ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.1999

BEFORE
THE HON'BLE A. A. DESAI 'J'
THE HON'BLE ONKARESHWAR BHATT 'J'

Civil Misc. Writ Petition No. 30928 of 1997

Allahabad University Teachers Association,
Allahabad, through its Vice-President,
Arun Kumar Srivastava & others ...Petitioners.
Versus
The Chancellor, U.P. State Universities,
Raj Bhawan, Lucknow & others ...Respondents.

Counsel for the Petitioners : Shri P. Padia
: Dr. R.G. Padia
Counsel for the Respondents: Mr. S.N. Upadhyaya
Shri K.S. Singh
Shri R.P. Goyal Advocate General
Shri Vinod Swaroop Addl. A.G.U.P.

U.P. State Universities Act 1973- Section 10/12 (2) (c)- Appointment of vice-chancellor- process for appointment challenged by the teachers Association on the ground of unfettered and unguided power of chancellor-Nothing a whispher in writ petition about misuse of power by the chancellor which resulted in selection of an inappropriate person-Petition not maintainable.
Held

The grievance as canvassed in this petition is hypothetical. The abuse or the misuse of the powers could judicially be reviewed in appropriate case where such abuse has resulted in selecting an in appropriate person as a Vice Chancellor. The petition, for the relief as claimed, therefore, cannot be entertained. We see considerable force in the submission. However, after hearing the learned Addl. Advocate General and the learned counsel for the Chancellor, prima-facie, we do not find the impugned provisions are unguided or they provide arbitrary discretion. The guidance is very much inherent in the scheme of section 12 of the act. The Governor is the highest constitutional office of the State. Rightly it is pointed out to us that as per Section 10 of the Act the Governor is an ex-office Chancellor of the Universities in the State. The very stature and status of a person holding the office of the Chancellor is an assurance against arbitrariness or misuse of the power. (Para 7 and 8)

Case law discussed:
W.P. No. 16888-99

By the Court

1. The petitioner No. 1 is an Association of teachers of the Alld. University. Petitioners No. 2 and 3 are members of the Association. They have questioned the constitutionality of various provisions under section 12 of the U.P. State Universities Act, 1973 (hereinafter referred to as 'the Act').

2. In ultimate submission Dr. R.G. Padia, the learned counsel for the petitioners, confined the challenge to sub-clause (c) of sub-Section(2) of Section 12 of the Act. Section reads thus:-

> "The Vice-Chancellor:-(1) The Vice- Chancellor shall be whole-tile salaried officer of the Chancellor except as provided by sub-section(5) whose names are submitted in accordance with the provisions of sub-section(2).
> (2) The Committee referred to in sub-section(1) shall consist of the following members namely-
>
> (a) one persons (not being a person connected with the University, an Institute, a constituent college, an associated of affiliated college or a s hall or hostel) to least three months before the date on which a vacancy in the office of the Vice Chancellor is due to occur by reason of expiry of his term);
> (b) one person who is or has been a judge of the High Court of Judicature at Allahabad including the Chief Justice thereof nominated by the said Chief Justice ; and
> (c) one person to be nominated by the chancellor who shall also be the Convenor of the Committee. (impugned provisions).

3. Contention is that the provisions confers unguided and unfettered discretion on the Chancellor to nominate anybody on the Committee to select the Vice Chancellor of the University. Such power has posed serious threat to the academic affairs of the

University. The impugned provisions, therefore, need to be struck down.

4. Learned Advocate General for the State and Sri S.N. Upadhyay, Counsel appearing for the Chancellor, questioned the tenability of the petition at the behest of the petitioners. According to them the petitioners are not concerned in any manner with the selection of a Vice Chancellor. No right of the petitioners or the organisation has been impaired so as to maintain this petition.

5. However, they agree with the contention that the petitioner being association of the lecturers each member is engaged in the job to educate the students community admitted to the various disciplines being conducted by the University. Certainly they are involved in the academic affairs which is a primary function of the University. This academic activity is organised regulated or promoted under the leadership of the Vice-Chancellor. Therefore, it cannot be gainfully said that the petitioners organisation of lecturers are not in any way interested or concerned with the selection of the Vice Chancellor. The petitioners, therefore, have a locus to maintain the petition.

6. Dr. Padia, learned counsel for the petitioners very vehemently tried to assail the impugned provisions on the ground that they are capable of being misused. Refering to the decision in Civil Misc. Writ Petition No. 16888 of 1999, Raj Kumar and others Vs. Chancellor, Mahatma Jyoti-ba-Phule Rohilkhand University, Lucknow and others, the learned counsel focussed on the feature that the Chancellor in exercise of powers under impugned provisions nominated his own secretary on the committee. Such exercise is fanciful and does not commensurate with the nature and responsibility of the function.

7. The learned Addl. Advocate General and the counsel for the Chancellor made a submission that the grievance as canvassed in this petition is hypothetical. The abuse or the misuse of the powers could judicially be reviewed in appropriate case where such abuse has resulted in selecting an inappropriate person as a Vice Chancellor. In the earlier occasion the Chancellor might have nominated his Secretary. In the instant case, however, there is neither a nomination by the Chancellor nor there is a selection, pursuant to the recommendation of the Committee under subsection (1) of sec.

12 of the act. The petition, for the relief as claimed, therefore, cannot be entertained. We see considerable force in the submission.

8. However, after hearing the learned Addl. Advocate General and the learned counsel for the Chancellor, primafacie, we do not find the impugned provisions are unguided or they provide arbitrary discretion. The guidance is very much inherent in the scheme of section 12 of the Act. The Governor is the highest constitutional office of the State. Rightly it is pointed out to us that as per Section 10 of the Act the Governor is an ex-officio Chancellor of the Universities in the State. The very stature and status of a person holding the office of the Chancellor is an assurance against arbitrariness or misuse of the power.

9. Besides this, under the impugned provisions a person to be nominated by the Chancellor, being his representative cannot be any person out of free will. As far as possible such a person being the nominee ought to possess same or similar stature and eminence as that of the Chancellor. Such person certainly, as per the scheme, need to be in such position academically and administratively, to deliberate with the members of the committee. One such member of the Committee is the Chief Justice of the State or any sitting or retired judge of the High Court. This aspect of the matter also furnishes sufficient guidelines. It, therefore, follows that the persons to be nominated in any manner could not be less in stature and eminence than the other members of the Committee as envisaged by sub-clause(b) of sub-section (2) of Section 12 of the Act. Particularly under sub-section (5) of Section 12 of the Act when the Chancellor is obliged to nominate the Committee, the persons need to be of an academic eminence. This also provides a guideline for exercise of power under impugned provisions that the nominee of the Chancellor also need to be of academic excellence.

10. We believe that the Chancellor guide himself in the matter of nomination under impugned provisions having regard to the some of the aspects which are explicit in the scheme of section 12 of the Act, and referred to above.

Rule is, therefore, discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED, THE ALLAHABAD : 30.08.1999

BEFORE
THE HON'BLE B. DIKSHIT, J.

Civil Misc. Writ Petition No. 22248 of 1989

Abdul Hamid s/o Mohd. Umar ...Petitioner
Versus
III Additional District Judge & others ...Respondents.

Counsel for the petitioner : Shri S.K. Mehrotra,
Counsel for the Respondents : Shri Pradeep Kumar, S.C.

U.P. Civil Laws Amendment Act 1972- Section 9 readwith Provincial Small Causes Court Act- S. 15 (1)- jurisdiction-suit for possession filed before the civil court instead of small causes court- Decree passed by the civil court whether will be nullity?
Held – No.
Held:
Thus, in the circumstances it is held that the small causes courts are courts of preferential jurisdiction and Small Causes Court Act confers jurisdiction upon small causes courts to try a suit for possession based on contract of tenancy of a building, it enables the small causes courts to take cognizance of a suit between lessor and lessee but it did not exclude the jurisdiction of civil court to try the case as a regular civil suit and therefore a decree passed by civil court in a suit of small causes court nature will be valid and not a nullity. (Para 13)

Case law discussed;
AIR 1970 Alld 604 (FB)
AIR 1982 SC 20
AIR 1983 Alld 275
AIR 1977 Alld 103(FB)
AIR 1981 Alld. 93
1984 (1) ARC 316
SA 1237 of 1988, decided on 19.12.1996

By the Court

1. The question, which arise for consideration in this writ petition, is whether the jurisdiction of civil court is barred to try a

suit which is of small cause court nature and the decree, if passed by civil court in such a suit, will be null and void?

2. The facts giving rise to said question are that respondent Beni Ram Agarwal (hereinafter referred as Plaintiff) filed Original Suit No. 420 of 1985 for possession before Munsif, Shikohabad against petitioner-defendant Abdul Hamid (hereinafter referred as 'defendant') after determining the tenancy in respect of premises in dispute. After considering the case of the parties Munsif, Shikohabad on 11.11.1987 decreed the suit. Aggrieved by decree of trial court, the defendant filed an appeal. During pendency of appeal, an application was moved on 02.05.1989 by defendant to amend his written statement. The plea, which was sought to be introduced by proposed amendment of written statement, is that as suit was cognisable by small causes court, the jurisdiction of civil court was barred. The plaintiff objected to proposed amendment and appellate court by impugned order dated 04.11.1989 rejected the amendment application. The amendment application has been rejected mainly on three grounds: (1) The jurisdiction of Civil court is not ousted under section 15 (1) of Provincial Small Causes Court Act. (2) The plea of jurisdiction was not raised before the trial court and therefore it cannot be raised before this Court for the first time. (3) it is a bogus plea, which is not relevant to adjudicate upon the controversy but has been raised to delay the disposal of the case. Aggrieved by order passed by appellate court, the defendant has filed this petition.

3. The learned counsel for petitioner has reiterated his stand which was taken up before the appellate court and argued that as there was inherent lack of jurisdiction with trial court, the decree passed by trial court is a nullity.

4. To answer the question, it is necessary to consider the relevant provisions of provincial Small Causes Court Act, the effect of amendment of Article (4) of Schedule II of said Act and the relevant case law. Section 15 (1) of Provincial small Cause Courts Act and old and new article (4) of Schedule II of the Provincial Small Cause Courts Act are as follows:

"15 Cognizance of suit by Courts of Small Causes (1) A Court

of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes"

X X X

Old Article (4) of Schedule II	New Article (4) of Schedule II
a suit for possession of immovable property or for the recovery of an interest in such property."	a suit for the possession of immovable property or for the recovery of an interest in such property, but not including a suit by a lessor for the eviction of a lessee from a building after the determination of his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease. Explanation.- For the purposes of this Article, the expression building means a residential or nonresidential roofed structure, and includes any land (including any garden), garages, outhouses, appurtenant to such building, and also includes. Any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof.

5. Section 15 (1) of the Act came up for consideration before a Full Bench of this Court in the case of Manzurul Haq v. Hakim Mohsin Ali (AIR 1970 Alld. 604) in which this court held that the court of small causes is not a court of exclusive jurisdiction but it is a court of preferential jurisdiction. This legal preposition has been approved by apex court in the case of Smt. Gangabai v. Smt. Chabuai (AIR 1982 SC 20).

6. In the case of B.P. Gautam V. R.K. Agarwal (AIR 1977 Alld. 103) a Full Bench of this Court, while dealing with a case where the decree was passed by civil court in a suit after enforcement of U.P. Civil Laws Amendment Act, 1972 which provided though under section 9 that all pending cases triable by

small causes court were to be transferred from civil court to small causes court after enforcement of amending Act, this court held that the decree passed is valid and not void. The Court held:

> " It cannot be gainsaid that the present suit become small causes in nature after the coming into force of the Civil Laws Amendment Act, 1972. It is true that under Section 9 of the Amending Act such suit was triable by the Small Causes Court and was liable to be transferred to it from the regular side, but nonetheless it continued to retain its nature, namely, small causes. In that event Section 102 which applies to suits of the nature of small causes but which are tried on the regular side, is fully applicable. Under it no second appeal, lies."

The Court further held:

> " We find that the defendant appellant did not inform the trial court that it has lost jurisdiction to continue to try the suit because of the coming into force of Section 9 of the Civil Laws Amendment Act, 1972, otherwise the trial Court would have immediately transferred the case to the relevant Small Cause Court. There is no evidence to show that the defendant was not aware of the coming into force of the Amending Act. Under the circumstances the position is that the defendant voluntarily had a trial on the merits before a regular court. The procedure before a regular court is more detailed. Further, the defendant has had another innings on the merits before the lower appellate court. Under the circumstances we do not think that this is a fit case where the prayer for conversion of the appeal into a revision should be sustained."

7. In the case of Lala Hari Shyam V. Mangal Prasad (AIR 1983 Alld. 275) this court relying upon Manzurul Haq v. Hakim Mohsin Ali (Supra) held:

> "Construing Ss.15 and 16 of the Provincial Small Cause Courts Act a Full Bench of our Court in Manzurul Haq v. Hakim Mohsin Ali, AIR 1970 All 604 held that the Courts of small Causes are courts of preferential, and not exclusive, jurisdiction. This decision has been approved by the Supreme Court, Smt. Gangabai vs. Smt. Chabubai (AIR 1982 SC 20). The necessary corollary is that the regular Civil Courts do not totally lose jurisdiction."

8. The Court also relied upon a decision of Full Bench in Bisheshwar Prasad Gautam v. Dr. R.K. Agarwal (AIR 1977 Alld. 103) and observed as follows:

> "A five-Judge Full Bench Bisheshwar Prasad Gautam v. Dr. R.K. Agarwal (AIR 1977 All 103) of our Court has held that even where a suit was, in ignorance of this provision not transferred, even though recording of evidence had not begun before the relevant date, the decree will not be a nullity. In such case the suit which should have been tried as a small cause was tried as a long cause; there is no defect of jurisdiction."

9. Counsel for defendant-petitioner has relied on Section 15 and the case of Arjun Lal vs. III A.D.J. (AIR 1981 All. 93) to show that small causes court is a court of exclusive jurisdiction. The case in no way helps him. It is distinguishable. In this case it has been held that the suit of eviction between landlord and tenant is cognizable by small causes courts. It does not lay down that there is inherent lack of jurisdiction in civil courts if it proceeds to try a suit of small cause nature.

10. Same legal proposition has been laid down by a Division Bench of this Court in the case of J.B. Pancholi Vs. Sri Sridharjee (1984 (1) ARC 316) wherein it has been held that though the suit for possession is cognizable by small Causes Court. It did not lay down that civil court lacks inherent jurisdiction.

11. The cases cited by learned counsel do not obviate the proposition of law that the small causes court is a court of preferential jurisdiction. They only lay down that a suit for possession of immovable properties between lessor and lessee lies before the civil court.

12. The learned counsel for petitioner has also relied on a Single Judge decision of this Court in Second Appeal No.1237 of 1988 Rahmatullah Vs. Mohd. Sharif and others of district Aligarh decided on 19.12.1996, wherein this Court held as under:-

> "In this respect it will also be useful to examine the argument of the learned counsel in the light of Section 9 of the U.P. Civil Laws Amendment Act, 1972. Section 9 provides for the

> transfer of pending suits from regular Civil court to the court of Small Causes, which have become maintainable by virtue of the amendment brought about by U.P. Act no. 37 of 1972. Section 9 of the Amendment Act, read with Section 15 of U.P. PSC Act and item 4 of the Second Schedule clearly make out a case against the appellant which, if read together, clearly demonstrates that the cognizance of suit, which was filed by the appellant could not be taken by regular Civil Court but by Small Causes Court. It is, therefore, not correct for the learned counsel to contend that the Small Causes Court has been given preferential jurisdiction and not original jurisdiction. The contention is wholly misconceived which is accordingly turned down."

This case has been decided against Full Bench decision of Bisheshwar Prasad Gautam v. Dr. R.K. Agarwal (AIR 1977 All 103) and does not help the petitioner.

13. Thus, in the circumstance it is held that the small causes courts are courts of preferential jurisdiction and not exclusive jurisdiction and as section 15 (1) of the Provincial Small Cause Court Act confers jurisdiction upon small causes Courts to try a suit for possession based on contract of tenancy of a building, it enable the small causes courts to take cognizance of a suit between lessor and lessee, but it did not exclude the jurisdiction of civil court to try the case as a regular civil suit and therefore a decree passed by civil court in a suit of small causes court nature will be valid and not a nullity.

14. Before parting with the case it is also necessary to dispose of an objection taken by counsel for plaintiff in respect of plea being raised in appeal. The objection of learned counsel is that the plea of jurisdiction sought to be raised at appellate stage cannot be allowed to be raised. The petitioner's main plea is about inherent lack of jurisdiction. The objection of inherent lack of jurisdiction can be raised at appellate stage even if it was not pleaded before court below earlier. The petitioner is entitled to raise it even when he did not seek amendment of his written statement. The law permits raising of plea of inherent lack of jurisdiction at any stage of trial and if it is raised before execution court where if it transpires that the court passing decree lacked inherent jurisdiction, then such decree cannot be executed. A decree passed by court which lacks inherent

jurisdiction is void. Thus, the objection of learned counsel for plaintiff that plea could not be raised in appeal is untenable.

15. However, as it has been held above that decree passed on regular side will not be a nullity and therefore the amendment, even if it is allowed is not going to serve any useful purpose and therefore defendant-petitioner will not be getting any benefit, no relief in respect of allowing the amendment sought can be given to petitioner.

16. For aforesaid reasons the writ petition fails and is dismissed. Interim order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 6.10.99

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

Civil Misc. Writ Petition No.17734 of 1999

Prabhat Tandon **...Petitioner**

Verses

Director of Technical Education,U.P., Kanpur & others **...Respondents**

Counsel for the Petitioner: Shri Ashok Khare
Counsel for the Respondents: S.C.
Sri Rahul Sripat

U.P. Pravidhik Shiksha Adhiniyam 1962-Section 22 E- read with Regulations of 1996-Notified on 14.7.97- Regulation 14 (6)- Appointment of Principal /Director in Institute of Engineering and Rural Technology, Allahabad- both candidates having equal marks –whether the candidate having better marks in B.Tech./ B.E. shall prevail or who is senior in age? Held-the candidate senior in age shall be preferred.(para 11,12) Held- However, in our opinion the marks in B.Tech. B.E. were to have been taken into consideration only if the circular of 17.9.90 had remained in force. The said circular had, in our opinion been superseded by the Regulations notified on 14.7.97, and the said Regulations have statutory force as they amount to delegated legislation.

Since the petitioner was 10 years senior in age to respondent no.3 and they had obtained the same marks in the interview the impugned order is clearly in violation of Regulation 14 (6).

By the Court

1. Heard Sri Ashok Khare learned counsel for the petitioner and Sri Rahul Sripat for respondent nos.2 and 3, and learned Standing Counsel for respondent no.1.

2. By means of this writ petition the petitioner has challenged the impugned order dated 17.3.99 and the order appointing respondent no.3 as Principal/Director, Institute of Engineering and Rural Technology, Allahabad (herein after referred to as the Institute) copy of which is Annexure CA 2 to the counter affidavit. It has also been prayed that the petitioner be appointed in place of the respondent no.3 as the Principal /Director of the Institute.

3. The Institute is a recognized institution governed by the provisions of the U.P. Pravidhik Shiksha Adhiniyam 1962(U.P.Act No.17 of 1962) and it is recognized by the Board of Technical Education, U.P. The total funding of the Institute is by the State Government and it is an instrumentality of State .Appointment of the Principal is made under section 22 E of the Act and the procedure for appointment is given in Section 22F. These have been quoted in paragraphs 11 and 12 of the writ petition.

4. Under Section 23 of the Act the Board can make Regulations. The Regulations made under Section 23 have been notified on 14.7.97, copy of which is Annexure 1 to the petition. Regulation 14 of the said Regulations prescribes the procedure for direct recruitment of Principal and Teachers. Under Regulation 14(2) a Selection Committee is constituted. The Committee has to invite applications and call the candidates for interview. Regualation14(6), with which we are concerned states:

"The Selection Committee shall prepare a list of candidates in order of their proficiency as disclosed by the marks obtained by each candidates in the interview. If, two or more candidates obtain equal marks, the candidate senior in age shall be placed higher in the list."

5. In para 25 of the petition it is alleged that for holding regular selection of Principal/ Director of the Institute an

advertisement dated 19.8.98 was issue by the Authorised Controller/Commissioner, Allahabad Division. Relevant extract of the same is Annexure 2. The petitioner applied in response to this advertisement, and after screening of the candidates he was called for the interview on 30.1.99 on which date he appeared before the Selection Committee.

6. The select list prepared by the selection committee was then forwarded to the Director of Technical Education for approval as required by Regulation 14(7). On the papers so submitted, the Director of Technical Education passed an order on 17.3.99 according approval to the appointment of respondent no.3.On the basis of this approval the Authorised Controller issued the impugned order of appointment in favour of respondent no.3.

7. In para 44 of the writ petition it is alleged that the marks obtained by the petitioner in the interview and that obtained by respondent no.3 are the same. It is also alleged that the petitioner is senior in age to respondent no.3. The petitioner was born on 17.8.48, while respondent no.3 was born on 20.12.58.

8. In paragraph 42 of the petition it is mentioned that a circular dated 17.9.90,copy of which is Annexure 8 to the petition, was issued by the Director of Technical Education in which it was mentioned that for appointing a Principal the criteria should be the computation of marks obtained in the interview and also marks awarded in academic qualifications and experience. However, subsequently the Regulations of 1996 were framed which were notified vide notification dated 14.7.97(copy of which is Annexure 1 to the petition).Under Regulation 14(6) of the Regulations the selection is to be made on the basis of proficiency as disclosed by marks secured in the interview. Hence in our opinion the circular of 17.9.90 stands superseded by the aforesaid Regulations.

9. Counter affidavits have been filed on behalf of respondents 2 and 3. In his counter affidavit respondents no.3 has only stated that he was interviewed and appointed, and his appointment is legal. In the counter affidavit of respondent no.2 it is alleged in para 15 that the marks were awarded in accordance with the circular dated 17.9.90 (Annexure 8 to the petition). We have already held that the circular dated 17.9.90 has been superseded by the Regulations of 1996 (notified on 14.7.97)

10. In para 15 of the counter affidavit it is admitted that the marks of the petitioner and respondent no.3 are equal, except that respondent no.3 has been given higher marks only because he obtained higher marks in the B. Tech/B.E. examination. However, in our opinion the marks in B. Tech/B.E. were to have been taken into consideration only if the circular of 17.9.90 had remained in force. The said circular had, in our opinion, been superseded by the Regulations notified on 14.7.97, and the said Regulations have statutory force as they amount to delegated legislation.

11. Since the petitioner was 10 years senior in age to respondent no.3 and they had obtained the same marks in the interview the impugned order is clearly in violation of Regulation 14(6).

12. In this circumstances this writ petition is allowed. The appointment order dated 17.3.99 appointing respondent no.3 as Director/Principal of the Institute of Engineering and Rural Technology, Allahabad is quashed. The respondent no.2 is directed to appoint the petitioner as Principal/Director of Institute of Engineering and Rural Technology, Allahabad forth with.

Writ petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD :5.7.1999

BEFORE
HON'BLE YATINDRA SINGH... J

Civil Misc. Writ Petition No.3429 of 1982

Shri Jai Pal Singh **...Petitioner**

Versus

II nd Addl. District Judge, Muzaffarnagar & others **... Respondents.**

Counsel for the Petitioner: Mr. Ravi Kant,
Mr. H.B. Joshi,
Mr. R. Joshi

Counsel for the Respondents: Mr. K.G. Srivastava
Mr. G.N. Verma,
Mr. H.P. Misra.

U.P. Urban Buildings(Regulation of Letting Rent and Eviction) Act, 1972-S-17-Allotment Proceeding –nominee of Land Lord applied for allotment –Rejected- whether the nominee can mentain the Revision or is aggrieved person? Held-'Yes'.
Held –

Petitioner is a nominee of the land- lord. He had also filed an application for allotment. He is interested in the allotment. In case it is allotted to anyone else then he is aggrieved by the order. The land- lord is also a person aggrieved in such a case, but this does not mean that his nominee has no rights or is not a person aggrieved in case premises are allotted to anyone else. The nomination confers a right. (Para 6)

Case law discussed
1980 U.P.R.C.C(2) 422
1986 ARC 1(FB)
1986 AWC 68

By the Court

1. Is a nominee of the landlord, under section 17 of U.P. Urban Buildings(Regulation of Letting, Rent and Eviction)Act,1972(the Act for short), a person aggrieved ? Can he file a revision under section 18 of the Act ? These are the questions involved in the present writ petition. This is how they arise.

FACTS

2. Sri Banwarilal, respondent no.4 was the landlord of the shop in question. One Sunder Prakash was tenant of the same. Landlord filed a suit for ejectment against the tenant. It was decreed. The landlord had filed an application for release of the shop on 6.8.1979 on the ground that shop is likely to fall vacant. The tenant was ejected and vacancy occurred in the shop in question. Applications for allotment were also filed : Pramod Kumar (Respondent no.3) filed one application on 29.08.1979; Jaipal Singh (petitioner) filed another application on 29.08.1979. the landlord did not press his application for release; it was dismissed as not pressed on 29.02.1980. When no allotment was made within 21 days, the landlord nominated the petitioner (his son) for allotment on 25.08.1980 under section 17 of the Act. The Rent Control and Eviction Officer (Respondent no.2) neither allotted the premises to him nor did he allot it to any other person within ten days from receipt of the intimation of the nomination. The matter was kept

pending and ultimately he, by his order dated 19.06.1981, did not accept the nomination of the landlord but allotted the premise to the respondent no.3. Petitioner, the landlord's nominee, filed a revision. This revision has been dismissed on 19.03.1982 by the II nd Addl. District Judge, Muzaffarnagar, (respondent no.1) (hereinafter referred to as the revision court). He has not decided the revision on merits but has dismissed it on the ground that; the nominee of the landlord is not a person aggrieved; and he is not entitled to file a revision under section 18 of the Act. This was done on the basis of a judgement reported in Dayaram vs. 4th Addl. District Judge, 1980 UP (2) RCC 422 (Dayaram's case). Hence the present writ petition.

POINTS FOR DETERMINATION :

3. I have heard the counsel for the parties. The following is the only point for determination in the writ petition.

- Is a nominee of the landlord, in case he is not allotted the premises, a person aggrieved ? Can he file a revision under section 18 of the Act ?

DAYARAM'S CASE

4. Respondent no.1 has rejected the revision as not maintainable on the basis of Dayaram's case. In this case the revision filed by the nominee of the landlord was dismissed on the merits. Thereafter he filed a writ petition. The High Court, in paragraph-5 of the judgement, held 'The view of the courts below, therefore, that the landlord not having sent the intimation within the mandatory period of one week from the date of the building falling vacant, he cannot claim to exercise the right given under section 17(1) of the Act appears to be perfectly correct.' It was then in paragraph –6 of the judgement, that certain observations regarding maintainability of the revision by the nominee of the landlord have been mentioned. These observations were not necessary to decide the case and are in the nature of obiter.

PROSPECTIVE ALLOTTEE – RIGHT

5. The counsel for the respondents have also cited two decisions reported in Talib Hassan vs. I st. ADJ, Nainital 1986 ARC 1, (FB) and MR Loiya vs. Richariya 1986 AWC 68 for the proposition that the nominee is like a prospective allottee, he has no say in the matter.

It is true that the prospective allottee has no say in the proceeding for release of the shop in favour of the landlord. In the present case, the dispute is not between a nominee or a prospective allottee or an unauthorised person on one side and landlord on the other side. The dispute is between two persons who claim that the shop should be allotted to them. In Talib's Hasain's case and MR Loiya's case the dispute was between the landlord on the one side and a prospective allottee in one case and unauthorised occupant in the other case. These cases are not applicable. In these proceedings we are not concerned with release of the shop but with the allotment proceeding. The court below had to decide as between the two namely the petitioner and the respondent, who was entitled to the allotment under the law. This is a different question.

NOMINEE – PERSON AGGRIEVED

6. Petitioner is a nominee of the landlord. He had also filed an application for allotment. He is interested in the allotment. In case it is allotted to anyone else then he is aggrieved by that order. It is true that the landlord is also a person aggrieved in such a case; but this does not mean that his nominee has no rights or is not a person aggrieved in case premises are allotted to anyone else. The nomination confers a right. Petitioner was a person aggrieved. He had locus standie to file the revision against the order allotting the premises to Respondent no.3. The order passed by the revisional court dated 19.03.1982 is illegal.

7. Petitioner is the son of the landlord. The counsel for the respondent has raised a plea that landlord can not nominate his own son for allotment. He may get it released in case he or his son bonafide requires it. The revisional court has not decided the case on merits but has held the revision to be not maintainable. I think it will not be appropriate to express any opinion on this question. It will be open to respondent no.3 to raise this question before the revisional court. The revisional court may decide the revision on merit without being influenced by any observations made in this judgement.

CONCLUSION

6. The writ petition is allowed. The case is sent back. The revisional court will re-decide the revision on merits in accordance with law. Parties will appear before the District Judge, Muzaffar

Nagar on 25th August 1999. He may decide the revision himself or transfer it to some other Addl. District Judge for decision.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD 13.10.1999

BEFORE
THE HON'BLE BHAGWAN DIN, J.

Criminal Revision No. 1144 of 1999

Lalloo singh **...Revisionist.**

Versus

State of U.P. & another **...Opposite parties.**

Counsel for Revisionist : Mr. V.P. Srivastava and
Mr. Rajesh Kumar Srivastava
Counsel for Respondent: A.G.A.

Wild life protection Act, 1972, Ss.50 (c) & 50 (4) readwith s. 457, Cr. P.C. – Magistrate's power under S.50 (4) to deal with the vehicle seized under s. 50 (c).
Held –

The Magistrate is empowered to deal with the things seized under section –51 (c) according to law and in exercise of such powers , the Magistrate may release the seized property in favour of the person prior to the initiation of the forfeiture proceedings. The Calcutta High Court has, therefore, held in the case of Ashok Kumar Rana (Supra) that the vehicle was not at all confiscated, it was only seized in terms of section 50 (c) of the Wild Life (Protection) Act. The magistrate, therefore, had jurisdiction to deal with the vehicle allegedly involved in the commission of the offence. (Para 2)

Cases referred.
1997 (1) crimes 359 (cal) (DB)
1987 Cr. L.J. 1709
LPA 152 of 1996, decided on 08.05.1996
1996 Cr. L.J. 366

By the Court

1. This criminal revision has been directed against the judgement and order dated 22.04.1999 passed by the Special Judge

(E.C. Act), Agra in criminal revision no. 85 of 1999 allowing the revision and quashing the order dated 17.03.1999 passed by the VIII Addl. C.J.M., Agra.

2. The facts, giving rise to the revision, briefly stated are that one Hoshiyar Singh, the brother of the revisionist, Lalloo Singh was allegedly found carrying sand on tractor trolley being dug and loaded from the bed of Jamuna river, within the sanctuary declared under Section 18 of the Wild Life (Protection) Act (hereinafter referred to as the Act.). The forest Authorities intercepted the tractor trolley, arrested Hoshiyar Singh and seized the tractor trolley in exercise of the powers conferred under the provisions of the Act. The revisionist is the owner of the tractor trolley. He, therefore, moved an application for release of the same. The C.J.M. VII in exercise of the powers conferred under section-457 Cr.P.C. released the tractor trolley in favour of the present revisionist on his furnishing personal bond of Rs. 2 lacs and two sureties in the like amount. Against that order, the State of U.P. through District Forest Officer, Agra filed a criminal revision no. 85 of 199 before the Sessions Judge, Agra which has been heard and disposed of by Special Judge (E.C. Act.). The revisional court on the view that the tractor trolley seized under the act, which has become the property of the Government, could not be released by the Magistrate, allowed the revision and set aside the order of the Magistrate. Hence, the revision by the revisionist, Lalloo Singh.

3. The vexed question involved in this case is whether the Magistrate is empowered to release the property seized under the Act in exercise of the powers conferred under 50 (4) of the Wild Life (Protection) Act or under section 457 Cr.P.C.?

4. Learned counsel appearing for the revisionist has submitted that the revisional court was wrong in holding that the Magistrate has no jurisdiction to entertain the application for the release of the property seized under section 50 (1) (C) of the Act. He relied on the decision of Calcutta High Court rendered in Ashok Kumar Rana vs. State of West Bengal (1997 (1) Crimes 359 Calcutta High Court (DB) wherein it is held that “in the present case the vehicle was not at all confiscated. It was only seized in terms of section 50 (c) of the Wild Life (Protection) Act, 1972. The Magistrate, therefore, had jurisdiction to deal with the question relating to the release of the vehicle allegedly involved in the commission of the offence.”

5. On the other hand, the learned A.G.A. urged that the revisional court was justified in holding that the Magistrate has no power to release the vehicle involved in the commission of the offence under this Act in terms of section 39 (d), the vehicle has become the property of the State. He relied on the decisions of Madhya Pradesh High Court in:-

(1) Babulal Lodhi v. State of Madhya Pradesh and another (1987 Cr. L.J. 1709)
(2) State of Madhya Pradesh through Director, Madhav National Park, Shivpuri V. Asad Amin (L.P.A. No. 152 of 1996 decided on 8-5-1996)
(3) State of M.P. V. Sayed Yahya Ali (1996 CRI. L.J.366)

In case of Babu Lal Lodhi (Supra), the M.P. High Court held that "The Range Officer who Seized the tractor and the trolley, did not have any power to initiate prosecution by filing a charge sheet before the Magistrate. As pointed out by the Hon'ble Supreme Court in AIR 1981 SC 379, the clinching attribute of an Investigating Officer being lacking in the instant case, it cannot be said that the seizure by the Range Officer was seizure by a Police Officer within the meaning of section 457 Cr.P.C., hence the seizure by the Forest Officer could not be said to be a seizure by a Police Officer, consequently Section-457 Cr.P.C. was not attracted.

6. In case of State of M.P. Vs. Sayed Yahya Ali (Supra) the M.P. High Court has observed that "Section-39 of the Act has been amended. The very purpose of carrying out the amendment, making the seized article the property of the Government, would be defeated by directing the return of the vehicle on furnishing security to the accused. The power of release has been expressly removed by omitting sub-section (2) of Section –50 of the Act to ensure that the vehicle, which has been seized, should not be returned to the accused."

7. In L.P.A. No. 152 of 1996 following the observations made in State of M.P. Vs. Sayed Yahya Ali, the M.P. High Court held that "Section 39 of the Act as amended in 1991 clearly lays down that any vehicle seized which involves any offence under the provisions of the Act shall be the property of the State Government. So also as a consequence of the removal of sub-section (2) of Section-50 of the Act whereby the power of the release of the vehicle

seized by the Forest Officer has been prohibited. In such circumstances, once the property has become the property of the state, no order for delivery of the property could be passed. Similarly under the provisions of section – 50 (4) of the Act where the intimation of the seizure is sent to the Magistrate has no jurisdiction to dispose of the seized goods, therefore, the Magistrate has no jurisdiction to release the property on supurnama."

8. The M.P. High Court, on the analogy, that the property seized under the Act is a property of the State as contemplated under section-39 (d) of the Act and the provisions relating to the return of the seized property to the owner once contained in sub-section (2) of Section –50 have been withdrawn by Amendment Act, 1991, held that Magistrate has no jurisdiction to release the same under this Act. I most respectfully disagree with the proposition laid down by Lordships of M.P. High Court, for the reason, that the Legislature by enacting the amended section 39 (d) never intended to render the provision of section –50 (4) and section 51 (2) of the Act redundant.

9. Section-39 (d) of the Act provides that every vehicle, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of this Act, shall be the property of the State Government. The provisions of this Section construe to mean that the property seized under this Act will become the state property only when it is proved that it was used for committing an offence. It is not that the seized property will become the property of Government immediately after the seizure. Had the law maker intended so, Section –50 (4) would have not been enacted which lays down that any person detained or things seized under the foregoing powers shall forthwith be taken before a Magistrate to be dealt with according to law. This goes to show that the property after its seizure does not become the property of the State prior to the judicial pronouncement by a court that the offence has been committed by a person and the property in question was used in the commission of the offence under the Act. So also, sub-section(2) of Section-51 providing that "when any person is convicted of an offence against this Act, the court trying the offence, may order that any captive, animal, wild animal, animal article, trophy, uncured trophy, meat, ivory imported into India or an article made from such ivory, any specified plant, a part of derivative thereof in respect of which the offence has been committed, and any trap, tool, vehicle, vessel or weapon, used in the commission of the said offence be forfeited to the State Government" would have not been enacted.

10. What postulates from above is that the seized property shall be taken to the Magistrate to be dealt with according to law, empowering the Magistrate, either to release or not to release the things used in the commission of the offence on Supurdaginama. After the conclusion of the trial, if the Magistrate decides that the offence has been committed by a person and the trap, tool, vehicle, vessel or weapon has been used for committing the offence under this Act, shall proceed to forfeit the same under sub-section (2) of Section 51 of the Act. Prior to that, the things seized under section-5(1)(c) shall not be declared State property.

11. On the above view, I am of the opinion that the Magistrate is empowered to deal with the things seized under section-51 (c) according to law and in exercise of such powers, the Magistrate may release the seized property in favour of the person prior to the initiation of the forfeiture proceedings. The Calcutta High Court has therefore, held in the case of Ashok Kumar Rana (Supra) that the vehicle was not at all confiscated, it was only seized in terms of section-50(c) of the Wild Life (Protection) Act. The Magistrate, therefore, had jurisdiction to deal with the question relating to the release of the vehicle allegedly involved in the commission of the offence.

12. In the result, the revision succeeds and is hereby allowed. The judgement and order passed by the revisional court in criminal revision no. 85 of 1999 is set aside and the order passed by the Magistrate is upheld.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 12.10.99

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

Civil Misc. Writ Petition No. 32739 of 1997

Dukchhor Singh **...Petitioner**

Versus

Director of Education U.P. Education & others **...Respondents.**

Counsel for the Petitioner: : Shri J.B. Singh
Counsel for the Respondents: S.C.

Constitution of India, Articles 14 and 226- Petitioners- Assistant Teachers in L.T. Grade appointed on the ground of being 'retrenched employees were denied the benefit of fixation of salary as per Government order dated 10.12.1973 by impugned order dated 28.2.1997 passed by D.D.E. (Secondary)- Impugned order, held, discriminatory - Hence quashed .
Held,

This Court finds no justification in treating a retrenched employee differently (Faltoo) – there being no discernible feature to classify them differently on any rationale or justification having support of law. Impugned order is clearly in violation of Article 14, Constitution of India.

In view of the fact that by passing interim order in case of certain other similarly situated Assistant Teachers, Who have been virtually granted final relief by means of the interim order, I find no justification for denying the Petitioner benefit of Government order dated 10th December 1973.(para 4 and 7)

Cases Referred.
CMW 9080 of 1997, order dated 14.3.1997.

By the Court

1. Impugned order dated 28th February 1997, passed by Deputy Director of Education (Secondary) on behalf of director of Education, U.P. copy of which has been filed as Annexxure-6 to the Writ Petition, directed Regional Joint Director of Education, U.P not to apply and extend benefit of Government order dated 10th December 1973 (Annexure-3 to the Writ Petition) for fixation of salary in the case of those Assistant Teachers in L.T. Grade who were appointed on the ground of being 'retrenched employee' vide Director's letter dated 18th October 1996. By means of this impugned order Director of Education (Secondary), U.P. directed that earlier letter of the Directorate dated 18th October 1996 shall be kept in abeyance and not given effect to.

2. A Counter Affidavit has been filed on behalf of Respondent, but there is no indication as to what has been done by the Director of Education after passing impugned order 28th February 1997.

3. Learned Standing Counsel is not in a position to apprise the Court whether further order has been issued by the concerned authority or not. The impugned order, which was apparently an interim order, was issued on the ground that Government Order dated 10th December 1973 (Annexure-3 to the Writ Petition) was made for ad hoc appointees only. This reasoning is against record inasmuch as it is not borne out from perusal of the said Government Order dated 10th December 1973, which shows that it specifically dealt with retrenched employees – otherwise also Director of Education (Secondary) U.P. is not competent to overrule Government Order.

4. This Court finds no justification in treating a retrenched employee differently vis-à-vis so-called of **'surplus employees, (Faltoo)-** there being no discernible feature to classify them differently on any rationale or justification having support of law. Impugned order is clearly in violation of Article 14, Constitution of India.

5. Moreover, Director of Education cannot be allowed permanently to deprive **'retrenched employees'** under impugned interim order, without passing final order.

6. Learned counsel for the petitioner has also drew notice of this Court to Paragraph 15 of the Writ Petition 9 (particular page 11 of the Writ Paper Book) wherein reference has been made to civil Misc. Writ Petition No. 9080 of 1997 (Pradeep Kumar Gupta versus Principal Secretary, Education, Government of U.P. Lucknow and others) wherein a learned single judge passed an order on 14th March 1997, Which reads: -

> "The respondents are directed to show cause as to why they have withdrawn the order dated 28.2.1997 by filling an affidavit within four weeks from date.
>
> Until further orders of this court the operation of the impugned order dated 28.2.1997 Annexure –24 shall remain stayed.
>
> Sd/- S.L. Saraf. J.
> 14-3-1997"

7. In view of the fact that by passing interim order in case of certain other similarly situated Assistant Teachers, who have been

virtually granted final relief by means of the interim order, I find no justification for denying the Petitioner benefit of Government Order dated 10th December 1973.

8. In the result, I quash the impugned order dated 28th February 1997 and it is further directed that Petitioner shall be given all benefits and paid arrears of salary, if any, ignoring impugned order dated 28th February 1997 within four months of submitting certified copy of this judgment before the concerned authorities. Petitioner shall be paid future salary month by month along with other staff of the College by fixing his salary on the basis of Government Order dated 10th February 1973.

9. Writ Petition stands allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 27.9.99

BEFORE
THE HON'BLE M. KATJU ,J.
THE HON'BLE SHITLA PRASAD SRIVASTAVA,J.

Civil Misc.. Writ No. 36267 of 1997

Satyendra Nath Mishra ...Petitioner.

Versus

U.P. Public Service Tribunal U.P. at Lucknow and others ...Respondents

Counsel for Petitioner :Sri Arvind Kumar Shukla
:Sri Rita Shukla
Counsel for Respondent :S.C.

Constitution of India, Article 226-Order of U.P.P.S. Challenged on ground that certain points urged before the tribunal were not dealt with in its order- Presumption in law is that all points have been dealt with by the Tribunal-However, petitioner allowed to move suitable application before the same court/Tribunal for the purpose Held,

The presumption in law is that the Tribunal or the lower court has dealt with all the points which were urged before it, and if a certain point is not dealt with by the Tribunal or Court then the presumption is that that point was not urged before it vide Shanti

Swarup Vs. Ist A.D.J. 1978 A.R.C. 342 It often happens that in the memorandum of appeal or petition several points are taken but lonely some of the points are pressed, and hence the lower court or the Tribunal deals only with the points which are actually pressed. However if the petitioner wishes to urge before the Tribunal that a point was not dealt with although pressed before the Court/Tribunal, then the petitioner should go to before the same court or tribunal by means of a suitable application for this purpose. If the petitioner files such an application before the Tribunal the same shall be decided expeditiously. (para 2)

Case referred.
1978 ARC 342

By the Court

1. The Petitioner is challenging the order of the U.P. Public Service Tribunal, Annexure 5 to the petition. Learned counsel for petitioner submitted that certain points were urged before the Tribunal but has not been dealt with by the Tribunal.

2. The presumption in law is that the Tribunal or the lower court has dealt with all the points which were urged before it, and if a certain point is not dealt with by the Tribunal or Court then the presumption is that that point was not urged before it vide Shanti Swarup Vs. Ist A.D.J. 1978 A.R.C. 342 It often happens that in the memorandum of appeal or petition several points are taken but only some of the points are pressed and hence the lower court or the Tribunal deals only with the points which are actually pressed. However if the petitioner wishes to urge before the Tribunal that a point was not dealt with although pressed before the Court/ Tribunal , then the petitioner should go to before the same Court or Tribunal by means of a suitable application for this purpose. If the petitioner files such an application before the Tribunal the same shall be decided expeditiously.

3. With this observation, this petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 6.9.99

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No. 37541 of 1999

Pati Ram & others ...Petitioner
Versus
VIIth Additional District Judge & others ...Respondents.

Counsel for the petitioner: Mr. U.K. Mishra
Mr. A.K. Mishra
Counsel for the Respondents: Mr. I.R. Singh.

Code of Civil Procedure

Order 39 r. 1- Injunction order- whether it is open for the defendant to claim injunction against the plaintiff ? – held- 'Yes'. (para 4)

Thus the decision in the case of Kirat Singh (supra) cannot come in aid for the plaintiff- petitioner. In view of the observation made therein, in the present case, the defendant can ask injunction under Order 39 Rule 1 against the plaintiff since prima-facie it appears right from The prayer for injunction restraining the defendant from interfering with the possession of the plaintiff's which itself means that there is every possibility of damages to the fishery right to the defendant which prima-facie is apparent from the finding of the learned Lower appellate Court where it has been found that a lease has been granted in his favour by the District Magistrate which has since been registered. (para 4)

Case Law discussed.
1979 AWC- 296
1998 (1) AWC- 706
AIR 1980 ALL.- 50
(1956) Ch. 131
AIR 1968 SC-281
(1883) ILR 9 Cal. 698
(1878) 3 Ex. Div. 361
(1978) 2 Cal.L.J.270
Easement Acct 1882- Section –4 read with Indian Limitation Act-1963-S-2(f)- Easementry Right- can not be permitted to exercise the fishery Right by adversely affecting the interest of valid lease holder-Easement-what is ? the essential ingredients discussed- it

includes the easement as defined in Section 4 of the Act as well as also the profit- a prendre in gross which are not easement under the Act.

All these elements are to be satisfied in order to claim as easement in view of the definition in the India Law of. Easements Act, 1882, Which includes Profit-a-prendre which is appurtenant to a dominant tenement. But such easement is for the beneficial enjoyment of the dominant heritage. Easement is also defined, in section 2(f) of the Indian Limitation Act, 1963. The Definition is an inclusive one. It includes the easement defined in Section 4 as also profit-a-prendre in gross which are not easements under the easements Act. However, the definition in Section 2(f) applies in all those are as to which the Easements Act has not been extended.

By the Court

1. The order dated 20th August. 1999 passed by the learned Additional District Judge VIIth Court Azamgarh in Misc. Civil Appeal No. 310 of 1998 reversing the order dated 17th November. 1998 passed by the learned Civil Judge, Junior Division. Azamgarh in O.S. No. 1285 of 1997 has since been challenged in this petition.

2. Mr. U.K. Mishra, learned counsel for the petitioner contends that the impugned order dated 20th August, 1999 could not have been passed restraining the plaintiff from interfering with the possession and his right to rear fish and its enjoyment and or catching the same in view of the provision contained in Order 39 Rule 1 of the code of Civil Procedure. According to him, the defendant cannot take advantage of Order 39 Rule 2 because of specific provision contained therein particularly in the absence of any contract between the parties. So far as the Order 39 Rule 1 is concerned, the defendant could have fallen back only on clause –(a).But in no way redress could have had by the defendant in clause –(b) and (c) of Rule 1. As such in the absence of any ingredient within the meaning of clause-(a), the order passed by the Appeal Court could not be sustained. Relying on a decision in the case of Kirat Singh and Another Vs. Madho Singh and Others (1979 AWC 296) in which this Court had held that Order 39 Rule 1 did not authorise the Court to restrain the plaintiff at the instance of the defendant unless there is a finding that the property in dispute was in danger of being wasted damaged or alienated by any party to the suit. Mr. Mishra has also relied on the decision in the case of Abdul Gaffar Vs. State of U.P. and Others (1988(1) AWC 706) in order to contend that there cannot be any renewal of lease through or to

private negotiation. According to him , the lease was renewed through private negotiators and as such the defendant could not claim any right on the basis thereof. Thus the impugned order cannot be sustained.

3. Mr. I.R. Singh, learned counsel for the opposite party on the other hand contends that the plaintiff did not pray for any declaration of right in his favour except that he has easement right over the suit property. He has not asked for any declaration that the lease granted in favour of the defendant is invalid and cannot be acted upon. As such he cannot maintain the suit. He further contends that the Appeal Court had come to a finding that there was lease executed in favour of the defendant which has since been registered and therefore, the order of injunction has been rightly passed. He then contends that there are ingredients to show that the present case comes within the scope and ambit of clause-1(a) of Rule 1 of Order 39 of the Code of Civil Procedure. On these grounds, he prays that the petition should be dismissed.

I have heard both the counsel at length.

4. A perusal of the plaint which is annexure-1 to the writ petition shows that the plaintiff had not claimed grant of the lease in respect of the suit property which admittedly belongs to the Gaon Sabha. In the impugned order, it was found that the suit property belongs to Gaon Sabha. The defendant had been granted lease in respect of the fishery right in the suit property by virtue of an order passed by the District Magistrate and that the lease of fishery right in favour of the defendant had since been registered. In the plaint the only prayer that has been made is in respect of an injunction on the basis of easement right in favour of the plaintiff against the defendant-opposite party. Gaon Sabha is not a party to the suit. The other prayer that was made in the plaint was that the plaintiff should not be dispossessed from the suit property. In a suit where the easement right is claimed the only protection that can be asked is in respect of easement right. The right of easement is a right to enjoy the property. In the present case as it appears from the order impugned that there is a lease in favour of the defendant. Thus if there is an attempt to possess the property in that event, there would be surely a case of causing waste and damage to the fishery right of the defendant which comes within the scope and ambit of clause-(a) of Order 39 Rule 1. Thus it cannot be said that this case was outside the scope and ambit of clause-(a) of Order 39 Rule 1 of the code.

Thus the decision in the case of Kirat Singh (Supra) cannot come in aid for the plaintiff-petitioner. In view of the observation made therein, in the present case, the defendant can ask injunction under Order 39 Rule 1 against the plaintiff since prima-facie it appears right from the prayer for injunction restraining the defendant from interfering with the possession of the plaintiff's which itself means that there is every possibility of damages to the fishery right to the defendant which prima-facie is apparent from the finding of the learned Lower Appellate Court where it has been found that a lease has been granted in his favour by the District Magistrate which has since been registered.

Section 4 defines easement as follows:-

> "An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and continue to do something or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own"
>
> "Dominant and servient heritage and owner:- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner of occupier there of the dominant owner and land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner."
>
> **Explanation:-** In the first and second clauses of this Section the expression "land" includes also things permanently attached to the earth, the expression "beneficial enjoyment" includes also possible convenience remote advantage, and even a mere amenity, and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, or any part of the soil of the servient heritage, or anything growing or subsisting thereon.

5. Thus easement is confined to a right of enjoyment over a servient heritage. This cannot mean to claim exclusive ownership or exercise a right of ownership. There is no ingredient made out in the plaint to show that the plaintiff had an easement in respect of

catching of fishing from the disputed fishery. On the other hand, the allegation that lease was renewed through private negotiation shows that the fishery was being leased out by the Gaon Sabha. Therefore, there cannot be any easement in respect of catching fish from the fishery by the plaintiff. Thus the plaintiff cannot claim right preventing the lessee from exercising his right in respect of the leased out fishery. If the plaintiff has a right of taking water from the tank or the right of bathing, the same would be something different. But the plaintiff has not prayed for any injunction in respect of exercise of his easement right either for taking water from the tank or for bathing in the tank. A prayer that has been made clearly shows that it is his prayer by which he seeks to interfere with the lease-hold right of the defendant who had held the lease for a period of ten years. Thus as against the lessee nothing has been shown by which the plaintiff could claim easement to prevent the lessee from enjoying his lease hold right even if the tank fishery is called to be a servient heritage.

6. Admittedly, the fishery is owned by the Gaon Sabha. Thus the Gaon Sabha is the servient owner of the alleged servient heritage whereas the lessee defendant is a occupier who can also be called a servient owner but that is subject to the terms of his lease only in respect of the fishery. The right to fishery is not a right to the property. The right of fishery is a right to rear and catch fish. It is only a possessory right to the extent of rearing and catching fish without the exclusive right in respect of the tank. The right of lessee in respect of a tank fishery is a restricted right. The lessee can maintain his fishery right against all others. An easement have been claimed in respect of catching fish from the tank fishery, which appears to be a wholly baseless claim in the facts and circumstances of the case. The learned Courts below had held that the plaintiff has not been able to make out a prima-facie case.

In view of the definition of the Easement in Section 4 of the Easements Act the following materials are required to be present in order to claim an easement right, which are as follows:-

(i) the right is in the owner or occupier of land as such
(ii) it is for the beneficial enjoyment of that land;
(iii) it is to do or to continue to do something or to prevent or continue to prevent something being done;

(iv) that something is in or upon or in respect of certain other land;

(v) the other land is not his own

7. All these elements are to be satisfied in order to claim an easement in view of the definition in the Indian Law of Easements Act, 1882, which includes profit-a-prendre which is appurtenant to a dominant tenement. But such easement is for the beneficial enjoyment of the dominant heritage. Easement is also defined in Section 2(f) of the Indian Limitation Act, 1963. The definition is an inclusive one. It includes the easement defined in Section 4 as also profit-a-prendre in gross which are not easements under the Easements Act. However, the definition in Section 2(f) applies in all those areas to which the Easements Act has not been extended. In Halsbury's Law of England, IVth Edition, Volume XIV at page 6, Paragraph9, Halsbury states:

> " A person possesses an easement in respect of some estate or interest in a particular piece of land, and the easement is said to be appurtenant to that land. No one can possess an easement irrespective of his enjoyment some estate or interest in a piece of land, for there is no such thing as an easement in gross. When validly annexed to land constituting the dominant tenement an easement remains inseparably attached to the tenement so long as the easement continues to exist, the easement cannot be served from the dominant tenement, nor can it be made a right in gross.
>
> The benefit or advantage conferred by the right must relate to the purpose for which the dominant tenement is used. Although in that sense an easement will usually, if not always, increase the value of dominant tenement.
>
> A legal easement must ensure to the benefit of the dominant tenement as was held in the case of **Fatik lal Pal Vs Sudhir Das** [(1978) 2 Cal L J 270]. Literally the word "appurtenant" means 'pertaining to "or "belonging to." The word does not, however mean adjacent to and from this it could be easily inferred that proximity of the appurtenant land is not essential. What is essential is the concept of belonging for more beneficial enjoyment of the parent property. The land in question being just in front of the plaintiff's house though across a narrow lace could still be land appurtenant to

the plaintiff's house if it was shown that it was being used for the more beneficial enjoyment of the plaintiff's house as was held in the case of **Harnam Singh v. Bhikimbar Singh** (AIR 1980 All 50)

An easement does not give the dominant owner the exclusive or unrestricted use of any part of servient tenement. The grant of exclusive and unrestricted use of a piece of land passes the property or ownership in the land and not merely an easement in it. A right which amounts in effect to the whole beneficial user of the servient tenement to the exclusion of the owner or to a joint user of the servient tenement, or which would prevent the servient owner from making ordinary use of his land cannot take effect as an easement either by virtue of grant or by prescription. Whether or not a right asserted amounts to a claim to the whole beneficial user of the servient tenement is a question of law to be determined in accordance with all the facts of a particular case, the problem is one of degree.

A right of easement subsists in order that the dominant owner may better enjoy the dominant heritage. The right must be in some way connected with the enjoyment of the dominant heritage. The characteristic that an easement must be for the beneficial enjoyment of the dominant heritage is also included in the expression "appurtenant to the dominant heritage".

In Re **Ellemborough Park** (1956) Ch 131 it was held that what is required is that the right accommodates and serves the dominant tenement and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection there with, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all.

The benefit or advantage conferred by the right must relate to the purpose for which the dominant tenement is used. Where the dominant tenement is used for business purposes a right which benefits the business may accommodate the dominant tenement and so be recognized as an easement.

In the case of **State of Bihar v. Subodh Gopal** (AIR (1968 SC 281 at page 289) the apex court had held that:-

> "A profit-a prendre in gross that is a right exercisable by an indeterminate body of persons to take something from the land of others, but not for the mere beneficial enjoyment of dominant tenement is not an easement within the meaning of the Easements Act. To the claim of such a right, the Easements Act has no application. Section 2 of the Easements Act expressly provides that nothing in the Act contained shall be deemed to affect, inter alia, to derogate from any customary or other right (not being a licence) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property. A claim in the nature of a profit-a-prendre operating in favour of an indeterminate class of person arising out of a local custom may be held enforceable only if it satisfies the tests of a valid custom. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be a valid, a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. A right in the nature of a profit-a-prendre in the exercise of which the residents of locality are entitled to excavate stones for trade purposes would ex facie be unreasonable, because the exercise of such a right ordinarily tends to complete destruction of the subject-matter of profit.
>
> A profit-a prendre if it is an unreasonable burden, a release from which could never be obtained from the owners of the right which would affect the subject matter in a manner that would soon become exhausted. Such an easement cannot exist.

9. In the case of **Lutchhmeeput Sing .v. Sadaulla Nushyo** (1883)ILR 9 Cal 698 a Division Bench of the Calcutta High Court

accepted the principle laid down in the case of **Lord Rivers .v. Adams** (1878) 3 Ex. Div 361). In that case the plaintiff sought to restrain the defendant from fishing in certain jhils belonging to his Zamindars. The defendants pleaded, inter alia, that they had prescriptive right to fish in the jhils, under a custom, according to which all the inhabitants of the zamindari had the right of fishing. It was held that no prescriptive right of fishery had been acquired under section 2(f) of the Limitation Act and that the custom alleged could not, the ground that it was unreasonable, be treated as valid.

10. The facts pleaded in the plaint does not satisfy the test as observed above with regard to the injunction sought for against the defendants.

11. Thus prima-facie it appears that the plaintiffs have not been able to make out a case in their favour for grant of injunction restraining the defendant from interfering with the possession of the plaintiff's. the decision in the case of **Abdul Gaffar (Supra)** also cannot come in aid in the present case since the grant of fishery right in favour of the defendant is not under challenge in this proceeding. Unless the grant of lease is under challenge, the question of validity thereof cannot be raised. Therefore, this decision also does not help the plaintiff.

12. In that view of the matter, I do not find any reason to interfere with the impugned order. The writ petition therefore, fails and is, accordingly, rejected. However, there will be no order as to costs.

13. However, none of the observation made by the Lower Appellate Court nor any of the observation made in this order shall be taken note of at the time when the matter will be decided on merit since all these findings are tentative for the purpose of deciding the application for injunction only. It is expected that the learned Trial Court shall expedite the hearing of the suit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 2.9.1999

BEFORE:
THE HON'BLE D.K.SETH, J.

Civil Misc. Writ Petition No. 37218 of 1999

Smt. Shail Agarwal & others ...Petitioner
Versus
IIIrd Additional District Judge, Allathabad, & others ...Respondents.

Counsel for the Petitioner: Mr. M. B. Saxena
Counsel for the Respondents: Mr. R.N. Upadhyay.

Code of Civil Procedure Order 22 r. 3,4 (A) and 5-Substitution-earswhile Mahant in his life time already nominated the Mahant-the scope of inquiry - discussed- right of the parties are not decided in substitution proceedings-excluded representative has right to apply for being added.

Held –
The submission does not preclude the parties to establish their respective right during the course of hearing of the suit, where it could be so permitted within its scope and ambit, on materials to be produced by adducing evidence oral or documentary. Even if a legal representative is excluded still then he has a right to apply for being added as a party to a proceeding if he is so advised depending on the facts and circumstances of the case.(para 11)

Case Law discussed.
AIR 1975 Mad.- 174
1988 (2) RCJ –647
AIR 1988 Mad. 117
AIR 1994 Raj. 31
AIR 1981 Punji 30
AIR 1982 H.P. 8
AIR 1988 SC 2041
AIR 1975 Cal 38

By the Court

1. The order dated 23.8.1999 passed by the learned Additional District Judge, IIIrd Court, Allahabad in Civil Revision No. 1660 of

1998, reversing the order dated 23.11.1998 passed by the learned Civil Judge, Junior Division. Vth Court, Allahabad in Original Suit No. 1257 of 1992, has since been challenged by Shri Mool Behari Saxena, learned counsel for the petitioner on the ground that the substitution in the present case is governed by Order 22 Rule 4 (A) of the Code of Civil Procedure, and as such the order passed by the learned trial court was justified. The revisional court had wrongly reversed the said order . He also contends that whenever such question comes, the court is to decide the same in view of Order 22 Rule 5 of the Code. He further contends that the revision against the order is not maintainable since even if the order is erroneous unless it is shown there is a jurisdictional error. According to him the trial court had jurisdiction to decide the question one or other way. Since there was no want of jurisdiction or erroneous exercise of jurisdiction, even if the order is illegal or erroneous, the revision may not be maintainable. As such the order of the revisional court is liable to be set aside.

2. Learned counsel for opposite party Shri R.N. Upadhyaya contends that since the legal representative has sought to be substituted under Order 22 Rule 3, Order 22 Rule 4 (A) prima-facie is not applicable. The question that has been raised by Mr. Saxena according to him is a question which can be determined only on evidence after issues are framed and the matters are decided at the time of hearing of the suit or otherwise. The question whether an administrator or receiver should be appointed in view of Order 22 Rule 4 (A) the same is still open to be decided even after a person is substituted under Order 22 Rule 3 of the Code. But such question is to be decided on the merits of the case having regard to the material that might be produced by the respective parties. According to him the question of substitution is determined on affidavit and no scope of allowing evidence of inter-se parties who should become the Mahant , cannot be decided. He further contends that even if any decision is arrived at in a proceeding under Order 22, the same is not final determination of the rights. It is only to enable the process of the case to be proceeded with by one or the other way. The rights or interests of the parties can be decided only upon material evidence that might be produced by the parties or of framing issues or at the time of hearing of the case as the case may be. He, therefore, supports the order passed by the learned Additional District Judge in civil revision,. He further contends that if there is any illegal or irregular exercise of jurisdiction even then a revision is maintainable. In the present case according to him the learned trial court had

determined the issues between the parties finally without evidence and as such it had adjudged the issue while deciding the application under order 22 Rule 3 and thus it acted illegally and with material irregularity in exercise of jurisdiction vested in him. Therefore, the revision is very much maintainable.

I have heard learned counsel for the parties at length.

3. In a case when there is no legal representative, Order 22 Rule 4(A) is applicable. If it is a case that succession is asked for in the office of Mahant in that even it would be governed under Order 22 Rule 10 but in case it is contended that the office is filled up by nomination of the erstwhile Mahant and it is contended that such nomination has already been made or it is contended that the appointment has already been made during the life time of the deceased in such case the same may be governed under Order 22 Rule 3. But then the substitution is only a technical matter by which the process of court continues. Whatever decision is arrived at in the process of substitution the same is subject to the final determination on the basis of material on record. Even if the substitution of a legal representative is allowed, it is open to the opposite parity either to raise the question that he is not the legal representative and despite having been substituted, he had no right to continue as Mahant, or he has no right to claim as a plaintiff or that administrator should be appointed. This question can be gone into on the basis of the material produced by the parties after deciding the respective contentions on the basis of the material placed before the court. The substitutions so allowed will neither operates as res-judicata nor it precludes the parties from raising the issue for determination by the court. If such issues are raised it is incumbent upon the court below to determine the issue in accordance with law. No title or right is conferred on a person substituted on the basis of the substitution application, except right to represent the lis or estate.

4. Then again Order 22 of the code requires substitution of the legal representative. Legal representative as defined in Section 2 sub-section (ii) of the code – " includes any person who intermeddles with the estate of the deceased…". Apart from the legal heirs or a person representing in law the deceased, a person intermeddling with the estate of the deceased, even representing the estate without law is also a legal representative for the purpose of Order 22 of the Code. Section 4 sub-section (24-A) of the U.P. General Clauses Act 1897

has adopted the definition of legal representative as that of Section 2(II) of the code.

5. In present case the opposite party had made out a prima facie case to the extent he could stake his claim as successor to the office at least purport to represent the estate. Even if it cannot be presumed to show then also he could definitely be said to be intermeddling with the estate. As such intermeddler he could well be considered as a legal representative in view of the definition of Section 2 (II) of the Code and Section4 (24-A) of the U.P. General Clauses Act 1897.

Thus the petitioner appears to be a person eligible for substitution under Order 22 of the code in the present case as is apparent on the materials disclosed.

6. Now it is time to consider the impact of Order 22 Rule 5 of the code. Order 22 Rule 5 of the code requires the Court to decide the question who is or are the legal representatives of the deceased. But the said determination does not require elaborate enquiry. Such a view was taken by the Madras High Court in the case of **Krishna Kumar Vs. N.G. Naidu** [AIR 1975 Mad 174]. An adjudication in the course of proceeding to substitute legal representatives does not make the legal representative heirs as such. The finding should be construed to have given only for the prosecution of the proceeding. It is not a decision on merits. It cannot operate as res judicata It was so held in the case of **Sakhtivel Vs. H.S. Govindan** [(1988)2 Ren CJ 647] by the Madras High Court. Similar view was taken by the Madras High Court in the case of **Muniappa Nadar Vs. K.V. Doraipandi** [AIR 1988 Mad 117]

7. The Rajasthan High Court had also taken the same view as that of Madras High Court in the case of **Kalu Ram Vs. Charan Singh** [AIR 1994 Raj 31] that the enquiry into right to heirship is not the determining factor in deciding whether a person is or is not legal representative for the purpose of proceeding before the Court. What is required to be considered is whether the person claiming to represent the estate of the deceased for the purpose of lis has sufficient interest in carrying on litigation and is not an imposter. In case of rival claimants, it may also be necessary to decide that out of the rival claimants, who really is the person entitled to represent the estate for the purpose of a particular proceeding. Even that determination does not result in determination of inter se right to

succeed to the property of the deceased and that right has to be established in independent proceedings in accordance with law. In the said case, in a suit for specific performance of contract of sale the transferor died leaving his widow who too died during the proceeding. One stranger on the strength of an unprobated will seek to be impleaded in the suit. He was allowed to be substituted in place of the widow.

8. Punjab High Court had also taken the same view that the decision in a proceeding under Order 22 Rule 5 of the code does not operate as res judicata. It was so held by the Full Bench of the Punjab High court in the case of **Mohinder Kaur Vs. Piara Singh** [AIR 1981 Punj 130]. Following the said decision the Punjab High Court in the case of **S.Charanjit Singh Vs Bhatinder Singh** [AIR 1988 Punj 123] had held that when two categories of legal representatives, one set claiming under a Will and another as natural and non-testamentary successors claim to be impleaded, the proper course is to implead both.

9. The Himachal Pradesh High Court had also taken the same view in the case of **Nisapati Vs. Gayatri** [AIR 1982 HP 8] holding inter-alia that in such an enquiry the question that a petitioner is an exclusive heir may be left open. Enough if he is found to be representing the estate of the deceased to the extent of a fractional share.

10. Whereas the Apex Court in the decision in the case of **Annupama Pruthi Vs. Rajen Bal** [AIR 1988 SC 2041] did not deviate and did not take a contrary view than those cited above. Though it had held that once an order of substitution was made at the instance of A substituting A,B,C as legal representatives, then A cannot be permitted to say that only A and M are to be substituted and not B and C on the strength of a will found.

11. But then the question to be decided under Order 22 is confined to the scope and ambit of Order 22. The scope and ambit of Order 22 is related to the carriage of the proceedings to the extent who is to carry on the proceedings. It does not determine the rights of the parties or even persons claiming as legal representatives. the definition of legal representative as defined in Section 2 (ii) of the Code of Civil Procedure includes a person who inter-meddles with the estate of the deceased. Thus it is only a proceeding for ascertaining as to who is the legal representative eligible to continue

the lis. the scope of enquiry under Order 22 cannot surpass the purpose and object for which Order 22 is prescribed. It cannot be stretched to the extent of determining the lis between the parties on merits by deciding title. Thus the provision of Rule 5 of Order 22 relating to determination of the question as to legal representative is confined only to the extent of determining the legal representative for the purpose of carriage of the proceeding and representing the lis or the estate even though he may be a inter-meddler. It does not determine the rights of the parties. Even if it is so determined, the same would wholly outside the scope of final determination in the suit here the question is involved the question remains open to be decided in appropriate proceeding either in the suit itself or in a separate suit or proceeding as the case may be. The substitution does not preclude the parties to establish their respective right during the course of hearing of the suit, where it could be so permitted within its scope and ambit, on materials to be produced by adducing evidence oral or documentary. Even if a legal representative is excluded still then he has a right to apply for being added as a party to a proceeding if he is so advised depending on the facts and circumstances of the case.

12. However, the Calcutta High Court in the case of **Rabindra Nath Das Vs. Santosh Kumar** [AIR 1975 Cal 381] had taken the view that an order under Order 22 is not in the nature of inter-locutory order and is conclusive and binding. With great respect and humility, I am unable to agree with the reasoning of the said decisions in view of the discussion made above particularly in view of my agreement with the decision of the High Courts of Madras, Punjab, Rajasthan, Himachal Pradesh as cited above.

13. In such circumstances, after having gone through the order dated 23.8.1999 passed by the learned Additional District Judge, III rd Court, Allahabad in Civil Revision No. 1660 of 1998, it appears that the said order was justified. It has also noted the situation in the order itself. In such circumstances I do not find any reason to interfere with the said order. Therefore, this petition fails and is accordingly dismissed. However, none of the observation made by the learned trial court or by the revisional court or by this court, shall be taken note of, when issues are raised by the parties or decided by the court on merit which should be decided on the basis of the material that might be produced before the court below in accordance with law. If the parties are so advised they may make an application to the trial court to frame and decide as to the right of the

opposite party no. 3 to continue the suit or to claim as successor or Mahant and decide the same along with the suit. It is expected that the learned trial court shall decide the suit as early as possible.

With the aforesaid observation this writ petition is dismissed. However, there will be no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.1999

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

Special Appeal No. 113 of 1999

Satyendra Pratap Singh & others ...Petitioners/ Appellants

Versus

Allahabad Kshetriya Gramin Bank & others ...Respondents

Counsel for the Petitioners-Appellants: Shri S.D. Kautilya
Shri S.K. Mehrotra
Shri Sudhir Chandra

Counsel for the Respondents: Shri Santosh Kumar Srivastava
Shri Anil Bhushan
Shri Ashok Bhushan
Shri P.K. Mukerji
Shri P.N. Khare

Constitution of India, Article 226 readwith Regional Rural Banks Act, 1976- Promotion of departmental candidates i.e. staff of Allahabad Kshetriya Gramin Bank, for non-selection posts- Select list of departmental candidates published on 14.04.1998-On that date criterion was seniority cum merit-After process of short listing but before finalisation criteria changed by Regulatory Authority i.e. NABARD, to merit cum suitability.
Held -

The change which was contemplated was not to affect the candidates who had been short-listed and were up for consideration on the existing criteria which stood as on date when the list had been published. The nominee of the Reserve Bank of India was pointing out the error on the very date when the

changed criteria was being adopted and the selected candidates were being approved on the changed criteria.

Clearly there has been an error in the time and chronology of making the changed criteria applicable to those candidates who had been short-listed on 14.04.1998. The changed criteria was not to apply to them. (para 12 & 13)

By the Court

1. This case relates to the process of promotion of certain section of the staff of Allahabad Kshetriya Gramin Bank which has been sponsored by the Bank of Baroda under the Regional Rural Banks Act, 1976.

2. The Court has heard arguments against the judgment appealed, in Writ Petition No. 13431 of 1988, Ramayan Prasad Shukla and others v. Allahabad Kshetriya Gramin Bank and others. It is the judgement dated 1st February, 1993. On behalf of the appellants arguments were advanced by Mr. S.D. Kautilya Advocate. On Behalf of some contesting respondents arguments were addressed by Mr. Ashok Bhushan Advocate. On behalf of the respondent bank Mr. P.K. Mukerji Advocate and on behalf of other respondents Mr. P.N. Khare Advocate were present.

3. While arguments have been lengthy the point involved in this appeal is very short.

4. The issue before the Court is not on what criteria is to be adopted for considering the departmental candidates for picking up promotions. The issue plainly is what is the date of implementation if any change in the criterion takes place. Plainly, on a careful reading of the judgment, all counsel present admit that this point was missed in the judgment.

5. The issue: Departmental candidates were to be considered for promotion. A select list of departmental candidates was published on 14.04.1998. Since the matter related to departmental promotions everyone is agreed that there was an obligation on the respondent bank to send letters calling the candidates for interview. There is no issue on record that on the date when the select list was published the criterion for considering departmental candidates, all for non-selection posts, was seniority-cum-merit. Thus, whoever was placed in the seniority list, which was duly published, and received a call for

interview was under the impression that the criterion which would judge them for promotion would be seniority-cum-merit.

6. In the meantime, the Regulatory Authority known as NABARD formed under the National Bank for Agriculture and Rural Development Act, 1981 was contemplating issuing standardised guidelines with change in criterion for promotions. No change had been heard of until the first communication was being received by the respondent bank on 29.04.1988 and the subsequent communication dated 28.05.1988. Both these communications in the contest refer to changes which were being contemplated in processing promotion. The entire issue apparently had been argued before the Hon'ble Judge delivering the judgement appealed against, on the proposition whether the Regulatory Authority, i.e., NABARD has the discretion or jurisdiction to issue the circulars for causing change in the criterion for future promotions. Which one aspect the Court has no issue before it that no one has challenged the power of the Regulatory Authority to issue directions. Thus, this aspect is not in issue.

7. The point which has been missed in the judgement is that if there be any change in the criteria then what would be the date of its implementation. Simply put, it means that there can not be a change in the rules of the game once the game has started.

8. It is admitted to all the parties that the process of considering departmental candidates for promotion the process was initiated when the seniority list was put up for publication on 14.04.1988. The fact that by the time the candidates were being interviewed the criteria was changed, is the circumstance, that has created the complication. Thus, the first aspect which has to be seen is on what exactly the Regulatory Authority was suggesting for changes in the criterion for future promotions. From the record it is clear that there was a proposal under consideration for changing the criterion from seniority –cum-merit to merit-cum-suitability. On one aspect the Court needs to place on record that at the meeting of the Board on 11.07.1988 the candidates who were to be finally selected for promotion, were approved. But this is also the date on which the change of criteria was approved. This does not reflect an administrative circumstance which inspires confidence.

9. The records of instructions which were being issued by the NABARD clearly contemplate that the changed criteria was to be

considered at some future date. What this future date would be was to be considered and decided by the respondent bank. There are communications issued by the Regulatory Authority (NABARD) dated 11.05.1988, Annexure-4 to the counter-affidavit, and dated 25.05.1988 at Annexure-6 to the counter-affidavit which clearly suggest that the changed criteria was to be applicable on any date after the issue of these communications. There was a meeting of the Board, of the respondent bank, on 11.07.1988. The minutes of the meeting are at Annexure-7 to the counter-affidavit. The resume of the proceedings record that the nominee of the Reserve Bank of India raised objection. The nominee of the Reserve Bank of India was clearly pointing out, in effect, that any reference to promotions which was under consideration the criteria stood as at the relevant time when the process of consideration was initiated i.e., seniority-cum-merit. He had his reservations recorded that promotion should be considered on seniority basis depending upon the number of vacancy and that the Board may reconsider its decision in giving effect to the contemplated promotions. The response to this objection was that the objection was being made only for purpose of raising an objection.

10. On behalf of the Bank the only submission was that the Regulatory Authority NABARD only gives guide-lines, but the banks are not obliged to obey the guide-lines.

11. The balance which remains on record is that when departmental candidates have been short listed and their names had been published, the candidates carry the confidence that promotions will be considered on the basis of the existing criteria, i.e., seniority-cum-merit. These candidates had not anticipated that after the process of short-listing but before finalisation the criteria would be changed. This is an error which took place and this has brought injustice to those who found the changed criteria between the time they had been short-listed and other candidates were finalised, leaving out the petitioners because there was a fundamental change in rules of the game during the course of the game itself.

12. The Court is very clear and is guided by two aspects that (a) the Regulatory Authority itself was contemplating that the implementation of the criteria would be at some future date, and the communication of 11.05.1988 and 25.05.1988 are much after the date of publishing the names of short-listed candidates on their being called for interview on 30.05.1988 and (b) the change which was

contemplated was not to affect the candidates who had been short-listed and were up for consideration on the existing criteria which stood as on date when the list had been published. The nominee of the Reserve Bank of India was pointing out the error on the very date when the changed criteria was being adopted and the selected candidates were being approved on the change criteria.

13. Within the parameters of a certiorari action under the High Court's prerogative writ jurisdiction, it is not necessary for this Court to quash the appointments on the changed criteria as now it is for the Bank to do administrative justice. A writ of certiorari points out the error. The rectification has to be done by those to whom the writ issues, that is, the respondents. Clearly there has been an error in the time and chronology of making the changed criteria applicable to those candidates who had been short-listed on 14.04.1988. The changed criteria was not to apply to them.

14. Thus, the appeal succeeds and is allowed with costs. The Judgment dated 01.02.1993 in Writ Petition No.13431 of 1988 is set aside. The respondent Bank will now be obliged to deliver administrative justice to petitioners in the writ petition who may have been effected by the changed criterion which has not to be applied to them.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD : 16.09.1999

BEFORE
THE HON'BLE YATINDRA SINGH, J.

Civil Misc. Writ Petition No. 26831 of 1995.

U.P. State Road Transport Corporation ...Petitioner
Versus
State of U.P. & others ...Respondents.

Counsel for the Petitioner : Shri Samir Sharma
Counsel for the Respondents: Shri P.C. Jhingan
Shri Vinod Sinha
S.C.

Industrial Disputes Act, 1947, S.11 read with U.P. Industrial Disputes Act, 1947, S.6 (2-A)-Scope.

Held,
The word 'may' used in the State Act neither confers unlimited discretion, not concedes unlimited powers to the Labour Court under the State Act. It can set aside the order of dismissal or discharge only if it was unjustified. The scope and jurisdiction under section 11-A of the Central Act and under section 6 (2-A) of the State Act are similar.(para 7)
Case referred.
AIR 1973 SC 1227
1989 Lab. I.C. SC 233 (Ker)
1991 Lab.I.C. 1133 (Bom.)

II. Departmental Proceeding and proceedings before Tribunal vis a vis Criminal Trial- Misconduct- Standard of proof required- In departmental proceedings standard of proof is preponderance of probability, whereas in Criminal Trial it is proof beyond reasonable doubt.

Held,

It is not clear if the Labour Court has looked into the evidence in the light of standard of proof as in a criminal trial-of beyond reasonable doubt, or like in a departmental proceeding- on preponderance of probability. The award of the Labour Court is illegal.(para 13)

Cases referred:
AIR 1977 SC 1513
1994 (69) FLR 1078
1997 (75) FLR 532
1989 (4) SLR 385
1996 (2) SLR 534 (P & H)
WP 9102 of 1980 decided on 26.02.1998
1972(4) SCC 618

By the Court

1. The writ petition involves with the interpretation of Sub Section 2-A of Section 6 (the Section 6 (2-A) of the U.P. Industrial Disputes Act, 1947 (the State Act) and the standard of proof in a departmental proceeding or before the labour court.

Facts

2. Sri Suresh Kumar Karnwal (the contesting respondent) was a conductor in U.P. State Road Transport Corporation (the

corporation). A checking squad checked his bus on Haridwar-Uttar kashi route on 03.01.1986 and found 27 out of 39 passengers to be without ticket. The contesting respondent, after an inquiry, was removed by an order dated 02.02.1980 and his balance pay for suspension period was forfeited.

Findings and Punishment

3. The contesting respondent raised an industrial dispute, which was referred to the Labour Court under the State Act. The Labour Court has recorded following findings:

(i) The departmental enquiry was fair and proper.

(ii) 27 out of 39 passengers were without tickets.

(iii) The contesting respondent is guilty of starting the bus without realising the fare.

(iv) The charge of realising the fare from the passengers and misappropriating the amount is not proved.

On these findings, the Labour Court held: the removal of the contesting respondent is not proportionate to the misconduct; the punishment is severe; and the contesting respondent is entitled to be reinstated. The Labour Court imposed punishment: for realisation of Rs. 337.50, the fare of 27 passenger; and stoppage of one increment (not effective in future). Hence, the present writ petition by the Corporation.

Points for Determination

4. I have heard Sri Sameer Sharma and Sri Vinod Sinha learned counsels for the parties. The following points arise for determination:

(i) What is the scope of the section 6 (2 –A) of the State Act?

(ii) What is the standard of proof in a departmental proceeding or before the Labour Court? Is misconduct required to be proved beyond reasonable doubt, or on the preponderance of probability?

(iii) Has the Labour Court applied the Correct principles in this case?

1st Point: Scope of Section 6 (2-A)
Scope of Section 11 –A The Central Act.

5. The powers of the Labour Courts or the tribunals while judging the validity of the punishment awarded by an employer, before insertion of section 11-A[1] of the Central Act and section 6 (2-A)[2] in State Act, were limited. The Supreme Court in Workmen of M/S Firestone Tyre and Rubber Co. Vs. The Management (the Firestone)[3], while dealing with powers under Section 11-A of the Central Act, summarised the law:

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[1] Section 11-A of the Central Act is as follows:

11-A: powers of Labour Courts, Tribunal and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen-where an industrial dispute relating to the discharge or dismissal of a workmen has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award set aside the order of discharge or dismissal and direct reinstatement of the workmen on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require: Provided that in any proceeding under this section the labour Court, Tribunal or National Tribunal as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

[2] The relevant part of the section 6 namely sub section 2-A of the State Act is as follows:

6 (2 –A) An award in an industrial dispute relating to the discharge or dismissal of a workmen may direct the setting aside of the discharge or dismissal and reinstatement of the workman on such terms and conditions if any, as the authority making the award may think fit, or granting such other relief to the workman, including the substitution of any lesser punishment for discharge or dismissal, as the circumstances of the case may require.

[3] AIR 1973 SC 1227

When a proper enquiry has been held by an employer and the finding of misconduct is plausible conclusion
Flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgement over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair Labour practice or malafide.

But this law changed with the insertaion of the section 11-A in 1971 in the Central Act; and the sub-section (2-A) Act the Section 6 in 1978 in the State Act.

6. The Supreme Court in the Firestone case has interpreted the scope of the section 11-A of the Central Act and held that the labour court-

(i) has power to reappraise the evidence produced in the domestic inquiry or the evidence adduced before it (Where it is permitted);

(ii) may arrive at a finding different than the finding in the departmental enquiry[4] and

(iii) may come to the same finding, regarding misconduct yet it may award lesser punishment, different from the employer for the cogent reasons[5].

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[4] This is clear from the following excerpt from the Firestone case:

The words "in the course of the adjudication proceeding the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicate that the Tribunal is now clothed with the
power to reappraise the evidence in the domestic enquiry and satisfy
itself whether the said evidence relied on by an employer established the misconduct alleged against a workmen……The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct; but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the satisfaction of the employer has ceased to be so; and now it is the satisfaction of the Tribunal that finally decides the matter.

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Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it or for the first time, the satisfaction under section 11-A, about the guilt or otherwise of the workman concerned is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at the Tribunal can now differ from that finding in a proper case and hold no misconduct is proved.

[5] This is clear from the following excerpt of the Firestone case:

Under Section 11-A, though the Tribunal may hold that the misconduct is proved, nevertheless it may be of the opinion that the order of discharge or dismissal for the said misconduct is not justified. In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or mismissal. It can, under such circumstances, award to the workman only lesser punishment instead. The Power to interfere with the punishment and alter the same has been now conferred on the Tribunal by Sec. 11A.

This has been elaborated and consistently followed [6]. Let's consider if the section 6 (2-A) of the State Act confers similar jurisdiction.

The Tribunal may also hold that the order of discharge or dismissal is not justified because the evidence does not establish the alleged misconduct itself. To come to a conclusion either way the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct it is not proved or that the misconduct it is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge….That is why according to us, section 11-A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points.

Central Act & State Act – Similar Jurisdiction

7. The Section 11-A of the Central Act empowers the labour court to set aside the order of discharge or dismissal of an employee, 'it the court is satisfied that order……..was not justified. ' The Sub Section 6 (2-A) of the State Act is differently worded. It does not use the words namely- Satisfied that the order….. was not justified; though it uses the words, "may direct the setting aside…on such terms and conditions… as the authority… may think fit and the words' award… lesser punishment… as the circumstances of the case may require', as the Central Act. Does it make any difference? Is jurisdiction of the labour court under the State Act wider than the Central Act? I don't think so. The word 'may' used in the State Act neither confers unlimited discretion, nor concedes unlimited powers to the Labour Court under the State Act. It can set aside the order of dismissal or discharge only if it was unjustified. The scope and jurisdiction under section 11-A of the Central Act and under Section 6 (2-A) of the State Act are Similar.

If a proper enquiry is conducted by an employer and a correct finding arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusion arrived at by the management, will have to give very cogent reasons for not accepting the view of the employer.

[6] Travabcase-Cochin Chemicals Ltd. Vs. V.P. Damodar Menon, 1989 LAB IC SC 233 (Kerla High Court). Bhavani Metal works Vs. Panjurang R. Sawant; 1991 LAB IC 1133 (Bombay High Court).

2nd Point: Standard of Proof

8. Misconduct may be subject matter of a criminal trial as well as a departmental proceeding. But these proceedings- are different, operate in different fields, have different scope and objectives.

9. The scope of criminal trial is to determine if a person has committed an offence against the law of the land and to punish him. The scope of a departmental proceeding is to determine if an employee has committed misconduct (even if it constitutes a crime) and to consider his retention in service.

Preponderance of probability – Not beyond Reasonable Doubt.

10. The rules relating to the appreciation of evidence in those two proceedings are different. In a criminal Trial the Evidence Act is applicable; the departmental proceeding is not bound by the Evidence Act (though broad principles apply)[7]. They are judged on different standard of evidence. The degrees of proof in the two are different. A person may be sent to jail by a criminal court but departmental proceeding can not do so. It is for this reason that higher degree of proof, beyond reasonable doubt, is required before the criminal courts. Whereas in a departmental inquiry preponderance of probability is sufficient-whether a reasonable man could have come to the same conclusion.

11. The Supreme Court has explained it in its different decisions as follows:

> *A disciplinary proceeding is not a criminal trial. The Standard of proof required is that of preponderance of

[7] This is how Justice Iyer put it in, State of Haryana Vs. Rattan Singh AIR 1977 SC 1513:

*It is well settled that in a domestic inquiry strit and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials, which are logically probative for a prudent mind, are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act.

probability and not proof beyond reasonable doubt. (Union of India Vs. Sardar Bahadur 1972 (4) SCC 618).

* The standard of proof for a successful prosecution before criminal court… is one of beyond all reasonable doubts, in the (departmental inquiry)… is one of probability. (Bharat Coking Coal Ltd. vs. B.K. Singh 1994 (69) FLR 1078).

* But the disciplinary proceedings are not a criminal trial… The doctrine of "proof beyond doubt" has no application. Preponderance of probabilities and some material on record would be necessary to reach a conclusion whether or not the delinquent has committed misconduct. The test laid down by various judgements of this court is to see whether… a reasonable man, in the circumstances, would be justified in reaching that conclusion. (High Court of Judicature at Bombay Vs. U. Singh 1997 (75) FLR 532).

This has been further elaborated by the different High Court.[8]

Labour Court- Standard of Proof

Same As In A Department proceeding

12. The Labour Court has held that the domestic inquiry was fair and proper but has re-assessed the evidence. There is no illegality in this; the Labour Court now has such jurisdiction. But the labour court, while reassessing the evidence, has to apply the same principles as are applicable in a departmental proceeding. It can not apply the standard of proof as are applicable in a Criminal Trial. Has it done so in this Case?

3rd POINT: PRINCIPLES-THEIR APPLICATION

13. The finding of the labour court has been mentioned in paragraph 3 of the judgement. The first three findings are against the contesting respondent and are not challenged. But in regard to the fourth finding, namely realisation and misappropriation of the fare, the labour court has used contradictory words. At one place the

[8] Surajeet Singh Vs. New India Assurance Co. Ltd.: 1989 (4) SLR 385.
Shyam Sundar Gupta Vs. The State of B of India; 1996 (2) SLR 534 (P & H).

labour court has observed that the charge, of realising the fare from the passengers and misappropriating it, is not proved; at the other place, the labour court held that this charge was not proved beyond reasonable doubt. It is not clear if the Labour Court has looked into the evidence in the light of standard of proof as in a criminal trial-of beyond reasonable doubt; or like in a departmental proceeding-on preponderance of probability. The award of the Labour Court is illegal.

14. There is another illegality. The Corporation has issued departmental instructions regarding duties of a conductor[9]. A division bench of this Court in Sri Krishna Sharma Vs. The Assistant Regional Manager[10], while taking into account these instructions, has held:

> *If a passenger entered into a bus and he did not have a ticket, then responsibility was of conductor and therefore, inference (of removing the conductor) drawn by opposite party (the corporation) can not be said to be erroneous, since petitioner

[9] The relevant part of the instructions IX (a) and (xiii) are as follows:-

Rule 24: Duties, functions and responsibilities of a Roadways Conductor-The duties, functions and responsibilities of a Roadways Conductor shall be as under:

(ix) The conductor shall collect the fares and freight as per prescribed rate for passengers and luggage, intended to go by his bus as well as passenger and goods tax at prescribed rate, and issue tickets therefor according to Standing Department Instructions in this, he shall comply particularly with the following instructions:

He shall pick up passengers and luggage only from the recognised but stops and "Request Bus Stops" and shall follow the "pay and Board" system, in rural or inter-city services, except when it is raining or extremely hot, but fare will be realised and tickets issued before starting the bus. However, in respect of mail and express long distance bus services, tickets should be issued, in any case before covering a distance of up to five miles from the starting station, to avoid delay.

(xiii) Every conductor shall note that the following excuses shall not be entertained, if he has not been able to issue tickets to passengers or for luggage at the time of checking by a checking official :

No light; bad light; insufficient light; broken pencil; pencil lost; tickets exhausted; tickets lost; inexperience or unfamiliarity, bus had been delayed etc. Any execuse of this type shall mean severest disciplinary action against him.

[10] WP 9102 of 1980 Sri Krishna Sharma Vs The Assistant Manager and other decided on 26.02.1998 by Justice R.M. Sahai and Justice B.L. Yadav JJ

(conductor) failed to perform duties as provided in the Rules, it was misconduct and his services could be dispensed with.

The labour court has not referred to the duties of a conductor and the inference to be drawn from it.

CONCLUSION

15. The first three finding mentioned in paragraph 3 of the judgement are upheld. But the fourth finding in favour of the contesting respondent, regarding non-realisation and non-misappropriation of the fare, is set aside. The writ petition is partly allowed. The case is sent back to the Labour Court for re-decision in accordance with law at an early date. The Labour Court will award the punishment as the circumstances of the case may require, uninfluenced by any observation made in this case. The parties will appear before the labour court on 25.10.1999.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED THE ALLAHABAD : 15.9.99

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

Civil Misc. Writ Petition No. 4371 of 1990

Suresh Chandra Jatav **...Petitioner**

Versus

Chairman, District Board and another **...Respondents**

Counsel for the Petitioner : Shri B. Ram.
Shri Rajeev Chaturvedi
Counsel for the Respondents: Shri V.J.Sahai
Shri Pradeep Kumar

Constitution of India, Article 226-Resignation-Immediate denial by petitioner-No denial of petitioner's alleged resignation by respondent no. 1- Acceptance of alleged denial of resignation by the appointing authority i.e. District Basic Shiksha Adhikari, held, vitiated in law.
Held

Resignation is relinquishing the service voluntarily. The respondent no. 1 did not care to the file counter affidavit. There is no material on record to show that the petitioner tendered his resignation intentionally or voluntarily.

Since resignation effects not only the person but his family as well the authority should act cautiously and where the employee claims immediately that he never resigned then it becomes duty of the authority to examine the claim carefully. The respondent no. 2 failed to discharge his responsibility in accordance with law. The order accepting the resignation, therefore, cannot be accepted. It did not result in valid discharge from service.(para 4)

Case referred;
1997(2) SCC (L &S) 1447
1999 (82) FLR 709
AIR 1993 SC 1662

By the Court

1. The petitioner was appointed in 1983 as Assistant Teacher in Primary Pathshala, Baliyapur Development Block, Jaswant Nagar. He was an employee of District Board, Etawah. He worked till 31.12.89 and went on medical leave from 1.1.90 to 15.1.90. When he came to resume his duties on 16.1.90 he was informed that his resignation letter dated 22.12.89 tendered to Chairman, District Board has been accepted by District Basic Education Officer, Etawah on 26.12.89. He made a representation to District basic Education Officer that he never tendered resignation and had worked till 31.12.89 after which he was on medical leave from 1.1.90 to 15.1.90 therefore, he was illegally prevented from joining. He further stated that District Basic Education Officer was his appointing authority and the petitioner being a permanent Assistant Teacher could only resign after giving three months' notice. It was further stated that he did not submit any resignation letter and he may be allowed to join duties. The petitioner further alleged that he is a victim of political vendetta. The resignation letter according to him was cooked up by the Chairman, District Board, Etawah. The petitioner has by the instant writ petition, challenged the acceptance of alleged resignation letter by District Basic Education Officer, Etawah on 26.12.89, Annexure-1 to the writ petition In counter affidavit filed by the respondent no. 2 the allegations are denied and it is alleged that the petitioner resigned on his own accord voluntarily. The allegation of political reasons was denied. It is

alleged that the resignation letter is in the handwriting of the petitioner.

I have heard Shri B. Ram, learned counsel for the petitioner and Shri V.J. Sahai learned standing counsel appearing for respondent no. 2 Shri Pradeep Kumar, learned counsel for respondent no. 1 was not present when the matter was taken up in the revised list Shri K.S. Shukla who also appeared for respondent no. 2 did not appear.

2. On the allegations and counter allegations the question is whether petitioner resigned. The petitioner is alleged to have tendered his resignation letter to the chairman of the district board who forwarded it to the Basic Shiksha Adhikari. In the writ petition it is asserted that he never resigned and the resignation letter was forged. The respondent no. 1 put in appearance on 28.3.90 but did not file any counter affidavit denying the allegations of the petitioner. The District Basic Shiksha Adhikari who had received the alleged resignation letter forwarded by the Chairman could not effectively deny these allegations. Since the allegations are not denied by respondents no. 1 by filing a counter affidavit the claim of the petitioner that he did not resign and the resignation was forged has to be accepted as correct in view of the law laid down by the apex court and this court. (See Bir Singh Chauhan v State of Harayana and others 1997 (2) SCC (Labour & Service) 1447, M/S J.K.Cotton Spinning & Weaving Mills Co. Ltd. V The Collector, Kanpur and others, 1999 (82 FLR 709)

3. The argument of the learned counsel for the respondent that the respondent no. 2 has not only denied the allegations but has stated that the signature on the resignation letter is of the petitioner therefore the claim of the petitioner cannot be accepted, is without any substance. He has drawn inference against petitioner by letter written by the petitioner to the Chief Minister on 25.1.90 that his resignation may not be accepted. It has been filed as Annexure-3 to the petition. The petitioner has denied that he ever resigned. The respondent no. 2 clearly misread this representation and has drawn an inference which cannot be maintained. There is no representation of 5.1.90. What is referred in the counter affidavit is this representation in the bottom of which it is mentioned as 25.1.90. If there is any other representation it has not been filed by respondent no. 2 There is no material to show that the petitioner signed the alleged letter of resignation.

4. Resignation is relinquishing the service voluntarily. The respondent no. 1 did not care to file counter affidavit. There is no material on record to show that the petitioner tendered his resignation intentionally or voluntarily. The apex court in Moti Ram v Param Dev AIR 1993 SC 1662 has laid down as under:

> "As pointed out by this Court, 'resignation' means the spontaneous relinquishment of one's own right in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in general juristic sense in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and concomitant act of its relinquishment. It has been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and conditions governing it."

Since resignation effects not only the person but his family as well the authority should act cautiously and where the employee claims immediately that he never resigned then it becomes duty of the authority to examine the claim carefully. The respondent no. 2 failed to discharge his responsibility in accordance with law. The order accepting the resignation, therefore, cannot be accepted. It did not result in valid discharge from service.

5. Since I am satisfied that that this petition is liable to succeed on this ground alone I do not propose to examine whether an employee under rules could resign only after giving three months' notice and the resignation being contrary to the rules it could not result in termination of petitioner's service.

6. The writ petition succeeds and is allowed. The order dated 26.12.89 passed by respondent Annexure-1 to the writ petition is quashed and the petitioner shall be reinstated with all consequential benefits of service. The respondents are directed to calculate the arrears of salary of the petitioner which has been revised from time to time and pay the same.

7. The aforesaid directions shall be complied with by the respondents within a period of three months from the date a certified copy of this order is produced before the respondent no. 2.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED THE ALLAHABAD : 29.9.99

BEFORE
THE HON'BLE P. K. JAIN, J.

Civil Misc. Writ Petition No 372 of 1998

M/S. Kakar Sugar works ...Petitioner
Versus
State Of U.P. & others ...Respondents

Counsel for the Petitioner : Shri J. P. Pandey
Counsel for the Respondents : Shri B.K. Pandey
S.C

U.P. Sugarcane (Purchase Tax) Act, 1961, s. 3(1) proviso read with U.P. Sugarcane (Purchase Tax) Rules, 1961, R. 13-A –Assessee liable to pay tax only for period of actual operation of unit.
Held ,
Combined reading of these provisions clearly indicates that there is no room for presumption for the authorities that the dealer had started operating his unit from date other than the date disclosed in the option.

Therefore, in considered view of the Court the authorities below i.e. respondents no . 2. And 3 have wrongly passed the impugned orders dated 16.6.98 and 29.8.98. The petitioner having fully complied with the provisions of Rule 13-A of the Rules the petitioner was liable to pay purchase tax only for the period from 22.3.95 to 31.3.95.(para 11)

By the Court

1. In the assessment year 1994-95 the petitioner was operating a sugar cane crusher under the name and style of M/s Kakar Sugar Works. He had submitted Option in From 13 in view of the proviso to Section 3(1) of the U.P. Sugarcane (Purchase Tax) Act, 1961 (hereinafter called as the Act) read with Rule 13-A of the U.P. Sugarcane (Purchase Tax) Rules, 1961 (hereinafter called as the Rules). According to the option given by the petitioner he was to

operate his unit from 15.1.95. However, on 7th January, 1995 he claims to have informed the authorities concerned in accordance with the provisions contained in the second proviso to Rule 13-A (1) of the Rules that for certain reasons he will not be able to operate the unit w.e.f. 15th January , 1995. The date from which he will operate the unit will be intimated later on. It is further alleged that on 15.1.95 the petitioner informed the authorities concerned that he would operate his unit from 22.3.95. He deposited the tax on 21.3.95 and there was inspection dated 22.3.95 and ultimately the petitioner closed his unit after working up to 31st March,1995. At the time of inspection dated 1.4.95 the unit was found to be not functioning. Another inspection was, made on 9.4.95 the unit was found to be not functioning. The petitioner's case is that after expiry of about 3 years he suddenly received a notice and after he furnished reply to the notice, assessment order was passed by cancelling the option exercised by the petitioner and by making best judgment assessment and tax liability of Rs.17,550/- was imposed by order dated 16.6.98. An appeal was filed by the petitioner before the Appellate authority/ Assistant Sugar Commissioner, Shamli, District Muzaffarnagar which was dismissed without sufficient reasons.

2. The petitioner, therefore, filed the present writ petition praying to quash the impugned order dated 29.8.98 passed by the Appellate authority and 16.6.98 passed by the assessing authority i.e. respondents nos. 2.and 3 respectively. A further prayer has been made for issue of a writ in the nature of mandamus directing the respondents not to give effect to the impugned orders dated 29.8.98 and 16.6.98.

3. The respondents have filed counter affidavit in which it is stated that on 7.1.95 information was given by the petitioner and no date was fixed from which the petitioner was to operate his unit and he had thus violated the provisions of Rule 13-A of the Rules framed under the Act. It was admitted that in the assessment year in question the petitioner operated his unit from 22.3.95 to 31.3.95 after depositing the purchase tax but this can not be accepted since information dated 7.1.95 did not disclose the date on which the unit was to be operated which was clear violation of Rule 13-A of the Rules. The option under Rule 13-A of the Rules was accepted for the entire season. In view of the audit objection when he had given option to start the unit from 15.1.95 he was bound to pay purchase tax for the period from 15.1.95 to 31.3.95.

4. Sri J.P. Pandey, Learned Counsel for the petitioner and Sri B.K. Pandey, Learned Standing Counsel for the respondents have been heard.

5. It is submitted that there is no denial of the fact that the information as provided by proviso to Rule 13-A of the Rule was given by the petitioner to the respondents and during inspections also it was found that the petitioner had started working of the unit from 22.3.95. It is submitted that in these circumstances there was no sufficient ground for assessing the petitioner for realization of purchase as for the period from 15.1.95 to 31.3.95.Learned Standing Counsel submits that since no indication was given in subsequent information dated 7.1.95 as to from which date the petitioner was operating his unit, the authorities were justified in presuming that the petitioner operated his unit from 15.1.95 to 31.3.95.

6. Proviso (2) to sub-rule (1) of Rule 13-A of the Rules reads as follows:-

> "provided further that where the owner decides to start the working of his unit from any date subsequent tot he date specified under this sub-rule, he shall five an intimation to this effect, in writing and under registered cover to the Sugar Commissioner, the Assistant Sugar Commissioner and the Assessing Officer, at least one week before the date specified."

7. Rule (4) of Rule 13-A of the Rules further provides that "the owner of a unit exercising option, shall at least one week before the closure of the unit for the assessment year, obtain from the Assessing Officer a certificate of clearance of the purchase tax in Form XIV and forward one copy each thereof to the Collecting Authority and the Secretary of the Cane Development Council Concerned."

8. Proviso (1) to sub-rule (2) of Rule 13-A of the Rules further provides that "in the first month of the working of the unit in any assessment year the quantity of sugarcane of the purpose of payment of tax shall be assumed from the date specified in declaration made under sub-rule (1) or changed under the first or the second proviso to that sub-rule as the case may be."

9. Proviso (2) to sub-rule (2) of Rule 13-A of the Rules further provides that " in the last month of the working of the unit in any assessment year, the quantity of sugarcane for the purpose of payment of tax shall be assumed up to the date which is intimated by the owner of a unit under sub-rule (1-A), or changed under the first or the second proviso to that sub-rule, as the case may be: and further that if the owner of a unit is found to have closed his unit after the specified or changed date under sub-rule (1-A), the quantity of sugarcane for the purpose of payment of tax shall be assumed for the whole of such month."

10. Proviso (3) to sub-rule (2) of Rule 13-A of the Rules further provides that "where the owner of a unit is found to have started the working of the unit before the date specified or changed under sub-rule (1) the quantity of sugarcane for purpose of payment of tax shall be assumed for the whole of such month."

11. Combined reading of these provisions clearly indicated that there is no room for presumption for the authorities that the dealer had stated operating his unit from a date other than the date disposed in the option. In the instant case there is no case of the respondents that on any date prior to 22.3.95 a survey was made and the petitioner was found operating his unit earlier than the date stated in the modified option under proviso (2) to sub-rule (1) of Rule 13-A of the Rules. It is also not the case of the department of the respondents that modification in the date of operation subsequent to the date given in the original option was not intimated well within time or in accordance with rules. Therefore, the Assessing authority or the appellate authority had no reasons to presume that the petitioner had operated his unit from 15.1.95 even though under proviso (2) to sub-rule (1) of Rule 13-A of the Rules he had given intimation to the authorities concerned well within time. In view of the provisions contained in sub-rule (2) of Rule 13-A of the Rules, the Assessing authority could not have assumed that the petitioner had operated his unit w.e.f. 15.1.95. There is nothing in the Rules or in the Act and nothing has been pointed out to the Court by the Learned Standing Counsel showing that in case while postponing the date of operation of the unit as given in the original option the dealer had not intimated the subsequent date from which the unit was to be operated , he would be liable for payment of tax from the date of original option given by him. Therefore, in considered view of the Court the authorities below i.e. respondents nos. 2 and 3 have wrongly passed the impugned orders dated 16.6.98 and 29.8.98. The

petitioner having fully complied with the provisions of Rule 13-A of the Rules the petitioner was liable to pay purchase tax only for the period from 22.3.95 to31.3.95.

12. In view of the foregoing discussions the petition is allowed. The orders passed by the respondents nos. 2 and 3 as contained in Annexures – 12 and 13 to the writ petition are hereby quashed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED THE ALLAHABAD : 9.9.99

BEFORE
THE HON'BLE M. KATJU, J.

Civil Misc. Writ Petition No. 33136 of 1996

Rajendra Kumar ...Petitioner

Versus

Regional Manager & another ...Respondents.

Counsel for the Petitioner : Mr. Sudhanshu Dhulia
Counsel for the Respondents: Mr. Vineet Saran

Constitution of India, Article 226 read with Article 14- Appointment on probation for two years- Termination of service during period of probation as petitioner's work not found satisfactory- Order of Termination, held, not arbitrary – Hence valid.
Held-

There is no hard and fast rule that if a person is appointed on probation for a certain period then his service cannot be terminated before that period has come to an end. A person appointed on probation is not a permanent employee and he is only a temporary employee and it is settled law that a temporary employee has no right to the post. Of course if a person is appointed on probation say for one year and his service is terminated within a month or so after appointment without any good reason it could be argued that the termination of service was arbitrary and hence illegal. In the present case however, the reason for termination of the petitioner's service has been given in the counter affidavit namely he could not achieve the target of 5.25 lacs in one year.

Hence in our opinion the termination of service was not arbitrary.(para 9)

Case Referred.

AIR 1964 SC 806
JT 1999 (5) SC 1
1998 (9) SCC 61
1996 (5) SCC 89
1995 (6) SCC 534

By the Court

1. Heard learned counsel for the parties. The petitioner is challenging the impugned order dated 13.8.96 (Annexure-4 to the petition) by which his service has been terminated.

2. The petitioner was appointed by order dated 29.8.88 (Annexure-1 to the petition) on probation in the service of the respondent. This order states that the petitioner will be on probation for two years. The petitioner joined on 9.9.88. In paragraph 3 of the petition it is stated that the petitioner was appointed after selection after advertisement of the post and facing a Selection Committee which recommended his appointment. The petitioner was suspended form 11.12.88 as stated in paragraph 8 of the writ petition as he was involved in a criminal case, but after his acquittal the suspension order was revoked and he joined as Development Officer vide order dated 3.2.95 (Annexure –2 to the petition). However, the order dated 3.2.95 itself sates that the revocation of the petitioner's suspension is without prejudice to the right of the Company to take action under the relevant Rules. By the impugned order the petitioner's service has been terminated.

3. A counter affidavit has been filed in which it stated in paragraph 3 that the petitioner was appointed as Development Officer Grade II on probation. In paragraph 4 it is stated that the petitioner was informed when he joined his duties on 17.2.96 after revocation of his suspension order that his period of probation will be one year now and he will have to complete his target of Rs. 5.25 lacs in one year for the purposes of confirmation. In paragraph 7 of the counter affidavit it is stated that the petitioner was not automatically confirmed. In paragraph 8 of the counter affidavit it is stated that the petitioner did not complete the quote of 5.25 lacs in one year. In paragraph 10 of the counter affidavit it is stated that

since the petitioner could not complete his target his service was terminated as his work was not found satisfactory.

4. Learned counsel for the petitioner has relied on the judgement of the Supreme Court in **The Management of the Express Newspapers (Pvt.) Ltd. Versus The presiding officer, Labour Court** reported in **AIR 1964 SC 806.**

5. Learned counsel for the petition has urged that Since the probation period of the petitioner was two years, his service could not be terminated before expiry of two years. The petitioner worked from 9.9.1988 to 11.12.88 i.e. for about three months when he was suspend. After the revocation of his suspension he joined duty on 17.2.95 but his service was terminated on 13.8.96 i.e. after about one and a half years. Hence he has worked for only about one year and nine months and not two years. Hence learned counsel contended that the petitioner's termination of service was illegal as he was not allowed to work on probation of the full period of two years. Learned counsel for the petitioner on the strength of the decision of the Supreme Court in the Management of the Express Newspaper (supra) contended that the termination of service was illegal.

6. In the aforesaid decision the Supreme Court observed in paragraph 12 " It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of am employee before six months had expired except on the ground of misconduct of other sufficient reasons in which case even the services of a permanent employee could be terminated."

7. On the other hand learned counsel for the respondents relied on the decision of the Supreme Court in **Ganga Nagar Zila Dugdh Sangh Vs. Priyanka Joshi reported in JT 1999(5) SC I** where if was observed:

"When judging the performance of a person if the services are terminated during the period of probation. Obviously there has to be a reason for such termination. If the services are terminated during the probationary period without any reason whatsoever, it is possible that such on order may be impugned on the ground that it has been passed arbitrarily. On the other hand, when there is a reason for terminating the services during the probationary period and the order terminating services is worded in an innocuous manner, we don not

see any force in the contention that such an order has to be regarded as by way punishment."

8. Similarly in **Rajasthani Adult Education Assoication Vs. Ashok Bhattacharya 1998 (9) SCC 61** the termination of service during the period on probation was upheld by the Supreme Court. In **K. V. Keishnamanis Vs. Lalit Kala Academy 1996(5) Scc89** the service of the petitioner was terminated during the probation period as his work was not found satisfactory. In the counter affidavit the reason for termination of service was stated that the driving of the staff car by the petitioner was not found satisfactory. The Supreme Court upheld the termination of service. A similar view was taken by the Supreme Court in **Hukum Chand Khundia Vs. Chandigarh Administration and another 1995(6) SCC 534.**

9. We are of the opinion that there is no hard and fast rule that if a person is appointed on probation for a certain period then his service cannot be terminated before that period has come to an end. A person appointed on probation is not a permanent employee and he is only a temporary employee and it is settled law that a temporary employee has no right to the post. Of course if a person is appointed on probation say for one year and his service is terminated within a month or so after appointment without any good reason it could be argued that the termination of service was arbitrary and hence illegal. In the present case, however, the reason for termination of the petitioner's service has been given in the counter affidavit namely he could not achieve the target of Rs. 5.25 lacs in one year.

10. Hence in our opinion the termination of service was not arbitrary. Hence there is no force in this petition and it is accordingly dismissed.

Petition Dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13-10-1999

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

Civil Misc. Writ Petition No. 42088 of 1999

Committee of Management Abdus Salam Muslim Girls Inter College Bhattee Street Moradabad & another ...Petitioners
Versus
District Inspector of Schools II, Moradabad & another ...Respondents

Counsel for the Petitioners : Shri Raj Kumar Khanna
Counsel for the Respondents : S.C.
Shri K.A.Ansari

Intermediate Education Act, 1921, Chapter III regulation 39(1) and (2) readwith Section 16-G(b)-suspension order-Head Clerk of the Institution suspended by the Management-necessary papers send to DIOS for approval – whether the DIOS can refuse the proposal as it has been send beyond 7 days ? Held – No.

The District Inspector of Schools is not justified in law in refusing to accord approval to the suspension order in question passed by the Management on the ground (e.g. failure of Management to submit suspension papers within seven days of its date) when there is no such requirement in law.(para 21)

Intermediate Education Act 1921, Chapter III- Regulation 39(1) and (2) – suspension order passed against non teaching staff – refusal by DIOS – whether the suspension order shall ceased with immediate effect or after the expiry of 60 days ? held –No'

Submission an papers within seven days is not in any case part of substantive law nor it will effect substantive right of a party and hence its breach can not vitiate entire action of suspension. No provision says that suspension shall cease with immediate effect.

Case law discussed

1980 U.P.LBEC 168 (DB)
1993(3) U.P.LBEC 1826

By the Court

1. This case as fresh has come up by nomination by the Hon'ble the Chief Justice.

2. Respondent No.2, appeared as 'Caveator' and has filed counter affidavit in the Writ Petition. Petitioner has filed Rejoinder Affidavit to it.

3. All the respondents are represented. Standing Counsel does not propose to file counter affidavit as the question reised by the petitioner is based on interpretation of statutory provisions.

Writ petition is, therefore, decided finally at Admission Stage.

4. The petitioner, Committee of Management, Abdus Salam Muslim girls Inter College Bhatee Street, Moradabad, is aggrieved against an order dated July 31, 1999 (Annexure 7 to the writ petition) whereby the District Inspector of Schools refused to accord approval to the resolution of suspension passed against Respondent No.2(Md. Ayaz)- Head Clerk in the College, on the3 ground that requisite papers were not submitted within seven days under section 16-G and Regulation 39(1) and (2) of Chapter III of the Regulation framed under the U.P. Inter Mediate Education Act, 1921.'the Act' Government Order dated 8th July,1986.

5. The management has prayed for issuing a writ, order or direction in the nature of certiorari, quashing the impugned order dated 31.7.1999 (Annexure 7 to the writ petition) on the ground that no prior approval was required from the District Inspector of Schools under law.

6. Petitioner claims to be Committee of Management of a duly recognised Girls Inter College under the Act. It is not disputed that provisions of the Act are applicable to the college and that Mod. Ayaz (Respondent No.2) is the Head Clerk in the institution.

7. All the parties agreed and confined their submissions to the following legal points; namely (I) whether petitioner (Management of the institution recognised under the Act in the case of a Head Clerk is under an obligation to submit papers for approval within seven days of the date of order of suspension under relevant Regulation 39(2) and (3);(II) whether Management in case of non-

teaching staff also required to submit papers or report as required in the case of a teacher u/s 16-G(6) read with Regulation 39(I) and Regulation 39(I) apply mutatis muntandis in the matter of suspension of a non-teaching employee. Second question arises incidentally but it is answered to avoid confusion in any with regard to the correct interpretation and scope of Regulation 39 in the case of non-teaching employee.

8. For convenience, relevant provisions under consideration are quoted:-

Section 16-G (1) Every person employed in a recognised institution shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee in so far as it is consistent with the provisions of this Act or with the Regulations shall be void.

(ii)……

(iii)……..

(iv)……..

(5) No Head of Institution or teacher shall be suspended by the management, unless in the opinion of the management-

(a) the charges against him are serious enough to merit his dismissal, removal or reduction in rank; or

(b) his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings: against him; or

(c) any criminal case for an offence involving moral turpitude against him is under investigation, inquiry or trial.

(6) Where any Head of Institution or teacher is suspended by the Committee of Management, it shall be reported to the Inspector within thirty days from the date of the commencement, of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975 in case the of suspension was passed before such commencement, and within seven days from the date of the order of suspension in any other case, and the report shall contain such particulars as may be prescribed and accompanied by all relevant documents.

(7) No such order of suspension shall, unless approved in writing by the Inspector, remain in force for more than sixty days from the date of commencement of Uttar Pradesh Secondary Education Laws(Amendment act,1975, or as the case may be, from the date of

such order, and the order of the Inspector shall be final and shall not be questioned in any Court.

(8) If, at any time, the Inspector is satisfied that disciplinary proceedings against the Head of Institution or teacher are being delayed, for no fault of the Head of Institution or the teacher, the Inspector may, after affording opportunity to the Management or make representation revoke an order of suspension passed under this section.

Chapter III

Regulation 39(1)- The report regarding the suspension of the head of institution or of the teacher to be submitted to the Inspector under sub-section (6) of Section16-G shall contain the following particulars and be accompanied by the following documents.

(a) the name of the person suspended along with particulars of the (posts including grades) held by him since the date of his original appointment till the time of suspension including particulars as to the nature held at the time of suspension, e.g., temporary, permanent or officiating;

(b) certified copy of the report on the basis of which person was last confirmed or allowed to cross efficiency bar whichever later;

(c) details of all charges on the basis of which such person was suspended;

(d) certified copies of the complaints, reports and enquiry report, if any, of the inquiry officer on the basis of which such person was suspended;

(e) certified copy of the resolution of the Committee of Management suspending such person;

(f) certified copy of the order of suspension issued to such person;

(g) in case such person was suspended previously also, details of the charges on which and the period for which he was suspended on previous occasions accompanied by

certified copies of the orders on the basis of which he was reinstated.

(2) An employee other than a head of institution or a teacher may be suspended by the appointing authority on any of the grounds specified in clauses (a) to (c) of sub-section (5) section 16-G

(Substituted by Government order dated 7.7.1976)

(3) No such order of suspension under sub-regulation (2) shall, unless approved in writing by the Inspector remain in force for more than sixty days from the date of such order.

(Substituted vide Government Order dated 8.7.1996)

Regulation 100 (added in March,1975)

"100-लिपिक, जिसमे पुस्तकालयाध्यक्ष भी सम्मिलित है, के संबंध में प्रबन्ध समिति तथा चतुर्थ श्रेणी कर्मचारी के सम्बंध में प्रधानाचार्य/प्रधानाध्यापक नियुक्ति प्राधिकारी होगा । लिपिकों जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित है तथा चतुर्थ श्रेणी के कर्मचारियों की नियुक्ति, परिवीक्षा जिसकी अवधि एक वर्ष की होगी स्थायीकरण एवं सेवा शर्तो आदि के संबंध में आवश्यक परिवर्तन सहित ऊपर के विनियम 1, 4 से 8,10,11,15,24 से 26, 30, 32 से 34ण् 36 से 39, 40 से 43, 45 से 52,54,66,67,70 से 73, तथा 76 से 82 लागू होंगे । किन्तु चतुर्थ श्रेणी कर्मचारियों के संबंध मे विनिमय 77 से 82 के प्रावधान तभी लागू होंगे जब इस संबंध में राज्य सरकार द्वारा आवश्यक निर्देश निर्गत किये जायेंगे। इन कर्मचारियों के संबंध में विनियम 9,12,13,14,16 से 20,27,28,54,55 से 65 तथा 97 में प्रावधान लागू नहीं होंगे ।"

9. Regulation 39 of Chapter III of the Regulations framed under the Act before its amendment in 1976, was not applicable to a non-teaching employee of a recognised institution under the Act.

Regulation 100 also did not make regulation 39 applicable to a non-teaching employee.

10. Hence the necessity to incorporate Clause (2) and (3) to Regulation 39 arose to provide some protection to non-teaching employee also against arbitrary exercise of power in the matter by Committee of Management.

11. State Government, in exercise of its power under Section 9(4) of the Act issued Government Orders dated July 7,1976 and dated July 8, 1996 and clause (2) and (3) respectively were added.

These are the only relevant provisions dealing with suspension of a non-teaching employee of a recognised institution under the Act.

12. Regulation 39(2) proclaims by giving a mandate to a 'management' of a recognised institution not to suspend a non-teaching employee (Class III + IV) on any-one or more grounds other than the grounds specified in Section 16-G(5) Clause (a) to (c). A management cannot suspend a non-teaching employee (after 7th July, 1976 when clause (2) was added to Regulation 39), if the grounds under Clause (a) to (c) of Section 16-G(5) did not exist. In the case of an employee (other than teacher) Section 16-G(5) of the Act is relevant for limited purposes namely to find out the permissible grounds on which such an employee can be suspended. Section 16-G(5) does not of its own and as such apply to a non-teaching employee. Clause (2) of the Regulation, therefore, placed restriction on the power of Committee of Management to suspend a 'non-teaching' employee only on grounds specified for 'Teacher' u/s 16-G(5) of the Act.

13. Further, Regulation 39(2) does not require a report to be submitted and it is contradictinct to Regulation 39(1) (dealing with the case of only teachers in this respect).

14. There is no obligation upon a management under Clause (2) of Regulation 39 to submit papers regarding suspension within seven days in case of an employee (other than teacher). Such papers/information may be given to District Inspector of Schools any time.

15. Regulation 39(3), however, provides for contingency of suspension order becoming in-operative if it is not approved by District Inspector of Schools within 60 days of its inception.

16. Clause (3) to Regulation 39(with effect from 8th July, 1996) merely imposed an obligation upon Management to obtain approval from concerned District Inspector of Schools within 60 days of its date with solemn object to (a) obviate harassment and illegal victimisation of a non-teaching employee (b) to require management to initiate bonafide disciplinary action and complete disciplinary proceedings with all seriousness and expeditiously.

17. If 'management' fails to seek approval or the District Inspector of Schools refuses to accord approval under Clause (3) of

Regulation 39, an order of suspension shall inoperative on expiry of sixty days of its inception. In other words, order of suspension of a 'non-teaching employee' in a recognised institution passed by Committee of Management shall lapse and cannot remain in force unless it is approved within 60 days of its inception by District Inspector of Schools.

18. The District Inspector of Schools, in the present case, evidentially laboured under misconception of law, when he held contrary to the above.

19. Section 16-G(6) of the Act, as stated above is relevant for the cases of Head of the Institution or teachers only. The said provision does not apply to an employee (other than teachers).

20. In 1980 UPLBEC, 168(DB) (The Managing Committee, Dayanand Inter College, Gorakhpur Vs. The District Inspector of School and others) and 1993(3) UPLBEC 1 & 26 (Division Bench) (Bali Ram Singh and another Vs. Committee of Management, Amarbir Inter College, Dhanapur Varanasi and others) similar view has been taken and it is held that omission of the words' other employees' in this section shows that omission of non-teaching staff in Clause (6) of Section 16-G is deliberate and it is not an inadvertent omission. It is further observed that where the legislature has specifically excluded a class of persons from the applicability of a provision, there will be no occasion for the Courts to apply the provision to such omitted class of persons. This court in the later case made an observation that " as regards the submission that Clauses (6) and (7) of section 16-G as the Act have been made applicable to non-teaching staff by virtue of Government order dated 4th June, 1966 and paragraph 143(1) of the Education it needs to be mentioned and is also not disputed that the education Code is not a statutory provision, but contains only administrative instruction issued by the Government, from time to time. A statutory provision cannot be amended or extended by administrative instruction."

21. The District Inspector of Schools is not justified in law in refusing to accord approval to the suspension order in question passed by the Management on the ground (e.g. failure of Management to submit suspension papers within seven days of its date) when there is no such requirement in law. On the incidental question, this court is of opinion that District Inspector of Schools has to consider the matter administratively but none the less it has to

act objectively, fairly, avoid arbitrariness and apply his mind to relevant material before it. Therefore, it must insist for papers as required in the case of a teacher, apply its mind and take same decision on relevant considerations. It must give ground/reasons, though in brief and summarily, for not according approval. In this context, it should insist to have relevant papers from Committee of Management. Provision of Regulation 39(1) relevant for 'Teacher' should be treated, on analogy, to be applicable mutatis-mutanis in case of non-teaching employee of a recognised institution also.

22. Alternatively, even if it is presumed that management ought to have submitted papers within seven days, I am of the view that non-compliance of such a condition did not render management's action a 'nullity' or 'void –ab-initio'. The object of imposing obligation upon management to submit papers before District Inspector of Schools, in case of suspension, is to avoid malafide action and unnecessary harassment of an employee on the protext of initiation of disciplinary proceedings. It places a check by supervisory authority.

23. Consequently the District Inspector of Schools, even if papers are submitted beyond seven days of suspension order should exercise its power to approve or not to approve suspension on relevant consideration having bearing upon on the merits of the case.

24. Submission of papers within seven days is not in any case part of substantive law nor it will effect substantive right of a party and hence its breach can not vitiate entire action of suspension. No provision says that suspension shall cease with immediate effect. If it is disapproved before expiry of 60 days. Suspension can remain operative for 60 days without approval of District Inspector of Schools. Therefore law does not put rider on the time factor as far as submission of papers is concerned. The relevant and substantive requirement of law is that District Inspector of Schools must granting approval before expiry of 60 days.

25. Under relevant Regulations, as they stand today, Respondent No.2 cannot be treated under suspension beyond 60 days (from the date of suspension order) in absence of approval from District Inspector of Schools (Respondent No.1). Respondent No.2, therefore, has to be treated in service with full pay.

26. On the other hand, interest of the Committee of Management (Petitioner) will be fully protected in case the management is left free to take or not to take to work from Respondent No.2.

The petitioner, however, on the other hand, apprehends that Committee of Management may not deliberately linger the enquiry so as to victimise him.

Ordinarily this Court should have quashed the impugned order passed by the District Inspector of Schools and required it to decide the question of according approval to the suspension of the petitioners on relevant grounds.

27. But in view of the fact that there are serious averments against each other, including that of malafide and victimisation, I propose to direct the Management to conclude the inquiry within specified time subject to the following:

In the above circumstance, I direct:
(1) the concerned authority to pay arrears of salary (dues with effect from date of suspension up-to-date) and further to pay his salary in future month by month along with other staff ignoring order of suspension vide management's resolution dated 31.5.1999 (Annexure 6 to this writ petition) (2) Respondent N0o.2 shall not, in any way, interfere with the functioning of the institution untill inquiry is completed and final decision taken by the Management; it is the option of Committee of Management to take or not to take work during inquiry; (3) The Committee of Management Abdus Salam Muslim Girls Inter College Bhatee Street Moradabad shall submit charge sheet within six weeks from today; (4) Inquiry officer shall also be appointed within six weeks from today; (5) Inquiry against Respondent No.2 shall be held on day today basis and there shall be no adjournment for more than one week at a stretch and next date shall always be fixed on the proceedings date and its acknowledge shall be obtained from the respondent No.2;(6) Day to day proceedings shall be communicated by way of monthly report by Registered post to the District Inspector of Schools within following weeks (immediately an expiry of one month), (7) District Inspector of Schools shall be at liberty to approve suspension and direct Respondent No.2 to be paid subsistence allowance if it comes to the conclusion that Respondent No.2 is deliberately obstructing or delaying inquiry. And in case Committee of Management delays the

inquiry, Respondent No.2 can approach this Court for further necessary directions and or modification of this order. District Inspector of Schools shall constantly watch the Inquiry Proceedings and sort out grievances, if any, of either party during these proceedings; (8) Copy of the inquiry report shall also be sent to the District inspector of Schools; (9) The Committee of Management shall pass final order on the basis of inquiry report within six months from today,; (10) Copy of the final decision along with resolution, if any, shall be sent to the petitioners by Registered Post/A.D. on his address which may be indicated by him before the Inquiry Officer.

It is made clear that Management of the Institution is at liberty to take work or not to take work from respondent No.2 until inquiry is completed. After disciplinary proceedings, respondent No.2 shall be dealt with in accordance with the decision taken in the disciplinary proceedings. The writ petition stands allowed subject to the directions given above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: OCTOBER 7, 1999

BEFORE
THE HON'BLE D.S. SINHA,J.
THE HON'BLE I. M. QUDDUSI, J.

Civil Misc. Writ Petition No. 6495 of 1999

Rama Shanker Barnwal ...Petitioner
Versus
The State of U.P. through the Secretary and others ...Respondents

U.P. Municipalities Act 1916-Section 48-Removal – Chairman Nagar Panchayat-Order passed on the basis of comments and notes submitted by the authorities copy not furnished upon petitioner-Principle of Natural Justice flagratly voilated-Order wholly unsustainable in law.
HELD:-

A perusal of the impugned order clearly shows that it is founded on the comments and notes (Samiksha) submitted to the respondent no. 1 by the respondent no. 2, which were not supplied to the petitioner. At no point of time was the petitioner warned that the

comments and notes (Samiksha) of respondent no. 2 will be relied upon by the respondent no.1. Thus, the well known principle of natural justice, which required the respondent no. 1 to give opportunity to the petitioner, was flagrantly violated rendering the impugned order wholly unsustainable in law.

Case law discussed:
AIR 1974 SC-87

By the Court

1. Heard Sri Rajeev Mishra, learned counsel for the petitioner, Sri Vinay Malviya, learned Standing Counsel of the State of U.P., representing the respondents No. 1,2 and 3, and Sri R.C. Dwivedi, learned counsel appearing for the respondents No. 4 to 9, at length and detail.

2. By means of this petition under Article 226 of the Constitution of India, the petitioner seeks to challenge the validity of the order dated 27 January, 1999, passed by the State government, the respondent No. 1,a copy whereof is Annexure '6' to the petition. The impugned order, which has been passed by the respondent No. 1 in exercise of powers under Section 48 of the U.P. Municipalities Act, 1916, hereinafter called the 'Act', purports to remove the petitioner from the office of Chairman, Nagar Panchayat, Bhatparani in the district of Deoria.

3. Taking cognizance of certain complaints received by it, the respondent No.1 formed an opinion that during the performance of his duties as Chairman the petitioner had violated the provisions of the Act warranting action under Section 48 of the Act. It, therefore, issued notice dated 25 October, 1997 to the petitioner calling upon him to so cause as to shy he should not be removed from his office. The notice was served on the petitioner on 13 November, 1997. Which was duly received by the petitioner on 20 November, 1997. From the pleadings of the parties before the court, it transpires that subsequent to the filing of reply by the petitioner, the District Magistrate, Deoria, the respondent No. 2, sent comments on the reply of the petitioner. These comments are before the court as Annexure C.A.-II appended to the counter-affidavit sworn by Sri Rajesh Kumar Rai, Sub-Divisional Magistrate, Salempur Deoria, the respondent NO. 3, filed on behalf of the respondents No. 2 and 3. Thereafter, the respondent No. I passed the impugned order dated 27 January, 1999.

I earned counsel of the petitioner submits that the impugned order is bad in law on following tow counts.

> (a) that the impugned order is founded on material, namely, the report of the respondent No. 3 and the comments of respondent No. 2 which was not disclosed to the petitioner. This was in violation of the principles of natural justice resulting in serious prejudice to the petitioner, and
>
> (b) that impugned order does not disclose reasons.

4. Countering the submissions of the learned counsel of the petitioner, learned counsels representing the respondents submit that the material relied upon by the respondent No. 1 for passing the impugned order was well within the knowledge of the petitioner. Therefore the submission that the impugned order is founded or undisclosed material cannot be sustained. Regarding the second ground of attack, namely, lack of reasons, the learned counsels contend that the respondent No. 1 was not required to give reasons.

5. In paragraph 12 of the petition, it is asserted that the respondent No. 3 submitted a report and the respondent No. 2 submitted his note (Samiksha). Put, neither the copy of the report of the respondent no 3 nor the copy of the note (Samiksha) submitted by the respondent no. 2 was supplied to the petitioner. In paragraph 14 of the petition, it is asserted that after the respondent No. 2 had sent his note (Samiksha), no notice or opportunity was given to the petitioner by the respondent No. 1

6. The averments of the petitioner made in paragraphs 12 and 14 of the petition have been replied in paragraph 14 of the counter-affidavit filed on behalf of the respondents NO. 2 and 3. The said paragraph is as follows:

> "14 That in reply to the contents of paragraphs 12,13,14 of the writ petition, it is stated that the petitioner was given full oppurtunity to submit his reply against the charges framed and to submit evidence in support of his case and after having received reply of the petitioner, the same was sent to the State Govt. along with the comments of the authorities concerned for necessary action and the

State Govt. after having considered each and every aspect of the matter, removed the petitioner from his pose which is perfectly just and legal."

7. The reply to the averments of the petitioner made in paragraphs 12 and 14 of the petition given in paragraph 14 of the counter-affidavit filed on behalf of the respondents No. 2 and 3, extracted above, does not, in the opinion of the court, constitute denial of the plea of the petitioner either specifically or by necessary implication . Therefore, the averments contained in paragraphs 12 and 14 of the petition cannot be taken to have been denied by the respondents No. 2 and 3

8. At this stage, it is pertinent to notice that no counter-affidavit has been filed on behalf of the respondent No. 1. Therefore, in the absence of any counter-affidavit, it has to be presumed that the respondent No. 1 does not dispute the averments of the petitioner made in paragraphs 12 and 14 of the petition.

9. It is also relevant to notice that in paragraph 8 of the counter affidavit, filed on behalf of the respondents No. 2 and 3, it is stated that after receiving the reply to show-cause notice charges were framed against the petitioner and the petitioner was required to submit the evidence, and that he was also accorded opportunity of hearing by the Enquiry Officer.

10. Paragraph 8 of the counter-affidavit has been supplied by the petitioner in paragraph 8 of his rejoinder-affidavit. In the rejoinder-affidavit, the petitioner asserts that it is patently wrong to say that the charges were framed against the petitioner. No charge-sheet as such was served on the petitioner, although after submission of reply to show-cause notice, the respondent No. 3 had sent a letter dated 16 March. 1998 requiring him to submit evidence in support of his reply to the show-cause notice. The petitioner did submit evidence.

11. From the pleadings noticed above in capable conclusion is that the petitioner was not given copy of the report of respondent no. 3 and that he was also not supplied the copy of note of (Samiksha) submitted by the respondent No. 2. It is also clear that the petitioner was not given any opportunity of hearing subsequent to the filing of his reply to the show cause notice.

12. A perusal of the impugned order clearly shows that it is founded on the comments and notes (Samiksha) submitted to the respondent No.1 by the respondent no.2 which were not supplied to the petitioner. At no point of time was the petitioner warned that the comments and notes 9Samiksha) of respondent No.2 will be relied upon by the respondent No.1 Thus the well known principle of natural justice, which required the respondent No.1 to give opportunity to the petitioner, was flagrantly violated rendering the impugned order wholly unsustainable in law.

For proper appreciation of the second contention of the learned counsel of the petitioner regarding lack of reasons in the impugned order, it is relevant to notice the provisions of sub-section (2-A) of section 48 of the Act which reads thus:

> "2-A After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary the State Government may, for reasons to be recorded in writing remove the President from his office.
>
> Provided that in a case where the State Government has issued notice in respect of any ground mentioned in clause (a) or sub-clause (ii), (iii), (iv), (vi), vii) or (viii) of Clause (b) of sub-section (2), it may instead of removing him give him a warning."
>
> (Emphasis added)

13. A bare perusal of sub-section (2-A) of Section 48 of the Act quoted above, reveals that written recording of reasons in support of the order is a condition precedent for passing the order removing the President from his office. The State Government may remove the President from his office only for reasons to be recorded in writing. In the President from his office only for reasons to be recorded in writing. In the absence of reasons recorded in writing the order purporting to remove the President from his office would be contrary to the statutory mandate contained in sub-section (2-A) of Section 48 of the Act. The court has read and re-read the impugned order dated 27th January,1999 but has not been able to locate any reason in support of the order. The first part of the order recites charges against the petitioner, second part of the order reproduces the reply given by the petitioner, and the third part of the order quotes the comments of the respondent No.2 submitted to the respondent

No.1. Thereafter, the order gives conclusion followed by the order removing the petitioner from his office of Chairman. No part of the impugned order records reasons. The impugned order contains only conclusion.

Learned Counsels appearing for the respondents contend that the order does satisfy the requirement of written recording of reasons in support of the order.

14. In its decision rendered in the case of Union of India Vs. M.L. Capoor reported in A.I.R. 1974 S.C. at page 87 the Hon'ble Supreme Court has ruled as below:

> "Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached."

Tested on the above touch-stone, the impugned order fails to satisfy the statutory requirement of recording reasons in writing. Thus, the impugned order is liable to be struck on this count also. For what has been said above, the petition succeeds and is allowed. The impugned order dated 27th January, 1999, a copy whereof is Annexure '6' to the petition, is quashed. There is no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.1999

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No. 5982 of 1996

Ati Ahmad **...Petitioner**

Versus

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

Counsel for the Petitioner : Shri S.C. Budhwar
Shri Arun Tandon
Counsel for the Respondents : SC
Shri S.P. Mehrotra
Shri Arvind Kumar

Constitution of India-Article 226- the attempt to retire the petitioner on the basis of the deleted date of birth recorded at the time of entry is wholly illegal and arbitrary particularly when no opportunity of hearing was given to the petitioner.

Held,

As soon there was civil consequence, it implies that an opportunity is to be given to the incumbent who would suffer such civil consequence. Therefore, without giving an opportunity to show cause, the date of birth could not be corrected and without correcting the same, the petitioner could not be asked to retire on the basis of delected date birth.(para 8)

By the Court

1. The petitioner was asked to retire on attainment of 58 years of age by a notice contained in annexure-7 to the writ petition being dated 21st August, 1995 informing him that he would be retiring with effect from 1st March, 1996 on account of attainment of 58 years of age on 29th February, 1996. Subsequently, another letter dated 16th November, 1995 contained in annexure-10 was issued to the petitioner informing him that he would be retiring on 30th June, 1996 and the date 29th February, 1996 mentioned in the letter dated 21st August, 1995 is to be read as 30th June, 1996. These two notices have been challenged by means of this writ petition on the ground that the date of birth of the petitioner was recorded in the service record as 2nd February, 1940 on the basis of the High School Certificate. Therefore, the petitioner ought to retire on 1st March, 1998 when he would be completing 58 years of age.

2. Mr. S.C. Budhwar, learned counsel for the petitioner assisted by Mr. Arun Tandon contends that the U.P. Recruitment in Service (Determination of date of Birth) Rules, 1974 were adopted by the respondents on 20th June, 1975 and as such the provision of the said Rules would not be applicable in a case where the date of birth is already corrected or recorded before the enforcement of the said Rules. According to him in the service record original date of birth was recorded as in June, 1938 but the same was corrected as on

2nd February, 1940 on the basis of High School Certificate on 29th April, 1974. The said 1975 Rules came into force on May 28, 1974. Therefore, according to him if the 1974 Rules cannot be applied in that event, it could not be said that the petitioner's age could not be corrected, simply because that the petitioner had passed the High School Examination after his entry into the service. He next contends that he service book was corrected by the respondents themselves and had allowed the same to continue even till today and has not yet been corrected and as such, the respondents are stopped from challenging the same or ignoring the same. According to him, unless the said date of birth is corrected in the service book and the date of birth as in June 1938 is restored, the respondents cannot compell the petitioner to retire on the basis of the date of birth since been scored out and substituted by 2nd February, 1940. He next contends that even if the date of birth recorded at the time of entry could be restored, the same can be done only by means of correction of the date of birth after giving an opportunity to the petitioner. There having been no opportunity given and no step having been taken to correct the date of birth, it was not open for them to retire the petitioner on the basis of the deleted date of birth. Mr. Budhwar had also relied on a circular issued by the Department on 17th December, 1974, a copy whereof was reproduced on 15th February, 1975 being annexure-SA-1 to the Supplementary Affidavit in order to contend that before 1974 Rules were adopted the date of birth could be corrected on the basis of the said circular taking into account the High School Certificate irrespective of the date as to when the examination was undertaken namely, before or after entry into service. According to him the correction was made on 20th April, 1975 on the basis of this circular dated 17th December, 1974. Therefore, according to him the notice could not be sustained. He further contends that by reason of interim order granted in this writ petition, the petitioner had continued till 28th February, 1998 and since had retired on 1st March, 1998.

3. Mr. Arvind Kumar, learned counsel for the respondents on the other contends that the order dated 17th December. 1974 cannot be resorted to or relied upon by the petitioner since the application thereof was confined to the incumbents mentioned in the D.O. letter referred to therein which were in respect of the employees of the Lucknow Electric Supply Undertaking, Lucknow. The petitioner's name was not mentioned in the list of Lucknow Electric Supply Undertaking, Lucknow. Since the petitioner had at no occasion been employed there, therefore, no benefit could be derived out of the said

circular dated 17th December, 1974. He further contends that the correction was made on 20th April, 1975 whereas the U.P.S.E.B. had adopted the said 1974 Rules on 20th June, 1975 namely only three months before the application of the said Rules were attracted. According to him, under the said Rules age cannot be corrected on the basis of a High School Certificate if such certificate is obtained after the entry into the service. Therefore, according to him, the correction could not have been carried out. He further contends that the above correction must have been corrected surreptitiously immediately before the enforcement of the 1974 Rules. Therefore, the petitioner having taken advantage of a situation, which according to him is wrongful, the petitioner cannot now derive any benefit out of his own wrong which he had obtained. He further contends that in any event, by reason of the 1974 Rules sine been adopted by U.P. S.E.B., the date of birth could not be corrected on the basis of High School Certificate obtained by the Petitioner after his entry into service. He next contends that in case the date of birth is accepted in that even, the petitioner would be less than 18 years and be disqualified to enter into the service and as such he cannot be allowed any benefit of such date of birth. Therefore, the writ petition should be dismissed.

4. I have heard both the counsel at length.

5. So far as the circular dated 17th December, 1974 is concerned, as rightly contended by Mr. Arvind Kumar the same cannot be attracted in the case of the petitioner. No benefit there could be derived for the purpose of correction of the date of birth in the service record by the petitioner. In as much as, it is apparent from the text of the said circular that the same was confined to the incumbents mentioned in the D.O. letter concerning the Lucknow Electric Supply Undertaking, Lucknow. Admittedly, the petitioner's name was not mentioned in the said D.O. letter. Though Mr. Budhwar contended that a copy was forwarded to Allahabad for necessary information and action means that it was applicable even in respect of the petitioner who was in Allahabad. But this contention does not appeal to me. Even if a copy is forwarded to Allahabad for information and necessary action but the order itself having confined to the incumbents mentioned in the D.O. letter employed in Lucknow Electric Supply Undertaking, Lucknow, the same cannot be extended to anyone else other than those mentioned the D.O. letter. Therefore, the petitioner cannot be derived any benefit there out as contended by Mr. Budhwar.

6. Admittedly, the 1974 Rules were adopted by U.P.S.E.B. on 20th June, 1975. Thus on 20th April, 1975, the 1974 Rules have no application. Therefore, the provision contained in 1974 Rules to the extent that the date of birth cannot be corrected on the basis of a High School Certificate if such examination is passed after entry into service, cannot be applied. On the order hand, in the absence of any provision it was open to the respondents to correct the date of birth. It was also open to the respondents to refuse to correct the date of birth on the basis of the High School Certificate produced in April, 1974. But once such correction is made on the basis of such High School Certificate, it is no more open tot he respondents to ignore the same and resile therefrom. Admittedly, the corrections are signed b the competent officer. Mr. Arvind Kumar in his usual fairness has not disputed that the corrections were initialled and signed by the Competent Officer. The original date that was mentioned at the time of initial appears to have been deleted or scored out. The said scoring out is also signed by an officer as is apparent from the annexure CA-I which is a Xerox copy of the service book of the petitioner. After having corrected the date of birth, the respondents cannot compel the petitioner to retire on the date of birth which had since been deleted. In as much as, on the service record the date of birth as 2nd February, 1940 was prevailing on being substituted after deleting the date of birth recorded at the time of entry.

7. However, it was open to the respondents to correct the date of birth in the service record in the service record if it was of the opinion that it was wrongfully entered in the service record and the correction made on 1974 was incompetent or inconsistent. But admittedly, no correction of the date of birth 2nd February, 1940 bas been made even till today. The said date of birth is still figuring in the service record as is apparent from annexure –CA-I. Then again, in case the respondents wanted to correct the same or decided to retire the petitioner on the basis of the deleted date of birth recorded at the time of entry, in that event, it was open to them to initiate appropriate proceeding for correcting the same by issuing a notice to the petitioner asking him to show cause why the date of birth should not be corrected. It may not necessarily imply that a personal hearing is to be given but it implies that the explanation so given was to be considered and decided by the respondents. Mr. Arvind Kumar had relied on the decision in the case of **Executive Engineer, Bhadrak (R & B) Division, Orissa & others Vs. Rungadhar Mallik** [1993

(1) UPLBEC 58] and contended that an opportunity of hearing is not necessary while correcting the date of birth when refusing the representation seeking correction of date of birth. The said decision on the basis that the representation may be decided but that does not entail giving of personal hearing. The said decision does not lay down a proposition that correction can be made even without giving notice. Though it can be done without giving hearing but it must follow that it has to be done after giving notice and considering the show cause or reply of the petitioner. Such consideration may not imply giving of personal hearing but still then the candidate should be given an opportunity to show cause why the date of birth should not be corrected through a written reply or representation as the case may be. Therefore, in the facts and circumstances of the case, the said decision does not apply. In as much as, in the present case no notice was even issued to the petitioner asking him to show cause as to why the date of birth should not be corrected. On the other hand, a simple notice was given that he would be retiring on 1st March, 1996 which was replaced by a further notice by fixing the date as on 30th June, 1996. This notice cannot suffice to satisfy the purpose of show cause of giving opportunity. Then again, this notice simply says that the petitioner was due to retire on attainment of 58 years of age on the date mentioned therein. It had never mentioned that the respondents proposed to correct the date of birth in service record in order to retire him on the basis of the deleted date of birth recorded at time of entry.

8. The date of birth which was recorded in the service record if sought to be corrected as in the present case reducing by two years in that event, it will pre-supose inflicting of the civil consequence. As soon there was civil consequence, it implies that an opportunity is to be given to the incumbent who would suffer such civil consequence. Therefore, without giving an opportunity to show cause, the date of birth could not be corrected and without correcting the same, the petitioner could not be asked to retire on the basis of deleted date of birth despite the date of birth having been recorded and maintained in the service record as on 2nd February, 1940.

9. Mr. Budhwar had relied on the decision in the case of **State of Orissa Vs. Dr.(Miss)Binapani Dei and others [AIR 1967 SC 1269]**. In the said decision, it was held that the State Govt. was not precluded from holding enquiry simply because the date of birth was entered in the service register but for the purpose of refixing the date of birth. But such decision is to be passed upon the result of an

enquiry held in a manner consonant with the basic concept of justice. In the present case, no enquiry at all has held for refixing the date of birth. There was also no attempt for refixing the date of birth. On the other hand, the petitioner was sought to be retired on the basis of the deleted date of birth recorded at the time of entry without refixing the date of birth in the service record. As observed earlier, there was no enquiry and there was no opportunity. The process adopted by the respondents does not suit the concept of justice. Mr. Budhwar had also relied on the decision in the case of **Shariful Hasan Vs. State of U.P. and others [1982 U.P. Services Cases 428]** wherein it was held that entry in the service book once corrected cannot be resorted to be entering the old date of birth to the prejudice of the employee without giving him an opportunity. In the said decision however, an opportunity was referred to as an opportunity of hearing. However, in view of the decision in the case of **Executive Engineer, Bhadrak (Supra)** the opportunity cannot be extended to the grant of hearing. But the fact remains that opportunity of hearing may not be given but still an opportunity is a must.

10. As it appears in the present case that the attempt to retire the petitioner on the basis of the deleted date of birth recorded at the time of entry appears to be wholly illegal and arbitrary particularly, when the date of birth in the service record is on 2nd February 1940 which still continuing when he was sought to be so retired.

11. Thus it appears that the there are substance in the submission of Mr. Budhwar as observed earlier. In the result, the writ petition succeeds and is allowed. The impugned orders contained in annexure-7, 10 and 14 are liable to be quashed and are accordingly quashed. Let a writ of certiorari do accordingly issue.

12. Admittedly, the petitioner had continued is service till attainment of 58 years of age on the basis of his date of birth as 2nd February, 1940 and had received his pay for the same period. Therefore, the petitioner be entitled to all service benefits as is he retired on attainment of 58 years on the basis of date of birth as 2nd February 1940 on 1st March, 1998. It would be open to the petitioner to make a representation for payment of his service benefits before the concerned respondents. The concerned respondents shall decide the said representation and ensure the payment of all retiral benefits of the petitioner, as admissible in law as early as possible, preferably within a period of six months from the date of making such representation.

13. With these observations, the Writ Petition is allowed. However, there will be no order as to costs.

14. Let a certified copy of this order be given to the learned counsel for the petitioner on payment of usual charges.

Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.7.99

BEFORE
THE HON'BLE BHAGWAN DIN, J.

Government Appeal No. 1348 of 1996

State of U.P **...Appellant**

Versus

Pramod kumar **...Respondent**

Counsel for the Appellant : A.G.A.
Shri Vijay Shanker Misra
Counsel for the Respondent : Shri Raghbans Sahai
Sri O.P. Singh

N.D.P.S. Act-s-50- the provisions of section 50 of the Act are mandatory and any failure in compliance thereof is fatal to the prosecution.

Held,

The Provisions of Section-50 has been made mandatory in order to have a check on the misuse of the authority conferred under Section 42 of the Act. Therefore, these provisions make it obligatory that such of those officers mentioned therein on receiving an information should reduce the same to writing and also record reasons for the belief as required under Section 42(1). Any failure in this behalf would vitiate the trial.

By the Court

1. The acquittal of the respondent, Pramod Kumar in a case under Section-18/20 of the N.D.P.S. Act (the Act for convenience), necessitated the filing of this appeal by the State of U.P. assailing the

judgement and order dated 26.3.1996 passed by the III-Addl. Session Judge, Hamirpur, holding the respondent not guilty of the offence punishable under Section – 18/20 of the Act.

2. The facts, which had bearing on the decision of the trial court briefly stated are, that on 1-10-1992 at about 1.00 A.M. in the dead hours of the night Sri Vishram Singh, the S.O. of P.S. Kotwali, Hamirpur with the police party comprised of Sub Inspector, Surendra Singh, Head Constable, Indra Pal Singh, Constable, Raj Kumar Singh and constable, Kamlesh kumar Awasthi, was on law and order duty during Ram Lila festival in the city of Hamirpur. It is stated that when the police party on a jeep driven by the Constable, Suresh Singh reached near Laxmi Park, Sri Vishram Singh saw the respondent coming from opposite direction on the road. On seeing the police, the respondent crouched in fear and tried to flee away, however, the police party succeeded to apprehend him near flour mill of one Guru. On interrogation, he told that he was carrying opium and Charas in the bag for being sold to its consumer. On this S.O. Sri Vishram Singh asked him whether he would like to be searched before the Gazetted or the Magistrate. The Respondent expressed his faith in S.O. Sri Vishram Singh and said that there was no necessity of the presence of the Gazetted Officer or the Magistrate during the search. Then the S.O. took personal search of the respondent and recovered 700 grms Charas and 300 grms Opium wrapped in a polythene sheet from the bag held by the respondent. He sealed the same in that very bag and got a search and recovery memo prepared by S.I. Surendra on spot on his dictation. Thereof, he brought the respondent with the recovered article to the police station.

3. The Head Moharrir, on duty, on the basis of the search memo, prepared the chick F.I.R. and registered a case against the respondent under Section-18/20 of the Act, vide Crime No.354 of 1992.

4. Dy. S.P., Sri Dariyao Singh was entrusted with investigation of the case. He recorded the statements of the members of the police party who claimed to have been present at the time of the search and recovery and the Searching Officer Sri Vishram Singh. Then he sent the sample of Opium, and chars to the Public Analyst, Agra for examination. On receipt of the Analyst's Report, he forwarded the respondent to the Court vide a charge – sheet for trial.

5. The trial court directed the respondent to be tried on the charge on the charge under Section-18 read with Section – 20 of the Act for having been found in possession of contraband opium, and charas. For which he did not possess valid license.

6. The respondent repudiated the charge and pleaded not guilty. He asserted that Sri Vishram Singh, the Station officer, P.S.Kotwali, Hamirpur had planted the contraband article to fasten him in a false case of recovery of opium, and Charas.

7. The Prosecution in order to bring the guilty of the respondent at home, examined Kamlesh Kumar Awasthi as P.W.I. and Head Constable, Indra Pal Singh as P.W.2. The respondent in his statement under Section 313 Cr.P.C. took the common plea of denial and examined none in defence.

8. The Trial Court acquitted the respondent on the ground that the Searching Officer did not comply with the provision of Secction-50 of the Act in its intention and spirit. He observed that the Searching Officer simply asked the accused, if he wants to be searched before the Magistrate or the Gazetted Officer. The accused said that he may himself take the search. The S.O. did not inform the accused that he has right to be searched in presence of the Magistrate or the Gazetted Officer and if the accused denied to be searched before the Magistrate or the Gazetted Officer, the Searching Officer Ought to have got it in writing separately. The Trial court further held that before completion of recovery memo it is mentioned therein that the memo has been read over and signatures of the witnesses are being obtained. Thus, it appears that the signatures were obtained on a blank paper.

9. Learned Additional Government Advocate appearing for the State urged that the Searching Officer did not have information from any person that any narcotic drug or psychotropic substance was being carried by he respondent in his bag. It was a coincidence that the respondent was being coming on the road from opposite direction and when he saw the police party, he cowered out of fear. It aroused a suspicion in the mind of the S.O. Sri Vishram Singh that the respondent was a criminal, thereof he halted and arrested him on the road near the flourmill. It was a sudden arrest and search of the respondent. Thereof, the provision of section-50of he Act are not attracted. Thereof, it was not even necessary for the Searching

Officer to ask him, if he wants to be searched before the Gazetted Officer or the Magistrate.

10. On the other hand, the learned counsel appearing for the respondent contends that the provisions of section –50 of the Act are mandatory and any failure in compliance thereof is considered fatal to the prosecution case. He urged that the trial court has rightly acquitted the respondent of the offences under Section –18/20 of the Act for non-compliance of the provisions of section-50 of the Act.

11. To appreciate the submissions of the learned counsel for the State and the learned counsel for the respondent and arrive at the correct decision, the perusal of the relevant provision of Sections –50 and 42 of the Act is essential.

12. Section –50 of the Act provides that 'when any officer duly authorised under Section 42 is about to search any person under the provisions of section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate."

13. Section 42 lays down that "any such officer (being an officer superior in rank to peon, sepoy or constable) of the departments of Central Excise, Narcotics, Customs, Revenue, Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf; by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise police or any other department of a State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV, has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may search and seize such drug or substance.

14. The compliance of provisions of Section-50 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of State of Punjab Vs. Baldev Singh {(198)2 SCC 724): "on prior information the empowered officer or authorized officer while

acting under Section 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to noncompliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial."

15. The Provisions of Section-50 has been made mandatory in order to have a check on the misuse of the authority conferred under Section 42 of the Act. The person to be searched to be taken to the nearest Magistrate or the Gazetted Officer, if so desired by him, particularly, when the authorised officer has reason to believe from his personal knowledge or information given by any person that any narcotic drug or psychotropic substance is likely to be recovered. Section –42 further requires the authorised officer to reduce such belief or information in writing. In this context the Hon'ble Supreme Court in the State of Punjab Vs. Balbir Singh (1995 JIC 382) has held that "the Object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions of the offences, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein on receiving an information should reduce the same to writing and also record reasons for the belief, as required under Section 42(1). Any failure in this behalf would vitiate the trial.

16. A question was mooted before the Hon'ble Supreme Court if the person to be searched has a right to be produced before the Gazetted Officer or the Magistrate. The Hon'ble Supreme Court in the case of State of Punjab Singh (Supra) held that "the words 'if the person to be searched so desires' are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the officer empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereof the search would be conducted. In the context in which this right has been conferred, it

must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate ……."

17. Nonest certandum de regulis juris the police of Uttar Pradesh has been empowered by the State Government in this behalf to search and seize the narcotic drug and psychotropic substances. S.O. Vishram Singh was thus, an authorised officer under Section-42 of the Act to search the respondent.

18. As far relates to the question whether the compliance of the provisions of Section-5- of the Act, in the case in hand, was necessary or not, it may be mentioned, that the respondent, when was confronted by the police party, told that he was carrying narcotic drug for being sold to its consumers. This information as such was sufficient for the authorized officer to believe that the respondent has committed the offence punishable under chapter IV of the act. The compliance of the provisions of Section-5- is, however, relaxed only when the Searching Officer had no pre information of the likelihood of the recovery of the narcotic drug or psychotropic substance from any premises or a person that is, when in the course of search of an incriminating article connected with the commission of the offence punishable under the law other than the law providing punishment under Chapter-IV of the Act, the authorized officer recovers contraband drug therefrom.

19. In the instant case, respondent before the search the search started, informed the authorised officer that he is in possession of Opium and Charas, thus, the authorised officer, before the search of the person of the respondent began, was informed that respondent was in possession of contraband drug and thus had reason to believe that respondent has committed the offence under Chapter-IV of the Act.

20. The trial court in view of the above observations of the Hon'ble Supreme Court has correctly held that the Searching Office has not complied with the provisions of Section-50 of the act and has rightly acquitted the respondent.

21. Apart that there is another feature in this case which needs attention of the court. The search of the respondent was conducted by S.O. Sri Vishram Singh. It is said that after completion o f the search and recovery, he got the search memo prepared by S.I. Sri Sruendra Singh. The prosecution has not produced Sri Vishram Singh, who was the author of the search memo. The documents, like search memo, F.I.R. etc. which are the foundation of the criminal proceedings in the court, need to be proved by the author of the same. Therefore,. His examination as witness in the court was necessary to prove the authenticity of the search memo or the F.I.R. the prosecution cannot wash off its hand by examining the witness who had signed the search memo, without examining the author of the same to prove the guilt beyond probable and reasonable doubt. In the instant case the prosecution ought to have examined the Searching Officer who had conducted the search and prepared memo to establish the prosecution case.

22. For the reasons shown above, I am of the view that the appeal is without merit and deserves to be dismissed.

23. The appeal is accordingly, dismissed.

Petition Dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26-5-1999.

BEFORE
THE HON'BLE D.K.SETH, J.

Civil Misc. Writ Petition No. 21384 of 1999.

Jata Shanker Misra & others ...Petitioners.
Versus
The Benaras State Bank Ltd. Head Quarter Varanasi
Through its General Manager and others. ...Respondents.

Counsel for the Petitoner : Mr. S.A.Gilani
Mr. S.T. Siddiqui
Counsel for the Respondents : Mr. Navin Sinha

Constitution of India Article 12 – Benaras State Bank of India has been held not a 'State within the meaning of Article 12 of the

Constitution of India and the writ petition is not maintainable against it as it is not a statutory authority.
Held,

Banaras State Bank of India is not a State within the meaning of Article 12 of the Constitution and that writ petition on is not maintainable against it. (para 7)

By the Court

1. Shri Navin Sinha Learned counsel for respondents at the out set has taken a preliminary objection that the writ petition is not maintainable. He further contends that the service condition of the petitioners is not governed by any statutory rules or regulations. The relation between the Benaras State Bank Ltd. and the petitioners is that of an employer and employee which is purely contractual. He also contends that in the case of Vijay Kumar Vs. General Manager, The Benaras State Bank Ltd. and others in writ petition no. 30753 of 1992 (decided on 1.11.1995), Division Bench of this court had held that writ petition against the Bench of this court had held that writ petition against the Benaras State Bank Ltd. Is not maintain. He produces copy of the said judgement.

2. Shri S.A.Gilani, learned counsel for the petitioners contends that even though the Benaras State Bank Ltd. Is not a statutory and as such it is not a State within the meaning of Article 12 of the Constitution yet it discharges public duty and there is an element of public function in the Benaras State Bank Ltd. And that if there is violation of principal of natural justice in relation to the condition of service of an employee, in that event, the writ jurisdiction can be invoked in order to establish his fundamental and non-fundamental rights. He relies on the decision in the case as Air India Statutory Corporation etc Vs. United Labour Union & others (JT 1996 (11) S.C.109) in support of his contention. He had also addressed the court on the merit of the case.

3. I have heard learned counsel for the parties. Mr. Gilani had relied on the observation made in the decision of Air India Statutory Corporation (Supra) which may be quoted below :-

> "13. If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality, agency or the person acting in public interest, through in the field of private law, is not free to prescribe any

unconstitutional conditions or limitations in their actions.

From this perspective and on deeper consideration, we are of the consider view that the two Judge Bench in Heavy Engineering case narrowly interpreted the words " appropriate Government" on the common law principals which it is tested on the anvil of Article 14. It is true that in Hindustan Machines Tools R. D. Shetty's and Food Corporation of India cases the ratio of Heavy Engineering case formed the foundation. In Hindustan Machine Tool's case, there was no independent consideration except repetition and approval of the ratio in Heavy Engineering case. It is reiterate that Heavy Engineering case is based on concession. In R. D. Shetty's case, the need to delve indepth into this aspect did not arise but reference was made to the premise of private law interpretation which was relegated to and had given place to constitutional perspectives of article 14 which is consistent with the view we have stated above. In food Corporation of India's case, the Bench proceeded primarily on the premise that warehouses of the Corporation are situated within the Jurisdiction of different State Governments which led it to conclude that the appropriate Government would be the State Government.

4. In a developing society like ours, steeped with unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time place and circumstances. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the port, the workman etc are languishing and to secure dignity of their person. The constitution, thereof, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social in all facets of human activity. The concept of social justice embeds equality to flavour and enliven the practical content of life. Social

justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, thereof is a potent instrument of social justice to bring about equality in results. It was accordingly held that right to social justice and right to be health were held to be fundamental Rights. The management was directed to provide health insurance during service and atleast 15 years after retirement and periodical tests protecting the health of the workman.

5. It would, thus be seen that all essential facilities and opportunities to the poor people are fundamental means to development means to development, to live with minimum comforts, food, shelter, clothing and health. Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workman, lower class, middle class and poor people is means to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the state, its agency instrumentality, jurisdic person or private entrepreneur it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating their from are specifies to make their right to life and dignity of person real and meaningful.

6. The Founding fathers placed no limitation or fetters on the power of the High Court under Article 226 of the constitution except self-imposed limitations. The arm of the Court is long enough to reach injustice wherever it is found. The court as essential in the qui vive is to mete out justice in given facts. On finding that either the workman were engaged in violation of the provisions of the Act or were continued as contract labour, despite prohibition of the contract labour under Section 10 (1), the High Court has, by judicial review as the basic structure, constitutional duty to enforce the law by appropriate directions. The right to judicial review is not a basis structure of the constitution by catena of decisions of this court starting from Indira Gandhi – vs Raj Narayan (AIR 1975 SC 2299) and Bommai's case. It would therefore be necessary that instead of leaving the workman in the lurch, the court would properly mould the relief and grant the same in accordance with law."

7. The above observation does not lay down that writ maintainable against any person irrespective of its public duty and devoid of any statutory obligation. There is a distinction between private law and public law. Even if a private body cannot be

characterised as an authority within the meaning of Article 12 even then a writ would like to enforce a public duty. Though Article 226 speaks of a person and does not mean that the person should be only a State or an Authority within the meaning of Article 12 but yet the in its wisdom The comb has imposed a self-imposed restriction so as to keep the writ jurisdiction workable and prevented it from overburdening the courts with innumerable cases making the exercise of writ jurisdiction impossible. Self-imposed restriction has to be respected to the extent as is meant and it cannot be open to an extent inviting anything and everything. It is not that every right against every individual can be enforced through writ jurisdiction irrespective of the fact that the person has no public function or not discharging any statutory obligation. Relation between the employee-petitioner and the respondent bank is purely contractual and is in the realon of private law without any public duty or situtary liability the case of Air India Statutory Corporation etc. (supra) cannot be attracted in the present facts and circumstances particularly when it has already been decided in the case of Vijay Kumar (supra) that Benares State bank of India is not a State within the meaning of Article 12 of the Constitution and that writ petition is not maintainable against it.

8. Now the Division Bench had held that Benares State Bank Ltd. Is not State and writ petition is not maintainable against it. The Division Bench decision is binding on the learned Single Judge. When the Division Bench decision is staring on the face, it is not open to me, particularly when I do not find to disagree or differ with the same, to ignore the binding precedent. In that view of the matter this writ petition is not maintainable and as such is dismissed as not maintainable without entering into the merit of the case. This order however will not prevent the petitioner from espousing their case or establishing their legal right before appropriate forum if they are so advised.

Petition Dismissed.

ORIDINAL JURISDICTION
CIVIL SIDE
DATED :ALLAHABAD 01.11.1999

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

Civil Misc. Writ Petition No. 34202 of 1999.

Km. Rajni Kumar ...Petitioner
Versus
Regional Secretary/Additional Secretary ...Respondents.

Counsel for the Petitioner :Shri M.D. Singh Shekhar.
Shri V.K. Nagaich
Counsel for the Respondents :S.C.
Shri V.K. Rai.

Constitution of India Article 226- where provisional mark-sheet having been supplied and authorities having remained silent for 8 years, the equity prevents them from canceling the examination.

Held,

Prevent injustice to a candidate who has as a consequence of declaration of result pursued higher studies successfully this case provisional mark-sheet having been supplied and the authorities having remained silent for eight years the equity is in her favour.(para 7)

By the Court

1. The petitioner passed High School in 1989 in first division. She appeared in intermediate examination with roll number 007989 as a regular student from Jawahar Inter College, Sheetapul, Agra in 1991. Her result was with held under WB category. But provisional mark-sheet was issued to her. The petitioner passed her B.A. in 1994 from degree college affiliated to Agra University as a regular student. She passed her M.A. examination in 1997 from Agra University. She produced her entire testimonials including intermediate Examination mark sheet of 1991. On 30.09.1999 she approached the principal of the institution and requested him that she be supplied the certificate of intermediate Examination 1991. The principal refused and asked the petitioner to approach the respondents. On 02.08.1999 the petitioner made a representation in the office of respondent no. 1. On same day she was served with

impugned order informing her that her result has been cancelled. The order dated 02.08.1999 has been challenged by the petitioner by means of the present writ petition.

2. I have heard Sri M.D. Singh Shekhar, learned counsel for the petitioner and Sri V.K. Rai, brief holder for the State of U.P. appearing for the respondents.

3. The learned counsel for the petitioner urged that the order was arbitrary as the result of the petitioner was withheld under WB category which under the rules means withholding for suspension and in absence of any proof that the petitioner was guilty of using unfair means the order cannot be maintained. He further urged that the respondents in passing the order after eight years without affording any opportunity to petitioner were guilty of violating principles of natural justice. It is urged that in any case the provisional certificate having been issued and no steps having been taken for eight years the petitioner completed her post graduation, thereafter, the circumstances have changed and the equity prevents them from cancelling the examination now. The learned standing counsel supported the order. He urged that provisional mark-sheet was issued as the High Court had passed a general order in 1983 to issue provisional marks-sheet in all cases of unfair means.

4. In the counter affidavit it is stated that the petitioner was found involved in mass copying, therefore, her result was cancelled. And the decision of the Disposal Committee was sent to the principal. It was published in the news paper also. The allegations are denied in the rejoinder affidavit.

5. If the allegation in the counter affidavit would have been correct there was no question of cancelling her examination in 1999. The learned standing counsel could not produce any material to substantiate the allegations made in the counter affidavit.

6. The result of the petitioner was withheld in WB category by the respondents. From the document produced by the petitioner, "परिषद की हाई स्कूल तथा इन्टरमीडिएट परीक्षा के लिए विभिन्न संकेत चिन्हों का विवरण जिसके अर्न्तगत परीक्षाफल रोके गये हैं" it is clear that WB category relates to cases of suspicion of using unfair means and not of the candidates who are found copying at the spot as alleged in the counter affidavit. The respondents themselves were not sure whether the candidate

indulged in using unfair means or not that is why the respondents issued provisional mark-sheet to the petitioner Learned Standing Counsel stated that in 1983 there were some general directions of the High Court for issuing mark sheet to the candidates whose results had been withheld but no such judgement has been brought on record except a bald statement made in paragraph 3 of the counter affidavit. The counter affidavit is also silent as to what they were doing for the last 8 years. They did not disclose any reason for such inordinate delay, in arriving at a conclusion as to whether the petitioner was guilty of using unfair means or hot. It appears that the respondents woke up only after the petitioner approached the respondents for issuance of the certificate and on the same date the respondents cancelled the intermediate result of the petitioner that too without assigning any reason for cancellation of the result of the petitioner. The petitioner in the meantime passed B.A, M.A. and B.Ed. examinations and if her result of intermediate examination is cancelled the petitioner would be seriously prejudiced.

7. Learned counsel for the petitioner has placed reliance on decision of this court in Ashok Kumar Srivastava v Secretary, Board of High School and Intermediate Education at Allahabad and another 1985 UPLBEC 76, Dr. Anil Kumar Agarwal v. Director of Medical Education and Training U.P. Lucknow and others 1987 UPLBEC 547 and Chhatrapal v Secretary, Madhyamik Shiksha Parishad, U.P. Allahabad 1991 (1) UPLBEC 388. In all these decisions the court has taken equitable view to prevent injustice to a candidate who has as consequence of declaration of result pursued higher studies successfully. In this case provisional marks-sheet having been supplied and the authorities having remained silent for eight years the equity is in her favour.

8. In the result, the writ petition succeeds and is allowed. The order dated 02.08.1999, passed by respondent Annexure-5 to this petition is quashed. A writ of mandamus is issued to the respondent to declare the result of the petitioner of Intermediate Examination 1991 and issue a fresh mark-sheet and certificate of Intermediate Examination of 1991 to the petitioner. The aforesaid directions shall be complied with by the respondent within month from the date a certified copy of this order is produced before him.

9. The parties shall bear their own costs.

Let certified copy of this order be issued to learned counsel for the parties on payment of usual charges within four days from today.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD: 14 OCTOBER, 1999.

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

Habeas Corpus Writ Petition No. 33888 of 1999.

Udai Veer Singh ... **Petitioner**

Versus

State of U.P. & others ... **Respondents**

Counsel for Petitioner: :Mr. O.P. Singh,
Mr. D.S. Mishra.
Counsel for Respondents: :Mr. Mahendra Pratap
A.G.A.

Article 21 of the Constitution of India- Distinction between law and order and public order explained. Objectional activities of the petitioner were held not to be prejudicial to the maintenance of public order. (para 10)

If the Act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentialities of the act is so deep as to affect the community at large and/or the even tempo of the community then it becomes a breach of the public order.

By the Court

1. The principal contention urged for the petitioner . Udaiveer Singh son of Shyam Singh, resident of village Badhai Khurd, P.S. Kotwali, district Muzaffarnagar relates to the of repeated question that the ground of detention has no nexus to the 'public order', but is purely a matter of 'law of order'. In order to appreciate this contention, it is necessary to disclose the facts as have been unfolded from the grounds accompanying the order of detention dated 16.6.1999 passed by the District Magistrate-respondent no.2 under the provisions of Section 3(2) of National Security Act (Act No.65 of

1980) hereinafter referred to as 'the NSA') served on the petitioner while he was in jail, in connection with case crime no.204 of 1999, under Section 302 I.P.C., P.S. Civil Lines, Muzaffarnagar.

2. On 9.5.1999, at 10.30 A.M., the present petitioner and his two nephews Amar Veer Singh and Param Veer Singh, murdered one Ravindra Kumar Malik at his residence in Civil Lines Muzaffarnagar. It is alleged that Amar Veer Singh opened fire on the deceased with his country made pistol while Param Veer Singh dealt the deceased with knife blows. After committing the gruesome murder, the present petitioner as well as other two persons were successful in escaping on Vespa LML Scooter U.P. 92-C/8346. F.I.R. was lodged by Vinod Kumar brother of the deceased at P.S. Civil Lines Muzaffarnagar at 11.40 A.M. morning the three accused persons. Later on, the petitioner was apprehended by the local Police and from his possession a 22- Bore licensed revolver was seized besides the scooter, which was used in fleeing from the situs of the crime. While the petitioner was in jail, the detaining authority, i.e., District Magistrate, Muzaffarnagar received reports from the sponsoring authorities that the various activities of the petitioner were prejudicial to the maintenance of 'public order' inasmuch as, he was previously involved in crime case no.337 of 1991, under Sections 302/307 IPC P.S. Kotwali, Muzaffarnagar and another crime case no. 50-A/95, under Sections 147/123/504/506 IPC, registered in the same Police Station. It was reported that on account of murder of Ravindra Kumar Malik, who happened to be a teacher, tension and commotion prevailed at district headquarters and the teachers stopped evaluation of the answer books at the various educational centers and staged demonstrations at number of places; a sense of insecurity gripped the general public. All these facts led to break down of the 'public order'. It was also mentioned in the grounds supplied to the petitioner in support of the detention order that he was making attempts to get himself released on bail and if he is successful in his mission, he would terrorize the witnesses and may commit another horrendous crime.

3. The petitioner made a detailed representation against the order of detention addressed to the Advisory Board through the Home Secretary, Government of Uttar Pradesh and Secretary, Home Ministry, Union of India, New Delhi, a copy of which is Annexure 5 to the writ petition. The State Government approved the order of detention dated 16.6.1999 passed by the District Magistrate – respondent no. 2.

4. In this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the validity of the order of detention passed under Section 3(2) of the NSA on variety of grounds. Counter and rejoinder affidavits have been exchanged.

5. Heard Sri V.P. Srivastava and D.S. Misra , learned counsel for the petitioner and Sri Mahendra Pratap, AGA on the State of U.P. as well as Sri K.N. Pande for Union of India at considerable length.

6. The challenge to the detention order has been confined only on the ground that in view of the facts mentioned above, it was a case of breach of 'law and order' and not of 'public order'. The grounds relating to infraction of any procedure with regard to the approval and confirmation of the order of detention or delay ion the disposal of the representation have not been canvassed.

7. Before embarking upon the controversy whether in view of the established facts, it is a case of 'public order' or 'law and order' it would be proper to determine a seemingly preliminary question, raised by Sri Mahendra Pratap that it is not for this court to probe into the correctness of the alleged facts on the basis of which the detaining authority felt satisfied in passing the order, since this Court has a limited role in the matter of examining the validity of the detention order . In support of his contention, learned AGA placed reliance on the decision of the apex court in the case of **State of Gujarat V. Adam Kasam Bhaya** (A.I.R. 1981 SC – 2005); **K. Aruna Kumari V. Government of Andhra Pradesh and others** – 1998 (25) ACC-15(S.C.); **U.Vijay Laxmi Vs. State of Tamil Nadu** – 1995 SCC (Crl)-176 and the decision of this court in **Vijay Pal alias Pappu V. Union of India**-1996 (33) ACC-741. The gamut of all these rulings is that the High Court in its writ jurisdiction under Article 226 of the Constitution is to see whether the order of detention has been passed on any materials before it. If it is found that the order has been passed by the detaining authority on materials on record then the Court cannot go further and examine whether the material was adequate or not, which is the function of an appellate authority or Court. It can examine the material on record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in Section 3 is the satisfaction of the detaining authority and not of the Court. It may be further clarified that there can be no quarrel about the well established proposition of law that the subjective satisfaction of the

detaining authority as regards the factual existence of the condition on which the order of detention can be made, namely, the grounds of detention constitute the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. Nor can the court, on a review of the grounds, substitute its own opinion for that of the authority. In a recent decision of the court reported in the case of Ravi Singh V. State of U.P. and others (1999)1J.I.C-99 (Alld), similar view was taken that it is the subjective satisfaction of the detaining authority which should weigh and this court cannot interfere if there was enough material before the detaining authority to from particular opinion . We find it difficult to agree with the AGA on the point that this court has to accept the subjective satisfaction of the detaining authority as such and cannot go behind the reasons which impelled him to pass the order of detention. If the submission of the AGA is accepted in that case, perhaps, no order of the detaining authority would be subject to scrutiny by this Court . As said above, and as was reiterated by the apex court in **Safiq Ahmad V. District Magistrate Meerut** (AIR 1990 SC –220), it has to be seen by this Court whether the grounds or the reasons supplied to the detenu in support of the detention order were germane to the maintenance of 'public order'. The Court can examine the record and determine the validity whether the order is based on no material or whether materials have national nexus with satisfaction that 'public order' was breached.

8. Having thus cleared the cobwebs created by learned AGA with regard to the jurisdiction of this court to look into the facts on the basis of which detaining authority formed his satisfaction, now it is the time to consider whether on the basis of the material available on record, the instant case relates to the breach of 'law and order or it has disturbed the maintenance of 'public order'. The distinction between the areas 'law and order' and 'public order' has come to be canvassed in a catena of decisions of apex court as well as this court. The oft quoted leading decision in the case **of Dr. Ram Manohar Lohia V. State of Bihar**-A.I.R. 1966 SC-740; **Arun Ghosh V. State of West Bengal** (A.I.R. 1970 SC-1228), came to be considered in the subsequent cases in **Pushkar Mukerji** V. **State of West Bengal** (A.I.R. 1970 S.C.-852); **Narendra Nath Mandal V.State of West Bengal** AIR 1972 S.C.-665); **Kishori Mohan Bera V. State of West Bengal** (AIR 1972 SC-1749); **Amiya Kumar Karmokar V. State of** West Bengal (AIR 1972 SC-2259) **Samresh Chandra Bose V. District Magistrate Burdwan** (AIR. 1972 SC-2481); **Sasthin**

Chandra Roy V. State of West Bengal (AIR 1972 SC- 2134); **Babul Mittra V. State of West Bengal** (A.I.R. 1973 SC-197); **Ram Ranjan Chatterjee V. State of West Bengal**- A.I.R. 1975 SC-609; **Jaya Mala V. Home Seceratry . Government of J&K** – A.I.R. 1982 SC-1297, **Ashok Kumar Vs. Delhi Administration** (A.I.R. 1982 SC- 1143); **State of U.P. V. Kamal Kishore Saini** (A.I.R. 1988 SC-298**), Gulab Mehra V. State of U.P**. (A.I.R. 1987 SC-2332). **Smt. Angoori Devi for Ram Ratan V. Union of India** (A.I.R. 1989 SC-371) **Harpreet Kaur (Mrs.) Harvinder Singh Bedi V. State of Maharashtra**- 1992 A.I.R. SCW – 835; **Smt. Kamlabai V. Commissioner of Police, Nagpur and others** – Jt 1993 (3) S.C.-666. The gamut of all the above decisions in short is that the true distinction between the areas of 'public order' and 'law and order' lies not in nature and quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might effect specific individuals only and therefore, touch the problem of law and order while in another it might effect public order. The act by itself, therefore not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.

9. On both sides, besides the decisions, referred to above, a number of decisions were cited in support of their respective contentions. As a matter of fact, the various decisions only furnish certain guidelines and parameters which may be relevant for the decision of a particular case but this fact cannot be lost sight of that the same act in a given setting may appertain to law and order while in a changed setting may be in the realm of public order. The dare devil way in which the acts were committed, the setting in which the incidents took place, the reaction that followed from these activities, and the repercussion thereof on the locality have to be taken into consideration to determine if the activities fall within the mischief of public disorder. To ascertain whether the order of detention is valid or is liable to be vacated it is not advisable to blindly follow the guideline in a different case. The problem arising in each case, must be considered on its own facts and in the proper setting. To import the ratio of a case vitally connected with facts thereof is bound to have misleading results .

10. An act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentialities of the act is so deep as to affect the community at large and or the even tempo of the community then it becomes a breach of the public order. Learned counsel for the petitioner urged that the case against the petitioner is simply that of taking part in the commission of the crime of murder of Ravindra Pratap Singh who happened to be a teacher. The F.I.R., it was pointed out, indicates that the petitioner as well as his two companions exterminated the deceased on account of enmity at his residence and, therefore, the incident is a case of mere breach of 'law and order' which can be tackled by the general criminal law of the land. Learned AGA, however, repelled the above submission and urged that since the impact of the murder has been that the teachers struck down the work and stopped evaluation of the answer books at different centres, and commotion prevailed at district headquarters, it was a case of disturbance of 'public order'.

11. In a recent decision of this court in 1999 (38) ACC – 563- **Balram Gupa V. Superintendent District Jail Banda**, one Prem Singh, an Executive Engineer, was killed in pursuance of a conspiracy hatched at the residence of the M.A. Khan, Executive Engineer. The deceased was done to death by piercing a screw driver in his stomach. Thereafter, his body was tied by woolen shawl and was put on the Railway track with the design that it sall be cut into pieces by a passing train and it shall be treated as a case of accident. An order of detention under the NSA was passed which was challenged and one of the grounds of apparent 'public disorder' was that the employees of various departments of the district approached the detaining authority and apprised him of their fear and feeling of insecurity they also threatened to boycott the Parliamentary Elections. The detaining authority said that in view of the aforesaid reaction among the employees, maintenance of public order and law and order was seriously threatened. It was also said that by the aforesaid occurrence of murder of Executive Engineer, persons employed in technical services in the entire State, officers and employees of other departments and the public at large fell in a grip of fear and terror. Placing reliance on the Full Bench decision in the case of **Sheshdhar Mishra V.Superintendent Central Jail, Naini and others** –1985 (Suppl.) ACC-304, in which it was observed:

12. "Where in a detention order the detenu was alleged to have committed murder of an Advocate at a public as a result of which local residents closed the doors of their houses and shops and it was further alleged to have threatened the prosecution witnesses to desist from tendering evidence in the murder case pending against him, the two grounds being intimately connected with the incident of murder committed on account of personal animosity and there being no material on record to suggest that the detenu would have indulged into similar activities of murder, in future, it could not be said that the single act of murder had its impact on the society to such an extent as to disturb the normal life of the community, thereby rudely shocking the ordinary tempo of the normal life of the public. Merely because the local residents closed the doors of their houses and shops did not mean that the balanced tempo of the life of the general public was disturbed as a result of which the members of the public could not carry on normal avocation of their life" it was held that no disturbance to even tempo of life was created. Every breach of peace does not lead to public disorder. Reliance was also placed on the decision of the apex court in the case of **Dipak Bose alias Naripada V. State of West Bengal**-1973 SCC (Cri.)-684 in which it was observed that every assault in a public place like a public road and 'erminating in the death of a victim is likely to cause horror and even panic and error in those who are the spectators. But that does not mean that all of such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. In respect of such acts the drastic provisions of the NSA are not contemplated to be resorted to and the ordinary provisos of our penal laws would be sufficient to cope with them. In Habeas Corpus Writ petition No. 3552 of 1998 – **Jiwan Singh V. State of U.P**. and others decided on 17.11.1998 by this Court, an incident had taken place on 30.11.1997 at about 1.30 P.M. when the deceased Shiv Singh, who was taking with another person near a betal shop, was murdered. The detenu and his companions took away the deceased in their vehicle. In the grounds of the detention order, it was mentioned that due to the above incident, an atmosphere of terror prevailed in the locality. No body tried to intervene no gave a chase to the assailants of Shiv Singh. A sense of insecurity gripped the general public. People remained inside their houses out of fear. Confusion was created amongst the passers by on the road. In this manner, even the tempo of life in the locality was disturbed and public order was breached. In these circumstances, the detaining authority was of the opinion that there was every likelihood that after

being released on bail, the detenu will again indulge in such criminal activities which will affect public order. Conscious of the fact that even a single incident taking place at a crowded public place may, in the facts and circumstances, affect public order this court took the view that the incident did not affect the public order. The incident aforesaid can it was observed, reasonably be said to have disturbed law and order at the place but does not have the potential and the reach to affect the even tempo of life of the community and the public at large.

13. Emphatic reliance was placed by learned counsel for the petitioner on the guiding principles laid down by the apex court in 1992 (29) ACC-143 – **Smt. Victoria Fernandes V. Lalmal Sawna and others**; 1988 JIC- 353 (SC)- **Subhash Bhandari V.District Magistrate, Lucknow and others**; 1986 (23) ACC-288 -**Sanjiv Yadav Vs. Union of India and others;** A.I.R. 1990 SC-1086 **Mrs. T.Devaki V. Government of Tamil Nadu and others**. We have thoroughly scrutinized the decisions aforesaid as well as the decisions relied upon by the learned AGA reported in 1994 SCC (Cri)-482-**Veeramani V. State of Tamil Nadu** ; 1999 (1) JIC-361 (Alld)-**Suneel Roy V. State of U.P. and some others** which have already been referred above. There is, at least, one such case of the apex court on which both the parties have placed reliance, namely, 1998 SCC (Cri)-1037- **Tarannum (Smt) V. Union of India and others**; in which the main incident pertained to looting of gold ornaments: wrist watches and cash from the house by the detenu and his associates by wielding knives and pistols. The other grounds of deention was based on an incident relating to alleged threats held out by the detenu himself or through his agent while e was put in jail. After discussing the cases of **Angoori Devi Harpreet Kaur and Ayya alias Ayub** (supra) it was held that the incident pertained to law and order problem and not to the maintenance of public order. In the instant case, the District Magistrate has observed that the teachers had stopped evaluating answer books and staged demonstrations at difference places with the result commotion and tension prevailed in the area. It is common knowledge that whenever a murder is committed and the deceased belongs to a class of employees or profession, the officers and employees of the department assemble to pressurize the administration with a view to take swift action to apprehend the criminals. Such pressures are usually exerted on the administration and the departmental authorities so that the arrest of the culprits is expedited. In the instant case, the teachers were not in the vicinity of locus in Que. They were examining/evaluating answer

books at different centers. They became agitated and stopped work of evaluation of the answer books and staged demonstrations with a view to put pressure on the administration to apprehend the criminals. Their agitation; stoppage of work and demonstrations had nothing to do with the public order. There is nothing on record to indicate that the people living in the locality where the incident of murder took place, were prevented from following their usual avocation.

14. It is also mentioned in the detention order that in case the petitioner is successful in getting the bail he would be released and in the event, he may repeat the crime. This aspect of the matter also came to be considered by the apex court in the case of Smt. Shashi Agarwal V. State of U.P. and others – 1998 SCC (Cri)-178 wherein it was observed that every citizen has a right to have recourse of law. He has a right to move the court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail, it should oppose bail. He cannot be intendicted from moving the Court for bail by clamping an order of detention. The possibility of Court's granting bail may not be sufficient nor a bald statement that the person would repeat his criminal activities, would be enough.

15. Without repeating the facts all over again, suffice it to say that the incident alleged against the petitioner pertained to specific individuals and none of the incidents alleged against the petitioner suggest that his activities endangered public peace or tranquility or his activity was directed towards general members of the public and its unpact was so much in the locality that those living there were prevented from following their normal avocation of life. It s true that the act or incident which may be attributed to the detenu may be reprehensible and yet if it concerns only specific idividuals and it has no impact on general members of the community and has no potentiality of disturbing even tempo of life of the people, it cannot be held to be an activity prejudicial to public order. Merely because the murder had taken place in the brilliat light of the day at 12.30 P.M. in the densely populated locality of Civil Lines at district Headquarters, if cannot be said that the public order was in any manner, disturbed. There is no evidence, as said above to indicate that normal life of the residents of the locality was in any manner disturbed.

16. It is a case where the criminal law of the land shall take care of the petitioner. If the prosecution is able to lead evidence and prove the case against the petitioner beyond reasonable doubt the petitioner shall certainly be punished. Judging the objectionable activities of the petitioner in the totality of the circumstances, we have no hesitation in recording the finding that the questionable activities of the petitioner were not in any manner, prejudicial to the maintenance of public order.

17. In the result, the writ petition succeeds and is accordingly allowed. The petitioner shall be set at liberty forthwith unless he is required to be detained in some other case.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 02.11.1999

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

Civil Misc. Writ No. 37644 of 1999

Km. Sharmishtha Srivastava ...Petitioner
Versus
Vice Chancellor, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur and others ...Respondents.

Counsel for the Petitioner :Shri Shyam Narain
Counsel for the Respondents :Shri Dilip Gupta SC

Constitution of India Article 226- One Cannot suffer for the fault of the department-in this case the university committed mistake and it was responsible for wasting one year of valuable carrier of the petitioner and as such she could claim damages for this fault.

Held,

In these circumstances the University committed the mistake then it has to thank itself. The petitioner who came to know of it in September 1998 when the marks-sheet was supplied to he cannot be made to suffer for it.(para3)

By the Court

1. The petitioner was a regular student of B.A. from Budhya Vidyapeeth Degree College, Naugarh, Siddhartha Nagar which was affiliated to Gorakhpur University. She appeared in B.A. Part III examination of 1997-1998. When the result was declared she was unsuccessful. She received her marks-sheet on 04.09.1998. the petitioner then came to know that she was marked absent in English third paper. She immediately moved an application on 04.09.1998 to the Registrar of the university informing him that the marks-sheet issued to her was incorrect and she had appeared in all the three papers of English subject and requested for a correct copy of the marks-sheet. On 16.09.1998 she received a letter from the principal of the institution directing her to return the incorrect marks-sheet so that the same may be cancelled and a fresh marks-sheet be issued to her on 16.09.1998 the principal cancelled the marks-sheet issued on 04.09.1998. The Gorakhpur University on 08.11.1998 issued the correct marks-sheet of the petitioner of B.A. III examination of the year 1998. She passed BA examination in second division. Due to the incorrect marks-sheet issued to the petitioner she could not be admitted to M.A. (English) as the admission closed by August 1998. The petitioner applied for admission in M.A. (English) for the session 1999-2000 from Gorakhpur University. The petitioner was selected for admission and was placed at SL. No. 54 of the merit list of general category candidate selected for admission which was published on 18.08.1999. when the petitioner went to deposit her fee it was not accepted and she was informed that her admission had been cancelled.

2. In the counter affidavit filed by the university it is stated in paragraph 10 and 11 that the petitioner was admitted due to clerical error as she having passed in 1997-98 she was entitled to be admitted in 1998-99. But since she did not take admission in that year 5% marks were to be deducted under rule 10 therefore, the clerical error was rectified even before the notice could be put on the notice board. I have heard Sri Shyam Narain learned counsel for the petitioner and Sri Dilip Gupta learned counsel appearing for the respondents Rule 10 on which reliance has been placed in the counter affidavit and is quoted paragraph 10 (a) is extracted below " योग्यता प्रदायी परीक्षा उतीर्ण करने के उपरान्त दो वर्ष से अधिक अन्तराल की दशा में किसी भी अभ्यर्थी का प्रवेश नहीं होगा । एक वर्ष अन्तराल पर 5 प्रतिशत एवँ दो वर्ष अन्तराल पर 7 प्रतिशत की कटौती के

उपरान्त प्रवेश लिया जा सकता है । एम0एड0 तथा एल0एल0एम0 में प्रवेश में यह नियम लागू नहीं होगा।"

3. A very perusal of the rule makes it clear that the gap of one year has to be counted from the date the candidate is declared successful it cannot be disputed that the petitioner was declared successful in November 1998. Therefore one year could be counted from that date only. And the first year of admission from that date was 1999-2000 as the admission from 1998-99 had closed in August 1998. The university therefore was not justified in invoking rule 10 and deducting 5% marks under it Even if it is assumed that the petitioners shall be deemed to have been successful in 1997-98 the delay in declaration of her result was caused due to mistake of the university itself it is well established principle of equity and fairness which is the basis of dispensation of stick that no one can suffer for the mistake of fault of the person of the institution who commits the mistake. The mistaken marks-sheet was issued due to the mistake of the University. The petitioner had appeared in all the papers. Her answer books in each paper must have been examined by the university which conducted the examination it in these circumstances the university committed the mistake then it has to thank itself. The petitioner who came to know of it in September 1998 when the marks-sheet was supplied to her cannot be made to suffer for it. The claim in the counter affidavit that there was a gap of one year because the petitioner did not take admission in 1998-99 cannot be accepted as it was impossible in the circumstance for her to take admission in 1998-99. In fact the university has been responsible for washing one year of valuable carrier of the petitioner. She could have claimed damages for this default yet the university instead of realising its mistake and correcting it immediately took recourse to cancel her admission even for next year. I was inclined to award exemplary cost against the university but the learned counsel for the petitioner requested that he was more interested for the petitioner pursuing her student and not to claim any damage or compensation from the university.

4. In the result this writ petition succeeds and is allowed. A Writ of mandamus is issued to the respondents no. 1 and 2 to admit the petitioner in M.A.(English) for the session 1999-2000 and permit her to appear in examinations. The aforesaid directions shall be complied by the respondents with fifteen days from the date a certified copy of this order is produced before respondent no. 2.

In the circumstances mentioned above there shall be no order as to costs.

Certified copy of this order shall be issued within four days by office to the parties on payment of usual charges.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD: 14.10.1999

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

Habeas Corpus Petition No. 27865 of 1999.

Zamir Ahmad **...Petitioner.**

Versus

Government of India and others **...Respondents.**

Counsel for Petitioner :Mr. N.I. Jafri
:Mr. D.S. Misra
Counsel for Respondents :Mr. Mahendra Pratap Singh, AGA
:Mr. N.K. Pandey.

Constitution of India Article 22- Habeas Corpus writ petition-undue and unexplained delay in deciding the representation of the detenue renders the detention to be illegal-Representation sent on 18.4.1999 received by the Central Government on 21.4.99 but the same was rejected on 3.6.99. The dismissal of the representation cannot be delayed or post-poned for want of information from the State Government.

Held,

Since there is no valid and justified reason for the delay in deciding the representation of the petitioner by the Central Government, therefore, this Habeas Corpus Petition Deserves to be allowed only on this ground alone. (Para 10)

By the Court

1. By means of this Habeas Corpus petition, the petitioner, Zahir Ahmad has challenged his detention order dated 6.4.1999 passed by respondent no. 3, District Magistrate, Rampur under

section 3(2) of the National Security Act and his continued detention thereunder.

2. We have heard Sri D.S. Mishra and Sri N.I. Jafri, learned counsel for the petitioner, Sri Mahendra Pratap Singh, Learned A.G.A. and Sri N.K. Pandey, Learned counsel representing Union of India, respondent no. 1

3. Learned counsel for the petitioner has challenged the continued detention of the petitioner as illegal on the ground of inordinate delay on the part of the Central Government in deciding the representation of the petitioner. Learned counsel for the petitioner submitted that the representation of the petitioner was sent on 18.4.1999 by the Jail Superintendent, Rampur,. and the same was admittedly received by the Central Government on 21.4.1999. On the basis of the said representation filed by the petitioner, Central Government required certain vital information from the State Government through a crash wireless message on 22.4.1999 and the same was made available to the Central Government on 31.5.1999. The case of the petitioner was put up before the Joint Secretary, Ministry of Home Affairs, New Delhi on 2.6.1999 The Joint Secretary considered the case and put up the same before MOS(H), Government of India on 2.6.1999. The MOS(H) duly considered the case of the detenue and rejected the representation of the petitioner on 3.6.199.Learned counsel for the petitioner submitted the at in the counter affidavit there is no explanation regarding delay in deciding the representation of the petitioner, as such continued detention of the petitioner is illegal and he is entitled to be released from detention.

4. Sri Mahendra Pratap Singh and Sri N.K. Pandey, Learned counsel representing the respondents have argued that there is no delay on the part of the State as well as Central Government in deciding the representation of the petitioner.

5. While appreciating the arguments made above, we may advert to averments made in paragraphs no 6 and 7 of the counter affidavit filed by Bina Prasad. Under Secretary, Ministry of Home Affairs Government of India, New Delhi. Which read as under:-

> **6. <u>The allegations made in the para nos 10 and 13 and ground (e) of para 21 of the petitioner are denied being incorrect. It is stated that a</u>**

representation dated 18.4.1999 from the detenu was received by the central government in the desk of Ministry of Home Affairs on 21.4.1999 through District Magistrate, Rampur. The representation was immediately processed for consideration and it was found that certain vital information required for its further consideration was needed to be obtained from the State Government District Magistrate, Rampur, through a crash wireless message dated 22.4.1999 the same was desired.

7. That required information was received by Central Government in the Ministry of Home Affairs on 31.5.1999 vide the State Government letter dated 26.5.1999. On receiving the same information on 31.5.1999, the case of the detenue was put up before the Joint Secretary, Ministry of Home Affairs on 2.6.1999. The Joint Secretary considered the case and put the same before MOS(H), Government of Inida on 2.6.1999. The MOS(H) himself duly considered the case of the detenu and rejected the representation of the detenu on 3.6.1999.

6. From what have been stated in the counter affidavit filed on behalf of the Central Government, the question which falls for consideration before us is as to whether t was necessary for the Central Government to seek vital information for the purposes of considering the petitioner's representation and thereafter postpone the disposal of the representation for want of report from the State Government or not.

7. It has been submitted on behalf of the petitioner that the disposal of the representation of the petitioner cannot be delayed or postponed for want of vital information from the State Government, as such, the Central Government wrongly has awaited report of the State Government. Therefore, the reasons which have been put neither valid not cogent. The representation filed by the petitioner should have been decided at the earliest. Had the Central Government not asked or waited for vital information from the State Government, there would have been no reason for not deciding the representation filed by the petitioner earlier. Postponing consideration of the representation of the petitioner for want of

information from the State Government has in no way explained the delay.

8. Learned counsel for the petitioner has relied upon **the decisions reported in 1999 U.P. Criminal Rulling, 208 Mohd Alam Versus State of U.P.(Alld.), 19547 of 1999, Mohar Ali Versus State of U.P. and others(Alld), FFR, 1999,202, Pappu Alias Versus Adhikshat Janpat Karagar, Mainpuri and others, Habeas Corpus Petitioner npo. 35469 of 1998, Lalla alias Arvind Versus Adhikshat, Janpat Karagar, Mainpuri and others, 1999 U.P. Criminal Rulling) 229 Sri Versus State of U.P.** and on its basic submitted that the detention of the petitioner is illegal and invalid on the ground of delay in deciding the representation by the Central Government .

9. We are not impressed by the arguments advanced by the learned counsel for the respondents that right to make representation to the Central Government is neither a fundamental right nor a constitutional right, hence, delay in disposing of thee representation by the Central Government would not result into invalidating the continued detention. **Hon'ble Supreme Court in the case of Raja Mal Versus State of Tamil Nadu and others. 1999 U.P. Criminal Rulling, 158**, has held that even if there is no explanation of short delay, detention is rendered illegal. Paragraph no. 7 of the aforesaid judgment read as under :-

> 7. **It is a constitutional obligation of the Government to consider the presentation forwarded by detenu without any delay. Though no period is prescribed by Article 22 of the Constitution of India for the decision to be taken on the representation "word as soon as not be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court certainly consider whether the delay was occasioned due permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of Court in K.M. Abdullah Kunhi and B. L. Abdul Khader Versus Union of India and others, JT 1991 (1) SC 216. The following observations of the Bench can profitably be extracted here:-**

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

10. In our opinion, [Since there is no valid and justified reason for the delay in deciding the representation of the petitioner by the Central Government, therefore, this Habeas Corpus Petition deserves to be allowed only on this ground alone.]

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

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 12.10.1999

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

Civil Misc. Writ Petition No. 15248 of 1999.

Shri Bahadur Singh Mehta ...Petitioner.

Versus

State of U.P. and another ...Respondents.

Counsel for Petitioner :Shri V.K.Shukla
Counsel for Respondents :S.C.

Constitution of India Article 226 – if any material is sought to be used against a person then copies of the same must be supplied to him so that he has an opportunity of Rebuttal – since the copy of the report dated 3.12.1996 was not supplied to the petitioner – the order impugned passed against principles of natural justice.
Held,

No specific reply has been given to the averment in para 29 of the writ petition that copy of the aforesaid report dated 3.12.96 was not supplied to the petitioner. Thus the allegations in para 29 of the writ petition stand unrebutted. The impugned order was passed in violation of the rules of natural justice since copy of the report dated 3.12.96 was not supplied to the petitioner.(para 10)

By the Court

1. By means of this writ petition, the petitioner has prayed for quashing the impugned order dated 9.12.98 (Annexure 11 to the petition) passed by respondent no. 1 by means of which petitioner has been given censure entry and his one annual increment has been withheld for two years.

2. The petitioner has also prayed for a mandamus directing that he should be promoted to the post of Deputy Director of Education from the date his juniors were promoted.

We have heard learned counsel for the parties.

3. The petitioner is a class one officer and is a member of the U.P. Provincial Education Service Group-A. He was posted as District Inspector of School, Haridwar for the first time with effect from 24.2.90. Prior to that date he was functioning as Principal of various Government Intermediate Colleges and it is alleged in para 3 of the petition that his work and conduct had been exemplary, and his record of service has been outstanding. It is further alleged that he was never issued any chargesheet or given any adverse entry prior to 24.2.90. It is further alleged that due to his exemplary, service record the petitioner was promoted as District Inspector of Schools, Hardiwar w.e.f. 24.2.90.

4. It is alleged in para 4 of the petition that when the petitioner was promoted as District Inspector of Schools, Hardiwar one Sri B. P. Khandelwal had been holding the charge of the post of Director of Education (Secondary) U.P. at Allahabad in para 5 of the petition it is alleged that Sri R. N. Bhargava who was very closely associated with B. P. Khandelwal, had been functioning as District Inspector of Schools, Saharanpur and at the relevant time on 18.2.90 in back date accorded approval to the appointment of 12 adhoc teachers at R. N. Inter College, Bhagwanpur, district Haridwar and the petitioner was saddled with the responsibility of payment of salary to these 12 adhoc teachers. The petitioner after acquiring knowledge of the correct fact passed order-withholding salary of these 12 illegally appointed adhoc teachers and for this reason R.N. Bhargava became hostile to him. In para 6 of the petition it is alleged that Sri R.N. Bhargava in spite of the fact that the petitioner was function as District Inspector of Schools, Hardiwar from 24.2.90 ensured payment of salary to the aforementioned 12 adhoc teachers from the District of Saharanpur for the month of march, 1990 and the further succeeded in briefing Sri B.P. Khandelwal against the petitioner.

5. In para 9 of the petition it is stated that Sri B.P. Khandelwal was bent upon harassing the petitioner and hence the petitioner was communicated an adverse entry dated 26.9.92 against which he made a representation on 30.11.92 to the State Govt. through the Director of Education (secondary), true copy of which is **Annexure 1** to the petition. Thereafter a chargesheet dated 10.6.93 was served on the petitioner containing three charges vide **Annexure 2** to the petition. True copy of the reply of the petitioner is **Annexure 3**. In para 11 of the petition it is stated that the petitioner was due for promotion from the post of District Inspector of Schools to the post of Deputy

Director of Education and the Departmental Promotion Committee met on 14.2.95 but because of the chargesheet dated 10.6.93 sealed cover procedure was adopted and the result of the Departmental Promotion Committee so far as petitioner was conce3rned was kept in a sealed cove. In pare 12 of the petition it is stated that the select list of Deputy Director of Education which was published pursuance to the meeting of the Departmental Promotion Committee contains the name of persons who were junior to the petitioner. The names of theses junior persons are mentioned in para 12 of he petition. In para 13 of the petition it is alleged that thereafter-another chargesheet dated 22.396 was issued to the petitioner containing charges identical to those in the earlier chargesheet. Copy of this chargesheet is **Annexure 4**, and the reply of the petitioner is **Annexure 5** to the writ petition.

6. In para 14 of the petition it is stated that once again a Departmental Promotion Committee met on 26.7.96, and again the petitioner was considered but his result was kept in a sealed cover. In this selection 35 persons were promoted who were all juniors to the petitioner except one Pan Singh Bishth. In para 15 of the petition it is stated that there was complete inaction on the part of the respondents and the enquiry made no progress. In para 16 of the petition it is stated that the Departmental Promotion Committee met for promotion to the post of Deputy Director but again seal cover procedure was adopted regarding the petitioner and the same ground was gain made foundation and basis for with holding the promotion of the petitioner, that is, that there was a charge sheet against him. A select list dated 21.6.97 of Deputy Director of Education is Annexure 6 to the petition. In para 17 it is stated that this select list dated 21.6.97 contains name of persons juniors to the petitioner. Thereafter the petitioner filed Writ Petition No. 25928 of 1997 before this Hon'ble Court. In this petition on 8.8.97 this Court directed that the disciplinary enq1uiry be concluded within four months. True copy of the High Court order dated 8.8.97 is Annexure 7. In para 22 of the petition it is stated that despite this order of the High Court no steps have been taken to conclude the disciplinary proceeding.

7. In Para 23 of the petition it is stated that in the meantime again juniors to the petitioner were promoted to the post of Joint Director of Education on 30.4.98. The petitioner has alleged that he is being harassed consistently due to non-conclusion of the disciplinary proceeding, and has been discriminated against.

8. In para 28 of the petition it is stated that ultimately the impugned order dated 9.12.98 has been passed, copy of which is **Annexure 11** to the petition

9. A counter affidavit has been filed on behalf of respondents. In para 4 of the counter affidavit it is alleged that when the petitioner was posted as District Inspector of Schools, Haridwar some serious irregularities were committed by him and as such departmental proceedings were initiated against him. The petitioner was given full opportunity of hearing and on the basis of the enquiry report a show cause was also given to him.. It was revealed that one Basu Dev Pant Assistant Teacher BSM Inter College Roorkee was promoted on adhoc basis to the post of Lecturer (Sanskrit) without requisite qualification and seniority on the basic of the recommendation made by the petitioner. In view of the relevant rule, the promotion of Basu Dev Pant was rejected. Also one Mahesh Kumar Sharma was promoted on adhoc basis without sending requisition to the Secondary Education Commission and on the basis of promotion given to Mahesh Kumar Sharma the petitioner appointed in his place one Sharmil Singh on adhoc basis treating the vacancy caused due to the vacancy caused by promotion of Mahesh Kumar Sharma as a short term vacancy. The petitioner was found acting against the rules and provisions of the U.P. Higher Secondary Education Service Commission rules and as such the petitioner was given censure entry on 9.12.98 and his annual increment was stopped for two years. In para 5 of the counter affidavit it is stated that the petitioner was promoted as District Inspector of Schools an adhoc basic and till date he had not been given a regular promotion on the post of Deputy Director of Education or on an equivalent post.

10. Having heard learned counsel for the parties we are of the opinion that the writ petition deserves to be allowed. A perusal of the impugned order dated 9.12.98 shows that it refers to some report of the Director of Education dated 3.12.96. In para 29 of the writ petition it is alleged that copy of this report dated 3.12.96 was never made available to the petitioner. The reply of the para 29 of petition is contained in para 24 of the counter affidavit shows. A perusal of para 24 that no specific reply has been given to the averment in para 29 of the writ petition that copy of the aforesaid report dated 3.12.96 was not supplied to the petitioner. Thus the allegations in para 29 of the writ petition stand unrebutted. In our opinion this itself vitiates the impugned order as it was passed in violation of the rules of natural justice since copy of the report dated 3.12.96 was not

supplied to the petitioner. It is a settled principle that in an enquiry if nay material is sought to be used against a person then copies of the same must be supplied in advance to the accused so that he has an opportunity of rebuttal, vide State Bank of India V.D.C. Agarwal, 1993 (66) F.L.R. 164 S.C, Sur Enamel and Stamping Works ltd. Their Workmen, 1963 II L.L.J 367 S.C, A.P. Kashinath Dikshita V. Union, A.I.R. 1986 S.C. 2118, Chandrama Tewari V. Union, 1988 (56) F.L.R. 323 S.C, etc.

11. Moreover in para 30 of the writ petition it is stated that appointment of Basu Dev Pant was cancelled immediately after the correct facts came to the notice of the petitioner and the promotion of Mahesh Kumar Sharma was approved on the resolution sent by the Managing Committee. There is no allegation in the chargesheet that the aforesaid action of the petitioner was on extraneous considerations. The petitioner had acted in discharge of his official duty, and that too, on the resolution of the committee of management. In our opinion, if the petitioner action was illegal it should have been challenged before this Court or before the appropriate authority, but this is not a ground for passing the impugned order.

12. Hence, in our opinion the impugned order dated 9.12.98 is arbitrary and illegal and against the principles of natural justice, and it is hereby quashed.

13. A mandamus is issued directing that the sealed covers relating to the petitioner be opened, and if he has been selected in any of the D.P.C meetings he shall be promoted as Dy. Director of Education from the date on which the persons junior to him have been selected in the earliest of these D.P.C. meetings in which the petitioner has been selected. The petitioner shall also get all consequential benefits and arrears within three months.

Writ Petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 20 1999

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

Civil Misc. Writ Petition No. 34535 of 1999

Rajendra Prasad Gupta & another ...Petitioners
Versus
The State of U.P. & another ...Respondents.

Counsel for the Petitioners : Sri Hemendra Kumar
Counsel for the Respondents : S.C.

Article 226 of the Constitution of India –Ordinarily writ petition against a show cause notice is not maintainable but where the show cause notice is illegal and without jurisdiction, this court is empowered to entertain the writ petition even against the show cause notice.

Held,

The power to issue prerogative writ under Article 226 is plenary in nature and is not limited by any other provision of the Constitution. But the High Court has imposed upon itself certain restriction one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (Para 10)

By the Court

1. The fate of this writ petition would turn out on the determination of twin simple legal questions – firstly, whether a disciplinary authority can order de novo enquiry against a Government servant on the same allegations and charges which have already been dropped, and secondly, whether a writ petition under Article 226 of the Constitution of India against a notice to show cause why the enquiry into the matter be not re-initiated, is maintainable. The controversy emanates in the background of the following facts:-

2. The petitioner no. 1 is Sub Inspector, while petitioner no. 2 is Head Constable in the Civil Police posted respectively at Meerut and Pilibhit. The gravamen of the charge against the petitioners was that they had misbehaved and ill treated Jasbir Singh resident of village Harraiya Kanja, Police Station Gajraula, District Pilibhit who had come to the Police Station to lodge an F.I.R. on 25.11.1993 and that instead of recording the F.I.R, faithfully and correctly, it was deflated to minimize the offence. Notices dated 7.3.1996, Annexures 6 and 7 to the writ petition were issued to the two petitioners to show cause as to why an adverse entry may not be made in their service record for the remissness aforesaid. The petitioners submitted their replies to the show cause notice on 26.3.1996 and 21.6.1996, copies of which are Annexures 8 and 9 to the writ petition. After taking into consideration the explanation/replies submitted by the petitioners and being satisfied by them, the Superintendent of Police, Pilibhit by order dated 1.7.1996, Annexure 10 and by another order dated 30.7.1996, Annexure 11, exonerated the petitioners and discharged the notices. In this manner, the chapter was finally closed and no further departmental proceedings were to be taken against the petitioners. The idea to record adverse entry in the service records of the petitioner was dropped. Subsequently, after about three years, in pursuance of the order dated 16.2.1999 passed by the State Government, fresh notices dated 1.7.1999, Annexures 12 and 13 to the writ petition, were served on the petitioners intimating them that a decision has been taken to initiate departmental enquiry afresh in the matter of alleged impropriety with regard to the F.I.R. lodged by Jasbir Singh on 25.11.1993. They were further required to show cause as to why the proposed adverse entry incorporated in the notices themselves be no made in their service record. It is in these circumstances that the petitioners have come before this court under Article 226 of the Constitution of India with the prayer that the notic4es aforesaid, Annexures 12 and 13 to the writ petition be quashed.

3. Heard Sri Hemendra Kumar, learned counsel for the petitioners as well as the learned Standing Counsel. Since the legal questions involved in the present case are well settled, and stand concluded by authoritative pronouncements of the apex court, as well as this court, instead of dragging this petition unnecessarily, I dispose it of finally with the consent of learned counsel for the parties.

4. Learned Standing counsel frankly conceded that the notices dated 1.7.1999 have been issued with a view to initiate departmental enquiry afresh in respect of the same allegations and alleged impropriety of the petitioner, for which they were proceeded against earlier and the proceedings were finally dropped after consideration of their replies/explanations.

5. Now the question is whether in view of the above indubitable factual position that the departmental enquiry against the petitioners has already been dropped after taking into consideration the reply to the show cause notice and the material available with the Superintendent of Police, Pilibhit, the disciplinary authority, on the direction of the State Government can initiate a second de novo enquiry into the same matter. The legal position on the point is well established. On general principles, there can be only one enquiry in respect of a charge for a particular misconduct, i.e., also what the Rules usually provide. If for some technical or other good ground- procedural or otherwise- the first enquiry of punishment or exoneration is found bad in law, there is no principle that a second enquiry cannot be launched. This aspect of the matter came to be considered by the apex court in the case of **K.R.Deb V. Collector of Central Excise Sheilong** – A.I.R 1971 SC – 1447. It was ruled that if there is some defect in the enquiry conducted by the enquiry officer, the disciplinary authority can direct the enquiry officer to conduct further enquiries in respect of that matter but it cannot direct a fresh enquiry to be conducted by some other officer. In another decision,. in the case of **State of Assam and another Vs. J.N. Roy Biswas** – A.I.R. 1975 S.C. – 2277, the power of the Government for reopening the proceedings in enquiry has been conceded provided a the rules vest some such revisory power. In that case, the delinquent employee was exculpated after enquiry and was reinstated in service. The State Government took into consideration the material of the case and came to the conclusion that the delinquent merited punishment and the proceedings be reopened. This was done and as the done recording of evidence progressed, respondent moved the High Court under Article 226 for a writ of prohibition as in his submission, there was no power to re-open a case concluded by exoneration and reinstatement and the illegal vexation of a second enquiry should be arrested. The grievance of the employee was held good by the High Court which granted the relief sought. The appeal filed by the State of Assam was dismissed observing that though no rule of inhibits a second inquiry by the disciplinary authority after

the delinquent had once been absolved. The matter was further clarified in paragraph 4 of the Report, which runs as follows :-

> "4. We may however, make it clear that no government servant can urge that if for some technical or other good ground, procedural or other, the first enquiry or punishment or exoneration is found bad in law that a second enquiry cannot be launched. It can be ; **but once a disciplinary case has closed and the official reinstated, presumably on full exoneration, a chagrined Government cannot re-start the exercise in the absence of specific power to review of revise, vested by rules in some authority.** The basics of the rule of law cannot be breached without legal provision or other vitiating factor invalidating the earlier enquiry……."
>
> (Emphasis supplied).

Sequel to the above, there is another consistent view of the apex court in **Anand Narain shukla V. State of M.P.** A.I.R. 1979 S.C.-1923 in which second enquiry on merits was held to be permissible as the earlier enquiry was quashed on a technical ground. The law, therefore, is well established that in case the earlier order passed in enquiry is quashed on technical or procedural ground, the fresh enquiry on merits would not be barred. Similarly in **Nahar Singh Vs. Union of India**-19992 (II) L.L.J – 573 (Delhi), drawing from the above decisions of the Supreme Court and also relying on Section 21 of the General Clauses Act, 18897, a division Bench of the Delhi High Court held that in certain circumstance, the disciplinary authority might have the power to direct a de novo enquiry to be held. A Division Bench of the Calcutta High Court has taken a somewhat different view. In **Calcutta Municipal Corporation and others Vs. Dr. S. Wajid Ali and another** – 1993(2) S.L.R. – 631, it was held that where an enquiry officer exonerates the delinquent official on the material disclosed on the departmental enquiry, the disciplinary authority has no jurisdiction to set aside the findings of the enquiry officer and direct a fresh enquiry after taking fresh evidence – de novo enquiry was not permissible under such circumstances. The legal position has further been explained by learned Single Judge of Madras High court in **M. Kolandai Gounder V. The Divisional Engineer, T.N.E.B. Thuralyur and others** – 1997 (1) S.L.R. – 467 (Madras), before whom it was contended that after having conducted and enquiry and

after receiving the report from the enquiry officer holding that the charges were not proved against the petitioner, it is not open to the respondents to tissue the very same charge and conduct another enquiry with reference to the same very same charges. It was ruled that through it is open to the management to take a different view from the views recorded by the enquiry officer ,yet the management cannot go on conducting the enquiry again and again till the guilt of the employee is proved. It amounts to harassment even though the principle of double jeopardy may not be applicable. Ultimately it was held that the second set of disciplinary proceeding with the very same charges which have not been proved, tantamount to harassment and the practice of de novo enquiry was deprecated as being not in the interest of the public service.

6. In view of the above decisions, one thins is very clear that a disciplinary enquiry on the same charges and material is not barred, if the earlier enquiry is vitiated on account of certain technical and procedural flaws. In such circumstances, the employer is at liberty to get the matter re-examined on merits by initiating the second enquiry. Other conclusion, which flows from the above decisions is that if after considering the material on record, the disciplinary authority has found that an employee was not guilty of the charges and has been exculpated of the allegations made against him in that event, the de novo enquiry would be nothing but harassment of the concerned employee and, therefore, the de novo or second enquiry would not be legally permissible.

7. In the instant case, taking into consideration the nature of the allegations, a minor punishment in the form of censure entry was proposed to be inflicted on the petitioners. The petitioners were called upon to show cause why an adverse entry of censure be not made in their service records. Both the petitioners, as said above, submitted their detailed explanations which were considered by the disciplinary authority, i.e., the Superintendent of Police, Pilibhit and he having satisfied himself of the falsity of the allegations made against the petitioners, discharged the show cause notices and exonerated the petitioners of the allegations made against them. This was done in 1996. After a lapse of about three years, again the matter was raked up and the petitioners were served with show cause notices based on the same material with regard to the same incident. Even the proposed punishment in the form of censure entry in the second notice is the true replica of the censure entry proposed in the earlier notices which were discharged. There is nothing on record to

indicate that the earlier orders of discharging the notices issued to the petitioners were vitiated on account of any technical or procedural defect. There is nothing in the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules 1991, which are applicable to the petitioners, to provide that the order of exoneration, or exculpation, of the petitioners on the allegations/charges for which minor punishment was proposed, is subject to revision or review . In the conspectus of this conclusion and the backdrop of the above legal position, the impugned show cause notices issued to the petitioners, proposing the punishment, though minor in nature, on the very same charges and material which were the subject matter of the earlier notices, which stand discharged, are wholly illegal, unjustified and without jurisdiction. The respondents are not entitled in the circumstances of the present case to initiate or commence de novo enquiry against the petitioners.

8. Now it is the time to consider whether the present writ petition is not maintainable against a show cause notice primarily on the ground that the petitioners have an alternative remedy to canvass their point of view before the disciplinary authority. Normally a writ petition under Article 226 of the Constitution of India is not maintainable against a show cause notice. This aspect of the matter was considered in ***Executive Engineer, Bihar State Housing Board Vs Ramesh Kumar Singh and others*** (A.I.R. 1996 SC-691) wherein, the apex court was concerned with the entertainment of the writ petition against a show cause notice issued by the competent authority. In that case there was no attack against the vires of the statutory provisions governing the matter and no question of infringement of any fundamental right guaranteed by the Constitution was alleged or proved. It could also not be said in that case that the notice was ex facie 'nullity' or totally 'without jurisdiction' in the traditional sense of that expression- that is to say, that even the commencement or initiation of the proceedings on the face of it and without anything more, was totally unauthorized. In the backdrop of these facts, the apex court observed as follows:-

> ……..In such a case, for entertaining a writ petition under Article 226 of the constitution of India against a show cause notice, at that stage, it should be shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the party should avail of the alternative remedy and show cause

against the same before the authority concerned and take up the objection regarding jurisdiction also, then. In the event of an adverse decision, it will certainly be open to him, to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article 226 of the Constitution of India."

9. Sri Hemendra Kumar, learned counsel for the petitioners further urged that in certain exceptional circumstances , like the present one, where de novo enquiry cannot be made by the disciplinary authority the show cause notice may be quashed as being without jurisdiction and this court in its plenary jurisdiction to do complete justice may step in to promote the cause of justice by invoking the provisions of Article 226. He also urged that the impugned notices are without jurisdiction and nullity as the same old and stale matter, which already stood concluded by an order of the competent authority, is sought to be raked up. According to him, if an enquiry is held again on the same matter, it would be unfair and violative of the principles of natural justice. In support of his contention, learned counsel for the petitioners placed reliance on the decision of a Division Bench of Lucknow Bench of this court in ***Ramesh Chandra Misra V. Chairman, Central Bank of India*** (1980 (8) L.C.D.-533). On the same point, the decision of Delhi High Court in ***R.N. Atri V. Union of India and another*** (1979) All India Service Law Journal-12) was cited in which the question of the maintainability of the writ petition under Article 226 of the constitution against show cause notice on the ground of alternative remedy by submitting reply to the enquiry officer came to be considered. It was observed that remedy as available to a person which could bar him from approaching the court under Article 226 must be a remedy under any other law and independent to making the plea to the very authority whose jurisdiction has been challenged. If enquiry officer cannot in law hold an enquiry because of the contentions raised by the learned counsel for the petitioner, it is no argument to say that the said points can be urged before the enquiry officer, and, therefore, an alternative remedy is available. An alternative remedy within the meaning of Article 226 (3) must be before an authority other than one whose jurisdiction is challenged.

10. There is a recent celebrated decision of the apex court in ***Whirpool Corporation V. Registrar of Trade Marks, Mumbai and others*** (1998) SCC-1 wherein the question whether a writ petition

under Article 226 against a show cause notice is maintainable was directly involved. The High Court had dismissed the petitioner under Article 226 on the ground of availability of alternative remedy. In that case, a show cause notice was issued to the Whirlpool Corporation by the Registrar of Trade Marks under Section 56 (4) of the trade and Merchandise Marks Act, 1958 as to why the certificate of registration be not cancelled. Against the said notice, the Corporation filed a writ petition in the Bombay High Court On behalf of the Registrar of Trade Marks, it was contended before the apex court that the High Court was fully justified in dismissing the writ petition at the threshold, particularly, as the writ petition was directed only against a show cause notice. It was further urged that the Corporation should have submitted a reply to the notice and allowed the Registrar to dispose of the whole matter on merits, particularly as the Registrar had initiated the action principally on the ground that the appellant had obtained the renewal of the trade mark by mis-representation and concealment of relevant facts. Learned counsel for the Corporation, in reply submitted that where the action initiated by the statutory authority is wholly without jurisdiction, as such, it can be challenged under Article 226 of the Constitution of India and the writ petition cannot be dismissed summarily. The submission made on behalf of the Corporation found favour with the apex court. It was observed that the power to issue prerogative writ under Article 226 is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in part III of the Constitution but also for 'any other purpose'. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the high Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contigencies, namely, there the writ petition has been filed for the enforcement of any of the fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of

the evolutionary era of the constitutional law as they still hold the field.

11. In view of the above legal position, now it would be a myth to say that a writ petition under Article 226 against a show cause notice is not maintainable. Where the notice is illegal and without jurisdiction, this court, which has all pervasive jurisdiction under the said Article, is empowered to entertain the writ petition even in a case in which show cause notice has been issued. It would be fruitless exercise to drive the petitioners to submit replies to the show cause notice. A Government servant cannot be harassed by making him to run from pillar to post. The present writ petition against show cause notices is held to be maintainable.

12. In the result , the writ petition succeeds and the impugned notices dated 7.7.1999 (Annexures 12 and 13 to the writ petition) are hereby quashed as the petitioners cannot be subjected to harassment by undergoing the rigours of the second enquiry which for the reasons stated above, is barred by law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD OCTOBER 6, 1999

BEFORE
THE HON'BLE D.S. SINHA, J,
THE HON'BLE ONKARESHWAR BHATT, J.

Civil Misc. Writ Petition No. 201 of 1997 (Tax)

Sahara India Ltd. and another ...Petitioners.
Versus
Commissioner of Income Tax and others ...Respondents.

Counsel for the Petitioners: Shri Devendra Pratap
Shri S.E. Dastur Senior Advocate
Counsel for the Respondents: Sri Bharatji Agarwal Senior Advocate
SC

Constitution of India Article 226–where the impugned order has been passed at Lucknow and no part of cause of action arose out

side the jurisdiction at Lucknow Bench of the Court- the writ petition was held to be cognisable by Lucknow Bench only.

Held,

The cause of action to maintain these petitions arose within the territorial jurisdiction of the Lucknow bench of the Court, and that no part of cause of action arose within the territorial jurisdiction of the Court at Allahabad.

Petitions are dismissed as not maintainable for want of territorial jurisdiction. (para 18 & 19)

By the Court

1. Order dated 24th January, 1997, passed by the Assistant Commissioner of Income Tax, Central Circle-III, Lucknow, the respondent No. 2, under sub-section (2A) of section 142 of the Income Tax Act, 1961, hereinafter called the 'Act', is under challenge in these petitions, under Article 226 of the Constitution of India which are before the court for admission.

2. Sri Bharatji Agarwal, learned Senior Advocate appearing for the respondents, raises preliminary objection regarding the maintainability of the writ petitions at Allahabad. He submits that the cause of action for institution the writ petitions arose within the territorial jurisdiction of Lucknow Bench of the Court in as much as the impugned order was passed at Lucknow, and that no part of the cause of action arose outside the jurisdicti0on of Lucknow Bench of the Court. Thus, according to the learned counsel, the writ petitions are cognisable by Lucknow Bench alone.

3. Countering the submission of the learned counsel of the respondents,, Sri S.E. Dastur, learned Senior Advocate representing the petitioners, submits that the writ petitions are maintainable at Allahabad also in view of the fact that the order of 'previous approval' for passing the impugned order, envisaged in sub-section (2A) of section 142 of the Act, was accorded by the Commissioner of Income Tax (Central), the respondent No. 1, at Kanpur, which is within the territorial jurisdiction of the Court at Allahabad.

4. In view of the decision of the Hon'ble Supreme Court rendered in Nasiruddin Vs. State Transport Appellate Tribunal, reported in AIR 1976 Supreme Court at page 331, which, as pointed

out by the Hon'ble Supreme Court in its later decision rendered in U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs. State of U.P. and others, reported in AIR 1995 Supreme Court at Page 2148, still holds good, and no other binding precedent having been placed before the court, it cannot be gainsaid that it the cause of action for maintaining the petitions is held to have wholly arisen at Lucknow, the petitions will be cognisable by Lucknow Bench of the Court, and that if it is found that the cause of action to maintain the petitions arose partly at Lucknow and partly at Kanpur the petitions would be cognisable at both the places namely, Lucknow and at Allahabad, and in such a situation the petitioners being dominus litis will have choice to maintain the petitions either at Lucknow or Allahabad.

5. Thus, the real question which the court is called upon to decide, in substance, is as to when and where the cause of action to maintain the petitions against the order of the respondent No. 2 dated 24th January , 1997, passed in exercise of powers under sub-section (2A) of section 142 of the Act, arose.

In the writ petitions, the petitioners have prayed for the following relief's:

(a) "that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ order or direction under Article 226 of the Constitution of India calling for the records of the first petitioner's case and, after examination the legality and validity thereof, pass appropriate orders and directions to quash and set aside the impugned order dated 24th January, 1997, being Exhibit "X" hereto;

(b) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions, under Article 226 of the Constitution of India, ordering and directing Respondent No. 2 to withdraw forthwith the impugned order dated 24th January, 1997, being Exhibit "X" hereto;

(c) that this Hon'ble Court may be pleased to declare the provisions of Section 142 (2A) as violative of Articles 14 and 19 of the Constitutions of India;

(d) that pending the hearing and final disposal of the present petition Respondent No. 2, his servants and agents, be

restrained by an order and injunction of this Hon'ble Court from taking any steps in furtherance of or pursuance to be impugned order dated 24th January, 1997 being Exhibit "X" hereto;

(e) for ad-interim reliefs in terms of prayer (d) above;

(f) for costs of this petition;

(g) for such further writs, orders and directions as the nature and circumstances of the case may require."

6. It is to be noticed that relief claimed in the petitions is against the order dated 24th January, 1997 passed by the respondent no. 2, at Lucknow, and no relief has been prayed for quashing the order of 'previous approval' passed by the respondent No. 1, under sub-section (2A) of section 142 of the Act.

7. For asserting that cause of action to maintain the petitions arose at Kanpur which falls within the territorial jurisdiction of the Court at Allahabad attention of the Court is invited to grounds (u) and (v) raised in the petition in support of the reliefs claimed. Grounds (u) and (v) run as under:

"(u) Because the sanction allegedly granted by the Respondent No. 1 to the issuance of the impugned order is vitiated by total non-application of the mind to the factors precedent to the exercise of jurisdiction under Section 142 (2A). The petitioner submit that the sanction was granted mechanically and or dictated by extraneous consideration and the impugned order that has been passed pursuant to the mechanical sanction must be set aside."

"(v) Because no reasonable person properly instructed could have ever granted his sanction to the issuance of the impugned order. The petitioners, therefore, submit that the entire proceedings are vitiated in the absence of a valid sanction and the impugned order must be set aside."

8. A bare perusal of the grounds (u) and (v) extracted above, reveals that the main focus of attack is on the validity of the impugned order, and not on the order of the Commissioner according 'previous approval to the order. It is true that for attacking the

impugned order the petitioners have stated that 'previous approval" granted by the respondent No. 1 was mechanical and dictated by extraneous consideration, and for that reason entire proceedings are vitiated. Therefore, the impugned order must be set aside. The submission of the petitioners pointing out infirmities in according the 'previous approval' by the respondent No. 1 may constitute foundation of the ground of challenge to the impugned order. The infirmities in according 'previous approval' themselves do not furnish the cause of action to maintain the petitions. The cause of action to the petitioners arose on passing the impugned order, and not merely on grant of 'previous approval' by the respondent No. 1 for passing the impugned order.

9. Learned counsel appearing for the petitioners draws attention of the Court also to the averments made in paragraph 4 of the rejoinder-affidavits filed in answer to the counter-affidavits filed on behalf of the respondents No. 1 and 2. The averments made in these paragraphs too enumerate various infirmities in the 'previous approval' granted by the respondent No. 1.

10. The Court refrains from expressing any opinion on the merits of various infirmities alleged to have been committed by the respondent No. 1 while granting 'previous approval' as it may prejudice the case of the petitioners against the impugned order.

11. In the context of the controversy, it would be apposite to notice the provisions of sub-section (2A) of section 142 of the Act which reads as below:

> "(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and

such other particulars as the Assessing Officer may require."

12. Section 142 (2A) of the Act ordams the Assessing Officer that before directing the assessee to get the accounts audited by an accountant, as defined in Explanation below sub-section (2) of section 288 nominated by the Chief Commissioner or Commissioner in that behalf, he should from an informed objective opinion that it is necessary so to do, keeping in view the nature and complexity of accounts of the assessee and the interests of the revenue. It also mandates the Assessing Officer to obtain approval of the Chief Commissioner or Commissioner before directing the assessee to get the accounts audited by an accountant. The twin requirements of forming of an informed objective opinion by the Assessing Officer and prior approval of the Chief Commissioner or Commissioner are conditions precedent for passing an order in exercise of powers under section142(2A)of the Act. In the absence of any of the two conditions the order of the Assessing Officer will be contrary to law.

13. In the exercise of powers under sub-section (2A) of section 142 of the Act there are three consecutive stages, namely, (a) formation of opinion by the Assessing Officer, (b) grant of approval by the Chief Commissioner or Commissioner; and (c) order by the Assessing Officer directing assessee to get the accounts audited by the defined accountant. Stages (a) and (b) pertain to the mode and manner in accordance with which the Assessing Officer will exercise power of passing order directing the assessee to get the accounts audited by the designated accountant.

14. Illegality in the mode and manner of exercise of power to pass an order is procedural illegality. It may render the order bad in law. It is the illegal order which results in pain and injury giving rise to cause of action, and not the illegality of mode and manner of exercise of power to pass the order.

15. At stages (a) and (b) there will be no occasion for the assessee to be aggrieved. It is at stage (c), i.e. when the order directing audit of accounts by the specified accountant is passed by the Assessing Officer, the assessee gets aggrieved. Unless the Assessing Officer directs the assessee to get the accounts audited the assessee will have no cause of distress or injury. In the absence of direction for getting the accounts audited by the nominated accountant, neither mere formation of requisite opinion by the

Assessing Officer nor grant of approval by the Chief Commissioner or Commissioner can cause any pain or injury calling for redress.

16. Therefore, in reference to the context, it is the act of the Assessing Officer directing audit by the defined accountant and the resultant injury which will furnish cause of action to the assessee. The cause of action will arise whenever and wherever the order giving direction to the assessee is passed by the Assessing Officer.

17. The respondent No. 2 passed the order directing the assessee to get the accounts audited by the nominated accountant on 24th January, 1997 at Lucknow, and the alleged resultant injury to the petitioners was caused at Lucknow. Thus, there is no escape from conclusion that the cause of action to maintain these petitions arose on 24th January, 1997 Lucknow when and where the respondent No. 2 passed the impugned order. The grant of 'previous approval' by the respondent No. 2, at Kanpur, is wholly irrelevant for the purposes of determining the cause of action in as much as grant of 'previous approval' by the respondent No. 1 did not furnish any cause of action to the petitioners for maintaining these petitions.

18. For what has been said above, the court is clearly of the opinion that the cause of action to maintain these petitions arose within the territorial jurisdiction of the Lucknow Bench of the Court; and that no part of cause of action arose within the territorial jurisdiction of the Court at Allahabad. The objection of the respondents regarding the maintainability of the petitions at Allahabad is upheld.

19. In the result, the petitions are dismissed as not maintainable for want of territorial jurisdiction. However, it is clarified that dismissal of these petitions shall not preclude the petitioners from filing fresh petitions before the Lucknow Bench of the Court, if there is no other impediment of law.

Petition Dismissed.