APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE A.K. YOG, J.

Special Appeal No.37 (Defective) of 2000

Life Insurance Corporation of India ...Appellant
Versus
Special Judge (Anti-Corruption), Varanasi ...Respondents.

Counsel for the Application:
Shri Manish Goyal
Shri R.P. Goyal

Counsel for the Respondents:
S.C.
Suman Sirohi

2. Chapter VIII rule 5 of Allahabad High Court Rules- No Special appeal is maintainable against a Judgement rendered in exercise of jurisdiction conferred by Article 226 of the Constitution of India in respect of an appellate order passed by the appellate authority under the payment of Wage Act as this Act had been passed by the parliament with reference to entries 22 to 24 of the concurrent list.
Held –(para 5)
The Jurisdiction exercised by the Appellate Authority, Whose order was the subject-matter of challenge in the writ petition was, therefore, referable to an Act made by the parliament with reference to Entries 23 and 24 of the Concurrent List and not to Entry 47 of the Union List.

By the Court

1. This special appeal is directed against the judgement and order dated 1.11.1999 of a learned Single Judge by which Writ Petition No. 34897 of 1999 filed by the appellant was dismissed.

2. Anwar Khan (predecessor-in interest of respondent nos. 4 to 11), who was working as development officer in Life Insurance Corporation of India (in short, the LIC), was retired from Service on 30.04.1979 after he attained the age of 58 years. He challenged the retirement order by filing a civil suit on the ground that his age of superannuation was 60 years. The suit was decreed and the appeal preferred by the LIC was also dismissed. Thereafter, the LIC filed Second Appeal No.1662 of 1982 in this Court, which was admitted and is pending for hearing. However, no stay order was granted in favour of the appellant-LIC. Thereafter, Anwar Khan filed a petition before the Payment of Wages Authority claiming wages for the period 30.04.1979 to 30.04.1981 and some other amounts under different heads, which was allowed by the Authority on 11.06.1993. The LIC preferred an appeal against the said order before the Appellate Authority but the same was dismissed on 07.05.1999. This order was challenged by filing the writ petition which was dismissed by a learned single Judge on 01.11.1999.

3. Sri K.P. Agarwal, learned senior counsel for the contesting respondents, has raised a preliminary objection is that in the facts of the present case no special appeal is maintainable under Chapter VIII Rule 5 of the Allahabad High Court Rules. Learned counsel for the appellant has, however, contended that the appeal is maintainable under the aforesaid provision. The language of Chapter VIII Rule 5 of the Allahabad High Court Rules shows that no appeal shall lie against a

judgement rendered in exercise of jurisdiction conferred by Article 226 of the Constitution in respect of any judgement or order made or purported to be made in exercise of appellate jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution. This position of law is not disputed by the learned counsel for the appellant. The subject-matter or challenge in the writ petition was an appellate order passed by the Appellate Authority under the Payment of Wages Act. This Act has been passed by the Parliament with reference to entries 22 to 24 of Concurrent List Entries 22 to 24 read as under:-

"22. Trade Union; industrial and labour disputes.

23. Social security and social insurance; employment and unemployment .

24. Welfare of labour including conditions of work, provident funds, employers liability, workmen's compensation, invalidity and old age pensions and maternity benefits."

4. The claim made by Anwar Khan before the Payment of Wage Authority was basically a claim for wages for the period during which he was wrongly retired and certain other amounts based upon the same cause of action and this claim was founded upon the decree passed by the civil court in his favour. The Authority determined the liability of the employee namely, the LIC, under the Payment of Wages Act. This Act has been enacted with reference to Entries 22 to 24 of the Union List. Therefore, the order passed by the Appellate Authority which was the subject-matter of challenge in the writ petition was under an Act which has been made by the Parliament with respect to matters enumerated in the Concurrent List. It is well-settled that if a writ petition is directed against an appellate order passed in exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, no appeal would be maintainable against the judgement and order of the learned single Judge. This view has been taken by a Division Bench, of which one of us was a member (G.P. Mathur, J.), in S.B. Nath Vs. Committee of Management, Anglo-Bengali Inter College, Allahabad and Others, 1995 AWC 1469, and also in Kaushal Kishore Singh Vs Shiv Karan Mishra and Others 1995 AWC 1987. Therefore the Special Appeal is not maintainable.

5. Learned counsel for the appellant has contended that Anwar Khan was retired from service in accordance with Life Insurance Corporation of India Staff Regulations. Which had been made in exercise of power conferred by Life Insurance Corporation Act which has been made with reference to Entry 47 of the Union List and, therefore, the Special appeal is maintainable, We are unable to accept this submission made. The dispute before the payment of Wages Authority or before the Appellate Authority was not with regard to the applicability of Life Insurance of India Staff Regulations to Anwar Khan. Or to the question as to whether he had been rightly retired at the age of 58 years. This dispute was the subject- matter of adjudication in the civil suit, where in the claim of Anwar Khan

was upheld and the Suit decreed. The dispute before the Payment of Wages Authority was only confined to the question whether Anwar Khan had been wrongly denied wages or some wages were due to him, and this was founded upon the decree wherein it had been held that his age of superannuation was 60 years. The jurisdiction exercised by the Appellate Authority, whose order was the subject-matter of challenge in the writ petition was, therefore, referable to an Act made by the Parliament with reference to Entries 23 and 24 of the Concurrent List and not to Entry 47 of the Union List. Learned Counsel has referred to two decisions of this Court in Yuvraj Dutta Singh Vs. Prescribed Authority, AIR 1968 Alld 305, and State of U.P. Vs. B.N. Singh, AIR 1971 Alld 359, in support of submission that the special appeal in maintainable. We have carefully considered the authorities cited and, in our opinion, they do not at all deal with the controversy involved here, We, therefore, find substance in the preliminary objection that the special appeal is not maintainable.

6. The Special appeal is accordingly dismissed summarily at the admission stage.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2000

BEFORE
THE HON'BLE J.C. GUPTA, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 4167 of 2000

Sri Kuldeep Singh and others...Petitioner
Versus
The State of U.P. through Trade Tax Officer & another ...Respondents

Counsel for the Petitioners:
Mr. A.K. Rathore

Counsel for the Respondents:
A.G.A.

3. Article 226 of the Constitution of India- when the first information report discloses the congnizable offence, it cannot be quashed. The question of examining the truthfulness or otherwise of the allegations made in F.I.R. is not to be gone by the Court but it is to be examined by the Investigating Agency.

Held—(para –6)

In appropriate cases, if the Court is convinced that the power of arrest will be exercised wrongly or mala-fidely or in violation of Section 41 (1) (a) of the Code of Criminal Procedure, writ of madamus can be issued restraining the police from misusing its legal power. However, the order of staying arrest may be granted sparingly in the exceptional cases.

By the Court

1. In the above noted writ petitions common questions of law are involved. Therefore, all the writ petitions are taken

up together for disposal regarding which the learned counsel for the petitioners of each petition have no objection.

2. We have heard learned counsel for the petitioners in each petition, the learned A.G.A. and have gone through the record.

3. It was contended by the learned counsel for the petitioners that the F.I.R. has been lodged on wrong facts. Having gone through the first Information Report of the respective writ petition we find that First Information Report of each case discloses commission of congnizable offence. It is well settled law when the First Information Report discloses a congnizable offence, the truthfulness of the allegation and the establishment of the guilt can only take place, When the investigation is done or trial proceeds. The probability or genuineness of the allegations made in the First Information Report cannot be gone into in a proceeding under Article 226 of the Constitution of India. Therefore, we find no ground for quashing of the impugned First Information Reports.

4. The learned counsel for the petitioners relying on judgement of this Court in M. S. Krishna Traders Kanpur Nagar Vs. State of U.P. and others (Criminal Misc. Writ Petition No. 1037 of 1999 decided on 2nd February, 2000) reported in 2000 UPTC 274 contended that in view of Section 14 of Trade Tax Act., the Trade Tax Authority had no jurisdiction to lodge report and the report lodged by Trade Tax Authority is patently without any cause and is an abuse of the process of criminal law. But it was held in Subsequent Division Bench case of Ashok Kumar Vs. State of U.P. and others (Criminal Misc. Writ Petition No. 2059 of 2000 decided on 28.04.2000 that it seems to us that the attention of the Bench was not drawn to express provision of Sec. 14 of the Trade Tax and its finer notes to find out whether the penalty provided there of is without prejudice to the liability under any other law for the time being in force. ……Decisions relied upon do not merit to be of any binding efficacy nor can be termed as decision ad rem " Moreover, the said decision in M/s. Krishna Traders Kanpur Vs. State of U.P. (supra) was based on decision of this Court in New J.T.C. Corporation New Delhi Vs. State of U.P. and Others, 1999 U.P.T.C. 1226. The Apex Court in Civil Appeal No.3380 of 2000 State of U.P. and Others Vs. M/s. New J.T.C. Corporation decided on 11.05.2000 set aside the above judgement and held as below:-

"After hearing both sides we think that investigating agency must be permitted to complete the investigation and file the final report. We refrain from expressing any opinion regarding the merits of the contentions, lest, they may affect one or the other of the parties. However, while setting aside the impugned order, we make it clear that the part of the impugned order by which the truck was released will not be affected by this order. It is open to either party to raise all their contentions at the appropriate stage. Therefore, we dispose of his appeal without prejudice to such rights."

5. In view of above decision of Apex Court the decision relied on by the learned counsel for the petitioners is not binding on us.

6. It was further contended that the arrest of the petitioners may be stayed

during investigation. We have already above found that the First Information Report disclose cognizable offence and therefore F.I.R. can not be quashed. It has been held by Full Bench of this Court in Satya Pal and others vs. State of U.P. 2000(40) ACC, 75, that in appropriate cases, if the Court is convinced that the power of arrest will be exercised wrongly or mala-fidely or in violation of Section 41 (1) (a) of the Code of Criminal Procedure, writ of mandamus can be issued restraining the police from misusing its legal power. However, the order of Staying arrest may be granted sparingly in the exceptional cases and with circumspection that too in rarest of rare cases keeping in mind that any relief, interim or final during investigation which has the tendency to slow or otherwise hamper the investigation should not be granted.

7. As already pointed out above the question of examining truthfulness or otherwise of the allegations made in the First Information Report is not to be gone into by this Court, as the same is to be determined by the investigating Agency during investigation. We hope and trust that the Investigating Agency shall act honestly, fairly and independently while making investigation and take legal recourse against the petitioner only when it is necessary to do so.

8. Lastly it was contended that goods seized may be released in favour of the petitioners. But no such prayer has been made in any of the writ petition. Moreover, order for interim custody of the goods may be made by the Court having jurisdiction to take cognizance of the case and the petitioners are at liberty to make such prayer before appropriate Court.

9. The above writ petition nos. 4167 of 2000, 4257 of 2000, 4258 of 2000 4283 of 2000, 4289 of 2000 and 4299 of 2000 are dismissed with the aforesaid observations.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 28.07.2000

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

Criminal Revision No. 1353 of 2000

Smt. Swarn Manjal ...Petitioner.
Versus
State of U.P. and another ...Respondents.

Counsel for the Petitioner:
Shri Raghubir Singh

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

4. Section 204 Cr.P.C.—the Magistrate has power to recall the summoning order passed under section 204 Cr.P.C. and can discharge the accused on the request of the accused that no offence is disclosed against them and the prosecution is barred by any law for the time being enforced.

By the Court

1. This is a revision under Section 397/401 Cr.P.C. The facts giving rise to this revision are as follows:

2. The opposite party no.2 filed a complaint against the revisionist and three other for offences under Section 406 I.P.C. and 138 N.I. Act which was case

no.792 of 1998 pending before VIth Additional Chief Judicial Magistrate, Agra. The learned Magistrate recorded the evidence under Sections 200 and 202 Cr.P.C. and thereafter passed the order under Section 204 Cr.P.C. summoning the revisionist. In compliance of the process issued against the revisionist, the revisionist appeared and filed objections pleading that no case is made out against her and therefore, the order of summoning her under Section 204 Cr.P.C. be recalled. The application was not considered on the merits. On the other hand, it was rejected only on the ground that objections against the order for issuing summons are not maintainable in view of the decision of Full Bench of this Court in the case of **Ranjit Singh and others Versus State of U.P. and others, 2000 (1) JIC 399**. Feeling aggrieved by this order, the revisionist has approached this Court.

3. I have heard Sri Raghubir Singh, learned counsel for the revisionist and the learned A.G.A.

4. This revision involve a question of law only regarding which there are several decisions of this Court and therefore, I think it proper to consider the matter in detail to clarify the law, on the point at the admission stage itself.

5. The important decision on this point was delivered by Hon'ble Mr. Justice S.R. Singh in the well known of **Kailash Chaudhary and others Versus State of U.P. and others, 1993 (30) A.C.C. 665** which was being universally followed by the subordinate courts of Magistrate in this State. Broadly speaking the following two prepositions were laid down in the above case:

1) That the order under Section 204 Cr.P.C. for issue of process is an interlocutory order and the revision against that order is barred by clause (2) of Section 397 Cr.P.C.

2) The order under Section 204 Cr.P.C. is an interim order which can be varied, rescinded or recalled by the Magistrate and the Proceedings could be dropped, if the Magistrate found that no offence was disclosed.

6. This decision of Kailash Chaudhary (Supra) came for consideration before the Division Bench of this Court in **Uma Kant Pandey Versus Addl. Chief Judicial Magistrate, Karvi, 1996 A.Cr.888.** The Division Bench of this Court patially over ruled the judgment of Kailash Chaudhary (Supra). The preposition no.1 mentioned above was over ruled by the Division Bench, but preposition no. 2 was upheld. It was observed by the Division Bench "In view of what we have discussed hereinbefore we find that barring the observations of Hon'ble S.R. Singh, J. that order issuing the processes under Section 204 Cr.P.C. is an interlocutory order against which no revision would lie in the High Courts in view of the bar under Section 397 (2) Cr.P.C., rest of the judgment of Brother S.R. Singh, J. in the case of Kailash Chaudhary and others meets our full approval."

In the above background I consider the decision of the Full Bench in the case of Ranjit Singh and others (Supra) which have been relied upon by the learned Magistrate to reject the application of the revisionist to recall the order passed under Section 204 Cr.P.C. The question referred to the Full Bench was "Whether a

Magistrate/Court before rejecting "Final Report" filed by the Investigating Officer has to hear the accused on his appeaing voluntarily or after notice irrespective of the fact whether or not the informant is proposed to be heard with or without a protest petition challenging the said "Final Report". The Full Bench considered the various decisions on this question and answered the question as follows:

" That There is no scope to uphold that the accused should be afforded an opportunity by the Magistrate/Court before accepting or rejecting a final report submitted by the police after investigation of a F.I.R."

8. The decisions of the cases of Kailash Chaudhary (Supra) and Uma Kant Pandey (Supra) were incidentally considered by the Full Bench in the above case of Ranjit Singh (Supra). Regarding the case of Kailash Chaudhary (Supra) it was observed "that the decision is neither correct on facts nor law and does not lay down the correct law." The decision of Division Bench of Uma Kant Pandey (Supra) so far as it confirmed the decision of Kailash Chaudhary (Supra) in part was also over ruled. Relying on this decision of the Full Bench the learned Magistrate therefore had held that an application to recall the order under Section 204 Cr.P.C. is not maintainable and there is no provision for the same.

9. In the cases noted above reference was also made to the decision of the Hon'ble Supreme Court in the case of K.M. Mathew Versus State of Kerala J.T. 1991 (4) SC 464 and was relied on in the case of Kailash Chaudhary (Supra) and Uma Kant Pandey (Supra). It was laid down in that case that the Magistrate has jurisdiction to recall the process. However it was observed by the Full Bench that correctness of the decision of the case of K.M. Mathew (Supra) was doubted by the Hon'ble Supreme Court in the case of **Nilamani Routry Versus Bennet Colemn and Co. Ltd., 1998 (8) SCC 594.** It was observed that "K.M. Mathew case requires re-consideration for it is settled law that a power of review has to be conferred by law specifically and Cr.P.C. does not confer such power." It was further observed that "it is desirable that the matter be heard by a Bench of three Judges." The another reason for not accepting the view expressed by the Apex Court in the case of K.M. Mathew (Supra) was that it was a summons trial in which on the appearance of the accused and praying for dropping of proceedings, the Magistrate can exercise powers conferred upon him by the provisions of Section 258 Cr.P.C. It was observed that this provision of Section 258 Cr.P.C. does not apply to warrant trial or the Sessions trial. The law laid down in the case of K.M. Mathew (Supra) is regarding summons cases instituted on a complaint.

10. In the present case I am not concerned with the preposition of law laid down by the Full Bench on the question referred to it. The consideration before me is the law laid down in the case of Kailash Chaudhary (Supra) and Uma Kant Pandey (Supra) which have been over ruled by the above Full Bench. The decision of the Full Bench was delivered on 12.11.1999. However, it appears that an important decision of the Apex Court on the controversy before me omitted from the attention of the Full Bench which is of great assistance. That decision is in the case of **Rajendera Kumar Sita Ram**

Pandey and others Versus Uttam and another, 1999 (3) SCC 134. It was decided by the Apex Court on 11.02.1999. In that case the appellant before the Hon'ble Supreme Court were accused in a case for offence punishable Under Section 500/34 I.P.C. The Magistrate after recording the evidence Under Section 200 and 202 Cr.P.C. issued summons to the accused persons to appear to stand trial for offence Under Section 500/34 I.P.C. That order of the Magistrate was challenged by the accused in the revision before the Sessions Judge. The learned Sessions Judge set aside the order of the Magistrate issuing process against the accused after coming to the conclusion that the case is covered by exception 8 to Section 499 I.P.C. Aggrieved by the order of the Sessions Judge, the complainant approached the High Court Under Section 482 Cr.P.C. The High Court set aside the order of the Sessions Judge on the finding that the order of the Magistrate is an interlocutory order and the Sessions Judge had no jurisdiction Under Section 397 Cr.P.C. to interfere with the same. Against that order the accused approached the Hon'ble Supreme Court by means of an appeal in which it was held by the Hon'ble Supreme Court that the order of the Magistrate directing issuance of the process is not an interlocutory order and therefore amenable to the revisional jurisdiction of the Sessions Judge. Therefore, by this decision preposition no. 1 mentioned above laid down in the case of Kailash Chaudhary (Supra) has been over ruled by the Apex Court. However, the following observation of the Apex Court in this case is very material and supports the preposition no.2 laid down in that case. It was observed that "In view of the matter, requiring the accused persons to face trial or even to approach the Magistrate afresh for reconsideration of the question of issuance of process could not be in the interest of justice." By this observation, the Apex Court has recognized the right of the accused to approach the Magistrate afresh for reconsideration of the question of issuance of process with the request to recall the order.

11. Another latest decision of the Apex Court in the case of **K.K. Patel and another Versus State of Gujrat and another, J.T. 2000 (7) SC 246** is very material regarding this point. In this case the complaint was filed in the court of Magistrate against the police officers for officers Under Sections 166,167,176,201,219,220,342, 417 I.P.C. The Magistrate took cognizance of the offences and processes were issued Under Section 204 Cr.P.C. to the accused persons. The accused on appearance before the Magistrate filed a petition for discharge briefly for the reason that no sanction was obtained to prosecute them. The Metropolitan Magistrate considered the matter and by very detailed judgment rejected the request for discharge observing that it will be decided on merits after considering the evidence produced by the parties. The accused, therefore, filed revision against that order before the Sessions Judge. The Sessions Judge held that there was no sanction for prosecution and the complaint is also barred by time and therefore, he quashed the complaint and also the summoning order. Thereafter the complainant approached the High Court. The High Court set aside the order of the learned Sessions Judge on the ground that the order was inter-locutory and the revision could not be entertained. The accused therefore, approached the

Hon'ble Supreme Court in an appeal. The Hon'ble Supreme Court allowed the appeal and restored the order passed by the Sessions Judge dismissing the complaint.

Therefore, this case is also an authority on the point that the accused persons on appearance after being summoned Under Section 204 Cr.P.C. may file a petition for discharging them. The very fact that the petition for discharging the accused and dismissing of the complaint was allowed by the Apex Court show that it was held that the application for this purpose is maintainable before the Magistrate passing the summoning order. The contrary view taken by the Full Bench in the case of Ranjit Singh (Supra) is not in conformity with the above two decisions of the Apex Court and therefore, can not be followed.

12. In the light of the above discussions, therefore I find that the decision of the Full Bench in the case of Ranjit Singh (Supra) to the extent that it over ruled the preposition no.2 mentioned above of the case of Kailash Chaudhary (Supra) is not a good law. In view of the decision of the Apex Court, the Magistrate has power to recall the summoning order passed Under Section 204 Cr.P.C. and can discharge the accused on the request of the accused that no offence is disclosed against them or the prosecution is barred by any law for the time being enforced.

13. In view of the above the learned Additional Chief Judicial Magistrate, has erred in rejecting the application of the applicant on the ground that it is not maintainable in view of the decision of the Full Bench in the case of Ranjit Singh (Supra).

14. The revision is therefore allowed. The learned Magistrate is directed to consider and dispose of the application of the applicant on merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 28th JULY, 2000

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

Civil Misc. Writ Petition No. 17439 of 1988

Nabbu Khan ...Petitioner.
Versus
IIIrd Addl. District Judge, Pilibhit & others ...Respondents.

Counsel for the Petitioner :
Mr. R.N. Bhall
Mr. Somesh Khare

Counsel for the Respondents:
Mr. Ajit Kumar
Mr. S.A. Gilani

Code of Civil Procedure Order 21 r-35-aplication putting resistance by an stranger-not maintainable heirs of the said stranger also has no locus standi to file writ petition that held not maintainable.

Held Para 16 and 22.

If a stranger has no right to intercept or intervene at this stage, he cannot claim any right to prefer a revision or make an application under Article 226. Against an order passed under Order 21, Rules 35, a stranger has no right.

Even then if it is so converted into an application under Article 227 of the Constitution, still then the position

would not change. In as much the stranger having no right to intervene at this stage in an execution proceeding, the heirs of Nabbu Khan cannot invoke jurisdiction under Article 227 of the Constitution.

By the Court

1. After hearing Mr. R.N. Bhall and Mr. Somesh Khare for the applicants and Mr. S.A. Gilani, and order dated 18th July, 2000 was dictated in open court disposing of the said application after having allowed the substitution on the ground that the impugned order arose out of a proceedings under Order 21, Rule 97 of the Code of Civil Procedure. Which was otherwise appealable and no revision lies. And therefore, the case was remitted to the court for deciding the revision directing it to create the memo of revision as a memo of appeal in exercise of its appellate jurisdiction since the order determining the question under Rule 98 or under Rule 100 of Order 21 of the Code are deemed decrees by reason of Rule 103 of Order 21 Mr. Khare had pointed out that the impugned orders were passed in proceeding arising under Order 21,Rule 97. This question was specifically pointed out to Mr. Gilani, who conceded to the situation. Therefore the said order was passed. Subsequently at the time of correcting the order, certain confusion cropped up. The records were perused and it was found that the application on the basis where of the impugned orders were passed, Were not an application under Order 21 ,Rule 97. The confusion was created that the order was related to the application filed in 1980 by the decree holder under Order 21 Rule 97. At that point of time, Mr. Gilani did not place the relevant materials and failed point out that these proceedings had no connection with the proceedings under Order 21, Rule 97 , which stood terminated by an order dated 10th January, 1985. Having regard to the said situation , the order was not signed and the matter was placed for orders in the computer list. Both the unusual were intimated. It was adjourned from time to time on the ground of absence of the counsel for the respective parties.

2. Today, the matter has since been taken up and heard. I have heard Mr. Sonmesh Khare, learned counsel for the applicant as well and Mr. S.A. Gilaini for some time.

In order to appropriate the situation, it would be nonofficial for us to refer to the facts giving rise to these proceeding

3. The decree holder Alauddin had filed an application under Order 21, Rule 97 on 9th May, 1980 in connection with Execution Case No.7 of 1980 before the Additional Munsif IIIrd Court, Pilibhit, which was registered as Misc. Case. Non 13 of 1980. In the said application, it was pointed out that the execution was resisted by one Nabbu Khan. The said Misc. Case was dismissed by an order dated 10th January ,1985. In the said order it was pointed out that on 8th April, 1980. The Amin had pointed out that there was a resistance in the execution of the decree. In the said order, the learned Judge had pointed out that the limitation for making an application under Order 21, Rule 97 is 30 days from the date or resistance There fore according to him, the question of resistance arose or 8th April, 1980. Whereas the application under Order 21, Rule 97 was made on 9th May, 1980.Therefore, it was beyond 30 days. But the said application did not accompany an application under Section 5

of the Limitation Act, On his ground, the application under Order 21, Rule 97 was dismissed.

4. Thus there was no adjudication on the merit of the case. Neither there was any finding that Nabbu Khan was in possession of the suit property. Subsequently the decree holder had filed an application on 10th May,1985 for issuing Parwana. Copy of the said application is not annexed with this petition. Neither Mr. Khare nor Mr. Gilani was able to produce a copy of the application made on 10th May, 1985. However, in the order dated 10th July, 1985, by which the application dated 10th May, 1985 was rejected mentioned that there was again an application under Order 21, Rule 57 for issuing Parwana for delivery of possession. But the fact remains that there cannot be any question of making an application under Order 21,Rule 57, which relates to the question of attachment, But from the prayer, that was made in the application, as was mentioned in the order dated 10th July ,1985, was that the decree holder had prayed for issuing a Parwana for delivery of possession. Such an application can be made under Order 21, Rule 35. However, Mr. Gilani submitted that by mistake an application under Order 21, Rule 37 has been ascribed as made under Order 21 ,Rule 57.

5. Be that as it may, by an order dated 10th July. 1985 the application was rejected on the ground that once the application under Order 21,Rule 97 having been rejected and a different person having been found in possession, the application for issuing Parwana could not be maintained in view of the order dated 10th January 1985.

6. Admittedly, this order is a evirable one and Civil Revision No. 36 of 1985 was filed by the decree holder, which was allowed by an order dated 13th September, 1988 treating the application dated 10th May, 1985 as an application under Order 21 Rule 35 and by directing issue of Parwana for delivery of possession under the said provision. This order has since been challenged by Nabbu Khan in a proceeding under Article 226 of the Constitution of India before this court.

7. The said Nabbu Khan is now dead, An application for substitution was filed by judgement debtor Yusuf, which has since been dismissed by an order dated 18th July,2000. Thereafter, Mr. Khare had presented an application for substitution on behalf of the sons of Nabbu Khan claiming to be substituted on the ground that they were heirs of Nabbu Khan.

8. In this writ petition the order dated 13th September, 1988 has since been challenged. In this background the entire question is to be looked into Therefore, both the substitution application filed by the heirs of Nabbu Khan as well as the writ petition itself was taken up for hearing simultaneously. In order to decide the issue , which involves a very interesting question of law.

9. Mr. Bhalla had made submissions on behalf of Yusuf while Mr. Somesh Khare had made submission on behalf of heirs of Nabbu Khan. Mr. S.A. Gilani has made submissions on behalf of the decree holder.

I have heard the learned counsel for the respective parties as mentioned herein before.

10. Admittedly, the claim of Nabbu Khan and his heirs as advanced by Somesh Khare is that Nabbu Khan is in possession of the suit property being subject matter of the decree. It is claimed that the decree cannot be executed against Nabbu Khan, who had claimed title to the property by virtue of adverse possession since 1966.This question could have been gone into in the proceedings under Order 21. Rule 97.But the said question has not been adjudicate of the ground that the application under Order 21, Rule 97 was made on 9th May.1980 while the resistance was made on 8th April, 1980 being beyond 30 days from 8th April,1980 .It appears that the application was late by two days. But the said application was not accompanying by any application under Section 5 of the Limitation Act and as such the application was dismissed as barred by limitation.

11. Thus there was no adjudication on the rights of the parties and the petition was dismissed on the ground being barred by time once the execution having failed on account of resistance by some parties, it is open to the decree holder to apply for fresh parwana for fresh execution. The principal enunciated in Section 11 of the Code does not apply to an execution proceedings under Order 21, Rule 97. Once a decree is to be satisfied. The only exception is to the extent that either the decree is inexcusable on the ground of various reasons that are permissible within the scope and ambit of the Code of Civil procedure or that it is unexcitable against the property for some reason that the property cannot be identified or it is not the suit property or that someone else who had interest in the property is not bound by the deuce or that the suit is sought to be executed against a person against whom it cannot be executed on account of the fact that he is not bound by the decree. But these questions are subject to adjudication on an application under Order 21, Rule 97 and could be gone into by reason of Order 21 ,Rule 98. But in this case no such adjudication was made .As such there was no scope to apply the principal of the judicate, which applies in the case where a question is decided. Here, the question having not been decided. The principle of resjudicata cannot be attracted.

12. Be that as it may, the character of an application is to be determined on the basis of the substance of the application and the relief's claimed. The application that was made was for issue of Parwana for delivery of possession. Which can be had under Order 21 Rule, 35.The said application even if inscribed as an application under Order 21, Rule 57, the same cannot be treated as such since Rule 57 has no manner of application in the present case and the relief's that was claimed was not as relief within the meaning of Rule 57 .Similarly if it was an application under Order 21,Rule 37, the same was a mistake, since Rule 37 applies to money decree and not with regard to delivery of possession of an immovable property which is being sought for in the present case. Thus there is no alternative but to conclude that application was one under Order 21, Rule 35 and nothing else. The said view finds support from the observations made in the order dated 10th July, 1985, in which it was mentioned that it was an application for issuing parwana for deli very of possession.

13. Since such an application could not be dismissed on the ground that the application under Order 21, Rule 97 was

dismissed by an order dated 10th January,1985. Therefore, the trial court was not justified in rejecting the application by an order dated 10th July,1985. Thus the said order was passed in illegal exercise of jurisdiction or in other worked it has failed to exercise it jurisdiction and as such the revision court had rightly fo7nd that the decree holder was entitled to make a fresh application under Order 21, Rule 97 and by reason of Order dated 10th January, 1985 dismissing the application under Order 21, Rule 97 as barred by Limitation. The application under Order 21, Rule, 35, could not have been thrown out and an appropriate order ought to have been passed. The said application was mentioned as an application under Order 21, Rule 35, which pre supposes that the mention of Order 21, Rule 57 might be a clerical or typographical mistake. AT the same time, it may be presumed that Mr. Gilani had made his submissions on the basis of his presumption since he was handicapped in absence of a copy of the said application.

14. Be that as it may, in view of the prayers made in the said application, it was noting but an application under Order 21, Rule 35. Thus the court had jurisdiction to issue Parwana for delivery of possession. In absence of a decision on merit on the application under Order 21, Rule 97 adjudicating the rights of the parties as contemplated under R7ule 98. It is not open to the judgment debtor or the person resisting the execution of the decree to raise any objection in issuing any order under Order 21, Rule 35.

15. Be that as it may, at the stage of the proceedings under Order 21, Rule 35, Nabbu Khan who in order to claim his independent right resists the execution of the decree is neither a necessary party or he is entitled to any notice. In as much as the parwana is issued for delivery of possession of the suit property in execution of the decree. At the time of issuing the parwana, it is not necessary to as certain as to who is in possession. If anyone claims that he si in possession still then the same may not be gone into under Order 21,Rule 35, the court does not prescribe any such procedure to entertain any objection by anyone else other then the judgment debtor while deciding an application under Order 21, Rule 35. Specific provisions having been provided in Rule 98.The contention of Mr. Khare cannot be accepted that the stranger in the execution proceedings has a right to intervene. If such a contention is accepted. In that event the execution will be am impossible proposition . The judgment debtor may invite his neighbours and friends to intercept and intervene at every stage and thereby rendering the whole execution proceeding redundant and inconclusive for all time to come and it will give rise to unnecessary proceedings

16. If a stranger has no right to intercept or intercept or intervene a this stage. He cannot claim any right to prefer a revision or make an application under Article 226. Against an order 21, Rule 35, a stranger has no right . But then the said Nabbu Khan was not a party in the execution proceedings and therefore, he cannot claim any right independently through proceedings under Article 226 relating to a civil proceedings. In as much as the question is to be determined under the provisions of the Code of Civil procedure. By reason of Section 141 of the Code. The provisions of the Code are not applicable in a proceeding under

Article 226 and as such by no stretch of imagination an application under Article 226 could be maintained against a proceeding relating to civil matters particularly in the facts and circumstances of the present case challenging the execution, that too, by a stranger at a stage when a stranger has no right to intervene.

17. This application preferred by Nabbu Khan could not be maintained on account of absence of a locus standie. Then again the heirs of Nabbu Khan claiming through Nabbu Khan cannot have any right to espouse the cause of Nabbu Khan even if they are permitted to be substituted in the proceedings.

18. Mr. Gilani had made an application for abatement of the petition on the ground of death of Nabbu Khan. But as soon heirs of Nabbu Khan has intervened. Then the petition could be maintained and would be maintainable. But the heirs of Nabbu Khan would be prevented from getting themselves substituted in the proceedings. Since these questions require to be gone into, therefore, for the sake of convenience, the heirs of Nabbu be substituted in the place and stead of the deceased Nabbu Khan and be substituted in the present writ petition and be permitted to carry on the writ petition.

19. In fact Mr. Somesh Khare appearing on behalf of heirs of Nabbu Khan has been permitted to make his submission on the application as well, Since the matter has been heard on merits, therefore, it is justified that the application be allowed. Since both the application for the substitution and the writ petition was taken up on merit by consent of the parties, therefore, the matter is treated as on day's list and also be decided on merit in view of the observations made herein before.

20. Since Nabbu Khan has no right as a stranger to the decree to intervene at this stage therefore, the application under Article 226 made by a stranger Nabbu Khan could not be maintained and as such is liable to be dismissed.

Mr. Khare had made a prayer for converting this application into one under Article 227 of the Constitution.

21. The prayer is allowed. The application is permitted to be converted into one under Article 227 of the Constitution of India.

22. Even then if it is so converted into an application under Article 227 of the Constitution, still then the position would not change. In as much the stranger having no right to intervene at this stage in an execution proceeding, the heirs of Nabbu Khan cannot invoke jurisdiction under Article 227 of the Constitution.

23. Having gone through the order dated 13th September, 1988 passed in Civil Revision No. 36 of 1985 reversing the order dated 10th May, 1985 passed in Misc. Case NO. 13 of 1980 arising out of Execution Case No.7 of 1980, I do not find any infirmity so as to intervene in exercise of power of superintendence under Article 227 of the Constitution of India..

24. In that view of the matter, this petition fails and is accordingly dismissed. No cost. The leaned executing court is directed to expedite the execution

in accordance with law. All questions with regard to the merits and the claims of the respective parties shall remain open to be agitated in appropriate proceeding if occasion so arise.

APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 02.08.2000

BEFORE
THE HON'BLE SHYMAL KUMAR SEN, C.J.
THE HON'BLE G.P. MATHUR, J.

Special Appeal No. 864 of 1998

Jayanti Prasad Dwivedi ...Petitioner.
Versus
University of Allahabad, through its Vice Chancellor ...Respondents.

Counsel for the Appellant:
Shri B.B. pual

Counsel for the Respondents:
Shri B.B. Paul

Article 226 of the Constitution of India the decision of the University regarding the cancellation of the examination result of the petitioner was taken without affording him an opportunity of hearing-the show cause notice was not served on the petitioner- the decision of the University cannot be sustained and has to be quashed

Held-(Para 4)

Ordinance 1.3 of the Ordinances on the use of Unfair means and causing Disturbances in Examination(Chapter XXVIII) of the Ordinances of Allahabad University lays down that a candidate found using unfairmeans in an examination shall be served with a notice therefore in the examination hall itself and if he refuses to accept or avoids or escapes personal receipt of such notice. Such notice shall be sent to him by registered post. Since the material placed before us does not show that the notice was sent to the appellant at the correct address. WE have to accept the appellant's plea that the decision of the University was taken without affording him an opportunity to given a reply, The decision of the University dated 8.12.1997 cannot be sustained and h as to be quashed.

By the Court

1. This special appeal is directed against the judgment and order dated 17.8.1998 of a learned Single Judge by which writ petition no. 13786 of 1997 filed by the appellant was dismissed.

2. The appellant appeared in L.L.B. IInd Year examination of the year 1993. Which was held in the year 1997. It is the case of the University that while appearing in the IVth paper on 9.4.1997, the appellant was caught red handed and some printed material relating to the aforesaid paper was seized from his possession. A notice was given to the appellant and, thereafter. By the order dated 8.12.1997, the examination of L.L.B. IInd year of the year 1993 in which he was appearing in 1997 was cancelled. The appellant preferred the writ petition challenging the aforesaid decision dated 8.12.1997 of the University but the same was dismissed by a learned Single Judge on 17.8.1998.

3. Learned counsel for the appellant has submitted that the impugned order dated 8.12.1997 has been passed by the University without issuing any show cause notice and without giving him any opportunity of hearing. The judgment and order of the learned Single Judge does not show that this point had been urged by the

appellant at the time of hearing of the writ petition. On the country what was urged before the learned Single Judge was that the material which is alleged to have been seized from the possession of the appellant had not been used by him during the course of the examination. The learned Single Judge was of the opinion that the use of the material would not make any difference as the mere possession of the material relating to the subject was sufficient to prove the charge of using unfair means and on this finding dismissed the writ petition. However, as the question of career of a student is involved we permitted the learned counsel to urge the contention regarding not giving of an opportunity to the appellant to show cause against the charge levelled against him.

4. The specific case pleaded in para 9 of the writ petition is that neither any charge sheet was given nor any show cause notice was served upon the appellant and as such there was violation of principles of natural justice. It is stated in para 9. 10 13 14 of the counter affidavit filled on behalf of the respondents that the appellant was given a show cause notice in the examination hall itself but as he refused to accept the same and sign in the relevant form. The same was sent to him by registered post on 6.5.1997 at his local address. It is further stated that since the appellant did not submit any reply to the show cause notice. The university authorities took an expert decision and passed the order for cancellation of the examination. The contention of the appellant is that he did not receive the registered notice as the same was not sent tat his correct address. We have considered this aspect of the mater carefully. We are satisfied by the material placed before us by the learned counsel for the university that the notice was not sent to the appellant at his correct address. Since the notice was not sent at the correct address. It is not possible to hold that the show cause notice was actually served upon the appellant. Ordinance 1.3 of the Ordinances on the Use of Unfair means and Causing Disturbances in Examination (Chapter XXVIII) of the Ordinances of Allahabad University lays down that a candidate found using unfair means in an examination shall be served with a notice therefor in the examination hall itself and if he refuses to accept or avoids or escapes personal receipt of such notice. Such notice shall be sent to him by registered post. Since the material placed before us does not show that the notice was sent to the appellant at the correct address. We have to accept the appellants plea that the decision of the University was taken without affording him an opportunity to give a reply. The decision of the University dated 8.12.1997 cannot be sustained and has to be quashed.

5. In the result the writ petition succeeds and is hereby allowed. The order dated 8.12.1997 passed by the respondents is quashed. The respondents are directed to declare the result of the appellant of L.L.B IInd year examination of the year 1993. Which was held in the year 1997. The appellant shall appear before the respondents no.2on 28.8.2000.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: AUGUST 03, 2000

BEFORE
THE HON'BLE M.C. JAIN, J.

Civil Misc. Writ Petition No. 22658 of 1993

Dharmendra Pal Dwivedi ...Petitioner.
Versus
The District Inspector of Schools, Bulandshahar and another .Respondents.

Counsel for the Petitioner:
Shri Raj Kumar Jain

Counsel for the Respondents:
Miss. Hina Rizvi
S.C.

U.P. Intermediate Education Act, 1921, Ss. 2(d), 7-AA and 15 readwith Regulation 29 – Resignation by Principal without giving three months notice or pay in lieu thereof on 23.4.93. Acceptance by Committee of Management on 27.4.93 and approved by the Society (Bhartiya Shiksha Samiti) on 12.5.93- Held, acceptance of resignation before expiry of three months as required under regulation 29, is illegal – Hence reinstatement ordered.

So, it emerges that the resignation submitted by the petitioner on 23.04.93 could not be accepted before the expiry of three months as he had neither given three months salary nor had the management committee exempted him from giving the notice of three months. The writ petition itself was filed on 25.06.93 viz. before the expiry of three months reckoned from the date of resignation dated 23.04.93 He has even made a representation to the District Inspector of Schools on 03.06.93 (annexure-8 to the writ petition) whereby he had challenged the acceptance of the resignation. In this view of the matter, he deserves to be reinstated, ignoring the resignation letter dated 23.04.93 and its so-called acceptance by respondent no.2 before the expiry of three months reckoned from 23.04.93.

Case Law discussed.
1982 UP. LBEC 476
1985 UP. LBEC 560

By the Court

1. The petitioner has sought a mandamus declaring the resolutions dated 21.12.92 and 11.5.93 as null and void and that he continues to be the Principal of the college and is entitled to his salary.

2. The case of the petitioner is that he was the Principal of Suraj Bhan Saraswati Vidhya Mandir, Inter College, Shikarpur, Bulandshahr, a recognised institution under the U.P. Intermediate Education Act. The college is being run by a registered society known as as Shikarpur Shikha Kalyan Samiti. The college was earlier a Junior High School which was upgraded as High School in the year 1989 and thereafter as Intermediate College. The petitioner was the Head Master of Junior High School and became the Head Master of High School when it was upgraded. On up gradation of the school as Intermediate College he was promoted as Principal by resolution of Managing Committee and was confirmed on a monthly salary of Rs.1700/-. The Committee of Management by resolution letter dated 21.12.1992 held that the petitioner had committed certain irregularities and without affording any opportunity to him and by letter dated 23.12.92 he was directed not work as Principal as to give the charge to Sri Chandra Pal Singh. He was attached with the head office of the Society at Vrindaban. He proceeded on

leave from 26.12.1992 to 30.6.1993 as he was in disturbed state of mind because of the serious illness of his wife. The leave was sanctioned to him on 30.12.92. He sent a letter dated 26.4.93 to the Manager by registered post on 28.4.1993. He contended that the resolution dated 21.12.1992 and the letter dated 23.12.92 were absolutely illegal. By letter dated 12.5.1993, the Manager informed him that he had submitted his resignation letter on 23.4.93 which had been accepted by the Committee of Management in its meeting dated 11.5.1993. As per this letter dated 12.51993 of the Manager, the resignation letter dated 23.4.1993 had personally been handed over by the petitioner to Manager of the College on 24.41993. The contention of the petitioner is that he never resigned and the said resignation had been forged. In the alternative, it is submitted that the resignation letter dated 23.4.1993 could be effective only after three months viz., with effect from 23.7.1993. Being inoperative before 23.7.93, it could not be accepted on 11.5.1993. in view of the applicable regulations. It is with these allegations that the writ petition has been filed.

3. The contest has been put forth by respondent no.2, the Committee of Management of the College in question. The defence, shortly put, through counter affidavit is that the institution is not on grant-in-aid. It is a private institution run by a registered society and has its own scheme of administration. The college is only recognised for the purposes of syllabus and examination. In the meeting of the Committee held on 21.12.1992, one of the resolutions related to the transfer of the petitioner. The petitioner was also present. He had been transferred and attached to the main office. He applied for leave from 26.12.1992 to 30.6.1993 which was sanctioned to him. He submitted his resignation dated 23.4.1993 to the Manager of respondent no. 2 on 24.4. 1993 which was accepted. The meeting of the Committee of Management was held on 27.4.1993 and the resignation of the petitioner was accepted. The resolution was sent to Bhartiya Shiksha Sansthan where it was approved on 12.5.1993. The petitioner voluntarily retired and no writ could be filed by him against the society running the college.

4. I have heard Sri Raj Kumar Jain, learned counsel for the petitioner, learned Standing Counsel for respondent no. 1 and Miss Hina Rizvi, learned counsel for the respondent no. 2.

5. The main thrust of learned counsel for the respondent no.2 is that since the college in question is not on grant –in aid and is being run by a society, the regulations framed under Section 15 of the U.P. Intermediate Education Act, 1921 would not apply. Reference has been made to Section 7-AA of the said Act and it has been urged that the college has simply been recognised for the purposes of syllabus and examination.

6. It may be pointed out that Section 7-AA of the Act aforesaid relates to employment of part-time teachers or part-time instructors. The term “Recognition” has been defined by Section 2 (d) of the said Act as meaning recognition for the purpose of preparing candidates for admission to the Board’s Examinations. It is an admitted fact that the college in question is a recognised institution. This being so, it cannot be accepted that the said recognition is of a qualified nature

and for limited purpose only. The recognised institution, as the college in question is, would be bound by the provisions of U.P. Intermediate Act, 1921 and the regulations made thereunder. The power for employing the part-time teachers and part-time instructors as per Section 7-AA of the Act does not detract from the efficacy of the institution being recognised and the consequences flowing from such recognition. Therefore, regulations framed under the Act would be applicable to the present case.

7. It may also be stated at this stage that the copy of resignation letter dated 23.4.1993 submitted by the petitioner has been filed as Annexure CA-5 by respondent no.2. It contains the signatures of the petitioner and also an endorsement of the Manager of the college that it was presented to him by the petitioner personally on 24.4.93. It is not acceptable that it is a document forged by respondent no.2. So, it is to be taken that the petitioner did submit his resignation letter on 23.4.93. The resignation letter, inter-alia, states that owing to family circumstances and for the reason that he had planned to work elsewhere, he was voluntarily tendering his resignation. He also made a request that his special leave be cancelled and resignation be accepted.

8. The argument of the learned counsel for the petitioner is that even if he tendered his resignation on 23.4.93, it could be effective only from 23.7.93 viz. after expiry of three months as provided by Regulation 29 which reads as under:

29. कोई कर्मचारी नोटिस देकर अथवा उसके बदले में वेतन देकर, जिसके लिये वह प्रबन्ध द्वारा उसकी सेवायें समाप्त किये जाने की स्थिति में अधिकारी होता, त्याग पत्र दे सकता है । प्रतिबन्ध यह है कि .....

1. कोई कर्मचारी जनवरी, फरवरी अथवा मार्च के मास में समाप्त होने वाली नोटिस नहीं देगा ।

2. ग्रीष्मावकाश नोटिस की अवधि में सम्मिलित कर लिया जायेगा ।

3. राजकीय सेवा अथवा किसी स्थानीय निकाय की सेवा की नियुक्ति हेतु चुने गये कर्मचारी को आवश्यक नोटिस देने की आवश्यकता न होगी और उसे नई नियुक्ति में कार्यभार ग्रहण करने के लिए समय से अपनी सेवा से त्याग पत्र देना होगा यदि पद के लिये उचित सारिणी से प्रार्थना पत्र दिया है ।

उपरोक्त प्राविधान लिपिक, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित है, पर लागू होंगे किन्तु चतुर्थ वर्गीय कर्मचारियों के सम्बन्ध में उपरोक्त प्रतिबन्धात्मक खण्ड के प्राविधान लागू नहीं होंगे ।

4. प्रबन्ध समिति को यह अधिकार होगा कि नोटिस के दावे में छूट दे दे ।

9. It is an admitted fact that the petitioner neither gave three months' notice nor three months' pay in lieu thereof while tendering the resignation on 23.4.93, but the case put forth by respondent no.2 is that the meeting of Committee of Management was held on 27.4.93 and resignation of the petitioner was accepted which was approved by the society (Bhartiya Shiksha Samiti) on 12.5.93, vide Annexure CA-7.

10. A Division Bench of this Court has laid down in the case **Shivraj Singh Vs. Shri Devi Mal Asha Ram Paliwal and Others 1982** UPLBEC 476 as under:

"In such case where the employee has not exercised his discretion by not actually paying the three months pay or giving the 3 months notice of resignation as required by Regulation 29 read with Regulation 26, the resignation cannot be termed as a valid resignation before the expiry of three months from the date lodging of the resignation letter itself. The resignation would be deemed to be ineffective before the expiry of three months from the date on which the resignation was lodged with the management."

It was followed subsequently in the case of **Giriraj Sharma Vs. State of U.P. and others** 1985 UPLBEC 560.

11. So, it emerges that the resignation submitted by the petitioner on 23.4.93 could not be accepted before the expiry of three months as he had neither given three months salary nor had the management committee exempted him from giving the notice of three months. The writ petition itself was filed on 25.6.93 viz. before the expiry of three months reckoned from the date of resignation dated 23.4.93. He had even made a representation to the District Inspector of Schools on 3.6.93 (annexure-8 to the writ petition) whereby he had challenged the acceptance of the resignation. In this view of the matter, he deserves to be reinstated, ignoring the resignation letter dated 23.4.93 and its so-called acceptance by respondent no.2 before the expiry of three months reckoned from 23.4.93.

12. The writ petition filed as back as on 25.6.93 has come to be decided after more than seven years. There was no interim stay order in favour of the petitioner. The point that I wish to make is that in all probabilities, the petitioner must have gainfully engaged himself during all these years after submitting resignation letter dated 23.4.93. It may be stated at the risk of repetition that the fact was mentioned by him in resignation letter also that he had planned to work else where.

13. It has to be taken note of that the tendering of resignation was the voluntary act of the petitioner owing to his family circumstances and on account of his having planned to work elsewhere as mentioned in the resignation letter. The relief of reinstatement is being granted to him for technical reason of non-compliance of Regulation 29. The question of back wages has to be decided having regard to the facts and circumstances of a particular case. In the present case, it would be just and proper to balance the equities between the parties that the petitioner should be made entitled to salary only from the date of his reinstatement.

14. To sum up, petition is allowed in that respondent no.2 is directed to reinstate the petitioner within one month from the date of production of certified copy this order. The petitioner would be entitled to his salary and allowances from the date his reinstatement. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD : 08.08.2000

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

Civil Misc. Writ Petition No. 7261 of 1995

Prem Singh ...Petitioner
Versus
Engineer- In-Chief, P.W.D., Lucknow & Others. ...Respondents.

Counsel for the Petitioner:
Shri Rajesh D. Khare

Counsel for the Respondents:
S.C.

Constitution of India, Article 226 Interpolation in service record- resulted premature retirement- direction issued to release the post retirel benefit along with 18.1. interest with cost of Rs.25000/- from personal benefit of the officer held responsible – within one month.

Held- (Para 12 & 13)

The officer concerned responsible for maintenance of record and for interpolation the service record should be brought to book. It is further directed that the respondents shall ensure release of petitioner's post retiral benefits. The respondents are directed to pay 18% interest per annum on amount due, for delayed payment for no fault of the employee on the petitioner as held in the recent judgement of the Apex Court in 2000 (1) Allahabad Civil Journal 824. Also reference be made to the cases reported in 1996 (Vol.37) III AWC 1525 (DB), 1982 UPLC 1097 (DB).

Writ petition is allowed with costs which I quantify at Rs.25,000/- to be paid within one month of receipt of judgement and to be recovered from the erring official.
Case law discussed.
2000 A C J 824 (Vol 37) III
III AWC 525 (DB)
1982 U.P.L.C. 1097.

By the Court

1. This writ petition under article 226 of the Constitution of India has been filed praying for a writ of certiorari to quash the impugned order dated 23.2.1995 (Annexure-6 to the writ petition) and for writ of mandamus commanding the respondents not to interfere in petitioner's functioning as work-agent till the petitioner attains the age of superanuation and to pay him regular salary month by month and other allowances also.

2. This writ petition was filed by the petitioner in the year 1995. The respondents were granted time to file a counter affidavit and the petitioner to file rejoinder affidavit. No counter affidavit has been filed. The writ petition was dismissed on 13.7.1995. Petitioner filed a restoration application which was allowed by the court on 12.5.1997, i.e. after about twenty two month i.e. more than one and half year.

3. Learned counsel for the petitioner stated that petitioner was not allowed to work and paid salary after February,1995.

4. In brief the undisputed facts of the case are that the petitioner was appointed as work agent in the Department of PWD, Government of U.P. in the year 1985. Subsequently he was confirmed vide order dated 23.3.1969 (Annexure-2 to the writ petition), which indicates that he was appointed on 1.3.1968 as work agent on temporary basis.

5. The petitioner states that due to some personal grudge of the authorities he is being dealt with in an arbitrary manner.

6. The learned Standing counsel has pointed out that a counter affidavit has been filed in the registry. It is not on record. Sri R.D. Khare, learned counsel for the petitioner placed a supplementary affidavit before this court which was received way back by the learned standing counsel. The respondent in para –4 of their counter alleged interpolation in the date of birth of petitioner in service record. It is to be disbelieved. The date of birth of petitioner purports to have been recorded by over writing in service record as 15.7.39 which should have been normally prepared when petitioner joined the services. According to the respondent no cutting or over writing has been made in the date birth of the petitioner . It is against record. However, the date of birth (15.7.39) apparently been made on the basis of the certificate dated 15.7.1976 given by the Superintendent of District Hospital, Muzaffarnagar; Photostat copy of which is annexed part of Annexure-3-A to the counter affidavit. It mentions petitioner's age as 38 years in the year 1976.

7. It is, therefore, clear that the date of birth of the petitioner initially entered in service record was 15.7.39 and not 15.7.36 as claimed by the opposite party over writing and interpolation are to the effect that figure '9' is made to appears '6' which is evident to naked eyes. Petitioner's age thereafter will be 15.7.1939 and thus he attained age of superannuating in July, 1999, on completing 60 years of age.

8. Petitioner filed several representations to the concerned Executive Engineer for verification of his date of birth in his service record. Copy of the representations are annexed as Annexures No. III, III-A,III-B, III-C and III-D to this writ petition. Employees Union also submitted representation to the Executive Engineer Division-I PWD, Muzaffarnagar on 6.9.1991 and raised the issue of manipulation in the service record of the petitioner (Annexure-IV to the writ petition).

9. It is clear that the allegations made against the petitioner are in correct. Petitioner claimed for promotion tot he post of work supervisor, but he was denied promotion, and he was forced to file claim Petition No.289/F/IV/1988 before the Public Tribunal, Lucknow, which was allowed on 23.8.1995. The Executive Engineer, however, held that the petitioner be promoted as work supervisor but denied the relief holding that he has superanuated w.e.f. 31.7.1994.

10. It is apparent that the petitioner has been victimised twice at the hands of the respondent's officials/employees in the concerned office with an ulterior motive and extraneous consideration to deny promotion to the petitioner.

11. Conduct of the department/ respondents in tempering with the service record of the petitioner can not be overlooked.

12. It is a fit case where higher authorities should initiated a inquiry to fix the responsibility for the above interpolation (over-writing) or forgery in the service record of the petitioner and punish the erring responsible persons.

The officer concerned responsible for maintenance of record and for interpolation the service record should be brought to book. It is further directed that the respondents shall ensure release of petitioner's post retrial benefits. The respondents are directed to 18% interest per annum on amount due for delayed payment for no fault of the employees on the petitioner held in the recent judgement of the Apex Court in 2000 (1) Allahabad Civil Journal 824. Also reference be made tot he cases reported in 1996 (Vol. 37) III AWC 1525 (DB), 1982 UPLC 1097 (DB).

13. Writ petition is allowed with costs which I quantity at Rs.25000/- to be paid within one month of receipt of judgement and to be recovered from the erring official.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.8.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN,C. J.
THE HON'BLE G.P. MATHUR, J.

Civil Misc. Writ Petition No. 30727 of 2000

Baldev Singh ...Petitioner.
Versus
Tehsildar Bilaspur, Rampur and others ...Respondents.

Counsel for the Petitioner:
Shri R.P. Singh
Shri Murlidhar
Shri K.P. Upadhyaya

Counsel for the Respondents:
Shri R.P. Goel
Advocate General

Article 226 of the Constitution of India - A Jat Sikh being also a Jat is fully covered by entry 78 of Schedule I of 1994 and is a member of backward class as is defined under section 2 (BB) of U.P. Panchyat Raj Act.

(Held - Para 12)

'Jat Sikh' being also a 'Jat' is fully covered by entry 78 of Schedule I of 1994 Act and is a member of backward class. The petitioner is, therefore, entitled to be issued a certificate that he belongs to a backward class and is eligible to contest for the office of Adhyaksha, Zila Panchayat, Rampur, which has been reserved for a person belonging to the said community.

By the Court

1. The petitioner a 'Jat Sikh' was elected as s member of Zila Panchyat, Rampur, in the election held for various Panchyats in the State in June 2000 in accordance with section 18(1)(b) of U.P. Kshettra Panchayats and Zila Panchayats Adhinlyam, 1961 (hereinafter referred to as the Zila Panchyat Adhiniyam). The office of Adhyaksha of Zila Panchyat Rampur has been reserved for a person belonging to backward class in accordance with section 19-A of the Adhiniyam.. The petitioner wanted to contest the election for the office of Adhyaksha and for that purpose he moved an application of July 10,2000 before the Tehsildar of his area for being issued a certificate that he belongs to a backward class. The Tehsildar directed an enquiry and after receiving a report passed an order on July 11, 2000 holding that the petitioner did not belong to backward class. The persent writ petition has been filed praying that the order of the Tehsildar be quashed and a writ of mandamus be issued to the respondents

commanding them to issue a certificate to the effect that the petitioner belongs to backward class.

2. Section 2(8) of Zila Panchyat Adhiniyam provides that 'backward classes' in the act shall have the meaning assigned to it in U.P. Panchayat Raj Act, 1947. Section 2(bb) of U.P. Panchayat Raj Act defines backward classes' and it means the backward class of citizens specified in Schedule-I of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (hereinafter referred to as the Act). Section 2(b) of this Act lays down that for the purposes of the Act 'other backward classes of citizens' mean the backward classes of citizens specified in Schedule-I. At the time when the Act was originally enacted, Schedule-I contained names of 55 castes, which were recognised as backward classes. Subsequently, by notifications issued from time to time, some more castes were added and finally by a notification issued on May 10, 2000 'Jat' has been included as item no. 78.

3. The claim of the petitioner for being issued a certificate of backward class is founded on the aforesaid entry 78 whereby 'Jat' has been included as a backward class. The case of the petitioner is that as he is a 'Jat Sikh' he comes within the aforesaid entry of Jat and he is entitled for being issued a certificate that he belongs to backward class. Sri Murlidhar, learned senior counsel for the petitioner, has contended that the preamble of the Constitution lays emphasis on securing to all citizens justice, social, economic and political and also equality of status and of opportunity and this is sought to be achieved by Article 38, which finds place in Part IV relating to Directive Principles of State Policy, and with that end in view section 19-A has been inserted in the Zila Panchayats Adhiniyam, which provides that the office of the Adhyaksha of the Zila Panchyats shall be reserved for persons belonging to he Scheduled Castes, Scheduled Tribes and the Backward Classes. The Schedule of the 1994 Act enumerates the castes, irrespective of religion of the person of the caste and, as 'Jat' has been notified as a backward class, the petitioner who is a 'Jat Sikh' is entitled to be issued a Certificate of backward class in order to enable him to contest the election of Adhyaksha of Zila Panchyat of his district which has been reserved for a person belonging to the said class. The learned Advocate General has, however, submitted that the castes designated as backward classes and included in Schedule-I of 1994 Act have been identified on the basis of religion and entry 78 which mentions 'Jat' means a Hindu Jat and not a Sikh Jat.

4. What would constitute 'backward classes of citizens' has been examined in great detail in Indra Sawhney Versus Union of India, AIR 1993 SC 477, and in the leading judgment delivered by Hon'ble B.P. Jeewan Reddy-J with whom 4 other Hon'ble judges agreed, it was observed as follows in para 83 of the reports:-

"……Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section. There is no set or recognised method. There is no law or other statutory Instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can will begin with castes, which represent

explicit identifiable social classes/groupings, more particularly when Art. 16(4) seeks to ameliorate social backwardness…The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, If any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner all the classes among the populace will be covered and that is the central idea……"

Again, in para 207, it was stated as follows:-

"It is said that the caste system is unknown to other communities such as Muslims, Christians, Sikhs, Jews, Parsis, Jains, etc. in whose respective religion, the caste system is not recognised and permitted. But in practice, it cannot be irrefutably asserted that Islam, Christianity, Sikhism are all completely immune from casteism."

Then in para 210, it was observed as follows:-

"Though Christianity does not acknowledge caste system, the evils of caste system in some States are as prevalent as in Hindu society especially among the converts……"

With regard to Sikhs, it was observed as follows:-

"It is further not correct to say that the caste system is prevalent only among the Hindu, and other religions are free from it…….As regards Sikhs, there is no doubt that the Sikh religion does not recognise caste system. It was in fact a revolt against it. However, the existence of Mazhabis, Kabirpanthis, Ramdasias, Baurias, Sareras and Sikligars and the demand of the leaders of the Sikhs themselves to treat as Scheduled Castes Could not be ignored and form the beginning they have been notified as a Scheduled Caste……."

5. The conclusion of Hon'ble R.M. Sahai, J. who gave a dissenting opinion on certain issues, have been mentioned in para 700 and sub-para (3) thereof reads as follows:-

"(3) Reservation under Article 16(4) being for any class of citizens and citizen having been defined in Chapter II of the Constitution includes not only Hindus but Muslims, Christians, Sikhs, Budhs, Jains, etc. the principle of identification has to be of universal application so as to extend to every community and not only to those who are either converts form Hindus or some of whom to (who) carry same occupation as same of the Hindus."

6. In view of the above noted authoritative pronouncement by a bench of nine judges, there cannot be even a slightest doubt that the identification of backward class has to be done on the basis of caste and the system of caste is not confined to Hindus alone but is prevalent amongst other castes including Sikhs.

7. 'Jat' caste has been recognised as a backward class in view of its entry in Schedule-I of the 1994 Act. The entry as it is, does not make reference to any particular religion. Therefore, there is no reason at all to treat a 'Jat' would come within the ambit and sweep of the entry 'Jat' and, therefore, belongs to a backward class.

8. Indra Sawhney (supra) has laid down in no uncertain terms that as a fact there are castes amongst the followers of other religions like Muslims, Christians and Sikhs in India though the aforesaid religions by themselves neither recognise nor permit a caste system. Islam and Christianity did not have their origin in India but came from outside. But Sikh as a religion or faith was born in India and it was the Hindus of India who adopted it as their religion. The names of Sikhs are akin to that of Hindus of the region and the Sikhs are also governed by Hindus Marriage Act, Hindu Succession Act, etc. Therefore, for a Sikh to belong to 'Jat caste is all the more natural and probable in comparison to a Muslim or Christian. There is nothing inherently wrong or contradictory for a person belonging to Sikh faith to be member of 'Jat' caste. Being a Jat he will be a person belonging to a backward class in view of 1994 Act.

9. Sri Murlidhar, learned senior counsel for the petitioner and also the learned Advocate General have referred to certain castes enumerated in Schedule-I to get support for their respective submissions. Sri Murlidhar has submitted that certain castes like Chikwa (entry 18), Kunjra (entry 12), Banjara (entry 31) and Darzi (entry 25) are found amongst Hindus and Muslims both, which shows that the identification of backward classes has been done only on the basis of caste and it has no correlation with religion. Learned Advocate General has referred to 'Muslims Kayasth' (entry 45), and Raj Sikh (entry 56) and has submitted on their basis that only one caste amongst Sikh namely, 'Raj Sikh' has been identified as backward class. In our opinion, entry 45 and 56 show that wherever a particular caste was in existence in more than one religious group and the Legislature wanted to include persons of that caste of only one religion, the same has been specified by also mentioning the name of the religion. 'Kayasth' is a caste in Hindus but the Legislature did not want to treat them as backward class and, therefore, the entry was specifically confined to Muslims by mentioning as 'Muslim Kayasth' which clearly excludes Hindus Kayasth. Some people belonging to Bhumihar caste in U.P. and Bihar write their surname as 'Raj'. Here the Legislature deliberately mentioned the word 'Raj Sikh' faith alone as backward class. Therefore, the aforesaid entries do not at all support the case of the State and on the contrary strengthen the petitioner's case that the entry would also include persons belonging to the said caste even though they may be professing Sikh faith.

10. Learned Advocate General has next contended that the Legislature has

enacted U.P. State Commission for backward Classes Act, 1996 and section 9 thereof imposes an obligation on the State Commission for backward Classes constituted under section 3 of the said Act to examine requests for inclusion of any class of citizens as a backward class in the Schedule and hear complaints of non-inclusion of any such class. The Commission has power to investigate and monitor all matters relating to the safeguards provided for the backward class. It is contended on the basis of averments made in the counter affidavit (which has been filed by a Deputy Secretary of Backward Welfare Department, Government of U.P.), that at the time of inclusion of 'Jat' caste in the Schedule, the Government had only examined the social and educational status of Hindu Jats and no such survey was made with regard to jat Sikhs. It has been further urged that 'Jat Sikhs' never raised any grievance nor made any demand for their inclusion in the list. Reference has also been drawn to a letter sent by Deputy Secretary of U.P. Government on June 2, 2000 to the Commissioner of Moradabad Division, wherein, clarification was made that 'Jat Sikh' has not been included as a backward class. In our opinion, the contention raised is wholly misconceived, as the fact that Jat Sikhs did not make any demand for being included in backward class is wholly irrelevant for deciding the controversy. The non making of demand by them would not mean that they should be deprived of what is lawfully due to them, especially the opportunity to contest for an elected office, which in law, is available to them. The entry in the Schedule has to be given its plain meaning and has to be understood in a common sense way. The Fact that the State Government did not conduct a survey with regard to the Sikhs or that the Sikhs did not make any demand for their inclusion in the Schedule cannot after the meaning of the entry. If the State Government did not perform its statutory duty or did not make the necessary inquiry before issuing the notification for including the Jats as a backward class it cannot change or after the meaning of the entries made in the Schedule. The power to amend the Schedule has been can feared by section 13 of 1994 Act, which provides that the State Government may, by notification, amend the Schedule and upon the publication of such notification in the Gazetee, the Schedule shall be demand to be amended accordingly. The notification issued for amending the Schedule has been given considerable importance and the Legislature has given ample safeguards for that purpose. Section 14 provides that any notification issued under section 13 shall be laid, as soon as it any be, before both the Houses of State Legislature and the provisions of sub-section (1) of section 23-A of U.P. General clauses Act, 1904, shall apply as they apply in respect of rules made by the State Government under any U.P. Act. Therefore, the notification issued including 'Jat' as a backward class has also received concurrence from both the Houses of State Legislature. The letter sent by the Deputy Secretary of Government of U.P. on June 2, 2000 is wholly irrelevant as he has no authority in law to tell as to how an entry made in the Schedule should be interpreted. It any be pointed out that it is settled law that even the speeches made by the members of the Constituent Assembly in the course of the debates on the draft constitution cannot be treated as extrinsic aid to the construction of the Constitution (see State of Trav. Co.

Versus Bombay Co. ltd., AIR 1952 SC 366). Similarly, the debates in Parliament for a bill are not admissible for construction of the Act which is ultimately enacted (see Aswini Kumar gosh vs. State of madras, AIR 1950 SC 27). The Court has to be solely guided by the language used in the enactment and has to give plain meaning to the words used therein. Therefore, the contention based upon the fact that proper survey was not done or no demand has been raised by the 'Jat Sikh' for their inclusion in backward class is wholly misconceived and cannot be accepted.

11. Learned Advocate General has referred to s. Swvigaradoss Versus Zonal Manager, FCI, (1996) 3 SSC 100 and has urged on its basis that the Court has no power to alter the notification or Schedule. In our opinion, the authority cited has no application to the facts of the case By holding that a 'Jat Sikh' is also included in the entry 'Jat', we are not altering or modifying the said entry but are merely holding that it would include a person belonging to the said caste though professing Sikh faith.

12. In view of the discussion made above, we are clearly of the opinion that a 'Jat Sikh' being also a 'Jat' is fully covered by entry 78 of Schedule-I of 1994 Act and is a member of backward class. The petitioner is, therefore, entitled to be issued a certificate that he belongs to a backward class and is eligible to contest for the office of Adhyaksha, Zila Panchyat, Rampur, which has been reserved for a person belonging to the said community.

13. The writ petition succeeds and is hereby allowed with costs. The impugned order dated July 11, 2000 passed by respondent no. 1 is quashed and the respondents are commanded by a writ of mandamus to issue a certificate to the petitioner that he belongs to backward class. By an interim order passed on July 31, 2000, it was directed that the nomination paper filed by the petitioner shall be accepted. The result of the election held for electing the Adhyaksha, Zila Panchyat, Rampur, Shall be declared in accordance with law treating the petitioner to be a member of backward class.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 30, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE S.K. JAIN, J.

Civil Misc. Writ Petition No. 1162 of 1995.

The Nagar Palika Parishad ...Petitioner
Versus
Shri Ganga Ram S/o Ghurdi Lal and others ...Respondents

Counsel for the Petitioner :
Shri Vinod Misra

Counsel for the Respondents:
S.C.

Section 2 (d) of the Consumer Protection Act - the respondent was not a consumer as defined under section 2-D of the Consumer Protection Act and as such the appeal filed by appellant was not maintainable. Moreover the supply of electricity which was snot within the control or domain of the petitioner, an apparent jurisdictional error has been

committed in passing the impugned order.
Held – (Para 3)

Respondent No. 2 has committed an apparent jurisdictional error in assuming jurisdiction in it and in proceeding to pass the impugned order.

By the Court

1. The Prayer of the petitioner is to quash the order dated 2.2.1994 passed by District Forum Consumer protection, Shahjahanpur, Respondent No. 2 directing the petitioner to pay a sum of Rs. 2,000/- as compensation for the inconvenience and trouble caused besides cost of Rs. 3,000/- of the proceeding to Respondent no. 1. (as contained in Annexure-3) in Complaint Case No. 834 of 1993 filed by Respondent no.1 Ganga ram against the petitioner for granting suitable compensation and refund of the water tax paid by him to the petitioner on the ground that his house has not been supplied regularly water by the petitioner despite several notices and who did not pay any heed to him.

2. We find that on 17.1.1995 the following order was passed by the Bench before which this writ petition was placed for consideration :-

"Notices to respondents no. 1 and 2 to show cause why this petition be not admitted and disposed of at the admission stage. Counter affidavit may be filed within four weeks. List the writ petition no. 21.2.1995.

Meanwhile, operation of the order contained in Annexure-3 shall remain suspended until further orders.

Sd - U.P. Singh, J
Sd - S.K. Phaujdar, J"

3. Sri Vinod Misra learned counsel appearing in support of this writ petition, contended as follows:- (I) No counter affidavit having been filed by Respondent No. 1 the statement made in paragraph 14 of the writ petition that the petitioner has not sold the water nor has rendered any service to Respondent no. 1 against any consideration thereby he (Respondent No. 1) was not a 'consumer' as defined under section 2(d) of the Consumer Protection Act and accordingly, his complaint before Respondent no. 1 was not maintainable and Respondent No. 2 has committed an apparent Jurisdictional error in assuming Jurisdiction in it and in proceeding to pass the impugned order. (ii) Even assuming that the Respondent no. 2 had jurisdiction to pass the order impugned, the apparent fact that the supply of water being dependant upon the supply of electricity which was not within the control and or domain of the petitioner, as stated in paragraph II of the writ petition, again an apparent jurisdictional error has been committed in passing the impugned order.

4. Having perused the provisions of the Act and taking into consideration non filing of any counter affidavit by the Respondent, we find that Respondent no. 1 was is not a "consumer" within the meaning of the Act and thereby Respondent no.2 lacked jurisdiction to entertain his complaint and pass the order impugned on merits.

5. Accordingly, the impugned order is set aside, the complaint of Respondent no.1 dismissed and this writ petition allowed. However, in view of the fact that none has appeared on behalf of Respondents to contest this proceeding, we make no order as to cost.

The office is directed to dispatch a copy of this order within two weeks to Respondent no.2.

6. The office is directed to dispatch a copy of this order within two weeks to Respondent no. 2.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.8.2000

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

Civil Misc. Writ Petition No. 31211 of 2000

Rajendra Prasad Tiwari and Others ...Petitioners
Versus
State of U.P. & Others ...Respondents.

Counsel for the Petitioner:
Shri P.N. Tripathi

Counsel for the Respondents:
Sri K.S. Kushwaha,
Standing Counsel

Constitution of India, Article 226- Superannuation Age- Tubewell operator- working in pay scale of Rs.950-1500 – according to G.O. dated 31.8.1989 readwith Fundamental Rules 56 (a) – Tube well operators comes in the catory of group C Post – retiring at the age of 58 held Proper.

Held – (Para 3)

The learned counsel for the petitioner placed reliance on a decision of this Court in Ram Tej Pathak Vs. State of U.P. (1994) 1 UPLBEC 593 and the judgement dated 26.7.1883 in writ petition no. 7353/99 (LB.) Raj Karan Yadav vs State of U.P. and others. These two decisions, in my opinion, are per incurtam in view of the fact that the Samta Samiti report and Government order recallifying the posts have not been taken into reckoning. The Government order dated August 31, 1989 readwith the Explanation to Fundamental Rule 56 (a), leaves no manner of doubt that the tube well operators now come in the category of Group 'C' posts and, therefore, the petitioners are rightly sought to be retired at the age of 58 years.
Case law discussed
(1994) IUPL BEC.593

By the Court

Heard Sri P.N. Tripathi for the Petitioner and Sri K.S. Kushwaha, Standing Counsel representing the respondents.

1. The Petitioners who are tube-well operators are sought to be retired at the age of 58 years. It has been submitted by the learned counsel that since the Petitioners were appointed prior to Nov. 5,1985, they were/are entitled to continue upto the age of 60 years in view of the proviso to Fundamental Rule 56 A inasmuch as they were clearly classified to be Group 'D' employees on the basis of office memorandum No. 15/140/81-Karmik-1 dated Feb. 27, 1982 according to which non-Gazetted employees the minimum of whose pay scale was less than Rs.354/- per month were classified to be Group 'D' employees, In fact according to the G.O. dated 27.2.1983, such Gazetted posts in the scale of which the maximum of pay was above Rs.1720/- were classified as Group 'A' Gazetted posts in the scale the maximum of which did not exceed Rs.1730/- were classified as Group 'B' posts; the non-Gazetted posts in a scale of pay the minimum of which was Rs.354/- or more came in Group 'C' and the rest in Group 'D' It was on the basis of the G.O. dated

27.2.1982 as indicated in the Government order dated Dec. 3, 1993 (Annexure 6 to the petition) that the tube-well operators whose pay scale as on 27.2.82 was Rs.350-495/- were classified as Group 'D' employees.

2. Subsequently, however, upon regard being has to the revision of the scales of pay with effect from Jan. 1986 the 'Samta Samiti' recommended for reclassification on the pattern of the classification made by the Central Government according to which the posts the maximum of whose scale of pay was Rs.4000-00 or more came in group 'A' the posts the maximum of whose scale of pay was Rs.2900/- or more but less than Rs.4000.00 came in group 'B'; the post of which the maximum of the scale was Rs.1150/- or more but did not exceed Rs.2900/- were placed in Group 'C' and the rest in Group 'D' i.e. the posts carrying the scale of pay the maximum of which did not exceed Rs.1150/- were recommended to be classified as group 'D' posts. The Government accepted the recommendation vide G.O. No. Ve Aa-1-1739/10-89-41 (M) /89 Vitta (Vetan Ayog) Anubhag-1 Lucknow dated 19th May, 1989,Subject to the postulates referred to therein produced for the perusal of the Court by Sri K.S. Kushwaha, learned Standing Counsel, whose assistance to the Court is indeed commendable. In Paragraph 4 of the supplementary affidavit dated Feb,22,1990, it has been stated that the petitioners were getting their salary in the pay scale of Rs.950-1500. The maximum of the pay in the scale of tube-well operators thus, admittedly was Rs.1500/- i.e. above Rs.1150/- and consequently, the post of the tube-well operator falls in Group 'C' and it has ceased to be Group 'D' post, It was certainly to be reckoned with as Group'D' post upto Jan 1986 but in view of the Explanation dovetailed to the proviso to Fundamental Rule 56 (a) the petitioners cannot draw mileage out of the proviso to the said rule in view of the subsequent change of classification.

3. The learned counsel for the petitioner placed reliance on a decision of this Court in Ram Tej Patahak vs. State of U.P. (1994) 1 UPLBEC 593 and the judgment dated 26.7.1993 in writ petition no. 7353/99 (L.B.) Raj Karan Yadav vs State of U.P. and others. These two decisions, in my opinion, are per incuram in view of the fact that the Samta Samiti report and Government order reclassifying the posts have not been taken into reckoning. The Government order dated August 31, 1989 read with the Explanation to Fundamental Rule 56 (a) leaves no manner of doubt that the tube-well operators now come in the category of Group 'C' posts and, therefore, the petitioners are rightly sought to be retired at the age of 58 years.

4. The learned counsel for the petitioner then switched gear to the submission that the petitioners have not been retired on the basis of the Government order dated August 31, 1989 but on the basis of judgment of the Services Tribunal in claim petition No. 1053 of 1985. Be that as it may, the legal position as explained above is that the age of retirement of tube-well operators is 58 years inasmuch as the post of tube-well operators now comes to fall in Group 'C' and is no longer a Group 'D' post with effect from Jan. 1986 by virtue of the report of the Samta Samiti which has been accepted by the Government reclassifying the posts with retrospective effect.

In the result, the petition fails and is dismissed. Interim order operating in the case shall stand discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.8.2000

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

Civil Misc. Writ Petition No. 35374 of 2000

Moar Singh ...Petitioner.
Versus
State of U.P. and Others ...Respondents.

Counsel for the Petitioner:
Km. Sunita Sharma

Counsel for the Respondents:
S.C.
Shri A.K. Mehrotra

Constitution of India, Article 226- Mandamus- Inordinate delay by U.P. Board in declaring scrutiny result of Intermediate examination –Board pleading lock of infrastructure- Mandamus issued directing State to provide the same- Directions also issued to the Board to declare scrutiny results by 30th September, 2000.

Held – (Para 12)

Difficulties of the Board cannot be ignored or overlooked. For this purpose a general mandamus is being issued to the State of U.P. through Secretary, Madhyamik Shiksha, and Chief Secretary Government of U.P. to consider the proposal of the Board, if one is submitted with relevant facts, figures and documents for providing requisite facilities to hold 'proper' examinations as well as 'scrutiny' the same shall be considered giving top priority, as 'Education' cannot be ignored if we want to put the State in order. Results have to be declared within the desired time so that students and their parents are not harassed apart from burdening this court compelling individual to file writ petitions.
Cases referred.
1999 (3) Edu. & Ser. Cases 2376 (All.)

By the Court

1. This is a petition by Moar Singh, who had appeared in the Intermediate Examination- 2000 conducted by U.P. Board and had applied for scrutiny after paying requisite fee within the time prescribed by the Board itself

2. This petition was taken up on 16th August, 2000 and thereafter at the request of learned counsel representing State and U.P. Board, adjourned from time to time in order to enable the respondent-authorities to assist the court in informing minimum possible time required for completing the entire work of scrutiny with regard to the High School and Intermediate Examination-2000 conducted by the Board.

3. Sri A.N. Verma, Additional Secretary, U.P. Board was present on the last date as well as he is present in Court today. On his instructions the learned Standing Counsel has made submissions and apprised the Court about magnitude of work to be undertaken by the Board while deciding the scrutiny applications with respect to aforesaid examination.

4. A suggestion is being made that the Board shall complete 'entire scrutiny work' of the said examinations and it shall declare/publish the results on or before October 31, 2000.

Heard learned counsel for the parties.

5. Learned Counsel for the petitioner placed reliance on the case of Km. Sweta Agarwal Vs. Additional Secretary, Board of High School and Intermediate Education U.P. and another. 1993 (3) Education and Service Cases 2276 (Alld.) wherein this Bench had occasion to consider the matter of delay in scrutiny by the Board.

6. This Court had directed U.P. Board last year also after considering similar difficulty to complete the scrutiny work by 31st October 1999. In the case of Sweta Agarwal (Supra) the present Additional Secretary, Board (who also happened to be Secretary at the time of scrutiny of Board's examination.1999) had informed the Court that regular scrutiny work is disrupted because of this Court issuing mandamus in individual writs and directing the Board has to decide the cases of those individual petitioners out of turn. The grievance of the Board was that in order to comply with the High Court's orders in individual petitions their regular work is being dislocated which ultimately precipitates the delay in completion of scrutiny work.

7. In the case of Sweta Agarwal (supra) referring to various decisions of this Court as well as that of Apex Court, it was observed that in matters like the present every individual should not be required to rush to Court and in exercise of its extraordinary jurisdiction under Article 226, Constitution of India, directed the Board to decide as cases of scrutiny together and declare the results simultaneously so that no candidate is placed in a better position only because he had rushed to the Court or otherwise disadvantage due to the fact that one failed to approach the Court. Consequently, Court issued a general writ of mandamus to command the concerned authorities (Present Respondents) to decide all pending applications of scrutiny on or before October 31,1999, to communicate the results to the concerned applicants in normal course as per prevailing practice and further to ensure to declare scrutiny result by publishing the same in two Daily Newspapers of Hindi and tow Daily Newspapers of English, namely "Dainik Jagran' 'Rashtriya Sahara' 'Hindustan Times' and Times of India respectively and in case of their various editions the publication to be made in all the editions of the aforesaid newspapers. Covering circulation in the entire State of Uttar Pradesh.

8. Facts of the present case are similar and this Court takes notice of the fact that the candidates are again running to the Court for obtaining relief so as to expedite the declaration of result of scrutiny and somehow bypass others in the waiting- irrespective of the one being late in submitting the scrutiny application.

9. No elaborate argument is required to assess agony of the examinees, in case of inordinate delay in completing the scrutiny work, inasmuch as the examinee shall lose benefit of 'scrutiny' even if the revised result in his favour unless it is declared promptly and at least before 'Admission' are over. Otherwise also he must know, if his result remain same, so that he may apply for same examination of the nest session.

10. The Board charges fees. It had to render service so that it is meaningful to the candidate. Tale of woes, narrated by

the official before this court regarding paucity of funds, Racks, Hall (accommodation etc.) is of no avail or purpose to the candidate.

11. Sri A.K. Mehrotra, learned Standing Counsel, submit that U.P. Board does not have proper facilities for storing copies, Evaluation Hall, generator in case of electricity failure, funds and other connected infrastructure so as to ensure the work of scrutiny to be completed promptly i.e. within 4 to 6 weeks.

12. Difficulties of the Board cannot be ignored or overlooked. For this purpose a general mandamus is being issued to the State of U.P. through Secretary. Madhyamik Shiksha, and Chief Secretary Government of U.P. to consider the proposal of the Board, if one is submitted with relevant facts, figures and documents for providing requisite facilities to hold 'proper' examinations as well as 'scrutiny' the same shall be considered giving top priority, as 'Education' cannot be ignored if we want to put the State in order. Results have to be declared within the desired time so that students and their parents are not harassed apart from burdening this court compelling individual to file writ petitions.

13. Court however, feels that U.P. Board has made no serious effort to improve the situation except repeating its difficulties in a stereotype form. Board was aware in advance this time of the decision of this court. Hence it must declare the result by 30th September, 2000.

14. Accordingly, this petition is allowed, U.P. Board Respondent No. 2 is directed to complete entire work of scrutiny by 30th September,2000 and to declare results as indicated above in accordance with law. If for some compelling reasons the Board requires more time it will approach this Court by filing an application in this petition for extension of time but it is made clear that in no case the time will not be extended beyond 31st October, 2000 as committed by itself.

15. It is further directed that a copy of this judgement be sent to Chief Secretary for information to ensure that adequate infrastructure is being provided to the Board for proper conductance of examination and its scrutiny work in future.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: AUGUST 31, 2000

BEFORE
THE HON'BLE R.H.ZAIDI, J.

Civil Misc. Writ Petition No. 36180 of 2000.

Deep Chand ...Petitioner.
Versus
Sunder Lal and Others ..Plaintiff & Defendants/ ...Respondents.

Counsel for the petitioner:
Sri V.K. Gupta
Sri M.K. Gupta

Counsel for the Respondents:
Sri A.K. Gupta

Constitution of India, Article 226- Writ petition by unauthorised occupant- Maintainability.

Held (Para 7)

It is well settled in law that the sub tenant is neither a necessary party to such a suit nor it is necessary to serve a notice under Section 106 of the Transfer of Property Act. Therefore, petitioner cannot claim any benefit of ratio of the decision of Full Bench in the Nootan Kumar's case (supra). The contesting respondent is right in his submission that an unauthorized occupant possesses no right enforceable in law and is legally not entitled to file and maintain a petition under Article 226 of the Constitution of India as held by this Court in Rakesh Kumar's case (Supra).

Cases referred:

1993.(2) ARC 204.(F.B.)
2000 (38) ALR-575.

By the Court

1. By means of this petition filed under Article 226 of the Constitution of India, petitioner prays for issuance of a writ, order or direction in the nature of certiorari quashing the judgment and decree dated 05.09.1997 passed by the trial Court in S.C.C. Suit No. 79 of 1985 and the judgment and order dated 31.07.2000 passed by the revisional Court in S.C.C. Revision No. 62 of 1997.

2. Relevant facts of the case giving rise to the present petition, in brief, are that Shri Sunder Lal, respondent no.11 filed a suit for ejectment and recovery of rent and damages against respondents no. 2 and 3 and the petitioner Shri Deep Chand pleading that the building in dispute was let out to the respondents no. 2 and 3 at a monthly rent of Rs.90/- who have defaulted in payment of rent for 33 months. A notice of demand and termination of tenancy was served upon them on 22.07.1984 but they failed to pay the rent. On the other hand. They have sub-let the premises in question to the petitioner without the consent of the respondent and started realizing Rs.375/- per month as rent from the petitioner. Hence the suit for the above mentioned relates. By means of amendment, plea of material alternation. Diminishing the value of the building in question was also taken Respondents no. 2 and 3 filed their written statement admitting the relationship of landlord and tenant denying the rest of the allegations. It was also pleaded that the petitioner was permitted to manage their business of Ice-Candy who committed irregularities in accounts. On the other hand petitioner also filed a written statement pleading that respondents no. 2 and 3 were acting in collusion with respondent no.1 He claimed that he was the tenant of the premises in dispute in his own right and had been carrying Ice- Candy business in the name of Parle Ice-Candy. He with the consent of plaintiff respondent. Carried out renovation of the premises in dispute. In which substantial amount was spent which was liable to be adjusted in the future rent. The suit as framed and filed was legally not maintainable and was liable to be dismissed.

3. Trial Court on the basis of pleading of the parties, framed issues. Issue no. 1 related to structural alternations diminishing the value of the building in question. Issue no.2 related to sub letting to defendant-petitioner; Issue no.3 related to the validity of notice; Issue no. 4 to related to the default in payment of rent and issue no. 5 to the relief. The trial Court held that the petitioner was the subtenant of respondents no. 2 and 3 in the building in question. While dealing with issue no. 1 it was held that although, alternations in the building in question

were made but by the same, the value of the building was not diminished, the notice under Section 106 of the Transfer of Property Act was held valid and it was also held that it was not necessary to give any notice to terminate the sub-tenancy of the petitioner. Issue no. 4 was decided in affirmative observing that the respondents no.2 and 3 committed default in payment of rent and that it was not necessary to record any finding with respect to the default committed by the petitioner who was inducted as a su-tenant by respondents no. 2 and 3. Fifth and last issue was decided in affirmative and the suit filed by the respondent no.1 was decreed for ejectment and for recovery of arrears of rent amounting to Rs.3020/- with damages pendente lite and future by judgment and order dated 05.09.1997. Respondents no.2 and 3 did not challenge the validity of the judgment and decree passed by the trial Court. A revision against the said decree was filed by the petitioner. The revisional Court affirmed the findings recorded by the trial Court. It was held that the trial Court took into consideration the entire evidence, oral and documentary on the record, thereafter recorded findings on the issues involved in the case in accordance with law, which did not suffer from any jurisdictional error. The revisional Court, having recorded the said findings dismissed the revision by its judgment and order dated 31.07.2000 hence the present petition.

4. Learned counsel for the petitioner, Shri V.K. Gupta, vehemently urged that the Courts below have misread, misconstrued and ignored the material evidence on the record and erred in law in holding that the petitioner was merely a sub-tenant. He asserted that from the material on the record, it was conclusively proved that the petitioner was the tenant of the building in question in his own right. The Courts below acted illegally in holding to the contrary and in decrecing the suit filed by respondent no. 1 and dismissing the revision filed by the petitioner. It was also urged that petitioner had no order of allotment in his favour, therefore, his status was that of an unauthorized occupant. Therefore, the suit as framed and filed was legally not maintainable and the decree passed by the trial Court which had no jurisdiction to pass the said decree was a nullity. In execution of the said decree, the petitioner cannot be ousted from the building in question. In support of the said submission, reliance was placed by learned counsel for the petitioner upon the decision in Nootan Kumar and others Vs II Additional District Judge, Banda and others reported in 1993 (2) A.R.C.204 (F.B.).

5. On the other hand, learned counsel appearing for the respondents no.2 and 3 Shri A.K. Gupta supported the validity of the judgment, orders and decree passed by the Courts below. It was urged that the findings recorded by the Courts below are concurrent findings of fact which are based on relevant evidence on the record and do not suffer from any illegality or infirmity. It was also urges that before the Courts below the petitioner never claimed that he was an unauthorized occupant. He, on the other hand, has contended that he was the tenant of the building in question in his own right. At this stage, therefore, he cannot be permitted to contend that he was unauthorized occupant or a trespasser and the suit filed by the respondent no. 1 was legally not maintainable or that the trial Court has no jurisdiction to entertain

and decide the suit. Alternatively, it was submitted that an unauthorized occupant has got no right enforceable in law, therefore, the petitioner has got no right to file the present petition under Article 226 of the Constitution of India. Reliance in support of this submission is being placed upon the decision in Rakesh Kumar Vatsa Vs District Judge., Saharanpur, reported in 2000 (38) A.L.R. 575. It was urged that the writ petition was concluded by findings of fact and was liable to be dismissed with costs.

6. I have considered the submissions made by learned counsel for the petitioner.

7. Learned counsel for the petitioner has utterly failed to demonstrate any misreading of any material evidence by the Courts below. He also could not show that any material evidence was ignored by the said Courts. The Courts below have taken into consideration and critically examined the entire evidence on the record, oral and documentary and thereafter, recorded findings on the issues involved in the case. Learned counsel for the petitioner failed to show from the record any material evidence on the basis of which it could be held that the petitioner was the tenant of the building in question. On the other hand, from the evidence, oral and documentary, it was conclusively proved that the respondents no.2 and 3 were tenants-in chief of the building in question who, without any permission in writing of the respondent no.1 sub-let the same to the petitioner. Petitioner was, thus, a sub—tenant of the building in question. The status of the person is a question of fact. In exercise of power under Article 226 of the Constitution of India, this Court cannot go into the questions of fact, cannot appraise or re-appraise the evidence cannot reverse the findings recorded by the Courts below and cannot substitute its own findings in place thereof. The findings recorded by the Courts below are based on relevant evidence on the record. I do not find any illegality or infirmity in the said findings. So far as the question of maintainability of the suit filed by respondent no.1 and the jurisdiction of the trial Court (Judge Small Causes Court) is concerned, the said plea was not taken by the petitioner in his written statement nor it was otherwise asserted before the Courts below. At this Stage, therefore, petitioner cannot be permitted to change his case and to assert that he was the unauthorized occupant, as he did not have any order of allotment in his favour. The suit was filed on the basis of relationship of landlord and tenant between the parties. (It is well settled in law that the subtenant is neither a necessary party to such a suit nor it is necessary to serve a notice under Section 106 of the Transfer of Property Act. Therefore, Petitioner cannot claim any benefit of ratio of the decision of Full Bench in the Nootan Kumar's case (supra). The contesting respondent is right in his submission that an unauthorized occupant possesses no right enforceable in law and is legally not entitled to file and maintain a petition under Article 226 of the Constitution of India as held by this Court in Rakesh Kumar's case (supra).

8. In view of the aforesaid discussion, no case for interference under Article 226 of the Constitution of India is, at all, made out. The writ petition deserves to be dismissed.

9. Lastly, learned counsel for the petitioner submitted that some reasonable

time may be granted to the petitioner to vacate the building in question, as at once it will not be possible for him to arrange another accommodation to carry on the business which is being carried on in the building in question. On the order hand, learned counsel appearing for the contesting respondents submitted that the petitioner being only a sub-tenant of the building in question, is legally not entitled to any leniency in the matter. He is to be ejected at once but with a view to end the litigation between the parties, he stated that he will have no objection if 8 months' time is granted to the petitioner to vacate the building in question subject to the condition petitioner furnishes an undertaking in writing before the trial Court within a period of 15 days from today to the effect that immediately on expiry of the aforesaid time, he shall hand over the vacant possession to the respondent no.1 and shall also pay the amount of damages for the period he remains in occupation of the same, at the rate he was paying to the respondents no.2 and 3.

10. In view of the aforesaid facts and circumstances, it is hereby directed the petitioner shall not be ejected from the building in question for a period of 8 months from today subject to the condition he furnishes an undertaking in writing within 15 days from today before the trial Court that he shall vacate the building in question and hand over the vacant possession to the respondent no.1 and also pay the amount of damages for the period he remain in occupation of the same at the rate he was paying to the respondents no.2 and 3, failing which this order shall stand automatically vacated and law will take its own course.

11. Subject to what has been stated above, the writ petition fails and is hereby dismissed, but no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: SEP. 1, 2000.

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

Civil Misc. Writ Petition No.15518 of 1995

Stamp Venders Association ...Petitioner.
Versus
The State of U.P. through the Chief Secretary ,Civil Secretariat, U.P. Lucknow and others ...Respondents.

Counsel for the Petitioner :
Shri B.N. Pathak

Counsel for the Respondents :
Smt. Sarita Singh,
S.C.

Constitution of India, Article 19 (1) and 21—Reasonable Restrictions—in Public interest enhancement of limit of stamp from Rs.5000/- to Rs.8000/- subsequently reduced restrictions confined only with the stamp of Rs. 2000/- and not on others—restriction emposed in public interest in order to avoide frandulent use and misuse of stamp papers—not arbitrary.

Held—

The amendment made is clearly permissible under Article 19(6) of the Constitution being in the interest of 'general public' imposing a reasonable restriction while permitting sale of stamps worth to the extent of Rs. 2000/- only to the Stamp Vendors under the provisions of the Stamp laws. The licensed stamp venders have not been

deprived from carrying of their trade or business secured under Article 19(1) (g). Only a restriction has been imposed which is not arbitrary. We hold that the amendment was made in order to avoid fraudulent use and avoid misuse of stamp papers in the interest of general public as the income of the revenue of the state is public revenue which is being spent for the interest of the general public. We find the grounds devoid of any substance. (Para 12)

Cases law discussed

(1995) 1. SCC—652
AIR 1975 SC. 1208
AIR 1958 SC. 398

By the Court

Whether the proviso added to Rule 156 of U.P. Stamp Rules, 1942 (hereinafter referred to as the Rules) ultravires Articles 19(1)(G) and 21 of the Constitution of India is the solitary question which requires our adjudication in this writ petition filed by the Stamp Vendors Association, Varanasi with two prayers (I) to quash the proviso added to Rule 156 aforesaid and (ii) to command the Respondents to allow the stamp vendors to sell stamp papers of any denomination available in the Treasury within the limits of their licence.

2. Rule 156 of the Rules before the impugned amendment read as follows:-

"Sale of stamps to non-official vendors weekly:-Licensed vendors shall be allowed to purchase stamps from the local or branch depot ordinarily once a week equal to their estimated demand for one week, based on the average sales of the last few weeks. If after a weekly purchase, the sales of any vendor have been heavy and his stock have run short within the week, he shall be allowed to purchase on any other day of the week when the treasury is open, equal to the probable consumption for the remaining part of the week."

2.1. By the impugned amendment at the end of this Rule following proviso has been added:-

"Provided that a stamp paper exceeding the value of two thousand rupees shall not be supplied to the licensed vendor."

3. The petitioner asserts, interalia, that earlier the licensed stamp vendors were allowed to sell stamps not exceeding the aggregate value of Rs.5000/- for one document, vesting powers in the Collector of the district to raise that limit to any higher limit, subsequently by the 40th Amendment that limit was raised to Rs. 8000/- conferring jurisdiction in the Board of Revenue to issue a licence in a special circumstance for any higher limit; non-judicial stamps of 23 denominations ranging between 25 paisa to Rs.5 lacs were being printed and available but in 1991 under the orders of the Ministry of Finance, Department of Economic Affairs, New Delhi the number of denominations of non-judicial stamps were reduced to 10 and the remaining 13 denominations, including of Rs.2 lac and Rs.3 lacs, were discontinued it has also been mentioned in the Circular dated 16.9.1991 that the Government has decided to introduce non-judicial stamps of Rs.10,000/-,Rs.20,2000/- and Rs.25,000/- denominations; there was no restriction on the stamp vendors that they will sell stamp papers of particular denomination only ; in April, 1993 a theft took place during railway transit from Central Stamp Department, Nasik Road to Railway Head in U.P. of Rs.5000/- denominations non-judicial stamps and in

order to avoid abuse of those stolen stamp papers a ban was imposed for sale of non-judicial stamps of Rs.5000/- denomination with effect from 18.4.1993 and instructing the District Registrars and the Sub-Registrars not to register any document executed of Rs.5000/- denomination non-judicial stamps on or after that date; this ban, however , was relaxed vide order dated 6.10.1994 on this condition that stamp of Rs.5000/- denomination shall be sold from the Treasury only directly to the purchaser and not through any stamp vendor; meanwhile the amended Rules were introduced permitting the licensed stamp vendors to sell Court-fee stamps and non-judicial stamps upto an aggregate Value of Rs.15,000/- for one document or instrument to an individual member of the public; and that stamp exceeding Rs.2000/- shall not be supplied to the licensed vendors, meaning thereby that the stamp vendors shall sell stamp papers upto Rs.2000 denominations only for the reasons of shortage of stamps, sale of forged stamp papers, theft of stamps, sale of stamp by stamp vendors of higher rates and artificial shortage of the stamp papers.

3.1. The petitioner challenges the aforementioned amended Rule on the ground that it has been made without application of mind and without looking into the fact that stamp papers of Rs.2000/- and Rs.3000/- denominations have already been discontinued by the Government of India; that forged stamp papers worth lacs of rupees have been found in the Sub Treasury, Amethi itself as per the Enquiry Report of the Collector of District Sultanpur ; that the restrictions imposed are wholly unreasonable, illegal and unwarranted; and that lot of inconveniences are being faced not only by the stamp vendors but also by the general public as Treasury Challan is required to be filled up and submitted in the Treasury upto 1.30 P.M. only for which there is a long queue due to heavy rush at the Treasury .

4. In the Counter Affidavit, which has been sworn by the Treasury Officer, Varanasi, it has been stated, interalia, that judicial stamps of Rs. 3000/- denomination were not discontinued and are available; that a licensed vendor was allowed to sell Court-fee stamps and non-judicial stamps upto an aggregate value of Rs.15,000/- for one document or instrument vide Notification dated 13.6.1994 and only the non-judicial stamps of the value of Rs.2000/- and 3000/- denominations were discontinued; that after thoughtful consideration restrictions were imposed in order to avoid misuse and fraudulent use of stamp papers in the interest of the revenue of the State; that a reasonable restriction can always be imposed in the interest of public revenue; that the grounds are wholly misconceived, irrelevant and baseless; and as the writ petition is misconceived it is thus liable to be dismissed with cost..

5. A Rejoinder Affidavit has also been filed reiterating the correctness of some of the statements made in the writ petition repeating that the impugned amendment is absolutely illegal, unwarranted and unjustified and thus the writ petition be allowed with cost.

The Submissions:-

6. Sri B.N. Pathak, learned counsel appearing on behalf of the petitioner,

contended that the stamp vendor's fundamental right of trade guaranteed under Article 19(1)(g) of the Constitution of India as well as their right to have a meaningful life guaranteed under Article 21 of the Constitution of India stands breached by the amended Rule aforementioned. He, however, did not cite any decision to support his submission.

7. Learned Advocate General Sri R.P. Goyal, assisted by Smt Sarita Singh Standing Counsel, on the other hand, contended that apart from the State the petitioner has come up stating the backdrop justifying the amended Rule and there is no question of breach of their fundamental rights as enshrined in Articles 19(1)(g) and 21 of the Constitution of India for the simple reason that only a partial restriction has been imposed and that, too, in the interest of the Revenue of the State which is a public purpose to prevent squandering the public money revenue. No decision was either cited by the learned Advocate General in support of his submission.

Our Findings:-

8. Article 19(1) and its sub-clause (g) of the Constitution of India read thus:-

"

"19(1) All citizens shall have the right"

x x x

"(g) to practice any profession or to carry on any occupation, trade or business"

9. Article 21 of the Constitution of India reads thus:-

"21. Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law."

10. Article 19(6) of the Constitution of India reads thus:-

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing in the interest of the general public reasonable restrictions on the exercise of the right conferred by the said sub-clause and in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to or prevent the State from making any law relating to,"

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a Corporation owned or controlled by State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise." (Underling is by us)

On a bare perusal of sub-clause 6 aforesaid it is crystal clear that sub clause (g) could not have prevented the State from imposing reasonable restriction while amending Rule 156 of the Stamp Rules in the interest of the general public. It is further clear that for the same purpose exclusion ---partial or complete—or otherwise of citizen is also permissible.

11. Let us now refresh the ratio laid down by the Apex Court of the Country while interpreting Article 19(1)(g) vis-à-vis 19(6) of the Constitution.

If one understands correctly the ratio laid down in M/s Fedco versus S.N. Bilgramai A.I.R. 1960 SC 415 prevention of fraud stands comprised within the phraseology expressed in Article 19(6) of the Constitution.

Further as per Steel Controller versus Manik Chand A.I.R. 1972 S.C. 935; Rarnandez versus Deputy Chief Controller A.I.R. 1975 S.C. 1208 and Nagendra versus Commissioner A.I.R. 1958 S.C. 398 it is clear that the right to sell the stamps is created by grant of a licence under the Indian Stamp Act and the Rules framed by our State under that Act and thus the exercise of the right to sell the stamps is subject to the terms and conditions imposed by the Statute and no fundamental right is infringed by imposition of terms and condition. In State of Orissa versus Radhey Shyam (1995) I.S.C.C. 652 it was laid down that business interest of an individual can be overridden by the Government policy in the public interest.

12. In sale of the stamps public interest is apparently involved. From the facts pleaded by the Petitioner it is clear that the limit of Rs.5,000/- was enhanced to Rs.8,000/- but now it has been lowered. The amendment made is clearly permissible under Article 19(6) of the Constitution being in the interest of 'general public' imposing a reasonable restriction while permitting sale of Stamps worth to the extent of Rs.2,000/- only to the Stamp Vendors under the provisions of the Stamp Laws. The licensed stamp vendors have not been deprived from carrying on their trade or business secured under Article 19(1)(g) . Only a restriction has been imposed which is not arbitrary., We hold that the amendment was made in order to avoid fraudulent use and avoid misuse of stamp papers in the interest of general public as the income of the revenue of the State is public revenue which is being spent for the interest of the general public. We find the grounds devoid of any substance.

13. The petitioner has failed to demonstrate as to how the right to life of the stamp vendors to have a meaningful life within the scope of Article 21 of the Constitution of India has been breached. It is somewhat surprising to hear that it tends to deprive the stamp venders right to have a meaningful life for the reason that only stamps of high denominations have been restrained to be sold to the licensed stamp vendors. We are of the firm view that the amendment was made in the interest of general public without breaching Article 21 of the Constitution of India.

14. Accordingly, we dismiss this writ petition, but without cost.

15. The office is directed to hand over a copy of this order within one week to the learned Advocate General for its intimation to the authority concerned.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.8.2000

BEFORE
THE HON'BLE D.S.SINHA, J.
THE HON'BLE DEV KANT TRIVEDI, J.

Civil Misc. Writ Petition No. 21214 of 1997

Ram Autar Singh son of Sri Tafsi Lal ...Petitioner
Versus
State of U.P. through Home Secretary, and others ...Respondents

Counsel for the Petitioner:
Shri Vijai Sinha
Shri Vijai Bahadur

Counsel for the Respondents:
S.C.
Shri H.P. Tripathi

Article 226 of the Constitution of India- the question of quantum of punishment has to be decided by the punishing authority and this Court in exercise of its extra ordinary jurisdiction should not interfere with the impugned order on the ground of adequacy or inadequacy of the punishment.

Held--

Court in exercise of its extra-ordinary discretionary jurisdiction under Article 226 of the constitution of India should not interfere with the impugned order on the ground of adequacy or inadequacy of the punishment. (para 7)

By the Court

1. Heard Shri Vijai Sinha, learned counsel appearing for the petitioner and Shri H.P. Tripathi, learned Standing Counsel of the State of U.P. representing the respondents No. 1,2,3 and 6.

2. On being found guilty of the charges of abusing and misbehaving with his superior officers under the influence of liquor, the petitioner, an erstwhile constable of U.P. Police, was dismissed from service by means of the order dated 17th May, 1988, a copy whereof is Annexure'5' to the writ petition.

3. The dismissal order dated 17th May, 1988, was challenged by the petitioner by filing a claim petition before the U.P. State Public Services Tribunal, Lucknow which has been dismissed by the order and judgment dated 3rd March, 1997, a copy whereof is appended to the petition as Annexure '6' impugned in this petition.

4. The grounds of challenge to the dismissal order before the Tribunal were and before this Court are that the order was passed without following due procedure of law that adequate opportunity for defending himself was not given to the petitioner and that the order was passed without application of mind by the punishing authority.

5. In the context of the above grounds of challenge the Tribunal has recorded the following findings:-

"From the perusal of relevant file which was summoned it is clear that departmental enquiry was conducted properly and witnesses were examined. The petitioner was also given adequate opportunity to defend himself. There is nothing on record to prove that there was any violation of principles of natural justice or of any provision of Police Act or Police Regulation. A copy of the enquiry report was served upon him alongwith show cause notice dated

9.10.1987. As such it was not essential for the punishing authority to give details of the enquiry report I n the punishment order. The punishing authority has applied his mind and had taken into consideration the replies of the petitioner while passing punishment order which is clear from the perusal of punishment order dated 17.5.1988 (Annexure1). There is no illegality in the punishment order."

6. In view of the above finding of the Tribunal, which has not been demonstrated to be erroneous in any manner, in the opinion of the Court, the impugned order and judgment is not liable to be interfered with.

7. The learned counsel of the petitioner also submits that this Court may intervene in as much as the punishment awarded to the petitioner is not commensurate to his guilt. It cannot be gainsaid that the question of quantum of punishment has to be decided by the punishing authority; and that this Court in exercise of its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution of India should not interfere with the impugned order on the ground of adequacy or inadequacy of the punishment. (See. State Bank of India & others Versus Samarendra Kishore Endow & another, reported in Judgements Today 1994 (1) S.C. at page 217; and U.P. State Road Transport Corpn. & others Versus A.K. Parul, reported in Judgments Today 1998 (8) S.C.. at page 404)

8. All told, the petition lacks substance. It is dismissed summarily.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 28, 2000

BEFORE
THE HON'BLE M.C. JAIN, J.

Civil Misc. Writ Petition No. 8866 of 1998

Committee of Management Bal Vidyalaya, Naya Pura (Stanley Road) Allahabad Through its Manager
...Petitioner
Versus
District Social Welfare Officer, Allahabad & another ...Respondents

Counsel for the Petitioner:
Shri S.C. Kushwaha

Counsel for the Respondents:
S.C.
Shri A.K.Goyal
Shri Anil Jaiswal

Constitution of India Article 226-"No work no pay" is not applicable in those cases where there is no fualt on the part of the concerned techer.

Held –

Thus, the circumstances were created by the petitioner, as result of which she could not work during the period 15.12.1996 to 22.7.1997. She cannot be deprived of the salary for the said period on the principle "no work no pay" because of such a situation illegally created by the petitioner and the respondent no.2 is not to be blamed therefor.

The attempt of the petitioner to deprive her of the same and filing of this writ petition to achieve this purpose is malafide, untenable and unfounded.

(Para 6)

By the Court

1. The petitioner has sought the quashing of order dated 29.1.1998 passed by respondent no.1 which is Annexure 1 to the writ petition.

2. The petitioner is the Management Committee of Bal Vidyalaya, Naya Pura (Stanley Road), Allahabad. Respondent no.1 is the District Social Welfare Officer, Allahabad and respondent no.2 Smt. Krishna Srivastava was a teacher in the School managed by the petitioner. The petitioner runs two primary schools, one at Naya Pura, Allahabad and the other known as Kanya Pathshala, Ramman Ka Pura, Allahabad. The Manager of both the schools is one and the same, namely, Shri Rishi Ram. The schools receive grant-in-aid from the Government through respondent no.1. By order dated 11.12.96, respondent no.2 had been transferred by the petitioner from Naya Pura to Kanya Pathshala, Ramman Ka Pura, Allahabad. She challenged her transfer by means of Writ petition no.41225 of 1996 which was finally disposed of on 19.12.1996 with a direction that the petitioner would make representation to respondent no.1 who shall dispose of the same within two weeks. When se represented to respondent no.1, the latter directed the petitioner on 16.1.1997 to decide the matter at its own level. The petitioner then rejected the representation of respondent no.2 and directed her to join at the transferred institution but she did not comply with the same. She made an application in writ petition no.41225 of 1996 for recall of the order dated 19.12.1996 and with the prayer that the petition be decided on merits . A contempt petition was also made by her. It was directed by the Court on 19.8.1997 that it was open to her to represent before the Committee of Management and on her such representation, the committee would decide the matter within three weeks from the date of production of a certified copy of the order, but she did not file any representation before the Committee of Management. Because of this order, respondent no.1 was under pressure to pass an order dated 15.7.1997, Annexure 9 to the writ petition, cancelling the transfer order of respondent no.2 and directing the petitioner to permit her to join at her post. Thereafter, respondent no.1 passed the complained order dated 29.1.1998 directing the petitioner to pay the salary of respondent no.2 for the period 15.12.1996 to 22.7.1997 within ten days. Admittedly, she was permitted to join on 23.7.1997. The contention of petitioner is that respondent no.2 did not work for the period 15.12.1996 to 22.7.1997 and as such she was not entitled to salary for this period on the principle of “no work no pay”, The also did not apply for any leave for this period.

3. Counter and rejoinder affidavits have been exchanged between the parties. The case of respondent no.2 is that her transfer order was wholly illegal. She was not permitted to work during the period 15.12.1996 to 22.7.1997 and had been unnecessary harassed by the petitioner. The impugned order dated 29.1.1998 passed by respondent no.1 was only a consequential order of the earlier order dated 15.7.1997 (Annexure 9 to the writ petition) passed by respondent no.1 whereby the transfer order dated 11.12.1996 passed in respect of respondent no.2 was cancelled as it was against the Government order.

4. I have heard Sri S.C. Kushwaha for the petitioner, learned Standing Counsel for respondent no. 1 and Sri A.K. Goyal for respondent no. 2.

5. Admittedly, the petitioner receives grant-in-aid from the Government through respondent no. 1. It is apparent that the transfer of respondent no. 2 from one institution to the other by the petitioner by order dated 11.12.196 was illegal and it was for this reason that it came to be cancelled by respondent no. 1. She was permitted to join her duty only on 23.7.1997. Her representation made to respondent no. 1 earlier and referred to the petitioner was rejected by it (petitioner). Thus, the circumstances were created by the petitioner, as a result of which she could not work during the period 15.12.196 to 22.7.1997. She cannot be deprived of the salary for the said period on the principle 'no work no pay' because of such a situation illegally created by the petitioner and the respondent no. 2 is not to be blamed therefor. She had all through been running from pillar to post and had even filed the writ petition also to challenge the illegal Act of the petitioner. It came to be revealed by the parties during the course of the arguments that by now she has retired. Anyway, she is entitled to receive her salary and allowance for the period 15.12.1996 to 22.7.1997. The attempt of the petitioner to deprive her of the same and filing of this writ petition to achieve this purpose is malafide, untenable and unfounded. In all fairness, the petitioner should pay the salary of respondent no. 2 for the period 15.12.196 to 22..1997. The petitioner shall be directed to make payment of the salary of respondent no. 2 for the period 15.12.1996 to 22.7.1997 within one month from today.

6. In the result, the writ petition is hereby dismissed. However, the petitioner is directed to make payment of the salary of the respondent no. 2 for the period 15.12.196 to 22.7.1997 within one month from today. There would be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28TH AUGUST, 2000

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

Civil Misc. Writ Petition No. 16795 of 2000

Executive Engineer ...Petitioner
Versus
The Presiding Officer and another ...Respondents

Counsel for the Petitioner:
Mr. Ranjit Saxena

Counsels for the Respondents:
Mr. Shashi Nandan & S.C.

U.P. Industrial dispute Act, 1947-R. 16(1) – EX – Parte Award – application to set-a- side Filed after 6 Months-rightly rejected- order refusing to set-a-side the ex- parte award warrants no interference.

Held-

The award dated 24.2.99 published on 2.8.1999 has become final . Its validity cannot be challenged on any ground whatsoever. The respondent I cannot be said to have misdirected itself to any factor relevant to exercise of its discretion in the matter in rejecting the application for setting aside the award and consequently the order dated 15.2.2000 refusing to set aside the ex – parte award warrants no inference

under Article 226 of the Constitution of India. (para 10)

Case law discussed

2000 (84) FIR 311 1995 (2) Sec 1
1997 (2) U.P.L. BEC – 12374
1999 (2) U.P.L. BEC – 1357
J.T. 2000 (6) SC – 227
1993 (67) FIR 70 (SC)
J.T. 2000 (1) SC – 388
2000 (84) FIR 304
1998 (1) U.P.L. BEC 152
1997 U.P.L. BEC (2) 1274

By the Court

1. By means of this writ petition under Article 226 of the Constitution of India the petitioner has challenged the award dated 24.2.1999 published on 2.8.1999, Annexure – 7 to the Petition made in adjudication case no.200 of 1997 by respondent no. 1 and it is prayed that the award in question be set aside and the subsequent order dated 15.2.2000 , Annexure –12 to the petition passed by respondent no. 1 in Misc. Case no. 155 of 2000 by also quashed.

2. Heard Sri Ranjit Saxena , learned counsel for the petitioner as well as Sri Shashi Nandan appearing on behalf of respondent no. 2 at considerable length Since both the parties have advanced the arguments touching the whole gamut of the case, it was agreed that the petition be decided on merits at this stage . Accordingly I proceed to dispose of this writ petition on merits

3. The respondent no. 2 Surendra Mishra was admittedly appointed as Apprentice in the erstwhile establishment of the petitioner on Ist July, 1977 His services were terminated on 30.10.1978 He raised a dispute with regard to the termination of his services By order dated 19.1.1996 (Annexure – 5 to the petition), the Deputy Labour Commissioner Gorakhpur in exercise of the powers conferred on him by notification dated 29.8.1990referred the dispute under the provisions of U.P. Industrial Disputes Act to the Labour Court, Gorakhpur for award Notices ware issued to the parties the respondent employer in spite of service failed to submit the written statement Ultimately on 24.2.1999, the respondent no I declared the award which was published on 2.8.1999. the respondent no . 2 moved an application for the enforcement of the award on 16.8.1999 a copy of which is Annexure - 8 to the writ petition Thereafter the petitioner sent an application by post on 27.9.1999 mentioning therein that the fact of the proceedings initiated before respondent no. 1 and the award came to the respondent no. 2 moved an application for enforcement of the award This application was registered as Miscellaneous Case no. 155 of 2000 After hearing the petitioner as well as respondent no. 2 it was dismissed on 15.2.2000 (Annexure – 12) on the ground that the petitioner has not satisfactorily explained the delay of nine months on moving the application for setting aside the award It appears when the respondent no. 2 insisted for payment of the arrears of salary for the period 1.11.1978 to 29.2.2000, amounting to Rs. 14,98,000/- the present petition has been filed.

4. The learned counsel for the petitioner made various submissions touching the merits of the case and challenged the proceedings which culminated into an award in favour of the respondent no. 2. It was urged that the respondent no. 2 who was appointed only

as an Apprentice had no right to hold the post and therefore, he could not have challenged the order of termination dated 30.10.1978 and that since the petitioner had not worked even for 240 days in a calendar year therefore his termination was not legally wrong Sri Ranjit Saxena pointed out that the reference to the Labour Court was made after more than 17 years and since dispute raised was highly belated the respondent no I should have dismissed the same out right It was further urged that the exparte award came into being without effecting service on the petitioner – employer and therefore it is bad in law Sri Shashi Nandan learned counsel for the respondent had been duly served and had the full knowledge of the adjudication case in which after moving an application for time. It deliberately avoided to appear It was further urged that the award has become final and therefore, respondent no. 2 cannot be deprived to reap the fruits under the award .

5. To begin with it may be mentioned that the merits of the case as to whether the respondent no. 2 was entitled to be reinstated in service in consequence of his alleged illegal termination cannot be gone into and decided by this court on writ jurisdiction. This controversy was the subject matter of decision in the adjudication which was dealt with by the respondent no. 1 Therefore reference to various decisions to challenge the position that the respondent no. 2 was merely an apprentice and not a regular appointee and therefore could not be remstated as laid down in - (2000(84) FLR 311)- **Chairman, Kulchandra Gram Seva Sahkari Samiti Ltd. Vs. Judge, Labour Court, Bikaner and another,** (1995) 2 SCC 1- **U.P.State Road Transport Corporation and another Vs. U.P.Parivahan Nigam Shishukhs Berozgar Sangh and others** (1972) 2 UPLBEC 12374)- **Manoj Kumar Mishra Vs State of U.P. and others,** (1999)2 UPLBEC 1357- **Arvind Gautam Vs. State of U.P. and others** (FB) as well as JT 2000(6) SC 227 – **U.P. Rajya Vidyut Parishad apprentice Welfare Association and Anr. Vs State of Uttar Pradesh and others** is otiose.

6. The sheet anchor of the case of the petitioner is that the reference was not maintainable as it came to be made after a lapse of more than 17 years and, therefore, in view of the settled law the determination of the dispute could not have been made by the respondent no. 1. In support of his contention learned counsel for the petitioner placed reliance on the decision of this Court dated 17.12.1998 in Civil Misc. Writ Petition No. 33145 of 1998- **U.P. State Electricity Board and another Vs. Presiding Officer, Labour Court U.P. Haldwani Nainital and others** 1993 (67) FLR 70(SC)- **Ratan Chandra Sammanta and others Vs. The Union of India and others,** JT 2000(1) SC 388- **The Nadungadi Bank Ltd. Vs. K.P. Madhavankutty and others;** 2000 (84) FLR 304 **U.P. State Electricity Board and another Vs. State of U.P. and others** and 1998 (1) UPLBEC-152 **U.P. Electricity Board, Kanpur and another Vs. Presiding Officer, Labour court, U.P. Kanpur and others.** The gist of all these decisions is that a person cannot be allowed to raise a dispute after a very long time and delay in the matter would be fatal. The delay of 7 or 8 years in making

reference has been held to be inordinate. There can be no dispute about the proposition of law laid down in the aforesaid decisions.

7. Now the question is whether there were any laches or delay on the part of respondent no. 2 in raising the dispute. The services of the respondent no.2 were terminated in October 1978. He made a number of representations to the officers of the petitioner department but when he remained unsuccessful in his attempts, he approached the Conciliation Officer. C.P. Case No. 40 of 1998 was registered before him This case was not disposed of by the conciliation Officer for a considerable long time with the result the petitioner had approached this Court by filing a writ petition No. 33281 of 1995. The said petition was finally disposed of by this Court on 22.11.1995 with the direction to the Conciliation Officer to dispose of the case within a period of two months. Thereafter the case was disposed of and reference to the Labour Court was made on 19.1.1996 which gave rise to Adjudication Case No.200 of 1997. Even this case remained pending for about two years. The respondent no. 2 again filed a writ petition No. 7590 of 1999 in which a direction was issued on 20.2.1999 to respondent no. 1 to decide the adjudication case with all expedition preferably within a period of three months . In view of the above facts, it would be apparent that respondent no. 2 has been frantically striving to enforce his rights and did not allow the matters to become state. He has been diligently pursuing his remedy but the proceedings remained stuck up with the Conciliation Officer for a long period. The blame for making the reference after about 17 years of the termination of the services of the respondent no. 2 cannot put at his door. The delay in making the reference of the dispute to the Labour Court though highly inordinate stands satisfactorily explained. Moreover, the petitioner failed to take this plea before the respondent no. 1. The proper course to be adopted by the petitioner was to have entered into a contest in the adjudication case and if it was done its plea that the reference was highly belated could be sifted by the respondent no.1.

8. The well established facts of the case tell an entirely different story . While passing orders in Misc. Case no. 155 of 2000. The respondent no. 1 had recorded the findings that the summons of the adjudication case no. 200 of 1997 had been served on the Executive Engineer concerned of the petitioner department and that the summons bearing the signature and seal of the Executive Engineer concerned is available on record of the adjudication case the fact that the service on the petitioner dated 29.1.1999 (Annexure –6 to the writ petition) moved by Executive Engineer himself before respondent no. 1 Through this application time to file written statement was sought on the ground that the personnel Officer –D.L.W. Varanasi who is required to file written statement will take about one month `s time as his functional area was quite large On the application of the petitioner the case was to be adjourned for hearing to 24.2.1999. On that date none appeared on behalf of the petitioner nor any application for adjournment was filed and consequently an ex parte award was made. It is, therefore , not a case in which service of summons was not effected on the petitioner As a matter

of fact, the assertion of the Executive Engineer of the petitioner department in the application dated 27.9.1999 that he came to know of the adjudication case and the award only through the application of the respondent no. 2 on 16.8.1999 is nothing but an attempt to cover up the negligence and remissness on the part of erring officer who had failed to contest the case and had adopted a casual attitude by passing the case and had adopted a casual attitude by passing the buck on the personnel Officer- D.L.W. Respondent no. 1 had no option but to make an award as the petitioner failed to appear and contest the adjudication case no. 200 of 1997.

9. Under Rule 16 (1) of the U.P. Industrial Disputes Rules, 1947 as application for setting aside the ex-parte award could be moved within a period of 10 days of the date of the order sought to be set aside after showing sufficient cause for the absence. In the instant case no such application was moved . The law with reference to Rule 16(1) had been interpreted in the celebrated decision of this Court reported in (1997) UPLBEC-2 Page 1274 **State of U.P. and another Vs. Bachai Lal and another.** It has been laid down that the expression "order" appearing in Rule 16(1) also includes ex-parte "award" and the Labour Court has power to set aside an ex-parte award passed against a party in its absence if within 10 days of such award , the party apples in writing for setting aside such award and shows sufficient cause for its absence. In the instant case the award aforesaid was made on 24.2.1999. The application for setting aside the award was received by Respondent no.1 on 29.11.1999 i.e. after expiry of a period of nine months. The application was hopelessly barred by time. The petitioner has not been able to show sufficient cause for its absence on the date fixed. On the hand, as stated above Executive Engineer on behalf of the petitioner had taken an absolutely false case that it came to know of the proceedings and the award only on 16.8.1999 from the contents of the application moved by respondent no.2. This assertion is clearly in conflict with the earlier application moved on behalf of the petitioner on 29.1.1999 during the pendency of the adjudication case no.200 of 1997. The respondent no.1 was justified in rejecting the application , which was registered as Miscellaneous Case No.155 of 2000 for setting aside the award dated 24.2.1999.

10. The award dated 24.2.99 published on 2.8.1999 has become final. Its validity cannot be challenged on any ground whatsoever. The respondent 1 cannot be said to have misdirected itself any factor relevant to exercise of its discretion in the matter in rejecting the application for setting aside the award and consequently the order dated 15.2.2000 refusing to set aside the ex-parte award warrants no interference under Article 226 of the Constitution of India.

In the conspectus of all the above facts, the petition turns out to be without any merit and substance and is accordingly dismissed.

No order as to cost is made.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD22.8.2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE ONKARESHWAR BHATT, J.

Criminal Misc. Writ Petition No. 4861 of 2000
Ajeet Singh alias Muraha ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Shukla
Sri R.K. Pandey

Counsel for the Respondents:
A.G.A.

Constitution of India-Article 226 whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused. This practice is illegal as it is against the decision of the Supreme Court in Joginder Kumar's case, and it is also in violation of Article21 of the Constitution as well as section 157 (I) Cr.P.C.- question referred to larger Bench.

Held-

It is not necessary to arrest in every case where ever a FIR of cognizable offence has been registered. No doubt investigation has to be made in every case where a cognizable offence is disclosed but in our opinion investigation does not necessarily include arrest. Often the investigation can be done without arresting a person, and this legal position becomes clear from section 157 (1) of the Cr.P.C., because that provision states that the Police Officer has to investigate the case, and, if necessary, to take measures for the arrest of the offender.(Para 11)

By the Court

1. Heard Sri S.K. Shukla learned counsel for the petitioner and learned Government Advocate. The petitioner has prayed for a writ of certiorari for quashing the FIR dated 19.5.2000 (Annexure 1 to the petition) registered as Case Crime No. 144 of 2000 under section 323, 504, 506 IPC read with Section 3 (1) (10) of SC/ST Act, P.S. Khuthan, District Jaunpur.

2. Learned counsel for the petitioner has relied on the decision of the Supreme Court in **Joginder Kumar vs. State of U.P. AIR 1994 SC 1349**. In the decision the Supreme Court observed (in paragraph 24)

"24. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause in calculable harm to the reputation and self-esteem a person…No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bonafide of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the

constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to a person to attend the Station House and not to leave the Station without permission would do.

3. The Supreme Court also (in paragraph 23) referred to the Third Report of the National police Commission that had suggested:-

"…An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances-

i) The case involves a grave offence like murder, dacoity, robbery, rape etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

ii) The accused is likely to abscond and evade the processes of law.

iii) The accused is given to violent behavious and is likely to commit further offences unless his movements are brought under rerstgraint.

iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again".

4. The Supreme Court also referred to the report of the Royal Commission in England in this connection (in paragraph 19 to 22)

5. The Supreme Court also observed (in paragraph 13) that the Third Report of the National Police Commission has mentioned that nearly 60% of the arrests by the police were either unnecessary or unjustified, and that such unjustified police action accounted for 43.2 percent of the expenditure of the jails. The Police Commission in its Third Report mentioned that a major portion of the arrests by the police were connected with minor prosecutions and therefore cannot be regarded as quite necessary from the point in view of crime prevention.

6. On the other hand learned Government Advocate has relied on the Full Bench decision of this Court in Satya Pal and others vs. State of U.P. and others 2000 (4) ACC 75. We have carefully perused the decision of the Supreme Court in Joginder Kumar's case and the decision of the Full Bench in Satya Pal's case (supra). We are of the opinion that many of the observations in Satya Pal's case are in conflict with the observations of the Supreme Court in Joginder Kumar's case (supra), and hence the matter needs to be referred to a larger bench for re-considering these observations in Satya Pal's case (supra) which appear to be inconsistent with the observations of the Supreme Court in Joginder Kumar's case (supra).

7. In paragraph 36 of the judgement of the Full Bench in Satya Pal's(supra) no doubt paragraph 24 of the decision in Joginder Kumar's case has been quoted. However, thereafter the decision of the Supreme Court in Joginder Kumar's case has been practically brushed aside in Satya Pal's case by the following observation in paragraph 37 "However, the aforesaid observation of the Hon'ble Supreme Court have been made on the peculiar facts circumstances of Joginder

Kumar' case which are different from the present one."

8. There is no discussion in Satya Pal's case about the principles relating to the power of arrest laid down in Joginder Kumar's case. It is settled law that the decision of the Supreme Court is binding on the High Court in view of Article 141 of the Constitution of India. Even obiter dicta of the Supreme Court are binding on the High Court. Hence we are constrained to observe that it was not open to the full bench of this Court in Satya Pal's case to practically brush aside the Supreme Court's decision in Joginder Kumar's case merely by saying that the decision in Joginder Kumar's case was made on its own 'peculiar facts and circumstances'. Decisions of the Supreme Court are absolutely binding on the High Court and must be followed faithfully and punctually. With profound respect to our brethren Judges who delivered judgement in Satya Pal's case we are constrained to saythat they did not seem to have followed the aforesaid decision of the Supreme Court and have brushed aside the said decision by a stray observation in paragraph 37. If Supreme Court decisions are treated in this manner then every decision of the Supreme Court can be disregarded by High Court Judges simply by saying that the decision was 'on its own peculiar facts.' To say the least, this would be grossly subversive of judicial discipline.

9. In paragraph 40 of Satya Pal's case (supra) it has been observed "However, the order staying arrest maybe granted sparingly in exceptional cases and with circumspsectuion, that too in the rarest of rare cases". This observation, in our opinion, is inconsistent with the decision in Joginder Kumar's case. There is no such principle of law laid down in Joginder Kumar's case that stay of arrest should only be granted in the rarest of rare cases. The criteria as to when there should be arrest and when there should not be arrest has been laid down in Joginder Kumar case's, and it is not open to the High Court to deviate from that criteria. The principle of rareast of rare case was laid down by the Supreme Court in connection with death sentences, and it has nothing to do with staying of arrest. Hence in our opinion to say that arrest should be stayed only in rarest of rare cases would be inconsistent with and contrary to the observations and directions of the Supreme Court in Joginder Kumar's case (supra).

10. After the promulgation of the Constitution individual liberty has become of great importance, particularly in view of Article 21, which is a fundamental right. Hence it cannot be lightly interfered with. Moreover, section 157(1) Cr.P.C. states:-

"157. Procedure for investigation-(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and **if**

necessary, to take measures for the discovery and arrest of the offender'.

11. The above provision clearly shows that it is not necessary to arrest in every case where ever a FIR of cognizable offence has been registered. No doubt investigation has to be made in every case where a cognizable offence is disclosed but in our opinion investigation does not necessarily include arrest. Often the investigation can be done without arresting a person, and this legal position becomes clear from section 157(1) of the Cr.P.C. because that provision states that the Police Officer has to investigate the case, and if necessary, to take measures for the arrest of the offender. The use of words if necessary clearly indicates that Police Officer does not have to arrest in every case where ever FIR has been lodged, and this position has been clarified in Joginder Kumar's case (supra).

12. In our country unfortunately whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused. This practice in our opinion is illegal as it is against the decision of the Supreme Court in Joginder Kumar's case, and it is also in violation of Article 21 of the Constitution as well as section 157 (1) Cr.P.C. No doubt section 157 (1) Cr.P.C. gives a police officer discretion to arrest or not, but this discretion cannot be exercised arbitrarily, and it must be exercised in accordance with the principles laid down in Joginder Kumar's case (supra).

13. It maybe mentioned that the provision for anticipatory bail has been deleted by an amendment in U.P. and a full bench of this Court has held that the High Court cannot order disposal of the bail application on the same day. It is well known that in U.P. criminal trials often take 5 years or sometimes even more to complete, and hence the question arises that if an accused is found innocent after this long interval who will restore these 5 years or so of life to him if he is not granted bail.

14. It may be mentioned that a person's reputation and esteem in society is a valuable asset, just as in civil law it is an established principle that goodwill of a firm is an intangible asset. In practice, if a person applies for bail he has to surrender in court, and normally the bail application is put up for hearing after a few days and in the meantime he has to go to jail. Even if the is subsequently granted bail he has to surrender in court, and normally the bail application is put up for hearing after a few days and in the meantime he has to go to jail. Even if the is subsequently granted bail or is acquitted his reputation is irreparably tarnished in society. Often false and frivolous FIR are filed yet the innocent person has to go to jail and this greatly damages his reputation in society. All these factors must be kept in mind by the High Court particularly after the promulgation of the Constitution, which has embodied the right to liberty as a valuable fundamental right in Article 21 of the Constitution of India.

15. In view of the above we are of the opinion that certain observations and directions of the three Judge full bench of this Court in Satya pal vs. State of U.P. (supra). Needs to be re-considered by a larger bench of this Court. Hence we are of the opinion that the following questions need to be referred to a larger bench :-

1. Whether arrest during police investigation can be stayed by this Court only in rarest of rare cases as observed in Satya Pal's case or according to the criteria laid down by Supreme Court in Joginder Kumar's case (supra) ?

2. Whether the full bench in Satya Pal's case (supra) was right in holding that Joginder Kumar's case was delivered on its own 'pecullar facts and circumstances' and hence does not lay down any legal principles relating to the power of arrest and the power of stay of arrrest by this Court ?

16. In view of the above let the papers of this case be laid before Hon'ble the Chief Justice for constituting a larger bench for reconsidering the correctness of the decision of the full bench decision of this Court in Satya Pal case (supra).

Learned Government Advocates may file counter affidavit within a month.

Issue notice to respondent no. 3 returnable at an early date.

17. In the meantime we direct that petitioner shall not be arrested in the above case till submission of charge sheet in court but investigation in the above mentioned case may go on.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2000

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE DEV KANT TRIVEDI, J.

Civil Misc. Writ Petition No.5054 of 1998

Devendra Dutta Bahuguna ...Petitioner
Versus
The Secretary, District Bhesaj and Cooperative Development Federation Limited, Muni ki reti, district Tihari Garhwal and another ...Respondents

Counsel for the Petitioner :
Sri C.D. Bahuguna

Counsel for the Respondents:
S.C.
Sri M.P. Gupta

Constitution of India, Article 226 read with U.P. Cooperative Societies Act, 1965 S.128- Alternative remedy of appeal not availed of- Petition wrongly asserting that no other altgernative efficacious speedy remedy available- Held, that extraordinary jurisdiction under Article 226 cannot be exercised.
Held- (Para 12)
Ignoring the factum of availability of statutory alternative remedy of appeal under section 128 of the Act, the petitioner approached this Court on the wrong assertion in para 29 of the petition that no alternative efficacious speedy remedy was available to him. It cannot be gainsaid that invoking the extra-ordinary jurisdiction of this Court under Article 226 of Constitution of India on wrong averments dis-entitles the petitioner for the benefit of any discretionary relief from this Court. Such a conduct of the petitioner renders his petition liable to be dismissed at the thresh –hold.

By the Court

1. Heard Sri C.D. Bahuguna, the learned counsel appearing for the petitioner and Sri M.P. Gupta, the learned counsel appearing for the respondents.

2. The services of the petitioner, an employee of the respondents, were terminated in connection with the alleged embezzlement of an amount of Rs. 31,588.99 and prolonged absence from duty.

3. However, the petitioner was reinstated in pursuance of an adjudication by the Labour Court vide its order dated 21.5.1996 in his favour.

4. The Labour Court had left open to the respondents to hold an enquiry against the petitioner in respect of the alleged embezzlement. It transpires that an enquiry was held by the respondents wherein it was found that the petitioner had embezzled the amount of Rs. 31,475.49. Then, the matter was referred to the Deputy Registrar, Co-operative Society, Garhwal Mandal, U.P. who passed an order dated 25.6.1988 under section 68 of the U.P. Co-operative Societies Act, 1965 (hereinafter called the Act) directing the recovery of an amount of Rs. 31.588.99 with interest at the rate of 18% per annum.

5. In pursuance of the above order dated 25.6.1988 the recovery proceedings were initiated on 13.8.1991. The petitioner challenged the recovery proceedings before this Court in Civil Misc. Writ Petition No. 13275j of 1991. He prayed for stay of recovery proceedings. The Court vide its order dated 29.5.1991 called upon the respondent/respondents to show cause why the petition be not admitted or heard and disposed of at admission stage.

6. At this stage, it is relevant to notice that the Court did not grant any interim order staying the recovery proceedings. The writ petition remained pending.

7. There is no material on record of the Civil Misc. Writ Petition 13275 of 1991, aforesaid, to indicate that the petitioner took steps to serve notice on the respondents in pursuance of the order of the Court dated 29.5.1991.

8. The petition remained pending and it was eventually dismissed in default on 31.1.1998. The order of dismissal is still intact.

9. During the pendency of civil misc. writ petition no. 13275j of 1991, in the absence of any interim order staying the recovery proceedings, the respondent issued a fresh demand notice which is the subject matter of challenge in the present writ petition, the Court permitted the petitioner to serve the respondents personally in addition to normal mode of service. The respondents have filed the counter affidavit. It is not disputed that the copy of ;the counter affidavit was served on the learned counsel for the petitioner on 16.3.1998. More than 21/2 years have elapsed, no rejoinder affidavit has been filed.

10. In the counter affidavit, on behalf of the respondents, inter-alia, it is pointed out that for redressal of his grievance raised herein the petitioner has got an effective statutory alternative remedy of appeal under section 128 of the

Act besides the remedy of approaching the District Magistrate and the Recovery Officer.

11. The learned counsel appearing for the petitioner has not been able to dispute the position that the petitioner has got an effective statutory alternative remedy of appeal under section 128 of the Act.

12. Ignoring the factum of availability of statutory alternative remedy of appeal under section 128 of the Act, the petitioner approached this Court on the wrong assertion in para 29 of the petition that no alternative efficacious speedy remedy was available to him. It cannot be gainsaid that invoking the extra-ordinary jurisdiction of this Court under Article 226 of Constitution of India on wrong averments dis-entitles the petitioner for the benefit of any discretionary relief from this Court. Such a conduct of the petitioner renders his petition liable to be dismissed, at the thresh-hold.

13. On the facts and circumstances noticed above, in the opinion of the Court, the petitioner is not a fit person in whose favour this Court may exercise its discretionary and extraordinary jurisdiction under Article 226 of Constitution of India.

14. Thus, the writ petition is dismissed summarily. The interim order dated 12.2.1998 shall stand vacated.

REVISION JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.8.2000

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

Criminal Revision No. 1772 of 2000

Haji Shafi and others ...Revisionists
Versus
State of U.P. ...Opposite party

Counsel for the Applicants:
Sri Dharmendra Singhal

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

Code of Criminal Procedure- Section 209 -the presence of accused is necessary for committal. The compliance of section 207-208 Cr.P.C. cannot be made in absence of the accused.

Held-

The accused cannot be committed to the Court of session, if they are not present in the court of the committing Magistrate.(para 5)

By the Court

1. A chargesheet in Crime No. 178 of 1998 for offences under sections 147, 148 and 302 I.P.C. has been submitted against the applicants regarding which case no. 4448 has been registered in the court of C.J.M., Rampur. The applicants were summoned. They moved an application to commit then to the Court of sessions through counsel in their absence. The said application has been rejected by the impugned order dated 17.8.2000 by the C.J.M., Rampur . Aggrieved by it, the present revision has been preferred.

2. I have heard Sri Dharemdra Singhal, learned counsel for the applicants and the A.G.A.

3. It is contended that the presence of the accused at the time of committal is not necessary. The learned counsel for the applicants in support of the argument, has referred to the case of 'Kamlesh Kumar Dixit vs. State, 1981 ACC page 238. ' I have gone through the judgement and is of the view that it is of no help to the applicants. In this case the accused was committed in his absence to the court of session. The trial ultimately resulted in conviction. Against the conviction, criminal appeal was filed and it was that the accused was committed to the court of session in his absence, which is not permissible under section 209 Cr.P.C. That, therefore, the trial as well as in the conclusion illegal. This contention was repealed by Hon'ble P.N. Goel, J., who decided the appeal and held that it is only which doles not vitiate the trial. It was further observed that no prejudice has been caused to the appellant for the reason that he was committed to the court of sessions in his absence. Therefore, the decision is not an authority on the point that the accused can be committed to the court of sessions in his absence through counsel. On the other hand, the law laid down in this case is against the arguments of the learned counsel for the applicants.

4. The opening words of Section 209 Cr.P.C. are that when the accused appears and brought before the Magistrate. In that case the Magistrate can commit the case, if the offence is triable by the Court of sessions. Therefore, the presence of the accused is must for committal. Apart from this, the compliance of Sections 207 and 208 Cr.P.C. are to be made before committal. The compliance could not be made in the absence of the accused.

5. After considering the arguments, I am of the view that the accused cannot be committed to ;the court of session, if they are not present in the court of the committing Magistrate.

6. The application was, therefore, rightly rejected. I do not find any force in this revision. It is dismissed.

Application Rejected.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.7.2000

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

Criminal Revision No. 1433 of 1984

Bismilla Idrisi ...Revisionist
Versus
State of U.P. and others ...Opposite Parties.

Counsel for the Revisionist:
Shri H.R. Misra

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure, 1973, S. 1967 (1) applicability

Held-)

I am of considered opinion that there is no application of Section 107 Cr.P.C. to these facts and circumstances. In order to avoid adverse consequences and claim the benefit of Section 197 Cr. P.C. it is incumbent upon the applicant to show that the act or offence alleged against him is committed by him in the discharge of his official duties or in the purported

discharge of the same. He has to establish a nexus between the alleged offence and discharge of his official duty. (para 6)

In the present case the act of the applicant is not covered by any of the two clauses of Section 197 Cr.P.C. If the applicant had asked or allowed any one to use material belonging to the complainant in the construction of Government Bridge the work so completed does not come to his rescue. He had absolutely no authority to direct any one to use personal property of another person is requisitioned by an appropriate governmental order. In the absence of any such fact the requisite relationship between his official duty and the offence alleged against him is missing. The offence of either theft or misappropriation has absolutely nothing to do with his official duty. These offences are individual offences. He has no authority to permit anyone to utilize some other persons properly in completing any start work. (Para 7)

By the Court

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

2. I have perused the order of learned Chief Judicial Magistrate, Orai dated 30.6.1984 and I do not find any infirmity or illegality in the above said over.

3. It has been contended before me by the learned counsel for the applicant that the act of the applicant is squarely covered by the provision of Section 197 Cr. P.C. For ready reference the provision is being quoted as under:

"When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may by, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government.

(b) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a Sate, State Government.

(Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" Government.)

4. Sub Section (1) of Section 197 Cr. P.C. clearly indicates that the prosecution against public servant can be brought only with the sanction of the concerned government or the authority so empowered if that act was committed by him while acting or purporting to act in the discharge of his official duty. Without such sanction no court can take any cognizance in such prosecution on any complaint or charge sheet by any agency competent to investigate or an individual against whom offence was committed.

5. The allegations made against the applicant are that the complainant was awarded a contract for the construction of a bridge but due to not supply of cement construction could not be completed in time. It appears clearly that the contract was cancelled and allotted to some one else. It is alleged that the material belonging to him was used in connivance with the applicant in construction of that bridge. The Chief Judicial Magistrate finding a prima facie case made out has held that it has no relation with the official duty of the above accused persons and accordingly he had rejected their application.

6. I have gone through the fact of the case and I am of considered opinion that there is no application of Section 197 Cr.P.C. to these facts and circumstances. In order to avoid adverse consequences and claim the benefit of Section 197 Cr.P.C. it is incumbent upon the applicant to show that the act or offence alleged against him is committed by him in the discharge of his official duties or in the purported discharge of the same. He has to establish a nexus between the alleged offence and discharge of his official duty.

7. In the present case the act of the applicant is not covered by any of the two clauses of Section 197 Cr.P.C. If the applicant had asked or allowed any one to use material belonging to the complainant in the construction of Government Bridge the work so completed does not come to his rescue. He had absolutely no authority to direct any one to use personal property in any government work unless such property of another person is requisitioned by an appropriate governmental order. In the absence of any such fact the requisite relationship between his official duty and the offence alleged against his is missing. The offence of either theft or misappropriation has absolutely nothing to do with his official duty. These offences are individual offences. He has no authority to permit anyone to utilize some other persons properly in completing any state work.

8. In view of this fact this revision does not appear to have any force. However, taking into consideration the long lapse of time i.e. 16 years in hearing this case it shall not be proper to direct the arrest of the applicant. There is absolutely no apprehension of either his running away or absconding from law.

9. In the circumstances I direct the trial court to release the applicant on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of Chief Judicial Magistrate and he shall ensure presence in court as and when called upon to do so.

10. The court below shall not go by observations made by me in my order. He is free to apply his mind to the evidence that will come forth on the record independent of these observations.

With this direction this revision stands dismissed.

Revision Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD SEPTEMBER 20, 2000

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

Habeas Corpus Writ Petition No.27252 of 2000

Nawab Dulha ...Petitioner.
Versus
Union of India through Secretary Home Affairs and others ...Respondents.

Counsel for the Petitioner:
Shri P.C. Srivastava
Shri D.S. Misra

Counsel for the Respondents:
A.G.A.
Shri K.N. Pandey
Shri Mahendra Pratap Singh

Constitution of India Article 22(5) —It was incumbent upon the detaining authorities to have communicated to the petitioner of his right to make the representation to the detaining authority also while serving the detention order. In absence of this constitutional mandate, an order of detention as approved by the State Government cannot sustained and the detention of the petitioner would be illegal.
Held
He has not been informed of his right to make a representation to the detaining authority which is also violation of the constitutional mandate. (Para 11)

By the Court

1. By means of the present writ petition, the petitioner has challenged the detention order dated 29.4.2000 as contained in Annexures-1 and 2 to the writ petition, said to have been served upon the petitioner on 30.4.2000. The impugned order against him was passed by respondent no.3, the District Magistrate, Udham Singh Nagar under section 3(2) of the National Security Act, 1980. He has also challenged his continued detention under the said order and has prayed to set at liberty forthwith by issuing a writ, order or direction in the nature of Habeas Corpus.

2. Originally, the petitioner had impleaded five respondents including Superintendent of Police, Udham Singh Nagar. However, on oral prayer of petitioner, respondent no.4 was permitted to be deleted and respondent no.5 Jail Superintendent, District Jail, Rampur was renumbered as respondent no. 4. Counter affidavits have been filed by four respondents. The petitioner's counsel expressed his desire not to file any Rejoinder affidavit. We have, therefore, heard Sri D.S. Mishra, learned counsel for petitioner, Sri Mahendra Pratap Singh, learned Additional Government Advocate appearing for respondents no. 2,3 and 4 and Sri Kamlesh Narain Pandey appearing for respondent no. 1.

3. Learned counsel for the petitioner has challenged the impugned detention order and continued detention of the petitioner there under on the grounds- (i) that there was unexplained inordinate delay on the part of the State Government respondent no. 2 in disposal of the petitioner's representation made on 17.5.2000; (ii) the detention order did not apprise the petitioner of the right that the representation by the detenu against the order can also be made before the District Magistrate, the Detaining Authority; and (iii) the representation was not placed

before the Advisory Board, Sri Mahendra Pratap Singh has fairly conceded that there was delay in disposal of the representation by the respondent no. 2, which has not been explained in the counter affidavit.

4. Sri V.B. Saxena, Jailor, District Jail, Rampur, where the petitioner is detained, has admitted in his counter affidavit that the detention order dated 29.4.2000 was received in the jail on 30.4.2000 and was served upon the petitioner the same day. It is also stated that the petitioner submitted his representation on 17.6.2000 to the District Magistrate, Rampur through jail authorities. The representation was rejected by the State Government and message was sent through radiogram dated 10.6.2000 and after the same was received the jail authorities informed the petitioner about rejection of his representation. It is also stated that the Central Government rejected the representation of the petitioner and radiogram message dated 26.5.2000 was received and the petitioner was informed. It was further stated in his counter affidavit that the government approved the detention order and sent the radiogram message on 10.5.2000 which was conveyed to the petitioner by jail authorities after it was received. The State Government confirmed the detention order for a period of 18 months from the date of detention and sent message dated 1.6.2000 and the said message was conveyed to the petitioner by the jail authorities.

5. Respondent no.3 Sri Narendra Bhushan, the then District Magistrate, Udham Singh Nagar, Detaining Authority has stated that the detention order was passed by the deponent against the petitioner on 24.4.2000 and the same was served upon the petitioner on the same date through jail authorities; that the detention order was passed by respondent no.3 on sufficient grounds as detailed in the counter affidavit as well as the detention order. The counter affidavit filed by the District Magistrate, respondent no.3 is, however, silent on the question as to when the representation of the petitioner was received by the respondent no.3 and how it was dealt with him and where the same was forwarded by him to the State Government.

6. Sri R.A. Khan, under Secretary to the Government of Uttar Pradesh, respondent no.2, has stated in the counter affidavit that the petitioner's undated representation addressed to the Home Secretary, U.P. Lucknow forwarded by the Superintendent, District Jail, Rampur on 17.5.2000 was received in the concerned section of the State Government on 29.5.2000, much after the conclusion of hearing of the petitioner's case on 18.5.2000. Since the Advisory Board had already concluded the hearing on 18.5.2000 and it had given its report on 24.5.2000 there was no justification for sending the copies of the representation to the Advisory Board. Since the representation dated nil was addressed only to the Home Secretary, U.P. Lucknow and not to the Central Government, the State Government had not sent the representation to the Central Government. It was stated that the concerned file was in submission for higher orders on the report of the Advisory Board till 31.5.2000. The file was received back in the concerned Section on 1.6.2000 and the concerned

Section of the State Government examined the representation and submitted a detailed note on 2/3.6.2000. Sunday dated 4.6.2000 was intervening and the deponent examined the representation and the note on 5.6.2000. The Special Secretary also examined it on 5.6.2000 and thereafter it was submitted to the Secretary, Home and confidential Department who examined it on 6.6.2000 and submitted it to higher authorities for final orders of the State Government. After due consideration, the said representation was finally rejected by the State Government on 8.6.2000. The rejection of the representation was communicated to the petitioner through district authorities by the State Government radiogram dated 9.6.2000. The facts thus show that the representation of the petitioner was decided expeditiously.

7. The respondent no. 1, Union of India, filed an affidavit of Sri Sushil Kumar, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi, Wherein it was stated that the relevant authority for disposal of the representation was State Government. However, as the detenu addressed the representation to the Central Government, it was disposed of on merits. The representation from the detenu was received by the Central Government in the concerned desk of Ministry of Home Affairs on 24.5.2000. It was immediately process for consideration and the case of the detenu was put up before the Deputy Secretary, Ministry of Home Affairs on 24.5.2000, who carefully considered the same and with her comments put up the same before the Joint Secretary, Ministry of Home Affairs on 25.5.2000 and the Home Secretary, who has been delegated with the powers by the Union Home Minister to deal with such cases, considered the case of the detenu and rejected the representation on 25.5.2000. The decision of the Central Government was communicated to the Government of Uttar Pradesh and Superintendent, District Jail, Rampur through crash wireless message on 26.5.2000 and thus there was no delay on the part of the Central Government, who quickly disposed of the representation.

8. Before we proceed further, it is significant to point out that the sacred idea behind Section 8 of the National Security Act is that the detenu must have the earliest opportunity of making the representation against the detention order to the Appropriate Authorities which also includes the disposal of the representation at the earliest possible. The duty is casts on the authorities concerned to take all possible steps for consideration of the representation of the detenu at the earliest possible without any undue loss of time. When the question of liberty of citizen is involved and that too by means of the preventive detention, it is incumbent upon the authority to explain delay in consideration of the representation. Every possible step is required to be taken by each part of the machinery concerned to facilitate and ensure earliest decision on the representation made by the detenu. Various pronouncements of the Apex Court as also of various High Courts have reminded the executive authorities of their obligation and duty under the Constitution of India to guard the liberty of the citizen but it appears that continued message given by the Courts in this regard is not percotated Executive authorities and their methods of acting in most casual manner have not changed. We may refer to the

observation of the Apex Court in the case of K.M. Abdulla Kunhi And B.L. Abdul Khader Vs. Union of India and others, (191) 1 SCC 476, wherein a Constitution Bench of the Court held as follows:--

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation and dispose of the same as expeditiously as possible. But the time imperative for consideration of representation can never be absclute or obsessive. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be deal with. It depends upon the facts and circumstances of each case, upon the necessities and the time at which the representation is made. The requirement 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 constitutional of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

9. Having given our anxious consideration to the material before us, we find that there is no denying of the fact that a representation was made by the petitioner which was forwarded by respondent no.4 on 17.5.2000 to the to the District Magistrate Rampur, as stated by the respondent no. 4 in paragraph no.4 of his counter affidavit. There is no averment in the counter affidavit filed by respondent no. 4 that the representation made by the petitioner addressed to the State Government and Central Government were also forwarded to the District Magistrate, Rampur or to the respondent no. 3 District Magistrate, Udham Singh Nagar, who was the detaining authority in the instant case. How and when the district Magistrate, Rampur sent the representation the detaining authority, respondent no. 3 or the State Government is not at all explained in the counter affidavit filed by respondent no.3, the District Magistrate, Udham Singh Nagar or the counter affidavit filed by Sri R.A. Khan on behalf of State of Uttar Pradesh, respondent no.2. In paragraph no,.4 of the counter affidavit filed on behalf of respondent no.2, only this much is stated that the copy of the representation addressed to the Home Secretary, Uttar Pradesh, Lucknow was forwarded by Superintendent, District Jail, Rampur on 17.5.2000 which was received in the concerned Section of the State Government U.P. on 29.5.2000 whereas the counter affidavit filed by respondent no.4 states that the representation was forwarded to the District Magistrate, Rampur and there is no averment that any representation or copy thereof was forwarded by the respondent no.4 to the State Government directly. Thus it is mystery as to what happened to the representation which, according to respondent no.4 he had forwarded to the District Magistrate, Rampur. How and through whom the representation to the State Government was rotted is also shrouded in mystery. Neither respondent no.4 nor respondent no.3 and even respondent no.2 have not explained as to when the representation was received by the State Government in the receipt section. The counter affidavit filed by respondent no. 2 speaks only of its receipt in the concerned section of the State Government on 29.5.2000. It the

representation was sent by special messenger, it ought to have been received in the receipt section of the State Government latest by 19th May,2000 and if it was sent by post, it ought to have been reached the receipt section of the State Government or the concerned department within three four days of its dispatch. The representation was taken up by the State Government for examination through concerned section of the State Government on 2/3.6.2000 and it was disposed of on 8.6.2000. The period between the date of receipt of the representation (which has been concealed in the counter affidavit) till 2/3.6.2000 which is unexplained. The facts stated above clearly disclose that the authorities, respondent nos.4,3 and 2 have taken a very casual and callous approach towards the representation of the petitioner. Respondents no.3 and 4 have specially failed to state as to how the various representations made by the petitioner were dealt with by them. Respondent no. 4 has stated that the representation was given to the District Magistrate, Rampur whereas the respondent no. 2 in his counter affidavit filed through Sri R.A. Khan had stated that the representation of the petitioner was received by concerned section of the State Government directly from the Superintendent, District Jail, Rampur. On the other hand, the counter affidavit filed by the respondent no. 3 is absolutely silent with regard to the representation made by the petitioner. We may also observe that on going through counter affidavit filed by respondent no.3, we feel that the respondent no. 3 has signed it without going through the counter affidavit which has been prepared in the most casual manner. The detention order was admittedly passed on 29.4.2000 and was served upon the petitioner on 30.4.2000 whereas paragraph no. 4 of the counter affidavit filed by respondent no. 3 states that the order was passed on 24.4.2000 and was served upon the petitioner the same day. There are so many grammatical and spelling mistakes in the counter affidavit which lead to no other inference except that Sri Narendra Bhushan, the then District Magistrate, Udham Singh Nagar/detaining authority has signed the counter affidavit without going through it.

10. In view of the facts stated above, we find that in the present case, the requisite care has not been taken by the respondents no. 2 to 4 to strictly observe a mandate enshrined in Clause 5 of Article 22 of the Constitution of India as declared by the Apex Court and various High Courts through its judicial pronouncements. This alone, in our view, renders the continued detention of the petitioner to be illegal and the petitioner is entitled to the relieves claimed.

11. We have gone through the impugned order of detention as contained in Annuxures-1 and 2. We find that the petitioner has been informed of his constitutional right to make a representation to the State Government, to the Advisory Board and to the Central Government. However, he has not been informed of his right to make a representation to the detaining authority which is also violation of the constitutional mandate. In the case of State of Maharashtra & ors. Vs. Santosh Shankar Acharya, JT 2000 (8) SC 374, the detention order was passed not by the State Government but by the concerned officer empowered by the State

Government under sub-section (2) of Section 3 of the Act.

12. It is also not disputed that while communicating the detenue the grounds of detention it has not been indicated therein that the detenue has right to make a representation before Detaining Authority, though in the said communication it was mentioned that the detenu can make a representation to the State Government as provided under Section 8(1) of the Maharashtra Act. Bombay High Court dealing with Habeas Corpus writ petition, held that failure on the part of the Detaining Authority in a case where order of detention is issued under sub-section (2) of section 3 to the detenue that he has a right to make a representation constitutes an infraction of the rights guaranteed under Article 22(5) of the Constitution and as such, the detention becomes invalid on that score. Hon'ble Supreme Court after considering the various provisions of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootlegers, Durg Offenders and Dangerous Persons Act, 1981 read with Section 3(2) , (3) ,Section 14 and 8 Article 22(1) of the Constitution of India held as follows:--

"The only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer under Sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith deport the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8 (1), the said Detaining Authority continues to be the Detaining Authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government the Detaining Authority can entertain a representation from a detenue and in exercise of his power under the provisions of Section 21 of Bombay General Clauses Act could amend, vary or rescind the order, as is provided under Section 14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8 (1) as well as Section 14 and also Section 3 of the Maharashtra Act. This being the position, non-communication of the fact to the detenue that he could make a representation to the Detaining Authority so long as the order of detention has not been approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under Sub-section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detenue under Article 22 (5) of the Constitution and the ratio of the Constitution Bench decision of this Court in Kamlesh Kumar's case (supra) would apply notwithstanding the fact that in Kamlesh Kumar's case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA."

13. In the instant case, the undisputed fact is that the impugned detention order was approved by the State Government on 8.5.2000 and the order of approval was communicated to the petitioner through radiogram on 9.5.2000. Till that date the petitioner had a right to

make a representation to the Detaining Authority also. Therefore, it was incumbent upon the respondent no.3 to have communicated to petitioner of his right to make a representation to the detaining authority also while serving the detention order as contained in Annexures-1 and 2 upon the petitioner. The respondent no.3 having failed in observing constitutional mandate, the order of detention passed by the said authority as approved by the State Government cannot be sustained and the continued detention of the petitioner under such order would be rendered to be illegal.

14. We do not feel it necessary to deal with the other submissions made on behalf of the petitioner.

15. For the foregoing reasons, this writ petition is allowed and the continued detention of the petitioner is found to be illegal. Respondents are directed to set petitioner at liberty forthwith, if he is not required to be detained in connection with any other case.

16. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEP. 15, 2000

BEFORE
THE HON'BLE M.C.JAIN,.J.

Misc. Application No. 62263 of 1998

Kailash Nath Bajpai and Others
...Petitioners.
Versus
Hind Housing and Construction Ltd. Lal Bagh through Official Liqudator & others
...Respondents

Counsel for the Applicants:
Shri Anand Kumar Gupta

Counsel for the Official Liquidator:
Shri Sunil Ambwani

Company Act- Section 446-Company was already wound up-Land declared surplus without prior permission of the Court-after quashing the acquisition order the land shall be recorded back in the Revenue records with the name of company through office liquidator.

Held –

It is, therefore, ordered that the land in question of Village Behsa and Village Mati, Pargana Bijnor, Tehsil and District Lucknow which was recorded in the relevant revenue records in the name of M/S Nind Housing Construction Ltd. (which was declared surplus by the order of the A.D.M. (Executive)Land Ceiling Authority by order dated 6.1.1988 in case no. 1/2/12/32/94 of 1987-88. State vs Ram Chandra Gurnani under the U.P. Imposition of ceiling on Land Holdings Act, 1960, which was subsequently quashed by this Court vide order dated 27.7.1994) shall be recorded back in the revenue records in the name of the said company (in liquidation) through Official Liquidator by the authorities concerned (respondents No. 2 and 3) within fifteen days of the production of a certified copy of this order, either by the official Liquidator attached to the High Court, Allahabad or by any of the application no. A-16.

(Para 8)

By the Court

1. M/S Hind Housing and Construction Ltd. (hereinafter referred as the Company in liquidation) was ordered to be wound up by this Court by order dated 16.4.1970 passed in Company Petition No. 18 of 1967. The Official

Liquidator attached to this court was appointed the Liquidator of the said company (in liquidation) as per section 449 of the Companies Act. The Liquidator took possession of moveable assets and record of the company through District Magistrate, Lucknow. The company owned certain agricultural land in village Behsa and Mati, Pargana Bijnor. Tehsil and District Lucknow duly recorded in the relevant revenue records in the name of company (in liquidation). The Official Liquidator sought permission of this court through report No. 51 of 1983 to sell the landed property of the company (in liquidation). By order dated 5.10.1983 this court granted such permission to the Official Liquidator. When the Official Liquidator got the revenue records verified on 7.3.1988, it transpired that the entire land left over in the aforesaid villages belonging to the company (in liquidation) had been acquired by A.D.M. (Acquisition)/Competent Authority, Land Ceiling, vide order and judgment dated 6.1.1988 in case no 1/2/12/32/94 of 1987-88. State vs. Ram Chandra Gurnani under the U.P. Imposition of Ceiling on Land Holdings Act, 1960, the Official Liquidator then made an application to this court complaining that the entire proceedings under the U.P. Imposition of Ceiling on Land Holdings Act 1960 were null and void and without jurisdiction for the reason that after the winding up orders, the property in question belonging to company (in liquidation) had come in the sustody of the court and were thus custodia legis through the Official Liquidator. No proceedings under the aforesaid Ceiling Act of 1960 could take place without the permission of this Court under section 446 of the Companies Act.

2. By order dated 27.7.1994 this court allowed the application of the Official Liquidator whereby the order dated 6.1.2988 declaring the land of the company (in liquidation) as surplus was quashed with the result the said land was to be deemed to be belonging to the company (in liquidation) under the custody of the court thourgh Official Liquidator. The above is the background concerning the application A-16 made by 4 applicants, namely, Kailash Nath Bajpai, Amitabh Adhar, Radha Krishna Gupta and Mahendra Kumar.

3. The company (in liquidation), Additional Tehsildar, Sadar Lucknow Sub-Divisional Officer, Lucknow and the Commissioner, Lucknow have been arrayed as respondents. The case, as set up by the applicants, is that the winding up order had been passed by this court on 16.4.1970 on a petition having been filed by M/S Krishna Brick Field, Allahabad.. The company filed Special Appeal No. 364 of 1970 in which stay order was passed on 22.4.1970, staying the operation of the winding up order which was confirmed on 2.11.1970.But the special appeal in question bearing Appeal No. 364 of 1970 was dismissed in default on 13.7.1973 and the application filed to restore the same was also dismissed on 20.7.1974. The winding up petition had been filed on 12.12.1967. Thus in fact there was no effective winding up order upto 13.7.1973. On 2.2.1972 Seth Hiranand Ram Chandra Gurnani, the then Managing Director executed three sale deeds in favour of Kailash Nath Bajpai, Amitabh Adhar and Kishori Saran. Another sale deed dated 4.2.1972 was executed in favour of Sita Ram. The present applicants no. 1 and 2 and predecessors of applicants 3 and 4 were

bona fide purchasers for valuable consideration without any notice or knowledge of winding up proceedings pending against the company. To come to the point, their contention is that after the setting aside of the order of the ceiling authority dated 6.1.1988 whereby the land of the company (in liquidation) had been declared surplus, the position as it stood before 6.1.1988 has to be restored. They made an application for mutation, which was rejected by respondent no.2 on 3.7.1998 on the ground, that the vendor (Company in liquidation) did not have the title to sell the land . The relevevant prayers made by the applicants are the following:

(a-1) To issue suitable direction to respondents no 2 & 3 for restoring the name of company in all revenue records as per the direction, contained in the judgment and order of this Hon'ble Court Dated 27.7.1994

(b) To issue a suitable direction for mutation of the applicants' names in the relevant revenue records and Khatauni in respect of Land situated in village Mati, Pargana Bijnore, Tehsild and District Lucknow after Expunging the entry UNDER CEILING ACT, ADDITIONAL DECLARED LAND' and restoring the position as existing before 6.1.1988."

4. The Official Liquidator has filed counter affidavit A –17 narrating the history of the case. He has also filed as Annexure 7 to his counter affidavit a copy of the order dated 13.8.1998 passed by the Additional District Magistrate (Supply)/Prescribed Authority (Ceiling) Lucknow in case no. 3 of 07-98, rejecting the application of the applicants dated 24.3.1998 for correction of papers. Rejoinder affidavit A-18 has been filed by the applicant Radha Krishna Gupta.

5. I Have heard Sri A.K.Gupta, Learned counsel for the applications and Sri Sunil Ambwani, appearing from the side of Offical Liquidator. The submission of the learned counsel for the applicants is that the applicants simply want the name of the company (In liquidation) to be mutated by way of correction in the revenue record in respect of the land in question which had been declared as surplus by the Ceiling Authority for the reason that the said order of declaring the land as surplus was quashed by this court vide order dated 24.7.1994. On the other hand, Sri Sunil Ambwani has urged that actually the applicants have no locus standi to make any application in this behalf. The reason, according to him. Is that the so-called sale deeds have been executed by the Managing Director of the Company (in liquidation) in favour of the applicants and their predecessors after passing of the winding up order which could not legally be taken note of. Therefore, they now have no business to intermeddle and to stampede themselves.

6. I have considered the matter carefully. It is an admitted fact that the declaration of the land standing in the name of the company (in liquidation) as surplus by the Ceiling Authority came to be quashed by this Court's order dated 27.7.1994. The resultant effect is that for all practical purposes, the declaration of land as surplus has to be ignored and the position as obtaining earlier to 6.1.1988 before the Ceiling Authority passed the order declaring the land as surplus has to be retrieved. Really speaking, it is the job of the Official Liquidator to take steps for

the mutation of the land in the name of the company (in liquidation) again. The land continues to be custodia legis through him. Indeed, it has to be proceeded with in liquidation as per the relevant provisions contained in the Companies Act 1956. It is not very material that such a prayer for re-mutation of the land in question in the name of the company (in liquidation) has been made by the applicants. In the proper sense, it may be so taken that the applicants are simply inviting the attention of this court to this aspect of the matter that after quashing of the order declaring the land a ssurplus it (land) should be recorded in the revenue papers in the name of the company (in liquidation) and the records should be corrected accordingly.

7. As per section 441 (2) of the Companies Act, in a case not covered by Sub-Section (I) of the said section, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up. Therefore, winding up of the company in question which was wound up on 16.4.1970 shall be deemed to have commenced on 12.12.1967 when the winding up petition was presented by M/S Krishna Brick Field, Allahabad. The sale deeds in favour of the applicants and their predecessors stand still on a lower footing as the same were executed in 1972 viz., after the passing of the actual winding up order. The fact that for a certain period the winding up order remained stayed under the orders passed in Special Appeal would not make any difference. The Special Appeal was also ultimately dismissed. In this view of the matter, there can be no question of the applicants or their predecessors acquiring title in respect of the land covered by the sale deeds relied upon by them. The sale deeds have to be simply ignored. However, the land in question which was declared surplus by the Ceiling Authority by order dated 6.1.1988 must be ordered to be recorded back in the name of the company (in liquidation) through Official Liquidator for the obvious reason that the declaration of the land as surplus was quashed by this court by order dated 27.7.1994.

8. It is, therefore, ordered that the land in question of Village Behsa and Village Mati, Pargana Bijnore, Tehsil and District Lucknow which was recorded in the relevant revenue records in the name of M/S Hind Housing Construction Ltd. (which was declared surplus by the order of the A.D.M. (Executive)/Land Ceiling Authority by order dated 6.1.1988 in case no. 1/2/12/32/94 of 1987-88, State vs Ram Chandra Gurnani under the U.P. Imposition of Ceiling on Land Holdings Act,1960, which was subsequently quashed by this court vide order dated 27.7.1994) shall be recorded back in the revenue records in the name of the said company (in liquidation) through Official Liquidator by the authorities concerned (respondents no. 2 and 3) within fifteen days of the production of a certified copy of this order, either by the Official Liquidator attached to the High Court, Allahabad or by any of the applicants of application no. A-16

9. Application A-16 stands disposed of accordingly.

Application Disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: AUGUST 29TH,2000

BEFORE
THE HON'BLE RATNAKAR DAS, J.

Criminal Misc. Application No. 5228 of 1996
Dev Narain Dev ...Applicant
Versus
State of U.P. and others ...Respondents.

Counsel for the Applicant:
Sri SurendraTewari

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

Code of Criminal Procedure Section 397- when an order of cognizance is challenged in revision, it is impermissible for the Sessions Judge in each and every case to look into the documents notwithstanding the statements of the complainant and his witnesses who supported the case as narrated in the complaint.
Section 397 postulates that the Sessions Judge can interfere with the order of inferior court when he finds that there has been illegality, irregularity or impropriety in the order. But then interference by the revision court is permissible if any of the tests as laid down by the Supreme Court in the case of Smt. Nagawa vs. Veeranna Shivalingappa Konjalgi, AIR 1976are satisfied. (Para-13)

By the Court

1. In this petition under section 482 Cr.P.C., the petitioner has assailed the order of the learned Sessions Judge, Bulandshahr passed in Criminal Revision No. 81 of 1996 whereby he set aside the order of the learned Chief Judicial Magistrate taking cognizance of the offence under section 397 I.P.C. in complaint case no.551 of 1996.

2. The complainant, petitioner herein, filed the aforesaid complaint alleging that on 30.5.1996 at about 2 P.M. the opposite parties (hereinafter referred to as 'the accused persons) being armed with this came to his house, dismantled the roof and removed the rafters and other materials. He lodged a report to the police, but as no case was registered on such report, he complained to the Superintendent of Police. Even thereafter when no action was taken, he approached the court by filing the aforesaid complaint. Learned Magistrate after having recorded the statement of the complainant conducted inquiry as onvisaged in section 202 Cr.P.C. in course of which he recorded the evidence of witnesses as produced by the complainant. Thereupon, on scrutiny of the evidence he was satisfied that there is a prima facie case under section 397 I.P.C. and accordingly took cognizance of the said offence and issued process against the accused persons for their appearance. Aggrieved thereby, the accused persons preferred revision and the learned Sessions Judge by the impugned order set aside the order of the learned Magistrate and dismissed the complaint. The legality and propriety of the said order of the revision court is under challenge in the present proceeding.

3. Learned counsel appearing for the complainant strenuously urged that the revision court exceeded its jurisdiction permitting the accused persons to lead some documentary evidence in consideration whereof it came to hold that since there was serious dispute with regard to title and possession of the house

in question between the parties, the criminal case was not maintainable and this finding being contrary to the materials on record, the impugned order requires interference of this court in exercise of inherent power conferred by section 482 Cr.P.C. He further urged that the order of the learned Magistrate taking cognizance of the offence being interlocutory one, revision could not have been entertained by the learned Sessions Judge, in view of the bar created by section 397 (2) Cr.P.C.

4. On the other hand, learned counsel appearing for the accused persons would urge that it is the settled position of law that when criminal law is put to motion, it is the bounden duty of the court to scrutinize carefully the allegations made in the complaint as also the statement of the witnesses examined if any, with a view to prevent a person arrayed as the accused from being called upon to face a false and frivol us charge. If that is not done, criminal justice system would be used as an arm to harass an innocent person in order to wreck personal vengeance. In the present case since the accused persons had no opportunity to place all materials before the learned Magistrate to show that possession of the house in question which was allegedly damaged on the date of occurrence was not with the complainant they produced the relevant documents before the Sessions Judge who on consideration thereof was satisfied that offence under section 397 I.P.C. was not made out and having held us, passed the order dismissing the complaint. In the circumstances, therefore, the impugned order cannot be held to be bad in law requiring interference of this court.

5. In view of the aforesaid submissions, at the outset I would like to deal with the question as to whether the order of the learned Magistrate taking cognizance of the offence is interlocutory one against which no revision lies. Under the code of Criminal Procedure, 1898 there was no bar for preferring revision against interlocutory orders. In absence of any provision revision was being entertained against interlocutory interim order and in certain cases order was passed staying the criminal proceeding. Experience showed that revision remained undecided for long years and the stay order continued to operate. In the long run it was noticed that the order staying the proceeding prejudicially effected the prosecution inasmuch as, when the trial commenced either the material witnesses were not available for their examination or they were found to be dead, as a result the accused involved in heinous crime was being acquitted. It was in this background that the Legislature brought out an amendment in the code of Criminal Procedure, 1973 (2) that no revision would lie against an interlocutory order. However, while providing such a bar the Legislature did not define the meaning of the expression 'interlocutory order' leaving the same to be interpreted by the court in the facts and circumstances of each case.

6. According to Black Law Dictionary the word 'interlocutory' means, 'provisional, temporary, not final, something intervening between the commencement and the end of a suit which decided some point or matter but is not a final decision of the whole controversy.'

7. The meaning of the word 'interlocutory' according to Webster's Dictionary is 'pronounced and arising during legal procedure not final.'

8. In the Halsbury's Laws of England, the expression 'interlocutory order' has been interpreted in the following terms :

"a judgment and order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required.'

9. The meaning of the expression 'interlocutory order' came to be interpreted by the Apex Court in the case of **Amar Nath and others vs. State of Haryana and others AIR** 1977 SC 2185. The order of issuance of summons to the appellants in the said case was subject matter of challenge in a revision before the High Court under section 397 read with section 482 Cr.P.C. In the police report, the appellants were not arrayed as accused since no clear evidence of their participation in the incident was made out. The said report was accepted by the Magistrate. Aggrieved thereby, the complainant moved in a revision to the Sessions Judge, Karnal who accepted the revision and remanded the case to the Magistrate for further enquiry. On receipt of the remand order, the learned Magistrate straight-away issued summons to the appellants and it was against that order of the learned Magistrate the appellants moved the High Court in revision. The court held that the impugned order of issuance of summons was an 'interlocutory order' and, therefore, the revision was not maintainable in view of the bar created by section 397 (2) Cr.P.C. The order of the High Court came to be challenged in the Supreme Court. In order to find whether the order of the learned Magistrate is an 'interlocutory order' or a final order, their Lordships made reference to the statement of 'Objects and Reasons' in enacting sub-section (2) of Section 397 Cr.P.C. as also various judicial pronouncements and held thus:

"Any order which substantially effects the rights of the accused or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which forms the basis for insertion of this particular provision under section 397 of the 1973 Code. Thus, for instance orders summoning witnesses, adoring cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceedings, may no doubt amount to interlocutory order against which no revision would lie under section 397 (2) of the 1973 Code. The orders which are matters of movement and which effects or adjudicates the rights of the accused or a particular aspects of the trial cannot be said to be interlocutory order so as to be outside the purview of the revision jurisdiction of the High Court."

10. The view taken in Amar Nath (supra) has been reaffirmed by a three Judge Bench decision in the case of Madhu Limaye vs. The state of Maharasthra 1977 SCC 551. And also in a latest decision in the case of Rajendra Kumar Sita Ram Pandey v. Uttam and

another 1999 (38) ACC 438. On a reading of the authoritative pronouncements of the Supreme Court and keeping in mind the legislative intentior behind section 397 (2) Cr.P.C. in putting an embargo upon the exercise of the revision power of the Court, I would hold that an order of taking cognizance of the offence which is no doubt a matter of moment, is a final order since it effects the rights of the accused, inasmuch as, on account of initiation of the criminal proceeding, the accused apprehends that the sword of Damocles hanging over his head may fail at any moment and his personal liberty may be curtailed and therefore, in order to further the ends of justice the higher court if approached would be well within its jurisdiction to bring the whole proceeding to a halt by quashing the said order in exercise of revision power.

11. Next question that crops up for consideration is whether the learned Sessions Judge was justified in setting aside the order of the learned Magistrate by taking into consideration the documents produced before him by the accused persons. Section 190(1) (a) of the Cr.P.C. empowers a Magistrate to take cognizance of any offence upon receiving a complaint of facts which constitute such offence. While taking cognizance it is obligatory for him to resort to section 200 and examine the complainant and his witnesses present if any. After considering the statements of the complainant and the witnesses if he is satisfied that there is sufficient ground for proceeding in the case, then he shall issue process for attendance of the accused. On the other hand, if he is of the opinion that no ground is made out for proceeding, he shall dismiss the complaint after recording brief reasons thereof. A reading of sections 203 and 204 Cr.P.C. would indicate that when the Magistrate issues the process under section 204 Cr.P.C. after taking cognizance of the offence he is not required to give detailed reasons of his satisfaction about the offence having been made out from the materials on record. His required satisfaction is implicit in the issue of process itself. But when he decides to dismiss the complaint under section 203 Cr.P.C., it is the statutory requirement that he shall briefly record the reasons thereof. In the present case, a reading of the order at Annexure-5 would show that the learned Magistrate by applying his judicial mind to the statements of the complainant and the witnesses was prima facie satisfied that a case under section 397 I.P.C. was made out and accordingly took cognizance of the said offence and issued process against the accused persons. It is well settled by a long catena of decisions of the Supreme Court that at the stage of issuance of process, the Magistrate is mainly concerned with the allegations made in the complaint and the evidence led in support thereof for his prima facie satisfaction, as to whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revision jurisdiction, which is a very limited one.

12. In that view of the matter, no fault can be found with the learned Magistrate taking cognizance of the offence under section 379 I.P.C. and issuing process against the accused persons.

13. It need not be emphasized that the scope of power of revision of the Sessions Judge, as provided in sections 397 and 399 of the Cr.P.C. is limited. Section 397 postulates that the Sessions Judge can interfere with the order of the inferior court when he finds that there has been illegality, irregularity or impropriety in the order. Therefore an order of the Magistrate taking cognizance of the offence being a final order can be challenged in revision by the aggrieved party, but then interference by the revisional Court is permissible if any of the tests as laid down by the Supreme Court in the case of **Smt. Nagawwa vs. Veeranna Shivalingappa Konjalagi** AIR 1976 S.C. 1947 are satisfied.

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does disclose the essential ingredients of an offence which is alleged against the accused.

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

14. Applying the aforesaid tests to the present case I would hold that none of those circumstances existed for the learned Sessions Judge to upturn the order of the learned Magistrate and put an end to the criminal proceeding. To my mind, he over-stepped his jurisdiction by allowing the accused persons to bring on record certain documents in support of their defence plea and relying upon those documents in support of their defence plea and relying upon those documents he appreciated the evidence as if he was exercising power of the appellate court. It may be stated, when an order of cognizance is challenged in revision, it is impermissible for the Sessions Judge in each and every case to look into the documents produced by the accused in support of his defence plea and quash the order being influenced by those documents notwithstanding the statements of the complaint and his witnesses who supported the case as narrated in the complaint. In certain circumstances, however, the Revision Court would be justified to have a glimpse over the documents produced by the accused for arriving at a finding that the criminal proceeding has been initiated on a distorted version to wreck vengeance.

15. Resultantly, the criminal miscellaneous application is allowed. The impugned order of the learned Sessions Judge is set aside and that of the learned Magistrate taking cognizance of the offence is restored.

Application Allowed.

REVISION JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 8.9.2000

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

Civil Revision No.127 of 2000

C.D. Sharma ...Revisionist/Respondent
Versus
Preveen Sharma ...Opp. party/Appellant

Counsel for the Applicant:
Sri J.J. Munir
Mr. M. Khan

Counsel for the Respondent:
Mr. Hemant Kumar

Constitution of India, Article 227-Scope and Limits- No Civil Revision can be entertained under Article 227 of the Constitution. The remedy by way of appeal or revision are statutory remedy. They can be created and taken away by the Legislature. Once the legislature barred a revision under section 115 C.P.C. against an order passed in appeal or revision by the civil court and such provision has been upheld by this court and apex court, it cannot be urged that the revision is still maintainable- question referred to larger bench.

Held –

The power under Article 226, 227 and section 117 C.P.C. are exercised by the High Court, when the remedy of approaching the High Court by way of revision has been taken away by the Legislature the entertaining of revision under Article 227 would be circumventing the provision of law. I am also doubtful if a writ petition under Article 227 can be entertained against an order passed by the civil court in appeal or revision. What has been barred directly cannot be invoked indirectly.

By the Court

1. This revision has been filed under Article 227 of the Constitution challenging the order dated 15.7.2000 passed in Misc. Appeal by the lower appellate court. The stamp reporter has reported that court fee paid in the revision is Rs. 100/-. He has mentioned in his report that the revision is not maintainable in view of full bench decision in AIR 1979 All.218.

2. Prima facie the report appears to be correct. But the learned counsel for the revisionist Sri J.J. Munir has challenged the report and has relied on four single judge decisions of this court and has urged that the revision is maintainable under Article 227 of the Constitution. The learned counsel urged that he did not file the revision under section 115 of the civil procedure code, therefore, the full bench decision referred in the report was not attracted.

3. A full bench of this court in M/s Jupiter Chit Fund (Pvt.) Ltd. v. Dwarika Diesh Dayal AIR 1979 All.(FB) 218 after considering the state amendment has held that a decision in appeal or revision by the civil court arising out of suits or other proceedings is not amenable to revisional jurisdiction of high court under section 115 C.P.C. In another full bench decision of this court in Ganga Saran vs. Civil Judge Hapur Ghaziabad and others AIR 1991 All.(FB) 114 it has been held that a writ under Article 226 against such order is not maintainable and no mandamus can be issued to a private individual. Both these full bench decisions were examined by the learned single judge in Matthan Singh vs. IInd Additional District Judge, Meerut 1996 (1) ARC 117 and it was held

that an order passed in appeal or revision could neither be challenged by way of appeal or revision nor writ jurisdiction under Article 227 and decided it accordingly. In Ram Pher Yadav vs. Union Bank of India and others 1999 (2) ACJ 1561 the learned judge entertained a petition under Art.227 of the constitution against an order passed in appeal arising out of a suit but while dismissing it on merits observed that, ' the court exercises revision al jurisdiction under Art. 227 of the constitution on the same grounds on which such jurisdiction is exercised by the High Court under section 115 C.P.C.'. Similar observations were made by him in M/s Om Rice Mill Jaspur and others vs. Banaras State Bank Ltd. Kashipur and another 2000 (1) ACJ 263. In Smt. Brijendra Kaur and others vs. Ram Agarwal and others 2000 (1) ACJ 535 the learned judge converted the revision filed under section 115 C.P.C. under Art. 227 and decided it as revision. But neither decision contains any reason in support of treating a revision filed under section 115 C.P.C. as a revision or a petition under Article 227 of the Constitution.

4. I have perused these decisions but I am not able to persuade myself to agree with the view taken by the learned single judge. No civil revision can be entertained under Article 227 of the Constitution. The remedy by way of appeal or revision are statutory remedy. They can be created and taken away by the Legislature. Once the legislature barred a revision under section 115 C.P.C. against an order passed in appeal or revision by the civil court and such provision has been upheld by this court and apex court it cannot be urged that the revision is still maintainable. The power under Article 226,227 and section 115 C.P.C. are exercised by the High Court. But when the remedy of approaching the high court by way of revision has been taken away by the Legislature the entertaining of revision under Article 227 would be circumventing the provision of law. I am also doubtful if a writ petition under Article 227 can be entertained against an order passed by the civil court in appeal or revision. What has been barred directly cannot be invoked indirectly. It has already been held in a full bench of this court in Ganga Saran (supra) that no writ petition under Article 226 is maintainable against such orders. The powers under Article 227 are powers of superintendence over subordinate courts and tribunals. It is a power vested bythe constitution in the High Courts to be exercised to ensure that the courts or tribunals functions within its jurisdiction but it cannot be invoked as a matter of course against any order passed in appeal or revision. It is not a revision power ass held by learned single judge. In some of the decisions the courts while emphasizing limited nature of power exercised under Art.226 and 227 have observed that they are in nature of revision power. But from such observation it cannot be held the power exercised under Art.227 is revision power. There is a well defined difference in existence and exercise of power. This in my opinion is not only circumventing the law but creating jurisdiction which does not exist. Further the court fee payable on revision is Rs. 10/-. But in this revision the court fee paid is Rs. 100/-. This court fee is payable in writ petition. The rules of the court do not permit it. The practice of paying Rs.100/- court fee which is fee for writ petition and then claiming that it may be treated as revision under Art. 227 in absence of any rule cannot be permitted.

5. For all these reasons the following questions are referred for being decided by a larger bench.

1. Whether a civil revision is maintainable under Article227 of the Constitution ?

2. Whether by paying Rs. 100/- as court fee a revision against an order passed by the civil court against which a revision under section 115 C.P.C. has been barred can be entertained by this court under Article 227 of the Constitution ?

3. Whether under the rules of the court the power under Article 227 can be exercised by this court in a writ petition against an order passed by civil court in appeal or revision?

4. Whether in absence of any procedure prescribed by the rules of the court what procedure would apply for exercising power under Article 227 of the Constitution?

5. Whether a person against whom an order has been passed by civil court in appeal or revision has no remedy?

Since the aforesaid questions are arising frequently, the office is directed to place the records of this case within a week before the Hon'ble the Chief Justice for constituting a larger bench.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.092000

BEFORE
THE HON'BLE U.S. TRIPATHI, J.

Criminal Revision No. 1973 of 1999

Dinesh Chandra Tiwari ...Revisionist
Versus
State of U.P. & another ...Respondents

Counsel for the Revisionist:
Sri P.K. Singh

Counsel for the Opp. Parties :
A.G.A
Sri Sanjay Mishra
Sri S.T.M. Rizvi

Code of Criminal Procedure-Section 319 Cr.P.C.- the court can take action under section 319 Cr.P.C. even on the statement in the examination in chief of one or more witnesses. The evidence does not mean evidence completed by cross examination.

Held-

For invoking provisions of section 319 Cr.P.C. the cross examination of the witness in the Court is not necessary.
(Para 10)

By the Court

1. This revision has been preferred against the order dated 28.9.1999 passed by IInd Additional Sessions Judge, Kanpur Dehat in Special Sessions Trial no. 7 of 99 summoning the applicant under Section 319 Cr.P.C. and issuing non bail able warrant and process under Sections 82/83 Cr.P.C. against him.

2. The opposite party no,. 2 lodged an F.I.R. against the applicant and some

other persons under Sections 147,148,149,302 I.P.C. and Section 3 (2) (iv)S.C. &S.T. (Prevention of Atrocities) Act on the basis of above report a case at crime no.50 of 1998 was registered. After investigation the police submitted charge sheet against six persons. No charge sheet was submitted against applicant. After examination of P.W.I. Respondents no. 2 moved an application for summoning the applicant and one Lala Ram in the said case for trial along with the other accused on the ground that she had lodged report against them and the witnesses also disclosed their involvement in the settlement under Section 161 Cr.P.C. but the police did not submit charge sheet against them.

3. Learned Special Judge on hearing learned counsel for the prosecution held that there was sufficient evidence on record to summon the above applicant and Lala Ram under Section 319 Cr,P.C. With these finding he allowed the application summoned the applicant and Lala Ram for trial along with other accused. The above order has been challenged in this revision .

4. Heard the learned counsel for the applicant, learned A.G.A. and the learned counsel for the respondent no. 2 and perused the record.

5. The learned counsel for the applicant contented that the order of summoning the applicant under Section 319 Cr.P.C. was passed without completion of cross examination of P.W.I. and investigation against applicant was pending and that the applicant be given opportunity to file objection against the summoning order before the Trial Court. He also placed reliance on Single Judge decision of this Court in Shailendra vs. State of U.P. 1999 (38) ACC 441. On the other hand learned counsel for the opposite party No. 2 contended that cross examination of the witness is not essential for exercising power under Section 319 Cr.P.C. and there is no provision in the Cr.P.C. for filing objection by an accused summoned under Section 319Cr. P. C.

6. Having heard the submission of the learned counsel for the parties I find no force in the above contention, of applicant's learned counsel..

7. Section 319 Cr.P.C. says that here, in the course of any inquiry, into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed .

8. It was held by the apex Court in the case of Jogider Singh Vs. State of Punjab and others, 1979 (16) ACC, 43(SC) that the expression any person not being accused occurring under Section 319 Cr. P.C. clearly covers any person, who is not being tried already by the Court and very purpose of enacting such a provision like S.319 (1) clearly shows that even persons, who have been dropped b the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal Court are included in the said case, The above view was repeated by the Apex Court in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi, 1983 (20)ACC 50 (SC).

9. In the instant case. The name of applicant was mentioned in the F.I.R. After investigation he was not challenged. In her statement before the Trial Court (P.W.I) Smt. Shakuntala stated about involvement of the applicant in her evidence. Section 319 Cr.P.C. is meant only for determining whether the evidence recorded in the Court prima facie indicates that some person other than the accessed facing trial has committed the offence and in case, the evidence indicates the involvement of such person, he may be summoned to face trial.

10. For invoking provisions of /section 319 Cr. P.c. the cross examination of the witness in the court is not necessary .As held by Division Bench. This Court in the case of Ram Gopal and another Vs. State of U.P. ,1999 (38) ACC 123 the term "Evidence' as used in section 319 Cr. P.C. does not mean "evidence completed by cross examination" and the Court can take action under Section 319 Cr.P.C. even on the statement in the examination in chief of one or more witness. The observations in the Single Judge decision in the case of Shailendra Vs. State are thus against the Division Bench and therefore cannot be relied on.

11. It was also observed in the case of Shailendra Vs. State of U.P. (Supra)relied on by the learned counsel for the applicant that summoning order is ex-parte order and only on basis of examination in chief of two prosecution witnesses Updesh Singh Chauhan and Mithilesh Kumari the applicant has been summoned but their cross examination has not been done so far. The revisionist first of all will appear and then he would be granted opportunity to cross examine the witnesses and it is also provided that in case the revisionist moves an application to the effect that no case is made out against him or raising any other contentions which he desires to raise the learned Additional Sessions Judge will consider and dispose of the same after providing an adequate opportunity of hearing to the revisionist.

12. So far question of passing the summoning order under Section 319 Cr. P.C. before cross examination of the witness is concerned, has been answered in the Division Bench case of Ram Gopal and another (Supra). The direction regarding providing opportunity to the applicant to file objection against the summoning order appears to have been issued in view of Kailash Chaudhary' case 1993 (30) ACC 665 which has been over ruled in Full Bench decision of this Court in case of Ranjeet Singh & others vs. State of U.P. and another, 2000 (40) ACC 342, in which it was held that the aforesaid conclusion in Kailash Chaudhary 's case is not bad up by the provisions in the Cr. P.C. and it amounts to reversing the procedure for trial, which is not permissible under the Cr.P.C. Challenging the order of issuing processes before the Court issuing said processes is in fact requiring the arms of the clock to move anti-clockwise which does not happen or atleast should not happen. A parallel trial should not commence before the actual trial beg….. Therefore, there appears no question of affording any opportunity to the applicant before passing summoning order under Section 319 Cr. P.C. to cross examine a witness or to file any objection against the summoning order before proceeding further.

13. Lastly it was contended that the Trial Court has issued non bailable warrant as well as processes under Section 82/83 Cr. P.C. simultaneously which is harsh one. I do agree with the learned counsel for the applicant that the Trial Court ought to have issued summon to the applicant first and if he did not respond to it, it would have issued non bailable warrant and other processes provided under law.

14. Therefore, the revision has no force and it should be dismissed with the observation that at the first instance, the Trial Court shall issue summon against applicant and would adopt coercive measure to secure his attendance subsequently if he does not respond to the summons.

15. The revision is, accordingly, dismissed with the above observations.

Revision Dismissed.
