ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.8.2000

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

Civil Misc. Writ Petition No. 285 of 2000

M/s Univeral Polyvinyl Chloride Gramodyog Sansthan ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Bharat Ji Agrawal
Sri Piyush Agrawal

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act-S-4(c) – Notification exempting certain products from Trade Tax- whether Latex solution is a rubber product? – held-No- impugned circular dated 24.9.93 quashed.

Held- Para 4

The learned counsel of the petitioner has relied upon a decision of this Court this Court rendered in M/s Mercury Laboratories Pvt. Vs. State o U.P. and others' reported in 2000 U.P.T.C. Page 82 in which it has been held that the Commissioner cannot issue such guide line or circular letter since they interfere with the judicial discretion of the Assessing Authority. We are in respectful agreement with the aforesaid decision and hence, we quash the circular letter dated 24.9.1993. Annexure 7 to the writ petition and direct that the appellate authority before whom petitioner's appeal is pending shall now decide the appeal in accordance with law ignoring the aforesaid circular letter.

Case law discussed
2000 U.P.T.C.-82

By the Court

1. Heard Sri Bharat Ji Agrawal learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

The petitioner is a registered society manufacturing and selling latex solution. In this connection the State Government issued notification dated 1.10.1994 under section 4(c) of the U.P. Trade Tax Act. A copy of which is Annexure 2 to the writ petition. By this notification sale of certain products of village industries certified by the All India Khadi and Village Industries Commissions or U.P. Khadi and Village Industries Board were exempted from trade tax. The exemption granted by the notification dated 1.10.1994 was further amended by notification dated 27.2.1997 vide Annexure 6 to the writ petition by which exemption was limited to the turn over of rupees fifty lacs per year. In Item No.3 (12) of the said notification dated 1.10.1994 an item which was exempted from trade tax was dipped latex and rubber products. Admittedly, the petitioner is registered with Khadi Gramodyog Board vide Annexure 1 to the writ petition. The petitioner was also issued certificates by the Uttar Pradesh Khadi and Village Industries Board vide Annexures 3 and 4 to the writ petition, certifying that it was exempted from trade tax.

2. It is alleged in para7 of the writ petition that latex solution is a rubber product manufactured from latex raw rubber acquired by the petitioner on the basis of licence granted by Rubber Board. The manufacturing process for making latex solution is mentioned in para 7 of the writ petition.

3. The petitioner is aggrieved by the circular dated 24.9.1993, Annexure 7 to the writ petition, in which it has been stated that latex solution cannot be treated as 'rubber product' in view of the opinion of the Law Department, vide Annexure 7. The grievance of the petitioner is that this circular letter interferes with the judicial discretion of the Assessing Authority.

4. The learned counsel of the petitioner has relied upon a decision of this Court rendered in M/S Mercury Laboratories Pvt. Vs. State of U.P. and others' reported in 2000 U.P.T.C. page 82 in which it has been held that the Commissioner cannot issue such guide line or circular letter since they interfere with the judicial discretion of the Assessing Authority. We are in respectful agreement with the aforesaid decision and hence, we quash the circular letter dated 24.9.1993. Annexure 7 to the writ petition and direct that the appellate authority before whom petitioner's appeal is pending shall now decide the appeal in accordance with law ignoring the aforesaid circular letter.

The writ petition is accordingly allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 4, 2000

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

Writ petition No. 9190 of 2000

Uttam Chand and another ...Petitioners
Versus
VI Additional District Judge, Jhansi and others ...Respondents

Counsel for the Petitioners:
Shri V.D. Ojha
Shri Pranav Ojha

Counsel for the Respondents:
S.C.
Shri N.B. Nigam

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, Ss.20 (2) (a) and 30 readwith Transfer of Property Act, 1882, S. 106- Suit for eviction after deemed service of notice of demand on ground of arrears of rent- Concurrent findings of Trial Court as well as revisional court that petitioner avoided service of notice and notice was also affixed at conspicuous part of the building- Courts below also found that petitioner was a defaulter as his cheque was not honoured by the Bank_ Further held, that deposit under S.-30 was also made after 30 days of service of notice- Hence the findings by Court's below were held not to be perverse.

Held-

I. The findings recorded by the Courts below regarding the service of notice in any view of the matter, cannot be said to be perverse or illegal. The notice was not only served by registered post at correct address but also by affixation of the notice on the conspicuous part of the house of the petitioners. (Para 9)

II. In the present case, the notice of demand was served on 14.3.1997, whereby rent for the period 23.2.1987 to 1.4.1997. The petitioner, even after receipt of the said notice, did not pay the arrears of rent within statutory period of 30 days. The amount in question alleged to have been tendered by means of a cheque, in law is not a valid tender. Further, the cheque in question was dishonoured by the Bank for shortage of money in the account of the petitioners. Petitioners also cannot take advantage of money deposited under section 30 of the Act as such deposit was made on

13.6.1997, i.e. after 30 days of the receipt of notice. (Para 11)
Case law discussed.
AIR 1989 SC 63
1994 AWC 1229

By the Court

1. By means of this petition filed under Article 226 of the Constitution of India, the petitioners who happen to be tenants of house and shop, i.e., 29, Mohalla Subhash Ganj, Jhansi, for short 'the building in question', pray for issuance of a writ, order or direction in the nature of certiorari quashing the judgment and decree dated 11.03.1999 whereby the suit filed by the respondent no.2, Judge Small Causes Court, was decreed, the judgment and order dated 10.02.2000 whereby the revision filed by the petitioners against the judgment and decree passed by the trial Court was dismissed by the revisional Court (respondent no. 1) and the order dated 14.02.2000 whereby the review application filed by the petitioners was dismissed by the revisional Court.

2. The relevant facts of the case giving rise to the present petition, as set out in the pleadings of parties (writ petition and counter affidavit) and other material on the record, in brief, are that the respondent no. 3 filed S.C.C. Suit No. 80 of 1997 for ejectment of the petitioners from the building in dispute and for recovery of arrears of rent and damages. It was stated that the building in question was originally owned by Shri Khushal Rai. Plaintiff respondent no. 3, Shri Vinod Kumar Jain, purchased the same from Shri Khushal Rai through a registered sale deed dated 23.02.1987. At the time of sale, the building in question was in occupation of the petitioners as a tenant at the rent of Rs.40/- per month which was, by agreement of the parties, enhanced to Rs.550/- per month. Thereafter, a notice dated 26.03.1993 is alleged to have been sent to the petitioners intimating him about the aforesaid transaction of sale and asking for payment of rent. Thereafter, two more notices dated 28.09.1995 and 29.02.1996 were alleged to have been sent to the petitioners by the respondent no. 3 of which no reply was received. Consequently, it was on 13.03.1997 that a notice of demand and termination of tenancy was sent to the petitioners by the respondent no. 3 demanding arrears of rent from 23.02.1987 to 01.04.1997 which was not received by the defendant petitioners and was returned to respondent no. 3 with the endorsement that the postman went to the house of the petitioners at the correct address on 14.03.1997, 15.03.1997, 17.03.1997, 19.03.1998, 20.03.1997, 21,03.1997 and on the last on 23.03.1997 to deliver the said notice to the petitioners and on enquiry, he came to know that the addressee was not met. It was on 14.03.1997 that a cheque of Rs.4,880/- plus Rs.40/-, total Rs.4920/-, was given to the respondent no. 3 which was presented for encashment before the bank but the same was dishonored on 17.06.1997. Therefore, the respondent no. 3 filed a suit for the above mentioned relief. On receipt of the summons from the trial Court, petitioners filed their written statement pleading that they were in occupation of the building in question as a tenant at the rent of Rs.40/- per month, which they used to pay to Shri Khushal Rai, the original owner; that the rate of rent was never revised or enhanced to Rs.550/-; that the allegation made to the contrary was incorrect; that the notice dated 26.03.1993 was replied through one Shri Brij Kishore, Advocate. In reply of the notice, the

respondent no. 3 was also asked to supply a copy of the sale deed alleged to have been executed in his favour by Shri Khushal Rai but which was never sent to the petitioners by the said respondent. It was on 14.03.1997 that a cheque of Rs.488/- was given to the respondent no. 3, which covered the amount of rent from 01.02.1987 to 31.03.1997. Thereafter, money order for an amount of Rs. 40/- was also sent in the month of May, 1997 as the aforesaid money order was returned to the petitioners and cheque was not honoured by the bank and the amount of Rs.4,920/- was deposited in the Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, for short, "the Act", in the name of the respondent no.3, which was permitted to be deposited by the Court concerned at the risk of the petitioners; that in view of the aforesaid facts and circumstances, the petitioners committed no default and the suit was liable to be dismissed.

3. On the basis of the pleadings of the parties, the trial Court framed three issues which related to the sufficiency of service of the notice of termination of tenancy and demand, default in payment of rent committed by the petitioners and the relief. Parties, in support of their cases, produced evidence, oral and documentary. The trial Court, after hearing the parties and perusing the entire evidence on record, recorded clear and categorical findings on all the three issues in favour of the plaintiff respondent no.3. It was held that the notice of demand and termination of tenancy was duly served upon the petitioners through the post office and by affixation on the building in question, but inspite of service of notice, the amount of rent was not paid to him by the petitioners within the statutory period. The petitioners, therefore, was a defaulter within the meaning of the term used under clause (a) of sub-section (2) of Section 20 of the Act. Therefore, the respondent no. 3 was entitled to the relief claimed by him. Having recorded the said findings, the suit for ejectment and recovery of rent and damages was decreed by the trial Court by its judgment and decree dated 14.05.1999. Challenging the validity of the judgment and decree passed by the trial Court, petitioners filed a revision before the Court below. The Court below has also affirmed the findings recorded by the trial Court and dismissed the revision by its judgment and order dated 10.02.2000. The petitioners thereafter filed a review application before the Court below, which was also dismissed on 14.02.2000, hence the present petition.

4. Learned counsel for the petitioners vehemently urged that the notice of demand and termination of tenancy was never served upon the petitioners and that the petitioners never committed default in payment of rent, therefore, the findings recorded by the Courts below, to the contrary, are perverse and the judgments and decrees passed by the Courts below were liable to be quashed.

5. On the other hand, learned counsel appearing for the contesting respondent no.3 submitted 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. The present petition was, therefore, liable to be dismissed with cost.

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

and also perused the material on the record carefully.

7. Admittedly, the suit for ejectment and recovery of rent/damages was filed by the respondent no.3 on the ground of default in payment of rent alleged to have been committed by the petitioners. The petitioners could not be held to be a defaulter unless the notice of demand was proved to have been served in accordance with law. A notice issued under Section 106 of the Transfer of Property Act terminating the tenancy and notice of demand under Section 20 of the Act are required to be served in accordance with the provisions of Section 106 of the Transfer of Property Act, 1882 which reads as under:

"106. Duration of certain leases in absence of written contract or local usage—

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or if such tender or delivery is not practicable, affixed to a conspicuous part of the property."

8. In the present case, according to the findings recorded by the courts below, notice shall be deemed to have been served personally and by affixation on the conspicuous part of the building in question. As stated above, the postman attempted several timed to serve the notice in question upon the petitioners personally but the notice could not be delivered to the petitioners as they had been avoiding to receive the same, therefore, in view of the decisions of the Apex Court and this Court referred to and relied upon by the Courts below, the notice was rightly held/deemed to have been served. The said finding is a concurrent finding of fact which is based on relevant evidence on the record. The Courts below also held that the notice in question was also affixed on the conspicuous part of the building, the said finding is also a finding of fact which is also based on relevant evidence on the record.

9. In M/s Madan and Company vs. Jaiveer Chand, A.I.R.1989, S.C. 63, the Supreme Court, while interpreting the provisions of section 11 of the Jammu and Kashmir House and Shops Rent Control Act, which is analogous to provision of Section 106 of the Transfer of Property Act, ruled that the word 'served' is to be read as sent by post correctly and properly addressed to the tenant and the word 'receipt' as tender of the letter by the postman at the address mentioned in the letter. Relying upon the said decision, this Court in V.K. Srivastava Vs. Avinash Chandra and another, 1994, A.W.C. 1229, while interpreting the provisions of section 21(1), first proviso, held that mere denial of the receipt of a notice sent by registered post at correct address is not enough for rebuttal of presumption of service. Postal endorsement of registered cover to the effect that despite repeated information, neither the addressees were met nor anyone there disclosed where they could be met, it appears that the addressees were avoiding to receive the notice, therefore, the Appellate Authority rightly held that the notice was presumed to be served by refusal. The findings recorded by the Courts below regarding the service of notice in any view of the matter, cannot be said to be perverse or illegal. The notice

was not only served by registered post at correct address but also by affixation of the notice on the conspicuous part of the house of the petitioners.

10. So far as the question of default is concerned, clause (a) of sub-section (2) of Section 20 of the Act reads as under:-

20. Bar of suit for eviction of tenant except on specified grounds –(1)……..
(2) A suit for the eviction of a tenant from the building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:
(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand."

11. The necessary conditions for declaring a tenant as a defaulter within the meaning of the term used under clause (a) of sub-section (2) of Section 20 of the Act, are that the tenant should be in arrears of rent for not less than four months and from the date of notice of demand is served upon him the tenant should have failed to pay the arrears of rent within one month. In the present case, the notice of demand was served on 14.03.1997, whereby rent for the period 23.02.1987 to 01.04.1997. The petitioners, even after receipt of the said notice, did not pay the arrears of rent within statutory period of 30 days. The amount in question alleged to have been tendered by means of a cheque, in law is not a valid tender. Further, the cheque in question was dishonoured by the bank for shortage of money in the account of the petitioners. Petitioners also cannot take advantage of money deposited under Section 30 of the Act as such deposit was made on 13.06.1997, i.e., after 30 days of the receipt of notice. Cheque was for an amount of Rs.4,920/- while in the bank account of the petitioners, there were a balance of Rs.2511.87 only. Even the money order which is alleged to have been sent in the month of May,1997, by which an amount of Rs.40/- only is alleged to have been sent, was of no consequence. The Courts below did not commit any error of law in holding that the petitioners were defaulters and on the said ground, they were liable to be ejected from the building in question. The petitioners having committed default in payment of rent were, therefore, legally liable to be ejected from the building in question. The trial Court rightly decreed the suit and the revisional Court rightly dismissed the revision and the review application filed by the petitioners.

12. In view of the aforesaid discussion, no case for interference under Article 226 of the Constitution of India is made out. The writ petition has got no merits.

The writ petition fails and is dismissed with cost.

Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2000

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

Second Appeal No.(146) of 2000

U.P. Rajya Vidyut Parishad, Lucknow and others ...Defendants/Appellants
Versus
Chandra Pal and others ...Plaintiffs/ Respondents

Counsel for the Appellants:
Shri S.P. Mehrotra

Counsel for the Respondents:
Shri Ashok Gupta

Code of civil procedure-s-100 Second Appeal- Principle of 'Resipsa loquitar'— Lower Appellate Court recorded specific finding- inference drawn by the Appellate Court held neither illegal, nor contrary to law-can not be interfered.

Held—

Further a court of fact is entitled to draw inference from circumstances. It is neither illegal nor contrary to law. In absence of any evidence from the appellant, the appellate court was justified in concluding that the wire was loose as claimed by the plaintiffs and Smt. Sakhia died due to negligence of the Board. (Para 8)

Case Law discussed.
(1865) 31-1 RC 596
AIR 1979 SC-1848

By the Court

1. The main question that arises in this defendants appeal is whether the lower appellate court committed any error of law in decreeing the suit by applying the principle of res ipsa loquitur

2. Shri S. P. Mehrotra the earned counsel for the appellant assailed the approach of the appellate court and urged that the principle of res-ipsa-loquitur was erroneously applied without setting aside the finding recorded by the trial court that the deceased was negligent in collecting 'kanda' (fuel) from beneath a place where high voltage wire was running and in any case the amount of compensation awarded was excessive. Shri Ashok Gupta the learned counsel who had filed caveat defended the order and urged that the appellate court was not only correct in law but it acted leniently in awarding merger amount as compensation.

3. Before discussing the principle of res ipsa loquitur and whether it was correctly applied by the appellate court, to the facts of this case, I am constrained to say that the court below having awarded only Rs.60,000/- for the death of plaintiff no.1's wife and mother of plaintiffs no.2 to 6, due to coming into contact with high voltage live wire of 11,000 volts maintained by U.P. State Electricity Board, Lucknow (in brief Board), the Board would have been well advised to let the matter rest.

4. The finding of fact recorded by the trial court was that Smt. Sakhia died on 5-6-1993 at distance of one kilometre from her house by coming in contact with high voltage wire maintained by the appellant and its servants. But the suit was dismissed as the plaintiffs could not prove the occasion and reason for the deceased, and her husband going away from their village to collect 'kanda'. The court further found that PWI Chandra Pal having admitted that he or any other resident of the village having not intimated the employees of the board on the pillar in red notifying danger, the deceased was neither justified nor she had any right to go and collect 'Kanda' from beneath the wire, therefore was no negligence of the appellants and the respondents were not entitled for any compensation. The trial court further assumed that in absence of any direct evidence about the manner in which Smt. Sakhia died the claim of the appellants that the might have gone to pluck the wire or she of her won accord touched the wire could not be denied. Therefore, the suit was dismissed.

5. In appeal the lower appellate court on the finding recorded by the trial court that the death had taken palace due to coming in contact of electric wire maintained by res ipsa loquitur applied and if so whether the trial court was justified in dismissing the suit. The court relied on various decisions given by the apex court., including AIR 1979 SC 1848 and other High Courts and held that once the incident was proved the principle of res ipsa loquitur applied and the appellants having failed to prove that the accident did not occur due to any negligence on their part the suit was liable to be decreed.

6. The principle of res ipsa loquitur is an exception to the rule that it is for the plaintiff to prove negligence. It was evolved to relive the plaintiff form discharging the burden where the true cause of accident was in the knowledge of the defendant due to whose due to whose negligence the accident took place. It is based on principal that the plaintiff can prove accident but he may not be able to prove that it could have been avoided but for the negligence of the defendant. In the leading English case Scott. V. London and St. Katherine Docks Co. (1865) H. & C. 596 the law was succinctly stated thus,

"There must be reasonable evidence of negligence but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose form want of care".

7. The tow principles which are necessary for the application of the principle res ipsa loquitur are one that the thing or object by which the accudebt took place must have been in the management or control of the defendants or his servants and second that the accident in ordinary course would not have happened if those who were in management and control had taken proper care. In Syed Akbar v State of Karnataka AIR 1979 SC 1848 the apex court after reviewing Indian and English authorities on the subject held that there were two lines of approach, one taken by English courts that the maxim of res ipsa loquitur operates as an exception to the general rule that the burden to prove negligence is on the plaintiff. The Hon'ble Court observed, " that if the nature of an accident is such that the mere happening of it is evidence of negligence …or where there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of requisite care no risk would in the ordinary course ensue the burden shifts or on the defendant to disprove it". And the other that when it applies appropriately it allows drawing of a permissive inference of fact as distinguished from mandatory presumption. Our courts have followed the line of approach adopted by English courts. In this case since the electric wire which ran up to tube well was of high voltage and it was under the management and control of the appellants or its servants, its proper maintenance in ordinary course was their duty to avoid any accident. The putting up of sign board in red indicating danger did not absolve the appellants from ensuring that the wire was at proper height and there was no risk of it coming in contact to anyone. I may refer to rule 77(3) of the Indian Electricity Rules 1956 which clearly provides that

high voltage wire shall be maintained at height of not less than 12 feet (4.0 meters). It was, therefore, the duty of the Board to ensure that the wire did not come down as it was hazardous and any contact with it could cause death. If the wire became loose it was the duty of appellants to set it right. It was not necessary at all that somebody form the village should have gone to intimate the appellants servants. The fact that it came in contact of Smt. Sakhia is proof that it was loose and was not at prescribed height. The appellate court after appreciation of evidence of PWI and PW4 found it as a fact that the wire was loose and it was due to this reason that Smt. Sakhia came in contact with it and was severely burnt. The failure to maintain proper height by the board was negligence per se. No further evidence was necessary to prove negligence. It was for the Board to prove that the wire did not come down and its maintenance by it in ordinary course was such that no accident could have taken place. The putting up of the sign board was of no consequence as the appellants were bound both under the general law and the rules framed to place it at safe height. If by putting sign board the appellant is absolved of its responsibility then movement on the roads would come to standstill.

8. Once the accident was found by the trial court to have taken place it was for the appellants to prove that it took ordinary care under law. In absence of any evidence the trial court indulged in conjecturing that Smt.Sakhia might have attempted to pluck the wire or touched it. A party like Board should not have raised such plea without being in possession of any material. In any case it was a question of fact but the appellant did not lead any evidence. The trial court, in the circumstances, in assuming that the claim of the Board could not be denied acted not only illegally and in complete disregard of principle of res ipsa loquitur but it indulged in presuming facts without any basis. The appellate court on the other hand held that even if the maximum height of Smt. Sakhia was assumed to be 6 feet and the hight of basket is added to it she could not have come in contact of the wire unless it was much below the prescribed height of 12 feet under rule. The inference is reasonable. The argument of the learned counsel for the appellant that the appellate court in drawing the inference acted illegally as there was no material on record to support the finding can not be accepted. I have referred earlier that the appellate court believed the statement of plaintiff's witnesses that the wire was loose, Further a court of fact is entitled to draw inference from circumstances. It is neither illegal nor contrary to law. In absence of any evidence from the appellant, the appellate court was justified in concluding that the wire was loose as claimed by the plaintiffs and Smt. Sakhia died due to negligence of the Board.

9. For these reasons I am not inclined to admit this appeal as burden of proof is no doubt a question of law but once I have held that the appellate court correctly applied the principle of res ipsa loquitur it ceased to be a question of law much less a substantial question of law.

The appeal is dismissed under Order 41 Rule 11 C.P.C.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2000

BEFORE
THE HON'BLE S. RAFAT ALAM, J.

Civil Misc. Contempt Petition No. 221 of 2000

Dr. Shyam Ji Shukla ...Applicant
Versus
Sri K.R. Naraynan, the visitor Banaras Hindu University, Varanasi, the President House, New Delhi ...Opposite party

Counsel for the Applicant:
Shri Sheo Shankar Tripathi
Shri Adya Prasad Tewari

Counsel for the Respondent:
Opposite Party

Contempt of Courts Act, S. 12 read with constitution of India, Article 361 (1) and the Banaras Hindue University Act, S.5 – Contempt proceedings against opposite party for defiance of court's order—president, Visitor of B.H.U. in his official capacity, is imnune from court proceedings under article 361 (1)—Hence no mandamus or direction can be issued to the president.

Held-

Section 5 of the Banaras Hindu University Act provides that the president of India shall be visitor of the University. The president has been made Visitor of the University by virtue of his office and not in his personal capacity and thus, in my view, the personal immunity to the president for official acts provided under clause 1 of Article 361 of the Constitution is available to him in respect of his functions and duties as Visitor of the University, because be has been visitor by virtue of his office. (Para 6)

By the Court

1. This is an application under Section 12 of the Contempt of Court Act for initiating contempt proceeding and punishing the opposite party for the alleged wilful and deliberate defiance of this Court's order dated 17.2.1998 passed in Writ petition No. 20883 of 1997 and the order dated 24.7.1998 passed in the review application no.20094 of 1998.

2. I have perused the aforesaid orders of this Court contained in Annexures 1 & 2 to the contempt petition. It appears that the petitioner had filed writ petition no. 20883 of 1997 for quashing the advertisement and selection as well as appointment of Sri Ashok Sonkar who was arrayed as respondent no.4 to the writ petition, to the post of Lecturer in Tridesh Vigyan, Department of Basic Principles Institute of Medical Sciences. Banaras Hindu University, Varanasi. The Division Bench of this Court, after hearing the learned counsel for the parties declined to entertain the writ petition in view of the alternative remedy available under Section 5 (7) of the Banaras Hindu University Act. However, while dismissing the writ the Division Bench has observed as under.

"However, it is provided that in case the petitioner will file a representation before the learned Visitor that would be entertained and decided on merit."

3. Thereafter the petitioner filed the review petition no. 20094 of 1998 which was partly allowed by providing that the learned Visitor should consider the representation of the petitioner dated 14.5.1997 and pass appropriate order on the representation possibly within a period

of ten weeks from the date of production of certified copy of the order.

4. It has been alleged in the contempt petition that despite service of the order of this Court upon the Hon'ble Visitor, the representation of the petitioner has not been decided.

5. It is apparent from the array of parties to the writ petition that the Hon'ble Visitor was not arrayed as respondent, and rightly so, because of constitutional bar as provided under Article 361 (1) of the Constitution of India. Clause 1 of article 361 of the Constitution of India provides that the president shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. Therefore, No Court can compel the president to exercise any power or to perform any duty, nor he is amenable to the writ or direction issued by any Court. Article 361 (1) of the Constitution gives complete immunity to the President and Governors of Sate from any proceeding of the Court in the exercise and performance of their powers and duties of his office including any duty or function which are incidental to the exercise of his power and performance of his duties. The protection given under this provision not only extends to his official acts and omissions but also to those acts and omissions which are incidental to the exercise of powers and performance of his duties, Therefore, the orders of his Court dated 17.2.1998 and 24.7.1998 were not binding on him. No doubt, the action or the order of the president can be scrutinized by the Courts in order to give relief to the individuals against the Government and the personal immunity given to the President under the Constitution will not stand as a bar in instituting any suit or writ petition against the Government. But in such suit or proceeding the President is not a necessary party and no Mandamus or direction can be issued to the President.

6. Section 5 of the Banaras Hindu University Act provides that the President of India shall be Visitor of the University. The president has been made Visitor of the University by virtue of his office and not in his personal capacity and thus, in my view, the personal immunity to the President for official acts provided under Clause 1 of Article 361 of the Constitution is available to him in respect of his functions and duties as Visitor of the University, because he has been made Visitor by virtue of his office.

7. In this view of the matter, the contempt petition fails and it is here by dismissed. The notice issued to the opposite party is here by discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 1.8.2000

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

Civil Misc. Writ Petition No. 733 of 1998

Radha Krishna Singh ...Petitioner
Versus
Commissioner Village Development, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri H.K. Singh
Sri S.A. Gilani
Sri Parvej Alam

Counsel for the Respondent:
Sri K.M. Sahai
S.C.

Retiral Benefits- Entitlement to- Petitioner retired as B.D.O. on1995- Made several representations for grant of retiral benefits- Respondents paid no held- writ petition filed in Court- No counter affidavit filed on behalf of respondents.

Held-

I. It cannot be gainsaid that the grant of retiral benefits to an employee of the State is not a matter of grace or charity. Indeed, he is entitled to retiral benefits as a matter of legally cognizable and judicially enforcement right. Instant case is a sad commentary of the in action on the part of the respondents, on account of which the petitioner has been deprived of his lawful dues despite his repeated approaches to the concerned authorities. (Para- 8)

II. The respondents, jointly and severally, are directed to settle the claim of the petitioner in respect of his retiral benefits and ensure the payment of all the dues to him within a period of three months to be computed from today. (Para-10)

By the Court

1. Heard Shri Parvej Alam Ansari, holding brief of Shri H.K. Singh, learned counsel appearing for the petitioner and Shri K.M. Sahai, learned Standing Counsel of the State of U.P., representing the respondents.

2. The petitioner, who retired as Block Development Officer of the State of U.P. on 30th June 1995, has not been granted retiral benefits for the period commencing from 1st January, 1996, hitherto. Long back, to be precise, on 31st October, 1995, he approached through his letter for the grant of the retiral benefits. Later on, he moved representation dated 12th January, 1996 before the respondent No.3. A copy of this representation is to be found on record as annexure-5 to the petition. Neither the letter nor representation was responded to.

3. The petitioner, therefore, moved before the respondent No. 3 by representation dated 30th March, 1996, a copy whereof is aannexure-6 to the petition. This representation too went unheeded. Thereafter, the petitioner moved representations dated 3rd June, 1996. 8th July, 1996. 7th September, 1996 and 21st September, 1996, copies whereof are annexures 7,8,9 and 10, respectively. On these representations also the concerned authorities turned deaf ears.

4. Eventually, the petitioner approached this court through instant writ petition under Article 226 of the Constitution of India.

5. On 9th January, 1998, while entertaining the petition, the court, on the request of learned Standing Counsel who had accepted notice on behalf of the respondents, granted four weeks' time for filing counter-affidavit. No counter-affidavit was filed. Again, on 14th July,2000, on the request of the learned Standing Counsel, the court granted one more and final opportunity to the respondents and granted two week's and no more further time for filing counter-affidavit.

6. The office report dated 31st July, 2000, recorded on the order sheet, indicates that no counter-affidavit has been

filed. Learned Standing Counsel does not dispute this position. Under the circumstances, the court is left with no choice but to proceed on the assumption that the averments made in the writ petition are correct.

7. From the averments made in the writ petition. Undisputed position that emerges is;

That the petitioner retired on 30th June as Block Development Officer;

That the requisite formalities for the grant of retiral benefits had been completed by the petitioner; and

That the retiral benefits which the petitioner may be entitled have not been granted hitherto.

8. It cannot be gainsaid that the grant of retiral benefits to an employee of the State is not a matter of grace or charity. Indeed, he is entitled to retiral benefits as a matter of legally cognizable and judicially enforceable right. Instant case is a said commentary of the inaction on the part of the respondents, on account of which the petitioner has been deprived of his lawful dues despite his repeated approaches to the concerned authorities.

9. On the facts and circumstances, noticed above, in the opinion of the court, the stage has arrived for intervention by this court.

10. In the result, the petition succeeds and is allowed. The respondents jointly and severally are directed to settle the claim of the petitioner in respect of his retiral benefits and ensure the payment of all the dues to him within a period of three months, to be computed from today. Shri K.M. Sahai., learned Standing Counsel of the State of U.P. in whose presence this order 'has been passed shall communicate to the respondents promptly. Petitioner shall also produce before the respondents a certified copy of this order as early as possible. However, it is made clear that the respondents shall not wait for production of a certified copy of this order by the petitioner and shall initiate action on the information received by them through Shri K.M. Sahai, learned Standing Counsel of the State of U.P.

11. Certified copy this order may be given to the learned counsel appearing for the parties within a week, on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 09,2000

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

In the matter of M/s Hira Floon Ltd.(In Liquidation)

In
Company Application No. 2 of 1997
In
Company Petition No. 18 of 1989

The Official Liquidator, U.P. ...Applicant
Versus
The Managing Director, U.P. Financial Corporation Ltd. ...Opp. parties/ Respondents

Counsel for the Applicant:
Sri S.P. Dixit
Sri Ram

Counsel for the Respondents:
Sri A.K. Gaur

State Financial Corporation Act Sec. 29- Steps taken by U.P.F.C.- when the loan was advanced the firm was in existence- subsequent conversion into company- immaterial- held- U.P.F.C. had every right to proceed against the property of firm.

Held-

Indeed, the land stood in the name of one of the partners of a the erstwhile firm , namely, Ragunath Prasad Singhal when the loan had been taken from U.P.F.C. by effecting simple mortgage of the said property with depositing the title deed. Raghunath Prasad Singhal was one of the partners of the firm when the loan had been advanced by the U.P.F.C. The firm was in existence when the loan was advanced and as a matter of fact the loan was advance to the partner ship firm. Therefore, the U.P.F.C. which had advanced the loan to the firm on 'the basis of simple mortgage of certain property belonging to one of the partners, namely, Raghunath Prasad Singhal, had every right to proceed against that property as per section 29 of the State Financial Corporation Act. Para-6

Unilateral act of the partners of the firm by converting the firm to the public Ltd. Company and professing to transfer all the liabilities and assets of the firm to the newly incorporated company would have no effect on the creditor- U.P.F.C. (Para-7)
Case law discussed.
1999 Camjp.cases(vol.1)-96

By the Court

1. The Official Liquidator has made the present application to declare the sale as void in terms of Section 537(2) of the Companies Act which has been made by the U.P.F.C.- respondentno.1 in favour of respondent no. 2 of the assets allegedly belonging to M/s Hira Floon Ltd. (In Liquidation).

2. The relevant facts may be stated briefly. A winding up petition no. 18 of 1989 was presented against M/s Hira floon Ltd. having its registered office at Kaloki, Anupshahr Road, Bulandshahr by one Jitendra Kumar, Proprietor of a firm Ultimate Advertising & Marketing, New Delhi. The company was ordered to be wound up by the court's order dated 8.8.1989. Formerly, Hira Industries was a partnership firm and Hira Floon Ltd. (In Liquidation) was incorporated on 2.1.86, taking the running partnership firm alongwith all its assets, liabilities and goodwill as agreed upon between the partners of the said firm and Directors of the newly formed company. The U.P.F.C. – respondent no. 1 had allegedly advanced a loan to the partnership firm above named. It took over possession of the company on 3.4.89 and sold the assets of the company to respondent no. 2 for Rs. 4 lacs in 1990. The winding up petition had been presented on 9.3.89 in which the winding up order was ultimately passed on 8.8.89. Section 44 (2) of the Companies Act provides that in a winding up of company by the court, the winding up proceedings shall be deemed to commence at the time of presentation of the petition for the winding up. The winding up order having been made on 8.8.89, all its properties came into the custody of the court, relating back to the date of presentation of the winding up petition. Therefore, the U.P.F.C. could not take possession of the assets of the company and sell them. It is with these allegations that the official liquidator has presented the present application for declaring the sale effected by the U.P.F.C.- respondent no. 1 in favour of respondent no. 2 in respect of the assets of the company to be void as per the provision contained in Section 537(2) of the Companies Act.

3. The defence put forth by respondent no. 1-U.P.F.C. may shortly be stated thus: It granted a term loan of Rs.2,84,000/- and Rs.52,000/- 9(reduced to Rs.29,650/-) respectively to the partnership firm- M/s Hira Industries. The partners of the said firm were Raghunath Prasad Singhal, Santosh Kumar, Harish Kumar Singhal and Smt. Madhu Singhal. To secure the above two loans, the firm mortgaged a piece of land 3 big has 15 biswas bearing khasra no. 106 situate at Kaloli, Tehsil & Pargana Baran, District Bulandshahr in favour of U.P.F.C. by deposit of title deed. The said land belonged to one of the partners of the firm, Raghunath Prasad Singhal. Subsequently, the partners of the firm decided to change the constitution of the firm and converted it into a public Ltd. Company. The U.P.F.C. granted permission to this change subject to completion of the requisite legal formalities. But the immovable assets of the firm were never transferred to the company. The U.P.F.C. took possession of the mortgaged property in pursuance of Section 29 of the State Financial Corporation Act and sold the same on 28.3.89 in favour of Mohd. Rais to whom the possession of these assets was handed over on 14.5.90. The property sold to the said purchaser never belonged to the company (In Liquidation). The U.P.F.C. being a secured creditor could proceed under section 29 of the State Financial Corporation Act and had every right to sell the property mortgaged to it t secure the ;loan advanced to the partnership firm. With these contentions, the U.P.F.C. has prayed for the rejection of the application made by the Official Liquidator.

Notice was also issued to the purchaser also, but he did not turn up before the Court.

4. The affidavit and counter affidavit have been exchanged between the contesting applicant- Official Liquidator on behalf of the company (In Liquidation) and U.P.F.C.- respondent no. 1 have also heard the arguments advanced by the Official Liquidator and on behalf of the respondent no. 1.

5. The point for consideration is as to whether the property sold by the U.P.F.C. – respondent no. 1 belonged to the company (in liquidation). Some facts are undisputed that the winding up petition had been presented by a creditor against the company in question on 9.3.89 and the winding up order was passed on 8.8.89. There can be no dispute about the legal position that as per section 441(2) of the Companies Act, in case a winding up of company by the Court, the winding up proceeding is deemed to commence at the time of presentation of petition for the winding up. Section 456(2) of the Companies Act says that all the properties and effects of the company shall be deemed to be in the custody of the Court as from the date of order for winding up of the company. The provisions contained in Section 537 (1) (a) & (b) of the Companies Act further provide that where any company is being wound up by or subject to the supervision of the court, any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company after such commencement shall be void. The submission of the Official Liquidator is that the company in question (In Liquidation) had been formed to take over the running partnership business of the

firm- Hira Industries along with all its assets and liabilities. As such, the property where against the U.P.F.C. proceeded, purportedly under section 29 of the State Financial Corporation Act, had vested in the company and were in the custody of the company court. The same, it is urged, could not be sold by the U.P.F.C. having acted in contravention of the provisions of the Companies Act referred to above, the complained sale is liable to be declared as void. It has been submitted that in any case, the UPFC is bound to make over the sale proceeds to the Official Liquidator for being distributed amongst eligible creditors consequent upon the winding up order. Stress had been laid on the balance sheet of the company for the year 1986-87 and as on 8.8.89. It has been pointed out that on the liabilities side, the loan advanced by the U.P.F.C. has been shown under the title (secured loans), amounting to Rs.5,62,500/-. On assets side land, building, machinery etc. have been shown, meaning thereby that liabilities and assets of the partnership firm had been transferred to the company. (In Liquidation).

6. The submissions made by the Official Liquidator do not stand a close and in-depth scrutiny. Indeed, the land stood in the name of one of the partners of the erstwhile firm, namely Raghunath Prasad Singhal when the loan had been taken from U.P.F.C. by effecting simple mortgage of the said property with depositing of title deed. Raghunath Prasad Singhal was one of the partners of the firm when in existence when the loan was advanced and as a matter of fact the loan was advanced to the partnership firm. The law provides that the liability of the partner of a partnership firm is joint and several. To day in simple words, the partner of a firm is liable personally also in respect of liability of the partnership firm and his personal property can be proceeded against by the creditor. Therefore, the U.P.F.C. which had advanced the loan to the firm on the basis of simple mortgage of certain property belonging to one of the partners, namely, Raghunath Prasad Singhal, had every right to proceed against that property as per section 29 of the State Financial Corporation Act.

7. Unilateral act of the partners of the firm by converting the firm to the public Ltd. Company and professing to transfer all the liabilities and assets of the firm to the newly incorporated company would have no effect on the creditor- U.P.F.C. The balance sheet of the company as on 31.3.87 itself contains a note that transfer deed of immovable assets had not yet been registered in the name of the company of taking over all the liabilities and assets of the partnership firm remained paper work only with no legal effect. There is clear averment from the side of U.P.F.C. in affidavit of Sri D.S. Lal, Senior Manager Law (A-7) that when the partners of the firm had decided to change the constitution of the firm and convert it into public ltd. company, the U.P.F.C. granted permission to this change subject to completion of the required legal formalities. Note in the balance sheet referred to above is to the effect that the transfer deed of immovable assets had not yet been registered in the name of the company and it is itself clearly an indicator that the legal formalities as to the transfer of the assets of the partnership firm to the company had not been completed.

The Official Liquidator has made reference to the case of Iftex Oils and Chemicals Pvt. Ltd. Vs. Official

Liquidator and others 1999 Company Cases Vol. 96-page 386 to urge that disposition of property after commencement of winding up is void unless approved by the Court. There can be no quarrel with this proposition but the point of the matter is that the ownership of the property must be shown as vesting in the company. Unless it is shown that the company was the owner of the property, the sale cannot be declared to be void. On an analytic scrutiny of the present controversy in an adjudicator manner, this Court finds that the property where against the respondent no.1 -U.P.F.C. proceeded under Section 29 of the State Financial Corporation Act and sold the same had not been transferred to the company (In Liquidation) and was not, therefore, owned by it. Resultantly, the official liquidator cannot lay any claim there against. The application made by the official Liquidator is liable to be dismissed.

In view of the above discussion, application made by the Official Liquidator is found to be devoid of merit and the same is hereby dismissed.

Application Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27TH JULY, 2000

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

Civil Misc. Writ petition No. 11573 of 1998

Canara Bank through Divisional Manager, Circle office, 4,Sapru Marg, Lucknow ...Petitioner

Versus

Central Govt. Industrial Tribunal Cum Labour Court, Deoki Palace Road, Kanpur Nagar and another ...Respondents

Counsel for the Petitioner:
Shri Rakesh Tiwari
Shri J.N. Tiwari

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

Industrial Disputes Act, 1947, Ss.2 (rr.), 17 B, 11 A and 33 C (2)- Award- Back Wages- Last drawn- Meaning of- whether includes Dearness Allowance, Increments, revision of pay, etc.

Held –

The labour court had qualified the back wages as a term and condition for reinstatement. This is to be interpreted according to the expression used in the award. The expression used in the award is back wages at the rate which he had last drawn. Therefore, the rate of wages is to be calculated at the rate at which the workman had drawn on the date of his termination. But the wages even though may be at that rate would include all the components as are mentioned in Section 2 (rr) of the said Act. No part of it could be excluded.

The exclusion of House Rent Allowance in the course of computation, therefore, cannot be justified. The House Rent Allowance is also inclusive to wages as defined in Section 2 (rr). It includes Dearness Allowance and all components mentioned in Section 2 (rr), which requires computation and is to be computed by the labour court. (para 18)

Case law discussed.
1992 (2) SCC 106
1998 (80) FLR 337
1997 (76) FLR 943

By the Court

1. The order dated 27th October, 1997 passed in L.C.A. No. 1151 of 1997 by the presiding officer Central Government

Industrial Tribunal-cum Labour Court, Kanpur has since been challenged in this writ petition. Mr. Tewari, learned counsel for the petitioner employer contends that the order allowing payment of back wages cannot be sustained since it had included payment at the rate at which the workmen would have been entitled to if he was reinstated with back wages in view of the qualified expression used in the award to the extent that "back wages at the rate at which lastly drawn." According to him this will not include any increment nor any revision of pay neither any other components as are mentioned in Section 2 (rr) of the Industrial Disputes Act while detaining the word "wages". According to him, the workman would not be entitled even to Dearness Allowance. He relies on the interpretation of the words "last drawn" of the apex court in the case of **Dena Bank Vs. Kirti Kumar** (1992 (2) SCC 106).

2. Mr. Sudhanshu Dhuliya, learned counsel for the workmen respondents on the other hand contends that the interpretation of words "last drawn" given in the decision in the case of Dena Bank (Supra) cannot be taken aid of when back wages are payable under an award. Inasmuch the provisions contained in Section 17B was enacted in a particular situation securing interim measure for a workmen in favour of whom an order of reinstatement is passed and is subject to a proceeding challenging such reinstatement, as a condition for stating the order of reinstatement. This is in the form of subsistence allowance, since in case the proceedings succeed, the amount paid to the workmen would not be recoverable and as such different meaning has since been given to this expression when used in the award. The right flowing from such an award is entitlement and not an interim measure for subsistence allowance and as such there is a broad distinction between these two situations on which the interpretation to the expression while dealing with Section 17B cannot be utilized for such purpose. He further contends that the decision in the case of Dena Bank (Supra) has itself recognized the entitlement of the workmen under these two different situations. He had relied on the decision in the case of Dena Bank (Supra) to substantiate his submission as well as on various other decisions, to which a reference shall be made at appropriate stage. He has relied on the Law of Industrial Disputes, Volume II, Fifth Edition by Sri O.P. Malhotra at page 1434. On these grounds, he contends that the petitioner is entitled to back wages as defined in Section 2 (rr) of the Industrial Disputes Act, including all the components mentioned therein, as will as the revised wages, if revised in the order him. He then contends that while reinstating the workman when the tribunal awarded back wages, the expression 'lastly drawn' incorporated in the award is superfluous and redundant. This expression cannot be reconciled with the entitlement of back wages pursuant to an order of reinstatement in the award. Therefore, the petitioner is entitled to full back wages, which will include all components of wages, as well as the increment and revision in wages as if the workmen was in service for the period during which he was prevented from working by reason of proceedings since culminating in the setting aside of the termination reinstating the workman. On these grounds, he prays that this petition should be dismissed.

3. I have heard both the learned counsel at length.

4. In order to appreciate with the situation, it would be necessary to briefly refer to the facts of this case. There was an industrial dispute between the petitioner employer and the workman-respondent. The said dispute travelled to the High Court through writ proceedings in the form of challenge thrown to the award. The High Court, however, had remanded the case after setting aside the award dated 25th October, 1991 passed in Adjudication Case No.179 of 1988 upon such remand, a fresh award was passed on 2nd of January, 1996. In the said award dated 2nd January, 1996, the concluding part was as follows:-

"As such my award is that the action of the management of Canara Bank in dismissing the concerned workman from services of the Bank is not justified. He is also entitled for back wages at the rate at which he had lastly drawn his wages."

This award has since not been challenged by the employer. It was also not questioned by the workman. Pursuant to the award, the workman have since been reinstated. So far as payment of wages after reinstatement is concerned, it is not being disputed. The employer paid back wages at the rate at which the workmen had drawn on the date of termination without Dearness Allowance and other components. Therefore, the workmen had filed an application under Section 33C (2) for releasing the difference according to his calculation. This application was registered as L.C.A. No. 15 of 1997. By an order dated 27th October., 1997 since impugned in this petition, the labour court had allowed the application in [part by directing recovery of the entire amount claimed less the House Rent Allowance. This order has since been challenged in this petition as referred to above.

5. Thus on facts of this case the point for determination is confined to the interpretation of the expression 'back wages' at the rate at which he had lastly drawn his wages' whether this will include Dearness Allowance, Increments, revision of pay and all other components as are mentioned in the definition of word "wages" in Section 2 (rr) of the Industrial Disputes Act or not.

6. In order to interpret the expression 'wages last drawn' in reference to the implementation of an award cannot be interpreted in the same manner as it can be interpreted when it is used in reference to a proceeding under Section 17B. Inasmuch as there is a marked different in the entitlement of the workmen flowing from an award and those under Section 17B. In other words, the entitlement flowing from an award is the right legally accrued to the petitioner independent of an intervention of court on the basis of the award itself, which is capable of execution. It does not depend on the discretion of the court or otherwise. Whereas Section 17B is by way of interim measure pending adjudication of a proceeding arising out of an award reinstating a workman as a condition for staying reinstatement. As rightly contended by Mr. Dhuliya, the amount paid under Section 17B is in the form of subsistence allowance paid to the workman, which may not be an entitlement to him if the award is set aside. But still then the amount paid under Section 17B cannot be borrowed in order to interpret the same expression appearing in the award. This distinction has also been recognized in the case of Dena Bank

(Supra) by the apex court. Paragraph 20 of the said decision makes a distinction between these two situations while it interpret full wages last drawn. If interpreted to mean full wages which could have been drawn, would result into giving an extended meaning which does not find support in the language of Section 17B. The payment under Section 17B while staying an implementation of the award, an interim measure is permitted. If the expression 'full wages' in Section 17B is interpreted with a different meaning in that event it will be amounting to implementing the award which is being stayed by the High Court, namely entitling the workmen to receive full wages as he would have been entitled if he continued in service. This distinction may be noted even from the observations made in paragraphs 21 and 24 respectively.

7. In paragraph 24, the apex court observed that the direction of the High Court by the learned Single Judge since affirmed by the Division Bench for payment of wages as revised, including increments, Dearness Allowance etc. which are granted to all employees pursuant to Vth and VIth Bipartite settlement, cannot be upheld since it would amount to directing payment of wages which would have been drawn by the workman if he had been reinstated with full wages last drawn by him. Thus the apex court had made a clear distinction between the two situation, namely, entitlement under an award and those under Section 17B of the Act.

8. In that view of the matter, it is not possible to borrow the expression wages last drawn given in the case of Dena Bank(Supra) by the apex court in order to interpret the expression used in the award, which requires a determination by this Court.

9. Mr. Dhuliya had relied on the decision in the case of **M/s Contienental Commercial Company And State & Others** (1998(80) FLR 337), wherein the decision in the case of Dena Bank (Supra) was followed in respect of a case arising out of Section 17B of the said Act in order to include the same distinction, which finds an expression in the concluding paragraph, where the court had observed that if the petition of the workman was unconnected with Section 17B in that event the court had a discretion to allow something more as available in terms of interpretation of words 'last pay drawn' under Section 17B in the case of Dena Bank (Supra).

10. He had also relied on the decision in the case of **Hindustan Wires Ltd. And Janardan Kundu** (1997 (76) FLR 943) which interpreted it to mean that it would include increment and Dearness Allowance, which might have accrued in the meantime. This decision was given prior to the decision in the case of Dena Bank (Supra). Therefore, the said decision is no more a good law and the endeavour of Mr. Dhuliya to borrow the said interpretation for the purpose of his case may not be of any avail to us since the decision was in relation to proceedings under Section 17B which as I have already held, cannot be relied upon for the purpose of interpretation of the expression with which we are now concerned.

11. Section 11A of the Industrial Dispute Act prescribes the power of a Tribunal. The Tribunal is empowered by its award to "set aside the order of discharge or dismissal and direct

reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require."

Thus it appears that the jurisdiction of the Tribunal is wide enough to attach any condition to the reinstatement as he may think fit. The power to reinstate is subject to the attachment of the conditions or terms according to the wisdom of the Tribunal. Mr. Dhuliya in his usual fairness has conceded to the proposition while reinstating the Tribunal has jurisdiction to allow back wages, full or partial wages or it may allow reinstatement without back wages or may also allow reinstatement with a lump sum payment or make payment of lump sum in lieu of reinstatement. Mr. Tewari had also advanced the similar contention. In fact the Tribunal has all these powers. The power of the Tribunal is not under any doubt.

12. But at the same time, Section17B is applicable only when an award directing reinstatement of the workman in challenged In the High Court, then it makes the employer liable to pay the workmen during the pendency of such proceedings full wages last drawn. Thus Section 17B can be attracted only when an award reinstating a workman has been challenged. Then again this provisions is dependent on the discretion of the court to the extent that such an order is to be passed when an application is made to the court establishing that during the period, the workman was not employed elsewhere. Thus it is an interim measure pending adjudication of the dispute before the High Court or Supreme Court. Thus it is completely distinct from the entitlement of the workman under an award, which was not by way of an interim measure but by way of entitlement. The relief under Section 17B is an interim measure pending enforcement of the award if the proceeding before the higher forum fails.

13. Therefore, in order to determine the question it would be beneficial to refer to the definition of wages given in Section 2 (rr), which is as follows:-

"wages means all remuneration capable of being expressed in terms of money which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes—

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles:

(iii) any travelling concession;

(iv) any commission payable on the promotion of sales or business or both;

but does not include

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service;

The wages includes all remuneration which are capable of being expressed in terms of money according to the terms of the employment expressed or implied. It also includes such allowance, including Dearness Allowance to which the workmen may be entitled to for the time being and the value of house accommodation or supply of electricity, light water, medical attendance and concessional supply of food grains and other articles. So far the other two components mentioned in the definition may not be relevant for our purpose.

14. Having regard to the said definition, the contention of Mr. Tewari to the extent that Dearness Allowance cannot be included, appears to be wholly unsound. The wages payable under the award is to be interpreted in the same manner as defined in Section 2 (rr) of the said Act and not otherwise.

15. Section 33 (2) empowers the labour court to determine such amount as are payable under an award. It can enforce entitlement of the workman giving the very award. Mr. Tewari contended that since entitlement of the workman is disputed, therefore, the labour court in exercise of jurisdiction under Section 33(2) cannot enter into such a dispute and decide the jurisdiction of the labour court. This contention also cannot not acceded to. Inasmuch under Section 33 C (2), the labour court has to compute the entitlement of the workman flowing from the award. Whether the entitlement flows from the award or not is a question to be determined and as such can very well be gone into. If the labour court finds that the entitlement flows from the award, then it has jurisdiction to compute the same.

16. In the present case the labour court has proceeded to compute the entitlement flowing from the award and as such the order is wholly within the jurisdiction. Therefore, the contention of Mr. Tewari is over-ruled.

17. Now let us examine as to whether the computation that has been made by the labour court could be justified on the basis of the expression used in the award.

18. Having regard to the power conferred on the labour court under Section 11A, it appears that the labour court may pass any kind of orders, terms and conditions for reinstatement. It may award full back wages, it may award partial back wages. It may not award back wages while reinstating a workman. It may award a lump sum payment in lieu of reinstatement or in lieu of back wages allowing reinstatement. Thus when the labour court expressed some special reference as a term for reinstatement, the same has to be interpreted according to the expression used. If the payment of back wages is qualified by any expression it has to be interpreted to the extent Mr. Tewari had contended to qualify the payment of wages to the extent as it has qualified by the expression used. If the back wages is qualified by any expression, it cannot be said that it is superfluous or redundant. But at the same time, it has to be examined from the expression whether there is any apparent contradiction in the expression used or not. If there is a contradiction in that the one that is more beneficial to the workman is to be accepted and that which is lesser beneficial to the workman is to be discarded. In case the expression could

have been full back wages last drawn was used, in that event definitely the contention of Mr. Dhuliya that the expression wages last drawn could have been superfluous and redundant and could not have been reconciled with the expression full wages but would mean that the back wages that would have been payable had the workman continued in service. The expression last drawn could not be reconciled with expression full back wages. As such the contention of Mr. Dhuliya could have some substance if such an expression is used. But if the expression used in the award is back wages last drawn, then perhaps it is not possible to accede to the contention of Mr. Dhuliya to the extent at which he had raised it. The labour court had qualified the back wages as a term and condition for reinstatement. This is to be interpreted used in this award is back wages at the rate which he had last drawn. Therefore, the rate of wages is to be calculated at the rate at which the workman had drawn on the date of his termination. But the wages even though may be at that rate would include all the components as at re mentioned in Section 2 (rr) of the said Act. No part of it could be excluded. The exclusion of House Rent Allowance in the course of computation, therefore, cannot be justified. The House Rent Allowance is also inclusive to wages as defined in Section 2 (rr), which requires computation and is to be computed by the labour court. However, the question of payment of other amenity with regard to any concessional supply of food grains or other articles or other amenities, if there be any, which was not consumed by the workman during this period, ma y not be a factor for payment of equivalent of such amenities in course of such computation. But if the workman has consumed such amenities, in that event that cannot be adjusted against such payment or deducted or reduced to that extent from the payment that has to be made. If not consumed, in that event the equivalent cannot be excluded other than the amenities relating to supply of food grains etc. are concerned. So far as the House Rent Allowance or if the workman was occupying any accommodation and was still in occupation of such accommodation is concerned. He will be entitled to the reimbursement to the extent of supply of light, water or medical attendance as were available to the workman under the terms of employment if he had availed such benefits as are allowed to the workman under the rules. herements. may not be available that if Liu scale cannot drawn is revised , the revised rate may also be available as such revised rate of the last pay drawn and be available.

19. In that view of the matter, the writ petition is allowed accordingly. The order impugned, namely, the order dated 27th October, 1997 is hereby set aside. No cost. The learned labour court is hereby directed to compute the amount payable to the petitioner in the light of the observations made above within a period of three months from the date of receipt of a certified copy of this order. It would be open to the workmen to compute the amount and place it to the employer within three weeks from date and in that event the employer may agree or certify the amount payable under such computation and may furnish details, if there is any difference, within a period of three weeks from the date of furnishing of the said statement and both the statements may be filed before the labour court in order to enable the court to determine the question of computation. The labour court will decide the question according to its own wisdom and

discretion having regard to the observations made herein before.

20. Let a certified copy of this order be issued to the learned counsel on payment of usual charges at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 02.08.2000

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

Civil Misc. Writ Petition No. 1265 of 1993

Bithoori Lal ...Petitioner
Versus
State of U.P. through Secretary, Local Self Government, U.P. Lucknow and others ...Respondents.

Counsel for the Petitioner:
Shri A.K. Sand

Counsel for the Respondents:
Shri I.M. Khan
S.C.

Dying in Harness Rules, 1974, R.6- Appointment made without following procedure prescribed under R.6— Direction to Director Local Bodies, U.P. to decide the matter afresh after affording opportunity to both parties to show whether deceased's family was in distress at all at the relevant time.

Held-

Hence, this Court is of the opinion that before appointment under Dying in Harness Rules is proposed, the employer must follow the procedure and undertake an exercise to ascertain financial condition of the family in question. The appointment under Dying in Harness Rules is not dependant merely upon one fact i.e. death of an employee 'Dying in Harness'. To seek benefit of employment under Rules,1974 family must be in distress—which must be ascertained as a fact. (Paras 6 & 8)

By the Court

1. Heard Sri A.C. Verma, learned counsel for the petitioner, learned Standing Counsel for Respondent No.1, and Sri Mehbood Ahmad Siddiqui, holding brief of Sri I.M. Khan, representing Respondent no.4, Sri R.K. Saxena, Advocate, representing Respondent nos. 2 and 3 is not present.

2. Petitioner, belonging to Schedule Caste, was working as Clerk-cum-Typist in the Nagar Palika, Fatehpur since 1984. On 17th September, 1992 one Mansoor Ahmad, holding post of the Senographer in said Nagar Palika, died living behind his widow Smt. Zahida Khatoon, who has been, admittedly, employed at the relevant time as will be evident from perusal of para 11 of the writ petition as well as para 21 of the Counter Affidavit, sworn by Mohd. Arif Mansoor, Respondent no.4.

3. The petitioner claims that the post of Stenographer held by deceased Mansoor Ahmad was in the promotional quota in the relevant rules no particulars given but Respondent no.4 (son the aforementioned deceased Mansoor Ahmad) was appointed on compassionate ground under Dying in Harness Rules, 1974 and copy of which has been filed as Annexure 2 to the writ petition. In para 10 of the writ petitioner, it is stated that appointment letter in favour of Respondent no.4 was anti-dated to make it appear as on 1.10.92 even though petitioner had already taken over the charge on the post in question on 19th September,1992 and hence the post was

not vacant at all when Respondent no. 4 was allegedly issued appointment letter.

4. This Court does not intend to go into the disputed question of fact, inasmuch as this petition can be decided on a short ground. It si admitted at the Bar that there is no material, as on date, to indicate that whether appointment under Dying in Harness Rules will take precedence over any other mode of appointment (including by promotion etc. or vice versa).

5. One fact, which is not disputed in the instant case, is that wife of the deceased was already employed. Para 6 of the relevant Dying in Harness Rules, 1974 (Annexure-2 to the Writ Petition) shows that certain procedure has to be adopted before a dependant of a deceased employee could be given benefit of appointment under Dying in Harness Rules. Main emphasis is upon the financial condition of the family.

6. Hence, this Court is of the opinion that before appointment under Dying in Harness Rules is proposed, the employer must follow the procedure and undertake an exercise to ascertain financial condition of the family in question. The appointment under Dying in Harness Rules is not dependant merely upon one fact i.e. death of an employee 'Dying in Harness'. To seek benefit of employment under Rules, 1974 family must be distress- which must be ascertained as a fact.

7. Since there is nothing on record to indicate that requisite procedure was adopted and whether condition precedent existed—viz family in distress, no appointment under 'Dying in Harness Rules 1974' could be made in favour of Respondent no. 4. Petitioner has also failed to substantiate that appointment by promotion is to take precedence over appointment on compassionate grounds under an Dying in Harness Rules.

8. I, accordingly, direct that the matter may be decided by the Director Local Bodies, U.P. Lucknow after affording opportunity of hearing to the concerned parties.

9. Consequently, I direct that if the concerned party/parties files a representation before Director Local Bodies, U.P., Lucknow in writing (along with certified copy of this order as well as complete paper book of the writ petition) within six weeks from today, the said authority shall decide the matter after affording opportunity of hearing to the parties concerned by a speaking order preferably within four months of the receipt of the representation.

10. Till the decision on the representation as indicated above, interim order dated 13.5.1999 passed by this Court shall continue.

11. Writ petition is party allowed subject to the observations made above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20TH MAY, 2000

BEFORE
THE HON'BLE P.K.JAIN
Second Appeal No. 658 of 2000

Durga Prasad Tandon & others...Appellant
Versus
Gaur Bramhan Sabha Zila Nainital, through its Acting President Som Prakash Sharma & others ...Defendants/ Respondents

Counsel for the Appellants :
Shri Murli Dhar
Shri R.K. Khanna

Code of Civil Procedure, 1908, O. 23 R 3-Explanation and 3-A (as amended and S.96 read with O.43 R.1-A-) compromise decree—challenge on ground of fraud and coercion by suit – Lower appellate court held that suit was barred under O.23 R.3-A- Relying on supreme Court decision in Banwari Lal's case, held that suit challenging the compromise decree is barred under O.23 R.3-A.
Held—(Para 6 and 9)

It is true as suggested by Sri Murli Dhar, learned Senior counsel that in the case before the Supreme Court, as the fact stated above disclosed, the question was whether application for recalling the decree or order accepting the compromise was an application under Order 23 Rule 3 CPC or under Order 23 Rule 1 C.P.C. The court held that it was an application under explanation of Order 23 Rule 3 C.P.C. But the court also held on consideration of the provisions of Rule 3-A.

Sub Rule (2) of Rule 1-A (of O.43), provides that an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that compromise should, or should not, have been recorded. Thus, if a decree passed under Order 23 Rule 3. C.P.C. was challenged, it would have been challenged by filing appeal under Order 43 Rule 1-A.
Case Law discussed.
AIR 1993 SC 1139
AIR 1986 Kant ...
1997 (1) Civil Court Cases 8 (Raj.)

By the Court

1. This is plaintiffs second appeal against the judgment and decree passed by the trial court dismissing the Original Suit No. 155 of 1989 and the decree of the lower appellate court affirming the judgment and decree of the trial court.

2. In short the facts are that the Small Cause Suit No. 18 of 1987 which was filed against the present appellants by the Gaur Brahman Sabha, Kashipur – respondent no. 1 was decreed in terms of compromise dated 24.7.87. The present plaintiffs appellants filed suit No. 155 of 1989 for cancellation of the decree dated 24.7.87 in the said Suit on the ground that the compromise was obtained by coercion fraud etc. The trial court dismissed the suit mainly on the ground that the suit was not maintainable in view of the provisions of Order 23 Rule 3-A of the Code of Civil procedure. The plaintiffs appellants preferred an appeal. The lower appellate court re-appraised the evidence and recorded a finding of fact that the compromise decree was not obtained by playing fraud or by exercise of undue coercion upon the plaintiffs. The lower appellate court also held that the suit was not maintainable. The lower appellate court consequently dismissed the appeal.

3. Sri Murli Dhar, learned Senior Counsel appearing for the appellants has been heard at length at the admission stage. He has submitted that there are conflicting decisions whether in such cases the provisions of Rule 3-A of Order 23 C.P.C. were attracted or not. He has also submitted that the trial court had not recorded the finding on the question whether the compromise was obtained by playing fraud and exercise coercion. The lower appellate court should have therefore. Remanded this matter to the trial court.

4. Having heard learned counsel for the appellants and having gone through the two judgment of the courts below. I find that there is no merit in this appeal. It is true that the trial court framed Issue no. 1 to the effect that whether compromise dated 24.7.1987 was not legal. The trial court, however, did not recorded any findings on this issue even through evidence of the parties was there. The trial court relying upon a decision of the Hon'ble Supreme Court in Banwari Lal Vs. Smt. Chando Devi A.I.R 1993 Supreme Court 1139 held that the suit was not maintainable. The Lower appellate court, however recorded finding on issue No. 1 after examining the evidence adduced by the parties. In arriving its finding the lower appellate court besides considering other evidence. Had placed reliance upon two material facts viz. A term of the compromise decree was that a defendant shall vacate the suit property on expiry of two years from the date of the compromise and in that event the plaintiff in Suit No. 18 of 1987 will not claim arrears of rent damages from the defendants in that suit. The lower appellate court had observed in its judgment that a sum of Rs.1,000/- was deposited by the defendants as arrears of rent and mesne profits in the trial court to escape consequences of decree of the ejectment. After the said compromise was entered into between the parties, the present plaintiffs appellants moved an application 37-C for refund of the said amount on the ground that with the intervention of certain persons a compromise has been arrived at and that the defendants applicants have been granted time till 1.8.1989 to vacate the suit property and further that the plaintiffs have exonerated the defendants from the liability of arrears of rent, expenses of litigation etc. Another circumstance or material evidence relied upon by the lower appellate court was that even though there were allegations of coercion and it was alleged that the police had forced the defendants to enter into compromise on threat of being implicated in certain cases yet the plaintiffs allowed the two years period to lapse and it was only after lapse of the said period that they file the present suit. The evidence of the parties was already there, the lower appellate court in my view committed no error in appraisal of the evidence and in recording the fact on Issue no.1 It has been fairly conceded that the finding on issue no.1 cannot be challenged on ground of its suffering from perversity. In the circumstances if the lower appellate court scrutinized the evidence and on appraisal of the same had recorded findings of fact, the lower appellate court cannot be said to have acted with illegality in not remanding the matter to the trial court. Therefore, in my view, there is no force in the submission of the learned counsel for the appellants that the lower appellate court in the facts and circumstances of the present case should have remanded the matter to the trial court.

5. Now coming to the main question whether in the facts and circumstances of the present case, the provisions of Rule 3-A of Order 23 C.P.C. are attracted or not, it would be proper to reproduce the provisions contained in Order 23 Rule 3-A and explanation to Order 23 Rule 3. Rule 3-A reads as follows :

"3-A Bar to Suit – No suit shall lie to set aside a decree on the ground that the compromise on which the decree is bases was not lawful."

Explanation to Rule 3 of Order 23 reads as follows :

"An agreement or compromise which is void or voidable under the Indian Contract Act 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

6. A compromise decree in the instant suit was challenged on the ground that it was obtained by playing fraud and exercise of coercion. Such a compromise is voidable under the provisions of the Indian Contract Act. The explanation to Rule 3 as quoted above declares that a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of Rule-3. If the provisions of Rule 3-A are read with explanation to Rule-3 it would be abundantly clear that a compromise obtained by playing fraud or exercise of coercion is not a lawful compromise and therefore suit for setting aside the decree on such a ground is barred by the provisions of Rule 3-A of Order 23. There is thus no ambiguity. It is true that the decree in a suit passed in accordance with the compromise is not appealable under Section 96 of the Code of Civil Procedure. Earlier such a decree was appealable under Order 43(1)(m). By Subsequent amendment, Order 43 Rule I (m) has been deleted. However, another Rule I-A has been introduced in Order 43. The said Rule I- A provides that whether any order is made under this code against a party and thereupon any judgment is pronounced against such party and a decree is drawn such party may in an appeal against the decree, contend that a such order should not have been made and judgment should not have been pronounced. Sub Rule (2) of Rule I-A (of O.43) provides that an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that compromise should, or should not, have been recorded. Thus, if a decree passed under Order 23 Rule 3 C.P.C. was challenged, it would have been challenged by filing appeal under Order 43 Rule I – A .

7. The trial court while holding that the suit was not maintainable has relied upon the decision of the Apex Court in Banwari Lal Vs. Smt. Chando Devi and another, A.I.R 1993 Supreme Court 1139. That was a case in which a compromise petition was filed on behalf of the appellant stating that both the parties have entered into a compromise on the basis of which the appellant had delivered possession of the land to the respondent. A prayer was made in view of the compromise arrived at between the parties the suit be dismissed. The compromise petition had not been signed by the contesting defendant or by his counsel. An endorsement was made by one Sri Soran Ram, Advocate that 'Thumb impression has been marked in my presence.' 'The trial court on the statement of the counsel of the plaintiff that the suit of the plaintiff be dismissed as withdrawn as per compromise deed Exhibit –C and that possession of the property has already been delivered to the defendant and that defendant no.2 Smt. Chando Devi is in possession of the disputed land as owner as per compromise deed Exhibit _ C and decree – sheet be prepared accordingly. The plaintiff/appellant thereafter filed an application alleging that the counsel Sri Soran Ram, Advocate collusion with defendant no.2 had played fraud on the appellant by filing a fabricated petition of compromise although no compromise had

been effected between the appellant and the respondent. The details of the fraud were mentioned in the said petition and it was alleged that since the compromise itself was void, illegal and against the requirement of Rule of Order 23 of the Code of civil Procedure, the order regarding such compromise be recalled and the suit be restored and be heard on merit. The trial court having heard learned counsel for the parties and considering the various circumstances recalled the order disposing of the suit in terms of the compromise and he directed restored of the suit to its original number. Against the order passed by the Trial Judge, a revision was filed before the High Court by the defendant and a Single Judge of the High Court set aside that order holding that the alleged compromise application was really an application for withdrawal of the Suit under Order 23 Rule I of the Code and as the plaintiff had voluntarily withdrawn the suit there was no occasion to recall the order treating it to be an order under Order 23 Rule 3 of the code. The plaintiff thereafter filed Civil Appeal before the Apex Court. The Apex Court on consideration of the provisions of explanation to Rule 3 and Rule 3-A held that " a suit used to be filed for setting aside such decree on ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the Second Suit. But after the amendments which have been introduced, neither an appeal against the order recording compromise nor remedy by way of filing a suit is available in case covered by Rule 3-A of Order. As such a right has been given under Rule I –A (2) of Order 43 to a party who challenges the recording of the compromise to question the validity thereof while preferring an appeal against the decree. Section 96 (3) of the code shall not be a bar to such an appeal because Section 96 (3) is applicable to cases where the factum of compromise or agreement is not in dispute."

8. The Court further held that the order on the face of it purported to dismiss the suit on basis of the terms and conditions mentioned in the petition of compromise. As such the validity of the order has to be judged treating it to be an order deemed to have been passed in purported exercise of the power conferred on the court by Rule 3 of Order 23 of the Code. Learned sub-ordinate judge should not have accepted the said petition of compromise even it had no knowledge of fraud alleged to have been practised on the appellant by his counsel, because admittedly the petition of compromise had not been signed either by the respondents or his counsel. This fact should have been discovered by the court. The court further held that "as such a party challenging a compromise can file a petition under the proviso to Rule 3 of Order 23 or appeal under Section 96 (1) of the Code in which he can now question the validity of the compromise in view of Rule I-A of Order 43 of the Code."

9. It is true as suggested by Sri Murli Dhar, learned Senior counsel that in the case before the Supreme Court, as the fact state above disclosed, the question was whether application for recalling the decree or order accepting the compromise was an application under Order 23 Rule 3 C.P.C. or under Order 23 Rule I C.P.C. The court held that it was an application under the explanation of Order 23 Rule 3 C.P.C.. But the court also held on consideration of the provisions of Rule 3-A that suit challenging the compromise

decree as invalid and illegal was barred by provisions of Rule 3-A.

10. Reference has also been made to a decision of the Karnataka High Court in S.G. Thimmmappa Vs. T. Anantha and others, reported in A..R. 1986 Karnataka in which it was held that rule 3 –A of Order 23 does not include suits where the compromise decree is challenged on grounds like void undue influence coercion by which the decree can be avoided treating it as voidable. With respect it may be pointed out that while holding that till the decree is avoided or displaced it can be treated as lawful for the limited purpose of Order 23 Rule 3 C.P.C., the court did not notice the provisions of the explanation to Rule 3 of Order 23. Besides this, in view of the decision of the Hon'ble Supreme Court in Banwari Lal's case (supra) the decision in S.G. Thimmappa's case (supra) rendered by Karnataka High Court stands implidely over ruled and is no more good law. S.G. Thimmappa's case was also considered by the Rajasthan High Court in Gopal Lal Vs. Babu Lal and others 1997 (I) Civil Court Cases – 8 (Rajasthan) and it was held that the decision in that case cannot be held to be correct view in the light of the decision of the Hon'ble Supreme Court in the case of Banwari Lal (supra).

11. For the reasons stated above, I am of the View that there is no error of law in the judgement and decree passed by the Lower appellate court. No. substantial question of law is involved in this appeal merits dismissal.

12. Appeal is hereby dismissed at the admission stage.

Appeal Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.8.2000

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

Second Appeal No.939 of 2000

Rama Shanker Srivastava ...Defendant—Appellant

Versus

Smt. Usha Bala Srivastva ...Plaintiff—Respondent

Counsel for the Appellant:
Shri Y.S. Saxena

Counsel for the Respondent:
Shri Satish Chaturvedi

Evidence Act, 1872- Agreement to sale defendant to obtain permission under Urban Land Ceiling Act and to give notice of the same to plaintiff-burden of proof lay on defendant.

Held-

The lower appellate court has come to the conclusion that in view of the aforesaid clause as contemplated in the agreement it was the duty of the defendant to obtain permission under the Urban Land Ceiling Act and to give notice of that permission to the plaintiff. On the basis of the record before him the lower appellate court to the conclusion that the defendant failed to discharge his obligation and consequently failed to discharge the burden to establish that he had obtained permission from the ceiling authority and due notice/information was given to the plaintiff.(Para 5)

By the Court

1. This is defendant's second appeal arising out of the original suit No.30 of 1994 (Smt. Usha Bala Srivastava vs. Rama

Shanker Srivastava) for seeking relief of decree for specific performance to execute the sale deed in pursuance of the agreement dated 28th December, 1992. The trial court by its judgement and order dated 30.3.1998 directed the defendant to execute the sale deed within two months on accepting the balance sale amount of Rs.14,500/- and in case defendant fails to execute the sale deed and getting the sale deed registered, the same shall be executed by the Court at the instance of the plaintiff and possession will be delivered accordingly. A perusal of the trial Court's Judgement indicates that the defendant did not co-operate and made all possible efforts to ensure that an the hearing of the suit is delayed. Trial court had finally proceeded for hearing of the suit under order XVII rule 3 of the code of civil procedure.

2. Against the order directing the case to proceed under order XVII rule 3 C.P.C. a revision was filled by the defendant which was also dismissed and thereafter the trial court had proceeded to decide the suit finally. The trial court decreed the suit of the plaintiff on 20.3.1998 aginst which Appeal No.355 of 199 filed by the defendant, has been dismissed by the XII Additional District Judge, Allahabad by its judgement and decree dated 22.7.2000.

3. Learned counsel for the defendant-appellant has raised two points only:

4. The appellant pleaded that the burden of proof lay upon the plaintiff to show that after obtaining permission from the competent authority under the Urban Land Ceiling Act, the burden of proof lay upon the plaintiff and he ought to have been given intimation to the defendant but the plaintiff having failed to do so and thus he failed to discharge his burden of proof. The grievance of the defendant-appellant as submitted by the learned counsel for the appellant is that the burden of proof on the said issue has been illegally placed upon the defendant-appellant.

5. It may be stated that from perusal of the trial court's judgment it does not transpire that any pleading to that effect or any issue on this point was pressed. It appears that in the absence of necessary pleading on this aspect no issue was framed and there is no reference on the said point in the trial court's judgement. Apparently the defendant raised the aforesaid objection before the lower appellate court who has dealt with it on internal page 7 of the certified copy of the judgement filed along with the memo of appeal. The lower appellate court has noticed that according to the agreement in question the defendant had to obtain the permission form the competent authority under the Urban Land Ceiling Act and to intimate the same to the plaintiff about the same. The lower appellate court has come to the conclusion that in view of the aforesaid clause as contemplated in the agreement it was the duty of the defendant to obtain permission under the Urban Land Ceiling Act and give notice of that permission to the plaintiff. On the basis of the record before him the lower appellate court came to the conclusion that the defendant failed to discharge his obligation and consequently failed to discharge the burden to establish that he had obtained permission from he ceiling authority and due notice/information was given to the plaintiff.

6. The second and the last submission made on behalf of the

appellant is that the court, if decided to proceed under order XVII rule 3 of the code of Civil Procedure, it was under statutory obligation to proceed forthwith and deliver judgement the same day and since in the instant cased the lower appellate court after concluding the hearing, fixed another date for delivery of judgement the case could not be dealt with under order XVII rule 3 C.P.C. and it ought to have been treated under order XVII rule 2 C.P.C. The argument is fallacious. Learned counsel for the appellant conceded that the rightly proceeded under order XVII rule 3 C.P.C. The arguments to treat the suit under order XVII rule 2 C.P.C., after the court had proceeded and completed the hearing under order ITR 3 C.P.C. at the time of fixing the date for delivery of judgment and should have reverted back to as to reverse entire proceeding for deciding the suit under order XVII rule 2 C.P.C., is repostrous and without merit.

7. A perusal of the provision of order XVII rule 3 C.P.C., as amended in the state of U.P. clearly shows that the Court is required to decide the suit for the with and it should not adjourn the case and proceed with the hearing of the suit is at it does not require on this date alone court must complete the evidence as well as hearing in continuity. The mere fact that the court after concluding the hearing on that date itself fixed the date of delivery of judgment does not mean that the court did not decide the suit forthwith with in the meaning of 0.17 R s C.P.C. The delivery of judgement is merely recording the decision which as process the court had already completed on the date.

8. No. other point has been raised.

In view of the above no substantial question of law arises in the present appeal. It is accordingly dismissed.

Appeal dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.07.2000

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

Criminal Revision No. 332 of 2000

Sunil Kumar ...Applicant/ Revisionist (In Jail)
Versus
State of U.P. ...Opp. Party.

Counsel for the Revisionist :
Sri D.R. Chaudhary

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

Juvenile Justice Act- Revisionist – accused claimed to be a juvenile on basis of entry in school register, which did not appear to be genuine – No documents filed to show the date of birth as mentioned when revisionist took admission in a school for first time – by Medical evidence and revisionist's appearance, trial court found revisionist not to be juvenile- Hence revision dismissed.

Held –

In view of the above decision, the revisionist can notice held to be juvenile on the basis of the entry in the scholar register, which also does not appear to be genuine. The revisionist has taken admission in class VIth on 03.07.1996, i.e. at the age of twelve years,. No documents were filed to show the date of birth as mentioned when the revisionist took admission in a school for the first

time. By the medical evidence and by appearance of the revisionist the trial court concluded that the revisionist is not a juvenile. There is no sufficient reason to interfere in the order. The revision is dismissed. Para 9

Class law discussed.

(1989) 3 SCC 1
(1997) 8 SCC 720
AIR 1965 SC 282
1998 (2) JIC 965 (Alld.)

By the Court

1. Revisionist, Sunil Kumar is an accused in case crime no. 405 of 2000, under Section 307, 302/34 I.P.C., police station Khurja Nagar, district Bulandshahar. He moved an application before the Juvenile Judge alleging himself to be juvenile. The learned Juvenile Judge rejected the application by order dated 30.11.1999, with the conclusion that the revisionist is not a juvenile. Against that order, the revisionist preferred Criminal Appeal No. 58 of 1999 under Section 37 of the Juvenile Justice Act. The appeal was also dismissed by Sessions Judge, Bulandshahar on 06.01.2000 and the contention of the revisionist is that he is juvenile was also not accepted by the learned Sessions Judge. Aggrieve by the order, the present revision has been preferred.

2. I have heard Sri D.R. Chaudhary, learned counsel for the revisionist and the learned A.G.A.

3. It is contended that the incident took place on 10.08.1999. The date of birth of the revisionist is 22.06.1984 and he was below sixteen years of age at the date of the incident. In support of the argument learned counsel for the revisionist has filed the copy of the scholars register of Junior High School, Khurja, wherein his date of birth is mentioned as 22.06.1984. According to the said certificate he was admitted in the school on 03.07.1996 in class-VIth and passed class VIIIth on 20.05.1999. The mark sheet of class VIIIth has also been filed. The clerk of the said school, Sri Anil Kumar Kaushik was also examined to prove the said certificate. He has verified the entries of the copy of the scholar register from the original register and narrated the above facts.

4. The learned Juvenile Judge also sent the revisionist for medical examination for assessment of age. On the basis of radiological tests the age of the revisionist was found to be seventeen years. This evidence was considered and the learned Magistrate has also made an observation that the revisionist appears to be above sixteen years of age. Therefore, he was not found to be a juvenile.

5. The contention of the learned counsel for the revisionist is that the entry of the scholars register should prevail over the medical evidence which is only an opinion evidence. The learned counsel in support of the argument has referred to the case of **Bhoop Ram Versus State of U.P., 1989 (3) SCC, 1.** In this case, it was found that the date of birth mentioned in the school certificate shows the age of less than sixteen years at the time of the incident. It was observed by the Apex Court that in the absence of anything showing that the entries in the certificates did not relate to the accused or were incorrect, the same can not be rejected on the basis of surmise that generally parents understate the age of their children at the time of admission in the school. It was further observed that medical evidence is an opinion and in the absence of any other material medical opinion should not

prevail over the entries in the school certificates.

6. The other case referred to is **Bhola Bhagat Versus State of Bihar, 1997 (8) SCC 720.** This case is not material for the controversy before me. It was observed that the benefit of the Children Act should not be refused on technical grounds if the accused take a plea that he was child on the date of incident should not be given an opportunity to establish the case and a positive finding regarding the age of the accused should be recorded.

7. The case of Bhoop Ram referred to by the learned counsel for the revisionist was decided by the Apex Court in the year 1989 by a Division Bench. Later on **Brij Mohan Singh Versus Priya Narain Singh and others** was decided by the Bench of five Hon'ble Judges of the Apex Court reported in AIR 1965, Page 282. The following observation was made by the Apex Court:

"In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The court of fact cannot ignore this while assessing the value of the entry and it would be improper for the court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with above motive."

8. The other important decision on the point which has been referred by the learned Sessions Judge in his judgement is **Pankaj Kumar Tripathi Versus State of U.P., 1998 (2) JIC 965 (Alld.)** In this case of this Court accepted the plea of the accused that he is a juvenile. The complainant Deoki Nandan filed criminal appeal no. 1887 of 1997 in the Hon'ble Supreme Court. The matter was remanded back by the Hon'ble Supreme Court with the direction that the question of juvenile should be considered in the light of the evidence adduced by the parties and not merely on the basis of the entry recorded in the scholar register of the school.

9. In view of the above decision, the revisionist can not be held to be juvenile on the basis of the entry in the scholar register, which also does not appear to be genuine. The revisionist has taken admission in class VIth on 03.07.1996, i.e. at the age of twelve years. No documents were filed to show the date of birth as mentioned when the revisionist took admission in a school for the first time. By the medical evidence and by appearance of the revisionist the trial court concluded that the revisionist is not a juvenile. There is no sufficient reason to interfere in the order. The revision is dismissed.

Revision dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 10.7.2000

BEFORE
THE HON'BLE I.M.QUDDUSI, J.

Civil Misc. Writ Petition No. 27548 of 1998

Committee of Management of Janta Siksha Prasar Samiti Pipra-Pratham ...Petitioner

Versus

Assistant Registrar Firms Societies and Chits Gorakhpur & others ...Respondents

Counsel for the Petitioner:
Sri Ram Niwas Singh

Sri K.K.Chand
Sri S.S. Chauhan

Counsel for the Respondents:
Sri V.K. Shukla
Sri Jata Shanker Singh
S.C.

Societies Registration Act, S.25 (2)- Meeting of General body for electing office bearers called by U.P. Zila Adhikari Menhdawal and not by Registrar held, illegal.

Held

Considering the facts and circumstances of the case and in view of the provisions of sub section (2) of Section 25 the meeting of the General Body is liable to be called by the Registrar for electing the office bearers of the society in question. Para 20
In view of the above, the order passed by the UP Zila Adhikari Mendawala calling meeting of general body of the society in question and framing time table for election is liable to be quashed. Para 21
Case referred.
W.P. No. Nil of 1990- Ram Kumar Varshney Vs. Tehsildar
Kol. Aligarh cum Election Officer and another

By the Court

1. These are two writ petitions filed by the Committee of Management, Janta Shiksha Prasar Samiti pipra Pratham, district Sant Kabir Nagar through its Manager Prahlad Singh. In both the writ petitions the petitioner has desired to restrain the respondents to hold election of the committee of Management of the Society on the basis of the order passed by the Assistant Registrar, Firms Societies and Chits, Gorakhpur since in both the case the facts are common and the later case has been filed due to further development and in the case filed earlier being writ petition no. 27548 of 1998, counter and rejoinder affidavit have been exchanged, both are being disposed of by the common judgement.

2. Heard Sri R.N. Singh, learned Senior Advocate alongwith Sri S.S. Chauhan appearing for the petitioner and Sri V.K. Shukla, learned counsel appearing for the respondent no. 3 of writ petition no. 27548 of 1998 and respondent no. 2 of writ petition no. 37612 of 1998, namely Jata Shanker Singh, as well as learned Standing Counsel for other respondents.

3. The brief facts of the case are that the Society in question namely Janta Shiksha Prasar Samiti Pipra Pratham which was earlier in the district of Basti and now it is district Sant Kabir Nagar was registered under the Societies Registration Act as a Society in the year 1973. The bye laws of the society was framed and the term of the committee of management was of three years. There was no dispute regarding the election held before the year 1982. In the writ petition it has been alleged that the election was held on 11.7.82 but this has been disputed in the counter affidavit and it has been alleged that election was held on 24.4.83 and the attestation was done on 17.9.93. The registration letter issued on 29.8.83 has also been filed as Annexure C.A.1 to the counter affidavit. A copy of the attention of signature of Jata Shanker Singh as Manager has also been filed as Annexure CA-3 to the counter affidavit. It is alleged in the writ petition that the renewal of the registration of the society was obtained fraudulently by Jata Shanker Singh and the Assistant Registrar, Firms, Societies and Chits set aside the same vide his order dated 30.1.1984 on the basis of the papers submitted by Prahlad Singh, Manager, but

the same was stayed in writ petition no. 2182 of 1984. It has not been disputed in the counter affidavit that the writ petition was filed and the interim order was granted. It has been further stated that the signatures of the Jata Shanker Singh were attested once again on 21.2.843. The attested copy of the attestation of signatures dated 21.2.84 has been filed as Annexure CA-6 to the counter affidavit. The interim order was confirmed vide order dated 26.4.85. But the said petition was dismissed for non-prosecution.

4. It is alleged in the counter affidavit that on account of the death of the learned counsel for the petitioner Sri G.C. Dwivedi no one could appear when the case was taken over and in the said writ petition in the absence of counsel ex-parte order was passed on 6.10.94. The petition was dismissed as in fractious. It is alleged in the writ petition that the registration of the society was recalled on 6.4.94 and the signature of Prahlad Singh was attested by the Basic Shiksha Adhikari on 23.2.1996.

5. In the counter affidavit it has been stated that the order dated 6.10.94 was recalled and the Assistant Director Firm Societies and Chits passed the order dated 30.7.97 recalling the registration of the society done on 6.4.94 and the District Basic Education Officer Basti also cancelled the attestation of signature of Prahlad Singh vide order 23.11.96 and the signatures of Jata Shanker Singh were re-attested. It has been mentioned in the writ petition also that application to recall the order dated 6.10.94 was allowed on 30.10.96 and the writ petition was restored to its original number but the same was again dismissed on 15.1.97 for default and stay order passed by this court came to an end. Again an application for recall of order dated 15.1.97 was filed which was allowed on 9.5.97 and the writ petition was restored to its original number.

6. After the Zila Basic Shiksha Adhikari passed the order dated 15.5.97 recognizing Jata Shanker Singh as Manager of the Institution which was challenged by the petitioner by filing writ petition no.23655 of 1997. Thereafter writ petition no. 2182 of 1984 and 23655 of 1997 both were heard together and were finally disposed of vide order dated 16.9.97, directing Assistant Director Firms, Societies and Chits, Varanasi as well as Basic Shiksha Adhikari Basti to pass fresh order on the fresh circumstances existing on date of judgement on the basis of the representations filed by the parties before them according to law and Rules made for the purpose without being influenced by any order either passed on 30th January, 1984 or 15th May, 1997. It was further directed that they are at liberty to decide the controversy afresh after giving an opportunity of hearing to both the parties within a period of two months from the date of production of a certified copy of this order.

7. Thereafter, Zila Basic Shiksha Adhikari Basti vide order dated 29.10.97 recalled the order dated 15.5.97 declaring the same as ineffective by which Jata Shanker Singh was recognised as Manager and his signatures were attested. The B.S.A. had passed that order holding that the High Court has vacated the interim order and directed to dispose of the matter. But the B.S.A. had not given his reason for declaring his order dated 15.5.97 as ineffective, except that the interim order has been vacated by the High Court. The Assistant Registrar, Firms, Societies and Chits Varanasi has also passed an order

dated 2.4.1998 in which he has held that society which has been re-registered and the renewal made thereafter in pursuance of the G.O. dated 16.2.90 is liable to be renewed. It is also stated that under Sub Section 2 of Section 25 of the Societies Registration Act and; the bye-laws of the society registered on 20.,8.1973, the Assistant Registrar ensure to conduct the elections of the valid members who were elected before the dispute of 1.9.83 and renewal of the registered society dated 30.8.73 be made after getting the fees deposited thereafter.

8. In pursuance of the aforesaid order Assistant Registrar, Gorakhpur issued notice-providing opportunity by 10.8.96. Thereafter, Assistant Registrar Gorakhpur passed the order dated 12.8.98 nominating Up Zila Adhikari, District Sant Kabir Nagar under the powers conferred to him under Section 25 of the Societies Registration Act and directed to conduct the elections of the society as early as possible on the basis of the list of general body. This order dated 12.8.98 has been challenged in writ petition no. 27548 of 1998.

9. Thereafter, the Assistant Registrar, Firms Societies and Chits Gorakhpur has modified the order dated 12.8.,98 to the extent that in place of Deputy Collector (Up Zila Adhikari Khalilabad) Deputy Collector Menhdawal, district Sant Kbair Nagar is nominated as Election Officer to hold elections of the committee of management of the society and thereafter vide order dated 3.11.1998 had declared the date of election as 16.11.98 . Against this order dated 3.11.98 the subsequent writ petition i.e. writ petition no. 37612 of 1998j has been filed praying for a writ of mandamus restraining the Deputy Collector Menhdawal, district Sant Kabir Nagar to hold the election of the committee of management of the society.

10. This court vide order dated 16.9.97 passed in writ petition no. 23655 of 1997 and 2182 of 1984 held that the order dated 30.4.84 renewing the registration has lost the existence by lapse of time. Assistant Registrar, firms Societies and Chits, Varanasi under the Societies Registration Act as well as Basic Shiksha Adhikari, Basti were directed to pass fresh orders on the facts and circumstances existing on the date of judgement on the basis of the representation filed by the parties before them according to law and representation made for the purpose without being influenced by any order either passed on 30.1,84 or 15.5.97. It was further directed that they be at liberty to decide the controversy afresh , after giving an opportunity of hearing to both the parties. Zila Basic Shiksha Adhikari has passed the order without following the aforesaid direction and only pass an order 20.10.97 on the basis of the fact that interim order was vacated by this court while passing the above mentioned order. This Court did not direct this. The direction was to provide opportunity of hearing and to pass appropriate order but Zila Basic Shiksha Adhikari Basti has not passed speaking order and it has also not been mentioned in the order whether any opportunity was provided to the parties concerned as was directed . Hence the order passed the Zila Basic Shiksha Adhikari is not relevant at this stage.

11. Now it is to be seen whether Assistant Registrar. Firms Societies and Chits Varanasi has passed the order after providing opportunity to the parties

properly or not. From the perusal of the impugned order dated 2.4.1998, passed by the Assistant Registrar Firms Societies and Chits, Varanasi, it appears that before passing; the order has provided opportunity of hearing to the parties concerned as the parties had produced documents in support of their pleadings before the Assistant Registrar. On 25.3.98, counsel were also allowed to represent the parties. The parties before Assistant Registrar also made written submissions. The assistant Registrar has indicated in his order the following points:-

1) Both the parties have produced their written submissions, evidence and contentions, but most of them are related to the college run by the society.

2) Both the parties want to get renewal of the society, which was re-registered.

3) The election conducted by both the parties are not in accordance with the by laws produced by themselves.

The state Government vide G.O. No. Adhi.4446/10-87-603/89 dated 16th February, 1990 has directed that Re-registration of the old registered society shall not be made and only renewal of the same can be made.

12. On the basis of the above mentioned points the Assistant Registrar has come to the conclusion that the re-registration made of the society already registered earlier and its renewal made on the basis of re-registration are liable to be cancelled and the old registration which was made vide no. 1-30554 dated 20.10.73 is liable to be renewed. But before this it is necessary that election should be conducted on the basis of the by laws registered at the time of registration of the society dated 20.,7.73 and all the valid members before dispute has arisen in the year 1983 and thereafter fees should be got deposited by the newly elected committee and renewal of the society registered on 20.8.73 should be done. This should be got done by the Assistant Registrar, Firms Societies and Chits Gorakhpur in pursuance of the order dated 2.4.98. The Assistant Registrar, Firms, Societies and Chits Gorakhpur pass the order on 12.8.98 to the effect that before dispute had arisen in the year 1983 it was found on the basis of the list of members, which was made available by the parties. That eleven members are common in both the list and there are 118 members list which have been made available by parties for the purpose of election and the Assistant Registrar exercises its powers conferred to him under Clause 2 of Section 25 of the Societies Registration Act.

13. This court found no illegality or impropriety in the order passed by the Assistant Registrar Firms, Societies and Chits, Varanasi dated 2.4.98 as he has acted in accordance with the directions of this court dated 16.9.97 and the G.O. dated 16.2.90 by which the government has restrained the re-registration of old society already registered and relied upon the registration made of the society on 20.8.73 and also bylaws submitted by the society at the time of registration. Certainly if the subsequent action was illegal, it cannot be said that any valid election was held subsequently as only the registration which was already in existence on 20.8.73 for a period of five years was to be renewed instead of getting re-registration of the society. The Assistant Registrar, Firms, Societies and Chits Gorakhpur has consequently passed order as this court has

held the order dated 2.4.98 passed by the Assistant Registrar, firms, Societies and Chits, Varanasi as valid, the consequential order passed by the Assistant Registrar, Firms Societies and Chits, Gorakhpur cannot be said to be illegal or improper. In so far as the powers conferred under Sub. Section 2 of Section 25 of the Societies Registration Act first of all the provisions of Section 25(2) of the same are liable to be perused, which are quoted as under :-

"Section 25 (2)- where by an order made under sub-section (1) an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a society has not been held within the time specified in the rules of that society, he may call meeting of the general body of such society for electing such office-bearer or office bearers, and such meeting shall be presided over and be conducted by the Registrar or any officer authorized by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modification."

14. Perusal of the above quoted provision would show that it has been provided therein that where the Registrar is satisfied that any election of the officer bearer of the society has not been held within the time specified, he may call meeting of General body of such society for electing such officer bearers and such meetings shall be presided over and be conducted by he registrar or by any officer authorized by him in his behalf.

15. This court has come to the conclusion that in view of the fact that re-registration of the society was not permissible and only renewal of the society was permissible while action done either by the petitioner or by the respondent Jata Shanker Singh on the basis of the re-registration of the society is illegal and on the basis of old registration of the society and the bylaws submitted with the application for registration of the society which was registered were to be followed on the basis of the old registration of the society. Hence, it cannot be said that any election of office bearers of the society was held within the time specified in the rules of that society.

16. In view of the above mentioned facts and circumstances the writ petition no. 27548 of 1998 has no force and is liable to be dismissed.

17. The Assistant Registrar, Firms, Societies and Chits, Gorakhpurk had authorized vide his order dated 12.8.98, Deputy Collector Khalilabad, district Sant Kabir Nagar as election officer. But subsequently vide order dated 28.8.98, a copy of which has been filed as Annexure 5 to the Writ petition no. 37612 of 1998 modified his order dated 12.8.98 to the effect that in place of Up Zila Adhikari, Khalilabad, Up Zila Adhikari Menhdawal was nominated as election officer and consequently Up Zila Adhikari Menhdawal declared the date of election and called meeting of General Body of the society for electing the office bearers.

18. Learned Counsel for the petitioner has urged that Up Zila Adhikari Menhdawal again called meeting of the General Body for electing the office bearers only Registrar is empowered to call such meeting under the provisions of Sub Section (2) of Section 25 of the Societies Registration Act.

19. In this regard learned counsel has drawn attention of this court towards the decision of this court made by the Division Bench in writ petition no. Nil of 1990 Ram Kumar Varshney Vs. Tehsildar Kol Aligarh-cum-Election Officer and another) in which it has been held that the meeting of general body of the society can only be called by the Registrar and the officer authorized by the Registrar comes into picture only after the meeting has been convened by the Registrar and it was directed to the Assistant Registrar to issue notice fixing the date of meeting and also framing time table.

20. Considering the facts and circumstances of the case and in view of the provisions of sub-section(2) of Section 25 the meeting of the General Body is liable to be called by the Registrar for electing the office bearers of the society in question.

21. In view of the above, the order passed by the Up Zila Adhikari Mendawal calling meeting of general body of the society in question and framing time table for election is liable to be quashed.

22. In the result writ petition no. 37612 of 1998 succeeds and is allowed to the extent that the order calling meeting of general body of the society in question by the Up Zila Adhikari Menhdawal vide order dated 3.11.1998 is illegal and is hereby quashed.

23. A writ in the nature of Mandamus is issued commanding the Assistant Registrar, Firms, Societies and Chits, Gorakhpur to call meeting of the General Body of the Society in question for electing office bearer and frame time table, but the same may be presided and be conducted by the Up Zila Adhikari Menhdawal, or any other officer authorized by the Assistant Registrar as the case may be.

The parties shall bear their own cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2000

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

Civil Misc. Writ Petition No. 90 of 1999

Uttam Charitable Trust and another ...Petitioners

Versus

State of Uttar Pradesh through Secretary Local Bodies Secretariat, Lucknow and another ...Respondents.

Counsel for the Petitioners:
Shri Vikram Nath

Counsel for the Respondent:
S.C.

U.P. Nagar Mahapalika Adhiniyam, 1959, Ss.173, 175 and S.177 © as amended by U.P. Municipal Corporation (amendment) Act, 1999- Petitioner a Charitable Trust established a School—Nagar Nigam imposed property tax on it- Petitioner claimed exemption u/s 177(c) G.O. dated 22.7.1998 providing that institutions imparting education on commercial basis were not entitled to benefit of exemption of tax- Held that the liability cannot be imposed by Government Order- Further held that under amended S.177 (c) no general tax could be imposed upon petitioner College which is neither professional nor vocational institution. Held (para 9)

In view of the unambiguous provision of Section 177 of the Act as well as amended clause (c) of the Section 177 referred to above, We are of the opinion that no general tax could be imposed upon the college of the petitioner which is admittedly neither professional nor vocational institution.

By the Court

1. The petitioner is a Public Charitable Trust as stated in paragraph 3 of the writ petition and it established a school in Ghaziabad in the State of U.P. known as Uttam School for girls.

2. Under Section 173 of the U.P. Nagar Mahapalika Adhiniyam 1959, provision is made for levying the property taxes like general tax, water tax, drainage tax, conservancy tax.

Section 175 of the Act provides for exceptions to the main provision extending benefit of exemption from general tax on certain buildings. Section 177 of the Act provides that general tax shall be levied in respect of all buildings and lands in the city except:

"(a) buildings and lands solely used for purposes connected with the disposal of the deed;

(b) buildings and lands or portions thereof solely occupied and used for public worship or for a charitable purpose;

(c) buildings solely used as jails, court houses, treasuries, schools and colleges."

3. The Government vide order dated 22.7.1998 (Annexure 1 to the writ petition) without amending the act attempted to explain the object of exemption to the schools and colleges and provided that the institutions which are giving education on commercial basis could not be given benefit of exemption of tax. Feeling aggrieved the petitioner filed this petition on 12.2.1999.

4. Counter affidavit has been filed on behalf of Nagar Nigam respondent nos. 2 and 3. No counter affidavit has been filed on behalf of the State of U.P. respondent no. 1.

5. The respondent Nigam has placed reliance upon the subsequent amendment of Section 177 of the Act vide U.P. Extra-ordinary gazette dated 26.3.1999. Section 177 of the Act is amended vide Section 4 of the amending Act of U.P. Municipal Corporation (Amendment) Act, 1999.

The amended clause (c) of Section 177 of the Act reads:

"building solely used as jails, court houses, treasuries and schools and colleges other than such professional, vocational technical and medical institutions as are not run and managed by the Government."

6. Heard learned counsel for the petitioner and learned counsels for the respondents.

7. A perusal of the amended clause (c) leaves no doubt that legislature did not agree with the view expressed in the Government Order dated 22.7.1998 (Annexure 1 to the writ petition) and hence the section itself was amended making it clear that the schools and colleges shall be exempt from general tax and that only such professional, vocational, technical

and medical institutions as are not run and managed by the Government shall become liable for making payment of general tax.

8. Learned counsels for the petitioner also submitted that by the Government order tax liability could not be imposed by issuing government order dated 22.7.1998. The argument has substance and it is accordingly accepted.

9. In view of the unambiguous provision of Section 177 of the Act as well as amended clause (c) of the Section 177 referred to above, we are of the opinion that no general tax could be imposed upon the college of the petitioner which is admittedly neither professional nor vocational institution.

10. In view of the above the Government order dated 22.7.1998 Annexure 1 to the writ petition is quashed. We further issue a writ of mandamus directing the respondents to refund the amount if any deposited as general tax under Section 177 of the Act within two months of production of a certified copy of this order in accordance with law.

11. The petition stands allowed. No order as to costs.

Petition Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 3.8.2000

BEFORE
THE HON'BLE B.K. RATHI

Criminal Revision No. 740 of 2000

Shiv Kumar ...Revisionist (In Jail)
Versus
The State of U.P. and another...Opp. Party

Counsel for the Revisionist:
Shri S.C. Pandey

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

Code of Criminal Procedure, 1973, Chapter XXX SS. 397, 398,399, 400, 401, 309, and 209 and SS. 436 to 439 read with constitution of India, Article 226, Illegal custody without any order of remand – No grant of Bail- Habeas Corpus is proper remedy.

Held – (Para 8)

I, therefore, find that neither the bail can be granted on the ground that there is illegal custody nor bail can be granted in revision against illegal remand. The remedy open for illegal custody is the writ petition for Habeas Corpus under Article 226 of the Constitution of India. This court while exercising power of revision except in the cases where the revision against the order of sentence can not order for release on bail of the accused. There are different provisions of bail contained under Section 436 to 439 Cr. P.C. in which alone the bail can be granted.

Case law discussed.
1995 (Supp) ACC 433
1995 (32) ACC 155
1994 (31) ACC 197
1993 UP Cr. R. 531
1953 Crl. LJ 1113

By the Court

1. I have heard Sri S.C. Pandey, Learned counsel for the revisionist and the learned A.G.A.

2. In this revision various order which have been passed on the order sheet adjoining the case no. 1640 of 1999 and after committal in S.T. No. 171 of 1999, State versus Shiv Kumar and Six others, Under Section 498- A, 304-B I.P.C. and ¾

D.P. Act pending in the court of Ist Additional Sessions Judge, Bhadohi have been challenged. All the orders have been challenged. All the orders have been challenged on one ground that the revisionist, Shiv Kumar is in jail. That he is detained in jail but no order for remand to judicial custody was ever passed to detain revisionist in custody. The other accused of this case are on bail. The only argument of the learned counsel is that he is in jail without any order of remand to the judicial custody. Under Section 309 or 209 Cr.P.C and therefore, the custody of the revisionist is illegal. The request made by the revisionist is that he may be enlarged on bail for the reason that he is in illegal detention.

3. Record of the S.T.No.171 of 1999 has been summoned and has been perused by me. In this case the revisionist was on remand granted Under Section 167 Cr.P.C. during., Bhadohi ordered that the case be registered. The revisionist and other accused are in jail. The copies be prepared. However, on receipt of the charge sheet neither be has been taken cognizance of the case nor he has ordered that a remand order Under Section 309 (2) Cr.P.C be prepared. There is no order in the entire order sheet of the learned Chief Judicial Magistrate, Bhadohi remanding the accused to judicial custody Under Section 309 (2) Cr.P.C.. Various dates were fixed in the case and ultimately the case was committed to the court of Sessions on 17.11.1999. It was ordered that he be produced before Sessions Judge on 17.12.1999. The other accused who were on bail were also directed to appear in the court of Sessions Judge on that day. However, to my utter surprise even on that date no remand order was passed by the learned Chief Judicial, Bhadohi under clause (b) Section 209 Cr.P.C. as amended in U.P. The commitment order was received for the court of Sessions Judge on 18.11.1999 and according to the order of the Magistrate 17.12.1999 was fixed for appearance. The case was transferred to Ist Additional Sessions Judge were it is proceeding. From that date till today no remand order was passed, but the revisionist continues to be in custody which is naturally illegal being without any remand order authorizing detention.

4. In the circumstances mentioned above I have no option but to say that the custody of the revisionist is illegal. However question that arises is whether the accused should be released on bail. The learned counsel for the revisionist has referred to several cases. The first case is **Sajid and another Versus The State of U.P., 1995 (Suppl.) A.C.C. 433.** In this case, the order of remand Under Section 209 Cr.P.C. was not found proper and therefore, in criminal revision was enlarged on bail. The other authority is **Raj Pal Singh Versus State of U.P., 1995(32) A.C.C., 155**. The facts of this case are similar to the case of Sajid & another (Supra) and the accused was released on bail in the revision filed against the order of judicial custody passed without application of mind. The third decision referred to is **Rajesh Mishra Versus State of U.P., 1994 (31) A.C.C. 197.** This is a very detailed judgment of Hon'ble Mr. Justice A.S. Tripathi and he has considered the several decision and held that there was no proper remand order. He therefore, held that detention of the accused is illegal and released the accused on bail in a criminal revision.

5. I am unable to follow these authorities as after careful going through

them I find that no doubt in all three case the accused were released on bail in criminal revision on the finding that there was no legal remand order. However, no law was laid down that in a case if an accused is in illegal custody he is entitled to be released on bail. Therefore, there is no law laid down I these cases to be followed. Only on the basis that in the cited cases the accused were released on bail, I am not inclined to release the revisionist on bail. The following two important questions were not at all considered in any of the cases:

1) Whether the accused can be released on bail on the ground that his custody is illegal.

2) Whether the bail order can be passed in revision ignoring the provisions of chapter XXXIII Cr.P.C. regarding bail.

6. Without considering the above two questions, it is not proper to grant bail to the accused in a criminal revision. The ground of bail has been mentioned Under Section 436 and 439 Cr.P.C. are relevant. Section 397 Cr.P.C. provide that where exercising the power under that section of examining the record, the High Court or Court of Sessions may "direct that the execution of any sentence or order be suspended and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record." The careful reading of the provision reveal that under this provision the bail can be ordered only in the case where sentence has been awarded and the power Under Section 397 Cr.P.C. is exercised against the order awarding sentence. In any other cases there is n o provision for grant of bail while exercising power of revision.

7. Secondly, this court exercise the power of revision under Chapter XXX Cr.P.C. and Sections 397 to 401 Cr.P.C. are relevant. Section 397 Cr.P.C. provide that where exercising the power under that sections of examining the record, the High Court or Court of Sessions may " direct that the execution of any sentence or order be suspended and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record." The careful reading of the provision reveal that under this provision the bail can be ordered only in the case where sentences has been awarded and the power Under Section 397 Cr.P.C. is exercised against the Order awarding sentences. In any other cases there is no provision for grant of bail while exercising power of revision.

8. I therefore, find that neither the bail can be granted on the ground that there is illegal custody nor bail can be granted in revision against illegal remand. The remedy open for illegal custody is in writ petition for Habeas Corpus under Article 226 of the Constitution of India. This court while exercising power of revision, except in the cases where the revision against the order of sentence can not order for release on bail of the accused. There are different provisions of bail contained Under Section 436 to 439 Cr.P.C. in which alone the bail can be granted.

9. I earned Counsel for the revisionist has referred to certain other cases also which in my opinion are against the arguments of the learned counsel for the revisionist but it is proper to refer to them. The first is **Vashist Muni Versus Superintendent, District jail, Faizabad and others, 1993 U.P. Cr.P.C. 159.** This

was a petition under Article 226 of the Constitution of India. In this case the detention was found illegal and for want of proper order of remand and therefore, the petitioner was directed to be set at liberty. The other case referred to is **Rafi Ahmad Versus Adhikshak Janpad Karagar and others, 1992 U.P. Cr.P.C. 531.** In this case also the remand order was found to be illegal and therefore, it was ordered that the revisionist, who is in illegal custody shall be set at liberty. The third case referred to is **Ram Narayan Singh Versus The State of Delhi and others, 1953 Crl. L.J., 1113.** This is a decision of the Hon'ble Supreme Court. In this case, also a writ petition under Article 32 of the Constitution of India was filed. The detention was found without remand order. The Hon'ble Supreme Court ordered that the petitioners be set at liberty.

10. All the above three cases therefore, are against the arguments of learned counsel for the revisionist. In all these three cases the writ petition for Habeas Corpus under Article 226 of the Constitution of India were filed and it was ordered that the accused be set at liberty. In no cases the revisionist was released on bail. Therefore, these cases confirm my view expressed above.

11. In view of the above, no relief can be given to the revisionist in this revision. He may file a petition for Habeas Corpus under Article 226 of the Constitution of India. The revision is accordingly dismissed.

12. However, I shall be failing in my duty if proper guidance is not issued to the Chief Judicial Magistrate, Bhadohi. The Learned Sessions Judge, Bhadohi will look into the matter and call for explanation of the chief Judicial Magistrate, Bhadohi as to why he did not order for taking cognizance of the case when the charge sheet was received and he did not prepare warrant Under Section 309 (2) Cr.P.C. on receipt of the charge sheet and the case was adjourned for preparation of the copies, and why he did not prepare warrants Under Section 209 (b) Cr.P.C. (as amended in U.P.) remanding the accused to custody until commitment of the case under clause (a) and therefore during and until the conclusion of the trial. The explanation shall be obtained within a month and shall be forwarded with the comments of Sessions Judge, Bhadohi to the Registrar General of the High Court to be placed before me. The office is directed to sent the copy of this order to the learned Sessions Judge, Bhadohi immediately alongwith record of the S/.T. No. 171 of 1999.

Revision Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.7.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE KRISHNA KUMAR, J.

First Appeal From Order No. 874 of 1999

The Oriental Insurance Co. Ltd.
...Defendant/Appellant
Versus
Nanhoonal Sharma and another
...Respondents

Counsel for the Appellant:
Shri Amaresh Sinha

Counsel for the Respondent:
G.C. Geharana

Motor Vehicles Act, s. 149 – Motor accident compensation claim neither contested by the owner nor driver – Hence Insurance company, held, entitled to take plea about reduction of quantum of compensation awarded, which was not covered under S.149 of the Act.

Held, (Paras 6,7,8)

I. But when, as in the present case, the owner failed to contest the claim, there was nobody to raise the plea about the quantum of compensation to be awarded to the claimant. Therefore, it was in the interest of justice that the insurance company should have been allowed to raise those pleas, which were not covered under Section 149 of the Motor Vehicles Act. The case law of this court, as cited above, can, therefore, be relied upon to consider the argument of the appellant in respect of quantum of compensation.

II. It is a fact that the Tribunal examined the disability of the claimant, who was present in the court, but that itself was not a ground taken by the Tribunal in fixing the quantum of compensation, rather the Tribunal also took into consideration the medical certificate, which has been discussed in the judgement and whereby the claimant had suffered disability to the extent of 50% and on the basis of the said disability it was held by the Tribunal that the claimant needs the service of a man through out his further life and accordingly fixed quantam of compensation. From the impugned judgement it is clear that the claimant got his treatment from the Appolo Hospital, New Delhi and had submitted sufficient documentary evidence on the basis of which the Tribunal fixed the amount of compensation.

III. There is nothing in the judgement of the Tribunal which could suggest that the amount of compensation fixed on different counts by the Tribunal in any way suffers from any impropriety or any irregularity. The compensation awarded is proper

By the court

1. This appeal has been filed against the judgement and order (award) dated 21.8.1999 passed by the Motor Accident Claims Tribunal (IV Additional District Judge, Aligarh) in motor accident claims case No. 79 of 1997 whereby the Tribunal awarded a sum of Rs. 2,55,000/- along with interest to the claimant respondent.

2. The Tribunal has allowed the aforesaid compensation because of the injuries received by the claimant respondent on various counts.

3. We have heard the learned counsel for the parties. Learned counsel for the claimant-respondent raised a legal objection that the appellant being the insurer. Can only raise pleas. In the petition as well as in the appeal, which were available to the appellant under Section 149 of the Motor Vehicles Act. It is contended by the learned counsel for the respondent that the appellant cannot argue for reduction in the compensation allowed because this plea was not covered under Section 149 of the Act.

4. Taking a cue from the decision of Hon'ble Supreme Court in **Chinnama George and others Vs. N.K. Raju and another,** J.T. 2000 (4) SC 207, learned counsel for the respondent argued that the High Court was incompetent to reduce the amount of compensation allowed by the Motor Accident Claims Tribunal.

5. Learned counsel for the appellant has placed reliance upon the decision of this Court in **United India Insurance co.**

Ltd. Vs. Manisa Porwar, 1999 (2) TAC (Alld), wherein it was held that where the owner and driver neglected or failed to contest the claim, the appellant court can go into the question relating to illegality or arbitrariness in computing the amount of compensation awarded by the Tribunal. It was also held that the appellate court can certainly look into and consider such submissions.

6. As far as the present case is concerned, it is clear that the driver was not made a party and the owner in spite of sufficient service did not appear nor filed written statement nor contested the case. The case was only contested on behalf of the Insurance Company, the appellant. It is thus, clear that the owner neglected and failed to contest the claim. In the case relied upon by the learned counsel for the respondents, the owner has contested the case and even filed the appeal before the High Court and, therefore, certainly the insurance company could not take plea in defence apart from those provided under Section 149 of the Act because the other pleas could be taken by the owner. But when, as in the present case, the owner failed to contest the claim, there was nobody to raise the plea about the quantum of compensation to be awarded to the claimant. Therefore, it was in the interest of justice that the insurance company should have been allow4d to raise those pleas, which were not covered under Section 149 of the Motor Vehicles Act. The case law of this Court, as cited above, can, therefore, be relied upon to consider the argument of the appellant in respect of quantum of compensation.

7. Learned counsel for the appellant contended that the Tribunal did not base its finding in respect of quantum of compensation on specific evidence rather fixed the compensation on surmise and presumption. Emphasis was given by the learned counsel for the appellant in respect of disability allegedly suffered by the claimant. It is a fact that the Tribunal examined the disability of the claimant, who was present in the court, but that itself was not a ground taken by the Tribunal in fixing the quantum of compensation, rather the Tribunal also took into consideration the medical certificate, which has been discussed in the judgement and whereby the claimant had suffered disability to the extent of 50% and on the basis of the said disability it was held by the Tribunal that the claimant needs the service of a man through out his further life and accordingly fixed quantum of compensation. From the impugned judgement it is clear that the claimant got his treatment from the Appolo Hospital, New Delhi and had submitted sufficient documentary evidence on the basis of which the Tribunal fixed the amount of compensation.

8. There is nothing in the judgement of the Tribunal of the Tribunal which could suggest that the amount of compensation fixed on different counts by the Tribunal in any way suffers from any impropriety or any irregularity. The compensation awarded is proper. There is no merit in this appeal. It is accordingly dismissed.

Appeal Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE KRISHNA KUMAR, J.

First Appeal From Order No. 388 of 1999

Durrani Oriental Carpets and another ...Defendant/Appellant
Versus
Obeetee Ltd. Company ...Plaintiff/ Respondent

Counsel for the Petitioner/Appellant:
Shri D.M. Tripathi
Shri R.K. Ojha
Counsel for the Respondent:

Arbitration Act,1940, S.34- Discretionary power to stay proceedings of the suit by appellate court—when not be exercised.

Held—(Para 6 and 9)

I. In this case the appellants are otherwise not entitled to any discretion from the Court for stay of the proceedings of the suit. The plaintiff- respondent had given legal notice dated 29.7.1994 to settle the matter and pay the amount. The appellant sent the reply dated 30.9.1994 and did not ask for settlement of the dispute by arbitration. The plaintiff again gave a notice on 19.10.1994 and when the defendant—appellants did not respond, it had to file suit for recovery of the amount after paying heavy court fee.

II. It is the discretion of the Court to stay proceedings of the suit under Section 34 of the Arbitration Act. The appellate court would be slow to interfere with the exercise of discretion of the Court below unless it is shown to be arbitrary or based on certain unjustified grounds.

Case referred.
AIR 1967 Mad. 201
AIR 1967 Cal. 372
AIR 1967 SC 249

By the Court

1. This appeal is directed against the order of the Civil Judge (Senior Division), Mirzapur dated 17.3.1999 rejecting the application of the appellants for stay of the suit under Section 34 of Arbitration Act, 1940.

2. Briefly stated the facts are that respondent is a registered company. It carries on its business of manufacture and export of hand knotted woolen carpets under the name and style of Obeetee Ltd. The defendant-appellant no. 1 is a partnership firm and appellant no.2 is one of the partners. They entered into an agreement on 10.8.1988. Under the said agreement it was provided that the respondent shall sell to the appellants all the raw materials for the manufacture of its floor coverings on the price mutually agreed between the parties from time to time. The floor coverings, after manufacture, shall be utilised by the appellants for the execution of the orders given by the respondent. There were other clauses in the agreement. Clause no.13 was an arbitration clause which reads as under:-

"13. In the event of any dispute(s) between the parties hereto in relation to the terms of this agreement, or in relation to the floor coverings covered by this agreement, or in relation to the interpretation of any of these terms, the said dispute(s) shall be referred for the arbitration and, for that, each party shall be entitled to appoint one Arbitrator under the Arbitration Act, 1940 and the decision of the Arbitrators shall be final and binding on the parties hereto. (emphasis supplied).

3. The parties however, changed some of the terms of the agreement in March 1990. The respondent claimed certain amount as due against the appellants and a legal notice was issued to the appellants on 29.7.1994 demanding the amount. The appellants sent a reply dated 30.9.1994 denying its liability. The respondent again sent a notice dated 19.10.1994 indicating that the amount be paid and the matter be settled.

4. As the appellants neither paid the amount nor settled the matter, the plaintiff-respondent filed suit on 14th July 1995 for recovery of a sum of Rs.5,69,600.32. The appellants, in the said suit, filed an application under Section 34 of the Arbitration Act, 1940 for stay of the proceedings in the suit on the ground that there was an application clause between the parties providing that in case of dispute between the parties, the matter shall be referred to the arbitrator and in view of the said arbitration agreement the matter has to be decided by an arbitrator and the proceedings in the suit be stayed. The appellants also filed written statement in the suit on 17.1.1997. The respondent filed objection to the application filed by the appellant for stay of the proceedings of the suit. The Court below rejected the application on 17.3.1999 on the finding that the parties have entered into another agreement in the year 1990 and therefore the original contract did not survive particularly in regard to the arbitration clause. This order has been challenged before this Court.

5. The learned counsel for the appellants contended that the transactions between the parties were going on as per agreement on the works order issued for each transaction but as there was some difficulty, some of the terms of the agreement were changed. The arbitration clause in the agreement still survived. The arbitration clause referred to above was in relation to the terms of the agreement dated 10th August 1988. Admittedly, the parties entered into another agreement, the result of which was change in the terms of agreement. The defendant-appellants themselves filed a Photostat copy of the said agreement (Paper No.21C) and the terms of the said agreement were incorporated in the letter dated 27.03.1994 (Paper No. 16C-9). In view of the change in the nature of terms of agreement and change of the pattern of transaction between the parties, the previous agreement dated 10th August 1988 to refer the matter to the arbitrator cannot be enforced.

6. In this case the appellants are otherwise not entitled to any discretion from the Court for stay of the proceedings of the suit. The plaintiff-respondent had given legal notice dated 29.7.1994 to settle the matter and pay the amount. The appellant sent the reply dated 30.9.1994 and did not ask for settlement of the dispute by arbitration. The plaintiff again gave a notice on 19.10.1994 and when the defendant-appellants did not respond, it had to file suit for recovery of the amount after paying heavy court fee. The respondent in paragraphs 14 and 17 of the plaint asserted these facts. In paragraph 17 of the plaint it has been categorically stated that the defendant refused to make settlement and to negotiate the outstanding balance against them even after the legal notice of demand and reminders were served upon them. The appellants have filed written statement and they have not specifically denied the fact that they had received the notice and in the reply to the

notice they never expressed their intention for settlement of dispute through arbitration.

7. Section 34 of the Arbitration Act provides that an applicant seeking for stay of proceedings of the suit must specify that he was at the time when the proceedings commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration, the Court may make an order staying the proceedings of the suit. In N.C. Padmanabhan and others v. S. Srinivasan, AIR 1967 Madras 201, the Court did not stay the proceedings of the suit on the ground that when the plaintiffs sent notice, the defendant in his reply did not indicate his intention to refer the matter to arbitration. The words at the time when the proceedings commenced' under Section 34 must cover the entire period both before commencement of the suit and thereafter. It was observed:-

"I have no hesitation in holding that the averment extracted above does not satisfy the requirements of S.34. A party who invokes S.34 must specifically allege that he was, not only, at the commencement of the suit quite ready and willing to have the dispute resolved by arbitration proceedings, but that he is throughout ready and willing for such arbitration and do everything necessary for the proper and successful conduct of the arbitration proceedings. The readiness and willingness to do everything necessary for the proper conduct of the arbitration proceedings should cover the entire period both before the commencement of the suit and thereafter. The readiness of the defendant should not be a matter of implication but there should be a clear, unambiguous and specific averment to that effect in an affidavit filed by the applicant for the stay of the suit."

8. In Shalimar Paints Ltd. v. Omprokash Singhania, AIR 1967 Calcutta 372, referring to the various correspondence between the parties prior to filing of the suit, the Court rejected the prayer to stay the proceedings of the suit with the following observation:-

"It does not appear from the facts and circumstances of the case that the applicant was ready and willing at the commencement of the proceedings to do everything necessary for the proper conduct of the arbitration. It is to be noted that no suggestion was ever made by the petitioner in any of the correspondence carried on between the parties that the disputes should be referred to arbitration for adjudication in accordance with the provisions contained in the arbitration clause. The plaintiff had made various demands and had sent letters of demands even through its solicitors."

9. Sometimes, it may not itself be a ground to reject the application but it has to be examined on facts each of the cases. It is the discretion of the Court to stay proceedings of the suit under Section 34 of the Arbitration Act. The appellate court would be slow to interfere with the exercise of discretion of the Court below unless it is shown to be arbitrary or based on certain unjustified grounds. In U.P. Co-operative Federation Ltd. v. Sunder Bros., Delhi, AIR 1967 SC 249, it was held that where the discretion vested in the Court under Section 34 has been exercised by the lower Court, the appellate Court would normally be not justified in interfering with the exercise of the discretion under appeal solely on the ground that it had

considered the matter at the trial stage and it may have come to a contrary conclusion.

10. For the reasons stated above we do not find any merit in the appeal and it is accordingly dismissed.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD : AUGUST 2, 2000.

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

Civil Misc. Writ Petition No. 37152 of 1998

Sunder Devi and others ...Petitioner
Versus
Rent Control & Eviction Officer/ Upper Nagar Magistrate (First) Kanpur Nagar & others ....Respondents

Counsel for the Petitioner:
Shri L.P. Singh

Counsel for the Respondents:
S.C.

U.P. Urban Buildings (Regulation of Letting, rent and Eviction) Act, 1972, Ss, 16, 1211(1), 3(a) (g) and 34 (4) (a) – Deemed Vacancy – At the time of and after the death of original tenant, his real brother, his sole heirs, continued to occupy the accommodation for several years – No deemed vacancy.

Held—(Para 13)

In view of the aforesaid decisions, it can easily be held that by allowing an heir to occupy the building even if he is not member of his family, no vacancy shall be caused in the building. In the present case, the authority below has erred in law and committed a mistake which is apparent on the face of the record in holding that by induction of the petitioner by the decreased tenant resulted in vacancy in the building in question, particularly when it was not disputed that the petitioner was the real brother and only heir of the deceased tenant. Thus, in my opinion, neither on induction of the petitioner in the building in question nor on the death of the original tenant, the building in question fell vacant.

Case law discussed.
1977 ARC 72
1981 ARC (Short Notes Cases 13)
1984 (2) ARR 683
1977 (1) ARC 199
1998 (33) ALR 306
2000 (38) ALR 550

By the Court

1. Heard learned counsel for the petitioner and learned counsel appearing for the contesting respondents.

2. 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 order dated 31.10.1998 passed by respondent no.1, declaring the building in question as vacant.

3. The dispute relates to building No. 86/382, Deo Nagar, Kanpur of which one Sri Jagdamba Prasad Awasthi was the original landlord. The said building was in the tenancy of Mr. Suraj Prasad alias Chhedi. The petitioner was permitted to reside in the building I question in 1955 by Sri Suraj Prasad alias Chhedi, the chief tenant. On receipt of the application for allotment of the said building, proceedings under Section 16 read with Section 12 of the U.P. Urban Buildings (Regulation of Letting, rent and Eviction) Act, 1972 for short, 'the Act' were initiated. On the directions issued by the Rent Control and Eviction officer, the building in question

was inspected by the Rent Control Inspector. He thereafter, submitted his report to the Rent Control & Eviction officer, the copy of which is contained as Annexure – 3 to the writ petition. The rent Control Inspector, by his report dated 29.05.1998, reported that the building in question was in occupation of the petitioner who was not a member of the family of the tenant. On the basis of the said report, the notices were issued to the concerned parties. The petitioner filed his objection in the said proceedings to the effect that he happened to the real brother of the deceased tenant. He has been living in the building in question for the last 17 years and normally resided in the same at the time of the death of the tenant. He therefore being the heir of the deceased tenant, inherited the tenancy right and was entitled to continue in occupation of the said building. His occupation of the building in question was quite legal therefore, it cannot be said to be vacant. On the other hand, learned counsel for the respondents no. 2 and 3 have supported the report of the Rent Control Inspector and stated that the petitioner although was the real brother of the deceased but was not his family member. They contended that he was included in the house in 1978, therefore, in view of the provisions of Section 12 (I)(b) of the Act, the building in question shall be deemed to be vacant. Parties thereafter produced evidence in support of their cases, oral and documentary. The Rent Control & Eviction Officer, after going through the entire material on the record, came to the conclusion that the petitioner was inducted in the building in question by the tenant Shri Suraj Prasad alias Chhedi in the year 1978. Petitioner was not a family member of the deceased tenant, therefore, the building in question shall be deemed to be vacant in view of the provisions of Section 12(I)(b) of the Act, that after the death of the tenant, possession of the petitioner cannot be legalised and declared the building in question as vacant by the impugned order dated 31.10.1998. Challenging the validity of the said order, the present petition has been filed.

4. Learned counsel for the petitioner vehemently urged that the petitioner was the heir of the deceased tenant, he therefore, on his death, inherited the tenancy right in the building in question and his occupation cannot be said to be unauthorised and illegal, therefore, the order declaring the vacancy was liable to be quashed.

5. On the other hand, learned counsel; appearing for the contesting respondent submitted that the petitioner was inducted in the building in question in 1978 in contravention of the provisions. After the death of the tenant, the occupation of the petitioner cannot be legalised. The writ petition was therefore, liable to be dismissed.

6. The questions which arise for consideration in this case, are as to whether petitioner was an authorised occupant of the building in question or he has, on the death of late Suraj Prasad alias Chhedi, inherited the tenancy rights in the building in question and thereafter, he was lawful occupant of the same. For resolving the aforesaid controversy, provisions of Section 3(a),(g), Section 12(I) and clause (a) of Sub-section (4) of section 34 of the Act are relevant which are reproduced below :-

"3. Definition:- In this Act, unless the context otherwise requires-

(a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death-
(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;
(2) in the case of a non-residential building his heirs;

[Explanation – An occupant of a room in a hotel or a lodging house shall not be deemed to be a tenant];

(g) "family", in relation to a landlord or tenant of a building, means, his or her –
(i) Spouse
(ii) male lineal descendants,
(iii) such parents, grandparents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her,
and includes, in relation to a landlord, any female having a legal right of residence in that building;

"12. Deemed vacancy of building in certain cases. –
A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if-
(a)…….
(b) He has allowed it to be occupied by any person who is not a member of his family, or

34. Powers of various authorities and procedure to be followed by them – (I) The District Magistrate, the prescribed authority or any appellate or revising authority shall for the purpose of holding any inquiry or hearing any appeal or revision under this Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908), when trying a suit, in respect of the following matters namely,-
……
(2)…….
(3) ……
(4) Where any party to any proceedings for the determination of standard rent of or for eviction from a building dies during the pendency may be continued after bringing on the record:-
(a) in the case of the landlord or tenant, his heirs or legal representatives:
(b) in the case of unauthorised occupant, any person claiming under him found in occupation of the building.

7. Admittedly, the building in question is a residential building and the petitioner is a real brother of the tenant, late Suraj Prasad alias Chhedi. It is also not disputed that petitioner was found normally residing with the tenant at the time of his death.

8. A combined reading of the above noted statutory provisions reveals that an heir, to be determined in accordance with the personal law of the tenant concerned, may be the member of the family or not within the meaning of the term used under the Act, can be permitted to reside with the chief tenant during his lifetime in as much as the tenancy right could be inherited only by the heir or heirs who normally resided with the tenant at the time of his death in the disputed building. The induction of the heir in the building, therefore, will not cause vacancy within the meaning of the term used under the Act. Any interpretation to the contrary would render the above noted provisions redundant, or contradictory to each other and unworkable in as much as if the induction of an heir results in vacancy, Section

3(a)(1) and clause (b) of sub-section (I) of Section 12 would become contradictory to each other n as much as the spirit/object of the Act is that the heirs of the tenant shall inherit the tenancy rights, may be members of his family or not and unless an heir is permitted to reside in the building in question sometime before the death of the tenant he cannot be said to have resided normally with the deceased tenant at the time of his death. The induction of an heir, therefore will not cause vacancy in the building. Any interpretation to the contrary, would result in conflict harmoniously interpreted.

9. In Smt. Rukmani Devi Vs, A.D.J. Kanpur and others, 1977 A.R.C. page 72 while considering the provisions of section 3(a) and (g), it was ruled by this Court that premises in dispute being a residential building, the petitioner (who was married daughter of the tenant) who resided with the tenant at the time of his death, would be a tenant within the meaning of the word under Section 3(a) of the Act, referred to the definition of word 'family 3(g) had no relevance.

10. In Munni Lal Vs. Smt. Sheo Dei, 1981 A.R.C. (Short Note Cases 13), it was held that there as no warrant for giving to the word "heirs', as occurring in Section 3(a) (1), a restricted meaning and limiting it to the members of the family of tenant, as defined in Section 3(g). In the said case, it was further held that married daughter residing with her parents would be an heir of tenant within the meaning of Section 3(a) of the Act irrespective of whether or not she would be regarded as a member of the family as defined under Section 3(g) of the Act. Therefore, Section 12(1)(b) of the Act was not attracted because the accommodation cannot be treated to be vacant merely because the married daughter was allowed to reside with her parents. She could not deemed to have occupied the accommodation.

11. In Om Prakash and others Vs. Prescribed Authority and others, 1984 (2) A.R.C. 683, it was held that the definition of the word, "family was not relevant for the purposes of determining the question as to who would become tenant on the death of original tenant. On the death of the original tenant of a residential building, his heir living with him at the time of death, will become tenant and there would be no vacancy in the building on the death of the original tenant.

12. In Dr. Ram Narain Bagley Vs. D. J. Saharanpur and others, 1997(1) ARC 199, it was held that it was clear that under Section 3(a)(1) of the Act, there is an specific provision that in case of a residential building, only such heir will inherit tenancy rights who resided in the building at the time of death of the tenant. Under the provisions of the Act, there was no distinction between the contractual and statutory tenant to inherit the rights of the tenant. In case of a residential building , only such heirs of the deceased tenant would inherit the tenancy rights who were normally residing with him in the building at the time of his death. Similar view was expressed by this Court in Surendra Kumar Vs. A.D.J. Kanpur Nagar and others, 1998(33) A.L.R. 306 and in Pradeep Kumar Katiyar Vs. II Addl. City Magistrate and another, 2000(38) A.L.R. 550.

13. In view of the aforesaid decisions, it can easily be held that by allowing an heir to occupy the building even if he is not member of his family, no

vacancy shall be caused in the building. In the present case, the authority below has erred in law and committed a mistake which is apparent on the ace of the record in holding that by induction of the petitioner by the deceased tenant resulted in vacancy in the building in question, particularly when it was not disputed that the petitioner was the real brother and only heir of the deceased tenant. Thus in my opinion neither on induction of the petitioner in the building I question nor on the death of the original tenant the building in question fell vacant. This writ petition, therefore, deserves to be allowed.

14. The Writ petition succeeds and is allowed with cost. The order dated 31.10.1998 is hereby quashed. The respondents are restrained from interfering in the possessions of the petitioner over the building in question except in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2000

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

Civil Misc. Writ petition No. 2362 of 2000

Shiv Singh Rana ...Petitioner
Versus
The Deputy Registrar Sahkari Societies, U.P. Agra Division, Agra and others ...Respondents

Counsel for the Petitioner:
Shri B. Ram

Counsel for the Respondents:
Sri K.N. Misra
S.C.

Constitution of India, Article 226- Petitioner- Secretary of a Co-operative Society Charge sheeted and found guilty after enquiry- Service terminated- Petitioner's appeal dismissed by appellate authority without recording reasons- Hence appellate order set a aside – Non application of mind.
Held- (Para 3)
A perusal of the appellate order dated 15th January 2000 copy of which is Annexure CA-14 to Counter Affidavit, shows that the Appellate Authority has not recorded any reasons for upholding the order of the Original Authority. The Appellate Authority has merely recorded the facts and thereafter given its conclusion. There is a distinction between reasons and conclusion.

Cases Referred:
AIR 1966 SC 671
AIR 1967 SC 1606
AIR 1971 SC 862
1993 (1) SCC 78

By the Court

1. Heard counsel for the parties.

2. The Petitioner was a Secretary of a Co-operative Society. He was charge sheeted and after an enquiry he was found guilty and his service was terminated, vide order dated 28th September 1999. He filed an appeal against the termination order, which has been dismissed. Aggrieved, this Writ Petition has been filed.

3. A perusal of the appellate order dated 15th January 2000, copy of which is Annexure CA-14 to Counter Affidavit, shows that the Appellate Authority has not recorded any reasons for upholding the order of the Original Authority. The Appellate Authority has merely recorded the facts and thereafter given its conclusion. There is a distinction between

reasons and conclusion. The earlier view of the Supreme Court was that an order of affirmance need not give reasons, vide M.P. Industries Limited. Versus Union of India, AIR 1966 SC 671 but subsequently the Supreme Court changed its view and held that an order of affirmance too must give reasons, vide Bhagat Raja versus Union of India, AIR 1967 S.C 1606, Travancore Rayons versus Union of India, AIR 1971 SC 862 and C.B. Gautam versus Union of India, 1993 (1) SCC 78.

4. No doubt the Appellate Authority need not go into details and give a detailed judgement like that of a Court of law, but it must give at least in brief its reasons showing application of mind. Since that has not been done, we set aside the Appellant Authority's order dated 15th January 2000 and remand the matter to the Original Authority to pass a fresh order expeditiously giving reasons and after hearing the Petitioner in accordance with law.

5. We make it clear that we are not setting aside the order of the Original Authority dated 28th September 1999 but only of the Appellate Authority. Also we make it clear that we have allowed the petition only on one point, and we are not dealing with the other points raised in this petition.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.7.2000

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

Civil Misc. Writ petition No. 29147 of 1995

Radha Raman and others ...Petitioners
Versus
The District Magistrate, District Mathura and others ... Respondents

Counsel for the Petitioner:
Anita Tripathi

Counsel for the Respondents:
S.C.
Shri B.D. Mahdhyan

Constitution of India, Article 226- Powers under – Not to be exercised where disputed questions of fact are involved.

Held (Para 7)

The real intention of Respondent no.s 4 to 12 may be to install the statue in the lads of the petitioners by claiming it to be theirs. The question, however, necessarily being of fact cannot be appropriately adjudicated under Article 226 of the Constitution of India but by any civil court under section 9 of the code of civil procedure or before any other appropriate forum having such jurisdiction to grant injunction though it was and will be duty of the police Administration to take appropriate action under the police Act, I.P.C. and Cr.P.C. and of the Civil Administration under the Cr.P.C. to protect citizens whose property is sought to be squandered or misappropriated by any one by taking law in his own hands and/or by resorting to apprehension of breach of the peace.

By the Court

The petitioners have come up with two prayers (I) to command Respondent Nos. 4 to 12 not to install the statue of Dr. B.R. Ambedkar in their chaks (the land which was allotted to them in the consolidation proceedings) and (ii) to command Respondent Nos. 1 to 3 to take suitable action in accordance with law against the afore mentioned Respondents who forcibly want to install the statue in their lands.

2. The petitioners assert, interalia, that plot No. 230 is their bhumidhari of which no portion was taken out for any public purpose; on their said plot their boring is situated, which fact was taken into account by the consolidation authorities while allotting chaks to them; Respondent Nos. 4 to 12, who are connected with the local Bahujan Samaj party, illegally and with a malafide intention want to install the statue of Dr. B.R. Ambedkar in their lands; the petitioners met Respondent No. 3. The station House Officer, police Station Vrindavan, District Mathura who, however, expressed his helplessness saying that Respondent Nos. 4 to 12 belong to a political party and thereafter they moved Respondent No. 2 The Senior Superintendent of Police, District Mathura and also sent copy of their application filed before Respondent No. 3 to Respondent No. 1 The District Magistrate, Mathura requesting them to restrain Respondent Nos. 4 to 12 from installing the statue in question but as despite repeated requests no action has been taken and hence this writ petition.

3. No counter has been filed by Respondent Nos. 1 to 3.

4. Respondent Nos. 4 to 12 in their counter affidavit, the original of which, however, has not been placed by the office on our record, but a copy thereof having been shown to us by both sides, assert that they sought permission from the District Magistrate for installing the statue of Dr. B.R. Ambedkar on their own lands bearing plot No. 260 and thus the petitioners are not affected in any manner.

5. The petitioners have filed a Rejoinder denying the stand taken in the Counter affidavit aforesaid and re-iterated their allegations.

The Submissions:

6. Learned counsel for the petitioners contended that the defence taken by Respondent Nos. 4 to 12 that they are installing the statue of Dr. B.R. Ambedkar in their own land is incorrect whereas on the other hand Sri Pramod Kumar Tewari, learned Counsel appearing on behalf of Respondent Nos. 4 to 12 contended that statue in question was not intended to be installed on any portion of the land which belongs to the petitioners but on their own lands.

Our Findings:-

7. No one has got any authority to erect any statue on some on else's land. According to the petitioners the statue is sought to be installed on their lands whereas Respondent Nos. 4 to 12 are denying this . The real intention of Respondent Nos. 4 to 12 may be to install the statue in the lands of the petitioners by claiming it to be theirs. The question however, necessarily being of fact cannot be appropriately adjudicated under Article

226 of the constitution of India but by any Civil court under section 9 of the code of Civil procedure or before any other appropriate forum having such jurisdiction to grant injunction though it was and will be duty of the police administration to take appropriate action under the police Act, I.P.C. and Cr.P.C. and of the Civil Administration under the Cr.P.C. to protect citizens whose property is sought to be squandered or misappropriated by any one by taking law in his own hands and/or by resorting in apprehension of breach of the peace.

8. Consequently we refuse to grant relief in relation to prayer No. 1 but in the larger interest of justice direct the District Magistrate and the Higher Police Authorities of the District Mathura to look into the matter and stop the mischief if it is attempted to be done by Respondent Nos. 4 to 12.

9. With these observations and directions this writ petition is disposed of but having regard to the peculiar facts and circumstances we make no order as to cost.

10. The office is directed to hand over a copy of this order to Smt. Sarita Singh, learned standing Counsel for its intimation to the District Authorities of Mathura for compliance of the directions made as above.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2000

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

Civil Misc. Writ Petition No. 838 of 999

D.C.M. Shriram Industries Limited and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri Shanti Bhushan
Shri Tarun Agarwal
Shri Rakesh Dwivedi

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

U.P. Seera Niyantran Adhiniyam 1964- Section 8 (10)—Market price of Molasses – to which the Sugar Factory is entitled to receive?—retired High Court Judge deputed to decide this question within the period of 3 months-- the rate fixed by interim order if any surplus amount shall be adjusted by either of the parties as the case my be—market price means free market price and—not the price fixed by the chemical Industry.

Held—(Para 9)

In our opinion the impugned order is arbitrary as it has considered the market price only from the point of view of the chemical industry and not the free market price. In our opinion market price means the free market price (as observed above) and not the market price vis a vis the chemical industry.

Case law discussed.

W.P. No. 120 of 99 decided on 9.07.99 (D.B.)
A.I.R.1987SC—720

A.I.R. 976 SC—2219
A.I.R. 977 SC---7 1560
A.I.R. 1967 465

By the Court

1. Heard Sri Shanti Bhushan and Sri Tarun Agarwal, learned counsel for the petitions and Sri Bharat Ji Agarwal and Piyiush Agarwal, counsel for the respondent Nos. 3 & 4 and the learned Standing Counsel for the respondent Nos. 1 & 2.

2. This writ petition has been filed against the impugned order of the Controller of Molasses dated 25.08.1999 (Annexure-7 to the writ petition). By that order the petitioner's application under the proviso to section 8 (la) of the U.P. Sheera Niyantran Adhiniyam has been rejected.

The petitioners are sugar factories which also have their own distilleries Under the U.P. Sheera Niyantran Adhiniyam 1964 and the orders passed there under, it has been provided that 40% of the molasses produced by the sugar factories are reserved for Chemical Industries, 40% could be sold in the open market and 20% will be reserved for country liquor producers Section 8 reads as follows.

3. **"8. Sale and Supply of molasses-** (1) The Controller may with the prior approval of the State Govt. By order require the occupier of any sugar factory to sell or supply in the prescribed manner such quantity of molasses to such person, as may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(1-a) Notwithstanding anything contained in Sub—Section (1) the occupier of a sugar factory shall sell or supply forty percent of the molasses produced in each quarter of a molasses year in the sugar factory to such chemical industries which are actual users of molasses and are granted licensee under the United Provinces Excise Act. 1910:

Provided that such quantum of molasses as is not required by the said chemical industries may be solid or supplied by the occupier of the sugar factory to any oil unit which is actual users of molasses with the prior approval of the Controller.

(2) The order under sub-section (1)

(a) Shall require supply to be made only to a person who requires it for his distillery or for any purpose of industrial development:
(aa) may require the person referred to in clause (a) to utilize the molasses supplied to him under an order made under this section (1) of Section 7- A and to observe all such restrictions and conditions, as may be prescribed,
(b) may be the entire quantity of molasses in stock or to be produced during the year or for any portion but the proportion of molasses to be supplied from each sugar factory to its estimated total produce of molasses, during the year shall be the same throughout the Sate save where, in the opinion of the Controller, a variation is necessitated by any of the following factors:
(i) the requirement of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost ;

(ii) the requirement for other purposes of industrial development within such area and
(iii) the availability of transport facilities in the area

(3) The Controller may make such modifications in the order under Sub-Section (1) as may be necessary to correct any error or omission or to meet a subsequent change in any of the factors mentioned in clause (b) of Sub Section (2).

(4) The occupier of a sugar factory shall be liable to pay to the State Govt., in manner prescribed. Administrative charges at such rate, not exceeding fifteen rupees per quintal as the State Govt. may from time to time notify, on the molasses sold or supplied by him.

(5) The Occupier shall be entitled to recover from the person to whom the molasses is sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses."

4. The short controversy in this case is about the price at which the sugar factory has to sell the molasses to the chemical industries. Section 10 of the Sheera Adhiniyam had provided for fixing the maximum price for the sale of molasses. In the year 1998 this provision was deleted and thereafter there was no statutory control over the price of molasses to be sold to the chemical industries. The problem which arose was that while on the one hand the sugar industries had to sell 40% of their production of molasses to the Chemical Industries, on the other hand, there was no statutory provision for fixing the price at which this molasses was to be sold. This difficulty was resolved by a Division Bench of this Court in Writ Petition No. 120 of 1999, decided on 09.07.1999 D.C.M. Shriram Industries Ltd. and others Vs. State of U.P. and others, (copy of which is Annexure-5 to the writ petition). The division bench held, and in our opinion rightly so, that the price which the sugar factory is entitled to receive is the market price of molasses. This view appears to be correct and reasonable because if the sugar factory offers to sell molasses at an exorbitant price which is far above the market price it will be an indirect way to refuse to sell to the chemical industry Hence the Division Bench held that the price to be paid to the sugar factory shall be the market price. The petitioner were asked to make a representation to the Controller under the proviso to Section 8 (l a).

5. By the impugned order dated 25.8.1999, the Controller of molasses has rejected the representation of the petitioners in which the petitioners had alleged that the chemical industry was not willing to lift the molasses at the prevailing market price, and hence, the molasses should be released in favour of the petitioners for either self consumption or sale in the open market. Against that order this writ petition has been filed. The Controller in the impugned order observed," the rates quoted by the sugar mills for the reserved molasses have in actual effect been in accordance with the open market price of the molasses and not in accordance with the sale and purchase rates of the controlled molasses."

6. The petitioners are aggrieved by the observation in the impugned order that the market price to be paid to the sugar factory by the observation in the impugned order that the market price to be paid to the

sugar factory by the chemical industries should be the market price for the Chemical Industries Sector. The grievance of the petitioner is that the market price is the general market price in the open market and not market price is the general market price for any particular sector. We agree with the submission of Sri Shanti Bhushan that the market price cannot be taken only for the purpose of Chemical Industry. Market price is the price at which a willing seller would sell to a willing buyer as held by the Supreme Court in a number of cases viz A.I.R. 1987 S.C. 720. A.I.R. 1976 S.C. 2219, A.I.R. 1977 S.C. 1560 and A.I.R. 1967 S.C. 465 etc. This market price is determined by the free play of market far us.

7. We can visualize a businessman who is selling molasses in the open market. Such a businessman would sell to whoever offers the highest price, and he has no concern whether the buyer belongs to the chemical industry or any other industry. The aim of a businessman is obviously to get the highest price for his product, and he has no concern whether his buyer is of any particular industry or not price, in our opinion, the approach of the Controller in the impugned order that the market price should be calculated only form the point of view of the chemical industry is not correct. In fact, the Controller has observed that the rates quoted by the sugar mills are in accordance with the market price of the molasses.

8. Sri Bharat Ji Agarwal, learned counsel for the respondent nos. 3 and 4 has submitted that the market price should not be taken to mean the free market price. We do not agree. In our opinion the market price means the free market price in the open market. Market price is to be contrasted to a controlled price fixed by the government or some authority under a statute for fixing the price. Since Section 10 has been deleted there can be no fixed price fixed by any authority. The market price hence undoubtedly means the free market price. Since in his own order the Controller has observed in the penultimate paragraph that the sugar mill has offered the market price that is between Rs. 135 to 150 per quintal but the chemical industry had refused to lift at that price hence permission should have been granted to the petitioners under the proviso to Section 8 (l a) of the Sheera Adhiniyam.

9. In our opinion the impugned order is arbitrary as it has considered the market price only from the point of view of the chemical industry and not the free market price. In our opinion market means the free market price (as observed above) and not the market price vis a vis the chemical industry .

10. Shri Bharat Ji Agarwal then argued that the division bench in Writ petition No.120 of 1999 had observed that discriminatory price can be changed by the producers. We have carefully examined the observations of the division bench in this connection, and in our opinion the said observations only mean that the sugar factories can enter into voluntary agreements with different purchasers of molasses for selling molasses at different prices.

11. In the circumstances we quash the impugned order dated 25.8.99. In this case an interim order was passed on 10.09.99 directing the petitioner to sell the

reserved molasses to the chemical industry at Rs. 125/-per quintal. The aforesaid interim order reads as follows.

"In the meantime, upon consideration of the facts and circumstances of the case and the submissions made across the Bar. It is provided as an interim measure, and without prejudice to the rights and contentions of the parties, that the petitioners shall sell the reserved quantity of molasses to the concerned allotted chemical units at the rate of Rs.125/- per quintal. In Case the concerned chemical units do not lift the molasses at the rate aforesaid. In the fortnight from the date of receipt of notice served by the petitioners, it will be open to the petitioners to captively consume the stocks of molasses of the second quarter of the sugar year 1998-99 or sell it to any other person in the open market. This is subject to such order as may be passed by the court to adjust the equity between the parties."

In our opinion market price now be determined afresh for the period of the lifting of molasses in pursuance of the impugned order dated 10.09.99 (as extended from time to time).

12. It may be mentioned here that the petitioners are themselves purchasing molasses for their distillery, and in paragraph 20 (f) of the writ petition (which has been added by an amendment application, which we have allowed) it has been stated that the petitioners have been purchasing molasses form various parties at the rate between Rs. Rs. 180/- to Rs.210/- per quintal. By the amendment application, which we have allowed to day, it has been claimed that the petitioners should be entitled for compensation for the difference between the prevailing market price and the interim price of Rs.125/- per quintal which was much below the prevailing market price at the relevant time was Rs.180/- to Rs.210/- per quintal. However, the respondents are disputing the figures and have alleged that the alleged market price was much lower than the price claimed by the petitioners, We are not going into the question as to what was the prevailing market price in the open market at the relevant time as there is a factual controversy. Hence, we are sending the matter to a retired Hon'ble Judge of this Court who will decide this controversy after considering the various relevant factors and evidence and after hearing the parties or their counsel. It may be mentioned here that one of the factors which is certainly relevant in determining the market price is that the petitioners themselves have been purchasing molasses at the rate of Rs.180/- to Rs.210/- per quintal as stated in paragraph 20 (f) of the writ petition. This is very relevant because no one will ordinarily purchase at a higher price if a commodity is available in the free market at a lower price. Hence this is certainly an indication that the prevailing market price at the relevant time was Rs. 180/- to Rs. 210/- per quintal because no business man will purchase a commodity at a higher price than the price at which it is available in the open market. In fact the division bench in writ petition no.120/99 has observed, "In a System of uncontrolled pricing, it would not be unreasonable to quote rates at which the petitioners are themselves purchasing molasses for consumption in their own distillery. The controller is to take this and other factors into reckoning while dealing the reckoning while dealing the controversy of whether. The rates quoted

by the occupiers of sugar factories are higher than the market ." However, this is only of the relevant factors and is not the conciuse factor for determining the market price. There may be other relevant factors also (e.g. the price, which the other sugar factories charged for the 40% reserved quota at the relevant time) and hence we are not expressing a final opinion on this point.

13. Sri Bharat Ji Agarwal, learned counsel for the respondents has alleged that the same sugar factory has sold the molasses to the chemical industry @ 116/- per quintal in August and September 1999. We are not expressing our final opinion on this matter. It is possible that the molasses was sold at a lower price due to pressure from some authority or for some other reason, and hence that may not necessarily be the market price. It is our considered opinion that the market price should be determined after hearing both the parties or their counsels and also considering the evidence adduced by them by a retired High Court Judge preferably within three months of production of a certified copy of this order.

14. Shri Shanti Bhushan, learned counsel for the petitioners agrees that the remuneration to the retired Judge will be paid by the petitioners. We direct that the petitioners hall pay Rs.50,000/- to the said retired Judge and we nominate for the purpose Hon'ble Mr. Justice A.N. Verma, a retired Judge of this Court and former Chairman of the Monopolies Commission. The petitioners shall also pay a sum of Rs. 3000/- per month to Hon'ble Justice Verma in addition to his remuneration for engaging a Secretary for the purpose. The petitioners shall also pay any incidental expenses incurred by Mr. Justice Verma to him. If the proceedings before Hon'ble Mr. Justice Verma take longer than three months then a further sum of Rs.25,000/- will be paid to him by the petitioners. These payments must be made in advance to Mr. Justice Verma by the petitioners. Also, the parties must supply copies of all documents on the record of this petition to him. The parties or their counsels shall appear before Hon'ble Mr. Justice Verma on 29.07.2000, and no separate notices shall be sent to them.

15. Since respondents have paid Rs.125/- per quintal for the amount of molasses which they have lifted under the interim orders of this Court, if it is found by the Hon'ble Judge to whom we are sending the matter that the market price was more than 125/- per quintal, then the balance will be paid by the respondents to the petitioners within two months of the decision of the said Hon'ble Judge. If, however, it is found that the free market price was less than Rs. 125/- per quintal than the petitioners will pay the balance to the respondents.

Petition is allowed . No orders as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 13TH JUNE, 2000

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

Civil Misc. Writ Petition No. 26624 of 2000

Ram Hit ...Petitioner
Versus
State of U.P. through District Magistrate, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Shri Manish Nigam

Counsel for the Respondents:
S.C.

Arms Act read with Constitution of India, Article 243 K(1)- District Election Commission's power to direct authorities to compel citizens in general to deposit/surrender their licenced fire arms at the Police Station on the eve of Panchayat Election- No direction by statutory authority under Arms Act- validity.

Held (Para 21)

A writ in the nature of mandamus is issued commanding the respondents not to compel the citizens within their respective jurisdiction to surrender/deposit their fire arms provided they held valid licence, without there being a specific order passed by the competent statutory authority under Arms Act merely on the basis of the general order on the ground of holding of Panchayat elections.
Case law discussed.
1994 suppl.(2) SCC 689
1994 ACJ 315
2000 (38) ALR 13
AIR 1984 SC 921

By the Court

1. This is a writ petition under Article 226 of the Constitution of India praying for a writ of certiorari to quash the letter dated 26.5.2000 issued by Additional Commissioner State Election Commission U.P. respondent no. 5 (Annexure-III to the writ petition)to the extent it required all the District Magistrates, District Panchayat Raj Officers and Senior Superintendent of Police/Superintendent of Police to take action for getting licenced arms to be surrendered and deposited with the concerned authority and for a writ of mandamus commanding the respondents not to compel the petitioner, holder of a valid licenced fire arms to deposit his arm on the basis of sweeping observation that Panchayat Raj elections were going to be held in near future.

2. Petitioner has filed copy of a News report allegedly containing a statement of District Magistrate concerned disclosing that licenced arms of all the persons in the district shall be required to be deposited necessarily and in case fire arms are not deposited on or before 26.5.2000,all the licences of such persons same shall be declared invalid and illegal.

3. Every day number of writ petitions are being filed before this court on some what similar facts and allegations containing that no sweeping or general order can be issued for depositing fire arms unless it is contemplated under Arms Act for but suspension and its cancellation.

4. In a nut shell, grievance of all these petitioners is that District Election Commission has no power to direct the authorities for compelling citizen holding Fire Arms Licence to surrender on the mere ground that Panchayat Raj Elections are in the offing.

5. Heard learned counsel for the petitioners in the present petition as well as in all other similar writ petitions before this Court on date, learned Standing Counsel on behalf of the State Authorities and the learned counsel representing U.P. District Election Commission.

6. With the consent of the parties writ petition/s are being decided finally at the admission stage. As agreed by the parties,

particularly in view of the fact that Panchayat Elections are expected to be over in a couple of weeks, this court has decided the petitions finally without waiting for counter and rejoinder affidavits. It was also agreed at the bar that these petitions may be decided on legal ground regarding competence of the respondents to issue a general order of the nature in question (i.e. dated 26.5.2000 referred to above). Before this court deals with the legal submissions of the parties it will be interesting to note that Additional Commissioner, District Election Commission vide its letter dated 26.5.2000 has given direction in a sweeping manner for all the fire arms to be deposited. The said letter of the commission dated 26.5.2000 merely required the District Administration to citen its grip by rounding up unsocial elements, Mafia etc. and further requiring these authorities to be on constant vigil for maintaining law and order. This letter merely states that while keeping an eye unsocial elements and Mafi as the preventive action contemplated under Criminal procedure (107/116/151 I.P.C.) may be initiated and bond (Muchalaka) may be obtained from such persons including getting their fire arms are deposited/surrendered. This letter clearly mentioned that Election Commission was to make aware and conscious Administration to ensure law and order and as a consequence thereof get free, fair and peaceful elections.

7. Alleged statement of the District Magistrate/Government Authorities on the basis of the said letter of the commission that all the fire arms will be got deposited in the district is not within the directions contained in the commission letter under reference. It is interesting to note that on behalf of the Government authorities no resistance was made except taking stand that State Authorities are getting fire arms deposited on the direction of the State Election Commission.

8. As already noted above, said stand of the State authorities placed before this court through Standing Counsel is

9. On behalf of State Election Commission, Sri Mandhayan, Advocate referred to Article 243 K and 324, Constitution of India.

10. Article 243 K (1) of the Constitution reads:

"The superintendence, direction and control of electoral rolls for, and the conduct of all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor."

11. Article 324 is not relevant for our purpose as it relates/deals with elections of Parliament and Legislature of every state apart from the elections to the office of President and Vice President. The power of superintendence and control to hold elections vested in the Election Commission.

12.Reading of Article 243 K(1) clearly shows that State Election Commissioner is vested with power to have over all control, superintendence and power to give directions to take all steps for the conduct of elections to the Panchayat. This Article in no manner confers power upon the State Election Commissioner to over ride Legislative enactment's (Arms Act) or Cr.P.C.

13. Learned counsel for the State Election Commission has placed reliance on the case of Election Commission of India Vs. All India Anna Dravida Munetra Kazahagam and another-1994 supp.(2) Supreme Court Cases 689. In the said case question before the Apex Court was whether Election Commission under Article 324, Constitution of India had power to restricting the hours of using loudspeakers fitted on vehicles for electioneering purpose.

14. It may be noted that using of Loudspeaker for the purpose of electioneering purpose was a matter directly related to the election and conducting of elections.

15. In the instant case, if a person carries fire arm without violating any provision of the Arms Act and without attracting any of the prohibitory provisions dealing with public order and law under code of Criminal Procedure and also otherwise does not interfere with the peaceful life of the public at large the matter will not be covered under the expression "Conduct of elections".

16. On behalf of learned counsel for the petitioner reliance has been placed upon a few decisions. Two decisions which are relevant and deals with the question in hand are-

(1) Mohd. Arif Khan and others Vs. District Magistrate, Lucknow and others, 1994 Allahabad Civil Journal 315. In this case Division Bench of this Court was dealing with a circular of election commission of similar nature. In para 17 of the said judgement, Bench held that a circular of the nature, as has been issued in the instant case (dated 26.5.2000, Annexure-III to the writ petition), merely on the basis of the directive of the Election Commission suffers from non application of mind and cannot be upheld. It was further observed that Election Commission under Article 324, Constitution of India has jurisdiction to issue appropriate directions within the scope of Article 324 with regard to conduct of election, but cannot control the exercise of power or discretion by a statutory authority under the provisions of the law conferring power on such authorities.

(2) Shahabuddin vs. State of U.P. and others (High Court, Lucknow Bench) 2000 (38) A.L.R. 13.A learned Single Judge of this Court relied upon the decision of the case of Mohd. Arif Khan, after discussing the various sections of code of Criminal Procedure and Arms Act did not approve the directions of the Election Commission on the basis of sweeping observation that election were to take place shortly. This Court noticed all the facts and held that fire arms on the basis of valid licence could not be directed to be deposited without there being written orders under Arms Act. In the aforementioned case this Court ok the view that a person holding firearm under valid licence could not be required to deposit the same on the basis of the order passed without application of mind and that too in accordance with law and that no law permits passing of general order to deposit fire arm on the direction of Station House Officer of the Police Station/District Magistrate. This Court noticed that holding of elections was a constitutional obligation but in the garb of discharging such an obligation, persons holding fire arms for their self defence, in absence of relevant material or even a shadow of suspicion for misusing the fire arm could not be stripped off their

fundamental right to protect their life. The very purpose of fire arm is for personal security could not be take away by an authority on whims for no reason particularly when State Election Officers and its authorities and officers did not, in turn, ensured security of their property and life from unlawful and unsocial elements. Bonafide holders of fire arms thus could not be compelled to deposit their fire arms by placing them in the same category as the lawful section in the society. There is another aspect of the matter. It is a matter of common knowledge that in a democratic country elections are to take place at all levels i.e. Municipal elections, panchayat elections, election of societies, state elections, parliamentary elections, etc. This will mean that a person who was obtain valid licence and posses a fire arm on that basis should deposit the same time and again only on the whim of State authorities, namely place and order can be maintained by stripping off sensible bonafide valid licence holders where as it cannot ensure and assure the public that unlawful elements in the society have been divested of their unlawful arms.

17.In the case of Shahabuddin (Supra) this Court issued following directions:-

(1) A writ in the nature of mandamus commanding the State of U.P. is issued directing that the citizen who have valid fire arm licences including the petitioners may not be compelled to deposit their including the petitioners may not be compelled to deposit their fire arms in general merely on the basis that Lok Sabha Election is to be held in near future.

(2) It is also directed that no District Magistrate or District Superintendent of Police or any officer subordinate to them shall compel the citizen in general to deposit their fire arm unless there is an order of the Central Government as indicated in the body of the judgement.

(3) The decision made in the case of Mohd. Arif Khan vs. District Magistrate (supra) by the Division Bench of this Court shall be followed by the State Government and its officers posted in the districts within the State of U.P.

18. In writ petition no. 26563 of 2000 Samim Abbas vs. District Magistrate, Allahabad, copy of order dated 24.9.1996 passed by Hon. R.R.K. Trivedi, J. and in writ petition no.18926/2000 Anil Kumar Chaudhary vs. District Magistrate, Allahabad, copy of the order dated 21.4.2000 passed by Hon. R.H. Zaidi, J.(Annexures 3 and 4 to the said petition) directed that petitioners in those cases shall not be compelled to deposit their fire arms except under orders passed by their Licensing authority in accordance with law. In other words unless the licenced fire arms held by a citizen was suspended/cancelled by specific order under law viz. Arms Act, he should not be compelled to deposit the same with the concerned police station or else where. Yet there is another aspect of the matter. A person holding a fire arm on the basis of valid fire arm licence may have to go out of his natural place of abode for so many compelling reasons where there may not be elections and he may be arm for his personal security. In that contingency there will be no justification for not allowing him to possess his arm. Similar will be position if one has to go with his family by road on high ways.

19. Learned counsel for the respondent commission also referred to the

case of A.C. Jose vs. Sivan Pillai and others A.I.R. 1984 Supreme Court 921, I do not find the said case to be an authority for the purpose of the present case. In the said case question regarding use of mechanical process for casting votes in the context of Article 324, Constitution of India was considered. As also directed by this Court in the case of Shamim Abbas (supra) it shall be open to the concerned authority under Arms Act, to regulate sale and purchase of ammunition during such period like elections and reasonable restriction may be placed if necessary, on purchase of aminition which may be allowed by considering cases individually considering the facts and circumstances of each case independently.

20. In view of direct decisions of this Court and the reasons given above there is no need to quash letter dated 26.5.2000 issued by Additional Commissioner State Election Commission U.P. Lucknow (Annexure III to the writ petition) as it does not contain any direction for general depositing of fire arms against the provisions of Arms Act and to this extent refuse to issue a writ of certiorari as claimed in the writ petition.

21. A writ in the nature of mandamus is issued commanding the respondents not to compel the citizens within their respective jurisdiction to surrender/deposit their fire arms provided they held valid licence, without there being a specific order passed by the competent statutory authority under Arms Act merely on the basis of the general order on the ground of holding of panchayat elections.

22. The writ petition is allowed in part as indicated above. There will be no order as to cost.

23. This order shall govern all other similar pending matters in this court and shall be deemed to have been decided in terms of the orders and directions mentioned above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JUNE 6, 2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE SHITLA PD. SRIVASTAVA, J.

Special Appeal No. 240 of 2000

Mahendra Prasad Tripathi ...Petitioner.
Versus
The Vice Chancellor Allahabad University, Allahabad and others ...Respondent

Counsel for the Petitioner:
Shri Prabha Shankar Pandey

Counsel for the Respondent:
Shri A.B.L. Gour

Indian Evidence Act, S. 115- Estoppel-Applicability

Held (para 9)

The facts of the present case do not show that the appellant was completely ignorant of the mistake in the mark-sheet issued to him and that he non fidely believed that he had secured 357 marks in the M.A. (Previous) examination and acting upon such a belief he took admission and appeared in M.A. (Final) examination. It appears that the appellant consciously took advantage of the wrong mark-sheet issued to him and perused the course of study M.A. (Final) class and also appeared in the said examination. We are, therefore, of the opinion that on the facts of the present case, the appellant cannot contend that on the principle of estoppel the university is debarred from proceeding on the basis

of the marks which he had actually secured in M.A. (Previous) examination. Consequently, we have no option but to dismiss the appeal.

By the Court

1. This special appeal is directed against the judgment and order dated 8.3.2000 of a learned Single Judge by which writ petition no. 51130 filed by the appellant was disposed of with certain directions.

2. The case of the appellant in the writ petition was that he passed M.A. (Previous) examination in English subject from Allahabad University and in the mark-sheet issued to him on 24.10.1997 he was shown to have secured 357 marks out of 600 marks. Thereafter, he took admission in M.A. (Final) class and deposited the fee, etc. He filled in the form for M.A. (Final) examination and the university issued him an admit card bearing roll no. 2537. He appeared in the back-paper examination of Ist paper of M.A. (Final) examination on 22.2.1999 after depositing the fee of Rs.153/- The result of M.A. (Final) was declared in first week of June 1999 but the appellant's result was not declared. He moved several applications for declaration of result and issuing him the mark-sheet but no action was taken. Consequently, he filed writ petition no. 39920 of 1999 praying that a writ of mandamus be issued directing the university to declare his result and issue him the mark-sheet of M.A. (Final) examination. The writ petition was disposed of on 20.9.1999 with a direction to the Controller of Examination of Allahabad University to consider the appellant's representation and communicate the decision by a reasoned order. The Controller of Examination thereafter communicated the decision 11.11.1999 of the Examination Committee of the University that his result M.A. (Final) examination cannot be declared as he had failed in M.A. (Previous) examination. It was further mentioned that on account of mistake, a wrong mark-sheet of M.A. (Previous) had been issued to him and subsequently he was informed by registered post to return the said mark0sheet. It was also mentioned that on sympathetic consideration. He was allowed to appear in M.A. (Final) examination but as he did not return the mark-sheet his examination of M.A. (Previous) had been cancelled.

3. The appellant then filed writ petition no. 51130 of 1999, which has given rise to the present appeal, praying that the order dated 11.11.1999 be quashed and a writ of mandamus be issued commanding the respondents to issue the mark-sheet of M.A. (Final) examination and declare the result. The writ petition was disposed of by the learned Single Judge on 8.3.2000 with the following directions:-

"…In the circumstances relying upon uncontroverted averments of the petitioner that he was not informed any time for appearing in the back paper of M.A. Previous, this writ petition is finally disposed of with a direction that the University will permit the petitioner to appear in back paper of M.A. Previous in English, in respect of only those papers in which the petitioner had failed and if the petitioner passes in those papers, his result of M.A. Previous in English and M.A. Final examination will be declared.

It is clarified that this order does not mean that the University will arrange for special

paper for the petitioner. The order only means that when the examinations are held in M.A. previous in English, the University will allow the petitioner to appear in the said paper."

4. The appellant feeling dissatisfied with the aforesaid direction of the learned Single Judge has preferred this special appeal and has contended that in the facts and circumstances of the case, the university was bound to proceed on the footing that the mark-sheet issued to him of M.A. (Previous) examination is correct and, therefore, his result of M.A. (Final) examination cannot be withheld.

5. The university has not filed any counter affidavit in the writ petition. However, in order to ascertain complete facts and to do justice between the parties, we permitted the university to file a counter affidavit in the appeal. Therefore, two counter affidavits, one sworn on 10.5.2000 and the other sworn on 18.5.2000 were filed on behalf of the university. The appellant filed rejoinder affidavit on 22.5.2000.

6. The case of the university as disclosed in the counter affidavits filed by it is as follows. The appellant Mahendra Pratap Tripathi appeared in M.A. (Previous) examination with roll no. 1558. A photocopy of the examination form filled in by the appellant wherein, this roll number was assigned to has been filed as Annesure-1 to the counter affidavit. A girl candidate namely, Km. Maneesha Upadhaya of the same class had been assigned roll no. 1559. After the examination was over the mark-sheet of all the students of M.A. (Previous) of English subject was prepared in the Computer Section on 24.10.1997. On account of some mistake in the mark-sheet roll no. 1558 was shown against Km. Maneesha Upadhaya and she was shown to have secured 183 marks and was declared to have failed. The name of the appellant Mahendra Pratap Tripathi was shown against roll no. 1559 and he was shown to have secured 357 marks and was declared to have passed the examination. A photocopy of the mark-sheet has been filed as Annexure-2 tot he counter affidavit. After declaration of result Km. Maneesha Upadhaya immediately contacted the university authorities and on scrutiny the mistake was discovered. Thereafter, a correct mark-sheet was prepared on 8.1.1998 in which against the roll no. 1558, the name of the appellant was shown and it was mentioned that he had secured 183 marks and had failed while against roll no. 1559, the name of Km. Maneesha Upadhaya was shown and she was shown to have passed. A copy of the corrected mark-sheet has been filed as Annexure-3 to the counter affidavit. It is specifically averred in para 7 of the counter affidavit that immediately after the mistake had been discovered, letters were sent to the appellant on 8.11.1997 both at his local address and at home address and a notice was also pasted on the notice board of the English Department. The case of the university further is that the appellant misbehaved with the Head of the English Department and also the Controller of Examination on the ground that he had been issued a wrong mark-sheet and, consequently, he was suspended from the English Department. However on his tendering apology, the suspension order was revoked and a true copy of the said order has been filed as Annexure-4. This incident occurred when the appellant was studying in M.A. (Final) examination. An order was also passed on 19.8.1998 that

the appellant may be provisionally permitted to appear in M.A. (Final) examination but the result shall not be declared till he was cleared of the charge of indiscipline for which he had been placed under suspension.

7. During the course of the hearing of the appeal, the appellant was asked to produce the original mark-sheet of M.A.(Previous) examination which he did on 23.5.2000. The mark-sheet mentions his name but the roll number mentioned thereon is 1559. In the said mark-sheet, he is shown to have secured 60,53,61,60, and 63 marks in I,II,III,IV and V paper respectively and 60 marks in Viva Voice. The total shown is 357 out of 600. The university also produced before us the copies of the appellant of I,II,III,IV and V paper wherein, he has secured 36,20,31 and 22 marks. The copy of IInd paper however was not produced. These copies bear the roll no.1558 on the first page. We have been informed by the counsel for the university that the appellant secured 29 marks in IInd paper and 45 in Viva Voice which is also mentioned in the corrected copy of the mark-sheet of the university dated 8.1.1998 (Annexure-3 to the IInd counter affidavit). The copies were shown to the appellant who admitted that the same were his copies. He also admitted that his roll number in M.A. (Previous) examination was 1558 and not 1559.

8. The facts, which emerge out from the affidavits filed by the parties are that the roll number of the appellant in M.A. (Previous) examination was 1558 and he had actually secured only 183 marks out of 600 and had failed in the examination. Km. Maneesha Upadhaya, who had been assigned roll no. 1559 had secured 357 marks and had passed in M.A. (Previous) examination. The main ground urged by the appellant, who appeared in person, is that after declaration of M.A. (Previous) examination he took admission in M.A. (Final) class and deposited the necessary fee, etc. He studied in the said class and thereafter filled in the form for M.A. (Final) examination and in fact appeared in the said examination. In these circumstances the university was estopped from contending that he had failed in M.A. (Previous) examination and, therefore, his result of M.A. (Final) examination cannot be declared. Though not argued in so many words but the contention of the appellant is based upon the principle of estoppel.

9 Assuming that the principle of estoppel of estoppel is applicable in matters relating to examination of a student in an academic institution, it has to be determined whether the facts are such which conclusively establish that the appellant believed the representation made by the university namely, that he had passed the M.A. (Previous) examination and altered his position to his detriment. The very first act attributed to the university by the appellant is that in the mark-sheet issued to him he was shown to have secured 357 marks and to have passed the M.A. (Previous) examination. But as mentioned earlier the mark-sheet though mentioned his name but mentioned roll number of another student. This should have immediately aroused a suspicion in the mind of the appellant that there was some mistake. The roll number of a student is an important feature in the examination. In all probability the appellant must be knowing that 1559 was the roll number of Maneesha Upadhaya who was a much better student. This is evident from the fact that she has secured almost double marks than that of the

appellant. The appellant may have thought to retain the said mark-sheet and take advantage of the same. According to the university, letters were sent to him on 8.11.1997 that is within two weeks of the preparation of the original mark-sheet asking him to return the mark-sheet issued to him as there was some mistake in the same. A notice to the same effect was also pasted on the notice board of English Department of University. In the rejoinder affidavit, the appellant has denied the aforesaid fact and has pleaded that he gave several applications between 7.7.1999 and 17.8.1999 praying for declaration of his result. The second counter affidavit has been sworn by the legal Assistant of the university and we have no reason to doubt its correctness. The appellant has not made any allegations of mala fide. There is no reason as to why the assertion of the University that letters were sent to the appellant both at his local address and also at his home address asking him to return the mark-sheet as there was a mistake should not be accepted. It clearly shows that within two weeks of the declaration of result the appellant had been informed about the mistake in the mark-sheet of M.A. (Previous) examination which had been issued to him. The university has further pleaded that the appellant had been suspended as he had misbehaved with the controller of Examination and Head of English Department but later on the said order was withdrawn. It is no doubt true that the appellant was admitted in M.A. (Final) class and was also allowed to appear in the examination. This was certainly a mistake on the part of the university. It appears that at the time when the appellant took admission in the M.A. (Final) class or filled in the form for the said class, the mistake was not brought to the notice of concerned person dealing with the matter. However, what we are concerned here is whether the appellant bonafidely and honestly believed the mark-sheet initially issued to him as correct and altered his position his determent acting upon such a representation. The facts of the present case do not show that the appellant was completely ignorant of the mistake in the mark-sheet issued to him and that he bona fidely believed that he had secured 357 marks in the M.A. (Previous) examination and acting upon such a belief he took admission and appeared in M.A. (Final) examination. It appears that the appellant consciously took advantage of the wrong mark-sheet issued to him and pursued the course of study in M.A. (Final) class and also appeared in the said examination. We are, therefore, of the opinion that on the facts of the present case, the appellant cannot contend that on the principle of estoppel the university is debarred from proceeding on the basis of the marks which he had actually secured in M.A. (Previous) examination. Consequently, we have no option but to dismiss the appeal.

10. In normal course of events, the appellant having failed in M.A. (Previous) examination, has to read in the said class all over again and to appear in the said examination. In such an event, the result of M.A. (Final) examination also cannot be taken into consideration. However, the learned Single Judge has issued a direction that the university will permit the appellant to appear in such back papers of M.A. (Previous) examination in which he has failed and in case he passes the previous examination his result of M.A. class (both Previous and Final) will be declared. Sri A.B.L. Gaur, learned counsel for the university has also made a statement that though under the rules the appellant was

not entitled to appear in back papers as he has secured less than 36 per cent marks in 4 out of 5 papers but as a special case and in order to mitigate the hardship caused to the appellant, the university will permit him to appear in the back papers of M.A. (Previous) examination.

11. In view of the discussion made above, the special appeal is dismissed and the judgment and order of the learned Single Judge is affirmed.

ORIGINAL JURISDICTION
DATED: ALLAHABAD: 12.6.2000

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

Civil Misc. Writ Petition No. 27000 of 2000

Kamalawati ...Petitioner
Versus
Kotwal, Rasra, Ballia.
and others ...Respondents.

Counsel for the Petitioners:
Sri Lallan Chaubey

Counsel for the Respondent:
S.C.

Article 21 of the Constitution of India-Right to life includes right to health which necessarily means in maintenance of Ecology and to check pollution-directions issued to all the District Magistrate to ensure that no break-klin is allowed to run in breach of concerned G.Os.

Held –(para-4)

The grievance of the petitioner concerns the entire society at large particularly the rural population in as much as running of brick kiln, without ensuring protection to the environment, ecology and grove, is a social menace.

By the Court

1. Heard learned counsel for the Petitioner and leaned Standing Counsel on behalf of the Respondents.

2. Petitioner claiming to be the Pradhan of the village filed a suit and certain interim order was obtained. Thereafter an application was filed before the Civil Court complaining breach of the interim order. These orders are ex parte.

3. Copy of the order sheet has not been annexed to satisfy this court that all efforts were taken to serve Defendants in the said suit.

4. Considering the controversy raised by the Petitioner, I treat this petition to be public interest litigation. The grievance of the Petitioner concerns the entire society at large particularly the rural population inasmuch as running of. Brick kiln, without ensuring protection to the environment, ecology and grove, is a social menace.

5. I regret that this petition has been filed casually. Petitioner has not even cared to produce Government Order/s dealing with the subject. The relief's sought, if allowed, are bound to seriously prejudice Respondent Nos. 4,5 and 6. Petitioner ought to have taken utmost care to place before this court relevant government Orders and legislative enactment's, e.g. Trees and Plant Protection Act, Necessary Licensing Act and Forest Corporation Act, Park and Playground Act, Etc.) This Court takes judicial notice that right to life includes right to health, which necessarily means maintenance of ecology and to check pollution.

6. In view of the above, I issue a general mandamus to all concerned authorities, including Chief Secretary, government of U.P., all the Senior Superintendent of Polices and Superintendent of Police Concerned circle and Station House Officer in the State and all other concerned authorities like District Magistrate and Sub Divisional Magistrate to ensure that no brick-kiln in allowed to run in breach of the G.O. No. 73/10b-b/1-33 dated 11th November 1965 (provided it is still in force) and any other Government Order dealing with the same subject as on date. If there is no government Order, the same may be issued by the government so as to ensure that groves are not being damaged by indiscreet running of brick-kiln.

7. In this context this Court may refer to news item published in 'Northern India Patrika' dated 08th June 2000 under the title Developing fixed chimneys **'Kiln owners seek further extension of deadline'**. The news report is reproduced in extenso.

"NEW DELHI, June 7 (UNI): The All India Brick and title manufacturers Federation (AIBTMF) has asked the government to further extend the June 30 deadline for brick kiln owners for developing fixed chimneys as per news emission norms.

Talking to newspapers here, AIBTMF vide presidnet R.P. Chandel said a further extension was necessary as so far only 50 percent of the brick kiln owners had been able to afford the new chimneys which required Rs. 10-15 lakh for construction.

As per the new emission norms introduced in 1997, brick kiolns were required to have a fixed chimney with a stack height of 22-30 metres. They are also required to have gravitational setting chambers for arresting the particulate matters.

The government has already extended the deadline twice, moving it ahead or more than three years. However, AIBTMF said if wanted the government to extend it by two more years.

Though around half of the brick kiln owners have changed to new norms, the rest cannot shift to fixed chimneys due to lack of financial assistance from banks and housing financial institutions. Thus, if the government does not extend the deadline, around 50,000 small and medium size kilns employing about one crore skilled and unskilled labour will face closure, he said.

Mr. Chandel said apart from extension of the deadline the industry also wanted soft term loans from the government.

They also demanded that the government set up a Rs. 200 crore brick kiln modernisation fund, as done for other industries to enable them to use fly ash and other waste materials for brick making.

This would help in usefully disposing about 60 million tonnes of fly ash per annum as well as saving precious top. Soil. But making kilns which use fly ash needs a total investment of around Rs. 25 lakhs per kiln. This also needs a research and development centre and thus we are also asking for a modernisation fund, Mr. Chandel said."

8. It may be noted that if it is cumbersome and cause grave hardship for

certain brick kiln owners to have fixed chimneys Government may device means to help them, but the brick kiln owners cannot be allowed to run their kilns at the cost of life and health of people living in the rural areas and natural wealth in the shape of precious grove of exquisite variety of mango, etc. of the country. Brick kiln owners must ensure observance of such restriction provided by the government in relevant government orders.

9. A writ of mandamus is issued to Respondent Nos. 1 to 3 in particular to ensure compliance of relevant Government Order on the subject, information in this respect may be provided by the District Magistrate, Ballia within one week of receipt of certified copy of this order, which may by provided to this Court.

10. Writ petition is allowed.

11. A copy of this judgment may be sent by the Registry to the following for necessary action:

1. Chief secretary, Government of U.P., Lucknow.
2. Director Agriculture and horticulture, Lucknow.
3. Director General of police, U.P. Police, Lucknow.

.....

CIVIL SIDE
DATED: ALLAHABAD 14.6.2000

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

Civil Misc. Writ Petition No. 27220 of 2000

Dr. Sanjay Kumar Singh ...Petitioner
Versus
State of U.P. & others ...Respondents

Civil Misc. Writ Petition No. 272211 of 2000

Dr.Ajay Kumar Singh Versus State of U.P. & Others

Civil Misc. Writ Petition No. 27220 of 2000

Aparna Tripathi Versus State of U.P. & Others

Civil Misc. Writ Petition No. 27212 of 2000

Dr. Girish Kumar Singh Versus State of U.P. & others

Civil Misc. Writ Petition No. 27213 of 2000

Dr. (Smt.) Kavita Saxena Versus State of U.P. & Others

In Re

Dr.Sanjay Kumar Singh ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Shri Krishnaji Khare
Shri P.S. Bhaghel

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Assignment of teachers prely by stopgap arrangement on fixed honorarium – on the basis of undertaking about not claiming any lien on the Post- and after joining the Regular Candidates they have to go- neither the such petitioners, applied pursuant to advertisement nor challenged the same before High Court after regular selection by commission- a futile exercise made by cancealment of matter of facts about giving their undertaking – In public interest as well as in the better interest students the

better candidates (Regular) should be allowed to join.-

Held – Para 28

Since the assignment of the Petitioner was purely by way of stop gap arrangement on a fixed honorarium on an unequivocal undertaking/declaration, he also had opportunity to undergo process of' regular selection' held by the Commission- but he chose to keep off, and that process for selection by the Commission was initiated without delay in the year 1998 itself, the Petitioner cannot maintain this petition at this belated stage.

(1992)2LIC 1602
1991 (4) Sec. 450
(1997) 3 See-124
1997 (5) See – 53 and 60
1997 (4) See 575
1981 Edu. Cases 359
1998 (34) ALR 740
1951 Alld. 746 (FB)

By the Court

1. In **CIVIL MISC. WRIT PETITION NO. 27220 OF 2000**, the petitioner was given an assignment (and not appointment in strict legal sense) on a fixed honorarium i.e. on the absolutely stop gap day to day arrangement on fixed amount (since no regular appointment could be made without following due process of law prescribed under U.P. Higher Education Services Commission which was bound to consume some time and thereby affecting education in the concerned institutions) vide Government Order dated 7.4.1998 (Annexure _1 to the Writ Petition).

2. The Government Order dated 07 April 1998 (Annexure –1 to the Writ Petition) categorically mentions that; subject to possessing minimum qualification prescribed by University Grant Commission, a candidate is allowed to teach by giving Rs. 100/- per lecture subject to a maximum of Rs. 5,000 per month provided he gives a declaration/undertaking on oath on stamp paper subject to the condition that capability of an available candidate is assessed (without holding interview) as per quality point marks on the basis of academic record only and as such a person shall walk out immediately on regular selection available or by 30th June. The process is to be repeated for each new academic session. Relevant Paras of the Government Order dated 7th April 1998 are 1,3,10 and 11. Director's approval dated 27th October 1998 (Annexure Writ Petition) also reiterates the same. It refers to its earlier letter dated 2 May 1998. Appointment letter dated 28th October 1998 (Annexure-3 to the Writ Petition) again re-asserts the above. It may be recalled that appointment letter was issued with reference to Manager's earlier letter dated 11th September 1998, but its copy has not been filed by the petitioner to enable the Court to have complete picture of the situation in which honorarium appointment was made.

3. This Court takes notice of the Director's letter dated 21st May 1998 (referred to in Director's letter of approval in favour of Petitioner dated 27th October 1998- Writ Annexure – 2) – found in the record of another Writ Petition.

4. In this letter of 21st May 1998 procedure for making honorarium appointment has been given. Apart from others, it contains, as its approved a proforma of 'agreement' (Anubandh) and format of appointment letter. These documents show that a candidate had to give declaration/undertaking to claim any

right against said 'assignment' on regular selectee being available or after 30th June, whichever may be earlier. Photostat copy of Director letter dated 21st May 1998 is being kept on record- (total six pages).

5. There is no statement in the petition that petitioner's alleged appointment on honorarium was subject to the condition that it shall cease immediately on a regular selectee/appointee being available from the U.P. Higher Education Service 'hereinafter called' The Commission.'

Why the Petitioner should conceal it? Paras 5 to 9 of Writ Petition be perused for this purpose.

6. The Courts have time and again deprecated adhoc appointments and emphasised upon regular appointments.

7. The petitioner was called upon to give lecturers at the rate (200-per lecture (subject to maximum of Rs. 5000/- in a month) stands on inferior footing' as compared to an adhoc appointee in a regular pay scale by adhoc selection committee' with one expert and/or facing interview from academic record only under concerned University Statute.

8. Regular Appointees are chosen and recommended by the Commission being the best amongst from the then available candidates on the basis of their academic record and performance in interview assessed objectively by a 'Selection Committee' consisting of the required members of Experts of the subject- depending upon cadre to which a post belongs.

9. The challenge in the petition is on the allegations pointing out defect/illegality in the rules and procedure adopted by the Commission for selecting candidates.

10. There is no averment in the 'petition' that Petitioner had applied against the advertisement by the Commission for regular selection. Learned counsel for the Petitioner failed to state whether Petitioner had applied against advertisement issued by the Commission.

11. There are two possibilities- namely if the Petitioner had applied, he ought to have raised his grievance at the First opportunity i.e. before the interview was held. There is no averment that he was unable to do so. Delay defeats equity if situation changes and a right accrues in favour of others (namely selected candidates) – See (1992) 2 LIC 1602 – Dr.B.S. Chauhan, J. and (1999) 4 SCC 450.

12. If the petitioner did not care to apply against the advertisement he has nothing to do with the Commission and its procedure since he indicate no desire to seek regular selection after facing 'selection committee' constituted by the Commission.

13. The petitioner's alleged appointment in the College was conditional and his continuation in the institution for taking classes is co-terminus with the end of academic session-i.e. 30th June or earlier depending upon availability of a regular selectee from the Commission. No. promise or assurance of employment can be read in the alleged engagement letter (Writ Annexure-3) approval by the Director (Writ Annexure-) in favour of the

petitioner, which were with reference to Government Order Dated 07th April 1998 (Writ Annexure-1) and Director's letters dated 21st May 1998 (referred to above). For a promise to be enforceable, the same has, however, to be clear and unequivocal. One can not read any such assurance or representation/assurance or hope in any of the documents. The petitioner is now estopped from challenging the process adopted by Commission in making regular selection while others have changed their position by Petitioner's own inaction.

14. The petitioner has no locus standi to challenge the selection process if he did not apply to the commission in pursuance to its advertisement. He ought to have agitated the matter as soon as the advertisement was made. Admittedly, it has not been done on the first opportunity and no good reason has been disclosed to the Court for said inaction.

15. Selection process by the Commission, as per its rules, cannot be permitted to be challenged by the petitioner who has allowed the Commission 'to go ahead, select candidates in pursuance of its Advertisement and the Commission and the candidates- who has applied to the Commission have now changed their position to their detriment. No prejudice is caused to the petitioner by Selection Commission as he did not even apply against advertisement by the Commission. In fact, writ petition is not maintainable at the instance of the Petitioner.

16. The petitioner cannot be permitted to change his position after the Commission has made selection and keep the selected candidates at bay and watch the development and Court proceeding for. The fence as they may not be aware and also not interested as select list may not have been declared in a given case. Petitioner, admittedly, did not raise a finger or pointed out defect to the State Government/the Commission or otherwise the State Government/Commission may have, if convinced, removed the alleged defects and not undertaken the exercise of selection in the process on being highlighted by the petitioner. No objection being taken at the earliest, Petitioner cannot be allowed to turn around and raise objection taking all concerned by surprise.

17. Honorarium assignees have no right in law or otherwise after giving undertaking as per Paras 1,3, and 10 and Government Order dated 7th April 19.98, writ Annexure 1-pp. 19 and 21 Director's approval letter dated 27th October 1998 - Paras 2,3 and 4 writ Annexure 2- PP 25 and 26, Manager's Appointment letter dated 28th October 1998 writ Annexure-3 declaring that he shall make no claim on regular appointee being available and abide by conditions of Government Order dated 07th April 1998.

18. One will appreciate that process of selection, howsoever defective, so long there is no allegation of manipulation, is much better than the process adopted in a case of assignment on honorarium basis exclusively on the basis of academic record and without interview by Selection Committee with experts.

19. It will also be useful to recall a few decisions by the Courts wherein ratio descendi laid down is to the effect that courts should be slow to interfere with the decision of Expert Bodies and in the matters of Educational Institutions. Reference may be made to (1997) 3 SCC

1.4, 1997 (5) SCC 53 & 60; (1997) 4 SCC 575; 1981 Edu. Cases 359 (DB) and (1998) ALR 740.

20. Assignment on honorarium if continued, lie adhoc/stop gap arrangements in the past, it is going to prove itself another device to seek entry from back door depriving better candidates to seek regular appointment. It will in correct deprive many others, who may not like to take up a stop gap assignment on fixed emoluments and wait in sanguine hope of availing opportunity to seek regular appointment- with security and certainty.

21. It is in general public interest as well as the students and the institutions in particular that the best available candidates (who are at present the candidates selected by the Commission), should be allowed to join the institutions.

22. The compassion, sympathies and equities can not be allowed to fly over and frustrate regular appointments. Honorarium appointees, like the petitioner, can be allowed in the institution only so long as it does not infringe the rights and interest of others, namely regular appointees.

23. In that situation Court must not exercise its equitable extra-ordinary discretionary jurisdiction. In fact, petitioner has no case in view of the above to continue after 30th June 2000.

His earlier Writ Petition No. 79404 of 1999 is pending as it is not listed/heard in spite of order of the Bench and now rendered infructuous on regular selectee being recommended and available.

24. Learned counsel referred to several orders, some of which are prior to 07th April 1998,I.e. issuance of relevant Government order which is the basis of the claim of the present petitioner. There is no averment that in those cases similar conditions existed. Petitioner has deliberately concealed that he had complied or not with the conditions contained in Government Order dated 07th April 1998 (Annexure-1 to the Writ Petition) approval dated 27th October 1998 (Annexure-2 to the Writ Petition), Assignment letter dated 28th October 1998 issued by the Principal of the College (Annexure-3 to the Writ Petition. Orders passed by the Benches of this Court in other petitions in the past cannot be treated as binding precedent in the above circumstances as there is no adjudication of any issue on merit after recording reasons and these were merely by ad interim measure in different situation.

25. By passing interim orders restraining regular selectee, Court will not encourage stopgap arrangements. On the other hand,. Court will unconsciously, by granting interim orders, which could be granted only if the petition is finally allowed, shall discourage regular selectee to wait and encourage to join elsewhere because of matter being sub judice. Why a good and brilliant teacher go for ligigation and stake his claim for a job without security and certainty. Interim order, if issued , will issued, will hang like a Damocoels' sword.

Court should not be tempted to pass order keeping regularly selected candidates in a fix and thereby give an advantage/or upper edge to the Petitioner for gaining time to mature or harness their rights by making claims before State Government

on so many considerations, other than merit, for regularisation.

26. Be that as it may be-a Court cannot place a regularly selected candidate in original position if interim order was not passed, in the eventuality of petition being dismissed after several years. No one can be reasonably expected to wait indefinitely when he cannot be compensated for loss of salary and seniority for the period he is prevented to join by virtue of Court's interim order.

27. Courts should not give better deal to the one (Petitioner) by its intervention and thus non-suit regular selectees. Equity must follow law and to the extent it does not infringe upon others right. Petitioner has not been vigilant and thus there is no equity either in his favour.

28. Since the assignment of the Petitioner was purely by way of stop gap arrangement on a fixed honorarium on an unequivocal undertaking/declaration; he also had opportunity to undergo process of 'regular selection' held by the Commission – but he chose to keep off, and that process for selection by the Commission was initiated without delay in the year 1998 itself, the Petitioner cannot maintain this petition at this belated stage.

In my opinion honorarium appointees have no prima facie case in the facts of the present case.

29. Considering all the aspects with reference to general interest of Education/Academic institution, it is also not a fit case for interference under Article 226, Constitution of India. Moreover, present petitioner is guilty of non-disclosure of relevant and material fact, as indicated in the earlier part of the judgment. This Court declines to exercise its jurisdiction under Article 226, Constitution of India in view of the fact that he has not approached the Court with clean hands (see 1951) All 746 (FB), a view consistently upheld in several decisions of the Courts.

30. It may also be noted that this very Petitioner earlier filed Writ Petition No. 39404 of 1999 claiming a writ or direction in the nature of mandamus commanding the Respondent (Same as in the present petition) not to interfere in the functioning of the Petitioner as ad hoc teacher till the regularly selected incumbent by the U.P. Higher Education Services Commission called the 'Commission") joins the college- when he written statement working on fixed honorarium as stop gap arrangement. The grievance in the earlier petition of Dr. Sanjay Kumar Singh (present Petitioner), who was engaged under Government Order dated 07th April 1998, was to the extent that he should be allowed to continue till a regularly selected candidate by the Commission was available.

31. There is no grievance in the said Writ Petition No. 39404 of 1999, record of which was summoned from the Registry and perused, that he should be continued beyond 30th June. Petitioner has no right to continue after the Commission has recommended regular selectee. In view of the above, Petitioner is estopped in law and cannot be permitted to challenge the selection of the Commission/or beyond 30th June as an after thought. In this petition, Petitioner has assailed the condition of making fresh 'honorarium assignments' for next academic session. Perusal of Para 22 read with Annexure-7

to the Writ Petition and Para 22 gives an incomplete and disputed picture, Couiously there is no mention anywhere in the Writ Petition as to what happened on 05th May 2000 when the delegation of the honorarium teachers was supposed to meet the representative of the Government. Information on this aspect has been conveniently withheld. Obviously order was obtained from the Division Bench by concealing relevant and material fact.

32. Again Annexure 8 to the Writ Petition to the said Writ Petition refers to an order passed dated 19th May 1999 disposing Writ Petition No. 2-830 of 1999 (Dr. Shivanand and another versus State of U.P. and others) disposing the petition in limine. From the averments in the present petition (Writ Para 23), it is not clear as to whether Dr. V.K.Srivastava (Petitioner in Writ Petitioner No. 21319 of 2000) has made claim in his petition as an 'honorarium appointee' for continuing until a regularly selectee was available irrespective of 30th June, cut off date or he had claimed continuance on the basis of his substantive appointment.

I called for the original record of Writ Petition No. 21319 of 2000 and perused the same.

33. Annexure-5 to the said petition is Director's letter dated 20th April 2000 addressed to the Secretary/Authorised Controller of Jadishpur Sanskrit Mahavidyalaya, Varanasi intimating that the Commission has recommended one Ravindra Kumar Singh. One can notice that copy of the Government Order dated 07th April 1998 was not annexed with the said petition for perusal of the Court and it was conveniently withheld and concealed from the Court and thus prevented the Court from noticing its contents, e.g. a honorarium appointment was subject to the condition of giving an undertaking/declaration to vacate the post immediately on a regularly selected candidate being available. The Division Bench, at the admission stage passed an interim order dated 05th May 2000 (referred to in Para 23 to the above mentioned first petition and annexed as Annexure-8 to the said petition. Writ Petition of Dr. V.K. Srivastava has been directed to be listed in the week commencing 10th July 2000. As mentioned above, an interim order obtained by concealing material Government Order cannot be followed on the Principle of parity.

34. It is evident that the said Petitioner and others have not approached the Court with clean hands in as much as they have concealed material face, viz they were required to and have actually given an undertaking/declaration on oath on stamp paper for not making any claim for regular appointment or end of academic session ending on 30th June, and walk out immediately on a regularly selected candidate by the Commission being available.

The Petitioner has conveniently ignored to file a copy of the format in which his appointment letter was to be issued,(see Annexure-2 to the petitioner 2-Pp25).

35. The present Petitioner as well as the Petitioners in the above referred other petitions have withheld as to whether they had filed affidavit on stamp papers as required under Para 3 of the Government Order dated 07th April 1998 (Annexure-1 to the present Writ Petition –pp 20).

Apparently, all the honorarium appointees were required to file undertaking/declaration for making no claim for regular appointment vis-s-vis regularly selected candidate by the Commission being available or after 30th June- when new 'honorarium assignment' is to be made. There is a clear and well-conceived attempt to misrepresent facts by concealing relevant material and thereby mislead the Court.

36. The concerned educational authorities required management of a Post graduate Government aided institutions affiliated to a State University to obtain an 'affidavit' on stamp in view of Para 3 of the Government Order dated 07th April 1998. Copy of letter dated 21st May 1998 sent by Director of Higher Education, U.P. to Government to Government aided post-graduate institutions referred to above shows that format of application, appointment and declaration (Anubandh) were enclosed. Petitioners have not filed copies of the above formats/documents with the petition as perusal of these documents would have clearly exposed that honorarium appointee was required to give a declaration that he shall get himself automatically relived on 30th June or earlier in case of a duly selected candidate by the Commission being available and that he shall make no claim in this respect. Such persons, like the Petitioner, cannot be permitted to resile from his undertaking without establishing necessary facts necessary for withdrawing an admission. There is no foundation for such a withdrawal in the petition.

In view of the above, Petitioners are not entitled to the relief claimed and the Writ Petitions are liable to be dismissed with costs.

In view of what has been stated above earlier Writ Petition No. 39404 of 1999 having been filed by Dr. Sanjay Kumar Singh has become infructuous. This fact may be brought to the notice of the Bench when said Writ Petition is listed Copy of this judgment shall be kept on the record of Writ Petition No. 39404 of 1999 (Dr. Sanjay Kumar Singh versus State of U.P. and others0.

For the reasons given above, the above Writ Petition. Civil Misc. Writ Petition No. 27220 of 2000 including all other above referred writ petitions fail and dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.5.2000

BEFORE
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 30762 of 1996

Smt. Fatma Parveen and others
...Petitioners
Versus
State of U.P. through Secretary, Karmik Vibhag, Lucknow and others ...Respondents.

Counsel for the Petitioners:
Shri Ashfaq Ahmad Ansari
Shri S.W. Ali

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

U.P. Basic Shiksha Adhyapak (Sewa Niyamawali), 1981-Policy decision to appoint Urdu Assistant Teachers in Primary Schools-Posts advertised-selection list prepared subsequent

cancellation without enquiry showing any irregularity or violation of rules-cancellation, held to be arbitrary and malafide-Hence quashed.

Held(Para 9)

The respondents have not produced any document of record demonstrating the bonafide of the respondent no.5 that he enquired into the matter and found some irregularity in the selection of the candidates and that there smacked some corruption or favouritism. The respondents no. 5 and 6 have not shown a good conduct in the court also. They have not filed the counter affidavit in the registry after supplying the copy of the same to the petitioners' counsel. I am unable to understand as to why they did not place the same in the court for perusal. What transpires from the conduct of the respondents is that they have nothing on record to show the court that the order of cancellation of the selection list of urdu Assistant Teacher was based on sound reasons and that it was so done after enquiry, and the respondent no. 5 was satisfied that some irregularity has been committed or the rules providing for selection has been violated. In such state of circumstances and having regard to the observations of the Hon'ble Supreme Court, quoted above, no other view, except that the respondent no. 5 has arbitrarily and with malafide intention cancelled the selection list by the impugned order dated 11.10. 1995, can be taken, Therefore, it deserves to be quashed.

Case law discussed;
JT 1993 (5) SC 439
JT 1999 (10) SC 29

By the Court

1. The State Government (respondent No. 1) took a policy decision to appoint in the year 1995-96 about 5,000 Urdu Assistant Teachers in the Primary/Upgraded Primary Schools established and managed by the U.P. Basic Shiksha Parished in this regard a Government order No. 2709/15-5-95-75/95 dated 21-7-1995 was issued, providing that such appointments shall be made under the provisions of U.P. Basic Shiksha Adhyapak (Sewa Niyamawali), 1981 in pursuant to the aforesaid policy decision. The District Basic Shiksha Adhikari issued a notice, published on 6-8-1995 in daily newspaper Amar Ujala, Meerut inviting applications for appointment on the posts of Urdu Assistant Teacher. A number of candidates applied for. After scrutiny those found suitable, were allowed to appear in the competitive examination held on 10-9-1995. After valuation of the performances in the competitive examination, a list of successful candidates was published on 15-9-1995. But the appointment letters were not issued to the selected candidates for quite a long time, therefore, by means of this petition under Article 226 of the Constitution of India, the petitioners sought for a writ in the nature to mandamus directing the District Magistrate, Saharanpur, the respondent no. 5 and the Basic Shiksha Adhikari, Saharanpur, respondent no. 6 to issue appointment letters to the petitioners.

2. Initially, this petition was filed by four petitioners, but later on, 10 others jointed the suit. They have been impleaded as petitioners no. 5 to 14.

3. During the pendency of the petition, the petitioners could know, that the District Magistrate, respondent no. 5 had already cancelled the selection list by order dated 11-10-1995 and fresh notice inviting applications for appointment on the post of Urdu Assistant Teacher in the district has been issued. Therefore, they

sought, by amendment, to add in the prayer clause to the effect that:-

"to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 11-10-1995 passed by the respondent no. 5 and the advertisement dated 13-9-1998 issued by respondent no. 6."

4. Mohd. Aslam, the petitioner no. 2 filed a rejoinder affidavit in the court after serving a copy thereof on the Chief Standing Counsel. On receipt of the rejoinder affidavit, it was believed that the counter affidavit must have been filed by the respondents in the office. So a direction to the office was made for tracing out the counter affidavit and placing the same on record. The office on 6-3-2000 reported that no counter affidavit has been filed by the respondents so much so, there is no entry of receipt in the progress register. It appears that the respondents after supplying a copy of the counter affidavit to the petitioners counsel, did not file the same in the Registry. Since no one was present on that date on behalf of the respondents, therefore, no orders could be passed and the petition was directed to be listed on next day. On the next day also no one was present for the respondents, therefore, the matter was again directed to be listed on the next day. One Sri Fahim Ahmad, holding brief of Sri S.G. Hasnain, the counsel for respondents no. 4 and 6 appeared on 9-3-2000 and he was informed that on 13-3-2000 the case will be taken up for admission/hearing. On the said date, the lawyers were on strike, therefore, the matter was taken up on 30-3-2000. Learned Standing Counsel appeared for respondents no. 1,2, and 5 but did not file even the copy of the counter affidavit supposed to have had been filed by the respondents in the Registry. None was present representing the respondents no. 4 and 6. Thus the petition has not been contested by the respondents.

5. The grievance in this petition is mainly against respondents no. 5 and 6. But none has come forward to oppose the petition. I heard the counsel for the petitioners. For want of instructions and the counter affidavit, on record, the learned Standing Counsel, was not in a position to controversy the assertions made in the petition and the submissions offered by the counsel for the petitioners.

The admitted facts, as it appears from the record, are;-

(1) That the State Government took a policy decision to appoint Urdu Assistant Teachers in Primary School, established by the U.P. Basic Shiksha Parishad.

(2) That the Basic Shiksha Adhikari, respondent no. 6 issued a notice in the daily newspaper Amar Ujala inviting the applications for appointment on the post of Urdu Assistant Teacher in Primary Schools in District Saharanpur.

(3) That a number of candidates, including the petitioners did appear in the competitive test held on 10-9-1995 and after evaluation of the performance of the candidates in the competitive test, a list of selected candidates, contained in annexure-4 to the writ petition, was published on 15-9-1995 and

(4) That the District Magistrate, Saharanpur, respondent no. 5 cancelled the selection list by order dated 11-1-1995.

6. The sole contention of the learned counsel appearing for the petitioner is that the act of the respondent no. 5, cancelling the selection list, is arbitrary and in violation of the settled norms and the standard. It is submitted by him that the Basic Shiksha Adhikari was the member of the Committee constituted for selection of the Urdu Assistant Teacher for their appointment in the Primary Schools in the district, the District Magistrate on the sole ground that the Basic Shiksha Adhikari orally informed that some basic errors have been committed in the selection of the candidates for apointment as Urdue Assistant Teachers, cancelled the selection list, without holding enquiry that the selection has been vitiated on account of the violation of the Rules or for the reason that it smacks of corruption, favouritism, nepotism or the alike.

7. Hon'ble Supreme Court in Dr. Mukherjee V. Union of India and other (judgements Today 1993 (5) SC 439) has held that-

"In the backdrop of these facts, this Court, while repelling the extreme submission that the Government as the appointing authority wields absolute power to approve or disapprove of the list at its sweet-will, observed, that where the Government is satisfied after due enquiry that the selection has been vitiated on account of vio9lation of rules or for the reason that it smacks of corruption, favouritism, nepotism or the alike, it may refuse to approve the list in which case if must record the reasons for its action and produce the same in court".

8. Similarly in the case of Bhagwan Parshu Ram College and another v. State or Haryana and others (Judgments Today 199 (10) SC 29), the Hon'ble Supreme Court has held that:-

"It is no doubt true that the position in law is that a selection process commenced for an appointment may be cancelled or stopped at any stage or not completed by appointment of the selected candidate but such action can be attacked as arbitrary or mala fide."

9. In the instant case, the petitioners appeared in the competitive test and the Committee found them suitable for appointment as Urdu Assistant Teacher in the Primary Schools and, therefore, declared them successful. The District Magistrate whimsically giving a lame reference to the conversation with the Basic Shiksha Adhikar; respondent no. 6, cancelled the selection list and refused to issue appointment letter to the petitioners and other selected candidates shown in the select list, contained in Annexure-4 to the writ petition. The respondents have not produced any document or record demonstrating the bonafide of the respondent no. 5 that he enquired into the matter and found some irregularity in the selection of the candidates and that there smacked some corruption or favouritism. The respondents no. 5 and 6 have not shown a good conduct in the court also they have not filed the counter affidavit in the registry after supplying the copy of the same to the petitioners' counsel. I am unable to understand as to why they did not place the same in the court for perusal. What transpires from the conduct of the respondents is that they have nothing on record to show the court that the order of cancellation of the selection list of Urdu Assistant Teacher was based on sound reasons and that it was so done after enquiry and the respondent no. 5 was

satisfied that some irregularity has been committed of the rules providing for selection has been violated. In such state of circumstances and having regard to the observations of the Hon'ble Supreme Court, quoted above, no other view, except that the respondent no. 5 has arbitrarily and with malafide intention cancelled the selection list by the impugned order dated 11-10-1995, can be taken. Therefore, it deserves to be quashed.

10. The writ petition is allowed. The impugned order dated 11-10-1995 is hereby quashed. The respondents no. 5 and 6 are directed to issue appointment letters to all the candidate whose names appear in the selection list, contained in Annexure-4 to the Writ petition.

Petition Allowed.