opens and when he becomes the actual reversioner.

8. After the death of Bunda Bai if it is taken that Vidya Bai as the next reversioner succeeded to her, she was bound by Bakshishnama which she had executed earlier unless it was shown to have been obtained by duress, undue influence or fraud. The deed was executed not in favour of any stanger but to the next reversioner i.e. son of Bunda Bai. Vidya Bai, during her life time never challenged the said deed. It has further been found that Vidya Bai had not executed the sale deed to Chandra Bhan in respect of the property in respect of which she had executed Bakshishnama.

9. The reversioner is otherwise also entitled to surrender his rights in favour of the next reversioner. In this connection a passage from Mulla's Principles of Hindu Law (para 197 14th Edition) is quoted:-

"It is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if they are more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The principle on which the whole transaction rests is the effacement of the widow- an effacement which in other circumstances is effected by actual death or by civil death-which opens the estate of the ceased husband to his next heirs at that date."

10. The courts below have recorded concurrent findings that the plaintiff-respondent has been in possession over the property since the date of execution of Bakshishnama in his favour. The appellant having not filed any suit for possession against him, during the period of limitation for ejectment, cannot claim that he is now exclusive owner of the property in dispute.

11. I do not find any merit in this second appeal and it is, accordingly, dismissed.

Second Appeal Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.19.99

BEFORE
THE HON'BLE B.K.RATHI, J.

Criminal Misc. Application No.1826 of 1999

Tarabi and others ...Applicants.
Versus
The State of U.P. and another...Respondents.

Counsel for the Applicants:
Shri Rahul Sripat

Counsel for the Respondents:
Shri R.S.Verma
A.G.A.

Code of Criminal Procedure, 1973, S. 145-Proceedings under-suit under Ss. 229-B and 209 of U.P.Z.A. and L.R. Act, pending-Ex-parte order by civil court, held, can be ignored by Criminal court in proceedings under Sec. 145, Cr. P.C. as it was without jurisdiction.
Held (Para 5)
Opposite party no.2 is the recorded tenure holder and no order has been passed in the suit in favour of the petitioners. The suit under Sections 209-B and 209 U.P.Z.A. & L.R. Act was pending and in the mean time an ex-parte order was obtained from the civil court on 15.3.89. The order was without jurisdiction. The learned Additional Sessions Judge has rightly ignored that decision. A decision without jurisdiction can be ignored in proceedings of 145 Cr. P.C.

Case referred.
1999 (I) JIC 607 (All)

By the Court

1. This is a petition under Section 482 Cr. P.C. to quash the orders dated 1.12.98 and 22.5.99 passed by the S.D.M., Rampur in Case No. 13 of 1997 u/s 145 Cr. P.C. and Special Judge, Rampur in Criminal Revision No.194 of 1997 by which they have held the opposite party no.2 to be in possession of the disputed agricultural land.

2. I have heard Sri Rahul Sripat, learned counsel for the petitioners and Sri R.S.Verma, learned counsel for the opposite parties and perused the record.

3. The contention of the learned counsel for the petitioners is that the plots in dispute are plots no.101, 277, 279, 285 and 286 situated in village Paimpur, Tehsil Sadar, District Rampur. Regarding these plots the petitioner filed a suit for injunction to restrain the opposite party no.2 from interfering in the possession of the petitioners over the said plots. The said suit was decreed on 15.3.89 by the IV Additional Munsif, Rampur and the copy of the judgement is Annexure-2. It is, therefore, contended that the rights of the parties have been decided by the civil court and therefore, the proceeding u/s 145 Cr. P.C. are not maintainable and the impugned orders are liable to be quashed. The learned counsel in support of his case referred to "Smt. Neelam Singh & Anr. Versus State of U.P., 1999 (1) JIC 607 (All)." It has held that if the rights of the parties have been decided by the civil court, the proceedings u/s 145 Cr. P.C. cannot be taken.

4. As against this, the contention of opposite party no.2 is that all the plots in dispute originally belong to Smt. Allahrakhi, who died in the year 1976. That she has a prostitute and had illicit relations with Anwar Ali, father of Tarabi, petitioner no.1. On the basis of the said relations Anwar Ali posted himself as husband of Allahrakhi and filed a suit under Sections 229-B and 209 U.P.Z.A. & L.R. Act before the S.D.M., Rampur, which was numbered as Case No.32 of 1987-88, which was decided against him and the appeal was also dismissed. However, Board of Revenue has set aside both the judgements and remanded the case on 29.1.96, which is still pending. Anwar Ali died and in his place Tarabi was substituted and other petitioners are relations of Tarabi. That opposite party no.2 is the daughter of Allahrakhi. Allahrakhi died in the year 1976 and after her death, the

name of opposite party no.2 was recorded in her place and she continued to be in possession. It is contended that the suit was decreed ex-parte by IV Additional Munsif, Rampur and not information was given to opposite party no.2. That the petitioners were not recorded as tenure-holders of the land in dispute and therefore, the civil court had no jurisdiction to issue injunction in respect of agricultural land. That the decree relied on by the learned counsel for the petitioners is, therefore, without jurisdiction.

5. The learned Additional Sessions Judge has considered the matter in great detail and has held that after the death of Smt. Allahrakhi in the year 1976, the name of the petitioner was recorded over the land in dispute and she was cultivating the land. That the petitioners filed a suit under Sections 229-B and 209 U.P.Z.A. & L.R. Act, which was dismissed and the appeal was also dismissed, but in revision the matter has been remanded back and is still pending. Opposite party no.2 is the recorded tenure holder and no order has been passed in the suit in favour of the petitioners. The suit under Sections 229-B and 209 U.P.Z.A. & L.R. Act was pending and in the mean time an expert order was obtained from the civil court on 15.3.89. That order was without jurisdiction. The learned Additional Sessions Judge has rightly ignored that decision. A decision without jurisdiction can be ignored in proceedings u/s 145 Cr.P.C.

6. In the circumstances, it cannot be doubted that opposite party no.2 is in possession of the land in suit and therefore, she was rightly declared in the possession.

7. I do find any ground to interfere in any of the orders. The petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.99

BEFORE
THE HON'BLE B.K.RATHI ...J.

Criminal Misc. .Application No..5695 of 1999

Virendra Singh ....Applicant
Versus
Union of India ...Opp. parties.

Case crime Nil/99 U/s 9/56 Foreign Exchange Regulation Act P.S. Parvartan Nideshalaya District Varanasi.

Counsel for the Applicant:
Shri Ashwini Kumar Awasthi
Shri Manish Tiwari

Counsel for the Opp. Parties:
Shri S.K.Singh

Counsel for Union of India:
Government Advocate.

Foreign Exchange Regulation Act, SS. 9 and 56 read with Constitution of India, Article 20 (3) – Applicant,an accused under SS 9 and 56, FERA, seeks a direction to be issued for his interrogation in presence of his lawyer-Following Poolpandi's case, that for interrogation under FERA, refusal of Counsel's presence is not violative of Act, 20 (3), Constitution of India.

Held (Para 2 and 3)

For interrogation during investigation under the Customs Act and F.E.R. Act, the refusal of the presence of the counsel is not violative of Article 20 (3) of the Constitution of India.

Therefore, the decision of Apex Court in the case of Poolpandi is binding and I accordingly find that the permission cannot be granted to the petitioner for interrogation in presence of the counsel.

Case law discussed.
1992 (29) ACC 550
Cr. M.A. No.2221 of 1999, decided on 24.6.99

Cr. M.W.P.No.447 of 1990, decided on 26.3.98
Cr. M.A. No.1620 of 1999, decided on 4.6.99
1985 Cr.L.J. 1325
AIR 1978 SC 1025.

By the Court

1. The petitioner is an accused in Crime No. Nil of 1999 under Section 9/56 F.E.R.A. He has been summoned for interrogation. The allegation of the petitioner is that he has been falsely implicated in this case. The only request made in that direction may be issued for interrogation of the petitioner in presence of his lawyer.

2. I have heard Sri Manish Tiwari, learned counsel for the petitioner and Sri S.K. Singh, learned counsel for Union of India. The request has been opposed by Sri S.K. Singh on the ground that it cannot be accepted in view of the decision of the Hon'ble Supreme Court in "Poolpandi and others Versus Superintendent, Central Excise and others, 1992 (29) A.C.C. page 550," it was held that for interrogation during investigation under the Customs Act and F.E.R. Act, the refusal of the presence of the counsel is not violative of Article 20(3) of the Constitution of India.

3. As against this, the learned counsel for the petitioner has filed the copies of the unreported judgements of this Court. The first is that Criminal Misc. Application No.2221 of 1991 decided by Hon'ble P.K. Jain on 24.6.99. The other decision referred to is Criminal Misc. Writ Petition No.447 of 1990 decided by Hon'ble G.S.N. Tripathi dated 26.3.98. Both these cases were under the Customs Act. Similar requests of the petitioner were allowed. However, the perusal of the judgements show that no law was discussed and only it was considered that there is no reason as to why the interrogation may not be permitted before the counsel. The third case relied on is the decision of Hon'ble O.P. Garg, J. in Criminal Misc. Application No.1620 of 1999 decided on 4.6.99. In a detailed judgement the case of Poolpandi (Supra) was considered and was distinguished on the basis of the decision of the Hon'ble Supreme Court in the case of "T.K. Advani, New Delhi Vs. The State, New Delhi, 1985 Cr.L.J. page 1325." I have carefully gone through the judgement and found that the decision of the case of T.K. Advani, New Delhi Vs. The State, New Delhi is based on the decision of the case of "Smt. Nandini Satpathy Vs. P.L. Dani and another, 1978 A.I.R. page 1025," decided by the Hon'ble Supreme Court. This case of Smt. Nandini Satpathy was considered by the Apex Court in the case of Poolpandi (Supra) and has drawn an adverse inference. Therefore, the decision of Apex Court in the case of Poolpandi is binding and I accordingly find that the permission cannot be granted to the petitioner for interrogation in presence of the counsel.

The petition is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2.11.1999

BEFORE
THE HON'BLE B.K.RATHI, J.

Criminal Misc. Application No. 2689 of 1999

Smt. Prem Rastogi & another ...Applicants
Versus
The State of Uttar Pradesh and others ...Opposite Parties

Counsel for the Applicants :
Sri R.B.Sahai
Sri Prakash Kumar

Counsel for the Opposite Parties:
A.G.A.
Sri Suresh Chandra

Cr.P.C., 1973, Sec. 482- Exercise of power under-To be exercised sparingly and cautiously.

Held (Para 9)

It is also contended that the opposite party no. 3 has also filed a complaint in the court of C.J.M., Farrukhabad under section 494, 109 I.P.C. Even if it is so, no inference can be drawn that the case is false. It is settled law that power under section 484 Cr.P.C. should be exercised very sparingly in rare cases.

Case referred

1986 SCC (Crl) 216
1996 SCC (Crl.) 628

By the Court

1. This is a petition under section 484 Cr.P.C. to quash the proceeding of case no. 747 of 1999 against the applicants pending in the court of C.J.M. Farrukhabad and also to quash the non-bailable warrants issued against the applicants. The facts giving rise to this petition are as follows;

2. The husband of applicant no. 1 Sri Bhagwan Das Rastogi had two sons namely Manoj Rastogi and Atul Rastogi. The applicant no. the wife of Manoj Rastogi. The second son, Atul Rastogi was married to opposite party no. 3 on 30.11.1995. That after the marriage with opposite party no. 3 she came to the house of the applicants. It transpired that she is not a normal lady of sound mind but is a chronic patient of mental disease and is suffering with disease schizophremia. That accordingly, he parents were informed. The father of opposite party no. 3 is a Senior Judicial Officer, presently posted as District Judge. They took the opposite party no. 3 on 5.12.1995. That the marriage was performed by suppressing the facts and therefore, a Matrimonial suit no.:4 of 1996 was filed on 1.1.1996 by the husband of opposite party no.,3 to declare the marriage as void on the ground of insanity of opposite party no. 3 In that suit the opposite party no. 3 has been directed to pay the maintenance and her husband is paying the maintenance regularly and till sow has paid about Rs. 90,000/-.

3. That the father of opposite party no. 3 being District Judge is well conversant with the law and therefore he lodged as F.I.R. against the applicants and her other family members for an offences under sections 498 - A, 323,506 I.P.C. and 3/4 of Dowry Prohibition Act. That the F.I.R. was lodged in order to put pressure to withdraw the matrimonial suit. That opposite party no. 3 lived at the house of the applicants only for five days and went on 5.12.1995. The F.I.R. was lodged after long delay on 5.3.1999 and it has been filed as a lever to terrorise the applicants. That the applicants filed a petition in this court in which their arrest was stayed. That however, now the charge sheet has been filed and therefore, the applicants have prayed for quashing of the F.I.R. and charge sheet.

3. As against this the contention of the learned counsel for the opposite party no. 3 is that se was being harassed and was tortured in connection with ;the demand of Maruti Car, frost free Refrigerator, Vedeocon TV Bazooka and Washing Machine. That certain amounts were paid by the father of the opposite party no. 3 but he was not able to meet all the demands. That it was totally false that the opposite party no.3 is a person of unsound mind and suffering from any disease. That she has passed High School and Intermediate Examinations in Ist Division and in B.A. she obtained 50%j marks and is now doing M.A. in English. That the applicants are trying to remarry the husband of the opposite party no. 3 and therefore, she also filed a suit which is pending. That therefore there is no ground to quash the charge sheet.

5. I have heard Sri R.B. Sahai, learned counsel for the applicant, Sri S.C. Verma, learned counsel for opposite party no. 3 and the learned A.G.A. and have gone through the record.

6. Whether the opposite party no.3 is a patient of schizophrenia and is a lady of mential disorder or the dispute between the

parties took place in connection with the demand of dowry iskprely a question of fact and can not be decided in these proceedings. Even prima facie the allegations of the applicants can not be accepted because the opposite party no. 3 is an educated lady, passed all examination in first division and now doing M.A. (Final) in English Literature. Therefore, it is not a case where prima facie contention of the applicants may be accepted that she is a lady of unsound mind. This point, therefore, can be decided by the court after recording the evidence of the parties.

7. It is true that F.I.R. was lodged after long delay on 5.3.1999 whereas the opposite party no. 3 left the matrimonial home on 5.12.1995. However, the F.I.R. is not barred by time and for the reason that the F.I.R. is delayed, the case of the complainant can not be thrown because it was a matrimonial dispute and in Indian Society lady is always treated at some lower level with the husband. It is of common experience after divorce the man is able to get remarry very easily, but it became were difficult for a lady to find suitable match after she has been branded as a divorcee. The lady has to live with her first husband happily, therefore, it is of common experience that every attempt is made by the lady to make the marriage successful so also save her life. In these circumstances it is also a matter of common experience that the lady is always show in taking legal steps against the husband or other family members as thereafter there will be a point of no return and question of conciliation becomes remote. For this reason it may be that the F.I.R. was lodged after long delay and from the delay in F.I.R. it can not be inferred that the allegations of the opposite party no.3 are false and should be discarded without examining them after the opportunity of evidence.

8. It may also be mentioned that it can not be said that the F.I.R. has been lodged with the sole purpose of harassing as it has been lodged in Farrukhabad where admittedly the applicants are residing there with their family and opposite party no.3 is not residing there. Therefore, arguments that the proceedings are wholly malafide and abuse of the process of the court can not be accepted.

9. It is also contended that the opposite party no. 3 has also filed a complaint in the court of C.J.M., Farrukhabad under section494 , 109 I.P.C. Even if it is so, no inference can be drawn that the case if false. It is settled law that power under section 484 Cr.P.C. should be exercised very sparingly in rare cases. Hon'ble Supreme Court in the case J.P. Sharma Versus Vinod Kumar Jain and others, 1986 SCC (Crl.) 216 has held that offence made out on the basis of allegation made in the complaint without going into truth of otherwise or the allegations, the High Court can not exercise its powers under section 482 Cr.P.C. In the case of State of Bihar Versus Rajendra Agrawalla 1996 SCC (Crl) 628, it was observed by the Apex Court that the power under section 482 Cr.P.C. should be exercised very sparingly and cautiously and the High Court should not appreciate the evidence and come to the conclusion that no prima facie case is made out. It is not necessary to refer the other authorities in this case. On the basis of the above discussions no conclusion can be drawn that the complaint has simply been filed in order to harass the applicants and is abuse of the process of the court and no case is made out.

10. The correctness of the allegations can be decided only after the evidence. I do not find any ground to quash the proceedings.

The petition is dismissed.

ORIGINAL JURISIDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 4.11.99

BEFORE
THE HON'BLE B.K.RATHI, J.

Criminal Misc. Application No.4746 of 1999.

Gobardhan ...Applicant.
Versus
State of U.P. and another...Opposite parties.

Counsel for the Applicant:
Shri V. Singh.

Counsel for the Opposite parties:
A.G.A.

Code of Criminal Procedure, 1973- Sec. 482- Petition to quash proceedings u/s 409 I.P.C. as per decision of apex Court in Raj Deo Sharma's case- This case held, not applicable in view of apex court decision in 'Common Cause' case.
Held-(Paras 5 and 7)

Therefore, the decision of Raj Deo Sharma (Supra) will also not apply to the offence under section 409 I.P.C. as the direction given in this case is without prejudice to the directions given in the case 'Common Cause'. If otherwise the view is taken it will prejudice the directions given in the case of 'Common Cause'.

Therefore, in case of an offender liable to punishment with death or imprisonment for life under first and second category of section 53 I.P.C. the decision of Raj Deo Sharma (Supra) will have no application. Therefore, the proceedings can not be quashed on the basis of decision of Hon'ble Supreme Court in the case of Raj Deo Sharma (Supra).

Case referred.
1998 (37) ACC 834
"Common Cause" V. U.O.I.

By the Court

1. This is a petition under Section 482 Cr. P.C. to quash the proceedings of Criminal Case No.293 of 1999, State Versus Gobardhan under Section 409 I.P.C. pending in the court of Ivth Additional Civil Judge (Junior Division), Mirzapur.

2. The quashing of the proceedings have been requested on two grounds. The first ground is purely legal for which learned counsel has relied on the decision of the case of Raj Deo Sharma Versus State of Bihar, 1998 (37) ACC 834.

3. It is contended that the Hon'ble Supreme Court in this case has directed that in cases punishable with imprisonment for a period exceeding seven years the court shall close the prosecution evidence on completion of three years from the date of recording the plea of accused on the charges framed, whether the prosecution has examined all the witnesses or not within the said period, and the court can proceed to the next step provided by law for the trial of the case. It is further contended that in the present case the charges were framed on 12.07.1994 and the plea of the accused was recorded on that date and large number of dates have fixed for evidence but the prosecution has not examined any witness as yet, and therefore, the evidence of the prosecution should be closed.

4. I have considered the argument and has bonafide doubt in my mind as to whether the evidence could be closed in this case which is for offence under Section 409 I.P.C. which is punishable with imprisonment for life in view of the directions given in the above case. The perusal of the judgement of the Hon'ble Supreme Court shows that the above directions are in addition and without prejudice to the directions issued by the Apex court in the case of "Common cause" Versus Union of India as modified later on.

5. The perusal of the direction given in the case of "Common Cause" by the Hon'ble Supreme Court shows that these directions

does not apply to the cases of misappropriation of public fund. Therefore, the decision of Raj Deo Sharma (Supra) will also not apply to the offence under Section 409 I.P.C. as the direction given in this case is without prejudice to the directions given in the case of "Common Cause". If otherwise the view is taken it will prejudice the directions given in the case of "Common Cause".

6. There is another reason for finding that the case of Raj Deo Sharma (Supra) does not apply to offence punishable for death or imprisonment for life. Section 53 of Indian Penal Code provides of punishments which reads as follows:

Punishments: The punishments to which offenders are liable under the provisions of this Code are: -

First –Death;
Secondly-Imprisonment for life;
Thirdly- (Deleted)
Fourthly-Imprisonment, which is of two descriptions, namely-

(1) Rigorous, that is, with hard labour;
(2) Simple;
Fifthly- Forfeiture of property;
Sixthly-Fine."

7. The perusal of the above Section shows that punishments have been categorised in six categories. The first and second are death and imprisonment for life. The fourth is regarding punishment of imprisonment. Therefore, where the Hon'ble Supreme Court has mentioned regarding the punishment with imprisonment of seven years or more it has mentioned regarding the punishment provided in the fourth category and no regarding punishments of first and second category. Therefore, in case of an offender liable to punishment with death or imprisonment for life under first and second category of Section 53 I.P.C. the decision of Raj Deo Sharma (Supra) will have no application. Therefore, the proceedings can not be quashed on the basis of the decision of Hon'ble Supreme Court in the case of Raj Deo Sharma (Supra).

8. Now coming to the second ground which is factual. It is alleged that there was dispute with managing committee and the petitioner was appointed as adhoc Head Master of the institution by the Basic Shiksha Adhikari. That the management committee did not accepted the petitioner as Head Master and therefore informed the bank not to accept the deposit made by the petitioner. That therefore, the amount realised by the petitioner as fee etc. were not accepted by the bank and therefore, the petitioner deposited the same in the post office by opening a separate account. That the Managing Committee thereafter lodged an F.I.R. that the amount was misappropriated. That in fact there is absolutely no misappropriation and the entire amount was deposited by the petitioner. For this reason, nobody is coming forward to support the case of the prosecution.

9. The narration of the facts as alleged by the applicant, if are correct no prima facie offence under Section 409 I.P.C. is made out and the petitioner is facing trial since last about more than five years.

10. In the circumstances I direct the trial court to decide the case very expeditiously on priority basis within six months from the date of prosecution of the certified copy of this order before it. The trial court may issue directions to the prosecution to produce the entire evidence on the date fixed with warning that no adjournment shall be granted.

The petition is accordingly disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: THE ALLAHABAD 02.11.1999
BEFORE

THE HON'BLE B. K. RATHI, .J.

Criminal Misc. Application No. 3549 of 1999.

Ajay Mehra & another ...Applicants
Versus
Durgesh Babu & other ...Respondents

Counsel for the Applicant:
Shri Vineet Saran

Counsel for the Respondents :
A.G.A.
Shri Y.S.Saxena
Shri Veer Singh

Code of Criminal Procedure, 1973, S. 482- complaint Proceedings- Quashing of – Permissibility.

Held (Para 9)

In the present case also there is factual issue as to whether drafts were given by the complainant or by Satish Chandra Agarwal and the allegation of the complainant that he gave the drafts can not be rejected without opportunity to him to produce evidence. Therefore, the proceedings can not be quashed under section 482 Cr. P.C.

Case referred.
1992 (4) SCC 305

By the Court

1. This is petition under Section 482 Cr.P.C. to quash the proceedings of complaint case no. 1920 of 1999. Durgesh Versus Ajay Mehra and another under Section 406 I.P.C., police station Bilsi, Badaun pending in the court of A.C.J.M., Badaun.

2. I have heard Sri Vineet Saran, learned counsel for the petitioners and Sri Y.S. Saxena, Learned counsel for the respondent no. 1.

3. The brief facts of the complaint are that the petitioners are the employees of I.B.P. Company Limited Petitioner no. 1 is the Senior Manager, Agra Division and petitioner no.2 is Assistant Manger (Sales). Aligarh. It is alleged in the complaint by the respondent no.1 that the petitioners assured him to appoint a dealer of mobile oil of I.B.P. Company. That the petitioners approached the complement and asked him to be ready with a bank draft of Rs. 5 lacs. That accordingly on 17.02.1995 in the afternoon the respondent no.1 handed over two bank drafts of Punjab National Bank, Bilsi each for Rs. 2.50 lacs bearing nos. 1-95-802830 and 5-95-802831 dated 15.02.1995. That in-spite of the said drafts the respondent no. 1 was not appointed as dealer. That therefore, the respondent no.1 on 16.02.1998 gave a registered notice to I.B.P. Company. In spite of the same the respondent no.1 was neither appointed a dealer nor his amount was returned. Thereafter the respondent no.1 filed a complaint against the petitioners for offences under Section 420 and 406 I.P.C. The learned Magistrate after recording the evidenced under Section 200 and 202 Cr.P.C. has summoned the petitioners.

4. The contention of the petitioners are manifold. It is contended that the bank drafts mentioned in the complaint were given in the name of I.B.P. Company by Satish Chandra Agarwal, who was the dealer of I.B.P. Company for purchase of mobile oil and other articles which were supplied to him. That no draft was given by the complainant. That it is not alleged that the drafts were given in the name of petitioners and therefore, there is no question of misappropriation of amount by the petitioners. That the petitioners moved an application for discharge before the learned Magistrate, which has been registered.

5. It is further alleged that the allegation of the complainant that drafts were given on 17.02.1995n in the afternoon is false, as the

supplies against the said drafts were made in the morning on 17.02.1995 itself. That there is no question of the submitting drafts without any application for dealership and without following the procedure for grant of dealership. That the dealership is granted by the Ministry of Petroleum and the complaint is highly belated.

6. Learned Counsel for the petitioners has file the notice 4 reply of the notice given by I.B.P. Company to Satish Chandra Agarwal, which is annexure no RA-1 and the reply of Satish Chandra Agarwal is annexure no Ra-2. In this reply Satish Chandra Agarwal has mentioned that the drafts in dispute were given by him for supply of diesel and mobile oil which have been supplied to him. The petitioners have also filed the account books. And other registers maintained by I.B.P. Company to show that the drafts in dispute were given by Satish Chandra Agarwal and has been credits his account. On the basis of this evidence it is contended that the allegations of the complainant that drafts were given by him is false. It is also contended that the petitioners has nothing to do with the grant of dealership. Which is granted by a Committee. That no form was filled for grant of dealership nor any application was given. That the complaint was also lodged after long delay. It is therefore shows that the allegations are totally false and can not be believed.

7. I have considered the arguments and is of the view that at present there is no ground to quash the complaint. No reason has been alleged as to why false complaint has been filed by respondent no. 1 against the petitioners. It has not been mentioned as to how the complainant came to know the numbers and amounts of the drafts and the name of the bank from which they were purchased. It they were not purchased by the complainant. The complainant allege that he purchased the drafts and it is a question of fact as to whether these drafts were purchased by the complainant or by Satish Chandra Agarwal. Reply of the notice given by Satish Cahndra Agarwal has been filed but no affidavit of Satish Chandra Agarwal has been filed. The question of fact can be decided after the evidence and can not be decided in these proceedings.

8. In this connection I may also refer the case of Janta Dal Versus H.A,S Chaudhary. 1992 (4) SCC 305. It was observed that inherent power conferred by Section 482 of the Code should not be exercised to stifle a legitimate prosecution . The High Court being the highest court of a State should normally refrain from giving a premature decision in a case wherein the entire facts are extremely incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved whether factual or legal are of great magnitude and cannot be seen in their perspective without sufficient material."

9. In the present case also there is factual issue as to whether drafts were given by the complainant or by Satish Chandra Agarwal and the allegation of the complainant that he gave the drafts can not be rejected will out oppertisnit to him produce evidence . Therefore, the proceedings can not be quashed under Section 482 Cr. P.C.

10. The next Contention of the petitioner is that even if the case of the complainant is accepted correct, he drafts were given to I.B.P. Company and therefore there is not question of misappropriation of amount by the petitioners and no offence under Section 406 I.P.C has been made out . This contention can also not be accepted. If the amount was given by the complainant it could not be accepted by I.B.P. Company. If the amount was given by the complainant the I.B.P. Company has also denied the taking of the amount from the complainant. Therefore, according to the complainant the petitioners have manipulated things and has used the amount of the drafts given by the respondent no. 1 to them for their

own use. Therefore at this stage it can not be accepted that no offence under Section 406 I.P.C. is made out.

11. Before parting it may also be mentioned that the complaint was filed under Section 420 I.P.C. which was dropped by the Magistrate on the objection of the petitioners. The contention of the respondent no. 1 is that he was cheated by the petitioners and on the pretext of giving the dealership of mobile oil of I.B.P .Company. Therefore, without being influenced with the observation made above the trial court will consider the question whether the charge u/s 420 I.P.C. should also be framed against the petitioners.

12. Considering the circumstances the proceedings of complaint case can not be quashed and the correctness of the allegations can be decided only after the evidence is recorded.

13. The petition is therefore dismissed.
