ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.7.2002

BEFORE
THE HON'BLE ANJANAI KUMAR, J.

Civil Misc. Writ Petition No. 15965 of 2002

Radhey Shyam ...Petitioner
Versus
X Additional District and Sessions Judge and others ...Respondents

Counsel for the Petitioner:
Sri C.M.Rai

Counsel for the Respondents:
Sri Iqbal Ahmad
S.C.

Provincial Small Causes Courts Act 1887- Section 25- suit for eviction on the ground of arrears of rent- dismissed by the trial court with specific finding- despite of 2nd and 3rd notice no suit filed- Notice stand waived- Revisional court has no power to record such finding other than the finding of fact recorded by trial court.

Held- para 5

Even if earlier occupant Sri Hari Baghwan Teneja might amount to sub-letting but the fact is also that after the service of second and third notices by the land lord if no action is taken by the land lord the notice stands waived. Thus, finding recorded by the trial court that suit deserves to be dismissed cannot be said to be perverse findings which required interference by the revisional court to exercise its power under section 25 of the Provincial Small Cause Courts Act, 1887.

Case law discussed:
1997 (1) ARC-338, 1999 (2) ARC- 524, 2000 (2) ARC-731, 1990 (1) ARC-93, 1982 ALJ-916

(Delivered by Hon'ble Anjani Kumar, J.)

1. This writ petition is filed by the tenant against the judgement dated 19 February, 1996 passed by the Small Causes Court, whereby the suit filed by the land-lord -respondent for eviction due to arrears of rent demanded from the petitioner was dismissed. The demand was for arrears of rent and water-tax which had not been paid by the petitioner inspite of demand and further the tenant had sub- let the accommodation in favour of one Sri Hari Bhagwan Tenaja and thus may be liable for eviction. This suit was filed by the land lord for the eviction, which was contested by the tenant-petitioner. After affording opportunity to the parties the trial court found that accommodation in fact was sub-let by the petitioner-tenant in favour of Sri Hari Bhagwana Taneja, in full knowledge of the land lord. The suit for eviction was, therefore, dismissed with costs. The defence taken by the tenant was that the land lord was in know of the fact that Sri Hari Bhagwan Taneja was carrying business of manufacturing Wax Candle alongwith Agarbati and, therefore, this cannot be said to be sub-letting as the same was within the knowledge of the land lord. The trial court discussed the case of the tenant, rejected the suit of land lord and held that since it was in the knowledge of the land lord that Sri Hari Bhagwana Taneja was carrying business with the tenant the same cannot be said to be sub-let and dismissed the suit.

2. Aggrieved thereby the land lord filed a revision under Section 25 of the Provincial Small Cause Courts Act, 1887. The revisional court on the basis of findings recorded by the trial court found that findings recorded by the trial court

deserves to be reversed and recorded its own findings that the suit filed by the land lord deserves to be decreed as trial court committed error in dismissing the same. The revisional court, therefore, decreed the suit after recording its own findings.

3. Learned counsel for the petitioner relied upon the decision of this court reported in 1997 (1) Allahabad Rent Cases at page 338, Sardar Gurdeep Singh Vs. VIth Additional District Judge, Kanpur Nagar and another. The law with regard to the interference under Section 25 of the Provincial Small Cause Courts Act, 1887 is well settled.

4. "It is the well settled in law that the Revisional Court in exercise of the power under Section 25 of the Act has got no jurisdiction to reappraise the evidence and reverse the findings of the trial court on the questions of fact and substitute its own finding in case the Revisional Court is not satisfied with the findings of fact recorded by the trial court, it could at the best remand the case to the trial court.

It is also well settled in law that if the findings recorded by the trial court are not based on any evidence or were in respect of the jurisdictional fact, or were vitiated by error of law, the Revisional Court is entitled to interfere with the said findings and could record its own findings."

5. By applying the principle laid down in the aforesaid case, in the present case it cannot be said that findings arrived at by the trial court are perverse and, therefore, view taken by the revisional court for decreeing the suit of the land lord is not in accordance with law. The similar view was taken by this court in 1999 (2) Allahabad Rent Cases at page 524, Suresh Kumar Sahu Vs. Ram Chandra Sahu and another and in case of Om Prakash and others Vs. IInd Additional District Judge, Saharanpur and others, 2000 (2) Allahabad Rent Cases, at page 739 Learned counsel for the petitioner further relied upon a decision reported in AIR 1966, Allahabad at page 623, Ram Dayal Vs. Jawala Prasad, whereby the court held that after service of first notice as in the present case if no suit is filed, the notice stands waived. Even if earlier occupant Sri Hari Bhagwan Taneja might amount to sub-letting but the fact is also that after the service of second and third notices by the land lord if no action is taken by the land lord the notice stands waived. Thus, finding recorded by the trial court that suit deserves to be dismissed cannot be said to be perverse findings which required interference by the revisional court to exercise its power under section 25 of the Provincial Small Cause Courts Act, 1887, Learned counsel for the petitioner relied upon the decision reported in 1990 (1) Allahabad Rent Cases at page 93, Badri Nath Garg Vs. Sheo Prasad Tandon and 1982 ALJ at page 916 Smt. Shyam Kumar Gupta Vs. Shanker Sahai and another. In view of the law laid down by this Court, I am of the opinion that revisional court committed error in decreeing the suit after reversing the findings recorded by the trial court and arrived at different findings. In this view of the matter the petition deserves to be allowed and the order of the revisional court deserves to be quashed. The matter is, therefore, remanded back to the trial court to decide it afresh in the light of the observations made by the revisional court. As the case is very old, therefore, trial court is directed to decide the case within a period

of three months from the date a certified copy of this order is served upon him.

6. What has been stated above, the petition is allowed. The order of the revisional court is quashed and the matter is remanded back to the trial court. The trial court is directed to decide the matter within a period of three months from the date a certified copy of this order is served upon him, on the basis of evidence on record and the observations made by the revisional court after affording an opportunity to the land lord as well as to the tenant.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.7.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 41552 of 1997

Smt. Har Piari Devi Gupta and others
...Petitioners

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Dhan Prakash

Counsel for the Respondents:
S.C.

U.P. Act No. 13 of 1972- Section 21 (8)- Enhancement of Rent- market value assessed as Rs.921498/- enhancement of rent from Rs.2000/- to Rs.4000/- not proper is can not be less than1/12 of the 10% of market value-direction issue for reconsideration.

Held- Para 3

The Prescribed Authority and the Appellate Authority having come to the conclusion that the market value of the accommodation in question being Rs.9,21,498/-, the enhancement to the extent to Rs.2,000/- by the Appellate Authority is non-application of mind and therefore deserves to be set aside and rent should be fixed according to the formula given under the Statute i.e. Rs.12th of 10 percent of the market value. 1/10 of the market value comes to Rs.92149/- and 1/12 of this amount i.e. Rs.9,21,498/- comes to roughly about seventy six thousand and odd per month. Since both the authorities have already arrived at the conclusion that the market value of the accommodation in question under the tenancy would be Rs.9,21,498/-, there was absolutely no justification in not fixing the rent payable on the basis of the aforesaid formula. The orders dated 21.11.1996 and 1.9.1997 passed by Prescribed Authority therefore deserve to be quashed to the extent the version of the quantum of the rent payable by the respondent-tenant.

(Delivered by Hon'ble Anjani Kumar, J.)

1. These two writ petitions, namely, writ petition no.41552 of 1997 and 11836 of 2001 filed by petitioner, Smt. Har Piari Devi Gupta and the land lord, the State of U.P. through Collector, Moradabad challenging the orders passed by the Prescribed Authority as well as by the Appellate Authority under the provision of Section 21 (8) of U.P. Act No. 13 of 1972, hereinafter shall be referred to as the Act, since raise common question of facts and law, thus being disposed of by this common judgement together.

2. The facts leading to the filing of present writ petition being writ petition no. 41552 of 1997 are that the Respondent no. 1 (petitioner in writ petition no. 11838 of 2001) is admittedly tenant of the aforesaid accommodation in question. The petitioner land lord filed an

application under Section 21 (8) of the Act with the prayer that the rent be enhanced. The said application for enhancement of the rent has been decided by the Rent Control and Eviction Officer (Prescribed Authority) holding that the provisions of U.P. Act No. 13 of 1972 are applicable and according to the evidence on record, there are sufficient grounds to enhance the rent of the accommodation in question, whose market value has been assessed to Rs.9,21,498/- and in view of the provision of U.P. Act No. 13 of 1972, the enhanced rent has been fixed as Rs.2,000/- per month, which shall be payable by the tenant since 1.9.1990. It is on this ground, the application filed by the petitioner-land lord was allowed in part.

3. Aggrieved by the aforesaid order, the petitioner- land lord preferred an appeal before the Appellate Authority and Appellate Authority accepted the market value to be Rs.9 lacs and odd and has enhanced the rent from Rs.2,000/- to Rs.4,000/- per month w.e.f. 1.9.1990. It is these two orders, which have been challenged by the petitioner- land lord on the ground that according to the provision of Section 21 (8) of the proviso, the rent should be enhanced to $1/12^{th}$ of 10 per cent of the current market value. The Prescribed Authority and the Appellate Authority having come to the conclusion that the market value of the accommodation in question being Rs.9,21,498/- the enhancement to the extent to Rs.2,000/- by the Prescribed Authority and Rs.4,000/- per month by the Appellate Authority is non application of mind and therefore deserves to be set aside and rent should be fixed according to the formula given under the Statute i.e. $1/12^{th}$ of 10 per cent of the market value. $1/10^{th}$ of the market value comes to Rs.92,149/- and 1/12 of this amount i.e. Rs.9,21,498/- comes to roughly about seventy six thousand and odd per month. Since both the authorities have already arrived at the conclusion that the market value of the accommodation in question under the tenancy would be Rs.9,21,498/-, there was absolutely no justification in not fixing the rent payable on the basis of the aforesaid formula. The orders dated 21.11.1996 and 1.9.1997 passed by Prescribed Authority as well as by the Appellate Authority, respectively, therefore deserves to be quashed to the extent the version of the quantum of the rent payable by the respondent - tenant.

4. I am in full agreement with the arguments advanced by learned counsel for the petitioner- land lord. The orders dated 21.11.1996 and 1.9.1997 passed by Prescribed Authority as well as by the Appellate Authority deserve to be quashed to the extent that the Rent Control and Eviction Officer shall fix the rent on the basis of the market value arrived at and affirmed by the Appellate Authority with effect from the date when the order was passed i.e. from 21.11.1996 taking market value as Rs.9,21,498/- and fixed the rent payable calculating at the rate of $1/12^{th}$ of 10 per cent of the aforesaid market value per month w.e.f. 21.11.1996.

5. In view of what has been stated above, both the writ petitions are allowed. The orders dated 21.11.1996 are hereby quashed. The Rent Control and Eviction Officer is directed to calculate and fix the rent taking the market value as Rs.9,21,498/- and 1/12 th of 10 per cent of the aforesaid market value with effect from the date when the original order passed i.e. on 21.11.1996.

In the result both the writ petitions are allowed. Order accordingly. However, in the facts and circumstances of the case, the parties shall bear their own costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2002

BEFORE
THE HON'BLE R.R.YADAV, J.
THE HON'BLE Y.R. TRIPATHI, J.

First Appeal from order No. 348 of 2002

Smt. Boby Devi ...Appellant
Versus
Kiran Pal Singh ...Respondent

Counsel for the Appellant:
Sri K.M. Garg
Sri Amit Daga

Counsel for the Respondent:

Family Courts Act 1984- Section 10 readwith order 43 r.(i) (d) CPC- suit for Restitution of conjugal rights decreed ex parte - application under order 9 r. 13 rejected- against that Appeal held maintainable.

Held - para 8 and 9

There is yet another reason to arrive at the aforesaid conclusion. Sub Section (1) of Section 19 of the Family Courts Act, 1984 provides that save as provided in sub- section (2) and notwithstanding any other law, an appeal shall lie from every judgement or order, not being an interlocutory order of a Family Court to the High Court both on facts and on law. From bare reading of sub section (1) of Section 19 of the Family Courts Act, it is crystal clear that an appeal is maintainable against every judgement or order passed by a Family court provided it is mot an interlocutory order. As a matter of fact, an appeal is prohibited against interlocutory order and consent decree or order passed by Family Courts.

Case law discussed:
AIR 1978 SC 47, AIR 1933 PC 58
AIR 1970 SC 406

(Delivered by Hon'ble R.R. Yadav, J.)

1. The present appeal is filed under section `19 of the Family Courts Act against the order dated 14.5.2002 passed by the Family Court, Meerut whereby the Family Court has rejected the application of the appellant moved under order IX Rule 13 C.P.C. read with Section 151 C.P.C.

2. When the aforesaid appeal was presented in the Registry, the office has raised an objection to its maintainability in view of section 19 (5) of the Family Courts Act.

3. The learned counsel for the appellant, Sri K.M. Garg contended that the present appeal is maintainable within the meaning of section 19 of the Family Courts Act and the office report deserves to be overruled.

4. We have given our thoughtful consideration to the argument raised by Sri Garg, learned counsel for appellant and we are of the opinion that there is substance in the argument raised by the learned counsel for appellant. The office report deserves to be overruled for the reasons given here in below.

5. A close scrutiny of section 10 of Family Courts Act clearly provides that subject to the other provisions of this Act and the Rules the provisions of Code of Civil Procedure, 1908 and of any other law for the time being in force shall apply to the suits and proceedings other than the

proceedings under Chapter IX of the Code of Criminal Procedure, 1973 before a Family Court and for the purpose of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.

6. It is evident from perusal of Section 10 of Family courts Act that provisions of Civil Procedure Code are applicable to the proceedings before the Family Courts. It would be pertinent to observe here that provisions encoded in Civil Procedure Code are based on principle of natural justice and fair play, hence all the provisions of Civil Procedure Code are made applicable to the proceedings before Family Courts within the meaning of Section 10 of the Family Courts Act. It is true that right to file an appeal is creation of a statute, therefore, the controversy involved in the present case deserves to be examined with reference to statutory provisions.

7. Once it is found that all the provisions of Code of Civil Procedure are applicable to the proceedings before Family Courts and the Family Courts are to act as a civil court then by corollary of reasons an appeal against the order impugned dated 14.5.2002 is maintainable within the meaning of clause (I) of sub-section (1) of Section 104 of C.P.C., read with sub- rule (d) of Rule 1 of Order XLIII which provides that an appeal shall lie against an order rejecting an application moved under Order IX Rule 13 C.P.C. , to set aside a decree passed exparte. It is held that if a suit filed under Section 9 of the Hindu Marriage Act for restitution of conjugal right is decreed exparte by Family Court then aggrieved party is entitled to move an application to recall such exparte decree. Since in the present case Family Court has rejected the application moved under Order IX Rule 13 CPC and declined to recall exparte decree, therefore, in such a situation against rejection of application moved under Order IX Rule 13 CPC, an appeal is maintainable within the meaning of clause (I) of sub- section (1) of Section 104 CPC read with sub rule (d) of Rule 1 of Order XLIII which provides that an appeal shall lie against an order rejecting an application moved under Order IX Rule 13 CPC to set aside a decree passed exparte.

8. There is yet another reason to arrive at the aforesaid conclusion, Sub section (1) of Section 19 of the Family Courts Act, 1984 provides that save as provided in sub- section (2) and notwithstanding anything contained in the Code of Civil Procedure or in the Code of Criminal Procedure or in any other law, an appeal shall lie from every judgement or order, not being an interlocutory order of a Family Court to the High Court both on facts and on law.

9. From bare reading of sub section (1) of Section 19 of the Family Courts Act, it is crystal clear that an appeal is maintainable against every judgement or order passed by a Family Court provided it is not an interlocutory order. As a matter of fact, an appeal is prohibited against interlocutory order and consent decree or order passed by Family Courts.

10. Now the next core question which is to be determined relating to maintainability of the instant F.A.F.O. would be what is correct interpretation of expression 'interlocutory order' used under sub section (1) of Section 19 of Family Courts Act. It is submitted by the

learned counsel for the appellant that generally the expression 'interlocutory order' is taken to mean as a converse of the term 'final order'. In support of his aforesaid contention he placed reliance on a decision rendered by Apex Court in the case of Madhu Limaye Vs. State of Maharastra, reported in AIR 1978 Supreme Court 47.

11. In our considered opinion the connotation 'interlocutory order' used under sub section (1) of Section 19 of Family Courts Act means if Family Court in exercising its power passed an order in a way allowing further action to continue in a suit or proceeding before it then such order would be termed as 'interlocutory order' but on the other hand if by an order passed by Family Court the lis between the parties is finally stood disposed of an nothing is left to be decided further such orders would be termed as 'final order' and would be appealable under sub section (1) of Section 19 of said Act.

12. Our aforesaid view is buttressed from the decision rendered by Supreme Court in the case of Madhu Limaye (supra). The relevant paragraph 14 of the aforesaid decision is quoted herein below for ready reference which reads thus:

"In passing, for the sake of explaining ourselves, we may refer to what has been said by Kania C.J. in Kuppuswami's case (1947 FCR 180 at P. 187) (AIR 1949 FC 1 at p. 3) by quoting a few words from Sir George Lowndes in the case of Abdul Rahman V. D.K. Casim & sons, 60 Ind App 76: (AIR 1933 PC 58). The learned Law Lord said with reference to the order under consideration in that case. The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even, a vital issue in the case, but it left the suit alive, and provided for its trial in the ordinary way. Many a time a question arose in India as to what is the exact meaning of the phrase ' case decided' occurring in S. 115 of the Code of Civil Procedure. Some High Courts had taken the view that it meant the final order passed on final determination of the action. Many others had, however, opined that even interlocutory orders were covered by the said terms. This Court struck a mean and it did not approve of either of the two extreme lines. In Baldeodas V. Filmistan Distributors (India) Pvt. Ltd. AIR 1970 SC 406 it has been pointed out (at page 410):

13. "A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy."

14. We may give a clear example of an order in a civil case which may not be a final order within the meaning of Art. 133 (1) of the Constitution, yet it will not be purely or simply of an interlocutory character. Suppose for example, a defendant raises the plea of jurisdiction of a particular Court to try the suit or the bar of limitation and succeeds, then the action is determined finally in that Court. But if the point is decided against him the suit proceeds. Of course, in a given case the point raised may be such that it is interwoven and inter-connected with the other issues in the case, and that it may not be possible to decide it under O. 14 R. 2 of the Code of Civil Procedure as a preliminary point of law. But if it is a pure point of law and is decided one way or the other, then the order deciding such a point

may not be interlocutory, albeit may not be final either. Surely, it will be a case decided, as pointed out by this Court in some decisions, within the meaning of S. 115 of the Code of Civil Procedure. We think it would be just and proper to apply the same kind of test for finding out the real meaning of the expression 'interlocutory order' occurring in S. 397 (2).

15. In view of what we have discussed hereinabove, office report is hereby overruled and it is held that the present appeal is maintainable. A copy of the order passed today be placed before Stamp Reporter to avoid inconvenience to the Bar on the aforesaid issue in future.

Heard the learned counsel for the appellant on merits at admission stage.

Admit.

Issue notice.

16. Meanwhile the execution and implementation of the exparte decree dated 3.5.2001 passed by Family Court in Case No. 604 of 2002 between the parties shall remain stayed till further order of this Court.

17. After dictation of judgement the members of the Bar present in Court made a request to make the judgement reportable. The request is allowed and judgement is made reportable.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 23, 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.

Civil Misc. Application No. 15589 of 2001

Dr. Manju Verma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Assem Chandra

Counsel for the Respondents:
Sri N.P.Srivastava
Sri R.K. Srivastava
Sri K.C. Sinha
Sri H.K. Misra
Sri Balram Singh

Amalgamation Order- Clause 14 - It does not take away the power of the Chief Justice, to exercise his discretion and pass orders in any case or class of cases arising within the area on Oudh to be heard at Allahabad- the power to exercise the discreation vested in the Chief Justice under the second proviso to paragraph 14 of the order shall be so exercised as to direct that the present writ petition, which has been instituted and filed at Lucknow Bench be directed to be heard at Allahabad. (Held in paragraph nos. 31 and 32)

This is a fit and appropriate case, where order should be made for hearing of the writ petition at Allahabad. The petition under Clause 14 of the Amalgamation Order is allowed and the writ petition, being writ petition no. 1678 (SB) of 1998, Dr. Manju Verma vs. State of UP and others, which has been filed at Lucknow Bench is directed to be transferred to Allahabad for hearing, which shall be listed for hearing before the appropriate court.

Case law discussed:
AIR 1964 SC 993, AIR 1970 SC 331, 1995 (4) SCC 738, 1994 LCD 1181.

(Delivered by Hon'ble S.K. Sen, C.J.)

1. This is an application under Order 14 of United Provinces High Courts (Amalgamation) Order 1948. The facts inter alia involved in this writ petition namely, Civil Misc. Writ Petition no. 1678 (S/B) of 1998 are that the petitioner Dr. Manju Verma, (hereinafter referred to as the first petitioner) was appointed as an adhoc lecturer in Obstetrics and Gynaecology in State Medical College, Jhansi . In Februrary 1978 she was transferred as adhoc lecturer by the State Government to Motilal Nehru Medical College, Allahabad where while working as Adhoc lecturer, she was regularized as lecturer under the provisions of the Regularisation of Adhoc Appointment Rules 1979. She was promoted in December 1980 as adhoc Reader in Obstetrics and Gynecology Department and was posted at Baba Raghav Das Medical College, Gorakhpur, but on account of the death of her father-in-law she was unable to join at Gorakhpur and continued to work as a lecturer at Allahabad.

2. It is alleged that while the petitioner was working as a lecturer at Allahabad, the post of Reader in Obstetrics & Gynaecology (Post Partem Programme) were advertised by the Public Service Commission, U.P. Allahabad in response to which she applied for appointment to the said post. It may be noted here that the posts of Reader in Obstetrics and Gynaecology advertised by the Public Service Commission, UP, Allahabad were to be filled in by direct recruitment. As appears from Annexure-1 to the writ petition, the notification dated 9.6.1982 notified by the Public Service Commission, U.P. Allahabad, on the basis of recommendation of Selection Committee, I) Dr. (Smt.) Veena Mathur, ii) Dr. (Smt. Meera Agnihotri, iii), Dr. (Smt.) Sadhana Kala (Upraiti) iv) Dr. (Smt.) Manju Verma (Srivastava) were selected in order of merit and Dr. (Smt. Sandhya Agarwal was placed in the waiting list. It is also alleged that the candidate recommended at Sl. No. 3 i.e. Dr. (Smt.) Sadhana Kala (Upraiti) did not join as Reader in obstetrics and Gynaecology in pursuance of the recommendations of the Public Service Commission, U.P. Allahabad and consequently the first petitioner who was at Sl. No. 4 moved to the position at Sl. No. 3 and Dr. Smt. Sandhya Agarwal, who was in the waiting list, came to the 4th position.

3. It is alleged that the State Government did not issue appointment letters to the candidates selected by the Public Service Commission and before that in November 1982 and May 1985, arbitrarily appointed, on adhoc basis Dr. Radha Jina, Dr. Kumkum Srivastava and Dr. Barun Sarkar as adhoc Readers in Obstetrics and Gynecology in State Medical Colleges.

4. It has been alleged that on 19.1.1983 Dr. (Smt.) Veena Mathur and Dr. Meera Agnihotri were offered appointment as Regular Reader in Obstetrics and Gynaecology in the State Medical Colleges but the first petitioner even on 19.1.1983 arbitrarily was not given appointment as Reader in pursuance of the recommendation of the Public Service Commission, UP Allahabad and it

was on 14.8.1986 that she was appointed as Reader in Obstetrics and Gynaecology on the basis of the recommendations of Public Service Commission, UP Allahabad and posted at the State Medical College, Jhansi vide the Photostat Copy of the appointment letter dated 14.8.1986, Annexure- 2 to the writ petition.

5. It is further alleged that in August 1986 Dr.(Smt.) Veena Mathur working as Reader in Obstetric and Gynaecology at Allahabad was given adhoc promotion as Professor and posted at Medical College, Agra. In these circumstances the petitioner submitted a representation to the State Government that as post of Reader in Obstetrics and Gynaecology has fallen vacant at Allahabad on account of adhoc promotion of Dr. Veena Mathur, the first petitioner's posting may be changed from Jhansi to Allahabad. On 31.8.1986 she made a representation to the effect that she may be given posting at Allahabad due to her husband being posted at Allahabad Medical College since a vacancy on the post of Reader (Obstetric and Gynaecology) was likely to occur on account of promotion of Dr. Veena Mathur as Professor, Obstetrics and Gynaecology at S.N. Medical College, Agra. A photo state copy of the representation dated 31.8.1986 made by her for her posting to Allahabad has been annexed as Annexure -2A to the writ petition. It is alleged that on 3.4.1987 the State Government posted the first petitioner as Reader in Obstetrics and Gynaecology at Allahabad in supersession of the posting at Jhansi. A copy of the order dated 3.4.1987 has been annexed as Annexure -3 to the writ petition.

6. It has been further alleged that the seniority mentioned in the seniority list dated 10.4.1992 and the seniority list of 1991 were similar but both the seniority lists were prepared arbitrarily showing the first petitioner below Dr. Sandhya Agarwal, Dr. Barun Sarkar and Dr. (Smt.) Gauri Ganguli. On coming to know of the wrong preparation of the seniority list in the year 1991, which was repeated on 10.4.1992, she made a number of representations for the correction of the seniority list commencing from 1992 to 1997. Four of such representations have been annexed as Annexure 5 to 8 to the writ petition.

7. It is also alleged in the writ petition that the Secretary, and the Director of Medical Education. UP Government Lucknow repeatedly assured the first petitioner's husband Dr. A.N. Verma, presently posted as Professor in Orthopaedics at Medical College, Allahabad that the seniority list would be corrected but did not do so in spite of their assurances.

8. The contention of the first petitioner is that in spite of her being senior to Dr. Sandhya Agarwal, Dr. Barun Sarkar and Dr. (Smt.) Gauri Ganguli, she was denied promotion as Professor in Obstetrics and Gynaecology while Dr. Sandhya Agarwal and Dr. (Smt.) Gauri Ganguli were made as adhoc and promoted professor in the year 1996 and 1990 respectively. It has been claimed that the first petitioner is senior as Reader in Obstetrics and Gynecology to Dr. Sandhya Agarwal, Dr. Barun Sarkar and Dr. (Smt.) Gauri Ganguli and she was entitled to be promoted as Professor in Obstetrics and Gynaecology prior to Dr. Sandhya Agarwwal, Dr. Barun Sarkar and Dr. (Smt.) Gauri Ganguli and that she is entitled to be regularised after giving

retrospective promotion as Professor and she can not be subjected to any further discrimination as she has already suffered immensely for she is being deprived of the promotion as Reader since 14.1.1983.

9. It is alleged that on 2.12.1998 the State Government passed an order rejecting the representation of the first petitioner for her being placed above Dr. (Smt.) Sandhya Agarwal, Dr. Barun Sarkar and Dr. (Smt.) Gauri Ganguli, although a perusal of the said order dated 2.12.1998 shows that the case of the first petitioner claiming seniority over Dr. Sandhya Agarwal and Dr. Barun Sarkar has not been adverted to at all and the seniority has been determined only qua Dr.(Smt.) Gauri Ganguli. A Photostat copy of the order dated 2.12.1998 passed by the State Government rejecting the representations of the first petitioner has been annexed as Annexure -14 to the writ petition.

10. It is also the contention of the first petitioner that on 18.10.2000 the Director Medical Education and Training, UP by means of letter dated 18.10.2000 published provisional seniority list inviting objections to the same and the first petitioner as well as Dr. (Smt.) Gauri Ganguli filed objections to the same. The first petitioner on 21.10.2000 submitted her representation mentioning therein that she was selected by the Public Service Commission, U.P. Allahabad during the year 1981-82 and Dr. (Smt.) Gauri Ganguli was rejected by the Commission but appointment in favour of the first petitioner was purposely delayed and it was on 14.8.1986 that the first writ petitioner was issued the letter of appointment, true copy of which is annexure-2 to the writ petition. So far as Dr. (Smt.) Gauri Ganguli is concerned, her adhoc appointment was regularised on 12.1.1990 under the provisions of Regularisation of Adhoc Appointment Rules 1988 and as such she is junior to the first petitioner.

11. It is further contended in the writ petition that in her representation dated 21.10.2000 (Dr. (Smt.) Gauri Ganguli has alleged that her date of substantive appointment was 9.9.1986 and that the date of her substantive appointment shown as 12.1.1990, is not correct and the first petitioner's date of substantive appointment as 14.8.1986 was not correct in as much as the first petitioner according to Dr.(Smt.) Gauri Ganguli was on that date working as Lecturer at the Medical College, Allahabad and that in pursuance of the Government order dated 3.4.1987 the first petitioner joined on 4.4.1987 on the post vacated by Dr. (Smt.) Gauri Ganguli and Dr. (Smt.) Gauri Ganguli, therefore desired that the State Government should amend the dates mentioned in the provisional seniority list.

12. The first petitioner has taken several other points alleging irregularity and illegality in the matter of determination of her seniority and under the circumstances she has prayed for the following reliefs:

i) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus requiring the opposite parties to dispose of the representations of the petitioner regarding seniority.

ii) Issue a writ or mandamus or a writ , order or direction in the nature of mandamus restraining the opposite parties from holding the departmental

promotion committee on 12.11.1998 or any other subsequent date without correcting the seniority list of the Readers in Obstetrics and Gynecology in the State Medical Colleges.

iii) Issue a writ of mandamus, or a writ order or direction in the nature of mandamus requiring the opposite parties to give promotion to the petitioner as Professor in Obstetrics and Gynecology from the date /dates her juniors Dr. Sandhya Agarwal and Dr. Gauri Ganguli were given promotion.

iv) Issue any other Writ, Order or direction for which the petitioner is entitled to under law.

iv a) Issue a Writ of Certiorari or a writ, order or direction in the nature of Certiorari to quash the order dated 2.12.1998 (Annexure-14) passed by the State Government holding the petitioner junior to Dr. Smt. Gauri Ganguli.

V) Award costs to the petitioner against the opposite parties.

V-a) Quash the office order dated 30.11.2000 (Annexure-15 to the writ petition) passed by the State Government.

13. A Writ petition being Civil Misc. Writ Petition No. 1945 of 2000 was also filed on behalf of Dr. Smt. Gauri Ganguli, in the Lucknow Bench of this Court wherein she has also prayed for the following reliefs.

i) Issue a writ, order or direction in the nature of quo- warranto not allowing the respondent no. 3 to continue on the post of regular Reader in Motilal Nehru Medical College Allahabad in Obstetrics and Gynecology under Post Partem Programme.

ii) Issue a writ, order or direction in the nature of certiorari quashing the paragraph no. 3 of the order dated 3.4.1987 issued by respondent no. 1 (annexure 5 to the writ petition).

iii) Issue a writ, order or direction in the nature of mandamus, directing the respondent no. 1 to delete the name of the respondent no. 3 Dr. Smt. Manju Verma from the final seniority list dated 30.11.2000 which was issued fixing the seniority of members in Obstetrics and Gynecology of Medical Colleges.

iv) Issue any other writ, order or direction as this Hon'ble Court may deem proper; and

v) Award costs of petition in favour of petitioner. "

14. The said writ petition was directed by order- dated 15.12.2001 passed by a Division Bench consisting of Hon'ble Jagdish Bhalla and Hon. R.D. Mathur JJ that the Lucknow Bench has no jurisdiction and the writ petition was to be filed at Allahabad. Accordingly, the same was filed in Allahabad.

15. It appears that the petitioner is resident of Allahabad. Private respondents No. 4, 5 and 6 are at Allahabad. UP Public Service Commission, which has to determine the seniority is also at Allahabad. Only the representations were rejected by Secretary Medical Education, UP and Director Medical Education, U.P. to whom the representations were made, are at Lucknow. Accordingly, the question arises if the matter should be

transferred to Allahabad? However, Mr. Umesh Chandra, learned Senior Advocate has strongly referred to Clause 14 of the UP High Court (Amalgamation) Order 1948 and has submitted that the proceedings may be transferred at the hearing stage only and not otherwise. In the instant case according to him since hearing has been concluded the question of sending the matter to Allahabad from Lucknow does not arise.

16. He has further submitted that the provisions similar to Chapter VII Rule 1 of the Rules of Court 1952 are to be found in order XX Rule 1 CPC, and the Supreme Court has held in the case of Arjun Singh Vs. Mohinder Kumar (AIR 1964 SC 993) that after hearing is concluded, application for setting aside the hearing under Order IX Rule VII CPC does not lie and a decree must be passed. Reason for transfer mentioned in paragraphs 14 to 20 and 27 and 28 of the application under Paragraph 14 of the Amalgamation Order is that the counsel of the parties will have to come from Allahabad. There is no question of the counsel coming from Allahabad, when hearing has concluded and judgement reserved. Moreover, counsel for Dr. Manju Verma, writ petitioner is from Lucknow.

17. It is also contended on behalf of applicant that part of cause of action arose at Lucknow because of the passing of the impugned order dated 2.12.1998 and 30.11.2000 at Lucknow and therefore, the writ petition was rightly entertained at Lucknow. The residences of Dr. Smt. Gauri Ganguli and Dr. Smt. Manju Verma are at Allahabad and their being posted at Medical College Allahabad, is of no consequence.

18. In support of his case the learned counsel has relied upon the cases of **Arjun Singh Vs. Mohinder Kumar and others** (AIR 1964 SC 993), **Nasiruddin Vs. S.T.A. Tribunal** (AIR 1970 SC 331), **UP Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs. State of UP and others** (1995) 4 SCC, 738 and **Nityanand Tewari Vs. State of UP and others** (1994 LCD 1181).

19. Learned counsel for Dr. Smt. Gauri Ganguli has urged that the question involved is with regard to seniority of both the persons who are at Allahabad and both are also residing at Allahabad. Further according to her, hearing was also not in fact concluded. Since the counsel for the writ petitioner Dr. Manju Verma could only make his submissions and the Senior Counsel for Dr. Smt. Gauri Ganguli Sri K.C. Sinha being absent adjournment was prayed on his behalf and no submission could be made on behalf of Dr. Smt. Gauri Ganguli. However, the finding that the Division Bench has passed orders that the hearing has been concluded, application has also been made for recall of the said order. Under such circumstances, it is not correct to say that the hearing has been concluded. In fact there is scope for further hearing of the matter.

20. Sri Rajeev Sharma, learned Standing Counsel submits that since on the same cause of action another writ petition filed by Dr. Gauri Ganguli, being Writ petition no. 1945 S/B of 2000 was returned to her vide order dated 15.12.2000 with liberty to file a fresh writ petition at Allahabad that this Court (Lucknow Bench) has no jurisdiction with the matter, in view of the fact that claim of the post of Reader and Head of

Department of Gynaecology is at Allahabad Medical College, both the parties are residing at Allahabad and no issue has arisen within the territorial area of Oudh except that the order has been passed at Lucknow, the writ petition 1678 S/B of 1998 should be transferred to Allahabad.

21. I have considered the respective submissions of the parties.

22. It is apparent from the writ petition that the writ petitioner has been working in Motilal Nehru Medical College, Allahabad and on the basis of her claim for seniority as made in her representation she prayed for a mandamus directing the opposite party no. 1 to give promotion to the petitioner as Professor in Obstetrics and Gynaecology whereas Dr. Smt. Gauri Ganguli in her writ petition no. 1945 (SB)/2000 has prayed for not allowing the respondent no. 3 to continue on the post of regular Reader in Motilal Nehru Medical College, Allahabad in Obstetrics and Gynecology. She has also prayed for a direction to respondent no. 1 to delete the name of respondent no. 3 Dr. Smt. Manju Verma from the final seniority list dated 30.11.2000, which was issued fixing seniority of the Readers in Obstetrics and Gynaecology of Motilal Nehru Medical College, Allahabad. Therefore, both the writ petitions, one filed by first writ petitioner Dr. Smt. Manju Verma and the other by Dr. Smt. Gauri Ganguli relate to determination of seniority whereas Dr. Smt. Manju Verma claims her seniority against Dr. Smt. Gauri Ganguli and also the post which is now being held by Dr. Smt. Gauri Ganguli at Motilal Nehru Medical College, Allahabad.

23. Dr. Smt. Gauri Ganguli in her writ petition in effect claims the same relief for a direction not to allow said Dr. Smt. Manju Verma to continue in the post of regular Reader as according to her she is not entitled to hold the post in accordance with her seniority, while in the writ petition of Dr. Smt. Gauri Ganguli being writ petition no. 1945 (SB) of 2000 it was argued that the High Court, Lucknow Bench has no jurisdiction to entertain the said petition and it had to be filed at Allahabad, High Court. Accordingly, the said writ petition was filed at Allahabad. There is no reason to take a different stand in the writ petition filed by Dr. Smt. Manju Verma when the consequential effect of both the writ petitions are the same. That apart, both the writ petitioners i.e. Dr. Smt. Manju Verma and Dr. Smt. Gauri Ganguli are residents of Allahabad. Other private respondent no. 4,5 and 6 are also at Allahabad, the UP Public Service Commission, which has to determine the placement and seniority is also at Allahabad. There is no reason for proceeding with the matter of the writ petitioner at Lucknow Bench when the other writ petition which is of the same nature, has already been directed to be filed at Allahabad.

24. The submission of Mr. Umesh Chandra, learned Senior Counsel that hearing was concluded, does not appear to be correct. In fact prayer for adjournment was made on behalf of Dr. Smt. Gauri Ganguli since her Senior Counsel Sri K.C. Sinha was not available on that date because of illness of his family member. Learned Judge, however, only heard Mr. Umesh Chandra, Senior Advocate and reserved the judgement and thereafter an application was made on behalf of Dr.

Smt. Gauri Ganguli for recalling of the said order. The matter is still open for adjudication and in the event recall order is passed the submission has to be made and the matter has to be heard. For proper ascertainment and determination of the scope of Clause 14, of the Amalgamation Order, the same is set out herein below:

"14. The new High Court, and the judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint.

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs, such judges of the new High Court, not less than two in number, as the Chief Justice, may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court.

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad.

25. In my view Clause 14 of the Amalgamation Order does not take away the power of the Chief Justice, to exercise his discretion and pass orders in any case or class of cases arising within the area of Oudh to be heard at Allahabad. The interpretation given by Mr. Umesh Chandra learned senior Counsel does not appear to be correct. That apart, in the instant case hearing on behalf of one of the parties is concluded, the scope of hearing on behalf of other party still remains. It appears that both the cases really relate to the areas not covering Oudh but falls within the jurisdiction of Allahabad. The decisions cited by Mr. Umesh Chandra learned Senior Counsel as mentioned above do not really assist him.

26. The decision in the case of ***Arjun Singh Vs. Mohinder Kumar*** AIR 1964 SC 993, relied upon by Sri Umesh Chandra has no application to the facts and circumstances of the present case as the same relates to the scope of Order 9 Rule 7 CPC for setting aside the hearing. The said provisions are quite distinct from the scope and meaning of Clause 14 of the Amalgamation Order and the Proviso thereto. In the aforesaid decision, there were three suits between the parties. In one suit plaintiff was present and the defendant was absent. Counsel for the defendant had no instructions and the case proceeded ex parte. The plaintiff examined his witness and the evidence was closed and the argument concluded with the words ' judgement reserved'. In the second suit, plaintiff was absent and the defendant with his counsel was present. Counsel for the plaintiff had no instructions. The suit was dismissed as per order passed separately. The third suit was also decreed ex parte. So, the three applications were filed in the aforesaid three suits for setting aside the ex parte order and decree and all the three applications were disposed of by a common judgement and order of the Civil Judge, who held that the story of the illness of the appellant which had been put forward as affording sufficient reasons for not being present in Court, was false. Thus in the case referred to above, the Supreme Court has dealt with

the question of setting aside ex parte orders which have no relevance to the facts of the present case.

27. The Supreme Court in ***Nasiruddin Vs. T.A. Tribunal AIR 1976 SC 331***, inter alia held as follows:

'The word ' heard' means that case which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad. '

Considering the facts and circumstances of the case it appears to me that the power to exercise the discretion vested in the Chief Justice under the second proviso to paragraph 14 of the order shall be so exercised as to direct that the present writ petition, which has been instituted and filed at Lucknow Bench, be directed to be heard at Allahabad. In my view the judgement in Nasiruddin 's case (Supra) does not in any way come in the aid of the writ petitioner although relied upon by his counsel Mr. Umesh Chandra.

28. The case of **U.P. Rashtriya Chini Mill Adhikari Parishad Vs. State of Uttar Pradesh and others (supra)**, relied upon Mr. Umesh Chandra, Senior Advocate may also be taken note of. The aforesaid decision has no application to the facts of the case since in the aforesaid decision before the High Court Notification issued by the U.P. Government at Lucknow was challenged, so it was held that the petitioner had been aggrieved only from the issuance of the Order/Notification which arose from Lucknow. In the instant writ petition the position is quite different as already stated herein before. In my view the present writ petition is quite distinguishable and as such the case referred to above does not assist the writ petitioner.

29. In the case of **Nityanand Tewari Vs. State of UP and others** (supra) two questions came up for consideration before the Full Bench :

1. Whether writ petition against an order passed by an authority outside the Oudh area can be entertained by this Court at Lucknow, if some order or the Act passed by a person or the Legislature in the areas of Oudh is also challenged in order to provide a ground for challenging the said order of the authority ?

2. Whether Lucknow Bench will have jurisdiction to interfere with the order passed by an authority outside Oudh areas either by way of interim order or by way of final order, if any proceeding in the form of appeal, revision or a representation is pending aginst it before an authority within Oudh areas, even though appeal or revision or represention has not been decided and the order of the original authority has not yet merged with the order of the higher authority within Oudh areas ?'

30. The questions raised for determination in the aforesaid decisions has no bearing to the facts and circumstances of the present case. The principles on which the said two questions were answered cannot be doubted. However, no such issue or question arises in the instant writ petition and as such the said decision cannot also come to aid in support of the case of the writ petitioner. In view of aforementioned reasons. I am of the view that it shall be appropriate for me to exercise the discretion as **Chief**

Justice to direct the writ petition, which has been instituted at Lucknow to be transferred to Allahabad.

31. Considering the aforesaid glaring situation and facts and circumstances of the case, I am of the opinion that this is a fit and appropriate case where order should be made for hearing of the writ petition at Allahabad.

32. Accordingly, the petition under Clause 14, of the Amalgamation Order is allowed and the writ petition, being writ petition no. 1678 (SB) of 1998,Dr. Manju Verma Vs. State of U.P. and others, which has been filed at Lucknow Bench, is directed to be transferred to Allahabad for hearing, which shall be listed for hearing before the appropriate Court.

33. Office is directed to transmit the necessary records forthwith to Allahabad High Court.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.7.2002

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

Habeas Corpus writ petition no. 324 of 2002

Malkhan Singh ...Petitioner
Versus
District Magistrate, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Sri Jagdish Singh Sengar
Sri Ajit Kumar Singh Solanki

Counsel for the Respondents:
Sri A.K. Tripathi
A.G.A.

National Security Act 1980- Section 3 (2)- Detention Order simply based on apprehension that detune shall be allowed on bail- and if allowed on bail there shall be possibility of Public Order- not simply illogical but also unsound- detention order being passed on mechanical manner quashed.

Held - para 11

In this connection the learned counsel also submitted that since the detenu was already in custody in connection with a heinous murder case no reasonable person can arrive at the conclusion that he was likely to be released on bail and the statement of the detaining authority in the ground that the detenu is likely to be released on bail or he is released on bail there is possibility of public order being in danger is not only simply illogical but also unsound.

Case law discussed:
JT 1994 (I) ASC 350

(Delivered by Hon'ble K.K. Misra, J.)

1. Heard Mr. J.S. Sengar, learned counsel for the petitioner and Mr. A.K. Tripathi, appearing for the State.

2. The petitioner Malkhan Singh Thakur has filed this Habeas Corpus petition for being set at liberty and quashing of the order of detention dated 27.2.2001 annexed as Annexure-1 to the writ petition passed under section 3 (2) of the National Security Act, 1980 (in short theAct) by the District Magistrate, Fatehpur.

3. The petitioner made a representation which was made in the month of November 2001. Precise date cannot be known since it is not dated. It was rejected. The State Government approved the order of detention on 30.10.2001, i.e. within 12 days from the

date of passage of detention order. The approval of the detention order was communicated to the petitioner through the District authorities by the State Government by a Radiogram message and a letter both dated 5.10.2001. The paper received by the District Magistrate Fatehpur were also sent to the Central Government which were received by the Secretary Ministry of Home Affairs, New Delhi on 7.10.2001, within 7 days from the date of its approval by the State Government that is within the period required under section 3 (5) of the Act. All this goes to show that the provision of Section 3 (4) and 3(5) of the Act referred to above were duly complied with. The matter was referred to the Advisory Board by the State Government well within a period of 21 days to be reckoned from the date of actual detention in pursuance to the above order. The Advisory Board found that there was sufficient cause for the detention of the petitioner. It thus approved the aforesaid detention order. After taking into consideration the recommendation of the Advisory Board and other material on record, the detention of the petitioner for a period of 12 months was approved by the State Government. The representation made by the petitioner was rejected and there was no delay in forwarding and processing it by the competent authority nor any such challenge towards it was ever pressed. Three under noted points have been convassed before this Court by learned counsel for the petitioner.

1. The detention order is vague and was passed without application of mind.
2. That in the detention order it has not been mentioned that the petitioner has applied for bail or is likely to apply and likely to be released on bail and thus the detention order is perse bad and illegal as well. Since there was no urgency. He was already in jail.
3. The incident in respect of which the petitioner was detained under section 3 of the Act does not pertain to the disturbance of public order, but at best it could be treated as an incident of breach of law and order and consequently the provision of Section 3 (2) of the Act should not have been invoked.

4. A perusal of the detention order would show that the detenu was in judicial custody in connection with an offence under section 396 IPC and while he was in jail, impugned' detention order was served upon him. An order of detention can validly be passed against a person in custody depending upon the circumstances of each case. In case of ***Kamrunnissa and another vs. Union of India and others***, reported in JT 1990 (4) SC 7 it has been held by the Hon'ble Supreme Court that in case a person is in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody, (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher Court.

5. From a catena of decision of this Court it is clear that even when a person is in custody a detention order can validly be passed, if the authority passing the order is aware of the fact that he is actually in custody, if he has reason to believe on the basis of reliable material that there is possibility of him being released on bail and on being so released the detenu in all probability will indulge in prejudicial activity disturbing public order and if the authority passes an order after recording his satisfaction, the same cannot be struck down. But the facts of the present case are quite different from the above case. The detenu was involved in case Crime No. 138 of 2001 under Section 396 IPC PS Khaga, district Fatehpur. In such type of cases in which the detenu was involved no subordinate court ordinarily grants bail. The satisfaction of the detaining authority arrived at in the detention order is quite baseless which goes to show that he has not properly applied his mind while passing the detention order.

6. There is no mention in the detention order that the detenu has made any attempt to secure bail for himself. The fact of pendency of any bail application was not asserted in at all. It only refers to that on being released on bail there is every possibility of breach of public order by him. Thus presence of pendency of a bail application and a possibility of his release on bail were crucial circumstances for the detaining authority to draw any such conclusion that on being so released he is likely to indulge in any activity prejudicial to public order. Unless, these two facts are present in the case the above conclusion is not permissible in law. In grounds of detention above two circumstances are totally lacking therefore the inference about the last ingredient is wholly without any basis. It clearly indicates that the impugned order was mechanically passed.

7. Learned A.G.A. tried to divert us by taking us through the report of the S.H.O. wherein as annexure a bail application is mentioned. We have given our anxious consideration to the submission. We find ourselves unable to accept it. On the contrary we are convinced that it further supports the fact that the detaining authority has not examined it at all otherwise this fact must have found a mention in the grounds of detention. We are fortified in our conclusion from this fact also that the report of the S.H.O. P.S. Khaga, Fatehpur did refer to these facts, therefore, the omission by detaining authorities to mention these two facts in his grounds clearly prove that he has just mechanically signed the grounds prepared by member of his staff. He apparently did not even examine any report or appended to accordingly rectify the grounds.

8. We are further supported in our conclusion by yet another fact. The observation made by the detaining authority in the detention order, AAP DWARA PURV ME BHI LOMHARSHAK GHATNAI KI GAI HAIN'. To support its contention the prosecuting agency did not send any material with the recommendation for his detention. The police agency has also sent an extract relating to crime number 3082 of 1984 showing only this much that in the year 1984 the petitioner was challaned vide charge sheet no. 79 of 1984 dated 26.7.1984. This extract was filed by the petitioner as Annexure 29 to his writ petition.

9. In this connection it is to be added that police agency withheld the relevant material from the detaining authority. It exposes the hollowness of this charge because in S.T. No. 299 of 1994 pertaining to above challan the petitioner was acquitted because the so called got up witness did not come to support the prosecution case. The relevant judgement was filed by the petitioner as Annexure 30 to the writ petition. The copy of the judgement was not sent to the detaining authority by recommending authority. This goes to show that the satisfaction made by the detaining authority in his grounds that 'AAP DWARA PURVA ME BHI LOMHARSHAK GHANTNAI KIGAI HAIN' was not only baseless but also without any supportive material order was, therefore, passed without applying its mind in a most mechanical manner. A reckless order differs in many ways from a mechanical order. A mechanical order may be protected from a civil, criminal action but a reckless order cannot be so guaranteed by our Constitution to be free. Therefore, any recklessly careless exercise of its authority to detain any citizen by a competent authority is not simply to be decried but something more is required to be done by the courts in such cases. The case at hand is a glaring example of such reckless exercise of authority.

10. Despite the fact that the bail application moved by the applicant in court of Session had no chance of its success in view of the trend prevailing in the lower court and also due to offence's heinous character. The district authorities just to shut the true version got a detention order dated 27.9.2001 slapped on the detenu. The purpose behind recommending his detention under National Security Act was positively altered. He was released on bail long after the service of this order by one of us (Hon'ble S.K. Agarwal, J.).

11. In a recent judgement of Supreme Court reported in JT 1994 (1) AS C. 350, Veeramani Vs. State of Tamil Nadu it has been held that by making a sweeping statement that the petitioner is likely to be released on bail the detaining authority cannot pass a detention order and when there is no likehood of the detenu being released on bail from custody, the order of detention is illegal in as much as there is no proper application of mind. In this connection the learned counsel also submitted that since the detenu was already in custody in connection with a heinous murder case, no reasonable person can arrive at the conclusion that he was likely to be released on bail and the statement of the detaining authority in the ground that the detenu is likely to be released on bail or if he is released on bail there is possibility of public order being in danger is not only simply illogical but also unsound.

12. In this context learned counsel has also relied upon a unreported judgement in Writ petition no. 604 of 1992- Rivadeneyra Recardo Agustin Vs. Government of the National Capital Territory of Delhi and others decided on 8.4.1993. In that case in the grounds it was only mentioned that there was a possibility of the detenu being released in case he moves a bail application. This Court observed that since the grounds did not indicate that such release was likely or that it was imminent and that on a mere possibility the detention order could not have been passed. The Bench also examined the relevant file and observed

that there was no material indicating that the release of the petitioner was likely.

13. The third contention raised by the learned counsel for the petitioner that the facts of the present case do not in any manner cause any breach or apprehension of breach of public order. It is not a breach of public order but is a case of breach of law and order. We are not inclined to go into the merits of this last submission made by detenu's counsel, particularly when the Session Trial is pending in the court below and if we enter into the merits of the case, any observation made by us may prejudice the parties in prosecuting its case in the court below. Suffice it to say that from the facts and circumstances discussed above we are fully inclined to accept the submission.

14. In the light of the discussion made above we find that the subjective satisfaction arrived at by the District Magistrate, Fatehpur in passing the impugned detention order dated 27.9.2001 is unwarranted in the eyes of law. It is passed mechanically without applying its mind. It is hereby quashed.

15. The petitioner is in jail and has already served out more than 8 months in pursuance to this impugned detention order, he shall be set at liberty forthwith unless wanted in some other case or cases.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.7.02

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

Criminal Misc. writ petition No. 6302 of 2002

Sabir ...Petitioner
Versus
Jaswant and others ...Respondents

Counsel for the Petitioner:
Sri Tej Pal

Counsel for the respondents:
Sri S.P. Tiwari
Sri Veer Singh
A.G.A.

Code of Criminal Procedure- Section 156 (3)- an order u/s 156 (3) of the Code has the complexion of a judicial order amenable to revision jurisdiction under section 397 of the Code.
Held in para 10

There is no illegality in the order of Incharge Sessions Judge in admitting the revision and also staying the operation of the order.
Case law referred:
JT 1997 (7) SC 85
2000 (41) ACC 435

(Delivered by Hon'ble B.K. Rathi, J.)

1. Heard Sri Tejpal , learned counsel for the petitioner, Sri S.P. Tiwari and Sri Veer Singh, learned counsel for the respondents.

2. The petitioner moved an application under section 156 (3) Cr.P.C. for registration of the case and investigation against the respondents for offences under sections 147, 148, 149,

302 IPC. The learned Magistrate has allowed the application on 25.6.2002 and directed the police to register the case and investigate. Against that order, the respondents prefered criminal revision no. 215 of 2002 before the Incharge Sessions Judge, Agra. The revision was put up before the Additional Sessions Judge, Agra, who has admitted it and stayed the operation of the order of the Magistrate. Aggrieved by it, the present petition has been preferred.

3. It has been argued by Sri Tejpal, learned counsel for the petitioner that the Magistrate passing the order under section 156 (3) Cr.P.C. is not a court and therefore, the criminal revision under section 397 Cr.P.C. is not maintainable. It has further been argued that the order is inter locutory and therefore, the revision does not lie as provided by Clause 2 of Section 397 Cr.P.C., that therefore, the learned Incharge Sessions Judge erred in admitting the revision and staying the operation of the order.

4. The learned counsel for the petitioner in support of his first argument has referred to the decision of the Apex Court in **Madhu Bala Versus Suresh Kumar and others, JT 1997 (7) SC 85**. The only relevant observation in this case is in para 8, which provide that as soon as the order is passed under section 156 (3) Cr.P.C. It transforms itself into a report given in writing within the meaning section 154 Cr.P.C. which is known as first information report. As under Section 156 (1) Cr.P.C. the police can only Investigate a cognizable case, it has to formally register a case on that report.

5. This authority does not lay down that the Magistrate passing the order under Section 156 (3) Cr.P.C. is not a court and does not support the argument of the learned counsel for the petitioner.

6. It has also been argued that the order is inter locutory and no revision lie against that order. In my opinion, the argument of Sri Tejpal, learned counsel for the petitioner does not require a detailed discussion in view of the decision of Division Bench of this Court in **Ajai Malviya Versus State of UP and others, 2000 (41) ACC 435**.

7. In this case, the F.I.R. was registered pursuant to an order under Section 156 (3) Cr.P.C. of the code directing the police to register and investigate the case. The accused approached this court under Article 226 of the Constitution seeking a direction not to arrest him besides the relief of certiorari for quashing the first information report of the said case. At the very outset a question arose before the bench as to whether the writ petition for quashing the first information report sans any challenge to the order under Section 156 (3) Cr.P.C. passed by the Magistrate is maintainable. It was urged on behalf of the accused-petitioner that the order under section 156 (3) of the Code has the complexion of an administrative order and hence it was neither revisable under section 397 of the Code nor open to challenge under section 482 of the Code and, therefore, the F.I.R. could be quashed by this court under Article 226 of the Constitution in case the Court was of the opinion that taken in its entirely the FIR did not disclose commission of cognizable offence.

8. The division bench took the view 'Having given our anxious consideration to submission of the learned counsel for

the petitioner we are of the considered view that an order under section 156 (3) of the Code has the complexion of a judicial order amenable to revision jurisdiction under section 397 of the Code. ' Accordingly the writ petition for quashing the first information report was dismissed as not maintainable.

9. This decision supply the complete reply of both the submission of Sri Tejpal.

10. In view of the above decision, there is no illegality in the order of Incharge Sessions Judge in admitting the revision and also staying the operation of the order.

11. Accordingly, the petition is dismissed. However, the learned Sessions Judge, before whom the revision is pending is directed to dispose of the revision expeditiously preferably within a period of one month from the date of presentation of the certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 17, 2002

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

Civil Misc. Transfer Application No. 211 of 2002

Brijesh Kumar Gupta ...Applicant
Versus
Smt. Poonam Gupta ...Opposite party

Counsel for the Applicant:
Sri Vijaya Prakash

Counsel for the Opposite Party:

Code of Civil Procedure- Territorial Jurisdiction 23 (3) 24- readwith section 21-A Hindu Marriage Act- Divorce Proceeding pending before family court judge, Meerut to Judge Family Court, Gwaliyar (MP) can not be entertained by High Court Allahabad.

Held- para 23

In view of the above, the present transfer application seeking transfer of the case from Meerut (State of UP) to gwalior (State of MP) is not cognizable by this Court.

Case law discussed:
AIR 1981 SC 1143

(Delivered by Hon'ble A.K. Yog, J.)

1. Brijesh Kumar Gupta, applicant before this Court, has filed the present Transfer Application under Section 23 (3) and 24 of the Code of Civil Procedure read with Section 21 A (B) of Hindu Marriage Act praying for transferring divorce petition no. 367 of 2001- Smt. Poonam Gupta versus Brijesh Gupta, under section 13 and 27, Hindu Marriage Act pending in the Court of Principal Judge. Family Court, Meerut to the Court of VII- Additional District Judge, Gwalior where Matrimonial petition no. 2A/2000- Brijesh Kumar Gupta versus Smt. Poonam Gupta under section 12. Hindu Marriage Act (to declare the marriage between the parties as void) is said to be already pending since before the filing of the aforementioned divorce petition by the wife at Meerut.

2. In para 10 of the affidavit, filed in support of the transfer application, the applicant, Brijesh Kumar Gupta has admitted that he had received notice of the said matrimonial divorce petition no. 367 of 2001 (Annexure 2 to the affidavit)

to appear in the case on July 30, 2001 when an attempt for reconciliation was made before the Family Court, Meerut. He also admitted that Family Court Meerut fixed 5.7.2002 vide its order dated 14.5.2002 and that the said court has rejected his application for stay of the proceedings not finding favour with the prayer made by the said applicant (the husband) vide application (paper no. 18 Ga) for transferring the matrimonial divorce petition at Meerut to Gwalior.

3. From the facts, as stated in the affidavit in support of the transfer application, it is evident that husband applicant has already submitted to the transfer of the Family Court, Meerut by joining proceedings.

Heard learned counsel for the husband-applicant. Sri Vijay Prakash, Advocate at length and perused the record.

4. The learned counsel for the husband applicant contends that the Court below (Family court, Meerut) has committed illegality in rejecting application filed by the husband applicant for transferring divorce petition no. 367 of 2001 to the Court at Gwalior where Matrimony- Petition No. 2 A/2000 (Annexure 1 to the affidavit), filed earlier in point of time, is already pending.

5. Copy of the application (paper no. 18G) dated 14.5.2002 have been filed as Annexure-1 to the affidavit wherein the prayer is to the effect that proceedings of matrimonial petition no. 367 of 2001 (Smt. Poonam Gupta versus Brijesh Kumar Gupta) be stayed and transferred to the Court of VII Additional District Judge, Gwalior so that both the cases may be heard together.

6. By means of the order dated 31.5.2002 the Family Court, Meerut has held, while rejecting the said application (18 Ga), that the said Court was not competent to transfer the case as prayed and it was open for the said husband (opposite party in the Meerut case) to seek desired relief by approaching the Hon'ble High Court, Allahabad/Hon'ble Supreme Court for the desired relief.

7. The learned counsel for the husband-applicant, in support of his prayer in the transfer application, referred to the provision of Section 21-A. Hindu Marriage Act, 1955 (as amended up to date) called the Act.

Section 21 A of the Act is being reproduced.

"21 A(1) Where-

(a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 or a decree of divorce under section 13 and
(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State, the petitions shall be dealtwith as specified in sub section (2).

(2) In a case where sub section (1) applies -

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court.
(b) If the petitions are presented to different district transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub section (2) applies, the court or the Government as the case may be competent under the Code of Civil Procedure, 1908, 5 of 1908) to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said code."

8. Learned counsel for the applicant submits that since a petition (for declaring marriage between parties void) has been presented prior in time at Gwalior under section 12, Hindu Marriage Act, the subsequent Matrimonial Divorce petition at Meerut filed by the wife could not proceed and it was incumbent upon the Meerut Court to stay proceedings before it and transfer the said petition to Gwalior. In support of the above argument he has referred to the expression' where in the same State or in a different State.' According to the learned counsel for the applicant Section 21 A. of the Act provides where conditions contemplated under sub section (1) clause (a) & (b) are fulfilled and in that situation, according to him the petitions have to be dealt with as specified in sub section (2) and since all the conditions contained under Section 21 A (1) clause (a) & (b) of the Act are specified in the present case, the court below had no choice option but to resort to sub section (2) of Section 21 A of the Act. Referring to sub section (2) he referred to clause (b) and sub section (3) of Section 21 A of the Act, it is argued that under sub section (3) of Section 21 A, Meerut Court should have transferred the case before it to the Gwalior Court.

9. Learned counsel for the husband-applicant, further referred to Section 22 & 23, Code of Civil Procedure which are reproduced:

22. "Where a suit may be instituted in any one of two or more courts and is instituted in one of such courts, any defendant, after notice to the other parties, may at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several courts having jurisdiction the suit shall proceed."

23.(1) Where the several courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3)Where such Courts are subordinate to different High Courts the application shall be made to the High Court within

the local limits of whose jurisdiction the Court in which the suit is brought is situate.

10. A bare reading of Section 22 and 23, Code of Civil Procedure go to show that these provisions deal with an entirely different contingency. Section 23 is complementary provision to Section 22, Code of Civil Procedure, as is evident from the reading of sub section (1) of Section 23. Further Section 22 and 23, Code of Civil Procedure come into play only in a situation when a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, then Section 22 confers a right upon any defendant to file an application (in the Court specified under section 23 Code of Civil Procedure) to have the suit transferred to some such another Court, subject to fulfilment of other conditions contained under Section 22 i.e. said application is being filed at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. If such an application is being filed by the defendant, the Court may, after considering the objections of the other parties, if any, shall determine in which of the several courts having jurisdiction, the suit shall proceed, if at all be transferred from that Court to another Court (considering the attending circumstances of a particular case.).

11. Sub section (3) of Section 23, Code of Civil Procedure contemplates that where two or more Courts where suit could be instituted, are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the court in which the suit is brought is situate.

12. Thus it will be seen that Sections 22 and 23 code of Civil Procedure deals with a situation where at suit can be filed in two or more courts but it has been instituted in any one or more courts, then on the objection of Defendant it can be directed to proceed in another such court. These provisions do not at all deal with a situation where two different suits have been instituted in the Courts which are subordinate to different High Courts. In fact where two suits are instituted which are within the territorial jurisdiction of two different High Courts, the relevant provisions, which shall come in play are Sections 24 and 25 of the Code of Civil Procedure which are also reproduced for convenience -

"(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage."
(a) transfer any suit appeal or other proceeding pending before it for trail or disposal to any Court subordinate to it and competent to try or dispose of the same or
(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same, or
(ii) transfer the same for trial or disposal to any Court subordinate to and competent to try or dispose of the same, or
(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1) the Court which (is thereafter to try or dispose of such suit or proceeding) may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court
(b) Proceeding includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred under this section from a Court which has no jurisdiction to try it.

25. (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexations, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court ink which the suit appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

13. It is, therefore, clear that in a situation where two suits have been instituted before different courts within the territorial jurisdiction of two different High Courts, the relevant provision for seeking transfer is Section 25, Code of Civil Procedure.

The aforesaid conclusion is clearly borne out from the bare reading of sub section (1) of Section 25 Code of Civil Procedure.

14. Coming to the submission of the learned counsel for the husband-applicant that Hindu Marriage Act contains special provision and confers power to transfer petition in certain cases- including a case in a situation existing in the present case, Section 21 A of the Act, it will suffice to mention that submission is itself bereft of merit as it has been made ignoring the provisions of sub section (3) of Section 21 A of the Act.

15. Sub- Section (3) of the Section 21 A of the Act provides that in a case

where clause (b) of sub section (2) applies, the Court or the Government as the case may be competent under Code of Civil Procedure, 1908 can entertain an application to transfer any suit or proceeding from the District Court in which later petition has been presented to the District Court in which earlier petition is pending.

16. No provision or the Clause under Section 21 A of the Act confers jurisdiction upon a District Court or upon the High Court to which such District Court in subordinate to transfer a petition to another District Court in which earlier petition is pending in the territorial jurisdiction of the State.

17. Submission of the learned counsel for the husband-applicant is completely devoid of merit as is evident from the reading of afore quoted Sections of the Act and the Code of Civil Procedure.

18. Learned counsel for the husband applicant has placed reliance upon the case of **Guda Vijaylakshmi V. Guda Ramchandra Sekhara Sastry**- AIR 1981 Supreme Court 1143.

19. I have carefully gone through the aforementioned decision.

In para 3 of the said decision their lordships of the Apex Court noted…"….In the first place it is difficult to accept the contention that the substantive provision contained in Section 25 CPC is excluded by reason of Section 21 of Hindu Marriage Act 1955…..In terms Section 21 does not make any distinction between procedural and substantive provisions of CPC and all that it provides is that the Code as far as may be shall apply to all the proceedings under the Act…'

20. In para 4 their Lordships observed- "So far as Section 21 A of Hindu Marriage Act is concerned since the marginal note of that section itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated trial ' in certain cases' and is not exhaustive…… This provision in terms deals with the power of the Government or the Court on whom powers of transfer have been conferred by the CPC as it then stood, that is to say, old Sections 24 and 25 CPC. It does not deal with the present Section 25 which has been substituted by an amendment which has come into force with effect from February 1, 1977 (Section 11 of the Amendment Act 104 of 1976), By the amendment very wide and plenary power has been conferred on this Court for the first time to transfer any suit ,appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State such wide and plenary power on this Court could not have been in the contemplation of parliament at the time enactment of Section 21 A of the Hindu Marriage Act 1955. It is, therefore, difficult to accept the contention that Section 21 A of Hindu Marriage Act excludes the power of transfer conferred upon this Court by the present Section 25 of CPC in relation to proceedings under that Act.'

Again in para 5 Apex Court held-

"such a view in our opinion is not correct. As stated earlier, in the mater of transfer of petitions for a consolidated

hearing thereof Section 21 A cannot be regarded as exhaustive for the marginal note clearly suggests that the Section deals with power to transfer petitions and direct their joint and consolidated trial ' in certain cases" Moreover, it will invariably be expedient to have a joint or consolidated hearing or trial by one and the same court of a husband's petition for restitution of conjugal rights on the ground that the wife has withdrawn from his society without reasonable excuse under Section 9 of the Act and the wife's petition for judicial separation against her husband on ground of cruelty under Section 10 of the Act in order to avoid conflicting decisions being rendered by two different Courts. In such a situation resort will have to be had to the powers under sections 23 to 25 of the Civil Procedure Code for directing transfer of the petitions for a consolidated hearing, Reading Section 21 A in the manner done by the Nagpur Bench which leads to anomalus results has to be avoided."

21. Hon'ble Amrendra Nath Singh concurring with the view expressed by Hon'ble V.D.Tulzapurkar in para 3,4 and 5 reproduced above, in paras 8 and 9 of the judgment, noted as follows -

"In my opinion, this argument of the learned counsel for the respondent husband is without any substance. I have earlier set out Section 25 of the Code of Civil Procedure and I have pointed out that an analysts of the section makes it abundantly clear that for the ends of justice, wide power and jurisdiction have been conferred on this Court in the matter of transfer of any suit, appeal or proceeding from any High Court or other Civil court in one State. A suit or a proceeding for divorce under the Hindu Marriage Act in a civil court is necessarily a suit or proceeding and must on a plain reading of Section 25 (1) of the Code of Civil Procedure be held to come under Section 25 (1) of the Code, as the said section speaks of any suit, appeal or other proceeding. This Court must necessarily enjoy the power and jurisdiction under the said provisions of transferring such a suit or proceeding for the ends of justice, unless the power and jurisdiction of this Court are specifically taken away by any statute. If the jurisdiction clearly conferred on any Court has to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal terms. Section 21 of the Hindu Marriage Act does not deal with the question of jurisdiction of any Court. As no procedure with regard to the proceedings under the Hindu Marriage act has been laid down in the said Act. Section 21 of the Act only provides that ' all proceedings under this Act shall be regulated as far as may be by the Code of Civil Procedure."

Section 21 of the Hindu Marriage Act cannot be construed to exclude the jurisdiction conferred on this Court under Section 25 of the Code of Civil Procedure. It does not become necessary in the instant case to decide whether the provision in relation to jurisdiction of this Court contained in Section 25 of the Code of Civil Procedure is one of substantive law or it belongs to the domain of procedure. Even if I accept the argument of the learned counsel for the respondent that Section 25 does not form any part of the procedural law and is a part of the substantive law. I am of the opinion, that jurisdiction conferred on this Court by Section 25 of the Code of Civil Procedure is not in any way, affected by Section 21

of the Hindu Marriage Act which as I have already noted only provides that all proceedings under the Hindu Marriage Act shall be regulated as far as may by the Code of Civil Procedure, 1908.

9.S. 21 A of the Hindu Marriage Act in my opinion, has indeed no bearing on the question of jurisdiction conferred on this Court under Section 25 of the Code of Civil Procedure Section 21 A of the Hindu Marriage Act makes provisions for transfer of petitions specified in the said section and for hearing and disposal of such petitions together by the District Court in which the earlier petition has been presented. Such power has been conferred on the Court or the Government ***Section 21 A has no application to the case of transfer of any suit or proceeding from one State to another****. As I have earlier noted very wide power and jurisdiction have been conferred on this Court in the interest of justice for transferring any appeal, suit or proceeding from one State to another under Section 25 of the Code of Civil Procedure. In the instant case, the petitioner has applied for transfer of the suit pending in the District at Eluru in the State of Andhra Pradesh to the appropriate court at Udaipur in the State of Rajsthan. I am, therefore, of the opinion that this Court enjoys the power and jurisdiction to entertain this application under Section 25 of the Code of Civil Procedure and Sections 21 and 21 A of the Hindu Marriage Act do not, in any way, exclude, affect or curtail the power conferred on this Court under Section 25 of the Code of Civil Procedure. I may incidentally add that the present Section 25 in the Code of Civil Procedure came into force after Sections 21 and 21 A have been incorporated in the Hindu Marriage Act, 1955".*

(Emphasis laid down by me)

22. The aforesaid decision in the case of G. Vijayalakshmi (supra) negatives the contention of the learned counsel for the husband-applicant before this Court.

23. In view of the above, the present transfer application seeking transfer of the case from Meerut (state of UP) to Gwalior (State of MP) is not cognizable by this Court.

24. Transfer application is, accordingly, rejected in limine as not cognizable.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2002

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 21348 of 2001

Braham Shanker Tripathi ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri W. Khan
Sri J.H. Khan

Counsel for the Respondent:
S.C.

Constitution of India, Article 226- where a person is appointed according to the Rules his seniority is to be computed

from the date of appointment and not from the date of confirmation.

Held - para 10

The facts of the case are covered by the Supreme Court decision in Union of India versus Lalita Rao 2001 (5) SCC 384. The question is whether adhoc service is to be added to total length of service. Since there is no provision in relevant rules for determining the seniority of the employees in service, the principle laid down by the Supreme Court in Direct Recruit Class II. Engineering Officers Association versus State of Maharasthra 1990 (2) SCC 715 have to be followed. In that decision the Supreme Court has held that where a person is appointed according to the Rules seniority is to be computed from the date of appointment and not from the date of confirmation. In the present case the petitioner was appointed in adhoc capacity in accordance with Rule 5 of the UP Subordinate Agriculture Service Rules 1977 after selection against posts which were advertised. Hence in our opinion the petitioner's service from 16.2.73 to 8.5.81 has to be added to the petitioner's total length of service for the purposes of seniority and his position in seniority will be fixed accordingly.

Case law referred:

2001 (5) SCC 384, 1990 (2) SCC-715

(Delivered by Hon'ble M. Katju, J.)

1. This writ petition has been filed by the petitioner praying for mandamus directing the respondents to count the petitioner's adhoc service from 16.2.1973 to 4.5.81 towards his total length of service for preparing the seniority list.

2. We have heard learned counsel for the parties.

3. In para 3 of the petition it is stated that 30 posts were advertised for making adhoc appointments on Group II post under UP Subordinate Agriculture Service Rules, 1977. The petitioner applied and was selected amongst others vide order dated 17.2.73 Annexure 1 to the writ petition. The petitioner joined on 16.2.73 as Soil Conservation Inspector in pursuance of the above appointment letter.

4. In para 9 of the petition it is stated that the Group II posts were advertised by the UP Public Service Commission for regular appointment in 1977-78 and the petitioner applied and was duly selected and was given appointment letter dated 4.5.81 vide Annexure 4 to the petition. The petitioner was promoted from Group II to Group I post, from the post of Horticulture Inspector to Senior Horticulture Inspector vide order dated 27.5.1984 Annexure 5 to the petition. A tentative seniority list was published on 14.3.1990 of Group II employees and the petitioner's seniority was at serial no. 101 and his date of appointment shown 4.5.81, and his adhoc service on the said post from 16.2.1973 was ignored. A true copy of the tentative seniority list is Annexure 6 to the petition. Without finalising the tentative seniority list of Group II the respondents published another tentative seniority list dated 30.4.1991 of Group I in which also the petitioner service from 16.2.1973 were not counted vide Annexure 7 to the petition. The petitioner filed objections against both these tentative seniority lists vide Annexure 8 to the petition but the same have not been decided. True copies of the reminders are Annexure 9 and 10 to the petition. In para 15 of the writ petition it is stated that the petitioner has been given regular increment since 16.2.73. The petitioner was given officiating appointment as

District Horticulture Officer by order dated 12.8.99 Annexure 12 to the writ petition. It is alleged in para 19 of the petition that the work of the petitioner is outstanding and he was given special appreciative entry dated 6.2.2001 Vide Annexure 13 to the writ petition. However, subsequently the charge of District Horticulture Officer was taken away from the petitioner without any rhyme and reason and posts are lying vacant. It is alleged in para 21 of the petition that 30 posts of District Horticulture Officers are vacant and promotions are to be made accordingly. In para 22 of the petition is stated that the tentative seniority lists has not been finalised and the petitioner's objections have not been decided.

5. Aggrieved this writ petition has been filed.

6. A counter affidavit has been filed by the respondents. We have perused the same. It is not disputed this fact that the petitioner has been working since 16.2.73. However, it is disputed by the respondents that the petitioner is entitled to seniority from 16.2.73.

Rule 5 of the relevant rules states:

"Subject to general control of the government recruitment in service whether in substantive or in officiating vacancies or to temporary post should be made by the Director of Agriculture U.P.".

7. Thus it is clear that appointment can be made on officiating capacity and hence the adhoc appointment of the petitioner from 16.2.73 was in accordance with the rules. In fact the Govt. had advertised 30 posts for adhoc appointment in Group II posts and the petitioner was selected and appointed against one of these posts on 7.2.73.

8. As stated in para 5 of the writ petition, initially the Horticulture and Agriculture Department were one but subsequently they were bifurcated in 1974 and two departments were created. No option was called for from the employees and the petitioner continued in Agriculture Department. The petitioner has done Master of Science in Horticulture in First Class. It was contended that he should have been posted in Horticulture Department but he continued in Soil Conservation section. After completing 3 years service in Group II he applied for posting in Group I in Horticulture Section but the Director of Horticulture instead of appointment him in Group I gave him adhoc appointment in Group II. It is alleged in the rejoinder affidavit that since the petitioner was working on adhoc basis in Group II since 17.2.73 his service should be counted from that date.

9. In para 5 of the rejoinder affidavit it is also stated that one Shesh Narain Tewari who was adhoc appointee was placed at serial no. 34 while the petitioner was placed at serial no. 101 in the tentative seniority of Group II The date of joining of service of Shesh Narain Tewari was shown as 20.2.1973 but the petitioners date of appointment was shown as 4.5.81. Similarly, one Ramesh Singh Tomar who was adhoc appointee in Group II was promoted to Group I in 1976 just in one year. This in our opinion, shows discrimination against the petitioner.

10. In our opinion the submission of learned counsel for the petitioner is correct. The facts of the case are covered by the Supreme Court decision in Union of India versus Lalita Rao 2001 (5) SCC 384. The question is whether the adhoc service is to be added to the total length of service. Since there is no provision in the relevant rules for determining the seniority of the employees in service, the principle laid down by the Supreme Court in Direct Recruit Class II. Engineering Officers Association versus State of Maharasthra 1990 (2) SCC 715 have to be followed. In that decision the Supreme Court has held that where a person is appointed according to the Rules his seniority is to be computed from the date of appointment and not from the date of confirmation. In the present case the petitioner was appointed in adhoc capacity in accordance with Rule 5 of the U.P. Subordinate Agriculture Service 1977 after selection against posts which were advertised. Hence in our opinion the petitioner's service from 16.2.73 to 4.5.81 has to be added to the petitioner's total length of service for the purposes of seniority and his position in seniority will be fixed accordingly.

11. The writ petition is allowed. No orders as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.7.2002

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

Civil Misc. Writ Petition No. 27939 of 2002

Moti Prasad Agarwal and others ...Petitioners
Versus
Prabandh Nideshak, Pradesiya Industrial and Investment Corporation of U.P. and others ...Respondent

Counsel for the Petitioners:
Sri S.C. Tripathi

Counsel for the Respondents:
Sri Avinash Misra
S.C.

Sick Industrial Companies (Special Provision) Act 1985- Section 22- whether the provisions for giving protection to the rich and wealthy persons- but at the some time the poor farmers- who could not repay the amount of agriculture loan- due to draught or Natural calamity- No provision about any protection- as such provisions of section 22 is discriminatory- Union of India also impleaded- for proper adjudication.

Held- Para 4

One can understand giving protection to the poor and weak people, but the Sick Industrial Companies (Special provision) Act, 1985 does just the reverse by giving protection to the rich in respect of recoveries against than while no such protection is available to the poor people in respect of recoveries against them. This is prima facie in our opinion highly discriminatory against the poor people of the country.

(Delivered by Hon'ble M. Katju, J.)

1. Heard Sri S.C. Tripathi for petitioners, Sri Avniash Misra for Respondent No. 1 and learned Standing Counsel.

2. Petitioners are challenging the impugned recovery and one of the grounds taken by the petitioner who are guarantors of the loan is that the petitioners are entitled to the benefit of Section 22 of the Sick Industrial Companies (special provision) Act 1985 (in short the Act). We are of the opinion that prima facie the Act is unconstitutional and is violative of Article 14 of the Constitution. This Act gives protection to the rich businessmen by staying the recovery against them whenever they bring their company before the B.I.F.R.

3. The poor people of the country do not get any such protection against their recoveries. For example if a poor peasant has taken a loan for seeds, fertiliser, etc. and if his crop fails e.g. for lack of monsoons, recovery is issued against him and his land is sold in pursuance of the recovery and even his personal assets may be sold, but this will not be done with regard to companies because they can go to the B.I.F.R. and get protection of Section 22 of the Act.

4. One can understand giving protection to the poor and weak people, but the sick Industrial Companies (special provision) Act, 1985 does just the reverse by giving protection to the rich in respect of recoveries against them, while no such protection is available to the poor people in respect of recoveries against them. This is prima facie in our opinion highly discriminatory against the poor people of the country.

5. Learned counsel for the petitioner is permitted to implead the Union of India. Learned counsel for Union of India will intimate the learned Attorney General of India about this order.

6. List on 12.8.2002 before us by which time parties may exchange the affidavits.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5TH JULY, 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S.R. ALAM, J.
THE HON'BLE V.M. SAHAI, J.

Writ Petition (Tax) No. 504 of 2002

Brij Bhushan Chaudhari and others
...Petitioners
Versus
State of U.P. through Excise Commissioner, Allahabad and others
...Respondents

Counsels for the Petitioners:
Sri Hemant Kumar
Sri P.P. Srivastava
Sri Bharatji Agrwal
Sri Mukesh Prasad
Sri H.P. Srivastava
Sri Arun Tandon

Counsels for the Respondents:
Sri Ashok Mehta
Sri Rakesh Dwivedi
S.C.

U.P. Excise Act- Section 36 A- The petitioners do not have any fundamental right to trade or business in liquor;

which is fact, the exclusive privilege of the State.

The grant of licence being in exclusive privilage of the state under the Rules, the State Government has been conferred power to renew the licence on such terms and conditions as may deem fit not proper.

The Rules do not provide for any right of the petitioners to claim renewal as a matter of right. If the State Government decides to renew the licence, it has to follow the Rules. The same however does not take away the power of the State Government to take decision that no renewal of licence be granted for a particular year.

Held- para 101

In the case of hand, it is fully established that the State Government has adopted uniform polict not to renew the licence. It has also not been discrimanted in the sense that there is renewal of one and non renewal of another. In such circumstances, there is absolutely no scope to interference.

Case law referred:
AIR 1980 SC P. 680
UPTC 1984 P. 178
UPTC 1988 P. 1348
SCC 2002 (2) P. 127
SCC 1998 P. 1
SCC 1991 (4) P. 139
SCC- 1997 (10) P. 338
AIR 1985 SC P. 956

(Delivered by Hon'ble S.K. Sen, C.J.)

1. The writ petitioners in these writ petitions are licensees for country liquor/foreign liquor and beers. Since common issues, namely, claiming renewal of their licences granted to them till 31.3.2002 for another period of one year from 1.4.2002 and for quashing the notice dated 18.3.2002 published in daily news paper (Dainik Jagran, Gorakhpur) are involved in these writ petitions, they are being disposed of by this common judgment. That apart, a large number of writ petitions involving the same questions of facts and law have been instituted in this court and they have been connected with these petitions. Therefore, all those connected writ petitions will be governed by the decision in these writ petitions and they are also disposed of by this common judgment.

2. The case of the petitioners is that some of the licensees were granted licenses in the year 2000 and some of them in the year 2001 for a period of one year or part thereof, renewable on the conditions to be decided by the State Government. According to relevant Rules governing the grant of license in respect of country made liquor, foreign liquor, and beer, to be discussed hereinafter, the licence granted to the writ petitioners may be renewed for such period and on such terms and conditions as to be decided by the State Government, from time to time. The State Government, however, had already issued advertisement on 18th March 2002 in several newspapers inviting applications for grant of licence for retail outlet for sale of beer, country made liquor and foreign liquor. Some of the writ petitioners applied for renewal of their licenses. Their case has not been considered. However, advertisement has been issued for issuance of fresh licence.

3. When the writ petitions came up for admission on 21.3.2002 before a Division Bench, they were admitted and an interim order to the following effect was passed:

"Be that as it may, we are not inclined to enter into the controversy. We

are of the view that the interest of justice shall be best served if those petitioners who have already applied for renewal and those whose applications were not entertained apply within 23rd March 2002, their cases for renewal is considered by the State Government in accordance with law and appropriate decision is taken by State Government by 25th March, 2002. In the event of refusal to grant renewal the State Government to record reasons for the same."

4. Pursuant to advertisement the draw of lots shall take place as fixed and the result shall be declared, but no contract shall be executed till 5.4.2002. It is made clear that this order is restricted to the case of writ petitioners only. The question of renewal shall be decided by the Secretary, Excise Department, U.P. Government, Lucknow.

5. The case shall be taken up on 1.4.2002 at 3 P.M. as specially fixed part heard matter.

On 1st April 2002, when the matter again came up for hearing the following interim order was passed:-

"Learned Advocate General submits that by way of interim measure it should be provided that the petitioners who moved applications by 23.3.2002, are not required to deposit any money at the moment.

6. The order passed by Secretary, Department of Excise, State of U.P. on 25.3.2002 has not been communicated to the petitioners. It shall be supplied to the learned counsel for the petitioners by 2.4.2002.

7. State quo as on 31.3.2002 shall continue till 5.4.2002 so far as the aforesaid petitioners are concerned.

8. The matter will be taken up on 3.4.2002 at 2 P.M. as part heard.

9. Let certified copy of this order be supplied to learned counsel for the parties on payment of usual charges today."

10. Again, the matter came up for hearing on 4th April 2002 before a Division Bench consisting two of us, and it had passed the following orders.

11. Shri S.C. Sinha, Joint Director, Government Printing Press, Allahabad is present in the Court in pursuance of our order passed today before recess.

12. He submits that Director, Government Printing Press has left for Lucknow today early morning for attending the meeting at Secretariat Lucknow. He has produced the record and submits that the Gazette, which is produced today, was printed yesterday night i.e. on 3.4.2002.

13. He further submits that Shri G.S. Sethi, Director, Government Printing Press has instructed him to print the Gazette by any means by 3rd April night since the publication is very important.

14. He further submits it was received on 14.3.2002 and was in the process of publication but it could not be printed.

15. He further submits that no copy has been sold out to any member of the public as yet.

16. Shri S.C. Sinha, Joint Director, Government Printing Press, voluntarily submits that he had received instruction that it must be published in view of the urgency by night of 3.4.2002 from Director, Government Printing Press. He further voluntarily says that the Director has instructed him specifically to publish the Gazette by 3.4.2002 from his office at Allahabad.

17. Considering the statements made by Shri S.C. Sinha, Joint Director, Government Printing Press, it appears to us that the matter has taken a very serious turn.

18. Shri P.P. Srivastava, learned counsel for the petitioners in the presence of the Chief Standing Counsel made a comment on 3.4.2002 that he apprehends that such printing of Gazetter shall take place by night as the printing of Gazette has not taken place as yet and as such the repealing Rules 2002 has not really come in to force. It appears that to circumvent and to stifle the course of justice, such a process has been taken, so that the submission of the learned counsel for the petitioner cannot have any effect when the Court is seized of the entire matter. It shall not be in the interest of the justice to take the matter lightly. Considering the gravity of the situation, we direct the Director, Government Printing Press, Shri G.S. Sethi, who instructed Shri S.C. Sinha, Joint Director, Government Printing Press to print the Gazette by any means by the night of 3.4.2002 to be present in the court tomorrow i.e., on 5.4.2002 at 2.00 p.m. The Secretary Department of Excise and the Commissioner of Excise, Uttar Pradesh, Allahabad shall also be present on 5.4.2002 at 2.00 p.m. and explain on what basis the printing could be made only in the night of 3.4.2002. In the meantime no sale to public of this gazette in question shall take place.

19. It may be noted that by order dated 21.3.2002 and 23.3.2002 the Division Bench, inter-alia, directed as follows: -

"Be that as it may, we are not inclined to enter into the controversy. We are of the view that the interest of justice shall be best served if those petitioners who have already applied for renewal and those whose applications were not entertained apply within 23rd March 2002, their cases for renewal is considered by the State Government in accordance with law and appropriate decision is taken by State Government by 24th March, 2002. In the event of refusal to grant renewal the State Government to record reasons for the same.

Pursuant to the advertisement the draw of lots shall take place as fixed and the shall be executed till 5.4.2002. It is made clear that this order is restricted to the case of writ petitioners, only. The question of renewal shall be decided by the Secretary, Excise Department, U.P. Government, Lucknow."

20. On 1.4.2002 the Division Bench passed an order directing the status quo as on 31.3.2002 to continue till 5.4.2002 in Writ Petition No. 504 of 2002 and Writ Petition No. 509 of 2002 and in large number of petitioners which came up for hearing:

"We are prima facie satisfied that the said order was not followed in its true spirit. By one general order the

applications for renewal of the applicants for renewal were rejected referring to section 36-A of the U.P. Excise Act. It is well settled that no body has a specific right to renewal, but each case has to be decided in its own perspective in view of Rules-5 for country and foreign liquor and 6 for Beer of U.P. Excise Rules, 2001. The said rules provide for renewal and the State Government has exclusive power to decide the terms and conditions of such renewal. The Rules of 2002 however provided that the consent of the licensee has to be obtained for the purposes of renewal, Prima facie it appears to us that the said order rejecting the case for renewal was passed mechanically and without application of mind. The Chief Standing Counsel however pointed out on the last occasion i.e. on 3.4.2002 that Rules for the year 2001 have been repealed with regard to country liquor and, therefore, the petitioners cannot get the benefit. We have already noted that the repealing Act has not been published as required under section 77 of the U.P. Excise Act, 1910 and as such the same has not come into force. In fact, the Secretary, Excise Department, Government of U.P., in his order dated 25th March, 2002, has not mentioned the said Rules of 2001 have been repealed and repealing rules have come into force by publication in the official gazette. Accordingly, we are prima-facie of the view that the interim order of status quo, which had continued upto 31.3.2002, shall continue upto 10.4.2002 subject to further order that may be passed tomorrow, since we have heard the case of all the petitioners today, all the petitioners shall be entitled to this interim relief.

21. This interim order shall, however, continue subject to the condition that there is no arrears due against the petitioners. In the event, there is any arrear against any of the petitioners; they will not be permitted to run their shops. Since we are passing this order, by way of interim measure, the petitioners shall be granted licence on day-to-day basis. As an interim measure the petitioners may be permitted to run the spot on day today basis on the terms and conditions as may be fixed by the State Government. It is expected that the supply of liquor shall be ensured provided the petitioners make payment of the amount due and payble upto 10.4.2002 at a time.

22. The matter shall be listed on 5.4.2002 along with all connected matters, as part-heard at 2.00 P.M. for hearing.

23. The office is directed to supply copy of this order to learned Chief Standing Counsel today for compliance of the order."

24. The matter was thereafter taken up on 7th April, 2002 as part heard when it was directed that the matter shall appear as part heard on 8th April, 2002 and interim order shall continue up to that date. Thereafter, the matter was heard on several dates, i.e. on 8.4.2002, 10.4.2002 and 11.4.2002, on 11.4.2002, the following orders, by the Division Bench consisting of two of us, were passed:-

"Sri S.C. Budhwar, learned Senior Advocate assisted by Sri Neeraj Sharma, learned Advocate, intervener in Writ Petition No. 595 of 2002 argued the case at length and placed before us the various provisions of the Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 (hereinafter referred to as the Rules), other relevant rules, country

liquor, foreign liquor and all the three Rules of 2002 particularly Rules 7,8,9,10 and 11 of the Rules which relate to the procedure and settlement of shops on the basis of new applications received. The State Government in spite of our granting repeated time has declined to life (file) counter affidavit in the matters. Therefore the State Government is directed to produce records relating to the procedure for grant of licence and settlement of shops adopted by it by 15th April, 2002. The matter shall be taken up as part heard at 2.00 P.M. on 15.4.2002. On 10.4.2002 in Writ Petition Nos. 504 and 509 of 2002 this Court has passed the following order:

"Put up tomorrow as part heard at 2.00 P.M. alongwith all connected matters. The interim order shall continue till tomorrow.

This order shall also apply in all other connected matters where the interim order is already operating.

Till 15.4.2002 status quo as of today be maintained. This order shall apply in all other connected matters where the interim order had been passed by this Court. The office is directed to issue certified copy of this order in all connected matters where said order is already operating.

The Chief Standing Counsel shall communicate this order to the State Government and the Excise Commissioner. The office is directed to hand over a copy of this order today to the learned Chief Standing Counsel."

25. The matter was finally heard and concluded on 15th April 2002 when the interim order of status quo was directed to continue till 19th April, 2002. It was also provided that the said interim order was to continue in all other connected matters in which the interim order was already operating. Ultimately, on 1.5.2002, the Division Bench consisting of two of us passed the following orders:-

"….it may be noted that during the course of hearing on 15.4.2002 learned Advocate General pointed out to us that similar writ petitions were being heard by Division Bench of the Lucknow Bench and the Bench had reserved the orders, we had also concluded the hearing and reserved the judgment and the interim orders was directed to continue till 19.4.2002. In the meantime, however, we were informed on 17.4.2002 that on 16.4.2002 that the Division Bench comprising Hon'ble Mr. Justice Pradeep Kant and Hon'ble Mr. Justice M.A. Khan, dismissed the writ petition no. 1543 (MB) of 2002 Kiran Jaiswal v. State of U.P. and others and connected writ petitions.

26. Records of the said writ petitions were called for and it appears from the records of the said writ petitions that the said writ petitions were assigned to the Bench comprising Hon'ble Mr. Justice Bhalla and Hon'ble Mr. Justice R.D. Shukla and on 25.3.2002. The said Division Bench passed the following order:-

"……To maintain judicial property and law of certainty, we find it to be appropriate to direct the Secretary, Excise Department, U.P. Government, Lucknow to dispose of petitioners' renewal applications if they have been received by 23rd March, 2002 upto 11 P.M., in accordance with law and the remaining order of the two benches (Supra) would also be available to the petitioners.

List on 1st of April, 2002.

27. We are further of the view that let these matters be communicated/placed before the Hon'ble Chief Justice during Holi vacation for considering as to where all the matters can be heard and disposed of together i.e., the matters filed at Allahabad and at Lucknow by the same Division Bench…."

28. On the reopening of the Court on 1.4.2002 the said matters were taken up by Hon'ble Mr. Justice Pradeep Kant and Hon'ble Mr. Justice M.A. Khan. On 3.4.2002 the said Division Bench referred to the order passed by Hon'ble Mr. Justice J. Bhalla and Hon'ble Mr. Justice R.D. Shukla, passed on 25.3.2002 and proceeded with the hearing of the matter, in view of the fact that there was no specific order of the Hon'ble The Chief Justice on the observation made by the Division Bench on 25.3.2002. The bench on 3.4.2002 passed the following order:-

"A Division Bench of this Court while entertaining the writ petitions noted the fact that similar writ petitions have been filed both at Allahabad as well at Lucknow and observed that these matters be communicated/placed before Hon'ble the Chief Justice for considering as to where all the matters can be heard and disposed of together that is the matters filed at Allahabad and at Lucknow by the same Division Bench. These matters were listed on 1.4.2002 (Listing) that because of the ignorance, the aforesaid observations made in the order, could not be communicated to Hon'ble the Chief Justice, therefore, we postponed hearing for today and required the Joint Registrar (Listing) to place these matters before Hon'ble the Chief Justice, in the meantime.

29. Sri P.K. Chaturvedi, Joint Registrar (Listing) is present. He informs that the order has been sent and placed before Hon'ble the Chief Justice on 1st April, 2002 itself but no written orders have been sent or communicated till this time. He has been informed telephonically by Sri D.N. Agarwal, Joint Registrar (Listing), Allahabad that the Hon'ble Chief Justice has observed that he could not pass any order for transferring the petitions otherwise than under Clause 14 of the Amalgamation Order which can only be passed when he sits at Lucknow.

30. Learned counsel for the petitioners argued that since the jurisdiction to entertain the petitions at Lucknow has already been upheld by the Division Bench while entertaining the writ petitions and there being no prayer for transferring the matters under Clause 14 of the Amalgamation Order nor there is any such order till date and Hon'ble the Chief Justice having been duly communicated the observation made by the Division Bench there is no impediment for the Court to proceed with the matters.

31. We are also of the view that in view of the information given by the Joint Registrar (Listing) and the fact that the order has been communicated to Hon'ble the Chief Justice and the writ petitions have been entertained at the Lucknow, there appears to be no legal impediment in hearing the matters and, therefore, we proceed with the hearing.

32. Put up tomorrow i.e., on 4.4.2002 for hearing alongwith other connected matters."

33. The question, however, still remains that if the matter was assigned to another bench, whether the matter could be taken up by the other Division Bench. However, we are not willing to go into the said controversy being a bench of co-ordinate jurisdiction. We feel that the question should be decided by a larger bench or higher forum wit several other questions which have been raised on behalf of the petitioners, by representing counsel for the petitioners Mr. Arun Tandon and Mr. Mukesh Prasad and Mr. K.D. Mishra.

34. It has been strongly contended by Mr. Arun Tandon that the judgment of the Division Bench of Lucknow is not binding, being contrary to the settled law that the matter was assigned to another bench could not be decided. That apart it was also argued that the judgment and decision of Division Bench of Lucknow Bench in Kiran Jaiswal's case is per incuriam.

35. Mr. Mukesh Prasad, learned counsel on behalf of another bunch of the writ petitioners states that the judgment and the order passed by the Division Bench at Lucknow should be treated as per incuriam. He argued that matter should be referred to the larger bench.

36. Mr. K.D. Mishra, learned counsel for the petitioner in writ petition no. 610 of 2002 has argued vehemently that the Rules of 2002 are ultra-vires U.P. Excise Act 1910 since the Commissioner under the statute has not been authorized for the purpose of grant of licence as has been done by the Rules 2002. He also placed before us the necessary averments in the writ petition and he has prayed in the writ petition also, which are as follows:-

"(i) Issue a writ, order or direction in the nature of certiorari to quash the U.P. Excise (Settlement of licences for retail sale of country liquor) Rules, 2002, notified by the notification No.27091/X-Licence-59, Dated March, 14, 2002 (Annexure-1 to the writ petition).

(ii) Issue a writ order or direction in the nature of Mandamus directing the respondents to consider for the extension of renewal of the petitioners licences for further period or till the New Rules are framed by the State Government."

37. The petitioners have challenged the lottery system in Mr. K.D. Mishra's Writ Petition No. 610 of 2002 and also prayed for the relief of quashing of the Rules of 2002, what was the effect of the said Rules on the advertisement as also on the notification on the basis of which the lottery was held pursuant to the Rules 2002 and on the basis of letter of 14.3.2002 from Joint Secretary, U.P. Government to Excise Commissioner, U.P. which is stated to be the policy of the State Government. We called upon the Chief Standing Counsel who has very fairly submitted that the said letter which is treated as Government policy is the basis of the Rules 2002. The said policy is reflected in the said Rules.

38. It may be noted that on the same day the Policy and Rules came to light. Admittedly, the said Rules 2002 were not taken into consideration by the Division Bench.

39. The Division Bench, felt that it was not necessary to consider the Rules. It has also been argued before us by the counsel for the petitioners that if the Rules 2001 and 2002 is declared to be not valid and binding then the U.P. Licensing under the Surcharge Fee System Rules 1968 shall hold the field. Naturally, the procedure mentioned there in has to be complied with and procedure under the 2002 Rules cannot have any effect. It is the specific case of the State Government that both the administrative policy and the advertisement are in consonance with the 2002 Rules. This aspect of the matter has been totally ignored by the Division Bench at Lucknow perhaps due to inadvertence or due to the fact that learned counsel appearing therein did not make out this case.

40. Be that as it may, the matter involves substantial question of law of very great importance as argued before us. Accordingly, we are framing the following question:-

1. If the judgment and order passed by Division Bench comprising of Hon. Mr. Justice Pradeep Kant and Hon. Mr. Justice M.A. Khan at Lucknow, dismissing the writ petition on 16.4.2002, is valid and has any binding effect in view of the fact that the said writ petitions were assigned to another bench comprising of Hon. Mr. Justice J. Bhalla and Hon. Mr. Justice R.D. Shukla?

2. If the principles of per incuriam and sub silentio are applicable to the said judgment and decision rendered by the Division Bench of Lucknow on 16.4.2002?

3(a). If the rules framed by the Excise Commissioner being Rules of 2000, 2001 and 2002 for country liquor, foreign liquor and beer on the basis of which, it has been contended by the respondents that grant of excise license for the period 2000-2001, 2001-2002 and 2002-2003 was made, are valid in the eye of law?

3(b). If so, when the said Rules came into force?

4. Are the petitioners entitled to the renewal of licence or for grant of new licence since they filled up the forms and paid the deposit as asked for by the respondent authorities?

41. We refer the entire bunch of writ petitions to be heard and decided by the larger bench, on the aforesaid questions amongst other question, which may be examined by it, for the determination by said bench to be constituted by the Chief Justice.

42. This order shall be applicable to Civil Misc. Writ Petition Nos. 504 of 2002, Writ Petition No.509 of 2002, Writ Petition No. 610 of 2002 and all other connected writ petitions."

43. It may be noted that pursuant to the interim order dated 21.3.2002, the application for renewal of the licenses were considered by the Secretary, Excise Department who passed an order on 25.3.2001 declining to grant renewal of excise licenses issued for 2001-02. The main reason disclosed for issuance of such order was that the State Government had taken a policy decision not to grant renewal of excise license and to hold public lottery for the purpose.

44. Mr. Bharatji Agarwal, learned Senior Advocate assisted by Mr. Mukesh Prasad, Mr. H.P. Srivastava and Mr. Arun Tandon, learned Advocates argued on behalf of most of the writ petitioners and others learned counsel, appearing on behalf of rest of the writ petitioners, adopted their submissions. The contention of Mr. Bharatji Agrawal, learned Senior Advocate is that the writ petitioners did not commit any breach of the terms and conditions of the licence and they have complied with all the necessary formalities. As such, they moved an application for renewal of the licence. On the one hand, applications of some of the petitioners were rejected by the State Government by means of an order dated 25.3.2002 and renewal applications of other petitioners were not, at all, entertained whereas, on the other hand, the applications of other petitioners have been accepted but could not be decided by the respondents on the ground that there did not exist any direction of this Court. Mr. Agarwal also urged that the license of the petitioners is to be renewed for such period and on such terms and conditions, as may be decided by the State Government in accordance with Rules of 2001 and 2002, as amended by U.P. Excise (Second) Amendment Rules, 2002 and U.P. Excise (Third) Amendment Rules, as well as, terms and conditions and the period is the discretion of the State Government subject to which the existing licenses are to be renewed.

45. Mr. Agarwal further urged that the writ petitioners have already expressed consent for renewal prior to 31.3.2002. Thus, the advertisement issued by the State Government on 18.3.2002 for grant of license for retail sale of beer, foreign liquor and country liquor is contrary to law and provisions of the existing Rules of 2002 as well as amended Rules of 2001 which came into force with effect from 3.4.2002. Therefore, the petitioners who were license holders up to 21.3.2002 are certainly entitled to get their applications for renewal considered, on merits, as per Rules and amended Rules, issued on 14.3.2002 and published in the Official Gazette on 3.4.2002.

46. Mr. Agrawal very specifically pointed out that on the own showing of Mr. G.S. Sethi, the Joint Director, Government Printing Press Allahabad, the amended Rules of 2002 were printed/published in the official Gazette in the night of 3.4.2002 and, thus, by virtue of Section 77 of U.P. Excise Act, new Rules shall be deemed to have come into force from the date of publication in the official Gazette. It was next argued by Mr. Bharatji Agarwal that any action taken under the new Rules of 2002 for drawing the lottery prior to 3.4.2002 shall be invalid. In support of his contention, Mr. Agarwal placed reliance in State of U.P. V. Kishori Lal Miccha (A.I.R. 1980 S.C.-680), wherein the Hon'ble apex court, at page 682 of the Report has held as follows:-

"Section 77 of the U.P. Excise Act, 1910 States-All rules made and notification issued under the Act shall be published in the official Gazette and shall have effect as if enacted in this Act from the date of such publication or from such other date as may be specified in the behalf. The High Court found that the conditions mentioned in Rule 357 had never been published as required and they did not, therefore, have the force of law. The High Court held that part II of the

Excise Manual which includes Rule 357 contained provisions which were "commonly referred to as rules" but were not really statutory rules and that it was " a sort of bocks of guidance'. Before us, it was claimed on behalf of the appellant that some of the conditions contained in Rule 358 had been published in the official Gazette, but the learned counsel for the appellant, State of Uttar Pradesh was not in a position to dispute that at least the last part of the 5th condition providing that in case of default if the price fetched at the resale was less than the bid as the first sale, the difference would be recovered from the defaulter, had not been published. That being so, it must be held that there was no law under which the respondent could be asked to make amends for the shortfall."

47. The learned senior counsel- Mr. Agarwal further submitted that similar view was taken by a Division Bench of this Court in Vijay Prakash Jaiswal and others V. State of U.P. and others-1984 U.P.T.C.-178 (para 17). According to Mr. Agarwal, the aforesaid decision has been upheld by the apex court in State of U.P. V. M/s National Industrial Corporation, decided on 17.9.1976. The apex court has approved the view of this court to the effect that the additional license fee of Rs.25,000/- cannot be recovered from the excise licenses under the U.P. Excise Act even though such a condition was in existence in the excise license but the rules made were not printed in the Gazette. Hence, the statutory rules will prevail.

48. Mr. Agrawal vehemently urged that the action of drawing lotteries on the basis of Rules of 2002 is abinitio invalid and no license can be granted on the basis of such lottery drawn in pursuance of the Rules of 2002 as no action under the Rules of 2002 could be permissible in the eye of law, prior to 3.4.2002 (the date, when the Rules of 2002 came into force). According to Mr. Agrawal, renewal applications are to be considered as per existing Rules of 2001, as amended by U.P. Excise Rules of 2002, (U.P. Excise Rule No. 6 of 2002 for beer and U.P. Excise Rule No. 5 of 2002 for foreign liquor) and similarly for country liquor as these Rules of 2002 have also come into force with effect from 3.4.2002. According to Mr. Agrawal, learned Senior Counsel, the administrative instructions of 14.3.2002 contained in the letter of Secretary to Excise Commissioner, relied upon by the State, being contrary to rules, is invalid and, therefore, the State cannot get any advantage of the said instructions for the purpose of renewal of license by way of lottery. In support of this contention, he placed reliance on the decision in Aditya Chemicals V. State of U.P.- 1988 U.P.T.C.-1348 Km. M. Chikka Puttaswamy V. State of Andhra Pradesh- AIR 1985 S.C. 956 and Collector of Central Excise Bombay V. Kores (India) Ltd., Thane- 1997 (10) SCC-338 (para 4). The argument of Mr. Agrawal is that the executive instructions and the circulars, if they are favourable to the assessee can be relied upon by the assessee as binding on the Department, but the administrative instruction, which are contrary to law can have no binding effect either on the assessee or on the court as has been held by the apex court in Collector of Central Excise, Bombay's case (para 4) (Supra). According to Mr. Bharatji Agrawal, Rules 5 and 6 of the existing rules are binding upon the Government and the Government is estopped from asserting the same to be

contrary to Section 36-A of U.P. Excise Act (hereinafter referred to as 'the Act').

49. Mr. Agrawal, learned senior counsel strenuously urged that section 36-A of the Act is an enabling provision. It enables the State Government and the Excise Commissioner to frame Rules in exercise of powers under Section 40 and 41 of the Act in respect of renewal of a license. In exercise of powers under Section 41 of the Act, the Excise Commissioner has framed the Beer, Country Liquor and Foreign Liquor Rules, which provide for renewal of licence. Thus, the petitioners are entitled for their application to considered on merits for renewal on the basis of the existing Rules for the year 2001 amended by Rules of 2002, which has now come into force with effect from 3.4.2002.

50. The further argument of Mr. Agrawal is that Rules 5 and 6 are not contrary to Section 36-A of the Act and it is not open to the State Government to argue that the Rules are contrary to Section 36-A of the Act. To fortify his submission, Mr. Agrawal placed reliance on paragraph 11 of the decision of Hon'ble the Supreme Court in Collector of Central Excise Vadodra Vs. Dhiren Chemical Industries- (2002) 2 SCC-127, wherein, the apex court has held that if there are circulars issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue regardless of interpretation placed by the Supreme Court.

51. With regard to question no. 1 for consideration by the Full Bench, citing paragraph 59 (4) of the decision of apex court in State of Rajasthan V. Prakash Chand and others- 1998 SCC-1, it has been submitted by Mr. Agrawal learned Senior Advocate assisted by Mr. Mukesh Prasad, learned Advocate, that a Bench can only take up judicial business assigned to it by or under the direction of Hon'ble the Chief Justice. In the instant case, since the matter was specifically assigned to the Bench presided over by Hon'ble Jagdish Bhalla, J. by the Chief Justice, Mr. Agrawal contended that the Division Bench presided over by Hon'ble Mr. Pradeep Kant, J. had no jurisdiction to decide the matter and as such, the said decision is no decision, in the eye of law, and the same is not binding.

52. So far as question no.2 is concerned, it has been contended by Mr. Agrawal that the conclusion of law by the Lucknow Bench of this court, dated 16.4.2002 to the effect that the writ petitioners have failed to establish any enforceable right for consideration of renewal of licence for excise year 2002-03, falls within the rule of sub-silentio and is per incuriam, since the Lucknow Bench of this court has not considered all the relevant provisions of the Act and the Rules framed there under and several issues have been left open. They were not adjudicated upon by the Lucknow Bench. To fortify his contention Mr. Agrawal took us through paragraphs 40 to 42 of the decision of apex court in State of U.P. and another V. Synthetic and Chemicals Ltd. and another (1991) 4 SCC-139 Mr. Agrawal, however, submitted that the order passed by the Lucknow Bench of this court, in any event, cannot and will not prevent the Full Bench of this court to pass an order and to take an appropriate decision, irrespective of the findings recorded by the Division Bench, since this

Bench is a larger Bench and, therefore, the question of validity of the order passed by the Division Bench as on the question of jurisdiction or on the question of sub-silentio and per incuriam has become immaterial.

53. So far as question no.3 is concerned, Mr. Agrawal has submitted that there is no infirmity in the Rules framed by the Excise Commissioner. The Rules of 2000, 2001 and 2002 have been validly framed by the Excise Commissioner in exercise of powers under Section 41 of the Act. By framing Rule 5 of the Uttar Pradesh Excise (Settlement of Licenses for Retail of Country Liquor) Rules, 2001, Foreign Liquor Rules, 2001 and Beer Rules, in exercise of power under Section 41 (a), the Excise Commissioner has imposed two specific conditions, firstly, that the licenses will be for an excise year, and, secondly, that the licence will be renewable. The Excise Commissioner has not usurped the powers of the State Government and had not made fresh Rules prescribing the period of licence. Period of licence has been prescribed under Rule 332, framed by the State Government, way back in the year 1910. The provisions of Rule 332 govern the period of all excise licenses.

54. As regard the question of renewal, it has been submitted that renewal is to be done, in respect of all licenses granted under the surcharge fee system under Rule 4 of the Uttar Pradesh Licensing Under the Surcharge Fee System Rules, 1968, framed by the State Government.

55. Mr. Arun Tandon, learned counsel appearing on behalf of many of the writ petitioners in several writ petitions draw our attention to page 25 of the Division Bench judgment rendered by Lucknow Bench of this Court in Civil Misc. Writ No. 1543 of 2002- Kiran Jaiswal and 40 others Vs. State of U.P. and others. According to Mr. Tandon, it has been clearly recorded by the Division Bench in the aforesaid judgment that the policy decision of State Government for the grant of licence for the year 2002-03 has not been challenged in the said writ petition. It also records that the policy decision which has been communicated to the Excise Commissioner U.P., Allahabad by the State Government by the State Government 14th March, 2002 discloses that the State Government has duly considered the policy which was to be adopted by the excise year 2002-03 and thereafter a decision was taken to make the settlement under public lottery system. It also (lays) down the conditions of fee etc. which would be applicable in the case of such licenses. The decision thus taken by the State Government cannot be faulted with. As a matter of fact, the aforesaid policy decision has not been challenged in any of the writ petitions. It has not at all been stated that how the policy decision is bad and contrary to any statutory provision or fundamental rights or any other constitutional provision or rules. The Division Bench has further, inter alis, recorded that the only ground of attack, during the course of argument, raised was that Rule 5 of the Rules of Country Liquor and Indian Made Foreign Liquor Rules, 2001 and Rule 6 of Beer Rules, 2001 denote the policy of the State to renew the licenses and, therefore, the subsequent decision doing away with the aforesaid alleged policy enunciated in Rules 5 and 6 respectively, was arbitrary and illegal. It appears that the Division

Bench only took into consideration Rule 5 and 6 of the Rules of 2001 and so far as Rules of 2002 are concerned, the same were not considered by the Division Bench perhaps because of the fact that they were not brought to the notice of the Division Bench as appears from a bare perusal of the said judgment. According to Mr. Tandon, in view of the fact that the Division Bench overlooked the Rules of 2002 and thereby failed to take note of the relevant statutory provisions, renders it to be ineffective and the same cannot have any binding effect and has to be treated as per incuriam. The said judgment is also distinguishable on account of the fact that it has been clearly mentioned at page 28 of the same that there was no pleading with regard to legitimate expectation and promissory estoppel. In the instant case, however, the writ petitioners have specifically pleaded the same. Mr. Tandon strenuously argued on U.P. Excise Licensing Surcharge Rules and contended that under surcharge fee system, the writ petitioners have been granted licence. He also referred to Sections 24, 24-A, 31 (d) and 10(2)(f) of the Act. He submitted that the State Government has power to delegate the authority to make rules to the Excise Commissioner except under Section 40(e) of the Act regarding period, locality and persons to whom license is to be granted. For that purpose, rules can be framed by the State Government only. In the instant case such power cannot be delegated to the Excise Commissioner. Excise Commissioner has power to frame Rules with regard to fixation of fee. Fee, however, can be determined under Section 41(C) of the Act by (i) auction, (ii) invitation of tender and (iii) assessment on the basis of sales to be governed by Auction-Cum Tender Rules, 1991. To the extent of fixation of these fee on the basis of the aforesaid provision, the Commissioner is certainly empowered to frame Rules. The aforesaid provision, however, does not contemplate any mode of determination of fee on the basis of lottery.

56. Mr. Tandon further contended that Section 24-A read with Section 24-B of the Act provides that the State Government has exclusive privilege to manufacture by wholesale or retail any foreign liquor, in any locality, and that the Excise Commissioner while determining or realizing the fee for grant of such exclusive privilege acts on behalf of the State Government. According to Mr. Tandon, the provision of Section 24-A of the Act, are, however, subject to the provisions of Section 31 of the Act, Section 31 of the Act provides that every licence, permit or pass granted under the Act shall be granted-

(a) on payment of such Fees (if any),

(b) subject to such restrictions and on such conditions,

(c) shall be in such form and contain such particulars, as the (Excise Commissioner) may direct either generally or in any particular instance in this behalf, and

(d) shall be granted for such period as the State Government may in like manner, direct.

57. He also referred to (i) Section 40(2) (e) of the Act which provides that the rule making power of the State Government cannot be delegated. (ii) Section 12 (2) (f) of the Act which

provides that the State Government may delegate all or any of its power under the Act to the Excise Commissioner except the power conferred by Rule 40 to make rules (iii) Section 40(1) of the Act which empowers the State Government to make rules for the purpose of Government carrying out the provisions of the Act or other law for the time being in force relating to excise revenue and submitted that the Legislature has adopted by incorporating the U.P. Licensing under the Surcharge Fees, Stamp Rules, 1968 made by the Excise Commissioner to be deemed as valid and effective as if the said Rules were duly framed by the State Government under this Section, Mr. Tandon also referred to Surcharge Fee System Rules and submitted that the same are applicable to grant of licenses of excisable articles settled under graduated surcharge fee system or under uniform surcharge fee system. Under the said Rules, the licenses granted are liable to be renewed compulsorily under Rule 4 Mr. Tandon, therefore, urged that in view of the aforesaid statutory provisions, the Excise Commissioner U.P. at Allahabad has absolutely no authority to frame any Rule, whatsoever, with regard to the period of license and the power in that regard vests with the State Government only. The writ petitioners having been granted licenses are entitled for renewal of the same on year to year basis and fresh applications in respect of the shops of the writ petitioners cannot be entertained because Rule 5 of the Rules of 2000 provides for renewal of licenses for succeeding year and Rule 6 of 2000 provides for renewal of the licenses granted under the Rules of 2000. According to Mr. Tandon, under Rule 7 of the Rules of 2001, fresh applications could only be invited in respect of the new licenses proposed to be granted in an area or locality. A joint reading of Rule 6 read with Rule 7 established beyond doubt that so far as existing licenses were concerned, there was no occasion for any new licenses to be treated, consequently, Rule 7 has no application in respect of the licenses, which were granted in the year 2000-01.

58. Mr. Tandon contended that admittedly the said Rules have remained unchanged till 31.3.2002 when the right of renewal has accrued in favour of the writ petitioners. It is only on 3rd April, 2002 when the Rules of 2002 were published in the official gazette in view of Section 77 of the Act. The said Rules of 2002 shall have application only on the date of publication in the official Gazette. In support of this contention, Mr. Tandon placed reliance on the two decisions, one rendered by the apex court- State of Uttar Pradesh Vs. Kishori Lal Minocha- A.I.R. 1980 S.C.-680 and the other by a Division Bench of this Court in Vijay Prakash Jaiswal and others Vs. State of Uttar Pradesh and others- 1984 U.P. Tax Cases-178. --------- Mr. Tandon specifically pointed out that the amendments made by amendment Rules of 2002 have been not altered the position of the writ petitioners to their detriment in any manner, whatsoever. As a matter of fact, the right of the writ petitioners for renewal has further been accured by delation of the words' granted under these rules' from Rule 6 as well as the addition of the words 'with the condition of the licence'. Mr. Tandon also referred to Rule 7-A of the Rules of 2001 and submitted that the said Rules have not been amended by the Rules of 2002, meaning thereby, that in respect of existing licensed shops of the writ petitioners, no fresh application could

be entertained as it was not grant of new licence contemplated by Rule 7-A of the Rules of 2001. According to Mr. Tandon, Section 36-A provides that no licencee shall have a claim for renewal. This Section has to be read along with other Rules framed by the State Government and the Excise Commissioner, whereunder renewal of the licence has statutorily contemplated, meaning thereby- the State Government may, by rules, provides for renewal of licenses and on such a prescription by the State Government, the State Government cannot refuse to act arbitrarily and no act contrary to its own Rules. The legal position in this regard has been firmly settled by a Division Bench of this court in writ petition No.385 of 1995, decided on 26.5.1995. In the said decision, it has been specifically held that although the State has exclusive authority to deal with intoxicating liquor, the State Government cannot act contrary to its own conditions and it is bound by the Rules by which it wants its action to be adjudged. To fortify his submission, the learned counsel draw our attention to the decision of apex court in Ramanna V. I.A. Authority- A.I.R. 1979 S.C.-1629 wherein the principles of natural justice and fair play have also been made applicable in regard to the claim of the licenses dealing in liquor, when the grant of licence is refused in breach of the conditions of the tender notice and statutory rules. Mr. Tandon urged that in view of the principle of legislation by incorporation which is to be applied to proviso Rule 41 as the Rules framed by the State Government, as already contained, it cannot be disputed that the State Government, irrespective of Section 35-A, can renew licence on year to year basis. According to him, rigours of Section 36-A have no application, at all, insofar as the right and power of the State Government are concerned as quaranteed by Section 31 (d) of the Act read with Section 40 (2) (e) of the Act for the purposes of determining the period of licence which necessarily includes the renewal on year to year basis and it is always open to the State Government to frame statutory conditions or rules providing for renewal of license and such conditions or rules framed by the State Government would not hit by Section 36-A of the Act. The learned counsel further submitted that such a rule being framed by the State Government, it is always open to the licensee to insist that the State Government must action accordance with the statutory rules framed by it, failing which the action of the State Government would be per arbitrary and violative of Article 14 of the Constitution of India. He supported this argument by citing the decision of apex court in Khodeya Distillery V. State of Karnataka-1996 (10) SCC-304. In this decision, the apex court has very specifically held that ever in respect of grant of excise contract, Article 14 would be attracted. Mr. Tandon painstakingly raised his arguments, at great length, on the different questions which have come up before this Full Bench for consideration.

59. So far as question no. 1 is concerned, Mr. Tandon vehemently urged that (i) Rule 1 of Chapter V of the Allahabad High Court Rules provides that the Judges shall sit alone or in Division Benches, as may be constituted from time to time and do such work, as may be allocated to them by the order of the Chief Justice or in accordance with his directions. Under Rule 10 of Chapter V, under the orders of the Chief Justice, writ jurisdiction can be exercised by such

Judges, as may be appointed for the purpose. Rule 10 (2) clarifies that arrangement of Benches shall be subject to the general or special order of the Chief Justice, (ii) once the Chief Justice has allocated a particular case to a particular Bench to sit, that Bench alone has the jurisdiction to deal with the matter in view of the aforesaid Rules. It will not be out of place to clarify that under Rule 6 of Chapter VI, publication of the Cause List by the Registrar is also subject to such direction as the Chief Justice may give, from time to time, meaning thereby, that once the Chief Justice has constituted as particular Bench and has allocated a case to the said Bench, the matter can be heard and decided by the said Bench alone, (iii) from the record of the writ petition no. 1543 (MB) of 2002- Kiran Jaiswal V. State of U.P., it is apparently clear that the Bench which was nominated by the Chief Justice during Holi vacations passed specific order that the matter may be placed before the Chief Justice during summer vacation for considering whether all the matter can be heard and disposed of together, i.e., matter filed before Allahabad and Lucknow by the same Division Bench, and lastly, (iv) in view of the aforesaid judicial order of the Division Bench which was nominated by the Chief Justice; the matters could not have been heard by any other Bench unless and until (a) the matter was placed before the Chief Justice and the Chief Justice had passed an order for hearing of the case at Lucknow and (b) in the event of any orders being not passed by the Chief Justice on the matter being placed before him, the same Division Bench to which the aforesaid writ petitions were allotted by the Chief Justice alone should have heard the matter. In view of the above, Bench comprising of Hon'ble Mr. Pradeep Kant, J. and Hon'ble M.A. Khan could not have heard the matter. Consequently, the order passed by the said Bench on 16.4.2002 has no binding effect.

60. On question no.2, Mr. Tandon submitted that the principles of sub-silentio and is per incuriam are attracted in respect of the judgment of the Lucknow Bench for the reasons (i) that there was no petition in respect of Beer licenses which were granted in the year 2000-01 and were renewed for the year 2001-02, Consequently, the impact of the Rules of 2000 read with the Clauses 6 and 7 of the Rules of 2001 have not been noticed and were not subject matter of consideration; (ii) Rules 6 and 7 of the Rules of 2001 have not been taken into consideration, nor the effect of words 'new licenses' under Rule 7 so far as invitation of fresh applications is concerned, has been considered. From the records of the present writ petitions and the proceedings which have taken place before this court, it is now well established, beyond reasonable doubt, that the Rules of 2002 had come into force only with effect from 3.4.2002, i.e. subsequently to the right of renewal having been accrued in favour of the writ petitioners and as such, had no application, at all; (iii) that in the present writ petition the writ petitioners have challenged the advertisement itself inviting fresh applications, as also order of the State Government rejecting their renewal application. The writ petitions were instituted prior to the settlement of the licenses and there is an interim order in favour of the writ petitioners whereby final settlement of the shops of the writ petitioners was stayed. Lucknow Bench has noticed that there is no challenge to the settlement of the licenses for the year

2002-03. The finding with regard to the publication of Rules of 2002 is based on non-consideration of Section 77 of the U.P. Excise Act. The letter dated 14.3.2002 written by the under Secretary to the Excise Commissioner has been taken as the policy decision of the State Government on the basis of mere allegations made by the standing counsel in the counter affidavit in another writ petition. From the records, which have been produced before this court in the present proceedings, it is crystal clear that there is no such policy decision. The document dated 14.3.2002 is only an internal letter; (v) a bare reading of Rules 5 and 6 with reference to Rule 7 clearly indicates that these provisions have material bearing upon the right of the sitting licensees to their licenses renewed. That being so, the finding that the licensees have no right under the statute for renewal of licences is incorrect and is based on non-consideration of Rules 5 to 7 as well as the Surcharge Fee System Rules. The incorporation of Section 36-A is based on non-consideration of proviso to Rule 40 (1) a as well as the power of the State Government to determine the period of licence which includes renewal thereof as provided for under Section 31 of the Excise Act; and (v) the Lucknow Bench has specifically left open the issue about grant of licenses to the new licenses which is prominently under consideration in the present proceedings.

61. Mr. Tandon urged that in the connected writ petition no. 410 of 2002, the vires of Rules of 2002 have specifically been challenged before this court (at Allahabad) which was not the case before the Lucknow Bench of this court. The Division Bench judgment in the case of National Industrial Corporation and Sirshadi Lal Industries has not been noticed by the Lucknow Bench which specifically provides that the action of the State Government is to be judged in accordance with the Rules framed by it and any action to the contrary would be violative of Article 14 of the Constitution of India.

62. Next submission of Mr. Tandon is that the grant of licenses for the Excise year 2001-02 has been done in accordance with the Rules of 2002 which were not in force in the eyes of law on the date of lottery when the licensees were selected. The impact of notification of the Rules of 2002 in the Gazette dated 4.5.2002 read with Section 77 has been completely ignored by the Lucknow Bench.

63. On question no. 3 (a), Mr. Tandon contended that the licenses granted in favour of the writ petitioners are in conformity with the Surcharge Fee System Rules which are para materia to the Beer Rules of 2000. Consequently, the grant of licence in favour of the writ petitioners is legal and valid and the said licenses are liable to be renewed.

64. So far as question no. 4 (b) is concerned, Mr. Tandon contended that in view of Section 77, the Rules shall come into force only on the date of publication in the official Gazette which in the facts and circumstances of the case is admittedly 3.4.2002 and the said Rules will have no application so far as the right of renewal of the writ petitioners is concerned, which had accrued on 1.4.2002, i.e. prior to the coming into force of the new Rules. He lastly submitted that the State Government having obtained option for renewal of the licenses from the writ petitioners and

other such persons in the month of February, 2002, it cannot now be permitted to refuse renewal of the licenses on the basis of its letter dated 14.3.2002 as well as under the impugned order dated 25.3.2002.

65. Mr. K.D. Misra assisted by Mr. Santosh Misra appeared in writ petition no.610 of 2002 for the writ petitioners and submitted that the writ petitioners were under the impression that the licence will be renewed for the year 2002-03 under the existing rules for the year 2001-02. But the State Government and the Excise Commissioner decided to settle the licenses a fresh by lottery system and the general public was invited to submit application in the prescribed proforma under the provisions of U.P. Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules 2002 (hereinafter referred to as 'the Rules'). It is claimed that the new rules were notified vide notification no. 27091/K-Licence-59, dated 14th March, 2002. He also urged that the said rules, however, were not printed and published in the Gazette till 3.4.2002 and, therefore, did not come into existence prior to that date. Mr. K.D. Misra, learned counsel also referred to the provisions of Section 77 of the Act and contended that the rules made and the notification issued under the Act can be made applicable from the date mentioned or specified therein. The new rules had been made applicable from the date of their publication in the official Gazette. Thus, the new rules can be made applicable with effect from 3.4.2002 and not from 14.3.2002 when the said notification was issued. In this connection he placed reliance on a decision of the apex court in State of M.P. V. Tikam Das- A.I.R. 1975 S.C.-1429. It is the contention of Mr. Misra that the State Government and Excise Department invited application liquor from 18th March and the lottery was drawn on 25.3.2001, under the new Rules. In the meantime, writ petitioners challenged the re-settlement of their licenses under the new rules, on the ground that the new rules were ultra vires and prayed for extension or renewal of their licenses till the new rules were framed by the State Government.

66. Mr. Mishra further contended that the new rules superseded the Rules of 2001 and 2002 with effect from 3.4.2002, and therefore, every action taken by the Department for settlement of licenses of the writ petitioners beginning from 14.3.2002 to 26.3.2002 were without the authority of law and the persons who were successful in the lottery held on 26.3.2002 were not, at all, entitled to be granted the licenses for retail sale of country made liquor for the year 2002-03 with effect from 1.4.2002. It is also submitted by Mr. Misra that pursuant to the interim orders dated 23.3.2002 permitting the writ petitioners to apply for renewal of their licenses till 23 hours on 23.3.2002 before the Excise Secretary, the applications for renewal of the licenses were made. However, the same were considered and rejected by the Excise Secretary-respondent no.1. Mr. Misra referred to Section 24-B of the Act and urged the in terms of the said section the State Government has an exclusive privilege of sale of country made liquor and foreign liquor. He also urged that under Section 36-A of the Act no person to who license has been granted under the Act shall have any claim to the renewal of licence. But the petitioners claim for renewal of or extension of the period of their licence on the basis of Rule 5 of the

Rules of 2001 though there is no fundamental right for trade in liquor. It is contended that the petitioners are certainly entitled to get the benefit of renewal or extention of the period of their licence by virtue of rules framed by the Excise Commissioner. Mr. Misra vehently urged that in accordance with the provisions of new rules, i.e., the Rules, 2002, the period of licence shall be for an excise year or part thereof, for which the licence has been granted and that the licence may be renewed or extended with the consent of the licensee for another excise year or part thereof on such terms and conditions, as may be decided by the State Government. It has been contended that while the relevant rules for the year 2001-02 provide that the period of licence shall be for an excise year or part thereof for which the licence has been granted, the licence may be renewed on such terms and conditions as may be prescribed by the State Government. But before the lapse of the rules for the year 2001-02, the term of the licenses granted under these rules stood expired on 31.3.2002. However, according to the old rules, if the Government so decides, the term of the licenses, of the petitioners could be renewed for the year 2002-03 but that possibility extinguished with effect from 3.4.2002 on account of the fact that the old rules stood suspended on coming into force of the new rules. The learned counsel vehemently challenged the validity of the new rules on the ground that the rules contained in paragraphs 8 to 12, 18 and 21 of the new rules are totally beyond jurisdiction of the rule making power of the Excise Commissioner. According to him, the State Government is obliged to make Rules under provisions of the Act on the subjects- (a) the period of licence; (b) the locality of licence; (c) the person to whom licence can be granted; (d) the procedure of grant of licence (e) the prescribing of restrictions under which any licence, permit or pass may be cancelled under Section 34 of the Act and (f) taking away property of the petitioners under the Rule 18 without paying the price for which the commodity was purchased. Mr. Misra, learned counsel pointed out that the State Government has already made rules under Section 40 of the Act fixing the period and duration of he licenses as mentioned in Rule 332 of the Excise Manual, Volume I. In Rule 338, the State Government has prescribed the eligibility conditions of the licensees for grant of licenses. Under Rule 331, the State Government has deemed to have made U.P. Licensing under the Surcharge Fee System Rules, 1968, prescribing the procedure as well as eligibility conditions have been given in Rules 381(3) of the Excise Manual Volume I, Rule 381 (4) of the Excise Manual, which is relevant for purpose of renewal of the licence, runs as follows:

"The collector shall decide whether a licence for sale of any excisable article should be renewed or not, for this purpose, he shall examine the list of existing licenses in consultation with the Assistant Excise Commissioner every year. If he considers that the conduct of any licensee has been suitable, he shall order the renewal of the licence. If the conduct of an existing licensee is reported to be unsuitable, the Collector shall call upon such licensee to show cause within a specified period why his licence should not be terminated and in doing so, shall inform him the reasons for believing him to be unsuitable. The show cause notice shall be served by registered post on the

licensee. If after considering the explanation, the Collector findings the licensee to be unsuitable he shall refuse to renew the licence and invite applications and select a new licensee in accordance with these rules."

67. Learned counsel has relied upon a Division Bench decision of this Court in Anant Ram V. State of U.P. and others (1985 E.F.R.-325) wherein the Division Bench quashed the amendment made by the Excise Commissioner to the eligibility conditions of licensees for retail sale of Tari, declaring the amendment to be ultra vires the powers of the Excise Commissioner under Section 41 of the Act. It has been submitted by Mr. Misra, learned counsel that the respondent no.2 with the approval of the State Government has fixed the licence fee of country made liquor licenses on the basis of minimum guaranteed quota for the shops. Thus, the licenses granted to the petitioners are on the condition of payment of licence fee imposed upon the licensees under the Surcharge Fee System. The surcharge increases with the increase in quota. Thus, the rules made under the U.P. Licensing under the Surcharge Fee System Rules, 1968 have to be applied in the present case, if this court finds the new Rules to be ultra vires the powers of the Excise Commissioner under Section 41 of the Act. The further contention of the learned counsel is that the State Government is deemed to have made U.P. Licensing under the Surcharge Fee System Rules 1968 under its powers under section 40 of the act and the U.P. Licensing under the Surcharge Fee System Rules cannot be succeeded by any rules made by the sub delegated authority, i.e., the Excise Commissioner, under section 41 of the Act. According to Sri Misra, there is specific prohibition of delegation of rule making powers under section 40 of the Act in favour of the Excise Commissioner as provided in Section 10 (2) of the Act.

68. Mr. Misra next contended that if the new rules are held to be ultra vires the powers of the Excise Commissioner, the Rules of 2001 are revived. As the Rules of 2001 also suffer from defect as pointed out in the new Rules and if this court is inclined to declare them to be ultra vires, they can fall upon the U.P. Licensing under the Surcharge Fee System Rules, 1968 containing a provision for renewal of licenses for retail sale of excisable articles, suo motu, by the Collector every year. In the event it is held that Rules of 2001 are not applicable, the UP Licensing under the Surcharge Fee System Rules 1968, which provides for renewal of licence for retail sale of excisable article suo motu, shall automatically be applicable. In terms of the said provision, if the Collector decided that the conduct of the licensees has been suitable, he shall order renewal of the licence. If it is held by the Collector that the conduct of the existing licensee is unsuitable, he shall call upon such licensee to show cause within a specified period as to why his licence be not terminated and in doing so, shall inform him the reasons for believing the licensee to be unsuitable. Mr. Misra, therefore, urged that the Government has been fully empowered under Article 12 298 (b) of the Constitution of India to carry on a trade or business by virtue of its executive power, subject to legislation by Parliament in the case of a trade or business with regard to which the State legislature has no power to legislate. It, therefore, follows that in the absence of law made by the Parliament, relating to

government organized lottery, any State may organize and conduct a lottery by virtue of its executive power to carry on a trade or business. To fortify his submission, the learned counsel draw our attention to a decision of the apex court in H. Anrai and others v. State of Maharasthra- AIR 1984 SC-781. According to Sri Misra, holding of lottery to settle the licenses for retail sale of liquor is not illegal but the grant of license to a person selected by lottery will be illegal unless the State Government by its executive power or rule making power lays down that selection of a person by lottery makes him the most eligible person for grant of an excise licence. Thus, submission of Mr. Misra, in the forefront, is that since does not exist any such rule, the grant of licence on the basis of lottery is out and out illegal and arbitrary and it is not vouched by law.

69. On the question of per incuriam and sub silentio Mr. Misra contended that such principle shall not apply in the instant cases in view of the fact that Lucknow Bench has specifically recorded a finding that there is no challenge to the rule on the said question. The judgment rendered by the Lucknow Bench of this court does not apply to the case of the writ petitioners of writ petition no. 610 of 2002. In the said writ petition, direct challenge has been made to the U.P. Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 and prayer has been made for declaring the same to be ultra vires the powers of the Excise Commissioner under Section 41 of the Act. Mr. Misra, therefore, submitted that the Rules of 2002 have been framed on the lines of Rules of 2001. Thus, by implication, the Rules of 2001 are also bad on the same grounds. According to Mr. Misra, U.P. Excise (Settlement of Licenses For Retail Sale of Foreign Liquor Excluding Beer and Wine) Rules 2001 together with amended version for 2002 as well as the U.P. Excise (Settlement of Licenses for Retail Sale of Beer), Rules, 2001 along with their amended version for 2002 fall on the same lines and, thus, all these rules are ultra vires the powers of the Excise Commissioner under Section 41 of the Act. Therefore, they have no sanctity in the eyes of law and, they have to be ignored. The Beer Rules of 2000 are also bad on the same grounds, though they are slightly different from the Rules of 2001. He referred to Section 36-A of the Act as also the Rules providing for renewal. According to Mr. Misra, it is permissible to renew the licence on the basis of the said rules for which power has been expressly conferred on the State Government. A licence or permit for carrying on any trade or business is not a bounty but a specific right subject to reasonable restrictions under the Act. A licence holder has an ordinary right of renewal unless there are outweighing reasons of public interest leading to a country result as held by the apex court in D. Nataraja Mudaliar V. State Transport Authority- A.I.R. 1979 S.C. 114 (para 8) and Meneka Gandi V. Union of India- A.I.R. 1978 S.C.-597. Sri Misra urged that even if the year of licence expired and the writ petition is pending, the writ petition does not become infructuous and right to renew continues as has been held in Balbir Singh Kripal Singh V. State of U.P.- (1979) UPTC-122.

70. Mr. Misra, in the light of aforesaid submissions, vehemently urged that the respondents have utterly failed to show that there was an outweighing

reason of public interest to refuse renewal of the licenses of the writ petitioners. According to him, the laudable objects of ousting the liquor mafia by settling licenses by lottery were not as successful as is being claimed. Persons with limited finances at their disposal suffered great disadvantage. The State exchequer has also suffered a tremendous loss. Most of the petitioners have acquired experience of running excise shops and now they can compete with liquor mafias. Refusal to renew their licenses shall only strengthen the hands of liquor mafias who possess heavy finances at their disposal and are capable of managing to acquire as many licenses as possible. With the network of licenses in the neighbouring States, the liquor Mafias are capable of ousting the new licensees who are raw hands in the field. In this behalf, the learned counsel quoted the decisions on Ahad Shah and others Vs. The District Excise Officer, Gorakhpur and others- 1982 E.F.R.-3418 and Rai Restraurant V. Municipal Corporation-A.I.R. 1982 S.C.-1550.

71. The Rules for the year 2000 to 2002 make provision for renewal of licenses for the sale of beer, foreign liquor except beer and wine as well as country made liquor. As such, there is no reasonable basis for making the policy that the licenses should not be renewed. Mr. Misra frankly admitted that there is no scope to claim renewal of licenses, as a matter of right, under the U.P. Licensing under the Surcharge Fee System Rules, 1968.

72. To sum up the submissions of Mr. Misra, it appears that his main argument is that the Rules framed by the Excise Commissioner are inconsistent with the Rules framed by the State Government on the subject of period and duration, locality, the persons to whom licenses may be granted and the procedure for grant of licence, and, in that view of the matter, the Rules framed by the Excise Commissioner cannot survive. His further submission is that the eligibility of a person to be granted licence as laid down by the State Government in Rule 381 (3) of Excise Manual, Volume I based on the U.P. Licence under the Surcharge Fee System Rules, 1968, does not include a person who is selected by lottery system and, therefore, the licenses proposed to be granted under the new Rules by the lottery system cannot be upheld. Thus, according to Mr. Misra, under these conditions, either the State Government may be directed to make new Rules consistent with the provisions of the Act or fall upon the U.P. Licenses under the Surcharge Fee System Rules, 1968, to settle the licenses afresh and, in the meantime, this court may also direct to extend the period of licenses for the period deemed reasonable during which the new Rules may be framed by the State Government subject to the condition that the petitioners have given their consent for extension of the period of licenses or renewal thereof for the year 2002-03 on the terms and conditions prescribed by the State Government. Mr. Misra has also contended that the assignment made during vacation remains valid for the period of vacation only. The decision regarding assignment becomes final and jurisdiction on that ground cannot be challenged.

73. Mr. Rakesh Dwivedi, learned Senior Advocate on behalf of the respondent- State of U.P.- Urged that it is not necessary to answer the first question since Full Bench can adjudicate all the

questions of law involved in the instant cases and, therefore, the decision on question no. 1 would be academic. He, however, did not dispute that the Chief Justice has the sole prerogative to assign or determine the cases to be taken by the Hon'ble Judges and the assignment, if made, remains valid. According to Mr. Rakesh Dwivedi, since none of the parties have raised any dispute with regard to reference made to the larger Bench and the issues involved are of great importance, it is not, at all, necessary to go into the question as the Full Bench is competent to determine all the questions including the question that has been decided by the Division Bench. He urged that the question of per incuriam does not arise since many of the questions have been left open for determination. Since the question raised was not argued before the Division Bench, the Division Bench at Lucknow was absolutely right in leaving the matter open. According to Mr. Dwivedi, since there was neither any issue raised nor any argument made, yet there is abrupt observation about the aspect having not been raised, the observation is said to be sub silentio. The judgment of the Lucknow Bench takes care not to decide the issue which has not been raised or with regard to which no arguments were advanced and, therefore, there is no observation, which can be said to be sub silentio. Before the Lucknow Bench of this Court, no arguments were advanced to challenge the vires of Rules of 2002. It is also noted that the Rules 2002 are not challenged on the ground that they remained unpublished on the date the licenses were granted. It is also noted that the writ petitioners do not challenge the grant of new licenses and the new licensees have not been impleaded as party. The only point argued before the Division Bench is that since the renewal of licence has not been considered, the action for fresh grant of licence would be invalid. Since the petitioners only sought for renewal of licenses which were granted under the Rules of 2002, the Bench only considered the said question. Issue of validity of the new licence was left open. Mr. Dwivedi, urged that it is settled law that the court should decide only that question which is pleaded and argued otherwise, the observation will be obiter. The matter for consideration before the Division Bench was with regard to Rule 5 of Country Liquor Rules of 2001 and Rule 5 of Foreign Liquor Rules of 2001 as well as Rule 6 of Beer Rules of 2001 pertaining to renewal of licenses. Court also noted Section 36-A of the Act. It rejected any right to renewal in view of the policy decision of the State. The Court proceeded to consider the question of renewal and rejected the same on the basis of the policy decision of the State to settle the liquor shops by fresh grant of licence. Mr. Dwivedi has submitted that the Lucknow Bench of this Court, in fact, applied its mind to all the relevant rules and was not oblivious of any rules and it held that any renewal claim under Rules of 2002 would be relevant for the licence granted under the said Rules. In such circumstances, Mr. Dwivedi urged that the judgment cannot be said to be per incuriam since there was no scope for consideration of the validity of the rules by the Division Bench Mr. Dwivedi also urged that the aforesaid Division Bench judgment may be right or wrong, may be upheld or over-ruled by the larger Bench, but the same cannot be declared to be per incuriam. He supported this contention by placing implicit reliance on the decisions in Municipal Corporation of Delhi's case

reported in (1989) 1 SCC-101 and Union Carbide's case reported in (1991) 4 SCC-584.

74. Mr. Dwivedi has further argued that the grievance, if at all, would be available to the writ petitioners of those writ petitions who were before Lucknow Bench only and they can make or agitate their grievance before Hon'ble the Supreme Court in Special Leave Petition under Article 136 of the Constitution of India and other Bench of this court-be it a larger Bench cannot sit in judgment/appeal on the judgment dated 16.4.2002 passed by the Lucknow Bench on any ground, whatsoever, including proper assignment.

75. On the question 3(a), Mr. Dwivedi, learned Senior Advocate contended that Section 41 of the Act empowers the Excise Commissioner to make Rules. The Rules have been made with previous sanction of the State Government. The procedures prescribed in Section 41 of the Act have been fully complied with and, therefore, the Rules are perfectly valid. All the provisions of Rules are well within the scope of Section 41.

76. According to Mr. Dwivedi, the question of breach of any Fundamental Right does not arise as trade in liquor is rest extra commercial and there is no Fundamental Right to trade in liquor. He fortified this submission by the decisions in Khodav Distilleries Ltd., and others Vs. State of Karnataka and others- (1995) 1 SCC-574; State of A.P. and others Vs. Mcdowell and Co. and others- (1996) 3 SCC-709; Ugar Sugar Works Ltd. V. Delhi Administration and others- (2001) 3 SCC-635; and Panna Lal and others Vs. State of Rajasthan and others- (1974) 2 SCC-633.

77. Mr. Dwivedi further contended that the publication of the Rules in the Official Gazette of the State is since question for giving effect to the Rules only and not for making of the Rule. According to him, 'making of Rule" and 'effect of Rule' are two different concepts. The Rule is made and becomes valid when the sanction of State Government is obtained and the Rule is finalized by the Excise Commissioner under Section 41 of the Act. But for having effect, it is to be published as per Section 77 of the Act. To fortify this submission, Mr. Rakesh Dwivedi, learned Senior Advocate placed implicit reliance on the decisions of Hon'ble Supreme Court in Y. Narayana Chetty and another V. The Income Tax Officer, Nellore and others- A.I.R. 1959 S.C.-213 I.T.C. Bhadarchalam Paper Boards and another Vs. Mandal Revenue Officer A.P. and others- (1996) 6 SCC-634; Makeshwar Nath V. Union of India and others (para 14)-1971 (1) SCC-662; D.C.T.O. V. Sri Sukraj-A.I.R. 1968 S.C. 67; University of Poona and others V. Shankar Narhar Ageshe and others- (1972) 3 SCC-186; and State of Uttar Pradesh V. Kishori Lal Minocha- (1980) 3 SCC-8. The learned Senior Advocate also drew our attention to pages 136 and 137 of the book- Francis Bennion 'Statutory Interpretation' by Butterworths. Placing reliance on the decisions of apex court in Major G.S. Sodhi Vs. Union of India- (1991) 2 SCC-382 (paragraphs 24) and Union of India Vs. Ganesh Das- 2000(9) SCC-461 (paragraphs 11,16 and 18) he strenuously urged that there is a presumption of proper publication of Rules.

78. Mr. Dwivedi, learned Senior Advocate next contended that assuming that the Government orders publication of Notification dated 14.2.2002 on the said date itself but the same was actually published on 3.4.2002, that would have no effect on the validity of the Rules. The only question would be as to from which date the Rules would take effect. While Rule 1 (ii) of the Rules of 2002 for Country Liquor expressly mention that they shall come into force from the date of their publication in the official Gazette, Rule (ii) of the Foreign Liquor (Third) Amendment Rules of 2002 and Beer (Second) Amendment Rules of 2002 clearly states that they shall come into force at once, meaning thereby, with immediate effect, i.e. with effect from 14th March 2002. Thus, in view of Section 77 of the Act, there can be no doubt that the Foreign Liquor and Beer Rules came into force with effect from 14.3.2002. In support of this contention, the learned Senior Advocate referred to the decisions in State of M.P. Vs. Takamdas- 1975 (2) SCC-100 and V. Balesubramanium's case reported in 1987 (4) SCC-738 (Vol. I, paragraphs 10 and 11) as also pages 154 to 158 of the book- Crawford on 'Construction of Statutes (Reprint (198) and page 176 of the book- Francis Bennion 'Statutory Interpretation' by Butterworths.

79. Mr. Rakesh Dwivedi painstakingly continued his argument and urged that there is vast distinction between 'publication of Rules' and 'operation of the Rules'. It was suggested that once the notification itself mentions the said date to be the date of publication in the Official Gazette, as per order of the Governor, the actual publication by the Government Press on a later date would not be relevant. The Government Press is simply an executing agency and it cannot subvert the legislative exercise of framing of Rules under the legislative mandate by Section 41. Under rule 55 of the Publication Rules, the publication in Extraordinary Gazette must take place on the same day. According to Mr. Dwivedi, some snag at the level of Government Press causing delay in issuance of the Notification shall not amount to any fraud on Rule Making Power. The pleasure of the Governor had been communicated to the Government Press well in time and, therefore the legislative intent must prevail. The purpose of publication in the official Gazette should also be kept in view. The purpose obviously is to inform the concerned persons about the legal position so that they take notice of law and take such steps as they may deem fit to protect their interest. In the instant case, the Rules dated 14.3.2002 were published in several newspapers and all the writ petitioners admittedly came to know of the said Rules. In fact, this court, by order dated 21.3.2002 permitted the Excise Department to conduct draw of lots and declare result but execution of contract was restrained till 5.4.2002. It was pointed out that the advertisement is not in conflict with the Rules at all. It gives limited information and requires the applicants to collect detailed information from the office. It also refers to the communication of the Excise Commissioner. It is important that the writ petitioners are all holders of existing licenses and the averments made in the writ petitions itself show that the were fully conversant with the Rules of 2001 and 2002. All the writ petitions were instituted well before the lottery was drawn. Mr. Dwivedi urged that the advertisement must be read along with the

communication of the Excise Commissioner and the Rules of 2002. They are meant to compliment each other. The new Rules find mention in the order is also in the order dated 22.3.2002 and, therefore, not only the writ petitioners were well aware of the Rules but the draw of lots were conducted as per orders of this Court. The writ petitioners cannot have any grievance for such non-publication of the Rules. Mr. Dwivedi dubbed the challenge based on delay in publication of Rules in the official Gazette, on the facts and in the circumstances of the case, as hyper technical. He contended that the new licenses were issued on 2.4.2002 and they would, in any case, operate with effect from 3.4.2002 even if the said date is taken as the date of operation of Rules.

80. Mr. Dwivedi next contended that the actions taken on the basis of valid Rules before publication would remain valid once the Rules are notified in the Official Gazette, which is evident from Section 22 read with Section 4 (42-B) General Classes Act, 1897). In support of this contention, he placed implicit reliance on the decision in University of Poona's case (supra); The Bangalore Woolen Cotton and Silk Mills Co., Ltd., Bangalore Vs. The Corporation of the City of Bangalore and others- A.I.R. 1962 S.C.-562 (paragraph 4); The State of Rajasthan V. The Mewar Sugar Mills Ltd. Bhopalsagar- A.I.R. 1969 S.C.-88o (paragraph 8); Jiyajirao Cotton Mills Ltd., Birla Nagar, Gwalior Vs. Employees State Insurance Corporation through its Local Manager, Gwalior- A.I.R. 1962 M.P.-340 (paragraphs 8 and 9); and The Gram Panchayat Zillaguda Village Hayatnagar Taluk Rangareddy and others Vs. Government of Andhra Pradesh and others- A.I.R. 1982 A.P.-315 (paragraphs 7,21, 29 and 30).

81. The further argument of Mr. Rakesh Dwivedi, learned Senior Advocate is that the State has exclusive privilege and right to manufacture and sell liquor. It has also exclusive privilege and right to sell the said right in order to augment its revenue. It is a normal incident of trading or business transaction to charge a price for this. In view of Section 21, 24, 24-A and 31 of the U.P. Excise Manual, 1910, the exclusive privilege is granted by means of a licence and this would guide and regulate the executive power of the State to carry on trade or business in liquor and to make contracts in that behalf. The learned Senior Advocate referred to Section 31 of the Act which provides for the form and conditions of licenses. The fee restrictions, conditions, the form and particulars of licenses are to be fixed by the Excise Commissioner and the period of licence is to be such as the State Government may direct. Section 31 of the Act does not necessarily envisage upon framing a rule under Sections 40, 41 of the Act and it can be given effect to or be implemented by directions contained in the executive orders. Thus, even if there is delay in publication of the Rules in the Official Gazette, the grant of licence and consequential execution of contracts in accordance with the Act and unpublished Rules would be valid and effective. According to Sri Dwivedi, grant of licence and contracts would be protected by Section 31 and Article 298 of the Constitution of India. He fortified this contention by relying on the decisions in Style (Dress Land) V. Union Territory Chandigarh (Vol. IV) (paragraph 9, 10, 13 and 14)- 1999 (7) SCC-89; Ram Chandra

Kailash Kumar and Co. V. State of U.P. and another- A.I.R. 1980 S.C.-1124 (paragraphs 15 and 18); State of Orissa V. Harinarayan Jaiswal (Vol. IV- paragraphs 10,11,13 and 14)- 1972 92) SCC-36; Lakhan Lal V. State of Orissa- 1976(4) SCC-660; Har Shankar V. Dy. Excise and Tax Commissioner- 1975(1) SCC-737 (Vol. IV paragraphs 38,54 to 59 and 63 to 65); and Doongaji and Co.(I) V. State of Madhya Pradesh and others- 1991 Supp. (2) SCC-313.

82. Mr. Dwivedi, thereafter referred to Sections 24,24-A and 31 of the Act, containing the provisions for grant of exclusive privilege of manufacture etc., grant of exclusive or other privilege in respect of foreign liquor, form and conditions of licenses etc. Thus, prescription of conditions of licence has to be done by framing Rules under Section 41 of the Act. The framing of rule would be a proceeding taken before grant of licence. The crux of his submission, therefore, is that even if there is some irregularity or omission in such proceedings pertaining to enforcement of Rules, the same would not make the grant of licence invalid in view of Section 37 of the Act. The publication, at any rate, is only a procedural matter. In support of this submission the learned Senior Advocate placed implicit reliance on the decisions rendered in I.T. Chadrachalam's case (paragraph 17- Vol. I)- 1996 (6) SCC-634; The Bangalore Woolen Cotton and Silk Mills case (supra) paragraphs 2,3 and 4); R.V. Sheer Metalcraft Ltd. and another- 1954 (1) All E.R.-542; Beigam Veeranna Venkata Narasimloo and others V. State of A.P. and others- (1998) 1 S.C.C.-563 (paragraph 14 and 15); as well as on page 370 of the book- 'Maxwell on the Interpretation of Statutes'.

83. On question no.3, Mr. Dwivedi submitted that even if the previous Rules are considered to be operative till 3.4.2002, there would be no material difference with regard to the entitlement of the writ petitioners either to renewal of licenses or grant of new licenses. It would still be open to the State to grant its exclusive right or privilege of sale of liquor in such manner as it decides and as per policy adopted. It is open to the State to adopt a policy of granting fresh licenses instead of granting renewal of licenses to the existing licensees.

84. Regarding question no.4, the argument advanced by Mr. Dwivedi is that on the factual premise, the writ petitioners were not, at all, asked by the Excise Commissioner to fill up renewal forms or application for renewal or to make deposits. The writ petitioners sought the renewal on their own. So far as the claim of renewal of licence is concerned, there is no basis or justification for the reasons- (i) Section 36-A of the Act makes it clear that no licensee shall have any claim of renewal and, therefore, irrespective of operation of the Rules of 2002, the writ petitioners have no right to renewal, (ii) in the trade of liquor, the State has exclusive privileges as has been held in various decisions of apex court as well as this court. For removal of doubts, Section 24-B of the Act makes this position crystal clear; and lastly, the writ petitioners have no Fundamental Right to trade in liquor and so they cannot claim, as a matter of right, renewal of license. Since there is no right to renewal of liquor licence and the State is not duty bound to renew the licence, under the provisions of law, no mandamus can be issued directing the Excise Commissioner to renew the licenses. The learned Senior Advocate,

supported this contention by the decisions of apex court in Chignleput Bottlers V. Majestic Bottling Company- (1984) 3 SCC-258 (paragraphs 13 and 41); State of U.P. and another V. Raja Ram Jaiswal and another- (1985) 3 SCC-131 (paragraph 16); Mohd. Fida Karim and another Vs. State of Bihar and others- (1992) 2 SCC-631; and Gajraj Singh and others V. State Transport Appellate Tribunal and others- (1997) 1 SCC-650.

85. According to Mr. Dwivedi, the only right of the writ petitioners with regard to renewal of licence is fair treatment based on Article 14 of the Constitution of India. In this behalf, he referred to the decisions of Hon'ble Supreme Court in Khoday Distilleries Ltd. and others V. State of Karnataka and others- (1995) 1 SCC-574; Doongaji's case (supra); and State of M.P. and others V. Nandlal Jaiswal and others- (1986) 4 SCC-566. The learned Senior Advocate also draw our attention to the law laid down by apex court in R. Vijay Kumar and others Vs. Commissioner of Excise and others- 1994 Suppl. (2) SCC-47 to the effect that the State has to follow a uniform and consistent policy. In the present case, in view of new excise policy, the State decided not to renew any licence and to seek applications for fresh grant of licence. Thus, there is no question of any discrimination and every existing licensee has been treated at par. The State Government has followed uniform and consistent policy and the writ petitioners cannot as sail the same on any ground whatsoever.

86. Mr. Dwivedi, assisted by Mr. Ashok Mehta, Chief Standing Counsel next submitted that all the applications have been made under the new Rules and have been given due consideration. Thus, it cannot be subject matter of judicial proceeding. Though the new excise policy is going to fetch more revenue, in matters of liquor regulation, the increase or decrease of revenue is only one aspect to be kept in mind. More dominant factors are health of general public, elimination of mafias, supply of good liquor and ending decentralization of supply. It is for the Government to attach weight as it deems fit to the various factors and it must be given enough play to experiment. Both judicial deference and judicial restraint are relevant in this behalf. It is also to be presumed that the Government knows the interest of people and has acted constitutionally in framing and adopting its policy. The approach of skepticism is not sanctified by law of judicial review. According to Mr. Dwivedi, it is not the case of the writ petitioners that there is infringement of Article 14 of the Constitution, in any manner, whatsoever; Moreover, in view of various decisions, such as, Ugar Sugar Works (supra); Punjab Communication Ltd. V. Union of India and others- (1999) 4 SCC-727; Mahrasthra State Board of Secondary and Higher Secondary Education and another V. Paritosh Bhupesh Kumar Sheth and others- (1984) 4 SCC-27 (paragraphs 14-16); State of Punjab and others V. Ram Lubhaya Bagga and others- (1998) 4 SCC-117; Premium Granites and another V. State of Tamil Nadu and others (1994) 2 SCC-691 (paragraphs 53,54,56); Delhi Science Forum and others V. Union of India and others- (1996) 2 SCC-405; Shri Sitaram Sugar Co. Ltd. and others V. Union of India and others- (1990) 3 SCC-223 (paragraphs 52 and 59); Krishnan Kakkanth V. Government of Kerala and others- (1997) 9 SCC-495 (paragraphs 32 and 36); Surjit Singh V. State of Punjab

and others- (1996) 2 SCC-336; Bhavesh D. Parish and others V. Union of India and another (2000) 5 SCC-471 (paragraphs 23 and 26); Balco's case (2002) 2 SCC-333; Ashok Kumar's case reported in 1995 (1) SCC-631; Narmada Bachao's case reported in (2000) 1 OSCC-664, Public policy adopted by the State is beyond the judicial scrutiny.

87. According to Mr. Dwivedi, learned Senior Advocate, the State Government has duly considered the applications of renewal submitted by the various licensees pursuant to the direction, dated 23.3.2002, of this court. Since the material aspects have been culled out and dealt with properly, there is no infirmity in passing a common order dated 25.3.2002. This is without prejudice to the submission that in view of the policy decision to invite applications for fresh grant of licence, it was not necessary for the State Government to consider the applications for renewal to the submission made on behalf of the petitioners to the effect that the State Government while disposing of the application for renewal in terms of the interim order of this court has not applied its mind in deciding the applications for renewal of licence since the applications for renewal have been disposed of by common order, Mr. Dwivedi contended that the objection to passing of common order by itself does not reflect any non-application of mind on the part of the State Government. Where large number of representations for renewal were presented for consideration before the State Government, it is most natural and permissible to the State Government to decide those representations/applications by a common order as the grounds mentioned in the representations were common and they can be disposed of by a common order. The new excise year was to start with effect from 1.4.2002 and draw of lots was to take place on 23.6.2002. Dates were fixed for the hearing of the matters both at Allahabad and Lucknow Bench of this court and as such, it was convenient and proper for the Government to decide the representations by a common order. In support of this contention, the learned Senior Advocate placed reliance on the decisions of the apex court in Shivaji Atmaji Sawant V. State of Maharashtra and others- (1986) 2 SCC-112 (paragraphs 3 and 7; Bihar School Examination Board V. Subhas Chandra Sinha and others- 1970 (1) SCC-648 (paragraph 11 and 13); and Ashwani Kumar and others V. State of Bihar and other- (1996) 7 SCC-577 (paragraphs 28 to 32, 72 and 73). It was also urged that though the order was common, in nature, it is recorded therein that all the applications were carefully examined and the different goods in the applications were collated. It is not the contention that any ground taken by the petitioners has not been included and has been left out of consideration. It would, thus, follow that all the grounds taken in the various representations were noted and considered by the Government. Each point has been considered separately and no prejudice has been caused to any of the writ petitioners. In fact, the representations were rejected in view of the new excise policy of 2002-03 wherein it was decided to settle the shops for retail sale of liquor by public lottery. The other ground for rejection of the renewal of licence is in view of Section 36-A of the Act since the Rules no not provide that renewal must be done compulsory. The other reason is that the arrangements and investments made by the licensee was for running the

business under the licence for 2001-02 and that cannot be a basis for continuance of the licence by renewal. Another reason is that the plea of assurances was incorrect as neither the advertisement gives any assurance nor the Government issued any order or notification extending any assurance of renewal of licence for 2002-03. Next reason is that the public lottery is inconsistent with the Constitutional provisions and the mere submission of applications for renewal would not create any right of renewal and renewal would be subject to Excise Policy of the Government which has exclusive privilege. The grant of renewal on new condition is the exclusive privilege of the State. It is noted that the new Excise Policy has introduced several changes in Excise Duty, Licence Fee and Licensing System. Therefore, the Excise shops are to be settled afresh. Since all the questions have been duly considered, it cannot be said that any action on the part of State Government suffers from any infirmity in disposing of the representation of the writ petitioners by a common order. Mr. Dwivedi, therefore, submitted with all vehement at his command that there is no scope to claim renewal on the basis of old terms as the rates of Excise Duty and Licence Fee would be wholly inconsistent with the new Excise Policy. It would also be detrimental to public interest and there remains no doubt about the well settled position of law that sale of liquor is the exclusive privilege of the State. At the same time, if the old licensees desire renewal on the basis of the new terms and conditions and new rates of Excise Duty and Licence Fee, then it is actually a case of fresh grant of licence on fresh terms and conditions and the very concept of renewal would be inapplicable.

88. Mr. Dwivedi next contended that the right of renewal is dependent upon the decision of the State Government. Unless the State Government decides to go for renewal of licenses and determines the terms and conditions for renewal, these Rules do not come into play at all. He further contended that in regard to three fourth of the shops, the licenses have already been granted afresh under the new Excise Policy and in regard to rest of the shops, new allottees are operating the shops on day to day basis in view of the order of this court. Under the new Excise Policy, the revenue target is Respondents (Rupees) 2696.33 crores. Three Fourth of the licensees have already deposited their basic licence fee and are continuing to deposit the monthly instalments of licence fee. Even if the Rules of 2002 are assumed to be operative on 3.4.2002, the issuance of mandamus, quashing fresh grant of licence would not nullify the new Rules of 2002 and the question of consideration of renewal applications under the old rules would not arise. The Excise Department will have to act under the new Rules of 2002, in any case. On the other hand, the quashing of the fresh grant of licenses would seriously hurt the revenue of the State with no gain to the writ petitioners. The excise revenue is an important source of fund for the State and loss of excise revenue would aggravate the financial crisis. The settled law is that the court would not issue a futile writ under Article 226 of the Constitution of India as held in S.L. Kapoor V. Jagmohan and others- (1980) 4 SCC-379 (paragraph 24-26) and Ashish Sharma and others V. University of Delhi and others- (1986) 1 SCC-1 (paragraph 3).

89. We have seriously considered the arguments advanced and the decisions

cited before us by the learned counsel for the parties. So far as the question no. 1 is concerned, it has not been actually disputed that the Chief Justice is master of the roaster and all assignments and determinations made by the Chief Justice are binding. The Judges cannot suo motu take up matters in the absence of proper order of determination and once a matter is assigned before a Single Bench or a Division Bench, the same is binding and there is no scope to override the determination to that effect. In this connection, reference may be had to paragraph 11 of a decision of the apex court in State of Rajasthan V. Prakash Chand and others- 1998(1) SCC-1 and also Division Bench judgment of this court in Prof. Y.C. Simadri, V.C.B.H.U. Vs. Deenbandhu Pathak- 2001 (4) A.W.C.-2698. In both the decisions, it was held that while on the judicial side, the Chief Justice of the High Court is only the first amongst the equals, the administrative control of the High Court vests in the Chief Justice of the High Court alone and it is the prerogative to distribute business of the High Court- both judicial and administrative. However, Mr. Dwivedi tried to raise a question to the effect that if the assignment made during vacation remains valid after vacation? He urged that such assignment was made in the instant case and was limited for the purpose of vacation and the said assignment automatically ceased after vacation. Thus, it was rightly placed before the Division Bench entrusted to take up such matters. Considering the facts and circumstances, it however, appears to us that the Division Bench to which the matter was assigned, never released it from the list but only wanted some directions from the Chief Justice in view of the fact that the matter was pending adjudication before the Division Bench at Allahabad. In these circumstances, there was absolutely no scope for taking such matters by the other Division Bench Learned counsel for the respondent-State Government, however, appreciated the above view although he urged that the same really relates to matter of propriety and it is not a question of jurisdiction. According to learned counsel, even assuming that the Division Bench at Lucknow, which has dismissed the writ petition, had no jurisdiction with regard to the matters assigned to the other Division Bench, there are large number of other writ petitions which were not assigned to other Division Bench presided over by Jagdish Bhalla, J., and as such, the decision in regard to those writ petitioner which were not assigned and dismissed by a Division Bench presided over by Pradeep Kant, J. has the binding effect and there was no irregularity, at all, therein. Be that as it may, since it has also been submitted by the learned counsel that all these matters which were decided by the Division Bench cannot have any binding effect on the Full Bench and it is open to the Full Bench to decide all the questions irrespective of any decision or finding recorded by the said Division Bench, any question in that context is mere academic. Although the learned counsel for the parties have advanced their submissions at great length, they have also argued that since no dispute has been raised with regard to the validity of the order of reference dated 1.5.2002, the question no. 1 has become academic, in nature, and it is not necessary to decide the same.

90. Question no. 2 is, if the principles of per incuriam and sub-silientio have become applicable to the

judgment rendered by the Division Bench of Lucknow Bench of this court. The same is also not required to be considered at this stage since this matter has already been referred to the large Bench. However, we are of the view that the questions of per incuriam and sub-silentio do not at all apply to the questions involved in the instant case in view of the fact that the Division Bench of Lucknow Bench of this court specifically left the various questions open it is open to any other Division Bench to consider and decide the same.

91. A decision or judgment becomes per incuriam and sub-silentio when the court due to oversight or inadvertence or ignorance fails to take into consideration any well settled proposition of law, any decision or authority which is clearly applicable in that particular case. In this behalf, learned counsel for the parties draw our attention to a number of decisions and we have given our anxious consideration to them. So far as the case on hand is concerned, suffice it to say that the Division Bench at Lucknow did not at all, overlook or fail to consider any principle of law or any decision which is applicable in the present case. On the contrary, the Division Bench at Lucknow was well aware of the well settled principle. The Division Bench, however, considered it not necessary to decide in the light of the fact urged before the Bench and facts pleaded in the said writ petition. Therefore, the judgment of the Division Bench of the Lucknow Bench does not suffer from the vice of per incurium and sub silentio. We answer question no.2 accordingly.

92. Now we come to question nos. 3 (a) and 3 (b). It appears to us that the formulation of the Government policy and framing of rules took place after holding discussions and meetings. The last meeting took place on 11.3.2002. On that day, the Governor of Uttar Pradesh held a meeting with the Chief Secretary, Principal Secretary (Finance). Principal Secretary- Law, Principal Secretary-Excise and the Excise Commission with regard to excise policy for the year 2002-03. Matters were discussed in great detail. It may be noted that on 11.3.2002, under the President Rule, the Governor was Head of the State as there was no council of Ministers at that time. On perusal of record, it appears that after such discussions, the Governor directed the senior officials to prepare a proposal and place the same for approval. On the same date, i.e. on 11.3.2002, the aforesaid officials again met in the office of the Chief Secretary and finalized the proposal for excise policy and placed it for Governor's approval. On the basis of such discussion, the option of granting renewal to the existing licensees for whole of the year was eliminated. Three options were considered. The first two alternatives were for renewal of existing licenses for a period of one month either on new terms or on existing terms and the third one was for granting licence on the basis of new rules or public lottery. Having considered these three options, as unanimous decision was taken to settle the liquor shops by granting fresh licenses on the basis of public lottery. This is recorded in the Minutes of Meeting dated 12.3.2002 prepared by the Principal Secretary-Finance. The file was then sent to the Principal Secretary- Finance and signified his approval on 13.3.2002. After fixing the target of 2696 crores on the same day the file went to the Chief Secretary. In his note, the Chief Secretary recommended

approval of third option for grant of fresh licenses for settling liquor shops on the basis of public lottery. The proposal so submitted by the Chief Secretary was approved by the Government of Uttar Pradesh being the Head of the State. The above settlement of shops by granting fresh licence through public lottery has been marked by the Governor in the margin by horizontal line by letter 'ka' and the same has been approved by the Governor. After approval of the Governor, the Chief Secretary, U.P. again signed the office not on 14.3.2002 and the Principal Secretary Excise put his signatures on 14.3.2002. The Joint Director not only communicated the approval of the new excise policy to the Excise Commissioner by letter dated 14.3.2002 had also communicated the information of sanction of the Rules on 14.3.2002. On receiving such information, the Excise Commissioner forwarded two copies of each of the rules dealing with the country liquor, Beer and Foreign liquor to the Director, Government Press, U.P., Allahabad. The Joint Director of Excise Department has also sent the letter to the Director, Government Press for publishing the Rules both in Hindi and English. It is also submitted that since the draft Rules have also been sent by the Excise Commissioner to the Principal Secretary-Excise on 7.3.2002 and 9.3.2002, and the same having already been translated into Hindi and wetted by the Principal Secretary (Litigation), therefore, the sanction of the Rules has been approved on 14.3.2002 itself by the Principal Secretary- Excise immediately after receiving the approval of the Governor of the new excise policy. In these circumstances, it cannot be said that the Rules were not made by the State Government. In fact, pursuant to the policy of the State Government, Rules were prepared and sent to the Government Press for publication after having complied with all the formalities. Arguments advanced on behalf of some of the writ petitioners by Mr. K.D. Misra and also by Mr. Arun Tandon that the Commissioner had no power to make such Rules do not apply to the instant case, particularly, in view of the facts, as stated above, as regards the procedures followed for framing the Rules. It appears that the Rules were framed at the instance of the State Government and the Excise Commissioner having been directed by the State Government to frame Rules, after approval of the Governor to issue and publish such Rules, no question of lack of authority to frame the Rules does, at all, arise. The Rules, in our considered opinion, are legal and valid and there is no illegality at all.

93. In the case of the Banalore Woolen, Cotton and Silk Mills Co. Ltd. Bangalore, Vs. The Corporation of the City of Bangalore and another (A.I.R. 1962 S.C.-562) the Supreme Court held that resolution imposing tax by Municipal Corporation since published, mere failure to notify the final resolution of the imposition of the tax in the Government Gazette is not fatal to the legality of the imposition of tax as required by Section 98 (2) of the Act and is cured by Section 38 (1) (b) of the Act. The Supreme Court in the said case also observed that the resolution was published in news papers and was also communicated to those affected by it and thus it was well known. The failure to publish in the Government Gazette did not affect the merits of its imposition. The answer to question no. 2 referred therefore, is that the mere failure to notify the final resolution of the

imposition of the tax in the Government Gazette is not fatal to the legality of the imposition.

94. In the case of Municipal Board Vs. Prayag Narain Saigal & Firm Moosaram Bhagwan Das- (1969) 1 SCC-399; (1969) 3 SCR 387, which was the case of levy of water tax, the Supreme Court held that since the local inhabitants did have the notice of the proposal and did indeed submit their objections, no prejudice is caused by not inviting fresh objections to the modified proposals. The Supreme Court also pointed out that the modified proposals raised the exemption limit and reduced the rate of tax and was thus in no way prejudicial to the inhabitants. With regard to other objections the Supreme Court observed that the special resolution did not require to be published in accordance with Section 94. Even if it is assumed that it required to be so published, the Court held, that the non-publication was a mere irregularity for the reason that the inhabitants had no right to file any objection to the special resolution. The Court also observed that inhabitants had clear notice of the imposition of the tax from the notification published in the Official Gazette on 3.8.1957 and the defect of non-publication of special resolution in the manner prescribed by Section 94 was cured by sub-section (3) of Section 135. It would be noticed immediately that the objection of non-publication pertained to the proposals and modified proposals to levy taxes and that requirement was held to be not mandatory. So far as the special resolution is concerned the Court held that it did not require to be published in the manner prescribed by Section 94. Even if it is required to be published, the Court held, the said defect of non-publication was cured by sub section (3) of Section 135 which provided that:

"A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

95. In Raza Buland Subar Co. Ltd. Vs. Municipal Board- (1965) 1 SCR 970; A.I.R. 1965 SC 895, which was a case of levy of water tax by Rampur Municipal Board under the provisions of the United Provinces Municipalities Act, 1916, the Supreme Court observed that in the manner required by Section 131 (3) read with Section 94 (3) of the Act the draft proposals were not published in the Hindi newspaper but were published in a local newspaper published in Urdu though the notification as published was in Hindi. The complaint did not pertain to the non-publication of the final notification levying taxes but only to the publication of draft proposals. The majority (Gajendragadkar, C.J., Wanchoo and Reghubar Dayal, JJ), held that Section 131 (3) read with Section 94 (3) consists of two parts, the first one providing that the proposals and the draft rules for a tax intended to be imposed should be published for the objections of the public, if any, and the second laying down that the publication must be in the manner prescribed in Section 94 (3). The majority held that having regard to the objection underlying the provision for publication, it must be held that while the first part is mandatory, the second part is not. In that case, it was held, the first part was complied with but that there was an irregularity in complying with the second part inasmuch as instead of publishing in

a local news paper published in Hindi, the proposals were published in a local paper published in Urdu though the publication itself was in Hindi language. It was also found that there was no regularly published local Hindi newspaper in Rampur. It was held that there was substantial compliance with section 94(3) in the circumstances of the case and further that Section 135 (3) which created a conclusive presumption that the tax had been imposed in accordance with the provisions of the Act, excludes any complaint of defect in procedure.

96. It may not (be) out of place to mention that in the instant case sanction of the Governor was obtained on 14th March, 2002. For giving effect to the same there is a presumption of proper publication of Rules. In this connection we may take note of the decisions in Major G.S. Sodhi Vs. Union of India- (1991 (2) SCC-382) and Union of India Vs. Ganesh Das- (2000 (9) SCC 461).

97. In the instant case assuming that Governor ordered publication of Notification dated 14.3.2002 on the said date itself but the same was actually published on 3.4.2002, that would have no effect on the validity of the rules. The only question would be from which date the rules would take effect. While Country Liquor Rules, 2002 expressly mention in Rule 1 (ii) that they shall come into force the date of their publication in the Gazette, the Foreign Liquor 3rd Amendment Rules 2002 and Beer 2nd Amendment Rules 2002 clearly state in Rule 1 (ii) that they shall come into force at once. "At once" would mean immediately on the date, March 14, 2002. In view of Section 77, there can be no doubt that the Foreign Liquor & Beer rules would come into force on 14.3.2002. In the case of Major G.S. Sodhi (supra) it was held that the publication in the official Gazette is presumed when a printed copy of the Gazette is produced. However, in the instant case there is no dispute that the publication took place on 3rd April, 2002. No licence was granted prior to the publication in the Gazette. Only an advertisement was published. Advertisement being step towards grant of licence and being in conformity with the rules, therefore, there is no scope for challenge only on the ground of its non-publication. The decisions rendered in State of U.P. Vs. Kishori Lal Minocha- (A.I.R. 1980 S.C.-680); Vijay Prakash Jaiswal V. State of U.P. and others- 1984 U.P.T.C.-178; and State of U.P. V. M/s National Industrial Corporation (of the Supreme Court) decided on 17.9.1996 cited by Mr. Bharatji Agrawal, learned Senior Advocate for the Writ Petitioners do not apply to the facts of the instant case. That apart, taking into consideration the fact that the said Rules were notified in the official Gazette of 3.4.2002 and as such, came into force on that date, the same cannot have any effect in view of the fact that no licence was, in fact, granted on the basis of advertisement for holding the lottery except that direction made in the interim order was carried out and licence was granted by way of interim arrangement. The fact that the State Government proceeded to hold lottery on 26.3.2002 is only step towards grant of licence but no licence was, in fact, issued on that basis and as such, there was no illegality even assuming that the Rules did not come into existence with effect from 26.3.2002. Both the questions 3 (a) and 3 (b) are answered accordingly.

99. So far as Question no. 4 is concerned, that is, if the petitioners are entitled to the renewal of licence, it is not disputed that the petitioners do not have any Fundamental Right to trade or business in liquor, which is, in fact, the exclusive privilege of the State. In this behalf, Section 36-A of the U.P. Excise Act is also very clear in that respect. Section 36A provides as follow:

"36-A Bar to right of renewal and compensation:-
No person to whom a licence has been granted under this Act shall have any claim to the renewal of such licence or any claim for compensation on the determination or non-renewal thereof."

100. The grant of licence being an exclusive privilege of the State, under the Rules, the State Government has been conferred power to renew the licence on such terms and conditions, as it deems fit and proper. A bare perusal of the provisions contained in the Rules makes it clear that the State Government has the privilege to deal with cases of licenses. The Rules, in effect, have to be read in consonance with Section 36-A. In our view, the Rules do not provide for any right on the petitioners to claim renewal as a matter of right or course. If the State Government decides to renew the licences, in that event, it has to follow the Rules. The same, however, does not take away the power of the State Government to take the decision that no renewal of licence be granted for a particular year. That apart, irrespective of the fact as to from when the Rules of 2002 come into force, the same shall apply prospectively in regard to the applications for renewal, i.e., to say for those who will obtain licence under the said Rules for this year and they shall be entitled to renewal in accordance with the Rules but those who have been granted licence under the earlier Rules and those who have already granted renewal, (as is the case of most of the writ petitioners), they cannot claim the benefit of renewal under the Rules of 2002, once the earlier Rules ceased to be operative. In the instant case, assuming that the Rules have come into force with effect from 3.4.2002, that does not confer any right on the petitioners or others who are continuing on the basis of Rules of 2000 and 2001 to have further renewal on the basis of Rules of 2002. In that view of the matter, in our view, the writ petitioners cannot claim any specific right of renewal and the writ petitioners, on that ground alone, cannot succeed.

101. However, only in case of arbitrary action on the part of the State, while exercising its power to grant licence or refusal to renew in terms of the Rules by making discrimination under Article 14 of the Constitution of India, there is scope for interference against the State action. In the case on hand, it is fully established that the State Government has adopted uniform policy not to renew the licence. It has also not been alleged in the writ petitions that any person has discriminated in the sense that there is renewal of one and non-renewal of another. In such circumstances there is absolutely no scope for interference.

102. So far as the argument to the effect that the petitioners are entitled to grant of renewal of licences on the basis of legitimate expectation as they had deposited the necessary amount etc., is concerned, in view of the findings recorded by us, as contained in the body of this judgment, there is no scope of

applying the principle of legitimate expectation in the facts and circumstances of the instant case on account of the view we have taken on the question, it is not necessary to refer to and consider other contentions and decisions raised and cited by the parties. Many of the writ petitioners participated in the lottery already held and as such, lottery held pursuant to order of this Court, need not be disturbed. However, in respect of further allotments, it will be open to the writ petitioners also to participate and the selections should be made in accordance with the Rules of 2002.

103. In the result, the questions having been referred to us for consideration by the Division Bench are answered in terms of the observations and answers contained in the foregoing paragraphs of this judgment. Accordingly, the writ petitions including the bunch of connected with petitions stand dismissed with the aforesaid observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.7.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 36147 of 1991

Khushi Ram ...Petitioner
Versus
Adhishashi Abhiyanta, Nalqoop Khand, Mainpuri and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Ji Verma
Sri S.U. Khan

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- the termination of the Services of the petitioner in terms of the letter of appointment cannot be said to be arbitrary or discriminatory.

(Held in para 10)

Case Law referred:
This writ petition is, therefore, devoid of merits and is liable to be dismissed. It is accordingly dismissed.

(Delivered by Hon'ble Anjani Kumar, J.)

1. Heard Sri S.U. Khan, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

2. The petitioner claims to have been appointed by the letter of appointment dated 13th February, 1987 (Annexure-1 to the writ petition) as Nalkoop Operator at Tube-well No. 165 in the district of Mainpuri.

3. A perusal of the letter of appointment clearly demonstrates that the appointment of the petitioner is purely provisional and temporary with a further rider that it can be terminated at any time without any notice. The letter of appointment further says that in any case, the term of appointment will not be extended beyond three years. It is on the strength of this letter of appointment the petitioner was functioning as Tube-well Operator.

4. By the order dated 25th November, 1991 (Annexure '2' to the writ petition), the services of the petitioner were terminated on the ground that Tube-well No.165 on which the petitioner was employed has since been abandoned and is no more functioning. Therefore, the petitioner's services were not required.

The termination order also says that the petitioner is being given notice for one month, according to his terms of appointment, and thereafter his services will automatically come to an end. This order was also communicated to the petitioner by the Ziledar of the area concerned.

5. It is these orders which are challenged by the petitioner firstly on the ground that the services of the petitioner have not been terminated in accordance with law, in as much as the termination of the services of the petitioner is arbitrary and discriminatory and while terminating the services of the petitioner, the principles of last come and first go has not been complied with. It has also been submitted that many other Tube-wells in the same district are still functioning and instead of terminating the services of the petitioner, the respondents should accommodate the petitioner in one of those Tube-well.

6. Learned counsel for the petitioner has relied upon a decision of the learned single Judge of this Court in Writ Petition No. 26466 of 1992 decided on 8th July, 1991 wherein the learned single judge has held as under:

"Even if these wells do not exist in the village of the petitioner he could not have been denied his posting on the vacant post on the failure of the Tube-well No.106. The Tube-well nos. 106,136,57 or 59 are all there in one group."

7. Learned counsel for the petitioner has relied upon this very decision for the ground as stated above. It has not been asserted that the Tube-wells, which, according to the learned counsel for the petitioner, are operative and situated in the same area nor the number thereof has been given in the writ petition. It has also not been stated as to whether any of the aforesaid Tube-well is functioning without any Tube-well Operator. In the absence of these materials, in my opinion, the decision relied upon by the learned counsel for the petitioner is not applicable because that depends upon the facts of that case.

8. Learned counsel for the petitioner has relied upon three other judgments of the learned single judge of this court passed in Writ Petition No. 35425 of 1995, decided on 15th May, 1998, Writ Petition No. 3051 of 1996, decided on 6th May, 1997 and Writ Petition No. 9044 of 1996 decided on 30th May, 1997, wherein the judgment referred above has been relied upon. A perusal of those judgments demonstrate that the facts as that of the present case were not in existence or this is not clear from the judgment relied upon by the learned counsel for the petitioner. Under these circumstances, the termination of the services of the petitioner in terms of the letter of appointment (Annexure- '1' to the writ petition) cannot be said to be arbitrary or discriminatory.

9. No other point has been raised or argued by the learned counsel for the petitioner.

10. This writ petition is, therefore, devoid of merits and is liable to be dismissed. It is accordingly dismissed. The interim order dated 10th December, 1991 stands vacated. However, the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.7.2002

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 4789 of 1999

Cantonment Board, Meerut ...Petitioner
Versus
St. John's School, 117 Bank Street, Meerut Cantt. & another ...Respondents

Counsel for the Petitioner:
Sri S.D. Dube
Sri Samir Sharma
S.C.

Counsel for the Respondents:
Sri Ashok Khare
Sri Vivek Chaudhary

Cantonments Act-Section 87(b)- the amount, if any in dispute in the appeal under section 87 (B) of the Act means the amount which was in dispute when the appeal was filed. (Held in para 16)

Amount sought to be deposited is the amount alleged to be due with accruals, which was in dispute at the time of filing of the appeal and not the amount at the time of hearing or determination of appeal. The objection of the counsel for the petitioner is as such over-ruled.

Case Law referred:
1993 (1) SCC 22
1989 (1) SCC 345
1994 (6) SC JT 80
1990 (4) SCC 256
AIR 1966 SC 108
1996 (I) SCC 427
AIR 1979 SC 564
AIR 1931 Madras 55
1974 (2) ACC 393
1975 (2) SCC 175
1988 (4) ACC 402
1981 Lab. I.C. 1015

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Cantonment Board, Meerut has filed this writ petition challenging judgment and order dated 23.11.1998 passed by Additional District Judge, Meerut by which he has allowed an appeal under section 84 of the Cantonments Act, 1924 in short "the Act" setting aside notice dated 24.3.1988 levying property tax on Bungalow No. 117 Bank Street, Meerut, occupied by St. John." School, Meerut (in short "the School").

2. I have heard Sri Samir Sharma appearing for petitioner and Sri Vivek Chaudhary for respondent.

3. The Executive Officer, Cantonment Board issued notice dated 27.6.1987 to St. John's School, Meerut to revise assessment of tax on property no. 117, Bank Street, Meerut under section 68 of the Act. The Principal of the school in his objection to the notice, stated that the entire building is used for educational purposes, and is thus exempt from paying any tax whatsoever. No house tax can be proposed on the said building. He further stated that no additional building has been constructed during the period and that no portion of the building has been given on hire, nor any rental income is being derived from the building or any portion thereof. A notice was issued fixing 27.10.1987 as a date for hearing. The Principal attended the office and requested to give further date. Accordingly a notice was given to him on 17.12.1987 by the Executive Officer, calling upon him to give details and particulars of the students, as well as books relating to the income of school. The Principal sought another date vide his

letter dated 18.12.1987. On 22.12.1987 Principal appeared before Executive Officer, but did not give any details nor any affidavit was given providing before said information. The assessment was consequently revised for the year 1989-90 increasing annual burden to the tune of Rs.7,24,654.76 over and above the tax paid by the school. According to report of the Cantonment Engineer, the total area of the school is 1.674 acres i.e. 72919.44 Sq. Ft.=6774.21 Sq. Meters of which the built up area is 1973.91 Sq. Meters. The assessment list was authenticated by the Assessment Committee after publishing notice dated 24.3.1988 under section 69 (2) of the Act, and was confirmed by the Board vide CBR No. 13 dated 13.4.1988. An increased bill was sent to the school for payment of the aforesaid amount, annually over and above the amount paid by the school.

4. The school preferred an appeal under section 84 of the Act, challenging assessment as authenticated on 24.3.1988 and filed a stay application along with memo of appeal. The Cantonment Board objected to the maintainability of the appeal under section 87 (b) of the Act on the ground that school has not deposited the amount due, and thus the Court has no jurisdiction to hear the appeal. By judgment and order dated 21.5.1988, IInd Additional District Judge, Meerut allowed Tax Appeal No. 3 of 1988 holding that educational institutions are exempted from assessment of tax on their property and accepted the argument that an affidavit was given before the Board that no income is being derived from the building. The Board preferred a writ petition No. 1452 (Tax) of 1988 which was allowed by this Court on 25.8.1994 directing St. John's School Meerut to comply with the provisions contained under section 87 (b) of the Act. In other connected matters Sophia Girls School and St. Mary's School, situated in Meerut Cantt. Civil Appeal No. 2922-24 of 1996 was filed. Theses civil appeals were dismissed by Hon'ble Supreme Court relying upon the decision in Shyam Kishore and others Vs. Municipal Corporation of Delhi and another 1993 (1) SCC 22 wherein similar provision of appeal provided under section 107 (b) of the Delhi Municipal Corporation Act, 1957 upholding that same observation namely that there is no bar in entertainment of the application before deposit of tax due but the same cannot be heard unless the tax is deposited were considered. The Civil Appeals were accordingly disposed off.

5. St. Mary's School and Sophia Girls School, appellants withdrew their appeals, admitted tax liability and paid the same. St. John's School, however, chose not to pay the amount and decided to contest the appeal. The said appeal has been allowed by impugned order.

6. Sri Samir Sharma has made two fold submissions. He submits that the appeal was preferred in 1988, at which time, the amount of Rs.7,24,654.76 was due by way of house and water tax. On the date when it came up for hearing, the School was served with a notice for payment of Rs.1,04,52,534.69 and which the school was required to pay before the appeal could be heard. Secondly, he submits that the interpretation to the exemption clause provided in section 99 (2) (b), given by the Appellate Authority is wholly incorrect and violative to the object of the Act and cannot be sustained. Accordingly to Samir Sharma, a building

used for educational purposes can only be exempted if it is proved that no income is derived and that the burden of proving the same lies upon the person who alleges it. The Principal of the School submitted his objection but did not chose to file any material, more particularly the documents, namely, the number of students and the details of the income of the school, demanded from him and as such the view taken by appellate Court cannot be sustained. He has relied upon the judgments in (1989) 1 SCC 345, 1994(6) SC; JT 80, 1990(4) SCC 256 in support of his submission that the exemption in taxing statutes must be strictly construed against those who wish to invoke its benefits, and that wherever there is any ambiguity, benefit of it must go to the State. He has also relied upon AIR 1966 SC 108; Cantonment Board Ambala Vs. Pyarey Lal on submitting that tax on property can also be levied on educational institutions.

7. Sri Vivek Chaudhary appearing for St. John's School in reply submits that under section 87 (b) of the Act the amount, if any, in dispute in the appeal, is to be deposited by the appellant in the office of the Board. The amount as such is an amount which is challenged in appeal and that if during the pendency of appeal the amount in dispute gets increased, the appellant cannot be penalized for the same. With regard to second submission Sri Chaudhary has relied upon a plain and simple interpretation of section 99 of the Act providing for exemption of payment of tax on buildings falling under Chapter of special provisions relating to taxation. He submits that clause (b) of Section 99 (2) of the Act, exempts building used for educational purposes and public property. The word, 'and from no income is derives', qualifies to play grounds and Dharmshalas which are open to the public. According to him these two properties namely for educational purposes, libraries and play ground and dharmshalas belong to different class and that a coma separates the two classes of properties separates them. With this interpretation, he submits that building used for educational purposes and play grounds are exempted from the property tax and that appellate court has rightly interpreted the exemption clause in allowing the appeal. He has relied upon in Samaalana Abdulla Vs. State of Gujrat (1996) 1 SCC 427; Mohd. Shabbir Vs. State of Maharashtra, AIR 1979 SC 564 and the judgment in Municipal Council, Trichinopoly Vs. S. Venkatarama Aiar, AIR 1931 Madras, 55 in submitting that in case of Madras Municipal Act having similar provisions Mr. Justice Madhavan Nair held that a school is exempt from property tax on the ground that it is a building used for educational purposes, even though the proprietor of it makes profit out of the school which he caries on in that building.

8. The Cantonment Act, 1924 was enacted to municipalize the governance of those cantonments which contains substantial civil population having no essential connection with or dependence upon military administration. The cantonment committees were replaced by Cantonment Board municipal in character, to be essentially a Local Self Government body. Under Section 60 of the Act the Board may, with previous sanction of central Government impose in any cantonment any tax which under any enactment for the time being in force, may be imposed in any municipality in the State wherein such cantonment is

situated to take effect from the date of its notification in the official gazette. Section 61 and 62 provides for framing of preliminary proposal to impose tax and to invite objections and their disposal under section 62 after which the central government may authorize Board to impose tax under section 63 of the Act. "Annual Value" is defined under section 64 and section 65 provides for incidence of taxation which is primarily upon the actual occupier of the property. Section 67 and 72 provides for assessment list, its revision and amendment. Section 99 and 99 (a), which is relevant for this case, provides for exemption in case of buildings and is quoted as below:

"99. Exemption in the case of buildings:- (1) When, in pursuance of section 98, a Board has fixed a special rate for the cleansing of any factory, hotel, club or group of buildings, or lands, such premises shall be exempted from the payment of any conservancy or scavenging tax imposed in the cantonment.

(2) The following buildings and lands shall be exempt from any tax on property other than a tax imposed to cover the cost of specific services rendered by the Board, namely:-

(a) places set apart for public worship and either actually so used or used for no other purpose;
(b) buildings used for educational purposes and public libraries, playgrounds and dharmasalas which are open to the public and from which no income is derived;
(c) hospitals and dispensaries maintained wholly by charitable contributions;
(d) burning and burial-grounds not being the property of the Government or Board, which are controlled under the provisions of this Act;
(e) buildings or lands vested in a Board; and
(f) any buildings or lands, or portion of such buildings or lands, which are the property of the Government.

99A. General power of exemption:- The Central Government may, by notification in the Official Gazette, exempt, either wholly or in part from the payment of any tax imposed under this Act, any person or class of persons or any property or goods or class of property or goods."

9. Section 99 (2) (b) exempts buildings used for educational purposes and public libraries, playgrounds, and dharamasalas which are open to the public and from which no income is derived. Each of the categories of building exempt has a condition attached to it. Buildings and lands set apart for public worship are qualified by the words that they are actually so used, or used for no other purposes. In case of hospitals and dispensaries the condition is that they must be maintained wholly by charitable contribution. Burning and Burial-grounds not being property of the Government or a Board, are exempt only if they are controlled under the provisions of the Act and that buildings or lands vested in a Board and buildings or lands or a portion of such buildings or lands, which are the property of the Government. The question to be decided in this case is whether buildings or lands open to public purposes and from which no income is derived is applicable to the buildings used for educational purposes and public libraries.

10. The counsel for the petitioner has challenged the interpretation given to the provisions by the Appellate Court. He submits that only those buildings used for educational purposes are exempt from which no income is derived, and that the exemption clause has to be strictly construed. No evidence was produced or material submitted in support of particulars given by the school and as such it cannot claim exemption from tax on property. Reliance has been placed on following decisions:

In **Collector of Central Excise, Bombay-I and another Vs. M/s Parle Exports (P) Ltd. (1989) 1 SCC 345**, Supreme Court held that the expression in the schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expression occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by those people who ordinarily deal with it. The notification must be read as a whole in the context of the other relevant provisions. When two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment. Though in taxing Act provision enacting an exemption to the general rule of taxation has to be construed strictly against those who invoke its benefit, but while interpretating an exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction arises. However, absurd results of construction should be avoided. In **Hindustan Alumunium Corporation Ltd. Vs. State of Uttar Pradesh**, Supreme Court emphasized that the notification should not only be confined to its grammatical or ordinary parlance but it should also be construed in the light of the context.

In **M/s Novopan India Ltd. Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad, J.T. 1994 (6) SC 80** while interpreting notification No. 55 of 1979 under Rule 81 (1) of Central Excise Rules, 1944 exempting plywood and Boards, the Court while holding that the words unveneered particle boards, cannot and do not take any melamine faced particle board and emphasized the principle that in case of ambiguity, a taxing statute should be construed in favour of an assessee does not apply to the construction of an exception or an exempting provision and that these are to be construed strictly. A person invoking an exemption of an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State.

In **Union of India and others Vs. Wood Papers Ltd. and another (1990) 4 SCC 256** while interpreting exemption notification No. 163/65 issued under Rule 8(1) of Central Excise Rules, 1944, exempting paper, Supreme Court held that the notification has to be read in its entirety and construed as a whole. A close reading of both the parts together makes it clear that it was intended to be exhaustive granting exemption to all factories

producing, packing and wrapping paper. It held that an exemption provision is like any exemption and on normal principle of construction or interpretation of statute it is construed strictly either because of legislative intention or on economic justification of inequitable burden of progressive approach of fiscal provisions intended to augment revenue. But strict or liberal construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction.

11. Section 99 (2)(b) exempts buildings used for educational purposes and public libraries, playgrounds and dharmasalas. The exemption clause is as such applicable to buildings used for educational purposes. A plain grammatical construction of sub clause (b) goes to show that this clause divides two categories of building by a coma. The building used for educational purposes and public library have been put in one category, whereas, the playgrounds and dharamasalas have been put in a different category with a cama intervening these two class of building. The question to be considered is whether the words from which no income is derived is applicable to both categories of building, or is qualified only to the later category play grounds and dharamasalas which are open to the public.

In **Municipal Council, Trichinopoly Vs. S. Venkatarama Aiyar, A.I.R., 1931 Madras 55**, same expression occurring in clause (a) of Section 83 of the Act came up for interpretation. The said clause is quoted as below:

"Coming now to the propriety of the collection of the tax of Rs.58-14-2 under Act 5 of 1920 we have to construe Cl.(a) S.83, of that Act which says that the following buildings and lands shall be exempt from property tax.

"Places set apart for public worship and either actually so used or used for no other purposes choulties, buildings, used for educational purposes, and libraries and playgrounds which are open to the public and from which no income is derived."

12. Justice Madhavan Nair did not agree to construe the clause by applying the words "which are open to public and from which no income is derived" to the buildings used for educational purposes and library. He found that there can be no justification for the use of the word "and" between 'purposes' and 'libraries' and held that if the legislature wanted said interpretation then the first "and" between "purposes and Libraries" would have been dropped retaining only the "and" between "libraries and playgrounds". But that has not been done, and so he found that the words which are open to the public, and from which no income is derived, are referable according to the natural construction of the words only to 'libraries and playgrounds' and not to buildings used for educational purposes.

In **Mohd. Shabbir Vs. State of Maharashtra, A.I.R., 1979 SC 564**, Section 27 of the Drugs and Cosmetics Act, 1940 came for interpretation.

Paragraphs 3 and 4 are relevant and are quoted as below:

"3 Section 27 is the penal section under which the offence is punishable and this section runs thus:

"Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes-
any drug-
(i) deemed to be misbranded under Cl.(a), Cl.(b), Cl.(c), Cl.(d), Cl.(f) or Cl.(g) of S.17 or adulterated under section 17-B; or
(ii) without a valid licence as required under clause (c) of S.18". shall be publishable with imprisonment for a term which, shall not be leas than one year but which may extend to ten years and shall also be liable to fine.

Provided that the Court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year."

"4. It was contended by Mr. Singh that in order to fall within the ambit of this section the accused must manufacture the drugs for sale or stock or exhibit for sale or distribute the same. There is no evidence in this case to show that the appellant had any shop or that he was a distributing agent. All that has been shown is that the tablets concerned were recovered from his possession. It was urged that possession simpliciter of the tablets of any quantity whatsoever would not fall within the mischief of S.27 of the Act. On an interpretation of S.27, it seems to us that the argument of Mr. Singh is well founded and must prevail. The words used in S.27, namely "manufacture for sale, sells," have a comma after the clause "stocks or exhibits for sale". Thus the section postulates three separate categories of cases and no other. (1) manufacture for sale; (2) actual sale; (3) stocking or exhibiting for sale or distribution of any drugs. The absence of any comma after the word "stocks" clearly indicates that the clause "stocks or exhibits for sale" is one individual whole and it contemplates not merely stocking the drugs but stocking the drugs for the purpose of sale and unless all the ingredients of this category are satisfied, S.27 of the Act would not be attracted. In the present case there is no evidence to show that the appellant had either got these tablets for sale or was selling them or had stocked them for sale. Mr. Khanna appearing for the State, however, contended that the word :stock: used in section is wide enough to include the possession of a person with the tablets and where such a person is in the possession of tablets of a very huge quantity, a presumption should be drawn that they were meant for sale or for distribution. In our opinion, the contention is wholly untenable and must be rejected. The interpretation sought to be placed by Shri Khanna does not flow from a true and proper interpretation of S.27. We, Therefore, hold that before a person can be liable for prosecution or conviction under section 27 (a) (i)(ii) read with section 18(c) of the Act, it must be proved by the prosecution affirmatively that he was manufacturing the drugs for sale or was selling the same or had stocked them or exhibited the articles for sale. The possession simplicities of the articles does not appear to be punishable under any of the provisions of the Act. If, therefore, the essential ingredients of S. 27 are not satisfied the plea of guilty

cannot lead the Court to convict the appellant.

In **Samaalana Abdulla Vs. State of Gujrat, 1996 (1) SCC 427,** Section 3(1)(c) and 3(2) of the Official Secret Act, 1923 came for interpretation on which Supreme Court held in paras 7 and 8 as follows:

"It was next contended that the High Court has misinterpreted Section 3(1) (c) and erroneously held that the sketch, plan, model, article or note or other document or information need not be secret for establishing an offence under that section. In order to appreciate this contention, it is necessary to refer to Section 3 which reads as follows:

"3. Penalties for spying:- (1) If any person for any purpose prejudicial to the safety or interests of the State-
(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited places; or
(b) makes any sketch, plan, model or note which is calculated to be or might be or is extended to be, directly or indirectly, useful to an enemy; or
(c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, play, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a mater the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States."

The High Court held that the word 'secret' in clause (c) qualifies only the words "official code or password" and not "any sketch, plan, model, article or note or other document or information". The reason given by the High Court is that after the phrase any secret official code or password" there is a comma and what follows is thus not intended to be qualified by the word secret". The Calcutta High Court in *Sunil Ranjan Vs. State* has also taken the same view. It has held that the word 'secret' in the said section qualifies official code or password and not any sketch, plan, model, article or note or other document or information. This is clear from the comma and the word 'or' which comes after the word 'password'.

8. In our opinion, the view taken by the Gujrat High Court in this case and by the Calcutta High Court in the case of Sunil Ranjan Ds is correct. We find that the said interpretation also receives support from sub-section (2) of Section 3. While providing for a presumption to be raised in prosecution for the offence punishable under that section the phraseology used by the legislature is "if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained collected, recorded, published or communicated. From the way the said sub-section is worded it becomes apparent that the qualifying word 'secret' has been used only with respect to or in relation to official code or password and the legislature did not intend that the sketch, plan, model, article, note, document or information should also be secret. As we do not find any substance in the second contention raised on behalf of the

appellant it is also rejected. In the result the appeal fails and is dismissed."

13. Plain grammatical interpretation, in the light of the decisions cited above as such supports the interpretation given by appellate Court. Section 99(2) divides into two categories of building by use of comma between buildings used for educational purposes and public libraries in one category and for playgrounds and dharamashalas which are open to public and that the qualifying words, 'from which no income is derived', as applicable only to the later categories of properties.

14. The aforesaid interpretation is further supported by the reasons that ordinarily buildings, used for education purposes and public libraries are not used for deriving income whereas playgrounds and dharmsalas can be put to both kind of user namely for purposes which may derive income or may not derive any income. In the year 1924 when the Act was enacted, the buildings used for educational purposes and public libraries could not be conceived to be erected for the purpose of income and profit and public libraries are not known to derive any income other than membership fee for their subscriptions and maintenance. Secondly the averment made in the petition that the school building, which is fifteen years old and was never subjected to the property tax and further that this was the first assessment, has not been denied. There is no assertion on behalf of petitioner that the building or any portion thereof was let out for hire, or that any rental income was derived. By notice issued to the school, the Executive Officer demanded production of documents relating to details and particulars of the students as well as books relating to the income of the school. The Board did not have any material either from any inspection report or otherwise that any part of the building was let out for hire, and further there was nothing on record to show that Municipalities in the State levy property tax on the buildings used for educational purposes, to give the Board's jurisdiction to impose tax under section 60 of the Act, which provides that the Board may, with the previous sanction of Central Government, impose in any cantonment any tax which under any enactment for the time being in force, may be imposed in any municipality in the State wherein such cantonment is situated.

15. Coming to the last submission of the counsel for petitioner that tax due was not deposited, and thus the appeal was incompetent, I find that section 87 (b) provides that amount, if any, in dispute in the appeal, has to be deposited by the appellant in the office of the Board. In the present case the amount in dispute in the appeal was the amount given in the notice against which the appeal was filed and the said amount was deposited by the school. During the period of pendency of appeal, in case any further amount fell due, the appellant was not required to deposit the same as a condition for hearing of the appeal. The matter with regard to amount due as a pre-condition of hearing of appeal, in case of St. Marry School which was connected with writ petitions filed by Saint John's School went up to Supreme Court in which the Apex Court relied upon **Shyam Kishore Vs. Municipal Corporation, Delhi, 1993(1) SCC 22** and disposed of the civil appeal in terms of the observations made in the said judgment. In the said case Supreme Court was interpreting the provisions of section 170

(b) of the Delhi Municipal Corporation Act, 1957 in which same words are used to the effect that no appeal shall be heard or determined under this Chapter unless the amount, if any, in dispute, in the appeal, has been deposited by the appellant in the office of the Corporation. Supreme Court upheld the condition for hearing and determination of the appeal, and Court did not agree to the challenge against the condition being ultra-virus of Article 14 of the Constitution of India on the ground that such provisions have been upheld by Supreme Court in **Ganga Bai Vs. Vijay Kumar, 1974(2) ACC 393, Anant Mills Company Limited Vs. State of Gujrat, 1975 (2) SCC 175, Vijay Prakash Mehta Vs. Collector of Bombay, 1988(4) ACC 402**, and other decisions. In para 38 of the judgment. Supreme Court held that aforesaid cases had no occasion to consider what the decision would be, if the condition placed on the right of appeal were unduly onerous or such as to render the right of appeal totally illusory. In **M/s Wire Netting Stores, Delhi Vs. The Regional Provident Funds Commissioner, New Delhi, 1981 Lab.I.C. 1015** Delhi High Court held the provision in Employees Provident Fund Act to this effect as violative of the provisions against which appeal was pending. Supreme Court, however, took another route, in the facts of the said case, to construe the provisions of section 170 (b) for saving its constitutionally. It held firstly that the words 'heard and determined' under section 170 (b) are capable of broader interpretation and that the payment of disputed tax is not a condition precedent to the entertainment or admission of the appeal and that such an interpretation will provide some much needed relief for the harshness of the provision. The assessee may not be able to deposit tax while filing the appeal but may be able to pay it up within a short time or at any rate before appeal comes on for hearing in the normal course. Some times to compel the assessee to pay the demanded tax for several years in succession might very well cripple him, or, the hearing of the appeal may be adjourned to give him a chance to pay up the tax and thus clause (b) of section 170 was read down as precondition to the hearing of the appeal at its disposal and not to as a condition to entertainment of the appeal itself. A careful reading of the report shows that Supreme Court tried to save its validity by softening rigour of deposit of tax due only as a condition of hearing and its disposal on merit and made observations against compulsion to pay demanded tax of several years or tax alleged to have accrued during pendency of appeal.

16. Applying the same principle I hold that the amount, if any, in dispute in the appeal under section 87 (b) of the Act means the amount which was in dispute when the appeal was filed. Any other interpretation will bring harshness into the provision and will make the right of appeal illusory. For example in the present case whereas the amount challenged in the notice was Rs.7,24,654.76, the amount claimed to be due by the Board at the time of hearing of the appeal was Rs.1,04,52,534.69 with interest up-to March, 1999. For a school having about 800 students a payment of such a huge amount as a pre-condition of hearing the appeal, was virtually impossible and thus the hearing of appeal, would have become totally illusory. In the circumstances, in order to save clause section 67 (b) from the vice of invalidity and by taking the same escape route of

statutory interpretation provided by Supreme Court, in Shyam Kishore's case (Supra), I take the liberty in extending the same reason a little further, in holding that the amount sought to be deposited is the amount alleged to be due with accruals which was in dispute at the time of filing of the appeal, and not the amount at the time of hearing or determination of appeal. The objection of the counsel for petitioner is as such over-ruled.

17. For the reasons detailed and discussed above, the order of appellate court is upheld and the writ petition is dismissed. Costs on parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.7.2002

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

Civil Misc. Writ Petition No.43533 of 2000

Babu Lal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bhanu Prakash Misra
Sri Dhananjay Awasthi
Sri U.S. Awasthi

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- Opportunity has to be given to the delinquent to cross-examine the witnesses and to lead evidence in his defence- for this it is necessary to issue a notice to the employee concerned intimating him date, time and placement of the enquiry. (Held in para 13)

From the perusal of the record it is also evident that the petitioner was prevented to place his defence before the enquiry officer as no opportunity, admittedly, was approved to the petitioner, therefore, it cannot be said that the submissions advanced by the petitioner are without force. Having perused the record and after hearing arguments advanced across the Bar we are of the view that the judgment and order passed by the learned tribunal, in totality, suffers from misreading of fact, non application of mind, legal infirmities and being based on conjuncture and surmises deserves to be quashed.

Case law referred:
(i) 1995 Supp. (3) SCC 212
(ii) AIR 1968 SC 158
(iii) AIR 1963 SC 1719
(iv) AIR 1960 SC 160
(v) 2001 (2) UPLBEC 1475
(vi) (1993) 4 SCC 727

(Delivered by Hon'ble D.R. Chaudhary, J.)

1. The services of the petitioner who was an employee in the Collectorate, Etah, have been terminated by means of the order dated 29.5.1998 (Annexure-4 to the Writ Petition). The statutory appeal preferred against the termination order was dismissed by the Commissioner, Agra Division, Agra by his order dated 26.11.1998 (Annexure-5 to the writ petition) and the claim petition challenging the aforesaid two orders also came to be dismissed by the U.P. Public Services Tribunal, Lucknow vide its order and judgment dated 24.7.1998 (Annexure-7 to the writ petition). The petitioner has assailed the aforesaid orders by means of the present petition.

2. The petitioner, who entered in service on 6.11.1985, was transferred to join as Arms Clerk-II on 1.1.1995. One Shri Hari Singh Rana- a B.S.P. activist,

without naming anybody, made a general complaint to the District Magistrate, Etah, alleging irregularities in issuing Arms Licences. In preliminary enquiries conducted by C.O. (City), Aligarh and the Sub Divisional Magistrate, Sadar and Patiyali, Etah, none was named as guilty. The C.O. (City), Aligarh found the licences to be genuine. However, on the basis of the twin reports a F.I.R. was lodged on 21.10.1997 which was registered as case crime no. 517 of 1997 under sections 419/420/467/468/471 I.P.C. wherein the petitioner was named as a co-accused alongwith others. In the investigation conducted by the Investigating Officer (for short 'I.O.') no evidence against the petitioner was found. Accordingly, the I.O. submitted final report in favour of the petitioner and charge sheet against the other accused. The final report was accepted by Chief Judicial Magistrate, Etah, on 18.8.1998; the departmental enquiry was in the meanwhile, initiated and the petitioner was placed under suspension on 21.10.1997 and served with charge sheet dated 12.11.1997. The petitioner submitted reply to the charge sheet. The Enquiry Officer (for short 'E.O.') fixed 23.3.1998 for hearing; the E.O. was not present on that date and no other date could be fixed. The E.O. submitted the inquiry report on 4.4.1998 with the findings that all the charges found proved against the petitioner. The petitioner was served with the show cause notice to which he submitted his reply though the petitioner was denied inspection of the relevant documents.

Parties have exchanged affidavits.

3. The learned counsel for the petitioner has challenged the impugned orders on various grounds. One of the contentions of the learned counsel for the petitioner is that no opportunity of hearing was afforded to the petitioner in as much as neither any inquiry was held nor any evidence was adduced by either of the parties and the inquiry report was prepared behind the back of the petitioner; the Tribunal fell into the error of law in not taking into consideration the aforesaid undisputed fact. The other contentions of learned counsel for the petitioner are that the Tribunal did not take into account the relevant fact that the licences under enquiry were issued in 1995 much before the petitioner took charge of Arms Clerk-II on 1.1.1997; that the Tribunal also failed to take into consideration the consistent view of the Apex Court that departmental enquiry conducted without affording opportunity to the delinquent vitiates the findings recorded by E.O.; the Tribunal did not take into consideration that the petitioner was Arms Clerk-II and his duty was to assist his Senior Arms Clerk I; it has also not been taken into account that it is the Arms Clerk-I who is the custodian of the Arms Register containing the details of licences and Licensees as is inferred from paragraph no.4 of the Counter Affidavit; the inventory prepared by the Tehsildar was not taken into consideration and indictment was made without application of mind.

4. Heard learned counsel for the petitioner and learned Standing Counsel appearing for the Respondents and perused the record.

5. In paragraph nos. 8 & 9 of the writ petition it is averred that on having submitted the reply to the charge sheet a hearing date 23.3.1998 was fixed by the

E.O. for the petitioner to appear personally. It is further averred that the E.O. on the date fixed was not present as a result no enquiry could be conducted and no fresh date could be fixed. In reply to contents of paragraph nos. 8 & 9 of the writ petition it is stated in paragraph no.10 of the counter affidavit that on the basis of the record available after 23.3.1998 no date was fixed for oral enquiry or adducing evidence. In the enquiry neither any statement was recorded nor any evidence was adduced. Therefore, the question of cross-examination of a witness has no meaning. The E.O. submitted the report on 4.4.1998 on the basis of the record. It is further averred in paragraph no. 10 of the counter affidavit that there is no such provision where the E.O. should prepare the enquiry report in the presence of delinquent. The petitioner was served with the show cause notice dated 23.3.1998. The petitioner by two applications demanded the copy of the relevant record as well as enquiry report. The prayer of the petitioner was not accepted. It is, thus, established on the record that no opportunity of hearing was afforded to the petitioner and there was no enquiry in the eye of law.

6. In similar set of facts the Apex Court in **Meanglas Tea Estate Vs. The Workmen**, AIR 1963 SC 1719 the Supreme Court observed as under: -

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted."

7. In **S.C. Girotra Vs. United Commercial Bank**, 1995 Supp. (3) SCC 212 the Supreme Court set aside a dismissal order which was passed without giving the employee an opportunity of cross examination. The Apex Court in **State of U.P. Vs. C.S. Sharma**, AIR 1968 SC 158 held that: -

"The omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings."

8. The Court further held that in the enquiry witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross examine these witnesses and to lead evidence in his defence. The similar view was taken by the Supreme Court in **Punjab National Bank Vs. A.I.P.N.B.E. Federation**, AIR 1960 SC 160 and in other long line of its decisions. The Division Bench of this Court in writ petition no.33291 of 1996, **Subhash Chandra Sharma Vs. Managing Director and others** decided on 7.9.1999, writ petition no.36434 of 1999, **Hari Nath Singh Yadav Vs. Administrator/Chairman, Provincial Co-operative Federation and others** decided on 8.3.2000 and in **Subhash Chandra Sharma Vs. U.P. Co-operative U.P. Co-operative Spinning Mills and others**, 2001 (2) UPLBEC 1475 consistently held that in cases where a major punishment is proposed to be

imposed an oral enquiry is a must, whether the employee requests for it or not. For this is necessary to issue a notice to the employee concerned intimating him date, time and placement of the enquiry.

9. Though the writ petition deserves to be allowed on the ground aforesaid alone however, under the judicial obligation of the Court we proceed to consider other submissions advanced by learned counsel for the parties. It is argued for the petitioner with reference to Annexure-8 to the writ petition that Sri Latoori Singh, Arms clerk I sent a letter dated 28.12.1996 (Annexure-8 to the writ petition) to the Prabhari Adhikari (Arms) stating therein that in the Arms Register he has noticed entries which appear to be suspicious and in case enquiry is made he shall not be held responsible for the same. The emerges position out of the letter dated 28.12.1996 is that the entries in question were existing on the date the letter aforesaid was sent by Sri Latoori Singh, secondly the Arms Register was in custody of Arms Clerk Sri Latoori Singh, therefore, in the facts circumstances aforementioned it cannot be held that the petitioner has manoeuvred the entries in the Arms Register. The finding recorded by the tribunal that it is the petitioner who was in custody of the Arms Register and has obtained entries in question in his self-interest is factually incorrect.

10. We have examined the arguments of the learned counsel for the petitioner in the light of the letter dated 28.12.1996 and the averments contained in para 24 of the counter affidavit wherein it is admitted by the Respondents that the Arms Register was in custody of Sri Latoori Singh, Arms Clerk I and the entries were existing in the Arms Register on 28.12.1996. It may also be noticed that the petitioner took charge of Arms clerk II on 1.1.1997 and Sri Latoori Singh, Arms clerk I took charge on 24.12.1996 as is evidenced from the letter afore stated. We are, therefore, of the view that the submission of the learned counsel for the petitioner has substance.

11. It is next submitted for the petitioner that it is nowhere case of the Respondents that the petitioner was given copy of the enquiry report alongwith the show cause notice. It appears that learned tribunal has misread the statements contained in para 33 and 34 of the claim petition wherein no statement finds place that the petitioner was supplied copy of the enquiry report and in view of the fact the enquiry proceedings stand vitiated as held by the Apex Court in **Managing Director, Ecil, Hyderabad and others Vs. B. Kaunakar and others** (1993) 4 SCC 727 wherein it was held that non supply of the copy of the enquiry report amounts to denial of reasonable opportunity and violation of Article 14 and 21 of the Constitution. Learned counsel for the Respondents has not rebutted the submissions canvassed by the learned counsel for the petitioner. In the circumstances, the finding recorded by the tribunal that the petitioner was supplied copy of the enquiry report is incorrect on facts available on record hence the entire enquiry proceedings stand vitiated due to non supply of the enquiry report as held by the Apex Court in the case referred to above. It is further argued for the petitioner that the petitioner was admittedly denied the inspection of the Arms Register which amount the denial of opportunity to lead the defence effectively through the reply to the show cause notice. In the circumstances the impugned

orders passed in utter disregard of Article 14 and 21 of the Constitution deserves to be quashed.

12. Learned counsel for the petitioner has also questioned the finding of the tribunal that the petitioner has committed misconduct by keeping typewriter and other official record at a privately rented room, on the ground that the statement of the petitioner explaining that he was orally permitted by the Prabhari Adhikari to discharge the official function at rented room for the reason that there was unduly rush of the politicians and other influential persons seeking arm licence. This statement of the petitioner having not been controverted by the prescribed authority and as such the finding of the tribunal is wholly perverse and unsustainable in law. In fact the tribunal erred in placing the burden upon the petitioner to prove that the entry in the arms register was not forged by him or that it was not done so to his knowledge. Burden to prove the charge was on the Respondent but the tribunal erroneously assumed that the burden was on the petitioner. The impugned order is therefore, vitiated by error of law.

13. From the perusal of the record it is also evident that the petitioner was prevented to place his defence before the enquiry officer as no opportunity, admittedly, was afforded to the petitioner, therefore, it cannot be said that the submissions advanced by the petitioner are without force. Having perused the record and after hearing arguments advanced across the Bar we are of the view that the judgment and order passed by the learned tribunal, in totality, suffers from misreading of fact, non application of mind, legal infirmities and being based conjuncture and surmises deserves to be quashed.

14. In the result the writ petition succeeds and is allowed. The impugned order dated 29.5.1998 (Annexure-4 to the writ petition), order dated 26.11.1998 (Annexure-5 to the writ petition), and the order of the learned tribunal dated 24.7.1998 (Annexure-7 to the writ petition) are quashed. However, it is open to the Respondents to pass fresh orders in accordance with law.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 393 of 1995

Sahid Ahmed and others ...Petitioner
Versus
Additional District Judge, III, Saharanpur and others ...Respondents

Counsel for the Petitioners:
Sri Anurag Pathak

Counsel for the Respondents:
S.C.

Provincial Small Cause Courts Act-section 23- merely because an objection has been raised that there is no relationship between the landlord and tenant, it cannot be said that the suit is barred by section 23. (Held in para 5).

Case Law Referred:
AIR 1990 Alld. Page 169
1988 A.W.C. Page 1057
1987 Vol. (1) ARC Page 89

In the teeth of the findings of the two courts below and the law laid down by this court as well as apex court no error

of law cannot be said to have been committed either by the trial court or revisional court.

(Delivered by Hon'ble Anjani Kumar, J.)

1. This writ petition is directed against the order passed by the Revisional Court in JSCC Revision No.243 of 1988, whereby the petitioners-tenant has challenged the order passed by Judge, small causes in a suit filed by the respondent-landlord.

2. The facts leading to filing of the present writ petition are that Mukhtar Ahmad and his wife filed a suit against the petitioner-tenant and their predecessors, which was decreed by the trial court on 22.9.1988 after rejecting the objection raised by the tenant-petitioners that there is not relationship of landlord and tenant between the plaintiff and defendant and therefore the suit is not entertainable by the Judge, Small Causes Court in view of Section 23 of Provincial Small Cause Courts Act. The trial court has gone into that this question and arrived at the conclusion after discussing the evidence led by the parties that there is relationship of landlord and tenant between the plaintiff and defendant and provisions of Act No. 13 of 1972 are applicable to the accommodation in dispute and therefore suit was decreed as stated above. Aggrieved thereby the petitioner-tenant preferred a revision. The revisional court affirmed the findings of the trial court that there is relationship of landlord and tenant between the plaintiff and defendant and defendant is defaulter in payment of rent and the defendant has not claimed benefit of Section 20 (4). The suit was therefore, rightly decreed and the contention of the defendant that the trial court should have returned back the plain to be presented before the appropriate court is not correct. This view of the Courts below finds support from the law laid down by this Court as well as the Hon'ble Supreme court as hereinafter discussed.

3. In these circumstances, the suit cannot be said to be barred by Section 23 of Provincial Small Cause Courts Act and laid down by this Court in **AIR 1990 Alld. Page 169** confirming the findings. The revisional court rejected the revision. Now the petitioner has challenged the aforesaid two orders before this Court and reiterated the arguments, which were raised before the two courts below particularly with regard to the maintainability of the suit in view of the provisions of Section 23. Section 23 has been stalled out and this Court has held as stated in the case referred to above that merely because an objection has been raised that there is no relationship between the landlord and tenant, it cannot be said that the suit is barred by Section 23. Learned counsel for the petitioner has relied upon a decision of Apex Court reported in **1988 AWC page 1057;** Budhu Mal Versus Mahabir Prasad and others, para 10 of which is reproduced below:

"10. It is true that Section 23 does not make it obligatory on the Court of Small Causes to invariably return the plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be res judicata in a suit based on

title. It cannot , however, be gainsaid that in enacting Section 23 the Legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties. On the facts of the instant cases we feel that these are such cases in which in order to do complete justice between the parties the plaints ought to have been returned for presentation to a court having jurisdiction to determine the title. In case the plea set up by the appellants that by the deed dated 8th December, 1966 the benefit arising out of immovable property was transferred and in pursuance of the information conveyed in this behalf by Mahabir Prasad to them the appellants started paying rent to Smt. Sulochana Devi and that the said deed could not be unilaterally cancelled, is accepted, it likely not only to affect the title of Mahabir Prasad to realize rent from the appellants but will also have the effect of snapping even the relationship of landlord and tenant, between Mahabir Prasad and the appellants which could not be revived by the subsequent unilateral cancellation by Mahabir Prasad of the said deed dated 8th December, 1966. In that event it may not be possible to treat the suits filed by Mahabir Prasad against the appellants to be suits between landlord and tenant simplicitor based on contract of tenancy in which an issue of title was incidentally raised. If the suits cannot be construed to be one between landlord and tenant they would not be cognizable by a court of Small Causes and it is for these reasons that we are of the opinion that these are such cases where the plaints ought to have been returned for presentation to appropriate court so that none of the parties was prejudiced."

4. In view of the law laid down in my opinion the trial court as well as the revisional court has not committed any error of law. This Court in the case reported in **1987 Vol.(1) ARC page 89,** para 10, which is reproduced below has held that:

"10. On a reading of this sub-section (1), it is apparent that a discretion has been conferred on the Court to return the plaint if it is satisfied that a question of title is involved in the suit which it cannot finally determine. It is only in such a situation that it is open to the Court of Judge, Small Causes to exercise a direction whether return the plaint or not. A mere allegation in the written statement that the title vests in a defendant in a suit filed for ejectment and arrears of rent, is by itself not sufficient to establish that the question of title is involved in a suit. Only after evidence has been produced and the Court is of the opinion that a question of title is involved in the suit, which the Court of Judge, Small Causes cannot finally determine, it is open to the court to return the plaint. In the present case, only a written statement had been filed in which the title had been set up. Mere filing of the written statement does not entitle the defendant-petitioner to move an application for return of the plaint to the proper court. In view of the above, I am of the opinion that the Court below was right in refusing to exercise a discretion under Section 23 of the Act at this stage."

5. In view of what has been stated above, in my opinion in the teeth of the findings of the two courts below and the law laid down by this court as well apex court no error of law cannot be said to

have been committed either by the trial court or revisional court.

6. In this view of the matter, this writ petition being devoid of any merit deserves to be dismissed and is hereby dismissed. The interim order, if any, stands vacated. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.06.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 20440 of 2001

Bharat Sanchar Nigam Ltd. ...Petitioner
Versus
Brij Mohan Srivastava and another ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri Devi Shanker Shukla

Counsel for the Respondents:
Sri B.P. Srivastava
S.C.

Constitution of India- Article 226- If the appointment is cancelled arbitrarily without a valid reason and without following principles of natural justice, such an action is arbitrary and capricious and is hit by Article 14 of the Constitution of India and has to be struck down. (Held in para 24)

Case Law Referred:
1979 (1) SCC 168
1990 (3) SCC 655
1991 Supp. (2) SCC 421
AIR 2001 1176
2001 (6) SCC 292

If the appointment is cancelled arbitrarily without a valid reason and without following principles of natural justice, such an action is arbitrary and capricious and is hit by Article 14 of the Constitution of India and has to be struck down.

(Delivered by Hon'ble M. Katju, J.)

1. This bunch of five writ petitions is directed against the judgment dated 12.2.2001 (annexure 1 to the writ petition) delivered by the Central Administrative Tribunal, Allahabad, here-in-after called as 'CAT' in five connected Original Application Numbers (here-in-after called as 'OA') 1038/98, 1012/98, 789/99, 802/99, 812/99 which were disposed of by the common judgment dated 12.2.2001, aforesaid.

2. These five OA Nos., mentioned above, were filed by the employees of Bharat Sanchar Nigam, which had cancelled their selection and appointment to the post of Stenographer, Grade III, in the Bharat Sanchar Nigam Ltd.. True copy of the OA filed by the respondent no. 1, is annexure no. 3 to the writ petition.

3. The applicant employees prayed before the Tribunal that the order of cancellation of their selections/appointments as Stenographers, Grade III be quashed.

4. The relevant facts of the case are that an advertisement no. 3/93 was published in the newspapers by the Chief General Manager, Telecommunications, Lucknow calling for applications for the said posts. About 4000-5000 candidates applied, though the applications were not invited through the Employment

Exchange, but a clause was incorporated in the advertisement that only those applicants will be considered who are registered with the Employment Exchange.

5. The first test was held on 14th/15th April, 1995. Those who qualified in the test were directed to appear in the short-hand test held on 20th/21st January, 1996. The result was declared on 15th March. The successful candidates, after Medical Examination and verification were offered appointments and joined on various dates in the month of June/July, 1996. The applicants were successful candidates and they continued to work for more than two years, when a notice dated 12.9.98 (vide Annexure A-12 to the OA filed before the Tribunal, which is Annexure 3 to the petition) was published in Hindi Daily Newspaper, Kanpur edition, notifying that the Chief General Manager, Telecommunications, Lucknow has cancelled the appointments on the sole ground that the selection was not done by the Staff Selection Commission.

6. Subsequently, the services of all the applicants were terminated by order dated 30.6.1999 (vide Annexure 2 to the writ petition) by one month's notice. This impugned order was challenged by the employees before the CAT by the aforesaid five OAs. The CAT allowed all the five OAs and set aside the impugned order of termination. The Bharat Sanchar Nigam Ltd., has filed this and four other writ petitions before this Court. All these five writ petitions have been heard and are being decided by this court by this common judgement, as common questions of facts and law are involved.

7. On behalf of the petitioners, it was urged that the selection was against the Rules and the appointments were temporary in nature and hence the Bharat Sanchar Nigam has a right to terminate the services of the respondents without giving any show-cause notice or opportunity of hearing.

8. Heard learned counsel for both the parties.

9. There is no dispute that the Bharat Sanchar Nigam Ltd., has not framed statutory Rules for recruitment for the post of Stenographer, Grade III, and that the recruitment for on the said post is governed by executive instructions, issued by the Government of India from time to time. There is also no dispute that all the applicants were qualified and there is no allegation of any fraud or misrepresentation in appointments of the employees.

10. From the record, it appears that Parliament by a resolution established the Staff Selection Commission for selection of staff of various departments including the department of Tele-communications. The Government of India, thereafter, issued instructions for recruitment of staff, which are annexed with Petition Nos. 20440/2001, 20433/2001, 20460/2001, 20459/2001 and 20438/2001. 123 posts of Stenographers were lying vacant in the Bharat Sanchar Nigam Ltd., as is evident from the letter dated 7.1.1993. Copy of the letter dated 7.1.1993 is Annexure A-3 to the OA filed before the Tribunal (Annexure 3 to the writ petition). The department of Telecommunication informed the Staff Selection Commission about the vacancies for making recruitment by

letters dated 6.3.1991, 10.11.1991, 10.12.1991, 7.1.1992, 5.2.1992 and 7.1.1993 but the Staff Selection Commission failed to make any recommendation for 33 posts, which were to be filled up by any recommendation for 33 posts, which were to be filled up by recruitment by outside candidates.

11. Sri N. Vittal, an Officer on Special Duty visited the office of the General Manager, Telecommunication, Lucknow on 21st September, 1993, vide para 6 of the Counter Affidavit of respondent no. 1. He issued a note to the D.D.G.(E)/D.D.G. (Personal), U.P. Circle, Lucknow directing him to recruit candidates from outside, by getting names from the Employment Exchanges, provided there was no ban existing on filling up of the post of Stenographers at the Circle level, vide Annexure C.A.-3.

12. Thereafter the Chief General Manager requested the Staff Selection Commission by letter, dated 26.10.1993 (vide Annexure C.A.-4) to recommend names of suitable candidates for the posts but no recommendation was received from the Staff Selection Commission. Hence he issued the advertisement no. 3/93 inviting applications from the open market for appointments to the posts of Stenographers, Grade III.

13. The Chief General Manager, Telecom, Lucknow by his letter dated 19.1.1994 (vide Annexure C.A.-5) informed the Heads of Telecom Circles and Administrative Officers inter-alia as under:

"SUBJECT: Filling up of vacant post of Stenographer.

Sir,

Kindly refer to this office letter No. 27.1./87-TE-II dated 11.7.1991 for the recruitment from the open market in any of the existing of restructured cadres of Group 'C' and 'D', except in the cadre of JTO has been banned.

2. In view of the request received from the various field units seeking permission for filling up of existing vacancies in the cadre of Stenographers, the existing instructions issued vide this office letter referred to above have been received. Accordingly, I am directed to convey the approval of Telecom Commission for relaxation of the ban order in the extent of filling up of vacant posts of Stenographers Grade III as a one time measure. Wide publicity should be given amongst the departmental employees for filling up the existing posts of Stenographers. It may also be ensured that direct recruitment from the open market should be restored to only if suitable persons are not available within the department and that this should be limited to the essential minimum no of stenographers needed for their work."

14. The above letter shows that the ban order was relaxed provided wide publicity for recruitment from open market was given. After holding the selection, the Assistant Director, Telecom (Recruitment) informed the concerned officers, that a departmental examination has been organized on 19.8.1994 but only two candidates appeared. He again sent a letter dated 12.02.96, which reads as under:

"SUBJECT: Filling up of vacant posts of Stenographers.

Kindly refer to this office letter no. even dated 19.1.1994 on the subject noted above vide which the circles were given permission to resort to direct recruitment of Stenographers from the open market in relaxation of the ban orders. The said permission was given only as a one time measure and to meet only the most pressing requirements.

The departments have objected to the direct recruitment of Stenographers instead of following the prescribed procedure of recruitment through Staff Selection Commission.

In view of the above, no further recruitment from the open market should be restored to. Only the prescribed procedure for recruitment through Staff Selection Commission may be followed. The number of Stenographers recruited in terms of this office letter dated 19.1.1994 may be intimated to this office letter dated 19.1.1994 may be intimated to this office. The details of section taken to approach the SSC before the recruitment from open market was restored to may also kindly be intimated alongwith the reply, if any, received from the SSC.

The above information may please be sent by FAX within 10 days positively.

Sd/-B.S. Verma
Director(TE)"

15. Copy of the letter is Annexure C.A.-3 to the petitioner's counter affidavit filed before the Tribunal. It appears that copy of this letter dated 12.2.1996 is not on the record of this petition, but it is on the scerred of connected writ petition no. 20460/2001, where it is Annexure 4 to the said writ petition No.20460/2001.

16. Another important letter dated 5.2.1998 was sent by the Chief General Manager, which narrates the entire history of this recruitment, is quoted below:

"SUBJECT: Filling up the vacant posts of Stenographers Grade III.

REF: Dir(TE) DOT No: 2-4-/93 TE II da. 19.98 and D.O.No. 2-45/96-VM-II dt. 10.11.1997.

1. This is in connection with the regularization case of examination/selection of Stenographer Grade III from open market. The details of the case has already been reported to Shri P.S. Dhillon, Director (TE) through the D.O. letter of Shri D.P. Mishra, Dy. G.M.(A) of his office letter No. Rectt/M-47/TA/92/5 dated 19.12.97. Now keeping in view the Directorate instructions, which have been communicated to me (copy enclosed) through D.O. letter of Shri Ashutosh Pandey, Director (VM) referred above, the instant case has since been examined and my observations on the subject are given below:

2. In this regard, I would like to mention that there was acute shortage of Stenographers in U.P. (E) Circle. Against 123 posts of Stenographers Grade III, only 57 were working and 66 of acute shortage of Stenographers in the circle.

3. Shri N. Vittal, the then OSD Telecom Commission during his visit to Lucknow could guess the pathetic situation and keeping in view the earnest requirement of stenographers had kindly granted the permission to recruit the Stenographers in the interest of service. The recruitment process was started on specific instructions of Shri N. Vittal, the

then OSD Telecom Commission. His decision was conveyed to this office vide his letter dated 24.9.93, which was later on confirmed by DOT letter dated 19.1.1994. Accordingly, the examination was conducted and result was declared vide this office letter dated 19.3.96 and total 29 candidates were selected through the said letter dated 19.3.96 and amongst them 12 candidates were allotted to U.P.(W) Circle which was lower in the merit and 07 out of them were appointed as Stenographer Gr. III and they were still working in U.P. (W) Circle while 12 candidates were allotted to this Circle but none of them was given appointment in view of complaints regarding using unfair means in the examination by the Candidates. The complaint was investigated by vigilance section of DOT and per enquiry report, it has been found that amongst 29 selected candidates only two candidates were found guilty by using unfair means and none else. Among the candidates who have not been given appointments 15 candidates have filed cases in CAT Lucknow/Allahabad and High Court, Lucknow.

4. It is agreed that Dtc. Vide letter No.9-4/93-TE-II dated 12.2.96 has communicated that no further recruitment should be resorted to from open market, but the same could not be operated in this examination as there was acute shortage of Stenographers in this Circle and the result of successful candidates was declared and it was not possible to cancel the whole process at this belated stage. However, in the above mentioned letter of dated 12.2.96 the Directorate has also instructed to send the list of Stenographers already recruited in terms of their letter dated 19.1.94. In compliance with the directions of the Dtc., conveyed through letter dated 12.2.96 a list of total 29 selected candidates for the post of Stenographers Grade III was sent to Shri B.S. Verma the then Director (TE) through letter No. Rectt/M-47/TA/92/5 dt. 30.4.96 and since then the matter continuously being taken up with the Directorate for regularization of selection.

5. In letter No. 9-4/93-TE-II dated 19.1.98 the Director (TE) Sri Dhillon has termed this selection illegal. Here I would like to mention very specifically that the said 'illegal selection' was only started when the then Chairman Shri Vittal has intiated the same in the best interest of service.

6. Apparently, the existing so-called legal procedures for recruitment of Stenographers centrally for a large country like ours is totally improper. That is why inspite of so much of shortage, much of unemployment we are failing to get the recruitment done and suffering from inefficiency. Therefore, there is immediate need for intervention of Telecom Commission as the power is vested with the Telecom Commission, Govt. of India to reverse and adopt the procedure initiated by Shri Vittal, the then Secretary, Telecommunications.

7. I very strongly recommend that the said selection must be regularized by giving special one time relaxation, keeping in view not only the earnest need of Stenographers in our circle but also probability of generation of several court cases if the said selection would be cancelled.

8. Seeing the present need of the Stenographer in the department and

further consequences of cancellation of whole examination undersigned feels that it would not be proper to cancel the examination as a whole at this belated stage, therefore, the examination as a whole is not being cancelled. Only the candidates who have been selected and appointed because of using unfair means in the examination, their candidature shall be cancelled after observing required departmental procedure.

(Sd./-Shabbir Ahmed)
Chief General Manager
Telecom Eastern U.P.
Telecom Circle, Lucknow"

17. Copy of this letter is Annexure C.A.-XIII-B to the writ petition.

18. Thus it is clear that recruitment through Staff Selection Commission was relaxed due to acute shortage of Stenographers and urgent need of the department due to inaction of the Staff Selection Commission in recommending names of candidates for the posts of Stenographers inspite of requisitions made repeatedly from 6.3.1991 to 7.1.1973 and its utter failure to discharge the its duties. Hence the Telecom Department rightly carried out the selections on the basis of one time exception.

19. In these circumstances, we are of the opinion that the selection made by the department cannot be said to be illegal or without authority, and the candidates who were selected had been continuously working. In our opinion, the selection is not tainted by fraud or misrepresentation.

20. The jurisdiction under Article 226 of the Constitution of India is tempered with equity. The Apex Court in several cases has held that equitable considerations should also be kept in mind while deciding the cases, and appointments made pursuant to a selection need not necessarily be disturbed on technical grounds. References can be made to the cases of:

1. Ram Swarup Vs. State of Hayana, 1979 (1) SCC 168
2. District Collector Vs. Vidanagam Social Welfare Residential School Society Versus Tripura Sudari Devi, 1990 (3) SCC 655
3. H.C. Putta Swamy versus Hon'ble Chief Justice, Karnataka High Court 1991 Supp.(2) SCC 421.

These cases have been followed in a recent judgment of the Apex Court in AIR 2001 1176 Buddhi Nath Chaudhary vs. Abahi Kumar.

21. Learned counsel for the petitioner has contended that the appointments made in this case amounted to back-door entries.

22. We do not agree. It was the persistent inaction of the Staff Selection Commission which led to this situation. After all, the work of the Corporation had to go on, and it could not be stopped due to the lethargy of others.

23. Learned counsel for the respondents has referred to the case of K.A. Abdul Majeed Versus State of Kerala 2001 (6) SCC 292 in which the Apex Court has held that where the appointment was made after selection pursuant to an advertisement, though not made through the Public Service

Commission, it would not be said to be an appointment through back-door.

24. So far as the question of termination on the ground of temporary nature of appointment is concerned, we are of the opinion that even a temporary appointment cannot be cancelled arbitrarily at the whims of the authority and without a valid reason. If the appointment is cancelled arbitrarily without a valid reason and without following principles of natural justice, such an action is arbitrary and capricious and is hit by Article 14 of the Constitution of India and has to be struck down. It has been held by the Supreme Court in Maneka Gandhi vs. Union of India, AIR 1978 SC 597 that arbitrariness violates Article 14 of the Constitution of India.

25. We see no reason to interfere with the view taken by the CAT. Accordingly, all the five writ petition nos. 20440/2001, 20433/2001, 20460/2001, 20459/2001 and 20438/2001 are dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2002

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

Civil Misc. Writ Petition No. 26639 of 2002

Committee of Management, Shiksha Prasar Samiti and another ...Petitioners
Versus
Deputy Registrar, Firms Societies and Chits and another ...Respondents

Counsel for the Petitioners:
Sri S.D. Shukla
Sri Ashok Khare

Counsel for the Respondents:
Sri Santosh Kumar Srivastava
Sri V.K. Shukla
S.C.

Societies Registration Act-Section 25(2)-fraud vitiates most solemn proceeding and as and when it is brought to the notice of any authority, the benefit derived by any party can be always recalled. (Held in para 12).

As respondent no. 1 has passed impugned order after recording clear finding that petitioner has succeeded in obtaining renewal certificate after concealing the fact and by playing fraud in the matter, this Court feels that respondent no. 1 is well within his jurisdiction in passing the impugned order.

Case Law Referred:
AIR 1988 Alld. 236
1996 I UPLBEC, 413
1970 AWR 775
1993 ACJ 152
AIR 1991 SC 909

(Delivered by Hon'ble S.K. Singh, J.)

1. Challenge in this petition is the order dated 27.6.2002 (Annexure-11 to the writ petition) passed by the respondent no. 1 in exercise of powers as conferred under Section 25 (2) of the Societies Registration Act for holding elections to elect office bearers of the society.

2. Learned counsel for the parties have been heard at admission stage.

3. There is a society known as Shiksha Prasad Samiti registered under the Societies Registration Act, 1860 at Mhammadabad Gohna, District Mau. It has its registered bye laws which govern the management of the society. Under the bye laws the terms of the committee of

management of the society is provided. The aforesaid society runs an institution know as National Inter College, Mohammadabad Gohna, District Mau. It is claimed that renewal of society has taken place for a period of five years w.e.f. 10.10.2000. It appears that on 6.11.2001 respondent No.2 made a complaint before the Deputy Registrar Firms Societies and Chits to the effect that the petitioner has obtained the renewal certificate by placing forged papers and incorrect list of members. It is in pursuance of the aforesaid complaint made by the respondent No. 2 the matter was examined with the result the impugned order came to be passed by the respondent No. 1, which is the subject matter of challenge before this court, in this petition.

4. Sri S.D. Shukla, learned Advocate who appears on behalf of the petitioner submits that respondent No. 1 has passed the impugned order without affording adequate opportunity in the matter. It has been further submitted that the petitioner lodged protest before the Registrar U.P., Lucknow directing the transfer of the matter before some other authority upon which no orders were passed and inspite thereof respondent No. 1 has taken the impugned decision. Lastly, it has been submitted that there appears to be a dispute of election which could not have been decided by the respondent No. 1 and therefore the order is without jurisdiction. Learned counsel submits that by the impugned decision the term of the committee has been cut short which is illegal and impermissible. In support of the aforesaid contention about want of jurisdiction of the respondent No. 1 to pass the impugned order and term of the committee cannot be cut short, reliance has been placed by the learned counsel on the decision as reported in A.I.R. 1988 Alld., 236 and 1996 (1) UPLBEC, 413 respectively.

5. Sri V.K. Shukla learned Advocate who appears on behalf of the respondent No. 2 in response to the aforesaid submission argues that petitioner was given full opportunity and after giving cogent reasons the decision has been taken by the respondent No. 1 in which finding of fact has been recorded and therefore no interference is required by this court. Learned counsel submits that in fact no election has taken place and it was all a forged affairs and therefore after recording aforesaid finding respondent No. 1 has properly exercised the jurisdiction as vested in him and required direction has been issued. It has been further submitted that the list of 12 members which is being relied upon by the petitioner though being incomplete and incorrect, nevertheless six members out of the aforesaid list of 12 members have filed affidavit stating that no election has taken place and they are not elected office bearers. Learned counsel submits that in view of the aforesaid, claim of the petitioners of their being valid election and that the respondent No. 1 has no jurisdiction to adjudicate, cannot be accepted. In view of the aforesaid learned counsel submits that the order of the respondent No. 1 being perfectly just and proper, no interference is required.

6. Learned Standing Counsel who appears in the matter also supported the order of the respondent No. 1 placing reliance on the findings so recorded in the impugned order.

7. On perusal of the impugned order of the respondent No. 1 it is clear that petitioner has been given opportunity at fullest length but he has not been able to produce any of the original document concerning to the list of members, original register, cash book etc. It has been mentioned in the order of the respondent No. 1 that by letter dated 22.11.2001 petitioner was called upon to furnish all the original documents referred above on the date so fixed i.e. 4.12.2001. On the date fixed from the side of the petitioner there was an application for adjournment alongwith medical certificate upon which 28.12.2001 was fixed. On that date again application was moved on behalf of the petitioner that further time may be allowed for producing evidence. This request was again accepted by the respondent No. 1 and 17.1.2002 was fixed. Respondent No. 1 has mentioned in his order that petitioner has been changing counsel from time to time and moving application for the purpose of adjournment instead of producing required documents. It has been mentioned that after 17.1.2002 again dates were fixed as 31.1.2002, 12.2.2002 and 2.3.2002. It appears that at this stage petitioner moved application/complaint to the Registrar U.P., Lucknow for transferring the matter from the respondent No.1 upon which as submitted by the learned counsel Sri V.K Shukla, comment was sent by the respondent No. 1 in which he clearly stated that he has no objection whatsoever from shifting of the matter to any other authority. It appears from the record that the application/complaint of the petitioner was duly attended by the Registrar who by order dated 6.5.2002 after repelling petitioner's contention directed respondent No. 1, being competent authority to decide the matter. Respondent No. 1 being fair enough again issued notice to both the parties by letter dated 8.5.2002 fixing 18.5.2002 and thereafter again to enable the petitioner to get further opportunity dates were fixed as 3.6.2002, 12.6.2002, 22.6.2002, 25.6.2002 and finally 26.6.2002, but as order states petitioner has not produced any of the documents i.e. the proceeding register, information register, membership register, receipt book etc. In view of the aforesaid, it is clear that right from 4.12.2001 up to 26.6.2002, petitioner has been just seeking time by changing counsel and no steps were taken on his behalf to place before respondent No.1 the documents justifying his claim. It is commonly said that a person who sleeps about his rights or if he is not vigilant then he is not entitled to invoke writ jurisdiction as it is equity jurisdiction. A party has no right to keep the matter lingering or choose the authority before whom matter is to be heard. Facts of present case, discloses that petitioner has tried to adopt both the aforesaid things. He tried to linger on the proceeding and also tried to get the matter shifted to other authority but when Registrar refused to accept prayer of petitioner, it was obligatory on his part to co-operate in the proceeding but this court feels there was complete lack of bonafide on the part of petitioner.

8. In view of the aforesaid respondent No. 1 came to the conclusion that petitioner is not possessed with any of the record or for the reason best known to him he do not want to produce the same. A further finding has been given that list of 12 members have been given out of which six members have filed their affidavits stating that no election has taken place and they are not elected office

bearers and petitioner has got renewal of the society by placing wrong facts. The finding so recorded by the respondent No. 1 as referred in this judgment is finding of fact, which on the facts of the present case this court feels, requires no interference.

9. The law is well settled that fraud vitiates most solemn proceeding and as and when it is brought to the notice of any authority the benefit derived by any party can be always recalled. Reference in this respect can be made to the decision reported in 1970 AWR 775 (Chet Ram Vs. D.D.C., & others). The observation as made in para 6 of aforesaid judgment will be useful to be quoted-

"It is well settled that fraud vitiates all solemn proceeding. If a decree is obtained by fraud, even through from a competent court, is not binding between parties. The question of fraud can be raised in any proceeding where-so-ever a decree is sought to be relied on as a good decree."

10. Reference can be made to another decision given by this court in Baliram Vs. Board of Revenue, reported in 1993 ACJ, 152. Para 17 of aforesaid decision is hereby quoted-

"When the Court finds that there is a miscarriage of justice on account of fraud practiced upon the Court, they cannot place an embargo of limitation upon it. It is the duty of the Court to see that no miscarriage of justice takes place on account of any fraud practiced by any party upon the Court. Whenever it comes to the light of the Court, it is under a duty to set aside such fraudulent decree. The Court cannot be used as a tool in fraudulent schemes of a party. It is settled principle that fraud vitiates all proceedings."

11. Hon'ble Apex Court in the matter of obtaining orders/admission by fraud has further permitted the authority to withdraw the benefit even without giving any opportunity and it has been said that rules of principle of natural justice will not apply. Reference in this connection is to be made to decision given in case of U.P. Junior Doctors' Action Committee Vs. Dr. B. Sheetal Nandwani reported in AIR 1991 SC, 909. Observation as made in para 5 is hereby quoted-

"The circumstances in which such benefit has been taken by the candidates concerned do not justify attraction of the application of rules of natural justice of being provided an opportunity to be heard."

12. As respondent No.1 has passed impugned order after recording clear finding that petitioner has succeeded in obtaining renewal certificate after concealing the fact and by playing fraud in the matter, this court feels that respondent No. 1 is well within his jurisdiction in passing the impugned order. In view of the aforesaid findings, the submission as made by the learned counsel for the petitioner about want of jurisdiction of the respondent No. 1 and curtailment of the period of committee, deserves rejection.

13. In view of the aforesaid analysis, it appears to be not a fit case for interference in the writ jurisdiction. Writ petition is thus dismissed at admission stage.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.7.2002

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

Criminal Misc. Writ Petition No. 3607 of 2002

Shahendra Misra & others ...Petitioners
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri Apul Misra

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

Constitution of India-Article 21- Article 21 of the Constitution of India has been interpreted by the Court to include the right to water, food and electricity as they are essentital for a life of dignity. (Held in para 3)

Case Law Referred:

A perusal of the impugned F.I.R. shows that the allegations against the petitioners are that they had held Chakka Jam on the road crossing there was no electricity supply in township Jasrana, district Firozabad. This is a problem which is assuming huge dimensions in large parts of the country and calls for immediate national level action by the authorities concerned.

(Delivered by Hon'ble M. Katju, J.)

1. The learned Addl. Government Advocate may file a counter affidavit within three weeks. List thereafter.

2. Until further orders we stay the arrest of the petitioners in case crime No. 271 of 2002, under sections 147,148,149,307,336,332,504 and 506 I.P.C. and Section 7 Criminal Law Amendment Act Police station Jasrana, District Firozabad.

3. A perusal of the impugned F.I.R. shows that the allegations against the petitioners are that they had held Chakka Jam on the road crossing because there was no electricity supply in township Jarana, District Firozabad. This is problem which is assuming huge dimensions in large parts of the country and calls for immediate national level action by the authorities concerned.

4. The shortage of water and electricity in large parts of the country are assuming colossal dimensions and unless something drastic is done about it riots, Chakka Jams etc. may take place in many parts of the country because without water and electricity people are bound to come on the streets. Hence a national level scientific apparatus needs to be set up by the Central Government in this connection so that this problem is tackled on a war footing.

5. It is an ironical situation that while some parts of the country are undergoing floods other parts including Delhi, U.P. Madhya Pradesh, Rajasthan, Orissa etc. are undergoing drought, and severe electricity shortage.

6. A national level plan should, therefore, be set up by the Central Government by using scientific methods with the aid of technical experts so that excess water in flood areas may be diverted to the drought hit areas. In this way the problem of drought and floods can both be solved. At the same time the

electricity problem has also to be tackled at the national level on war footing. There was a time when electricity was only a luxury but today in the modern age it is a necessity, without which life becomes hellish. Without electricity industrial activities also come to a stand still and normal life is totally dislocated.

7. Article 21 of the Constitution of India has been interpreted by the Courts to include the right to water, food and electricity as they are essential for a life of dignity. In our opinion, therefore, it is duty of the authorities to ensure regular water and electric supply to the citizens, otherwise, their lives become miserable and there may be civil disorders. We are seeing on the T.V. that citizens in large parts of Delhi, M.P., U.P. and other places are facing the problem of shortage of water and electricity and their lives have become hellish. In Allahabad water is being sold from pots carried on eccas, and there have been Chakka Jams. As per T.V. news a power contractor has been killed by a mob in Delhi. As per another newspaper report, in Nanpara township of district Bahraich an angry mob of people, incensed over the lack of electricity, took out a procession, burnt a roadways bus, destroyed 3 transformers, stoned the police station and residences of the power department officials, closed the shops, and they were lathi charged by the police causing several injuries. In another incident rail traffic on the Kanpur Delhi section of Northern Railway was affected after an angry mob, protesting erratic power supply and drinking water shortage blocked movement of trains and damaged the railway tracks. In Sambalpur in Orissa students protesting against power shortage were fired upon by the police causing several injuries, some of them reportedly critical. Many such incidents all over the country are being reported by the media every day. On T.V. screens scenes of parched and cracked agricultural fields in many parts of the country appear daily, and there is danger of famine due to failure of the monsoons. This problem should be tackled on the highest level, otherwise the consequences may be very serious.

8. Let a copy of this order be sent by the Registrar General of this court to the Secretary, Power and Energy Departments, Government of India as well as the Attorney General of India and the Solicitor General who shall submit a report to this Court as to what action is being taken by the Central Government for making a national level plan for resolving this problem of water and electricity shortage which has become night-mare for the whole nation. A copy of this order shall also be sent to the Chief Secretary U.P.

9. List this petition before us on 5.8.2002 on which date we request the learned Attorney General of India or Solicitor General to be personally present before us.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD JULY 17, 2002

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.C. DEEPAK, J.

Criminal Misc. Bail Cancellation Application No. 78419 of 2001

Raj Pal Singh and others ...Appellants
Versus
State of U.P. ...Opposite Party

Counsels for the Applicant:
Sri G.S. Chaturvedi
Sri A.K. Sachan
Counsels for Appellants:
Sri V.P. Sriv astava
Sri Akilesh Srivastava

Counsel for the State:
Sri J.P. Singh,
Addl. Government Advocate

Code of Criminal Procedure - Section 482 - Section 439 (2) of the Code of Criminal Procedure cannot be invoked for cancellation of bail to a convicted appellant who has been granted bail in his criminal appeal under section 389 (I) of the Code of Criminal Procedure- Section 482 of the Code of Criminal Procedure recognises existence of inherent powers of the High Court to be exercised in this regard in order to prevent abuse of the process of the Court or otherwise to secure ends of justice-labeling a wrong section will not oust the jurisdiction of the Court, if it can be traced. We , thus, hold that even though this application has been filed under Section 439 (2) of the Code of Criminal Procedure, it is maintainable under the inherent powers of this court which stands recognised by the Legislature vide Section 482 of the Code of Criminal Procedure, 1973.

Held in para 15.9

That the applicant hais succeeded in making out a case that in order to prevent abuse of the process of the Court and secure the ends of justice the bail bonds of appellants are liable to be cancelled under the inherent powers of the Court.

(Delivered by Hon'ble B.K. Roy, J.)

This order dispose of Criminal Misc. Bail Cancellation Application No. 78419 of 2001 which involves adjudication of following questions:

(i) Whether in the peculiar facts and circumstances we will be justified, instead of disposing of this application, in taking up hearing of Criminal Appeal No. 282 of 1991, which stood listed at Serial No. 182 of our list out of turn in preference to Criminal Appeals of the year ?

(ii) Whether the High Court has jurisdiction to cancel the bails which were granted to the appellants at the time of admission of their Criminal Appeal No. 282 of 1991 ? and
Whether, if the answer to question no. (ii) is in the affirmative, in the peculiar facts and circumstances we should exercise that jurisdiction ?

2. Firstly the facts:- Through this application, filed on 20.8.2001, after serving its copy on the learned counsel for the appellants on 17.8.2001, the Informant Rakesh Pal singh of Sessions Trial No. 358 of 2001 of the Court of Sessions, Aligarh, who is uncle of the Informant of the case giving rise to the Criminal Appeal, has come up with a prayer to cancel the bails granted to the appellants and send them to jail asserting, inter alia to the following effect :-

(i) His own elder brother Amrit Pal Singh was brutally murdered in broad day light on 1.7.1989 by Appellant Nos. 1 to 5 Raj Pal, Bhojraj alias Pappu, Rishi Pal, Jagannath Kahar and Ashok Kumar respectively which was witnessed by his own son sushil Kumar alias Pintoo, then aged 11 years (P.W.4) and his nephew Satendra Pal Singh (PW 3), who was Informant, Vijendra Pal Singh (PW 6). By the Judgement and Order dated 21.2.1991

passed by Sri Pradumn Kumar Special Judge (EC Act) Aligarh the Appellants were found guilty and convicted and sentenced to undergo imprisonment for life under Sections 302/149 IPC, Rigorous Imprisonment for 5 years under Sections 307/149 I.P.C. and Rigorous Imprisonment for 2 years under Section 148 I.P.C. directing the sentences to run concurrently.

(ii) The appellants preferred Criminal Appeal No. 282 of 1991, which was admitted and they were granted bail.

(iii) Thereafter on several occasions the appellants threatened the applicant and his son Sushil Kumar @ Pintoo for dire consequences pressurising them not to do pairvies in this appeal. Sushil Kumar @ Pintoo was shifted to Agra where he completed his studies. The applicant orally requested the Station Officer P.S. Hathras Junction but no First Information Report was lodged by him. An application dated 27.4.2001 (as contained in Annexure-1) was also filed for expediting the final hearing of the Criminal Appeal by Satendra Pal Singh P.W.3- (the son of the deceased Amrit Pal Singh) and Hon'ble the Chief Justice realising the gravity of the matter was pleased to expedite the hearing of the Criminal Appeal.

(iv) On 19.7.2001 Sushil Kumar @ Pintoo (PW 4) who was doing pairvi in the appeal and was an eye-witness came to village from Agra and was murdered by Appellants Nos. 1 to 3 and 5 in broad day light and a First Information Report dated 19.7.2001 (as contained in Annexure -2) was lodged against them.

(v) Appellant Nos. 1 to 5 are hardened criminals who have framed a criminal gang in the village and threatened the applicant and his family members on several occasions as a result of which the applicant and the members of his family had restricted their movement.

(vi) The applicant after the murder started doing pairvi in this Criminal Appeal and the other murder case and apprehends another murder.

(vii) Since the appellants have misused their bail, thus it would be expedient in the interest of justice that their bail be cancelled forthwith.

3. On 3.4.2002 the appellants filed their Counter Affidavit and Supplementary Counter Affidavit along with a request for condonation of delay occurred in its filing, asserting, inter alia to the effect that they have been falsely implicated, since the hearing of the appeal has been expedited and even though it was listed a number of times for hearing but could not be taken up and thus under that impression no Counter Affidavit was filed by them, all the appellants, except appellant Raj Pal Singh, who is aged 75 years, have been implicated in a case under the Gangster Act and they have not been released on bail till date, it has been wrongly stated that they have threatened the informant's side, 4 out of them have been implicated in regard to murder of Sushil Kumar alias Pintoo in which they have been granted bail by this Court , a false case has been cooked up just to get their bails cancelled although they have never mis-used the privilege of the bail granted to them, and that the application has no force and is liable to be rejected.

4. The applicant filed a Rejoinder to the Counter Affidavit high lighting, inter alia, that the expedite application was moved on 27.4.2001 and soon thereafter on 19.7.2001 Sushuil Kumar Singh alias Pintoo, was brutally murdered by Appellant nos. 1,2,3 and 5 which was witnessed by Virendra Singh @ Vintoo, a true copy of his statement is appended as Annexure RA 1, the appellants have mis-used the privilege of bail by committing murder and in that case a charge sheet was submitted on 30.8.2001 (copy appended as Annexure RA 2) and the trial, numbered as Sessions Trial No. 3578 of 2001, was committed to the Court of Sessions by order dated 12.9.2001 (copy appended as Annexure RA 3) and that the appellants are trying to linger the same and their acts being deliberate the reason for ignoring the delay in filing of the counter are not sustainable in law.

5. The criminal Appeal was listed before us on 1.4.2002 and was placed at serial no. 182 of the list. Our Board also was pre-occupied with 'Fresh Criminal Writs and Writ Petitions for the year 1996 for Orders, Admission and Hearing including Bunch Cases and Old Criminal Appeals."

5.1. On that day a motion was made by Sri Gopal S. Chaturvedi, learned Senior Counsel for the applicant, to take up this application on the ground that since there is no chance of taking up the hearing of this Criminal Appeal and hence for the facts and circumstances mentioned in the affidavit accompanying this application, to which no Counter Affidavit was filed since then, the bail granted to the appellants be cancelled.

5.2. On 2.4.2002 Sri V.P. Srivastava, learned counsel appearing on behalf of the appellants, had prayed for adjournment on the ground that a Counter Affidavit has been prepared and presented before the Oath Commissioner for its swearing. The further hearing was adjourned to 3.4.2002.

5.3. This application was further heard on 3.4.2002 and 11.4.2002 and orders were reserved.

The Submissions:-

6. Sri Gopal S. Chaturvedi, learned Senior Counsel appearing on behalf of the applicant with reference to various statements made in the affidavit accompanying the expedite application, this application and the rejoinder to the Counter Affidavit, contended that since the action of the appellants has resulted in abuse of the process of the Court it is a fit case in which the bails granted to the appellants should be cancelled to prevent the abuse of the process of this Court and to secure the ends of justice since they have abused the privilege of bail. He emphasized that the relevant allegations made in the Expedite application were not denied till its disposal by Hon'ble the Chief Justice on 3.8.2001 and the statements made in the Counter affidavit of this application, which was filed after its hearing, are lame excuses. It cannot be denied that one of the most important witness of the Prosecution has been murdered during the pendency of the Expedite application in which charge-sheet has been submitted.

7. Sri V.P. Srivastava, learned counsel appearing on behalf of the appellants , on the other hand, contended

that the instant application is not maintainable under section 439 (2) of the Code of Criminal Procedure since that provision is not applicable, that instead of taking up this application on its merit it will be in the ends of justice to take up the hearing of the Criminal Appeal itself for its disposal on its merit, and if it is held alternatively that the instant application is maintainable, then it be dismissed as sufficient grounds justifying cancellation of bails have not been made out.

8. The learned Additional Government Advocate supported the arguments of Sri Chaturvedi, who in reply contended that this application is maintainable under section 439 (2) Code of Criminal Procedure or in any view of the matter under the inherent powers of the Court.

Our Findings :-

Re- Question No. (i)

9. This Criminal Appeal was listed first before a Division Bench comprising G.P.Mathur and R.P. Misra, JJ. The said Bench, however, passed the following order on 4.2.2000:-

"This is a Criminal Appeal of the year 1991, which has been expedited by the orders of Hon'ble the Chief Justice dated 3.8.2001. Learned counsel has submitted that the appellants have committed some more murders and consequently the application for cancellation of bail and also the appeal be heard finally. This Court is hearing fresh matters in writ petitions relating to recovery, land acquisition, mines, minerals, and service writ petitions relating to judicial officers. Nearly 160 writ petitions are being listed every day for admission and hearing. It is therefore, not possible for us to hear the criminal appeal in the near future. It is, accordingly, directed that the appeal may be listed before the regular Bench hearing criminal appeals in the next cause list. The appeal shall not be treated as tied up to this bench."

9. 1 Thereafter this Criminal Appeal was listed at serial no. 182 of our list dated 1.4.2002. Several Criminal Appeals of the years 1981, i.e. to say 10 years older, were listed above the instant appeal. As per the roster fixed by Hon'ble the Chief Justice we are required to take up the criminal appeals for their hearing from 3.00 P.M. Our list is so heavy that many cases listed every day are not taken up to 3.00 P.M. As our working hours is only upto 3.45 P.M., thus we get only 45 minutes time for hearing a Criminal Appeal.

9. 2. Hon'ble the Chief Justice broke our Bench with effect from Monday dated 22.4.2002.

9.3. Summer Vacation of the Court commenced from 27.5.2002 and the Court re-opened on 1.7.2002.

9.4 Thus, the prayer made by Sri V.P. Srivastava that we should not dispose of this application rather we should take up the hearing of the Criminal Appeal itself cannot be accepted . Question No. (I) is answered against the appellants.

Re-Question No.(ii)

10. Relevant sections for our consideration are sections 389 (1) & (2),

439 and 482 of the Code of Criminal Procedure, which reads as follows :-

"389. Suspension of sentence pending the appeal, release of appellant on bail- (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto …"

x x x

439. Special powers of High Court or Court of Sessions regarding bail - (1) A High Court or Court of Sessions may direct -

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub- section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub section.

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody…"

"482. Saving of inherent powers of High Court- Nothing in this code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

11. Following order was passed at the time of admission of the Criminal Appeal-

"Heard.
Admit.
Issue Notice.

The appellants Rajpal, Bhoj Raj alias Pappu, Rishipal, Jagan Nath Kahar and Ashok Kumar convicted in S.T. No. 519 of 1989 State Vs. Rajpal and others under sections 147, 148, 307 and 302 IPC, PS , Hathras Junction, district Aligarh are released on bail on each of them furnishing a personal bond and two sureties each in the like amount to the satisfaction of the CJM Aligarh . Sd/- Surya Prasad, J."

11.1 Surya Prasad, J had retired long time back.

11.2 The order granting bail to the appellants at the time of admission of the Criminal Appeal shows that this Court had exercised its jurisdiction to grant bail

to the appellants vested under sub sections (1) and (2) of Section 389 of the Code of Criminal Procedure which falls under Chapter XXIX of the Code of Criminal Procedure. We remind ourselves of a decision of the Hon'ble Supreme Court in Ramji Prasad V. Rattan Kumar Jaiswal and another 2000 (3) A.Cr.R. 1891 (SC), when a learned Single Judge of our High Court granted bail to an appellant without recording any reason who was found guilty of the offence under section 302 IPC by the trial court, while setting aside that order of the learned Single Judge, it was observed and held as follows:-

"Absolutely no reason is shown by the learned Single Judge for adopting this exceptional course in a case where an accused was found guilty by the trial court under section 302 of the Indian Penal Code. The normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted."

11.3. Section 439 of the Code of Criminal Procedure which vests special powers in this Court regarding bail occurs in Chapter XXXIII of the Code of Criminal Procedure. Clause (2) of Section 439 aforementioned vests powers in this Court to arrest a person who has been released on bail under Chapter XXXIII and commit him to custody.

11.4. Thus in our humble view section 439 (2) of the Code of Criminal Procedure cannot be invoked for cancellation of bail to a convicted appellant who has been granted bail in his Criminal Appeal under section 389 (1) of the Code of Criminal Procedure.

11.5 However, section 482 of the Code of Criminal Procedure recognizes existence of inherent powers of the High Court to be exercised in this regard in order to prevent abuse of the process of the Court or otherwise to secure ends of justice.

11.6 This conclusion of our stands well settled by following eight decisions of the Hon'ble Supreme Court :-

(i) In Talab Maji Hussain v. M.P. Mondkar AIR 1958 SC 376 it was held after affirming three decisions of our own High Court in Mohammad Ibrahim V. Emperor AIR 1932 Allahabad 534, Seoti V. Rex AIR 1948 Allahabad 368 (Full Bench) & Bache Lal V. State AIR 1951 Allahabad 836 to the effect that the High Court has inherent powers to cancel bail even in bailable offences in a proper case and in the interest of justice and the tests specified in Section 561 -A of the Code of Criminal Procedure, 1898.

(ii) In Pampapathy V. State of Mysore AIR 1967 SC 286 it was laid down that the High Court has inherent power to cancel an order of suspension of sentence and grant of bail to an appellant made under section 426 of the Code of Criminal Procedure if the allegation against him prima facie indicates that he is misusing liberty granted to him and indulging in acts of violence to prevent abuse of process of the Court.

(iii) In Ratilal Bhanji Mithani v. Asstt. Collector of Customs, Bombay and another AIR 1967 SC 1639 it was laid down to the effect that if any accused of a bailable offence is found (a) intimidating, or (b) bribing , or (c) tampering with the prosecution witnesses or (d) is attempting

to abscond, the High Court has inherent powers to cause him to be arrested by cancelling his bail which jurisdiction springs from its over-riding inherent powers.

(iv) In Dolat Ram v. State of Haryana (1995) 1 SCC 349 it was laid down that following principles are required to be considered by a Court while cancelling bail already granted:-

"Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. Generally speaking, the grounds for cancellation of bail broadly (illustrative and not exhaustive) are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trail to allow the accused to retain his freedom by enjoying the concession of bail during the trail."

(v) In Subhendu Misra versus Subrat Kumar Misra AIR 1999 SC 3026 it was observed that the principles laid down in Dolat Ram's case ought not to have ignored by the High Court.

(vi) In R. Rathinam versus State AIR 2000 SC 1851 it was held as follows :-

"The frame of sub section (2) of Section 439 indicates that it is a power conferred on the said courts. Exercise of that power is not banned on the premise that bail was earlier granted by the High Court on judicial consideration. In fact the power can be exercised only in respect of a person who was released on bail by an order already passed. There is nothing to indicate that the said power can be exercised only if the State or investigating agency or even a Public Prosecutor moves for it by a petition. The power so vested in the High Court can be invoked either by the State or by any aggrieved party. The said power can also be exercised suo motu by the High Court. If so, any member of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power suo motu. There is no barrier either in Section 439 of the Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. If the High Court considers that there is no need to cancel the bail for the reasons stated in such petition, after making such considerations it is open to the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court feels that the reasons stated in the petition are sufficient enough for doing so. It is, therefore, improper to refuse to look into the matter on the premise that such a petition is not maintainable in law. (Para 8)"

(vii) In Puran Versus Ram Bilas AIR 2001 SC 2023 it was observed as follows:-

"Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive."

x x x

"Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation."

(Viii) Very recently in Ram Govind Upadhayay Versus Sudarshan Singh and others (2002) 3 SCC 598 it was observed and held as follows :-

"8. While it is true that availability of overwhelming circumstances is necessary for an order as regards the cancellation of a bail order, the basic criterion, however, being interference or even an attempt to interfere with the due course of administration of justice and/or any abuse of the indulgence/privilege granted to the accused.

9. Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge sheet have already been issued the court ought to take note of the facts on records rather than ignoring them. In any event, the discretion to be used shall always have to be strictly in accordance with law and not dehors the same. The High Court thought it fit not to record any reason, far less any cogent reason, as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago."

x x x

"10….Tempering with the evidence and threatening of the witnesses are two basic grounds for cancellation of bail- both these two factors stand alleged and by reason of subsequent filing of the charge sheet therein…"

12. It is well settled that labelling a wrong section will not oust the jurisdiction of the Court, if it can be traced. We, thus, hold that even though this application has been filed under section 439 (2) of the Code of Criminal Procedure it is maintainable under the inherent powers of this court which stands recognized by the Legislature vide section 482 of the Code of Criminal Procedure, 1973.

13. We thus over-rule the preliminary objection raised by Sri V.P. Srivastava in regard to non-maintainability of the instant application and proceed to adjudicate it on its merits. Question no. (ii) is answered accordingly.

14. Re-Question No. (iii)

Amrit Pal Singh, who was the own brother of the applicant Raksha Pal Singh, was murdered on 1.7.1989. Sessions Trial No. 519 of 1989 State Vs. Raj Pal and others under sections 147, 148 , 307 and 302 IPC related to the murder of Amrit Pal Singh in which Sushil Kumar alias Pintoo, the son of the applicant Raksha Pal Singh was PW 4-the child eye witness On the basis of the testimony of Sushil Kumar alias Pintoo and other witnesses the appellants were convicted by the judgement and order under appeal.

15. It was on 26.4.2001 that Satendra Pal Singh, son of the deceased Amrit Pal Singh had moved an Expedite Application No. 339853 of 2001 for expediting the final hearing of the Criminal Appeal.

15.1 Paragraph 3 of the Affidavit accompanying the Expedite Application reads as follows :-

"That, the aforesaid appellant hardend criminal and they are continuously threatening the applicant-complainant and his family members and causes to loss to the life and property of the complainant by assaulting and making criminal attempt over the appellant."

15.2 No Counter was filed by the appellants to the aforesaid Affidavit.

15.3. Undisputedly during pendency of the expedite application Sushil Kumar @ Pintoo PW 4 was murdered on 19.7.2001 and a First Information Report was lodged on that very date. True it is that the appellants against whom the allegation of his murder was made were granted bail by this Court but nevertheless it is equally true that a charge sheet was submitted against them on 13.8.2001 and the trial has been committed to the Court of Sessions on 12.9.2001 registered as Sessions Trial No. 358 of 2001.

15.4 The hearing of the Criminal Appeal was directed to be expedited vide order dated 3.8.2001 of the Hon'ble Chief Justice.

15.5 Thus we accept the correctness of the stand of the Applicant that considering the aforesaid facts Hon'ble the Chief Justice had passed an order expediting the hearing of the Criminal Appeal.

15.6 It is equally true that except appellant no. 1 Raj Pal Singh all other appellants are involved in a Gangster Act case and are allegedly in Jail.

15.7 The aforementioned facts and circumstances prima facie prove that the appellants have mis-used the privilege of bail granted to them.

15.8 We also hold that the explanation in regard to non filing of the Counter Affidavit earlier rather only on the second day of hearing of this application does not appear to be convincing.

15.9 Having reminded ourselves of the tests laid down by the Hon'ble Supreme Court we hold that the applicant has succeeded in making out a case that in order to prevent abuse of the processs of the Court and secure the ends of justice the bail bonds of appellants are liable to be cancelled under the inherent powers of the Court.

15.10 Accordingly, in the result without expressing our opinion on merits of the accusations made against the appellants that they had committed the murder of PW 4 or that they are Gangster within the meaning of the Gangster Act, we cancel the bails granted to them pursuant to the Court's order dated 22.2.1991, forfeit the bail bonds and discharge the sureties furnished.

16. Question no. (iii) is answered accordingly.

17. We clarify that if they are in jail in connection with any criminal case, then they shall remain therein during pendency of their criminal appeal no. 282 of 1991 in this Court, or if they have been granted bail, then they shall be taken into custody and sent to jail.

18. This application is allowed.

19. Let a copy of this order be sent forthwith by the office to the Chief Judicial Magistrate, Hathras to ensure compliance of our directions by him and all concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2002

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

Civil Misc. Writ Petition No. 25780 of 2002

Rakesh Shukla ...Petitioner
Versus
District Magistrate, Allahabad and another ...Respondent

Counsel for the Petitioner:
Sri R.K. Yadav

Counsel for the Respondents:
Sri Vivekanand Srivastava
S.C.

Constitution of India, Article 226- Recovery Proceeding- Petitioner operated theka- not deposited the money- recovery proceeding challenged mode of realisation as arrears of land revenue- not permissible in view of decision reported in 1985 ACJ 615- even then High Court can declined to exercise its power under Article 226 if the law and equity is not in his favour.

Held. Para 2

In the present case even assuming that the law has been violated because the recovery could not be made as arrears of land revenue yet there is no equity in favour of the petitioner. The petitioner has not disputed his liability to pay the amount in question. He really wants to delay payment. It is well known that civil suits take years and years to decide. Hence this is not a fit case for exercising our writ jurisdiction under Article 226 of the Constitution of India.

Case law discussed:
1985 ACJ 615

(Delivered by Hon'ble M. Katju, J.)

1. The petitioner took a Theka in respect of which the impugned recovery has been issued. The petitioner has not disputed that he has operated the Theka but he is not paying the Theka money. He is challenging the recovery certificate on the ground that the recovery could not be made as arrears of land revenue and he has relied upon a decision of this Court reported in 1985 ACJ 615 Raj Bahadur Singh Vs. Collector, Etah and others.

2. In our opinion this is not a fait case for exercise of our discretion under Article 226. Writ is a discretionary

remedy, and in a writ petition the petitioner must satisfy the court that not only the law has been violated but equity is also in his favour. If the petitioner only shows that the law has been violated, but there is no equity in his favour, a writ will not be issued. In the present case even assuming that the law has been violated because the recovery could not be made as arrears of land revenue yet there is no equity in favour of the petitioner. The petitioner has not disputed his liability to pay the amount in question. He really wants to delay payment. It is well known that civil suits take years and years to decide. Hence this is not a fit case for exercising our writ jurisdiction under Article 226 of the Constitution of India.

3. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.7.2002

BEFORE
THE HON'BLE S.R. SINGH, J.
THE HON'BLE (MRS.) M. CHAUDHARY, J.

Criminal Misc. Writ Petition No. 5348 of 2001

Virendra Singh ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Dilip Kumar
Sri Rajiv Gupta

Counsel for the Respondents:
Sri G.C. Saxena
S.C.

Constitution of India, Article 226- Section 173 (2)- Re-investigation of case- payment to order passed u/s 156 (3) invest ion completed final report submitted- Magistrate has no power to specify the name and rank of particular officer for fresh investigation.

Held- Para 4 and 5

Submission made by the learned counsel are loaded with substance in K. Chandra Shekhar etc. versus State of Kerala and others, 1998 (37) ACC, 136 Hon'ble Supreme Court has held that even after submission of police report under 173 (2) of the Code of Criminal Procedure on completion of investigation, the police has a right of 'further investigation under sub section (8) thereof ' but not ' fresh investigation' or re-investigation'. Further investigation is therefore in the continuation of earlier investigation and not a fresh investigation or re-investigation to be started ab intitio wiping out the earlier investigation altogether. The direction given by the learned Magistrate to re-investigate' the case therefore cannot be sustained in law.

The order passed by the learned Magistrate is also not sustainable due to the reason that he has directed a officer to re-investigate the case. In Hemant Dhasmana Versus Central Bureau of investigation and another 2001 (43) ACC, 570 at page 575 it has been laid down by the Apex Court that it is not within the province of the Magistrate while exercising the power under Section 173 (8) of the Code of Criminal Procedure to specify any particular officer to conduct such investigation, not even to suggest the rank of the officer who should conduct such investigation.

Case law discussed:
1998 (37) ACC 136
2001 (43)ACC 570

(Delivered by Hon'ble (Mrs.) Mithlesh Chaudhary, J.)

1. Heard Sri Dilip Kumar, learned counsel for the petitioner, the learned

A.G.A. representing the State and Sri G.C. Saxena, learned counsel representing respondent no. 2.

2. The writ petition seeks issuance of a writ in the nature of certiorari quashing the FIR of case crime no. 18 of 2000 under Section 147, 323, 504 and 506 IPC and Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Nanuta District Saharanpur as well as the order dated 21.7.2001 passed by the Additional Chief Judicial Magistrate, Deobandh, District Saharanpur in case no. 133 of 2001 Sunita V. Virendra and others. A perusal of the impugned FIR, prima facie, indicates commission of cognizable offence and hence we are not persuaded to quash the same at this stage.

3. So far as quashing of the impugned order dated 21.7.2001 is concerned, it would appear that on application under Section 156 (3) of the Cr.P.C., learned Magistrate directed the police to register and investigate the case under appropriate provision of law. The police on investigation seems to have submitted a final report against which protest petition was filed by the complainant respondent no. 2. Upon hearing the protest petition, learned Magistrate passed the impugned order dated 21.7.2001 thereby directing the police officer Sheo Ram Yadav to ' re-investigate ' the case. The impugned order has been sought to be quashed firstly on the ground that the re-investigation is not permissible in law and secondly that it is vitiated by reason that the learned Magistrate has specified a particular officer for 're-investigating' the case.

4. Submissions made by the learned counsel are loaded with substance. In K. Chandra Shekhar etc. versus State of Kerala and others, 1998 (37) ACC, 136 Hon'ble Supreme Court has held that even after submission of police report under 173 (2) of the Code of Criminal Procedure on completion of investigation, the police has a right of 'further investigation under sub section (8) thereof, but not 'fresh investigation' or 're-investigation'. Further investigation is, therefore, in the continuation of earlier investigation and not a fresh investigation or re-investigation to be started ab initio wiping out the earlier investigation altogether. The direction given by the learned Magistrate to 're-investigate' the case therefore cannot be sustained in law.

5. The order passed by the learned Magistrate is also not sustainable due to reason that he has directed a particular officer to re-investigate the case. In Hemant Dhasmana versus Central Bureau of Investigation and another, 2001 (43) ACC, 570 at page 575 it has been laid down by the Apex Court that it is not within the province of the Magistrate while exercising the power under Section 173 (8) of the Code of Criminal Procedure to specify any particular officer to conduct such investigation, not even to suggest the rank of the officer who should conduct such investigation. We, therefore, do not find any justification to quash the impugned FIR at this stage.

6. Accordingly, the writ petition succeeds and is allowed in part. The impugned order dated 21.7.2001 passed by the learned Magistrate is quashed with a direction that learned Magistrate concerned shall pass the order afresh inaccordance with law.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.7.2002

BEFORE
THE HON'BLE J.C. GUPTA, J.
THE HON'BLE K.K. MISRA, J.

Criminal Appeal No. 682 of 1987

Jumman Khan and others ...Appellants (in Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri V.C. Tiwari
Sri A.K. Awasthi
Sri P.N.Misra
Sri R.L. Verma
Sri R.D. Verma
Sri V.C. Tewari.
Sri Satish Trivedi

Counsel for the Respondent:
Sri Amar Saran
A.G.A.

Indian Penal Code- Section 374- Rule of pleadings of civil law does not apply to criminal cases. Unlike in a civil case, it is open to a criminal court to give benefit to the accused of a plea even if not stated by him in his statement under section 313 Cr.P.C. It is not for the accused to firmly establish his defence and it is sufficient if he is able to create a reasonable doubt in the mind of the court showing a preponderance of probability.

Held in para 26

Motive alleged by the prosecution has not been firmly established, that both the witnesses produced from - prosecution side are highly interested and inimical and independent persons though admittedly present at the time of alleged incident were withheld by the prosecution and that it is not established beyond doubt that the incident had occurred at the place and in the manner as alleged by the prosecution it would be hazardous to hold the appellants guilty of the offences charged for, particularly when neither the prosecution nor the defence has been able to show with certainty how and where the incident occurred and where persons on both sides received serious injuries and the court is left with guesses and conjectures. In these circumstances we are left with no option but to acquit the accused persons by giving them the benefit of doubt.

Case law referred:
AIR 1974 SC 1950
1976 (13) ACC 372
2000 (41) ACC 696

(Delivered by Hon'ble J.C. Gupta, J.)

1. The above named six appellants have filed this appeal against the judgement and order dated 3.3.87 in Sessions Trial No. 714 of 1983 whereby they have been convicted and sentenced to imprisonment for life under Section 302/149 IPC, to five years R.I. each under section 307/149 IPC and one year R.I. each under Section 148 IPC Sentences are to run concurrently.

2. The prosecution story in brief is that all the appellants are resident of village Paisa Khera police station Pawayan district Shahjahanpur. Faiyaz Khan P.W.1 is also a resident of same village. It is alleged that election for the post of delegate of the Co operative society of Nyaya Panchayat Badehla was to be held. Faiyaz Khan and accused Jumman Khan both were candidates in that election. Jumman Khan pressurized Faiyaz Khan to withdraw his candidature in his favour but Faiyaz Khan refused to

do so. Jumman Khan then threatened him with dire consequences.

3. Further allegation of the prosecution is that on 6.9.83 one Bankey sweeper was taking his pigs through the passage in front of house of the accused Jumman. The accused told Bankey not to take his pigs from the route. Bankey did not listen. He was assaulted by accused Jumman Khan and others. Bankey lodged report against Jumman Khan and others wherein Faiyaz Khan was cited as a witness for Bankey. Accused party asked Faiyaz Khan not to give evidence against them but Faiyaz Khan told them that whatever he had seen he would depose. Jumman Khan and others were thus bearing enmity against Faiyaz Khan.

4. It is alleged that on 25.9.83 at about 5.30 p.m. Faiyaz Khan P.W.1 alongwith his brother Eijaz Khan, deceased of this case, and Wasim Khan P.W. 2 were sitting under a neem tree in front of the house of Tauquir Khan. They were talking with each other. Accused Jumman Khan came there and asked Faiyaz Khan to file affidavit in his favour in the case instituted by Bankey sweeper. Faiyaz Khan did not pay any heed to this request of accused Jumman Khan, whereupon accused started abusing him. Eijaz Khan and Wasim Khan asked accused Jumman Khan to stop abusing. Accused Jumman Khan went back to his house saying that he would see them just now. With in a few minutes thereafter accused Jumman Khan armed with rifle, accused Sami Ullah, Ismail Khan, Laddan armed with D.B.B.L. guns and Abrar, Shafayat armed with S.B.B.L. guns came there from south. Accused Jumman Khan challenged and incited his companions to kill Eijaz Khan and others. All the accused persons started firing from their respective arms. Jumman Khan any how saved himself by going behind the neem tree. Deceased Eijaz Khan and Wasim Ullah however sustained fire arm injuries at the hands of accused persons. Witnesses Ahmad, Masroor Ullah, Mohd. Shafi, Majid Khan and many other villagers reached there. On their challenge, the accused persons ran away towards south. Deceased Eijaz Khan on receiving fire arm injuries fell down under the thatch of Tauqir Khan and died on the spot.

5. Jumman Khan went to the police station in the same evening and lodged oral First Information Report (Ex.Kha.1) at 9.30 p.m. Case was registered and investigation ensued. The Investigating Officer went to the place of occurrence and found the dead body of Eijaz deceased lying under the thatch of Tauqir Khan. The dead body was taken into custody and sent to mortuary for post mortem examination after holding inquest. Investigating Officer then prepared site plan Ex. Kha. 11 . In this site plan , the place where deceased with the witnesses was talking, has been indicated by letter 'A'. The place where dead body of deceased was found has been shown by letter 'F'. The distance between 'A' and 'F' is noted at 12 paces. The place from where accused persons opened fire has been shown by letter 'B'. The distance between A and B is indicated as 30 paces. Letter C denotes the place from where witness Maskalla Khan had witnessed the incident from his house, while letter D denotes the place from where witness Mohd. Safi witnessed the incident from his house. The distance between B and C is 11 paces while between B and D is 15 paces. E is the

place from where witnesses Ahamad Hasan Khan and Majid Khan saw the incident. This place was situated at a distance of 18 paces from the scene of occurrence. It may also be relevant to mention here that when the Investigating Officer inspected the scene of occurrence he found no tikli, peilets or empty cartridges either at place A or B or F or in between. No drop of blood was also found either near about the place A or in between A and F . Blood was found by the side of dead body in the Chhappar of Tauqir Khan. Statements of witnesses were recorded and on completion of investigation, charge sheet was submitted against all the six nominated accused persons.

6. Before the trial court prosecution produced six witnesses in all, of whom only Faiyaz Khan P.W.1 and Wasim Khan P.W.2 were witnesses of fact P.W. 3 Dr. P.S. Varma is the Medical Officer who conducted autopsy on the dead body of deceased Eijaz Khan on 27.9.83 at 3.30 p.m. Deceased was aged about 18 years and probable time of death was reported to be about two days. Rigor mortis had passed off from both the upper and lower extremities. Body was decomposed. Following ante- mortem injuries were found:

1. Multiple fire arm wounds of entry on right side chest front in an area of 25 cm.x 10 cm. And eight fire arm wounds of entry on left side chest in an area aof 17 cm.x 10 cm . Each wound was measuring 0.3 cm. X 0.3 cm. X chest cavity deep. Margins were inverted and lacerated. No blackening or tattooing was seen. Direction was from front to back horizontally.

2. Five fire arm wounds of entry on front of left arm in an area of 16 cm.x 8 cm. Each measuring 0.3. cm. X 0.3. c.m. Margins were inverted and lacerated. All were muscle deep. No blackening or tattooing seen. Direction was front to back horizontally.

3. Four fire arm wounds of entry on front of right arm, two on right wrist dorsal side and five on left side. Each wound was 0.3. cm. X 0.3. cm. X muscle deep. Margins were lacerated and inverted. No blackening and tattooing found. Direction was front to back horizontally.

The internal examination revealed that pleura was lacerated on both sides.Right and left lung were also lacerated and about one litre of blood in left chest cavity and half litre on right chest cavity was found. Cause of death was shock and hemorrhage as a result of fire arm injuries. In all 23 small metallic pellets were recovered from the body. Post mortem Report of Eijaz Khan is Ex. Ka. 2. In his deposition before the Court Dr. P.S. Varma stated that death of Eijaz in the evening of 25.9.83 was probable.

7. Dr. H.P.Bhatt P.W. 4 had medically examined injured Wasim Khan on 26.9.83 at 12.10 p.m. and he found following injuries at the time of medical examination:

1. Lacerated wound 0.25 cm. X 0.25 cm. X scalp deep, surrounded by swelling present on front of head 9 cm above from root of nose. No blackening, charring present.

2. Lacerated wound 0,.25 cm x 0.25 cm. X skin deep present on right fore

head 4 cm above right eye-brow. No blackening and charring present.

3. Two circular lacerated wounds each measuring 0.25 cm. X 0.,25 cm. X skin deep present on nose. Bo blackening present.

4. Lacerated wound 0.25 cm. X 0.25 cm. X muscle deep present on middle of upper lip. No blackening and charring present.

5. Lacerated wound 0.25 cm. X 0.25 cm. X not probed present on left side of chest 15 cm. Below from left nipple. No blackening and charring present.

6. Lacerated wound 0.25 cm. X 0.25 cm. X not probed present on right side of chest 13 cm. Below from right nipple. No blackening and charring present.

7. Two oval lacerated wounds 0.25 cm. X 0.25 cm x not probed present on front of abdomen just 6 cm away from umbilicus and 2nd 8 cm away from umbilicus. No blackening and charring present.

8. Seven oval lacerated wounds each measuring 0.25 cm. X 0.25 cm. X not probed present on front of left thigh in an area of 22 cm. X 12 cm x 3 cm. Below frominguing region. No blackening and charring present.

9. Six oval lacerated wounds each measuring from 0.25 cm. X 0.25 cm. X not probed present on front of inner aspect of right thigh in an area of 29 cm. X 13 cm. No blackening and scorching present.

10. One oval lacerated wound 0.25 cm. X 0.25 cm. X bone deep present on front of left leg 9 cm. above from left ankle joint. No blackening and scorching present.

8. In the opinion of doctor except injuries no. 2,3 and 4 which were simple, rest of the injuries were kept under observation and x-ray was advised. Duration was about one day. The doctor has also deposed that injuries of Wasim Khan could be caused on 25.9.83 at about 5.30 p.m. Injury Report of Wasim Khan is Ex. Kha. 4 The X-ray report. Ex. Ka 3, was prepared by Dr. P.S. Varma. The X-ray report confirmed that the injuries sustained by Wasim Khan were pellet injuries caused by fire arms.

9. PW 5 Head Constable Surendra Pal has deposed that check FIR was prepared by him on the basis of oral report lodged by Faiyaz Khan P.W. 1 . On the basis of this report case was registered in the general diary at serial no. 39 at 9.30 p.m. Copy of the general diary entry has been proved as Ex.Ka.5.

10. P.W. 6 V.P. Singh was posted as Station Officer at P.S. Powayan. He himself conducted the investigation and submitted charge sheet.

11. Prosecution also filed affidavit of Constable Dharmapal Singh who had escorted the dead body to mortuary.

12. P.W. 1 Faiyaz Khan and P.W. 2 Wasim Khan in their statements before the trial court have stated that the incident had occurred at about 5.30 p.m.when they were sitting under the neem tree. According to them all the accused persons started indiscriminate firing upon the deceased and the witnesses. According to them Eijaz Khan and Wasim Khan

received fire arm injuries in the firing while Faiyaz Khan escaped injury as he concealed himself behind the neem tree.

13. Jumman Khan appellant in his statement recorded under section 313 Cr.P.C. denied the prosecution allegations. According to him he has been falsely implicated on account of previous enmity. He stated that Buddhan Khan and others were convicted. In that case this accused had done pairavi for Mukhtar Khan. Therefore, Buddan Khan and others were inimical to him Abrar Khan stated that he was an old man of 82 years of age and was not even able to move. Accused Ismail Khan stated that he has been falsely implicated on account of enmity. Similar were the statements of other accused excepting Sami Ullah Khan. According to accused Sami Ullah Khan, his brother was Mangal Khan whose cousins were Liyaqat Khan and Sharafat Khan. Deceased Eijaz and Wasim used to go there. They used to misbehave. On some occasions some altercation had occurred between Mangal Khan. Wasim and Eijaz Khan. On the date of incident they fired upon Mangal Khan in respect of which report was lodged and cross case also proceeded. As a counter blast the present case has been instituted. Badhel Khan his maternal uncle had given evidence against Buddhan Khan in a case in which Buddhan Khan was convicted. For that reason Buddhan Khan was annoyed with him.

14. Ex. Kha 2 is the copy of First Information Report lodged by Mangal Khan against Buddhan Khan , Dulare Khan, Mukhtar Khan, Jumman Khan, Faiyaz Khan and Eijaz Khan deceased. This report was lodged on 27.9.83 on the basis of which case crime no. 241 A under Sections 147/148/307 IPC was registered. This FIR was also investigated and cross Session Trial proceeded before the same Judge in the court below. Injuries of Mangal Khan were examined by Dr. Jasbir Singh C.W. 1 who was examined as a court witness in appeal by the order dated 7.2.2001. Dr. Jasbir Singh found following injuries on the person of Mangal Khan:

1. Multiple lacerated oval fire arm wounds measuring 0.5. cm x 4 cm. To 0.4. x 0.3. cm over the whole back 50 x 32 cm. Area From base of neck (upper first) and apart occion (lower part) outer part of back. In some wounds pellets are palpable. No charring, blackening or scorching present. Margins are inverted.

2. Lacerated oval fire arm wound 0.4. cm. X 0.3. cm. X muscle deep over the right side of buttock 10 cm. Above anus at 1.0 clock position. No charring, blackening or scorching present. Pellets palpable margins inverted.

3. Lacerated oval small wound (fire arm) 0.3 cm. X 0.2. cm. Over the lower and medial part of right buttock 8 cm. Below the arms at 5.9 clock position. No charring, blackening and scorching present. Margins are inverted, pellets not palpable.

4. Lacerated oval fire arm wound 0.3. x 0.2 c over the left side of head of occipital region 8 cm from left ear at 3.0 clock position pellets is palpable and scalp deep. No charring and blackening present. Margins are inverted, pus is not present.

5. Lacerated oval fire arm wound 0.4 cm. X 0.3. cm depth not taken over the

front and lateral part of left side of chest 17 cm. Below left axilla and 13 cm. Below and lateral to left nipple. No charring and blackening present. Margins are inverted, pellet is not palpable, advised x-ray.

6. Abraded contusion 5 cm. X 4 cm over the post lateral part of right hand at the base of right thumb, 6 cm front of right wrist. Irregular Radish blue.

7. Contusion 16 cm x 12 cm area radish blue over the front and medial part of right elbow including lower portion of upper right wrist and upper portion of right fore arm. Defused swelling present. Margins are red in colour.

8. Two oval lacerated fire arm wound 0.4 cm. X 0.4 cm. Each 4 cm. Apart in a line over the medial side of right upper arm lower part , 8 cm. Above right elbow proving not done. No charring, blackening or scorching present. Margins are inverted. Pellet is palpable.

9. Lacerated oval fire arm wound 0.5 cm x 4 cm over the back of left elbow, probing not done. Pellet is not palpable. No charring, blackening or scorching present. Advised X-ray. Margin inverted.

15. Dr. Jasbir Singh in his deposition before this court has also stated that in his opinion injury no. 6 was simple while rest were kept under observation. Injuries no. 6 and 7 were caused by blunt object while rest were of fire arm. The injuries were about one and half day old Mangal Khan injured was brought before him by Constable of P.S. Puwayan. Dr. Jasbir Singh has categorically stated that injuries of Mangal Khan could be caused in the evening at about 5.30 p.m. He has further deposed that most of the fire arm injuries were on vital parts and pellets were palpable and that these injuries could not be self-inflicited. X-ray examination of Mangal Khan was done by Dr. P.S. Varma P.W. 3 who in his statement before the trial court has stated that on 28.9.83 he had taken x-ray of Mangal Khan and found radio opaque shadow in his chest, back and right arm. He proved the X-ray Report as Ex. Kha. 1.

Accused did not examine any witness in defence.

16. On appraisal of evidence the learned Session Judge has found all the appellants guilty and accordingly they have been convicted and sentenced as mentioned above.

17. We have heard Sri P.N. Misra, and Sri Satish Trivedi Senior Advocate for the appellants, learned A.G.A. for the State and Sri Amar Saran for the complainant.

18. It may be relevant to mention here that as per the report of Chief Judicial Magistrate, Shahjahanpur dated 18.3.2000 Abrar Khan has died during the pendency of appeal, accordingly his appeal stands abated.

19. As far as factum of death of Abrar Khan is concerned the same has neither been disputed nor assailed before us by the learned counsel for the appellants. It has been also not disputed that injured Wasim Khan had also sustained fire arm injuries in the same incident wherein deceased had received injuries. However the submissions of the learned counsel for the appellants have

been that both the prosecution witnesses examined at the trial are highly inimical and interested and their evidence does not inspire confidence, that the number of injuries found on the deceased and the injured do not coincide with the number of assailants and the prosecution has exaggerated their number, that the prosecution has utterly failed to offer any explanation regarding serious fire arm injuries found on the person of Mangal Khan on accused side and from this failure it should be inferred that the evidence of the prosecution witnesses is not true and the prosecution has purposely suppressed the genesis of the origin of occurrence and that such non-explanation will assume greater importance in this case because the evidence consists of interested and inimical witnesses only, as independent witnesses have been withheld. It has also been urged that the motive alleged by the prosecution has not been established which in the circumstances of the case cannot be lost sight of as the defence has put a cross version of the incident wherein Mangal Khan on their side had suffered very serious fire arm injuries on his person which by no stretch of imagination could be self-inflicted or self-suffered. On the other hand learned counsel for the complainant and the learned A.G.A. have tried to support the judgement of the trial court.

20. As far as motive part of the prosecution case is concerned it is alleged that before the occurrence in question an election was to be held for the post of delegate of Co -operative society. The complainant Faiyaz Khan P.W. 1 and accused Jumman Khan both were candidates for the same. Accused Jumman Khan wanted the complainant to with-draw his name for which the later was not agreeable, whereupon accused Jumman Khan is alleged to have threatened him with dire consequences. This motive has been stated by P.W. 1 Faiyaz Khan. In cross examination however he admitted that he did not have any knowledge if any notification of election had been issued. He further admitted that no one had filed nomination. There was no written order fixing date for the election. He further admitted that no such election was however held. He also admitted that neither he lodged any report nor had moved any application against Jumman Khan with regard to the alleged threat. There is no other corroborative evidence . Accused persons have denied the said allegation. In our opinion this motive has not been clearly established from the evidence on record.

21. The other motive which the prosecution has alleged is that prior to the incident in question an incident had occurred between Jumman Khan and Bankey sweeper on the issue of the later taking his pigs from in front of the house of Jummnan Khan. Bankey sweeper had lodged a report against Jumman Khan and others wherein Faiyaz Khan was cited as a witness. It is further alleged that Jumman Khan accused asked Faiyaz Khan not to give evidence against him in that case and when he did not agree. Jumman Khan extended threat to him. Accused Jumman Khan has denied this allegation of prosecution. Bankey sweeper has not been produced as a witness in this case. As per the statement of P.W. 1 Faiyaz Khan, Bankey sweeper used to reside in the house of Babu which was situated in the south of village. This house was removed by about 50-60 paces from the house of accused Jumman Khan

whose house was situated in south west of the mosque. The witness further admitted that in the case of Bankey sweeper,. Masrullah who is also a witness in the present case, was also a witness. Masrullah has not been produced in the present case. Faiyaz Khan has admitted that he did not receive any summon to appear as a witness in the case of Bankey sweeper. He further admitted that he had no knowledge if any such case was proceeding in court. He also admitted that he was never interrogated by police in that case. Though P.W. 2 Wasim Khan has also stated of this motive but his presence at the time of incident alleged to have taken place between Jumman Khan accused and Bankey sweeper has not been stated by P.W. 1 Faiyaz Khan. This motive thus has also not been fully established. We therefore, find that it is doubtful that the incident in question had occurred for the reasons as alleged from the prosecution side. This conclusion of ours is further strengthened by other circumstances appearing in the case which we would point out in the later part of this judgment.

22. It is true that where direct evidence regarding assault is available the question of motive looses much of its importance and the absence or inadequacy of motive would have no adverse effect on the prosecution case if the direct evidence is otherwise found trust worthy and reliable However, in a case where there is a cross version of the incident and the prosecution fails to prove the alleged motive and further the circumstances appearing in the case raises a needle of suspicion against the prosecution party and the court is in a doubt that the incident occurred for a reason other than the one as alleged by the prosecution in that event failure to prove motive assumes greater importance. As per the First Information Report lodged by Mangal Khan Ex. Kha. 2 the deceased and his party were having old enmity with him and on the day of occurrence when Mangal Khan was passing through the way lying in front of the house of accused persons he was fired upon and assaulted and in the same incident deceased Eijaz sustained fire arm injuries at the hands of his own men and he fell down in front of thehouse of Taukir Khan. However as per the prosecution case the incident occurred when Faiyaz Khan , Eijaz Khan deceased and Wasim Khan were talking with each other under the neem tree, accused Jumman Khan came there and asked Faiyaz Khan to file affidavit in his favour. On his refusal he went back and after about 10 minutes all the accused persons arrived there armed with rifle, D.B.B.L. guns and S.B.B.L. guns and all the six accused persons made indiscriminate firing upon Faiyaz Khan and others. According to Faiyaz Khan he did not sustain any injury as he went back behind the neem tree. It is further stated by P.W. 1 Faiyaz Khan that Wasim Khan and Eijaz Khan after sustaining fire arm injuries ran in the west and Eijaz fell down in the Chappar of Taukir Khan while Wasim Khan went inside. On examination of evidence on record, we find that there is great deal of doubt that the incident had occurred at the place and in the manner as alleged by the prosecution. As many as six persons armed with rifle, D.B.B.L. guns and S.B.B.L. guns had fired indiscriminately upon Faiyaz Khan , Wasim Khan and Eijaz Khan. Faiyaz Khan as per the own case of prosecution was their dire enemy. It does not sound to reason that if firing was made indiscriminately by as many as

six persons, Faiyaz Khan would have not gone unhurt. According to him he did not receive any injury as he hid himself behind the neem tree. No pellet marks were found on the neem tree. The incident occurred during day time it does not sound to reason that the accused persons would have left Faiyaz Khan without making any attempt over him particularly when he was their main target. His going behind need tree would have also not gone unnoticed. The allegation of prosecution that Eijaz Khan deceased and Wasim P.W. 2 had sustained fire arm injuries under the neem tree also does not get support from the spot position. No blood was found at the scene of occurrence or under the neem tree or at any place nearby. Dead body of Eijaz Khan was found at the place shown by letter F in the site plan Ex. Ka. 11. This place is shown in the Chappar of Taukir Khan. The distance between this place and the neem tree which is shown by letter A was 12 paces, meaning thereby that the deceased after sustaining fire arm injuries ran to a distance of 12 paces. Not even a single drop of blood was found between point A and F. Accused persons are alleged to have fired from a distance of 30 paces from point B. If firing was made from a distance of 30 paces that is about 75 feet, the deceased and injured would not have received injuries of the kind which were in fact found on their persons. Appellant Jumman Khan is alleged to be armed with rifle. He is also alleged to have open fire from his rifle. No rifle injury was however found either on the deceased or on injured Wasim . We thus find that it is highly doubtful that the incident had occurred at the place and in the manner as alleged by the prosecution. It is true that Wasim P.W. 2 is an injured witness and his presence at the scene of occurrence cannot be doubted but the question which requires determination is whether he has given a correct account of the occurrence suppressing the genesis and the origin of the occurrence. As already pointed out above Mangal Khan had himself lodged FIR at the police station stating therein that he was assaulted by Faiyaz Khan, deceased Eijaz Khan and others when he was passing through the way and during the course of firing Eijaz Khan had sustained fire arm injuries at the hands of his own men. The First Information Report lodged by Mangal Khan has been proved as Ex. Kha. 2 . Injuries on Mangal Khan were examined by Dr. Jasbir Singh C.W. 1. His statement was recorded in the cross case which proceeded before the trial court and it appears that under a mistaken advice the said doctor was not examined in this case by the counsel who represented accused persons in the trial court. Even the learned Sessions Judge failed to summon him as a Court witness though the X-ray Report of Mangal Khan had been brought on record and proved in the statement of P.W. 3 Dr. P.S. Varma. Dr. Jasbir Singh C.W. 1 has categorically stated that injuries of Mangal Khan could be caused in the evening of 25.9.83. Most of the fire arm injuries were on vital parts in which pellets were palpable. These fire arm injuries could not be self-inflicted. Injuries no. 6 and 7 were caused by blunt object. As per the version of Mangal Khan he was assaulted by lathi and fire arms. Both P.W. 1 and P.W. 2 have offered no explanation of the injuries of Mangal Khan. It was vehemently argued by learned counsel for the appellants that the prosecution has utterly failed to explain the serious injuries of Mangal Khan who was undoubtedly a man of accused party and it must be held that the

prosecution has suppressed the truth, benefit, therefore, must go to the accused.

23. The law as to how far the prosecution case will be effected on account of non-explanation of injuries suffered on defence side is now well settled. In the case of Onkarnath Singh and others Vs. State of U.P. AIR 1974 SC 1550, it was held that the question as to what is the effect of the non explanation of injuries on defence side is a question of fact and not of law. Such non explanation , however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses, and the court should scrutinize their evidence with all care and caution.

24. In Lakshmi Singh and others Vs. State of Bihar 1076 (13) ACC 372, the Apex Court held that non explanation of the injuries on the defence side by the prosecution witnesses may affect the prosecution case and such non explanation will assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution..

25. In Rajendra Singh Vs. State of Bihar 2000 (41) ACC 696, it was held by the Apex Court that it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence then certainly the court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident.

26. Learned counsel for complainant submitted before us that excepting accused Sami Ullah Khan all other accused persons have not stated that incident had occurred with Mangal Khan, and no right of private defence has been pleaded by them. It was further argued that it is ridiculous to believe that Wasim Khan and deceased Eijaz Khan had sustained fire arm injuries at the hands of their own men. Sri Amar Saran argued that as no right of private defence has been pleaded nor any evidence led, it must be held that Eijaz Khan and Wasim Khan had received fire arm injuries at the hands of present appellants. Accused Sami Ullah Khan in his statement under Section 313 Cr.P.C. has clearly stated that Mangal Khan was his brother and he has died. Therefore, the defence could not be blamed for not examining him as a witness in defence. We may also point out that it is well settled law that onus of proving all the ingredients of an offence always lies upon the prosecution and at no stage the same shifts to the accused. The court has first to look into the evidence led by prosecution to find out if the incident had occurred in the manner as alleged by it before scrutinizing the defence plea. It is also well settled that even in cases where the defence of the accused does not appear to be credible or is palpably false, the burden which lies on the prosecution does not become any less. It is only when this heavy burden lying on the prosecution is discharged that it will be for the accused to explain or controvert the essential elements in the prosecution case which would negative it. It is not for the accused at the initial stage, to prove something which has to be eliminated by the prosecution itself. Rule of pleadings of civil law does not apply to criminal cases. Unlike in a civil case, it is open to a

criminal court to give benefit to the accused of a plea even if not stated by him in his statement under Section 313 Cr.P.C. It is not for the accused to firmly establish his defence and it is sufficient if he is able to create a reasonable doubt in the mind of the court showing a preponderance of probability. An accused can be convicted only when the court is in a position to come to a definite conclusion beyond the possibility of reasonable doubt that the accused has committed the offences. No conviction can be placed on mere possibilities nor it is permissible for the court to speculate as to what had really happened. Where both the parties come to court with untrue facts concealing real truth they are themselves to be blamed. They cannot expect the Court to arrive at any definite conclusion on the basis of unreliable evidence produced either in favour or against by either of the parties. In such cases the court certainly owes a duty to make an attempt to separate grain from the chaff but if the circumstances appearing in the case are such that it may be found to be an inseparable task the inevitable result would be to extend benefit of doubt to the accused. That is particularly so when the evidence of both the parties is thoroughly unreliable and cannot be acted upon even in part with safety. It is not open for the court to bring out a third story entirely different from the one set up by the parties. In such cases the Court can only say that the matter is doubtful in the trane and it is not possible to arrive at any definite conclusion one way or the other. The mere fact that the version given in the First Information Report lodged by Mangal Khan was also not true, that would not absolve the prosecution in discharging its burden of proving the case against the accused persons beyond any reasonable doubt. Once we have found above that the motive alleged by the prosecution has not been firmly established beyond doubt that the incident had occurred at the place and in the manner as alleged by the prosecution, it would be hazardous to hold the appellants guilty of the offences charged for, particularly when neither the prosecution nor the defence has been able to show with certainty how and where the incident occurred and where persons on both sides received serious injuries and the court is left with guesses and conjectures. In these circumstances we are left with no option but to acquit the accused persons by giving them the benefit of doubt.

27. For the reasons stated above, this appeal is allowed. The conviction and sentence recorded by the trial court by the judgement dated 3.3.1987 in Session Trial No. 714 of 1973 are set aside and the appellants are acquitted of the offences charged for. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2002

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 27043 of 2002

Rajendra Prasad Maurya ...Petitioner
Versus
Dy. Inspector General of Police, (Establishment) and another
...Respondents

Counsel for the Petitioner:
Sri Jagannath Singh
Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service law- Transfer order- challenged the ground taken the provision of G.O. being inconstant to the Rules- not available- Police Regulation 525 itself provide for transfer from P.A.C. to Civil Police Force- visa-versa-petition dismissed.

Held- Para 7 and 8

The power to transfer as such is vested in Deputy Inspector General (Personnel), U.P. Police Headquarter, Allahabad and have been rightly exercised by him in transferring petitioner from Police to PAC.

The Government orders are neither inconsistent nor run contrary to the scope and object to regulation 525 of U.P. Police Regulations and only provided for delegation which has not been restricted by Regulation 525 and as such the decision cited above are not applicable to the present case.

Case Law discussed:
1988 (8) SCC. 469
1981 (1) SCC. 675

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard Sri Jagannath Singh for petitioner and learned Standing Counsel for respondents.

2. A transfer order by which petitioner, working as Stenographer in the office of Superintendent of Police (Jamunapar), Allahabad, as Sub Inspector (M) to P.A.C. Allahabad has been challenged on the ground that an officer working in ministerial branch of police force U.P. cannot be transferred to Provincial Armed Constabulary and secondly on the ground that petitioner is suffering from heart trouble and has been advised treatment at Allahabad.

3. It is contended by counsel for petitioner that Deputy Inspector General of Police (Establishment), Police Headquarter, Allahabad has no power to transfer petitioner to P.A.C. and that such a power can only be exercised by Director General of Police, U.P. as provided in Regulation 525. U.P. Police Regulations. Petitioner has not been listed/enrolled under section 4 of U.P.P.A.C. Act 1948. A Government Order relied upon by the respondents cannot over-ride the provisions of Police Regulations made under the U.P. Police Act 1861 inasmuch as the Government Orders and departmental instructions cannot over-ride statutory provisions of law. He has relied upon K. Kuppusamy and another Vs. State of Tamil Nadu and others, (1998) 8 S.C.C. 469 and Union of India and others Vs. Arun Kumar Roy (1981) 1 S.C.C. 675 in support of his submission that statutory rules cannot be over ridden by executive orders or executive practice and that a notification cannot over-ride statutory rules governing service condition of the employees. He submits that a representation has been made with regard to medical condition of petitioner which has not been considered by the respondents.

4. Learned standing counsel has relied upon a notification dated 21/29 March, 1990 by which Director General of Police has in exercise of powers under clause-1 of regulation 525 of U.P. Police Regulations delegated the powers of transferring a non-gazetted officers and employees of U.P. Police from one branch to another to Dy. Inspector General of Police (Personnel) Police Headquarter, Allahabad and has further delegated the powers of transfer of Head Constable/Constables level employees

from one branch to another to Police Superintendent level employees from one branch to another to Police Superintendent (Personnel), U.P. Police Headquarter, Allahabad. He has also relied upon a policy decision taken by Inspector General of Police (Personnel's) U.P., Police Headquarter, Allahabad dated 16.11.1989 to all the Zonal Police Inspector Generals/ Police Inspector Generals, P.A.C., and others with regard to the period of posting from the non-gazetted officers and employees of police ministerial cadre with reference to his earlier letters dated 9.12.1985 and 25.1.1989. By these demi official circular letters it has been clarified that during the entire period of service of employees of police ministerial cadre shall have to serve for a minimum period of 10 years in P.A.C. Battalions/Units to be divided in three stages namely 4 years in the first stage, and 3 years in second and third stages, and that a posting of atleast three years shall be given at one place which could be extended upto 5 years. In paragraph 12 of this circular it has been provided that the orders of transfer to P.A.C. Battalion/Unit, shall be issued at the central level of police Headquarter. These employees of ministerial staff shall be ordinarily allotted the concerned zone/ P.A.C. Headquarter and thereafter the concerned Inspector General of Police, Dy. Inspector General of Police/ P.A.C. shall allot to them the same D.I.G. area/sector who shall give them posting in the districts and battalions in their respective areas. In special circumstances the D.I.G. Police Headquarters, P.A.C. and D.I.G. Zone can directly transfer such officer/employees to the district/units.

5. The Provincial Armed Constabulary Act, 1948 was enacted for constitution and regulation of united provinces armed constabulary. Section 3 of the Act provides that there shall be raised and maintained by the State Government a force to be called the Pradeshik Armed Constabulary and it shall be constituted in one or more companies in such manner or for such period as may be prescribed. Section 5 of the Act provides that subject to sections 6 to 8 every member of P.A.C. shall upon his appointment and as long as he continues to be a member thereof, be deemed to be a police officer, and, Subject to any terms, conditions and restrictions, as may be prescribed, to have and be subject to, in so far as they are not inconsistent with this Act or any Rules made thereunder, all the powers, privileges, liabilities, penalties, punishments and protection as a police officer duly enrolled has or is subject to by virtue of the police Act, 1861, or any other law for the time being in force, or any rules or regulations made thereunder.

6. The officers and employees of P.A.C. are as such subject to provisions of Police Act, 1861, or any rules or regulations made thereunder. They have same powers, privileges, liabilities, penalties, punishment and protection as a Police Officer duly enrolled by virtue of Police Act, 1861. Section 10 of the Act provides that the Commandant or an Assistant Commandant may notwithstanding anything contained in Section 9, at any time revert to Uttar Pradesh Police and officer of the Pradeshik Armed Constabulary who has been seconded from the Police Force. The provisions of Police Act, 1861 and U.P. P.A.C. Act 1948 do not restrict transfer of police officer from U.P. Police to P.A.C. and vice-versa. The powers can be

exercised by Inspector General of Police and have been delegated by the then Director General of Police/Inspector General of Police, U.P. by notification dated 21/29.3.1999 to Deputy Inspector General of Police (Personnel), Police Headquarter, Allahabad, in respect of non-gazetted officer and employees; and to Superintendent of Police (Personnel) U.P. Police Headquarter, Allahabad in respect of employees at the level of Head Constable/Constables from one branch to another branch. The branch in this notification includes P.A.C. which has been constituted as a branch of police in U.P., members of which are deemed to be police officer and/or to the Provincial Police Act, 1861.

7. The power to transfer as such is vested in Deputy Inspector General (Personnel), U.P. Police Headquarter, Allahabad and have been rightly exercised by him in transferring petitioner from Police to P.A.C.

8. The Government Orders are neither inconsistent nor run contrary to the scope and object of regulation 525 of U.P. Police Regulations, and only provided for delegation which has not been restricted by Regulation 525 and as such the decision cited above are not applicable to the present case.

9. So far as the medical ground setup by petitioner, the Court finds that he is taking treatment as OPD Patient at Nazareth Hospital, Allahabad for hypertension since 7.3.2001. Petitioner has not been given posting by the competent authority in P.A.C. as yet. He has a right to represent to the competent authority in P.A.C. for a suitable posting, where the facilities of his treatment are available.

10. In the facts and circumstances of the case, no case for interference with the transfer order has been made out. The writ petition is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ petition No.2010 of 2002

Kailash Singh ...Petitioner
Versus
Assistant Regional Transport Officer and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Dixit

Counsel for the Respondents:
Sri S. P. Kesarwani
S.C.

Motor Vehicle Taxation Rules 1998-R-22- Practice and procedure- particular provisions specified in the Rules- every one bound to follow- other wise no relief could be granted- application for exemption certificate w/o following the procedure- Court declined to interfere.

Held- Para 3

It is well settled that where a provision is made in a statute prescribing the particular procedure, that particular procedure has to be followed and in the event of non compliance of that procedure, no benefit can be claimed by a person.

(Delivered by Hon'ble S.K. Sen, C.J.)

1. Heard Shri A.K. Dixit, Learned Standing Counsel for the respondent.

2. The counsel for the petitioner contended that documents of the vehicle has been surrendered on 29.1.2000. Our attention has been drawn to annexure-1 to the writ petition. A perusal of annexure-1 to the writ petition reveals that said document is only an application seeking No Objection Certificate. There is nothing no record to show that the petitioner has complied with the provision of Rule 22 of U.P. Motor Vehicle Taxation Rule 1998 where in the procedure has been prescribed in the case of withdrawing the vehicle from use.

3. It is well settled that where a provision is made in a statute prescribing the particular procedure, that particular procure has to be followed and in the event of non compliance of that procedure, no benefit can be claimed by a person.

4. In view of above, there is no infirmity in the order dated 18.6.2002. We are not inclined to grant any relief to the writ petition.

5. The writ petition being without any merit fails and is dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.7.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 348 of 2002

Deputy Director General (National Cadet Corps) and another ...Petitioners
Versus
Sanjai Kumar & another ...Respondents

Counsel for the Appellants:
Sri Shabha Jeet Yadav
S.C.

Counsel for the Respondents:
Sri S. P. Kesarwani S.C.
Sri N. L. Pandey

U.P. Temporary Government Servant (termination of Service) Rules 1975- Compassionate appointment – always to be treated as permanent appointment— termination order. Held- illegal.

Held- Para 3

We are of the opinion that the Judgment of learned single judge which is based on division bench decisions in Ravi karan Singh's case needs no interference in this appeal. However, it will be open to the appellants, if so advised, to proceed in accordance with law. The petitioner respondent no I shall be reinstated in service forthwith and shall be entitled to pay including all consequential benefits as already directed by the learned Single Judge.

Case law discussed:
1992 (2) AWC 976

(Delivered by Hon'ble S. K.Sen, C.J.)

Present: For the Appellants:
Shri Shabhajeet Yadav .

For the respondents: Shri S. P. Kesarwani

1. This Special appeal is directed against judgment of Learned Single Judge dated 11.2.2002 allowing the writ petition, where the Learned Singh Judge held that the appointment of writ petitioner having been made on compassionate ground, the same cannot be treated to be a temporary appointment and as such the order dated 5.12.1996 terminating has services under U.P. Temporary Government Servants (Termination of Service) Rules of 1975 is set aside.

2. It is not in dispute that before passing the termination order, no show cause notice was served on the petitioner nor the petitioner was given any opportunity to explain his misconduct, if any, irregularity and unauthorized absence. It is true that if the appointment is confirmed, there cannot be simplicitor termination. On the allegation against the petitioner which has been noted by Learned Single Judge in his judgment of court in 1999 (2) A.W.C. 976 Ravi Karan Singh Versus State of U.P. & Others. The Division Bench in the aforesaid case has held that an appointment under the Dying in Harness Rules has to be treated as permanent appointment otherwise if such appointment is treated to be a temporary appointment, then it will be followed that soon after appointment, the services can be permanent and this will nullify the very purpose of Dying in Harness Rules.

3. We are of the opinion that the Judgement of Learned Single Judge which is based on Division Bench Decision in Ravi Karan Singh's case needs no interference in this appeal. However, it will be open to the appellants, if so advised to proceed in accordance with law. The petitioner respondent no.1 shall be reinstated in service forthwith and shall be entitled to pay including .all consequential benefits as already directed by the Learned Singh Judge.

4. Accordingly, we are of the view that there is no merit in this special appeal, Special appeal fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 39672 of 2000

V. K Srivastava ...Petitioner
Versus
Union Bank of India through General Manager and others ...Respondents

Counsel for the Petitioner:
Shri Ashok Bhushan
Shri Anil Bhushan

Counsel for the Respondents:
Shri Vivek Ratan

Constitution of India, Article 226— Promotion from clerical cadre to officer cadre promotion policy dated 23.10.92 providing cut off date 1.12.97 awarding 2 additional marks in each year to those who were actually working in rural areas on the prescribed dated held arbitrary- an employee having working experience in rural areas entitled for 2 additional marks for each years subject to maximum 10 marks.

Held- Para 20

Further held that an employee who has experience of working on the cut off date in the rubal branches is entitled to be awarded two marks for every year of service subject, to maximum of 10 marks irrespective of whether on the cut off date he is working in a rural branch or not.

Case law discussed:
(2000) 5, SCC.346.
(1987) 3, Sec 279.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard Sri Anil Bhushan, learned counsel for the petitioner and Sri Vivek Ratan, Learned Counsel for the respondents and perused the counter and rejoined affidavits.

2. By this writ application, the petitioner has claimed promotion from clerical cadre to Officer cadre on the ground that he is entitled to the marks allotted for experience of working in rural branches, which according to him have been denied by the respondents on arbitrary ground i.e. the cut off date mentioned in the Circular dated 23-10-92 was 1-12-97. On this date, according to the Bank, petitioner was not actually working in rural branch and as such was not entitled to marks for working in rural branch. The petitioner has assailed that Circular dated 23.10.92 as being unfair, arbitrary and on the ground that it provides a handle to the respondents to pick and choose or manipulate consideration of candidates for depriving them from being considered for promotion. He has alleged that though he has experience of working in rural branch of the Bank. He has not been awarded two additional marks.

3. The grievance of the petitioner is that the respondent Bank has rejected the representation of the petitioner dated 3rd February, 1999 and has denied the marks to the petitioner for working in the rural branches. It has been alleged that the cut off date was 1.12.1997 for promotion. Clause 3,4 of the promotion policy provides that two additional marks candidates for two years service in the rural branches will be given to such candidates. This clause is as under:

"3.4 All those employees posted at a rural branch on the specified cut off date for each promotion process will be granted two additional marks for each completed year of service in rural branch(e s) subject to maximum of 10 marks."

4. Clause 3.4 of the promotion policy Staff Circular No.4274 dated 4-5-96 was struck down by the Punjab and Hariyana High Court in the case of Narwal Singh Vs Union Bank of India and others on 14-1-2000 in C.W.P. No.1768 of 1999. It was, however clarified that this judgment shall operate prospectively and shall not affect the promotions already made.

5. The brief facts of the case are that the petitioner was appointed as clerk-cum-Typist in the Bank on 16-4-79. Promotion policy was circulated by the Bank on 23-10-92 for giving promotion from clerical cadre to officer cadre. The cut off date mentioned in the Circular dated 23-10-92 was 1-12-97 at the relevant time. On 1-12-97 the petitioner was not working in any rural branch. However, he was called for interview by a letter dated 27.7.98. The promotion policy

dated 23-10-92 was to be given effect with effect from 1.9.98.

6. The petitioner appeared in the interview on 5th October, 1998 and obtained 89 marks out of total 150 marks. The petitioner made a representation to the Bank claiming weightage marks for working in rural area in promotion on the ground that he worked in Marchhalishahr Branch, which lies in rural area branch. The representation of the petitioner was rejected on 3rd February, 1999 on the ground that Machhlishahr Branch of the Bank is a semi urban branch and as such the petitioner is not entitled to weightage marks for working in rural area.

7. The petitioner submitted a fresh representation on August 01, 2000. In view of the Circular dated 18th July, 2000 issued by the Union Bank of India claiming that he should be given marks of working in the rural branch. According to the petitioner, all those employees who served in the rural branch are entitled to the marks of working in the rural area branches. He further stated that the cut off date has no relevance and has no nexus to the object. It is averred that giving marks to only those persons, who were in the rural branches on a particular date is arbitrary and gives undue advantage to such employees as employees are liable to be transferred from one branch to other branch. It is experience of working which is relevant and not working on a particular date i.e. the cut off date for working in rural area, is arbitrary.

8. It is argued that the petitioner is entitled for marks for service in rural area for promotion in Officer cadre with effect from 1-9-98 and non- promotion of the petitioner is arbitrary and illegal. The petitioner would have been promoted, had marks for his working in the rural branches been awarded to him. Hence the respondents should be directed to give promotion to the petitioner w.e.f. 1.12.98 by awarding him ten marks as he has experience of working in rural branch.

9. The respondent Bank vide letter dated 3.10.2000 rejected the representation dated 1.8.2000. The Circular dated 3.10.2000 was brought on record by the means of an amendment vide court's order dated 18.2.2002. By the amendment the petitioner has also challenged the letter dated 3.10.2000, by which the petitioner was informed that he is not entitled for the benefit of rural service in view of the decision of Punjab and Hariyana High Court.

10. The learned counsel for the respondents has contested the claim of the petitioner on the ground that the employees, who were posted in rural branch of the Bank on the specified cut off date i.e. 1.12.97 only were eligible for two marks for each completed year of service in rural branches subject to a maximum of 10 marks. It was submitted that since the petitioner was not working at any rural branch of the Bank on the cut off date, he is not entitled to any weightage of working in the rural branch. It is also submitted that the bank filed S.L.P. No. (civil) C.C. 3860 of 2000 before the Hon'ble Supreme Court against the judgment and order, dated 14.1.2000 of Punjab and Hariayna. High Court , which is still pending and notices have been issued.

11. Sri Vivek Ratan, learned counsel for the respondents urged that the Judgment dated 14.1.2000 of Punjab and

Hariyana High Court has made it absolutely clear that quashing of paragraph 3.4 of the promotion was prospective and hence the present writ petition is misconceived and is not maintainable. He further submitted that the petitioner has an alternative and efficacious remedy by way of appeal before the General Manager of Union Bank of India.

12. We have given our anxious consideration to the controversy. In our view the whole purpose of giving weightage of two marks per year for service in rural area is for benefit of experience of the candidate in rural areas. It will be wholly unjust to lay down that the candidate must be actually working on the cut off date in the rural branch Suppose a person had experience of working in a rural branch for five years, but ten days before the cut off date he is transferred to an urban branch, he will then loose ten marks for no fault of his. It would be very unfair and unjust to deprive him of his marks. Such an interpretation is against equity and has to be avoided. Purposive interpretation is well known method in law. The literal interpretation will defeat the purpose of the rule, hence the marks have to be awarded to advance justice. Reference can be made to **(2000) 5 S.C. C. 346 "Tata Engineering & Locomotive Co. Ltd. Vs. State of Bihar and another**. In the said case the Apex Court held:

"15 Statutes, it is often said, should be construed not as theorems of Euclid but with some imagination of the purposes which lie behind them and to be too literal in the meaning of words is to see the skin and miss the soul. The method suggested for adoption, in cases of doubt as to the meaning of the words used is to explore the intention of the legislature through the words, the context which gives the Colour, the context, the subject matter, the effects and consequences or the spirit and reason of the law. The general words and collocation or phrases, howsoever wide or comprehensive in their literal sense are interpreted from the context and scheme underlying in the text of the Act. The decision in **Utkal Contractors and joinery (P) Ltd.** Case also emphasises the need to construe the words in a provision in the context of the scheme underlying the other provisions of the act as well, which ultimately was considered to be in tune with the object set out in the statement of the Objects and Reasons and in the preamble. Apart from the fact that the observations contained in the decision have to be understood in the light of the issue raised and exercise undertaken by the Court therein, the fallacy in the submission on behalf of the appellant lies though not in the principles of construction to be adopted but in the assumption of the counsel to confine or restrict and construe the law in question to be one made to regulate the trade."

13. The question that cut off date provided in the order, is arbitrary came up before the apex court in the case of "**Utkal Contractors and joinery Pvt. Ltd. And others Vs State of Orissa and others, 1987 (3) S.C.C. 279**" The Apex Court also emphasized:

"It is settled that the words of an enactment are important as the context that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute and the context of an Act may well indicate that

wide or general words should be given a restrictive meaning. (Halsbury 4th edn. Vol 44 page 874)

14. In Attorney General V. H.R. H. Prince Ernest Augustus, Viscount Simonds said that:

"Words and particularly general words, cannot be read in isolation, their colour and content are derived from their context."

15. In Maunsell Vs Olins, it has been observed that:

"all general words are open to inspection, many general words demand inspection, to see whether they really bear their widest possible meaning."

16. It was further observed that:

"Then rules of construction are relied on. They are not masters. They are aids to construction, presumptions or pointers. Not infrequently one ' rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight is attached to any particular 'rule'

17. We are of the view that providing cut off date for considering the experience of working in any rural branch has no relevance. It is the experience that is necessary and not working on a particular date. Weightage of working in the rural branches under clause 3.4 of the Circular has to be given irrespective of the fact whether on cut of date he was posted in a rural branch or not. The interpretation of this clause has to be purposive and not literal or narrow. Such interpretation defeats the object and purpose and results in injustice to many, and hence such an interpretation has to be avoided.

18. We do not think that relegating the petitioner to alternate remedy will serve any purpose in this case, as we are deciding the controversy finally on merits.

19. We, therefore, hold that the words posted in a rural branch on the specified cut off date mean that the employee has acquired the experience of working in rural area by the cut off date, avoiding the literal meaning to give the employee benefit of his experience.

20. We further hold that an employee who has experience of working on the cut off date in the rural branches, is entitled to be awarded two marks for every year of service subject to maximum of 10 marks irrespective of whether on the cut off date he is working in a rural branch or not.

21. In this view, we allow the writ petition and direct the respondents to award the benefit of 2 marks for each year to the petitioner working in rural area and allow him promotion, if he is entitled in the light of the ratio laid down in this judgement.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2002

BEFORE
THE HON'BLE R. K. DASH, J.

Criminal Misc. Application No. 3875 of 2000

Gurcharan Singh ...Applicant
Versus
State of U.P. and another
...Opposite parties

Counsel for the Applicant:
Sri R.R. Singh

Counsel for the Respondents:
Sri Satish Trivedi
Sri K. B. Srivastava
Sri Ashish Kumar Singh
Sri R. K. Jain
A.G.A.

Negotiable Instrument Act- Section 138- complaint made by unregistered firm whether can be maintained.Held- 'Yes'

Held—Para 9

A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under section 138 is completed, the prosecution proceeding can be initiated not for recovery of the amount covered by the cheque but for brining the offender to penal liability.
Case law discussed:
2000 SCC (Ga) 538
1999 I.S.J. (Bombay) 701
AIR 1975 Kerala -144 distinguished

Words and phrases-'Suit' –means a process instituted in a court for recovery or protection of right, enforcement of a claim or to redress and civil injuries.
Held—para 7

It is, therefore, desirable to refer to 'Law of Lexicon' and the judicial pronouncements to ascertain the true meaning of word 'Suit' in the legal context. 'Suit' means a proceeding instituted in civil court by presentation of a plaint. The word 'Suit' ought to be confined to such proceedings as, under that description, are directly dealt with in the code of civil procedure, or suchas by the operation of the particular Act which regulates them are treated as suits (See Law of Lexion) 1997 Edition). The word 'Suit' in common parlances means a process instituted in a court for recovery or protection of a right, enforcement of a claim, or to redress civil injuries.

(Delivered by Hon'ble R.K. Dash, J.)

1. M/s Sterling Novelty Products, Moradabad (U.P.) is a partnership firm of which Mrs. Jagdish Kaur W/o Gurbaksh Singh, Mrs. Jasleen Kaur W/o Arvinder Pal Singh and Master Uvraj Singh are the partners. The aforesaid firm is engaged in export business in handicrafts, brass wares, textiles and aluminum items at Moradabad since 1992. International Gifts Ltd is a company at Ontario, Canada and Gurcharan Singh, petitioner herein is the President of the said company. M/s. Sterling Novelty Products through its partner Uvraj Singh represented by his natural guardian Arvinder Pal Singh filed a complaint before the court of Chief Judicial Magistrate, Moradabad bearing case no.852/9 of 1999 under Section 138 of Negotiable Instruments Act. (hereinafter referred to as "the Act") and Sections 406 and 420 I.P.C. arraying International Gifts Ltd and its President Gurcharan Singh as accused.

2. The case of the complainant, in short is that the firm (M/S. Sterling Novelty Products) Supplied brass wares and textiles to the accused persons which were duly received by them. Towards payment thereof, they issued post dated cheques no. 001530 dt. 15.2.1999 of worth $ 85,959.20 and no. 001531 dated 15.3.1999 of worth $84,208,80 Canadian Dollar. Both the aforesaid cheques were issued by Gurcharan Singh, the petitioner as President of M/S International Gifts Ltd. The complainant presented the cheques no.001530 dated 15.2.1999 with its banker Indian Overseas Bank, Moradabad and the same was sent to Bank of Monteral, Canada. The Cheque was dishonoured and returned unpaid since the accused intimated his banker to stop payment. Similarly the other cheque No.001531 dated 15.3.1999 which complainant deposited with its banker, Indian Overseas Bank, Moradabad was dishonoured on the very same ground. The complainant then served notice upon the accused as provided in the Act asking for payment of the amount covered under both the cheques within fifteen days of the date of receipt of the notice. As the accused failed to make payment, the present complaint was filed. However, after filing of the complaint the amount covered under cheque no.001530 was paid. The learned Magistrate after recording the statement of the complainant and having gone through the relevant materials and documents was satisfied that prima-facie offence under Section 138 of the Act and Section 420 I.P.C. was made out against the accused persons and accordingly. took congnizance of the said offence and issued process to the accused Gurcharan Singh, President of the International Gifts Ltd for appearance, the accused has filed the present case seeking quashing of the criminal proceeding inter-alia on the ground that the notice issued after bouncing of cheques is bad in law and that the complaint is barred by limitation as provided in Section 142 of the Act. Admitting that the cheques were dishonoured by his banker on his intimation, the accused has urged that he was compelled to take such steps since the goods supplied by complainant's firm were sub-standard and therefore, in view of the nature of the dispute he can not be imputed with any criminal liability.

3. The complainant on being noticed filed return refuting the allegation that the goods supplied by it were sub standard. It is urged that when the cheques were returned unpaid by the Bank of Monteral, correspondence was made with the accused to explain the reason of the return of the cheques. He responded to complainant's letter, but did not take such plea that payment was stopped as the goods supplied were sub-standard. As regards the validity of the notice and period of limitation for filing complaint, his case is that on being informed by its banker, Indian Overseas Bank on 23-4-1999 regarding dishonour of the cheques, he sent notice on 6.5.1999 to the accused calling upon him to pay that amount of the cheques and the same was acknowledged on 10.5.1999. As provided under law, the accused was required to discharge his liability within 15 days from the date of receipt of the said notice that is, on or before 25th May, 1999. Since the accused did not discharge his liability and failed to make payment, the complainant filed the case on 18.6.1999 which is well within time as envisaged in Section 142 of the Act. The accused by way of filing supplementary affidavit has taken two

new more grounds challenging the criminal proceeding that the firm of the complainant namely, M/s. Sterling Novelty Products being not a registered firm cannot maintain criminal case and that the complaint was not a properly constituted one since the Vakalatnama so filed does not bear the signature of the complainant. To this, complainant replied by way of affidavit denying the allegation and urged that the firm is a registered firm and that complaint was filed by one of the partners, a minor through his natural guardian.

4. Sri R.R. Singh, learned Counsel for the petitioner at the commencement of the argument raised three contentions that the complaint so filed was not a properly constituted one in as much as, Vakalatnama filed in the Court is an unsigned one, that the petitioner was not liable to pay the amount covered under the cheque in question, for the goods supplied were sub-standard and that M/s. Sterling Novelty Product being not registered firm under the Partnership Act cannot maintain the criminal proceeding. He, however, confined his argument as to the maintainability of the criminal proceeding, in support where of he relied upon a decision of the Andhra Pradesh High Court in the case of **Mr. Amit Desai and another Vs. M/s. Shine Enterprises and another**, 2000 Cri. L.J. 2386.

5. Sri Satish Trivedi, Senior Advocate assisted by Sri K.B. Srivastava appearing for the complainant- respondent no.2 on the other hand urged that it is untrue that the Vakalatnama was not executed by the father of the minor, one of the partners of the aforesaid firm. The Xerox copy of the Vakalatnama which has been filed by the petitioner is not legible and properly Xeroxed one. In fact, it was executed by the complainant's father. Even conceding that the Vakalatnama was not executed by the minor's father, yet the same cannot be a ground to dismiss the complaint at the threshold. With regard to the defence plea that the goods supplied were sub-standard, it is submitted that it is false and after thought. Besides such a plea cannot be entertained and complaint can not be quashed on the premise that the dispute related to commercial transaction. In answer to the maintainability of the criminal proceeding as raised by the learned counsel for the petitioner, he contended that M/s. Sterling Novelty Products is a registered partnership firm and that is the reason why such a plea was not taken in the petition filed under Section 482 Cr.P.C. Moreover, assuming that it is an unregistered firm, what is barred under Section 69, of the Partnership Act is the 'suit' and this being a criminal case arising out of a 'complaint' under Section 138 of the Act, the said provision cannot be borrowed and applied to it.

6. The factual aspect of the case that emerges from the pleadings of the parties and the submissions made by the learned counsel appearing for them is that two cheques in question issued by the petitioner as President of M/s. International Gifts Limited to M/s. Sterling Novelty Products, Moradabad were deposited with its banker namely, Indian Overseas Bank, Moradabad who in turn sent the same for encashment to the banker of the petitioner, but it returned the cheques unpaid in view of the intimation by the petitioner to stop payment. Accordingly, Indian Overseas Bank informed the respondent regarding

bouncing of cheques on 23-4-1999. The respondent firm thereupon gave notice in writing to the petitioner on 6-5-1999 making demand for payment of the amount covered under the cheques as provided under Section 138 (b) of the Act. The notice was served on 10-5-1999 i.e. within stipulated period. When the petitioner failed to make payment within the permissible period of fifteen days of the receipt of the notice, respondent-firm through one of its partner filed complaint on 18-6-1999 which is within the period of limitation as prescribed under Section 142 of the Act. In that view of the matter, the sole question posted is whether, assuming the contention of the petitioner that the respondent- firm is not a registered one, the criminal proceeding would be maintainable in view of the bar created by Section 69(2) of the Partnership Act. Before proceeding to answer the said question, it may be noted that the petitioner's assertion that the respondent firm is unregistered one has been stoutly denied and disputed. It is affirmatively pleaded that the firm is registered firm.

To appreciate the submission, the relevant part of Section 69 of the Partnership Act necessary for the purpose is extracted hereunder:

"69 Effect of non- registration-(1) xxxxxxxx

(2) No. suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as Partners in the firm.

(3) xxxxxxxxx

(4) xxxxxxxxx

7. The aforesaid provision postulates that if a firm is not registered one, it or anybody on its behalf cannot maintain a 'suit' against a third party to enforce a right arising from a contract. So, what is barred is a 'suit' against a third party to enforce a right arising from a contract. So, what is barred is a 'suit' that has been filed to enforce a right arising from a contract. In other words, the liability of third person to the firm arising out of a contract cannot be enforced by way of suit if the firm is unregistered. The word 'suit' has not been defined in the aforesaid Act. It is, therefore, desirable to refer to 'Law of Lexicon' and the judicial pronouncements to ascertain the true meaning of word 'suit' in the legal context. 'Suit' means 'a proceeding instituted in civil court by presentation of a plaint. The word 'suit' ought to be confined to such proceedings as, under that description, are directly dealt with in the Code of Civil procedure, or such as by the operation of the particular Act, which regulates them are treated as suits (See Law of Laxicon, 1997 Edition). The word 'Suit' in common parlance means a process instituted in a court for recovery or protection of a right, enforcement of a claim, or to redress civil injuries.

8. Section 142 of Act under caption "Congnizance of offences" provides that conginizance of the offence under Section 138 can be taken upon a ' complaint' in writing made by the payee or the holder in due course of the cheque. The word 'complaint' defined in section 2 (d) of the Code of Criminal Procedure means any allegation made orally or in writing to a Magistrate, with a view to taking action under the said Code, that some person, whether known or unknown, has committed an offence, but does not

include a police report. Since Section 138 is a penal provision that prescribes punishment for bouncing of cheque on any of the grounds mentioned therein, the legislature in its wisdom has used the word 'complaint' and not 'suit' in Section 142 because a 'Suit' can be maintained for recovery of money or for any other civil remedies. So the bar created for a maintaining a suit in section 69 of the Partnership Act by an unregistered firm cannot be stretched and applied to maintain criminal proceeding under Section 138 of the Act. In **Amit Desai (supra)** a Division Bench of Andhra Pradesh High Court has taken the view that the firm being not registered under of the Partnership Act cannot maintain a complaint under Section 138 of the Act. No discussion on point of law involved was made by the learned Judges except referring to Section 69 of the Partnership Act and some decisions of the Apex Court. While disagreeing with the view taken by the Kerala High court that Section 69 (2) of the Partnership Act is applicable only where civil rights are invoked, the learned Judges referred to explanation to Section 138 of the Act and observed "enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in explanation (2) of Section 138 of the Negotiable Instrument Act." A Division Bench of the Kerala High Court in the case of **Kerala Arecanut Stores Vs. M/s Ramkishore and Sons and another**, AIR 1975 Kerala 144 having made reference to various provisions of the Act regarding rights/ Obligations arising out of a negotiable instrument observed that the obligation of the drawer of the cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provision and there being no privity of contract between the maker of a cheque and the holder in due course, any right of action available to such holder is not under any contract. So he is entitled to sue on his cheque by reason of the right conferred upon him by the statute. That being so, action under Section 138 is not a suit by the indorsee to enforce a right arising out of a contract and therefore, the bar under Section 69 (2) of the Partnership Act will not operate in such a case. To the same effect is view of a learned Single Judge of the said High Court in the case of **Abdul Gafoor Vs. Abdurahiman**,1999 ISJ (Banking) 701. It is observed in the said case that "the effect of non registration of the partnership firm under Section 69 of the Partnership Act is applicable only to cases involving civil rights and it has no application to criminal cases."

9. In a recent judgment rendered by the Supreme Court in **BSI Ltd and another Vs. Gift Holdings Pvt. Ltd and another**, 2000 SCC (Cri) 538, the word 'suit' came to be interpreted for deciding maintainability of a proceeding under Section 138 of the Act in view of the ban imposed by of the Sick Industrial Companies (Special Provisions) Act. Under Section 22 (1) of the aforesaid Act, it is provided that no suit for recovery of money or enforcements of any security against the industrial company or guarantee in respect of any loan or advance granted to the industrial company shall lie if in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or

consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending adjudication. It was contended that the ban against maintainability of a suit for recovery of money would encompass prosecution proceedings also. Reliance was placed on the meaning of the word 'suit' as given in *'Bouvier's Law Dictionary'* Repelling such contention the court observed that the word 'Suit' envisaged in Section 22 (1) cannot be stretched to criminal prosecutions. A Criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability.

10. In view of discussions made above, I would hold that even accepting the contention of the learned counsel for the petitioner that M/s Sterling Novelty Products is not a registered firm under the Partnership Act, yet the bar created by Section 69 of the said Act has no application for maintaining a criminal proceeding under Section 138 of the Act. In that view of the matter, no interference is called for in the criminal proceeding (case no.852/9 of 1999) pending against the petitioner in exercise of inherent power.

11. In the result, Criminal Misc. Application fails and the same is dismissed.

12. The court below is directed to take up expeditious hearing and dispose of the case within reasonable time preferably within a period of six months from date of receipt of this judgment.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.7.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE K.N. SINHA, J.

Criminal Misc. Writ Petition No. 915 of 2002

Vijai Kumar Verma ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri Madhur Prakash
Sri S.P. Singh
Amicus Curiae

Counsel for the Respondents:
A.G.A.

Recommendation to restore the provision of anticipatory bail under section 438 of Cr.P.C.- Thousands of writ petitions and section 482 Cr.P.C.- applications are being filed in this Court praying for stay of the petitioner's arrest- problem will be obviated by restoring the provision for anticipatory bail which was contained in Section 438 Cr.P.C. but was deleted in UP by section 9 of U.P. Act No. 16 of 1976 (held in para 17).

We, therefore, make a strong recommendation to the U.P. Government to immediately issue an ordinance to restore the provision for anticipatory bail by repealing section 9 of U.P. Act No. 16 of 1976, and empowering the High Court as well as the Sessions Courts to grant anticipatory bail.

Case law Referred.
AIR 1994 SC 1349, AIR 1997 SC 366, AIR 1980 SC 1632

(Delivered by Hon'ble M. Katju, J.)

1. Learned Government counsel may file counter affidavit within a month.

2. Issue notice to respondent no. 4 returnable at an early date.

3. Until further order of this Court we stay the arrest of the petitioner in Case Crime No. 214 of 2001, Under Sections 409, 420, 468, 467 and 471 I.P.C. Police Station Sadar Bazar, district Mathura but the investigation may go on.

4. We have heard Sri S.P. Singh, General Secretary of the High Court Bar Association as Amicus Curiae, in this case.

5. The petitioner Vijay Kumar Verma is a Government servant posted in the U.P. Police Department as Sub Inspector (Ministerial)/ Head Clerk in the office of the Superintendent of Police, Hathras. By means of this writ petition the petitioner is challenging the impugned FIR filed against him. This F.I.R. states that certain appointment under Dying in Harness Rules was obtained by playing some fraud in which the petitioner was also involved. The petitioner claims that he is innocent and has been falsely implicated. The only allegation against him in the impugned FIR is that he did not make proper verification of the documents relating to the appointment made under the Dying in Harness Rules.

6. It has been held by the Supreme Court in **Joginder Kumar Vs. State of U.P. and others AIR 1994 Supreme Court, 1349**:

"No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in Police lock up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can be made in routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional right of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and reasonable belief both as to the persons' complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendation of the Police Commission merely reflects the constitutional concomitants of the fundamental right to person liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be a reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave station without permission would do."

7. Despite this categorical judgement of the Supreme Court it appears that the police is not at all

implementing it. What invariably happens is that whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused person. This is clear violation of the aforesaid judgement of the Supreme Court.

8. Thousand of writ petitions and section 482 Cr.P.C. applications are being filed in this court praying for stay of the petitioner's arrest. This is unnecessarily increasing the work load of this court and adding to the arrears.

9. In our opinion the problem will be obviated by restoring the provision for anticipatory bail which was contained in Section 438 Cr.P.C. but was deleted in U.P. Act 16 of 1976.

10. It is surprising that the provision for anticipatory bail should be deleted in this State although it exists in all other States in India, even in terrorist affected States. We do not understand why this provision should not exist in U.P. also.

11. As pointed out in Balchand Jain Vs. State of Madhya Pradesh, AIR 1977 Supreme Court, 366, the provision for anticipatory bail was included in the Cr.P.C. 1973 in pursuance of the Forty First Report of the Law Commission which observed:

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody and remain in prison for some days and then apply for bail."

12. Thus the provision for anticipatory bail was introduced in the Cr.P.C. because it was realized by Parliament in its wisdom that false and frivolous case are often filed against some persons and such persons have to go to jail because even if the First Information Report is false and frivolous a person has to obtain bail, and for that he has to first surrender before the learned Magistrate, and his bail application is heard only after several days (usually a week or two) after giving notice to the State. During this period the applicant has to go to Jail. Hence even if such person subsequently obtains bail his reputation may be irreparably tarnished, as held by the Supreme Court in Joginder Kumar's case (supra). The reputation of a person is a valuable asset for him, just as in law the good will of a firm is an intangible asset. In the Gita Lord Kirshna said to Arjun.

"संभावित चाकीर्ति मरणादतिरिच्यते"

Which means

" For a self respecting man , death is preferable to dishonour".

Gita Chapter 2, Shlok 34

13. No doubt anticipatory bail is not to be granted as of course by the Court but only in accordance with the principles laid down by the Supreme Court in ***Gurbaksh Singh Vs. State of Pubjab AIR 1980 SC 1632***. However, we are of the view that there must be a provision for

anticipatory bail in U.P. for the reason already mentioned above.

14. Experience has shown that the absence of the provision for anticipatory bail has been causing great injustice and hardship to the citizens of U.P. Often false First Information Reports are filed e.g. under Section 498- A I.P.C., section 3/4 Dowry Prohibition Act, etc. Often grandmothers, uncles, aunts, unmarried sisters etc. are implicated in such cases, even though they may have nothing to do with the offence. Some times unmarried girls have to go to jail, and this may affect their chances of marriage. As already observed by us above, this is in violation of the Supreme Court decision in ***Joginder Kumar's case (supra)*** and the difficulty can be overcome by restoring the provision for anticipatory bail.

15. Moreover this court is already overburdened with heavy arrears and over loaded with work. This load is increasing daily due to the absence of the provision for anticipatory bail. In the absence of the provision whenever an F.I.R. is filed the accused person files a writ petition or application under section 482 Cr.P.C. and this has resulted in an unmanageable burden on this Court. At present in the Allahabad High Court, one Division Bench is doing fresh and recent writ petition in which the FIR is challenged, and another Division Bench is doing similar writ petitions in old cases. Similarly, one Hon'ble Singh Judge is dealing with fresh and recent applications under section 482 Cr.P.C. and another Hon'ble Single Judges deals with similar old cases. Thus six Hon'ble Judges of this Court are presently tied up with such work.

16. This court had on several occasions requested the State Government to issue an Ordinance immediately to restore the provision for anticipatory bail, but all our requests seems to have fallen on deaf ears. It seems that there is an impression in some quarters that if the provision for anticipatory bail is restored crimes will increase. In our opinion this is a specious argument, since it has not made such difference to the crime position in the States where the provision for anticipatory bail exists.

17. We, therefore, make a strong recommendation to the U.P. Government to immediately issue an Ordinance to restore the provision for anticipatory bail by repealing section 9 of U.P. Act No. 16 of 1976, and empowering the High Court as well as the Sessions Courts to grant anticipatory bail.

18. The Registrar General of this Court shall send a copy of this order to the Chief Secretary, Principal Home Secretary and Principal Law Secretary, U.P. forthwith who are requested to urgently take up the matter and do the needful for issuing the ordinance as suggested above.

19. The General Secretary of the High Court Bar Association Sri S.P. Singh will also communicate this order to the appropriate authorities.

20. Let a copy of this order be given to Sri S.P. Singh, Secretary of High Court Bar Association free of costs within 24 hours.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.7.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE K.N. SINHA, J.

Civil Misc. Writ Petition No. 4119 of 2002

Dev Prasad and others ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri A.K. Saxena

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226- writ of certiorari- for quashing FIR lodged u/s 304 B I.P.C. and 3/4 D.P. Act- court expressed its great concern that in simple murder case- death sentence is inflicted while in dowry only Life Imprisonment given- direction issued for enactment of death sentence to the accused of Dowry death accused also- as a dowry death is much worse offence.

Held- Para 5

We are surprised that while an ordinary murder can be punished by a death sentence under section 302 I.P.C. a dowry death, which is much worse offence, has a maximum punishment of life imprisonment. An ordinary murder is committed in a fit of rage or for a property, but a dowry death is not just an ordinary crime, it is a social crime. It outrages the modern conscience. It makes the whole of society revert to feudal barbarism. Hence we recommend to Parliament to amend the law and provide for death sentence in dowry death cases.

(Delivered by Hon'ble M. Katju, J.)

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

The offence of dowry death under section 304 B I.P.C. was only introduced in the Statute Book in the year 1986. Before 1986 dowry death cases were very rare. Now the position has totally changed. Everyday several cases relating to dowry death are coming before us, which shows that this is a social phenomenon which has spread like cancer and is making our society barbaric.

2. In our country when a young girl comes after her marriage to her sasural she comes into a new environment where every one is a stranger to her. She leaves behind all her relations and friends in her maika and comes to her husband's house bewildered, diffident and apprehensive. At that time she needs a lot of love and affection from her-in-laws who start demanding more and more dowry and inflict all types of atrocities on her for this purpose. The girl's father out of love for his daughter has to succumb to these demands, but even then very often the girl is killed. The reason for this is that very often the husband or the father of the husband kills the girls so that the boy may be married again to some other girl and the same process may begin again. This barbaric attitude is only due to the lust for money, which has spread all over our society.

3. Hundreds and thousands of young girls are being killed in this manner, and this can be seen from the large number of FIRs under section 304 B IPC which are filed all over the country.

4. No amount of persuasion will pursuade stone hearted people to give up this horrible and barbaric practice, and only harsh and deterrent measures can achieve this. Now the time has come when there should be a large number of death sentences in such cases and that alone can create the deterrence for this.

5. We are surprised that while an ordinary murder can be punished by a death sentence under section 302 I.P.C., a dowry death, which is a much worse offence, has a maximum punishment of life imprisonment. An ordinary murder is committed in a fit of rage or for a property, but a dowry death is not just an ordinary crime, it is a social crime. It outrages the modern conscience, it makes the whole society revert to feudal barbarism. Hence we recommend to Parliament to amend the law and provide for death sentence in dowry death cases.

6. When a woman is given respect by her husband and in-laws the child of such a woman when he grows up will become a fighter against injustice as from childhood he sees that his mother was given respect by his father who was physically the strong person. Hence he sees justice done in his own home. But when a woman is oppressed her child sees injustice, and hence when he grows up he will become a coward or a bully because he will think that injustice is the normal way of life. When a large number of women are treated like this the whole of society becomes mentally sick. This is why this barbaric practice must be ruthlessly stamped out, by imposing harsh punishment.

7. Very often in such cases even a post-mortem is not done as in the present case. This is evidently to destroy all evidence in the case. The time has now come when this court will not tolerate these practices any more and will adopt very tough measures. In the present case the impugned FIR dated 6.4.2002 states that the first informant's sister Sia Dulari aged about 23 years was married to one Chandra Shekhar on 16.5.99. She was harassed for dowry and ultimately killed on 6.4.2002 and her body was burnt.

8. This is not a fit case for interference under Article 226 of the Constitution. The petition is therefore dismissed.

9. However, the bail application of the petitioners will be decided by the court concerned expeditiously. It is made clear that any observations made in this judgement will not influence the trial court.

10. Let a copy of this order be sent by the Registrar General of this Court to the Union Law Secretary, New Delhi and the Chairman, Law Commission of India, New Delhi, and the Law Secretary, U.P.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2002

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 21197 of 1987

Kr. Om Autar ...Petitioner
Versus
District Commandant Home Guard and others ...Respondents

Counsel for the Petitioner:
Sri Krishan Mohan Agarwal
Sri Rajendra Kumar

Sri Murlidhar
Sri R.P. Singh
Sri P.K. Singh

Counsel for the Respondents:
S.C.

U.P. Act No. 13 of 1972- Section 21 (8) - Enhancement of monthly rent- appellate authority at the time of determining the valuation of property committed great mathematical error fixing rate of Rs.20/- per sq. feet and Rs.60 per sq. yard while sq. feet converted sq. yard it would come Rs.180/- direction issued to reconsider this aspect only.

Held- Para 17

The matter is sent back to the Appellate Authority to decide afresh the application for correction dated 13.7.87 regarding arithmetical mistake in the judgement and order dated 19.5.1987 regarding determination of the value of construction as Rs.40,500/- and determination of the total value of the property as Rs.3,01,950/- and rectify the said figures in the judgement and order dated 19.5.87 in the light of calculations made above. The Appellate Authority will accordingly make consequential rectification in the monthly rent determined in the judgement and order dated 19.5.87. It is made clear that the parties will not be permitted to raise any other point before the Appellate Authority.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. This writ petition has been filed by the petitioner, inter-alia, challenging the order dated 27.2.1985 passed by the respondent no. 3 (Annexure no. 3 to the writ petition), judgment and order dated 19.5.1987 passed by the respondent no. 4 (Annexure no. 4 to the writ petition) and the order dated 18.9.1987 passed by the respondent no. 4 (Annexure no. 7 to the writ petition).

2. It appears from the writ petition that the petitioner is the land lord of Bungalow no. 234-A, Katra Chand Khan, Shahjahanpur Road, Bareilly of which the respondent no. 1 is a tenant, the rate of rent originally was Rs. 181.25 p. The petitioner moved an application under section 21 (8) of the UP Act XIII of 1972 for enhancement of rent in respect of the said premises to Rs. 5,333.33 per month.

3. Initially, the said application under section 21 (8) of the U.P. Act XIII of 1972 was rejected by the Rent Control and eviction Officer, Bareilly by the order dated 22.10.1982..

4. The petitioner filed an appeal against the said order 22.10.1982. The Appellate Authority by its order dated 25.8.1983 allowed the appeal, set aside the order dated 22.10.1982 and remanded the matter to the Rent Control and Eviction Officer, Bareilly for deciding the same again.

5. After remand, the respondent no. 3 by its order dated 27.2.1985 partly allowed the application under section 21 (8) of U.P. Act XIII of 1972 and enhanced the monthly rent of the said premises in question to Rs.700/-.

6. Against the said order dated 27.2.1985, the petitioner filed an appeal being Misc. Appeal No. 60 of 1985. The Appellate Authority (Respondent no. 4) by its judgment and order dated 19.5.1987 partly allowed the appeal and modified the order dated 27.2.1985 passed by the respondent no. 3 and fixed the monthly rent of the premises in question at

Rs.2,516/-. Thus, the rent of the premises in question was enhanced from 181.25 p. to Rs.2,516/-.

7. Thereafter, it appears that an application dated 13.7.1987 was filed on behalf of the petitioner before the Appellate Authority (Respondent no. 4) under section 152 of Code of Civil. Procedure seeking correction of clerical/arithmetical mistake in the said judgement and order dated 19.5.1987. Besides, other mistakes mentioned in the said application dated 13.7.1987, it was inter-alia, stated that the figure Rs.40,500/- mentioned as the cost of construction in the said premises was not correct, and the correct figure was Rs.1,39,560/-. It was, inter alia, also stated in the said application dated 13.7.1987 that the figure of Rs.3,61,450/- mentioned as the value of the land in the premises in question was not correct, and the correct figure was Rs.2,61,478/-.

8. The Appellate Authority (Respondent no. 4) by its order dated 18.9.1987 considered the said application dated 13.7.1987, and rectified only one mistake, namely, that in place of figure Rs. 3,61,450/-, the correct figure was Rs. 2,61,450/-.

9. The petitioner has filed this writ petition challenging the said order dated 27.2.1985, the judgement and order dated 19.5.1987 and the order dated 18.9.1987.

Counter affidavit has been filed on behalf of the respondent no. 1. The petitioner has filed his rejoinder affidavit.

10. I have heard Sri Murlidhar, learned Senior counsel assisted by Sri R.P. Singh and Sri P.K. Singh, Advocates for the petitioner and learned standing counsel for the respondent.

11. Sri Murlidhar, learned Senior counsel made only one submission. He submitted that while the Appellate Authority was correct in passing the order dated 18.9.1987, rectifying the figure Rs.3,61,450/- and substituting the same by the figure Rs.2,61,450/-, the Appellate Authority acted illegally in not correcting an arithmetical mistake regarding the valuation of the construction determined as Rs.40,500/-.

12. Sri Murlidhar submitted that the following observation made by the Appellate Authority in its judgement and order dated 19.5.1987 was erroneous on the face of it. t." the year of construction is 1935 and considering the depreciation, I am satisfied that the rate of construction for main building, out houses and boundary wall can be fixed at the flat rate of Rs.20/- per sq. feet i.e. Rs.60/- per sq. yard inclusive of electric and water fittings. The cost of construction for determining the market value of the property comes to Rs.40,500/-…..

13. It is submitted by Sri Murlidhar that the Appellate Authority committed an arithmetical mistake in converting Rs.20/- per sq. feet as Rs.60/-per sq. yard. According to the learned senior counsel, 9 sq. feet is = one sq. yard. Accordingly Rs.20/- per sq. feet when converted into Sq. yard would be Rs.180/- per sq. yard. Therefore, valuation of construction should have been done on the basis of the flat rate being Rs.180/-per sq. yard, and not Rs. 60/- per sq. yard.

14. Having heard learned counsel for the parties, I am of the opinion that the

contention raised on behalf of the petitioner is correct. While the Appellate Authority was correct in passing the order dated 18.9.1987 and rectifying the arithmetical mistake in the figure Rs.3,61,450/- and substituting the same by the figure Rs.2,61,450/-, the Appellate Authority acted illegally in ignoring the arithmetical mistake committed in computing the value of construction as Rs.40,500/-. The Appellate Authority in its judgement and order dated 19.5.1987 adopted a flat rate of Rs.20/- per sq. feet for determining the value of construction in the premises in question Rs.20/- per sq. feet when converted into square yard would come to Rs.180/- per sq.yard. The area of total constructed portion was determined by the Appellate Authority as 675 sq. yard.

15. Therefore, the value of construction would be equal to (675/- x 180) i.e. Rs. 1,21,500/-. Thus, there was arithmetical mistake apparent on the record in the said judgement and order dated 19.5.1987 in determining the value of construction as Rs.40,500/-. Consequently the total value of the property would not be Rs.3,01,950/- as determined in the judgement and order dated 19.5.1987, but would be Rs.3,82,950/-.

16. In the circumstances, the Appellate Authority while considering the application for correction dated 13.7.1987 ought to have considered the said arithmetical mistake in the figure Rs.40,500/-. The Appellate Authority acted illegally in not considering the said arithmetical mistake in the figure Rs.40,500/- while passing the order dated 18.9.1987.

17. In the circumstances, the writ petition is partly allowed. The order dated 18.9.1987 is quashed only to the extent it has not considered the arithmetical mistake in the value of construction at figure Rs.40,500/- and has held that the total value of the property has rightly been calculated at Rs.3,01,950/-. The matter is sent back to the Appellate Authority to decide afresh the application for correct dated 13.7.1987 regarding arithmetical mistake in the judgment and order dated 19.5.1987 regarding determination of the value of construction as Rs.40,500/- and determination of the total value of the property as Rs.3,01,950/- and rectify the said figures in the judgement and order dated 19.5.1987 in the light of calculations made above. The Appellate Authority will accordingly make consequential rectification the monthly rent determined in the judgment and order dated 19.5.1987. It is made clear that the parties will not be permitted to raise any other point before the Appellate Authority.

18. Since the matter is an old one. The Appellate Authority shall endeavdor to decide the same expeditiously, preferably within a period of three months from the date of production of a certified copy of this order.

19. On the facts and circumstances of the case, there will be not order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2002

BEFORE
THE HON'BLE JAGDISH BHALLA, J.

Civil Misc. Writ Petition No. 25442 of 2002

Smt. Sahina Parveen ...Petitioner
Versus
Director of Education (Madhyamik) and others ...Opposite Parties

Counsel for the Petitioner:
Sri Rahul Jain
Sri Ashok Khare
Sri Raj Kumar Jain
Sri Vinod Kumar Singh

Counsel for the Respondents:
Sri Yogesh Agarwal
S.C.

Constition of India-Article 226-Cancellation of transfer order can be interfered only on two counts; firstly, violation of law, secondly allegation of malafide. There is no foundation in the writ petition with regard to violation of law except the ground of cadre, which has already been decided-as far as allegations of malafides are concerned, vague, allegations have been raised, which too the Petitioner counsel failed to substantiate. (Held in para 8).

In light of above, no interference is warranted under Article 226 of the Constitution of India.

(Delivered by Hon'ble Jagdish Bhalla, J.)

1. A preliminary objection has been raised by Senior Advocate, Sri Ashok Khare regarding maintainability of this petition on the ground that the petitioner is not the affected party, therefore, the Petitioner cannot challenge the order passed by her superiors.

2. My Attention was brought to the fact that the petitioner aggrieved by an order dated 18.01.2002 whereby the transfer order of the opposite party nos. 3 and 4 were cancelled, has filed writ petition No. 4799/2002. The said writ petition was finally disposed of with a direction to the petitioner to approach the Director of Education, who shall decide the representation within a period of three months. The director, in compliance of the directions of this Court, considered the matter and rejected the representation by an order dated 23.05.2002 upholding the cancellation of the transfer order. Aggrieved by the said order, the petitioner has approached this Court.

3. From the perusal of the impugned order, it is evident that the documents furnished by the petitioner were also taken into consideration while deciding the matter. In fact the representation of the petitioner has been decided by the Director of Education in compliance of the directions issued in writ petition No. 4799/2002 filed by the petitioner challenging the cancellation of transfer order, therefore, it can be said that the petitioner is aggrieved party because it is his representation which has been decided by impugned order dated 23.05.2002. Accordingly, this petition filed by the petitioner is maintainable.

4. Now, I proceed to decide the matter on its merit. Learned counsel for the petitioner submitted that the opposite party Nos. 3 & 4 belong to male cadre of teacher whereas, they were posted and working in the Mahila Institution and the Director of Education wrongly came to

the conclusion that the opposite parties 3 and 4 belong to the Mahila Cadre. In support, the petitioner has relied upon the seniority list as contained in annexure R.A.-2 to the Rejoinder affidavit of Rajendra Prasad Agarwal, opposite party no. 3. Annexure No. RA-2 is the service book of opposite party No.4, Sri Girdhari Lal Chaubey. It has been further contended by the learned counsel for the petitioner that the complaints made by the petitioner were not taken into consideration while deciding the matter wherein apprehensions have been shown to ill effect on the students due to the presence of the opposite parties 3 & 4 in the Institution. It has further been informed by the learned counsel for the petitioner that the opposite parties 3 & 4 were working in boys institution for quite some time earlier before being posted in the present Institution. Lastly, it has been alleged that the transfer of opposite parties 3 & 4 has been cancelled because of the political reasons as alleged in paragraph 12 of the writ petition. The document contained in annexure No.1 to the rejoinder affidavit is an extract of seniority list of the L.T. Grade Teacher of female cadre. The said complete list has been placed before this court by Sri Ashok Khare, Senior Advocate. From the perusal of the said list, it is crystal clear that the opposite party No. 3 belongs to female cadre. Further, from the perusal of annexure No. C.A.-8 to the counter affidavit which is the list of L.T. Grade Teacher of female cadre, it is clear that the name of opposite party No. 4 figures at Sl. No. 63. Accordingly, there is no doubt even with regard to the status of opposite party No. 4 for being in female cadre.

5. In paragraph-12 of the writ petition vague allegations have been alleged by the petitioner against opposite parties 3 & 4 that they belong to the political party and they have some political clout and they exercised political pressure on the Joint Director of Education. Learned counsel for the petitioner failed to appreciate that which political party opposites parties 3 & 4 belongs to and how and in which manner they have pressurized the Joint Director of Education. Further, the Joint Director of Education Mr. Avadhesh Chand is not party to the writ petition. It may be further recalled that the petitioner has already challenged the other of cancellation in writ petition No. 4799/2002 and after considering the matter on merit, no interference was shown by this Court.

6. I am of the considered opinion that in backdrop of catena of judgements of the apex court, cancellation of transfer order can be interfered only on two counts; firstly, violation of law, secondly allegation of malafide. There is no foundation in the writ petition with regard to violation of law except the ground of cadre, which has already been decided herein above. As far as allegations of malafides are concerned, vague allegations have been raised, which too the petitioner counsel failed to substantiate.

7. With regard to the apprehensions, no writ can be issued on the basis of apprehensions as alleged on behalf of the petitioner. Lastly, the allegation regarding non consideration of the complaints of the petitioner is concerned, it appears that all the documents, produced by the petitioner and the opposite parties 3 & 4 were taken into

consideration. If the petitioner has any other complaint, it would be open for him to bring it into the knowledge of the Director of the Education for redressal in the public interest, particularly in the interest of students.

8. In light of above, no interference is warranted under Article-226 of the Constitution of India.

9. The writ petitioner is dismissed.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 97 of 1987

Bal Mukund Prasad and others
...Revisionists
Versus
Mathura Prasad ...Respondent

Counsel for the Petitioner:
Sri Tarun Verma

Counsel for the Respondents:
Sri K.C. Srivastava

Code of Civil Procedure – Section 115 – appeal filed without vakalatnama – court below simply allowed 7 days time to remove the irregularity – held – committed no illegalities – rather than has done substantial justice instead of denoy of technicalities..

Held – para 12 and 13

In my opinion the court below has committed no irregularity. The court should not decide the cases on technalites but decide the case on merits and do substantial justice. I am fortified by the judgement of the The Hon'ble Supreme Courtin this regard in Re-AIR 1956 SC-140 Pratap Singh Vs. Sri Krishna Gupta.

In view of the above position of law this revision has no force and it has been filed on hyper technicality and requires no interference by this Court under Section 115 of the Code of Civil Procedure as the issue decided neither affects the jurisdiction of the Court below nor the court below has committed any material irregularity.

Case Law Discussed:
1994 AWR 217
1972 ALJ 9
AIR 1966 SC 1119
AIR 1956 SC 140 Relieded

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the parties and perused the record.

2. This revision is directed against the judgment and order dated 05.12.1986 passed by the Civil Judge-I, Gorakhpur in suit no. 64 of 1985 Mathura Prasad Vs. Smt. Rati Devi and others. By the aforesaid judgment and order dated 05.12.1986 the Civil Judge-I, Gorakhpur has decided issue no. 8 against the defendant-revisionist.

3. The brief facts giving rise to this revision are that initially the suit was filed in the Court of Munsif. The valuation of the suit was excessive; hence the plaint was taken back for filing the same before the Civil Judge. At the time of filing of the suit defendant Mathura Prasad was aged about 19 years and during the pendency of the suit he has attained the majority. In this regard an amendment application was moved on 31st March, 1980. An objection was raised that after attaining the majority the plaint should not be signed by his guardian while

presenting the plaint before the Court of Civil Judge. It is alleged that since the defendant has not signed the plaint the suit has become illegal.

4. The findings of the trail Court are assailed on the ground that the trail Court has acted illegally in deciding issue no. 8 in favour of the plaintiff and has exercised his jurisdiction with material irregularity by holding that lack of proper verification and signing of pleading is merely a mistake and can be subsequently rectified.

5. It has been submitted by the respondents that the decision on issue no. 8 does not come within the ambit of expression 'any case which has been decided' and as such, the revision is not maintainable against the order deciding an issue.

6. It is not in dispute that the suit was filed by the defendant Mathura Prasad, the minor and it was signed by his guardian and the same was maintainable and was not defective when it was filed at the relevant time.

7. In the impugned order the Civil Judge has held that after attaining the majority defendant Mathura Prasad has committed irregularity by not signing the plaint and this irregularity can be rectified in law.

8. In **Kanhaiya Lal Vs. Panchyati Slahara (Akhara) 1994 AWR 217**, it was held that the act of defective presentation did not amount to any illegality and that it was a mere irregularity. It was held that in such circumstances opportunity should be offered to the applicant to have filed a Vakalatnamd to remove the defect in presentation of the appeal.

9. In **State Vs Raja Singh and others, 1972 , A.L.J. page-9 (Revenue side)** it has been held that:

"Under Order III, Rule 4 C.P.C. no pleader can act for any person unless he is appointed for the purpose by a document in writing signed by such person or by his recognized agent or by some other person duly authorized to make such appointment. This Rule requires a Vakalatnama and for Government pleader Order XXVII. Rule 9 prescribes an alternative in the shape of a memo of appearance signed by him.

Where the D.G.C. filed an appeal on behalf of the State Government but did not file his Vakalatnama or a memo of appearance, such defective presentation does not amount to any illegality. The Court should afford an opportunity to file a memo of appearance as soon as it becomes convinced of the defect."

10. In **AIR 1966 Shashtri Yasan Purush Das Ji Vs. Mool Das Pundar Das Vaish, page-1119 it has been held that**:

"In this case, the Vakalatnama had evidently been signed by respondent no. 1 in favour of the Government Pleader in time and so, the High Court was plainly right in allowing the Government Pleader to sign the memo of appeal and the Vakalatnama in order to remove the irregularity committed in the presentation of the appeal. We do not think that Mr. Desai is justified in contending that the High Court was in error in overruling the objection raised by the appellants before it

that the appeal preferred by respondent no. 1 was incompetent."

11. It is against this order dated 06.12.1986 the present revision has been filed by which the Court below has held that if the appeal has been filed without Vakalatnama it is only a mistake, which can be rectified and has granted 7 days' time to the plaintiff-opposite party Mathura Prasad to remove the aforesaid irregularity.

12. In my opinion, the Court below has committed no irregularity. The Court should not decide the cases on technicalities but decide the case on merits and do substantial justice. I am fortified by the judgment of the The Hon'ble Supreme Court in this regard in **Re-AIR 1956 SC-140 Pratap Singh Vs. Sri Krishna Gupta.**

13. In view of the above position of law this revision has no force and it has been filed on hyper technicality and requires no interference by this Court under Section 115 of the Code of Civil Procedure as the issue decided neither affects the jurisdiction of the Court below nor the court below has committed any material irregularity.

14. Therefore, the revision is dismissed.

15. Since the proceedings in O.S. No. 64 of 1985 are stayed since 1987, it is directed that the Court below may decide the suit expeditiously preferably within 6 months from the date of production of a certified copy of this order.

16. Let a copy of this judgment be sent to the Court below for restart of the hearing without any further dealy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 37210 of 1997

Smt. Sneh Sharma ...Petitioner
Versus
Regional Assistant Director of Education (Basic) , Agra and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Bhushan
Sri H.N. Pandey
Sri Ajay Dubey
Kamini Dubey
C.S.C.

Counsel for the Respondents:
Sri Pramod Kumar Sharma
S.C.

U.P. Junior High School (Payment of Salaries of Teachers and other employees) Act 1978-Section 18-Transfer of Assistant Teacher from one aided institution duly approved by the competent authority-can not be cancelled without affording opportunity, without any reason.

Held-Para 7.

A perusal of the order of cancellation of the transfer since does not disclose any reason nor it has been disclosed in the counter affidavit that any fraud or misrepresentation has been made either by the institution concerned or by the petitioner and there being no provision under rule 18 as argued by the learned counsel for the petitioner. I see that the order dated 01.11.1997 suffers from

manifest error of law and thus deserves to be set aside and is hereby set aside.

(Delivered by Hon'ble Anjani Kumar, J.)

1. The petitioner is working as Assistant Teacher in recognized senior Basic School, namely, Shri Narain Das Vidya Mandir, Rajpurajat, Mathura, which is a recognized institution within the meaning of U.P. Basis Education Act and is also governed by the provisions of U.P. Junior High Schools (Payment of Salaries of Teachers and other employees) Act 1978.

2. The facts giving rise to the filing of the present writ petition are that a vacancy of assistant teacher was advertised in Sant Sunder Das Junior High Schools, Bhairo, Belanganj, Agra, which is also a recognized institution within the meaning of U.P. Basic Education Act and U.P. Junior High Schools (Payment of Salaries of Teacher and other Employees) Act 1978 also applies to this institution.

3. Rule 18 of Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 provides for transfer of teachers from one recognized institution to another institution which is reproduced below:

"18. Transfer:- (1) A permanent Headmaster or assistant teacher of a recognized school may, on application in this behalf, be transferred to another recognized school in which he may be lawfully employed under these rules.

(2) Such application shall be given by the Headmaster or assistant teacher, as the case may be, to the District Basis Education Officer through the Manager of the School from which the teacher is sought.

(3) The Manager shall along with the application for transfer, forward copies of service-book and character roll of such Headmaster and assistant teacher, as the case may be, to the District Basic Education Officer.

(4) No transfer shall take effect unless it is agreed to by the managements of the concerned recognized schools and is approved under Clause (5).

(5) the Approval for the transfer of a Headmaster or assistant teacher of recognized school shall be accorded by –

(i) The District Basic Education Officer in case of transfer from one school to another school within the District;
(ii) The Regional Deputy Director of Education in case of transfer from one School to another School situated in different districts but within the same division;
(iii) Secretary of the Board, in case of transfer from one school to another school situated in different divisions."

4. The petitioner pursuant to the aforesaid rules applied for transfer as assistant teacher from Shri Narain Das Vidya Mander, Rajpurajat, Mathura to Sant Sunder Das Junior High Schools, Bhairo, Belanganj, Agra. The respondents by their order dated 05.10.1997 (Annexure – 5 to the writ petition) have accepted the request of the petitioner – Smt. Sneh Sharma and transferred her from Shri Narain Das Vidya Mandir, Rajpurajat, Mathura to Sant Sunder Das

Junior High Schools, Bahiro, Belanganj, Agra. Pursuant to the aforesaid order, approval was granted by the respondents. The petitioner joined at Sant Sunder Das Junior High School, Bhairo, Belanganj, Agra and started working as assistant teacher. The Regional Assistant Director of Education (Basic), Agra vide order dated 01.11.1997 cancelled the order of transfer of the petitioner from Shri Narain Das Vidya Mandir, Rajpurajat, Mathura to Sant Sunder Das Junior High School, Bahiro, Belanganj, Agra with immediate effect. It is this order which the petitioner has challenged by the means of the present writ petition.

5. Learned counsel for the petitioner has argued that before passing of the aforesaid order dated 01.11.1997, no opportunity was granted to the petitioner. The fact has been stated in paragraphs 17 and 18 of the writ petition which have not been denied by the respondents in their counter-affidavit. Learned counsel for the petitioner has further submitted that all the materials and relevant documents were produced before them for transfer from one district to another district but no reasons, whatsoever, has been stated in the impugned order.

6. Learned counsel for the respondents tried to justify the order dated 01.11.1997 and submitted that as it would be clear from the advertisement which was issued for direct recruitment the said post was reserved for Scheduled Caste and, therefore, the order of cancellation of the transfer of the petitioner is justified. Learned counsel for the respondents has conceded that the provisions of Rule 18 which is applicable in the present case of transfer of a teacher nowhere mentions that any provision of reservation will apply as the same according to the learned counsel for the petitioner is applicable only with regard to direct recruitment and since according to the learned counsel for the respondents the post was reserved for Scheduled Caste the cancellation of the petitioner's transfer was justified.

7. A perusal of the order of cancellation of the transfer since does not disclose any reason nor it has been disclosed in the counter-affidavit that any fraud or misrepresentation has been made either by the institution concerned or by the petitioner and there being no provision under Rule 18 as argued by the learned counsel for the petitioner, I see that the order dated 01.11.1997 suffers from manifest error of law and thus deserves to be set aside and is hereby set aside.

8. In view of what has been stated above, the writ petition deserves to be allowed and is, hereby, allowed. The order dated 01.11.1997 is set aside. The respondents are restrained from interfering with the petitioner's functioning as assistant teacher in Sant Sunder Das Junior High Schools, Bhairo, Belanganj, Agra. Since the impugned order has been quashed, the consequential order dated 04.11.1997 (Annexure – 9) to the writ petition) also deserves to be quashed and is hereby quashed and the petitioner is entitled for payment of salary in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 26, 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Central Excise Reference No. 11 of 2001

M/s Flex Engineering Limited, Noida
...Applicant
Versus
Commissioner of Central Excise, Meerut
...Respondents

Counsel for the Appellant:
Sri A.P. Mathur

Counsel for the Respondents:
Sri S.P. Kesharwani

Centre Excise Act 1944 2 (f) – Manufacture – Plastic film/poly paper – user for Trail/Demonstration – can not be treated as manufacture – termed as imput.

Held- para 18

In this view of the matter, and having regard to the scope of Rule 57-A of the Act, we are unable to accept the contention of the applicant that materials used for testing the fully finished machines would also be the materials used in or the relation to them manufacture of the final product namely, the extrusion machine. IN the instant case, we find that Form Fill and Seal Machineies used for testing its performance. Testing performance is not a process of manufacture and, therefore, flexible plastic films used for testing the performance of the machine cannot be termed as 'inputs' for the purpose of allowing MODVAT credit of duty paid on flexible plastic films.

Case Law Discussed:
1990 (80) ELT (Tribunal) 475
2000 (124) ECT 267
1996 (88) ELT 273
2000 (20) ELT 105
1989 (43) ELT 201 (SC)
1989 (40) ELT280 (SC)
1989 SCC (1) 602
1977 (I) ELT (J-199)
1989 (43) ELT 214
1965 STC 563

(Delivered by Hon'ble S.K. Sen, C.J.)

1. Brief facts of the case, inter alia, are that the applicant – M/s Flex Engineering Limited manufactures packaging machines of various types classifiable under Chapter 84 of the Central Excise Tariff. It is the case of the applicant that it was availing the benefit of MODVAT credit on laminated plastic films and poly papers. Show cause notices were issued to applicant with regard to denying the benefit on the above inputs on the ground that they are used for the purpose of testing of their final product 'packaging machines' and is not an input as defined under Rule 52-A of the Central Excise Rules. The adjudicating authority denied the benefit of MODVAT credit. The applicant preferred an appeal, which too was rejected. The applicant filed appeals before the Customs, Excise and Gold (Control) Appellate Tribunal, Following the earlier order in the case of the same applicant, the Tribunal, on 17.04.1998, upheld the order passed by the Commissioner (Appeals). In the meantime, in regard to the earlier order court, on 01.07.1997, had directed the Tribunal to refer questions of law to this court for opinion. Accordingly, the following questions of law have been referred to this Court for opinion:-

1. "Whether, in the circumstances of the present case, facts of which are not in dispute, duties paid on material, namely,

plastic films/poly paper used for testing machines for forming commercial/ technical opinion as to their marketability/excistability would be eligible to be taken as credits under rule 57-A read with relevant notification?"

2. Whether such use of material in testing in view of the purposes mentioned above, could be said to be 'use in the manufacture of' or use in relation to the manufacture of the final products viz., Machines as assembled?"

2. Heard Sri A.P. Mather, learned counsel for the applicant and Sri S.P. Kesharwani, learned Standing Counsel for the Respondent. Both the parties have also submitted their written note of submissions. We have carefully gone through the entire documents, placed before us, including the written note of submissions.

3. It has been contended by Mr. Mathur, learned counsel for the applicant that there are not testing machines and the laminated plastic films and poly papers are not used in any testing machines . On the other hand, laminated Plastic Films and Poly Papers are used by the applicant in the process of manufacture of filling and sealing machines, which is also evident from order No. Ref/42/96-NB passed by the Tribunal on the reference application filed by the applicant.

4. The learned counsel has drawn our attention to the relevant portion of the reference application, which is quoted herein below:

"This is a reference application under Section 35 G(1) of the Central Excise and Salt Act 1944 arising from the order of this Tribunal dated 24.11.1995. The question arose in this case whether flexible plastic films/poly paper can be regarded as an input for the manufacture of filling and sealing machines (F.S. Machines) and also whether the cost of flexible plastic films/poly paper was eligible for MODVAT Credit as an input."

He has further referred to final order dated 24.11.1995 passed by the Tribunal on the appeal of the applicant, which is as follows:

"Heard the submissions. On careful consideration of the submissions made before us we find that the question in short compass is whether MODVAT Credit under rule 57A of theCentral Excise Rules, 1944, was admissible on flexible plastic films used in testing the performance of the form fill and sealing machines."

5. Contention of the learned counsel for the applicant is that there are no test machines and the flexible plastic films or poly papers are used directly for testing the form fill and sealing machines in the process of manufacturing the same by the applicant. Accordingly, he has submitted that the applicant is fully eligible to avail MODVAT Credit on flexible plastic films/poly paper used as inputs in testing the form fill and sealing machines in the process of the manufacturing the same in terms of Rule 57A of the Central Excise Rules, 1944.

Rule 57 A, at the relevant time, provided as under:

"Rule 57A. Applicability –(1) The provisions of this section shall apply to

such finished excisable goods (hereinafter referred to as the "final products") as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as the "inputs") and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the Notification:

6. Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

Explanation – (For the purpose of this rule, "inputs" includes –

(a) inputs which were manufactured and used within the factory or production in or, in relation to the manufacture of final products, and

(b) Paints and packaging materials. (But does not include-)

(i) Machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing any goods or for bringing about any change in any substance in or in relation to the manufacture of the final produces;

(ii) Packaging materials in respect of which any exemption to the extent of the duty of excisable payment on the value of the packaging materials in being availed of for packaging any final products;

(iii) Packaging materials the cost of which is not included or had not been included during the preceding financial year in the assessable value of the final products under section 4 of the act;

(iv) Cylinders for packing gases;

(v) Plywood for tea chests).

7. Mr. Mathur, learned counsel has further submitted that the provisions of the said rule shall apply to such finished excisable goods (hereinafter referred to as the final products) as the Central Government may, by notification in the official gazette, specify in this behalf, for the purpose of allowing credit or any duty of excise or the additional duty under Section 33 of the Customs Tariff Act 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the specified duty), paid on the goods used in or in relation to the manufacture of the said final products – whether directly or indirectly and whether contained in the final product or not – (hereinafter referred to as the inputs) and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act,, as may be specified in the said notification, subject to the provisions of this Section and the conditions and restrictions that may be specified in the notification.

8. It has been further submitted by the learned counsel for the applicant that

undoubtedly Laminated Plastic Films/ Poly Paper and packaging machines are specified input and final products under Rule 57A and hence MODVAT Credit should be available to the applicant. He has also referred to section 2(f) of the Central Excise Act 1944 and has submitted that "manufacture" includes any process-

(i) Incidental or ancillary to the completion of a manufacture product; and

(ii) Which is specified in relation to any goods in this section or chapter notes of the schedule to the Central Excise Tariff Act 1985.

9. It is the contention of the learned counsel for the applicant that the applicant is engaged in the manufacture of Automatic Form Fill and Sealing Machines, which are used by the purchasers for packing and sealing their produces in plastic pouches. Before the machine is ready to be marketed and can be said to be finally manufactured, the applicant has to use Laminated Plastic Films/Poly Paper for the purpose of testing, turning and adjusting various parts of the machine so as to ensure that they are fit and ready for packing and sealing the required size of pouches. It is the case of the applicant that the purchasers place their orders to the applicant mentioning the specifications of the pouches, which they require for packing and sealing their products. Unless and until tuning and adjustment is done by the applicant with the help of Laminated Plastic Films/Poly Paper, the machine cannot be tuned and adjusted in accordance with the purchase order and the same will not be purchased by the purchaser. In other words, without tuning and adjustment to make the machine in conformity with the specifications of the purchaser, it cannot be said that the machine has been manufactured. Manufacturing is not complete unless the tuning and adjustment has been done as per specification given by the purchaser.

10. It has further been submitted by the learned counsel that under the Central Excise Act, it is nowhere defined that at what stage various products, covered by the Central Excise Tariff Act, 1985, will be termed as completely manufactured. In the applicant's case the machines are completely manufactured only after the same are tested. The machines are tailor made and each machine is to import a distinct and different result. If the results are not as per the requirement of the customer, the machine loses its marketability because it is of no use to any other customer. The Laminated Plastic films are used to find out as to whether the result desired to be obtained is available from the machine so made. Unless this is done the process of manufacture is not complete. The machines manufactured by the applicant is entered in the RG1 Register (a Register prescribed for entering fully manufactured goods) only after the same are tested by the applicant as the process of such testing is an essential ingredient of manufacture. In the instant case, admittedly, the goods are manufactured on the specific order and design of the customer with specified test mandatory before delivery of goods. Under the circumstances, the manufacture can be deemed to be complete after the qualitative and other specification tests are undergone. The tests conducted by the applicant are the parts of the process of

manufacture and without the same the manufacture is not complete.

11. In support of his contention learned counsel has relied upon the following decisions:

1. 1990(50) E.L.T. 475 (Tribunal), *D.S. Screen Pvt Ltd. Versus Collector of C.Ex.*
2. 2000 (124) E.L.T. 267 (Tribunal), *Prayas Castings Ltd. Vs. Collector of Central Excise, Baroda.*
3. 1989 (4) E.L.T. 201 (S.C.) *Collector of C.Ex. versus Eastend Paper Industries Ltd.*
4. 1996 (88) E.L.T. 273 (Tribunal) *Maschinenfabrik Polygraph (I) Ltd. Versus Commissioner of C.Ex., Pune.*
5. 1996 (83) E.L.T. 117 (Tribunal), *Walchanager Inds. Ltd. Versus collector of C.Ex., Pune/Bombay.*
6. 2000 (120) E.L.T. 105 (Tribunal), *Commissioner of C.Ex. Surat vs. Kolsite Maschine Fabrik Ltd.*

12. It is also the contention of the learned counsel that the expression "***in or in relation to the manufacture"*** used in Rule 57A is a term of extremely wide import and it does not admit of any exclusion on the basis of the stage of production or whether the inputs have been used interior or posterior to manufacture. If the use of inputs has nexus to the manufacture, that would suffice. However, in the instant case, the applicant has used the inputs, in question, in the course of manufacture itself for the purposes of tuning, adjusting and finishing the machine so as to make it in conformity with specifications mentioned in the purchase order. The inputs i.e. Laminated Plastic Films/Poly paper are used by the applicant in or in relation to the manufacture of the machines. According to the learned counsel there is no scope for doubt when the raw materials/inputs are actually used in the main stream of manufacture of final products, that is, actually used in the physical or chemical process of manufacture. It is certainly an input used in the manufacture of final products. Doubt may arise only in regard to use of some articles not in the main stream of the manufacturing process but in another scheme of manufacturing something, which is to be used for rendering final product marketable or used otherwise in assisting the process of manufacure. Such doubt is set at rest by use of the words "used in relation to the manufacture". The use of Laminated Plastic films/Poly Paper is for rendering the final products marketable and without the use of the same machines cannot be called as fully manufactured.

13. Learned counsel has further submitted that in the instant case the goods manufactured by the petitioners are, admittedly, tailor made according to specific order and design of the customer with specified test mandatory before delivery of goods. Demonstration of goods is always conducted on the goods, which have been cleared from the factory. In the instant case, the goods are not cleared from the factory and the rests are conducted in the process of manufacture of the said goods by the applicant in the factory itself. No adverse inference can be drawn against the applicant even if the tests are conducted in the presence of the representative of the customers. Accordingly, learned counsel claims that benefit of MODVAT Credit should have been allowed to the applicant in the instant case and there is no scope for denial of the same.

14. It has been submitted on behalf of the respondent that finding of the Tribunal is that fill and seal machine is used for testing the performance. That being so, it is not a process of manufacture and, therefore, flexible plastic films used for testing the performance of the machine cannot be termed as inputs for the purpose of allowing MODVAT Credit of duty paid on flexible plastic films. It has also been mentioned on behalf of the respondent that the applicant has annexed purchase order, which appears at pages 100 and 101 of the paper book and under the column Inspection/trial the contractual obligation is written, which is reproduced below:

"***Inspection/Trail will be carried out at your works in the presence our Engineer before dispatch of equipment for the performance of the machine."***

15. In fact, it is contention of the learned counsel for the applicant that the purchase order and the condition as aforementioned have been relied upon by him and he urged that the plastic films/poly papers used for testing the performance amounts to process of manufacture and, therefore, is an input. Learned counsel for the respondent has, however, submitted before us that a bare perusal of the conditions clearly shows that the aforesaid argument is misconceived.

16. Learned counsel for the respondent has relied upon Section 2(f) of the Central Excise Act, 1944 which defines the term 'manufacture' and submitted that the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired Labour in the production or manufacture of excisable goods, but also a person, who engages in the production or manufacture, on his own account. Learned counsel for the respondent has also referred to Rule has submitted that the term 'input' includes (a) inputs, which were manufactured and used within the factory of production in or, in relation to manufacture of final products, and (b) paints and packaging materials. It is, therefore, implied from the aforesaid provision that only those goods, which are used within the factory in or, in relation to the manufacture of final products, can be regarded as "input". Thus the most important term requiring interpretation is the interpretation of the term "in or in relation to the manufacture". It has been contended by the learned counsel for the respondents that it is clear from the definition of the term "manufacture", as provided in Section 2 (f) of the Act that "manufacture" is a process to the completion of a manufactured product and in the instant case the same is complete in all respect and the machines so manufactured were final product and the plastic films/poly papers used for testing machine is after complete manufacturing of machine and unless the machine has been completely manufactured, no testing is possible. It is apparent that in fact the plastic films/poly papers used for testing the performance of machine is merely for the satisfaction as to its performance and there is no scope for considering the same to have been used in or in the materials used for the manufacture.

17. We have considered the submissions made by learned counsel for the parties and the decision cited by them. The use of laminated plastic films and

poly paper for filling and sealing machine, used for testing the performance of machine for inspection/trail in the presence of Engineer before dispatch of the equipments, cannot be termed as "inputs" for the purpose of allowing MODVAT Credit duty paid on flexible plastic films. Section 2(f) of the Central Excise Act, 1944 defines the term "Manufacture" and from this definition, it clearly implies that use of plastic film/poly paper for the purpose of inspection/trail or demonstration is not part of the manufacturing process. Learned counsel for the applicant, however, has relied upon the decision of the Supreme Court in the case of **Collector of Central Excise Vs. Eastend Paper Industries Ltd.** Reported in 1989 (43) E.L.T. 201 (S.C.) wherein it has held that since wrapping paper is marketed in packed or wrapped condition, the wrapping paper used in wrapping of paper is to be treated as raw material or component part for other variety of paper which is wrapped. Accordingly, it was held that wrapping paper, so consumed or utilized, would be entitled to exemption under Notification No. 18 A/83-C.E. In that view of the situation, wrapping paper should be treated as raw material. "Manufacture" in the sense it is used in the Excise law, was not complete until and unless wrapping was done. It is settled law that excise is a duty on manufacture. Manufacture is the process or activity, which brings into existence new, identifiable and distinct goods. Goods have been understood to be articles known as identifiable articles known in the market as goods and marketed or marketable in the market as such. This view finds support from the decisions of the Supreme Court in **Bhor Industries Ltd. Bombay Vs. Collector of Central Excise, Bombay –** 1989 (40) E.T.L. 280 (S.C.) – 1989 (1) SCC 602,; **South Bihar Sugar Mills Ltd. Etc. Vs. Union of India and ors.** 1978 (2) E.L.T. (J. 366) S.C.) – 1968 (3) SCR 21; **Union Bank of India Vs. Delhi Cloth and General Mills Ltd. –** 1977 (1) E.L.T. (J 199) (SC) = 1963 Supp. 1 SCR 586; **Union Carbide India Ltd. Vs. Union of India and Ors.** (1986 (24) E.L.T. 169) and *Civil Appeal No. 2215 (NA) of 1988* – **Collector of Central Excise, Baroda Vs. M.s Ambalal Sarabhai Enterprises** – 1989 (43) E.L.T. 214 (S.C.) judgment delivered on 10th August 1989. In the case of **Empire Industreis Ltd. And Ors. Vs. Union Bank of India and Ors** 1985 (2) E.L.T. 179 (S.C.), reported in paragraph 4 of the Judgment, the Supreme Court has explained the concept of "Process" in Excise Law. In view of the principle laid down therein and other relevant decisions, processes incidental or ancillary to wrapping are to be included in the process of manufacture, manufacture in the sense of bringing the goods into existence as these are known in the market as not complete until these are wrapped in wrapping paper. The Supreme Court in the case of **J.K. Cotton & Spinning & Weaving Mills Co. Ltd. Vs. Sales Tax Officer** reported in 1965 STC 563 (S.C.), while construing the expression 'in the manufacture or processing of goods for sale' in the context of Sales Tax Law, though the concept is different under the Excise Law, has held that manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process, the Supreme Court further emphasized, is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of

goods would be commercially inexpedient, articles required in that process, would fall within the expression 'in the manufacture of goods'. The Supreme Court further illustrating the position, observed that "for instance in the case of a cotton textile manufacturing concern, raw cotton undergoes various process before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendared and pressed. All these processes would be regarded as integrated process and included "in the manufacture" of cloth. It would be difficult to regard goods used only in the process of weaving cloth and not goods used in the anterior processes as goods used in the manufacture of cloth. To read the expression "in the manufacture" of cloth in that restricted sense would raise many anomalies. Raw Cotton and machinery for weaving cotton and even vehicles for transporting raw and finished goods would qualify under rule 13, but not spinning machinery, without which the business cannot be carried on". The judgment and decisions in the case of **Collector of Central Excise Vs. Jay Engineering Works Ltd.** Reported in 1989 (3) E.L.T. 169 (S.C.) may also be taken note of. In the aforesaid case before the Supreme Court, the respondent was a manufacturer of electric fans and brought into its factory nameplates under Tariff Item 68 of the erstwhile Central Excise Tariff. The nameplates were affixed to the fans before marketing them. The respondent claimed the benefit of proforma credit in terms of Notification No. 20-1/79 dated 4th June, 1979, which was for the purpose of relief on the duty of excise paid on goods falling under Tariff item 68, when these goods were used in the manufacture of other excisable goods. The said notification stated that in superssion of the Notification No. 178/77 of the Central Excise dated 18th June, 1979, all excisable goods on which duty of excise was leviable and in the manufacture of which any goods falling under Item No. 68 have been used, were exempted from so much of the duty of excise leviable thereon as was equivalent to the duty of excise already paid on the inputs. In that case, the question before the Tribunal was whether the nameplates could be considered as component part of the electric fan, so as to be eligible for proforma credit under the exemption notification. It was found by Tribunal that no electric fans could function without the nameplates, for actual marketing of the fans, the affixation of the nameplate was considered an essential requirement. To be able to be marketed or to be marketable, it appears to us, that it was an essential requirement to be goods, to be wrapped in paper. Anything required to make the goods marketable, must form part of the manufacture and any raw material or any materials used for the same would be component part for the end product. In the instant case, however, laminated plastic/poly paper did not form part of the manufacturing process nor became part of the package machine of various types sold in market. They were only used for the purpose of testing which could not form part of the manufacture. The applicability of MODVAT is covered by rule 57-A of the Central Excise Rules, according to which, credit of duty paid on goods used on or in relation to the manufacture of the final product, namely, the inputs, can be allowed for utilizing towards payment of duty on the final product. In this case before us, the admitted position is that the extrusion machines manufactured by the applicant,

after being fully manufactured, are tested by feeding them with plastic granules to see whether the machines so manufactured produce lay flat tubing without any defects. Therefore, the plastic granules are used after the final product, namely, the extrusion machine, manufactured by the applicant is fully finished. It is only to detect defects, if any, in the finished product.

18. In this view of the matter, and having regard to the scope of Rule 57-A of the Act, we are unable to accept the contention of the applicant that materials used for testing the fully finished machines would also be the materials used in or in relation to the manufacture of the final product, namely, the extrusion machine. In the instant case, we find that Form fill and Seal Machine is used for testing its performance. Testing performance is not a process of manufacture and, therefore, flexible plastic films used for testing the performance of the machine cannot be termed as "inputs" for the purpose of allowing MODVAT Credit of duty paid on flexible plastic films.

19. In the above facts and circumstances of the case, we are unable to accept the contention of the applicant. Accordingly, both the questions are answered in the negative, i.e. against the applicant and in favour of the respondents.

The reference stands disposed of accordingly.

REVISION JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 26TH , 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

I.T.R. No. 205 of 1983

The Additional Commissioner of Income Tax, Lucknow ...Applicant

Versus

Ram Prasad ...Respondent

Counsel for the Applicant:
Sri Prakash Krishna

Counsel for the Respondent:
Sri V.K. Rastogi

Income Tax Act 1961 – Section 40 (b) whether the interest paid to the Assessee can not be included in the hand of U.D.F. Firm ? held 'No'

Held – Para 14 & 15

It appears that the Supreme Court in the case of M/s Brij Mohan Das Laxman Das (Supra) held that even for the period anterior to April 1, 1985 any interest paid to a partner, who is a partner representing his Hindu undivided family on the deposit of his personal/individual funds, does not fall within the mischief of clause (b) of Section 40 of the Act and agreed with the view of Rajasthan High Court Explanation 2, in the context of clause (b) of Section 40, is declaratory in nature.

In the case of M/s Suwala Anandilal Jain Vs. Commissioner of Income Tax, Bihar, Ranchi reported in AIR 1997 SC 1278, the Supreme Court followed the same principle of law laid down earlier in the case of M/s Brij Mohan Das Laxman Das (Supra).

Case law discussed:
1958 I.T.R. 312

1969 I.T.R. 890
J.T. 1997 (i) SC-115
(1984) 174 I.T.R. 346
(1977) 106 I.T.R. 292

(Delivered by Hon'ble S.K. Sen, C.J.)

1. We have heard Sri Prakash Krishna, learned counsel for the Revenue and Sri V.K. Rastogi, learned counsel for the Respondent.

2. Brief facts of the reference which relate to assessment years 1969-1970 and 1970-1971, inter alia, are that M/S Bhagwati Prasad Ram Sarup was a Hindu undivided family, which was assessed as such for and up to the assessment year 1952-1953. There was a partition in the joint family on 9.11.1950 and a firm was formed w.e.f. the assessment year 1952-1953. The firm has been assessed to tax from the said assessment year up to date. S/Sri Ram Sarup and Ram Prasad, who were real brothers, were the two partners of the firm having equal shares in the firm as constituted, on the partition of the family. Both S/Shri Ram Prasad and Ram Sarup were assessed to Income tax for their assessment year 1956-1957. For and up to the assessment year 1968-1969 they were assessed as individuals and w.e.f. the year 1969-70 they were assessed as an HUF. However, the income on which they were assessed arose out of the assets, which were received, on the partition of the joint family and the assessments for all the years should have been made in the assessments of HUF. In connection with the assessment year 1964-65 the Income tax Officer received information that the partners had accounts in banks, which were not incorporated in the books of the firm. So far as Shri Ram Prasad is concerned he came up with a disclosure petition dated 9.8.1965 disclosing an income of Rs.76,062/-, which had escaped assessment and requested that the same be assessed for the assessment years 1956-1957 to 1964-65. As per that disclosure he had Rs.43,919.99 at the end of the financial year 1953-54 which was outside the account books of the firm. Shri Ram Sarup did not make any disclosure petition. In his case, it was found that there were deposits in the bank in 1954 to the extent of Rs.34,200/- as under:

14.7.1954	Rs.10,200/-
29.12.1954	Rs.12,000/-
29.12.1954	Rs.12,000/-
	Rs.34,200/-

3. Thereafter he was found to have made further deposits of Rs.20,000/- and Rs.10,000/- in the subsequent years. The assessments of S/Shri Ram Prasad and Ram Sarup were reopened for the assessment years 1956-57 to 1963-64 under section 147 to assess the undisclosed income represented by the bank deposits and interest thereon. The position of unexplained investments surrendered for assessment in the case of Ram Prasad was that Rs.31,000/- were surrendered in the assessment year 1956-57 and Rs.800/- in the assessment year 1960-61 total Rs.39,000/-. The position in the case of Ram sarup was that he surrendered Rs.10,000/- in 1963-64 and Rs.20,000/- in the assessment year 1964-65 total Rs. 30,000/-.

4. In the accounts for the previous year relevant to the assessment year 1966-67 and subsequent years they opened another account in the books of the firm, in addition to their original account. They treated their original account as their capital account (in which only the profit was credited) and the accounts

subsequently opened were treated as loan accounts (in which interest was charged from the firm). However, the entire income by way of profit and interest from the firm was assessed in the hands of the two partners. Shri Ram Prasad in his disclosure petition dated 9.8.1965 stated that he was a partner in the firm M/s Bhagwati Prasad Ram Sarup and that at the time of his marriage he had received substantial amounts from far and near relations in the shape of silver coins, which were kept with his wife and later on sold for Rs.40,000/-. He stated that he believed that this Rs.40,000/- was his wife's exclusive property. He further stated that with this amount he purchased and sold bidis and the money earned from bidi business was kept with his wife. He added that although he had a bona fide belief that this money was his wife's exclusive property but since he had no evidence to prove his claim, he was offering a sum of Rs.76,062/- for assessment. This amount was offered for assessment in his own assessments in which the income from the firm (which was undoubtedly the joint family income) was being assessed. This income was offered for being assessed as joint family income. Similarly Shri Ram Prasad surrendered the deposits for assessment alongwith his share income from the firm, which was the income of the joint family. Both the partners also got the interest on these bank deposits assessed alongwith the income of the joint family. In fact, Shri Ram Swarup in his letter-dated 16.1.1965 (filed during the course of the assessment for 1964-65) had stated that the money deposited in the banks represented the savings of his family. Each of the two accounts of both the partners in the books of the firm M/s Bhagwati Prasad Ram Swarup were in their own names. For the assessment year 1970-71, it was claimed that they were partners in the firm representing their respective HUFs. This contention of the assessee was accepted by the Income tax Officer. The assesseee further claimed that the partners had two accounts, one in the name of HUF and the other in the name of individuals, and that the interest paid to the two partners on their individual accounts could not be disallowed while computing the income of the firm. The Income tax Officer noticed that the assessee paid interest to the two partners for the first time in the assessment year 1970-71 amounting to Rs.4,567/- in the account of the partner Shri Ram Sarup and Rs.8,123/- in the account of the partner Shri Ram Prasad. The Income tax Officer further noticed that the two partners showed all the assets as usual in their wealth tax returns for the assessment year 1969-70 and that it was for the first time in the assessment year 1970-71 that an attempt was made to describe a part of the investment in the firm as individual. Considering the past history of the assessee and the fact that the two partners were showing these assets in the wealth tax returns and also the fact that no distinction was drawn at any time to indicate that one account represented the account of an individual and the other account that of a joint family, the Income tax Officer rejected the assessee's claim. The Income tax Officer further held that interest paid to the two partners had to be added back under clause (b) of Section 40 of the Income tax Act, 1961 while computing the income of the firm.

5. In appeal before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner rejected the

claim on the ground that simply because the assessments of the partners were made for some time in the status of individuals, the assessee could not claim that interest was their indivudual income. On further appeal before the appellate Tribunal, the assessee took the stand that these two partners were carrying on some indivudual business and that they made disclosure petitions, which were not accepted, and the nature and source of the deposits made by them were also not explained. Accepting the above contention of the assessee, the Tribunal observed that this showed that they were having some other undisclosed sources of income, but that certainly it was not from the firm; that there could be no presumption that in a joint Hindu Family the business carried on by a coparcener belonged to the family and that the coparceners could carry on their individual business as well. The Tribunal further observed that there could be no presumption that the other business, which these persons were carrying on, also belonged to the family. The tribunal further observed that it was from the assessment year 1966-67 that these two partners opened their individual account in the books of the firm and interest was being paid on that account; that in the assessment year 1968-69, though interest was not paid, but that it did not mean that interest was not payable on those accounts. Observing that a karta is a separate entity while the individual is distinct from it, the Tribunal held that keeping in view the two capacities the payment of interest on the individual account could not be disallowed. The Tribunal, therefore, held that the amount of interest paid in the individual accounts of the two partners, ie. Rs.4,567/- to Shri Ram Swarup and Rs.8,123/- to Shri Ram Prasad were allowable deductions. In the appeals filed by Shri Ram Swarup HUF for the assessment year 1970-71 and by Shri Ram Prasad HUF for the assessment years 1969-1970 and 1970-71 the Tribunal held that the interest income could not be included in the assessments of their respective HUFs.

6. Revenue, being aggrieved, moved reference application before, the Tribunal, which was not allowed. Thereafter, being aggrieved, reference application was moved in this Court, where upon following questions of law were framed :

1. Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in holding that the interest paid to the assessee was not includible in the hands of the firm under section 40 (b) of the I.T. Act, 1961?

2. whether on the facts and in the circumstances of the case there was material before the Tribunal to hold that the two partners were carrying on some individual business and having some other undisclosed sources of income ?

7. We have considered the submission of learned counsel for the parties. The amounts of interest were Rs.4,507/- in the account of Shri Ram Swarup and Rs.8,123/- in the account of Sri Ram Prasad. It was noted by Income Tax Officer that the assessee paid interest to the partners for the first time in the assessment year 1970-71. In the immediate preceding assessment year the status of the partners had been taken as that of Hindu undivided family. For that year both the partners showed all their assets as usual in their wealth tax returns. An attempt was made by the assessee to

describe a part of the investments made in the firm as being on individual account. The Income tax Officer, relying on Section 40, (b) of the Income tax Act, 1961 (hereinafter referred to as the "Act") held that the allowance of payment by way of interest, bonus, commission or remuneration made by a firm to any of its partners is not permissible and this is an absolute prohibition. In the result, the same was added back in the income of the assessee. It appears that up to the assessment year 1951-52 it was done in the status of Hindu undivided family and thereafter a partition took place in the family and the firm was constituted. In the assessment year 1952-53 the partition was accepted. It was clearly recorded in the findings of the Income tax Appellate Tribunal referring to the final order of the respective Appellate Assistant Commissioner of Income tax.

8. It was submitted on behalf of the Revenue that no evidence was adduced at that time that the partner had any individual business. On the basis of this fact, the Tribunal held that no such inference could be drawn that it was Hindu undivided family account as no withdrawals were made except for personal expenses and as such the said view of Appellate Assistant Commissioner of Income tax was not accepted. Referring to the Income tax Officer's order in the assessment year 1968-69 in the case of Shri Ram Prasad, it was stated that no interest was charged on individual accounts, which shows that this account was treated as belonging to the Hindu undivided family. According to the departmental representative, it was an important statement and was not rebutted by any concrete evidence and as such this account also belongs to the Hindu undivided family and the interest has been rightly disallowed. In fact, whatever payment was made by way of interest or salary would be a payment made to a partner and cannot be allowed under section 40 (b) of the Act. In this connection, judgment and decisions in the case of ***A.S.K. Rathnaswamy Nadar Firm Vs. C.I.T.*** Reported in 1958 ITR 312 and ***Girdharilal Ghasiram Vs. C.I.T.*** Reported in 1969 ITR 890 may be taken note of. In the case of ***A.S.K. Rathnaswamy Nadar Firm Vs. C.I.T.*** (Supra) the Division Bench of Madras High Court held that Section 10 (4)(b) enacts an absolute prohibition, (which corresponds to Section 40 (b) of the Income Tax Act, 1961). It does not limit the operation of the Act to remuneration, paid to a partner as such, but includes remuneration or salary paid to a partner in any capacity. The assessee firm, which paid a salary to one of its partners, claimed that the salary should be deducted in computing its income. It contended that though the recipient of the salary represented a joint family as the manager thereof, in the partnership he worked in his individual capacity for the firm for which remuneration was paid and, therefore, the provisions of section 10 (4) (b) would not apply to the payment. In the aforesaid dicision, it was also held that the case was governed by Section 10 (4) (b) and the salary paid was rightly added to the profits and gains of the firm.

9. In ***Girdharilal Ghasiram Vs. C.I.T.*** (Supra) the Division Bench of Calcutta High Court held that the Karta of a Hindu undivided family, receiving a salary for services rendered to a firm, became a partner of the firm and the firm continued to pay a salary to him as before. It was also held in the said decision that in

whichever capacity the karta was appointed as a partner of the assessee firm, the remuneration paid to him could not be claimed as a deduction, as he was serving the firm for remuneration in his capacity as partner.

In the aforesaid decision, it was also held as thus;

"It is now well-settled that a Hindu undivided family cannot, as such, enter into a contract of partnership with another person or persons. The karta of the Hindu undivided family, however, may and frequently does enter into partnership with outsiders on behalf and for the benefit of his joint family. But when he does so, the other members of the family do not, vis-à-vis the outsiders, become partners in the firm. They cannot interfere in the management of the firm or claim any account of the partnership business or exercise any of the rights of partners. So far as outsiders are concerned, it is the karta, who alone is, and is in law recognized, as the partner. Whether in entering into partnership with outsiders the karta acted in his individual capacity and for his own benefit, or he did so as representing his joint family and its benefit, is a question of fact. In the instant case, there is no dispute that Prahladrai entered into the partnership representing his joint family and for the benefit of that family. But although that is so, the relationship between the partnership and Prahladrai was that of a individual appointed as a partner. The partnership was not in any way concerned with the fiduciary relationship in which Prahladrai stood with the family, which he represented; Thus, the profit earned by Prahladrai as a partner of the assessee-firm may become the income of the family which he represented in the partnership but that would not entitle the partnership to claim remuneration paid to the partner for services rendered as business expenditure under section 10 (2) (xv) of the Indian Income-tax Act. In the view that we take, we find considerable support from the observations of the Supreme Court in ***Commissioner of Income tax Vs. Kalu Babu Lal Chand.***

Since we are of the opinion that, in whichever capacity appointed as a partner of the assessee-firm, the remuneration paid to Prahladrai could not be claimed as deduction, because he was serving the firm for remuneration in his capacity as partner, we answer the question referred to this court in the affirmative and in favour of the revenue.

10. On the basis of law, as existed prior to the Explanations were added by the Taxation Laws (Amendment) Act, 1984, the settled view was that Section 40 (b) of the Act absolutely prohibits the allowances of any payment by way of interest, bonus, commission or remuneration made by a firm to any of its partners. The said view, however, has under gone a sea change in the case of **M/s. Brij Mohan Das Laxman Das Vs. Commissioner of Income-Tax, Amritsar** reported in JT 1997 (1) S.C. 115. The Supreme Court upheld the view taken by **Rajasthan High Court** in the case of ***Gajanand Poonam Chand Vs. Commissioner of Income Tax*** (1984) 174 I.T.R. 346).

11. The question that arose before the Supreme Court in the aforesaid decision was as to whether interest paid to a partner on the amounts deposited by him in his individual capacity is hit by

clause (b) where the partner is a partner not in his individual capacity but as representative of a Hindu undivided family. The question, which had been referred by the Tribunal the High Court for its opinion, reads as follows:

"Whether the Tribunal was correct in allowing the assessee's claim for interest paid on the credit balance in the individual account of Sri Rajendra Kumar"

12. Section 40 (b) of the Act and Explanations, which are relevant for the purpose of determination of present contraoversy read as under :

"40. Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head 'Profit and gains of business or profession',-

(b) in the case of any firm, any payment of interest, salary, bonus, commission or remuneration made by the firm to any partner of the firm.

Explanation 1: Where interest is paid by a firm to any partner of the firm who had also paid interest to the firm, the amount of interest to be disallowed under this clause shall be limited to the amount by which the payment of interest by the firm to the partner exceeds the payment of interest by the partner to the firm.

Explanation 2: Where an individual is a partner in a firm on behalf, or for the benefit, of any other person (such partner and the other person being hereinafter referred to as 'partner in a representavive capacity' and 'person so represented' respectively),-

(i) interest paid by the firm to such individual or by such individual to the firm otherwise than as partner in a representative capacity, shall not be taken into account for the purposes of this clause:

(ii) interest paid by the firm to such individual or by such individual to the firm as partner in a representative capacity and interest paid by the firm to the person so represented or by the person so represented to the firm, shall be taken into account for the purposes of this clause.'

Explanation 3: Where an individual is a partner in a firm otherwise than as partner in a representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of this clause, if such interest is received by him on behalf, or for the benefit, of any other person."

Explanations 1, 2, & 3 to Section 40 (b) of the Act, were added by the Taxation Laws (Amendment) Act, 1984 with effect from April 1, 1985. Explanation 2 expressly provides that where an indivudual is a partner in a firm on behalf of or for the benefit of any other person, any interest paid by the firm to such individual otherwise than as partner in representative capacity, shall not be taken into account for the purpose of clause (b).

13. The question, however, came up before the Supreme Court if the benefit of the said Explanations could apply retrospectively and if the benefit could be

available prior to April 1, 1985. The Supreme Court in this context held that Taxation Laws (Amendment) Act, which introduced the said Explanation, does not say that the said Explanation shall have effect retrospectively. However, the question is whether the said Explanation is merely declaratory and clarificatory in nature, in which case it will govern the previous assessment years as well or whether it is a substantial provision having effect only prospectively. The Supreme Court while dealing with the said basic principle of partnership law in paragraphs 6, 7, & 8 of the said judgment which are set out as under, held thus:

*"6. In **Gajanand Poonam Chand V. Commissioner of Income Tax** {(1984) 174 I.T.R. 346}, the Rajasthan High Court has taken the view that the said Explanation is merely declaratory in nature and that, therefore, even for the assessment years prior to April 1, 1985, the position of law should be understood to be the same. In support of this proposition, the High Court relied upon the fact that ordinarily the purpose of an Explanation is to clarify that which is already enacted and not to introduce something new. The High Court opined that the Explanation was inserted by the Parliament with a view to settle the controversy as to the meaning and effect of the said clause among the several High Courts and that the Explanation puts a seal of approval on the view taken by the majority of the High Courts. The High Court also referred to the definition of "person" in clause (31) of Section 2. It pointed out that the definition shows clearly that an individual; a H.U.F. and a firm are distinct persons/entities for the purpose of the Income Tax Act. The High Court, therefore, concluded that since an individual and a H.U.F. are two distinct entities for the purpose of the Act, clause (b) of Section 40 has no application where the interest is paid to the partner on deposits made by him with the firm in his individual capacity where such person is a partner not in his individual capacity but as representing a H.U.F. Sri G.C.Sharma, learned counsel for the appellant-assessee, strongly relies upon this decision and commends it for our acceptance. Learned counsel points out that even before the enctment of Taxation Laws (Amendment) Act, 1984 (which inserted Explanation 2 aforesaid), a majority of the High Courts in the country had taken the same view though a few High Courts have no doubt taken a contrary view. Looked at from any angle, Sri Sharma says, the issue must be answered in favour of the assessee.*

*7. Clause (b) of Section 40 is based upon and is recognition of the basic nature of relationship between a firm and its partner. In **Commissioner of Income Tax vs Chidambaram Pillai** (1977) 106 I.T.R. 292) this Court observed :*

"Here the first thing that we must grasp is that a firm is not a legal person even though it has some attributes of personality. Partnership is a certain relation between persons, the product of agreement to share the profits of a business. 'Firm' is a collective noun, a compendious expression to designate an entity, not a person. In income tax law, a firm is a unit of assessment, by special provisions, but is not a full person which leads to the next step that since a contract of employment requires two distinct persons viz. the employer and the employee, there cannot be a contract of the service, in strict law, between a firm

and one of its partners. So that any agreement for remuneration of a partner for taking part in the conduct of the business must be regarded as portion of the profits being made over as a reward for the human capital brought in. Section 13 of the Partnership Act brings into focus this basis of partnership business."

8. This Court also quoted with approval the passage from Lindley on the law of Partnership to the effect:

"In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer. "The provisions in Chapters III and IV of the Partnership Act amply define and delineate the duties, obligations and rights of the partners vis-à-vis the firm. The question yet remains where an individual is a partner in one capacity, e.g., as a representative of another person, can he have no other capacity vis-à-vis the firm. To be more, precise, does the above position of law preclude an individual, who is a partner representing a H.U.F., from depositing his personal funds with the partnership and receiving interest thereon < Explanation 2 says in clear terms that there is no such bar. This is the legislative recognition of the theory of different capacities an individual may hold(-) no doubt confined to clause (b) of Section 40. Once this is so, we see no reason to hold that this theory of different capacities is not valid or available for the period anterior to April 1, 1985. Accordingly, we hold that even for the period anterior to April 1, 1985, any interest paid to a partner, who is a partner representing his H.U.F., on the deposit of his personal/individual funds, does not fall within the mischief of clause (b) of Section 40. In this view of the matter, we agree with the view taken by the Rajasthan High Court in ***Gajanand Poonam Chand*** *that Explanation 2, in the context of clause (b) of Section 40, is declaratory in nature. Accordingly, we allow this appeal, set aside the judgment of the High Court and answer the question referred under Section 256 in the affirmative, i.e. in favour of the assessee and against the Revenue.*

14. Accordingly, it appears that the Supreme Court in the case of **M/S. Brij Mohan Das Laxman Das** (Supra) held that even for the period anterior to April 1, 1985 any interest paid to a partner, who is a partner representing his Hindu undivided family on the deposit of his personal/individual funds, does not fall within the mischief of clause (b) of Section 40 of the Act and agreed with the view of Rajasthan High Court that Explanation 2, in the context of clause (b) of Section 40, is declaratory in nature.

15. In the case of **M/S. Suwalal Anandilal Jain Vs. Commissioner of Income Tax, Bihar, Ranchi,** reported in AIR 1997 SC 1279, the Supreme Court followed the same principle of law laid down earlier in the case of **M/S. Brij Mohan Das Laxman Das** (Supra).

16. In view of the above pronouncement of the Supreme Court, the position of law is well settled and we do not think that this question requires any further elucidation. Accordingly, both the questions are answered in affirmative, i.e. in favour of the assessee and against the Revenue.

This instant Reference stands disposed of accordingly.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 21, 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 726 of 1997

Union of India and others ...Appellants
Versus
No. 145432071-F Hav/Arm (Sub) Ram Adhar Tiwari EME, Station Workshop, New Cantt, Allahabad ...Respondent

Counsel for the Appellants:
Sri Shishir Kumar
Addl. S.C. Central Govt.

Counsel for the Respondent:
Sri G.D. Mukherji

Army Act, S-120(2) Summary Court-martial-Shortage of Stock found in May 96-employee chargeshetted on 6.6.97 No grave reason disclosed-allegation under Section 52 (b) and 63- Summary court martial can be held.

Held – Para 13

Section 52 (a) read with clause (b) as extracted above, makes it clear that theft or misappropriation of any property will be an offence but any offence with regard to property of a mess, band or institution cannot be said to be an offence against, the Commanding Officer. Section 120 (2) refers to offence against the officer holding the court. Officer has been defined in Section 3 (xviii). The definition of officer as given in aforesaid provision refers to persons commissioned, gazetted or in pay as an officer in the regular Army. From the facts of the present case, there is no material to hold that the offence in question can be said to be an offence against the officer holding the court. We find force in the submission of counsel for the appellants that provisions of Section 120 (b) were not attracted in the facts of the present case and summary court martial proceedings could have been proceeded in the present case. In view of the aforesaid discussion, the first submission of the counsel for the appellants has substance.

Case law discussed:
J.T. 1993 (5) SC – 154
AIR 1999 SC- 1980
AIR 1998 SC-577
1986 UPL BEC-663
AIR 1993 SC-773
JT 1997 (4) SC 8

(Delivered by Hon'ble Ashok Bhushan,J.)

1. We have heard Sri Shishir Kumar, counsel for appellants, and Sri G.D.Mukherji, counsel appearing for the respondent.

2. By this appeal, the appellants have challenged the judgment of learned Single Judge in Writ Petition No. 20405 of 1997 (Ram Adhar Tiwari Vs. the Union of India & others). Learned Single Judge vide judgment dated 19th August,1997 has allowed the writ petition filed by the respondent setting aside the order imposing sentence in the summary court-martial dated 30th July,1997.

3. Brief facts giving rise to this appeal are; respondent at the relevant time was working as Havaldar in Corps of Electrical and Mechanical Engineering (E.M.E.) and was posted at Station Workshop, Allahabad. The respondent was detailed to look after the Canteen Store Department (CSD) run by E.M.E. Station Workshop. In the checking of stock of canteen, at the time of handing

over charge, shortage was found. A court of enquiry was held to ascertain the facts. In the court of enquiry the Commanding Officer, Colonel S.C. Verma, was also examined as Witness No.1. After the court of enquiry, the charges were issued to the respondent by charge-sheet dated 6th June,1997. The Commanding Officer, Sri S.C. Verma, ordered for trial of the respondent by summary court-martial. In the summary Court Martial proceedings, an application dated 14th June, 1997 was filed by respondent praying that summary court-martial be dissolved and reference be made to the Commander, Headquarters, Sub-Area, Allahabad to convene a district court-martial. In the aforesaid application it was stated that Sri S.C. Verma, the Commanding Officer being Witness No.1 in the court of enquiry, he will be called as prosecution witness to depose during the trial, hence reference be made for general court-martial. The said application was rejected. The respondent filed Writ Petition No. 20405 of 1997 praying for quashing of the summary court-martial proceedings. In the aforesaid writ petition, an interim order was granted on 24th June, 1997 staying proceedings of summary court-martial for a period of one month. By the order dated 24th June,1997 two weeks time was granted to the appellants to file counter affidavit and thereafter one week was allowed to the respondent to file rejoinder affidavit. The respondent filed an application for extension of the interim order well before expiry of the interim order to which application an order was passed on 22nd July, 1997 directing the application to be listed in the next supplementary cause list. The appellants who were respondents in the writ petition served their counter affidavit and filed counter affidavit along with application for vacation of stay order on 24th July, 1997. The respondent has also informed the Commanding Officer that he has filed an application for extension of the stay order in the writ petition and case is fixed for 1st August, 1997. On 29th July 1997 summary court-martial proceedings started. The counsel for the respondent was informed. It is stated that on 29th July, 1997 when the summary court-martial proceedings started, the Commanding Officer was informed that matter is fixed for 1st August, 1997 and adjournment was prayed for till 2nd August, 1997. The summary court-martial proceedings were adjourned for the next date. On the next date, the counsel for the respondent could not appear and sent a medical certificate. On 30th July, 1997, the summary court-martial proceedings proceeded and were completed. One Captain H.R. Chandel was appointed as friend of the accused. By order dated 30th July, 1997, summary court-martial sentenced the respondent for 90 days detention in military custody and reduced his rank from Havadlar to Craftsman. The respondent was allowed to amend the writ petition challenging the order dated 30th July,1997. Supplementary counter affidavit and supplementary rejoinder affidavit were filed in the writ petition and learned Single Judge vide its Judgment dated 17th August, 1997 allowed the writ petition.

4. Learned Single Judge while allowing the writ petition recorded following reasons:

(i) Commanding Officer was Chairman of the Canteen Committee and has himself caused the investigation which was admitted by him in the court of enquiry. The shortage was detected in May, 1996 and charge-sheet submitted on

6th June, 1997 which shows that one year time was taken in reaching the stage of issuing charge-sheet and the respondents to the writ petition were not having any feeling of urgency which suddenly arose when petitioner to the writ petition obtained an interim stay on 24th June, 1997. There was no reason for immediate action to go on with the trial without reference to officer empower to convene a district court-martial, summary court-martial or general court-martial.

(ii) There was no reason for refusing adjournment on the date of trial when the counsel for respondent was ill and sought adjournment by producing medical certificate. The appellants could not have proceeded with the trial without giving an opportunity to the respondent to appoint another friend to assist him during the trial of his own choice. The friend imposed on the respondent by the appellants has already affirmed an affidavit on behalf of the appellants in the writ proceedings. There was violation of Rule 129 of Army Rules.

The counsel for the appellants challenging the judgment of learned Single Judge has made various submissions. Following are the submissions raised by the counsel for the appellants in support of this appeal :-

(i) Learned Single Judge has misread the provisions of Section 120 of Army Act. Reference is only necessary if a person is tried under Section 34, 37 and 69 of the Act.

(ii) Findings recorded by learned Single Judge regarding non compliance of Rule 129 of Army Rules is based on no evidence.

(iii) Charges leveled against the respondent are fully proved and he also admitted the charges and has made deposit of the amount.

(iv) This Court in exercise of jurisdiction under Article 226 of the Constitution will not quash the proceedings of summary court-martial, which were based on evidence.

(v) There is very limited scope of judicial review of court-martial proceedings.

(vi) It be clarified by this Court that the appellants are entitled to proceed again against the respondent as per observation of learned Single Judge in the impugned judgment.

5. The counsel for the appellants placed reliance on various decision, namely, JT 1993(5) S.C.154; ***Bhuwneshwar Singh v.Union of India and others,*** A.I.R. 1999 S.C. 1980; ***Union of India v. Himmat Singh Chahar***, A.I.R. 1998 S.C. 577; ***Union of India and others v. Major A. Hussain,*** 1986 UPLBEC 663; ***Ruval Kumar Vasave v. Chief of Army Staff and others,*** 1993 sc 773; ***Union of India and others v. J.S.Brar*** and J.T. 1997(4) S.C. 8; ***General Inder Jit Kumar v. Union of India and others.***

6. The counsel for respondent refuted the submissions of counsel for the appellants and has supported the judgment of learned Single Judge. The counsel for the respondent contended that Commanding Officer, Colonel S.C. Verma, having personal interest in the matter being Chairman of the

management committee of Canteen was not competent to hold summary court-martial, relying on Section 120 Note(d) of Army Act. It was contended that there was clear violation of Rule 129 since respondent could not appoint a friend of his choice to assist him in the trial. The friend of accused thrust upon the respondent to assist him had already filed counter affidavit against the respondent in the writ petition and the respondent objected his appointment as friend of accused.

7. The counsel for the respondents replying to the submissions of counsel for the appellants that appellants can again proceed against the respondent as directed by the learned Single Judge contended that appellants cannot proceed now against the respondent. It was contended that holding of successive trial is barred by Army Amendment Act, 1992 which has omitted Section 127 of the Army Act.

8. We have heard submissions of both the counsels and have perused the records. The first issue, which has arisen for consideration in this appeal, is as to whether in accordance with Section 120 of the Army Act, the Commanding Officer was required to make reference for general court-martial, before proceeding with the summary court-martial and secondly whether there has been violation of Rule 129 of the Army Rules in the present case. Thirdly as to whether the appellants can still proceed against the respondent as permitted by learned Single Judge.

9. Section 108 of Army Act, 1950 provides for four kinds of court-martials i.e. general court-martial, district court-martial, summary general court-martial and summary court-martial. Section 120 of the Army Act provides for powers of summary court-martial. Section 120 of the Army Act is extracted below:-

*"**120 Powers of summary courts-martial.-(1)** Subject to the provisions of sub-section(2), a summary court-martial may try any offence punishable under this Act.*

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the Section 34, 37 and 69, or any offence against the officer holding the court.

(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, Junior commissioned officer or warrant officer.

(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or (imprisonment for life) or of imprisonment for a term exceeding the limit specified in sub-section(5)

(5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months if such officer is below that rank."

10. The provisions which need consideration for the purposes of the present case is Section 120(2) of the Army Act which provides that when there is no grave reason for immediate action an officer holding summary court-martial shall not try with regard to certain offences without reference to the officer empowered to convene a district court-martial or summary general court-martial. In the present case, it is clear from the material on the records that detection of shortage in the stock was found in May, 1996. The court of enquiry was held and charges to the respondent were given only on 6th June,1997 which shows that there was no grave reason for immediate action, since had there been any grave reason, there was no occasion to initiate action for court-martial after expiry of one year from the date when shortage was detected. The submission of counsel for the appellants is that Section 120 (2) is attracted only with regard to offences punishable under any of the Sections34, 37 and 69 and since in the present case the respondent was charged with an offence under Section 52(b) and 63 of the Army Act, the said provisions are not attracted and summary court-martial could have been held in the matter. Learned counsel for the respondent has submitted that offence in the present case was against the officer holding the court, hence Section 120(2) is attracted. Counsel for the respondent has referred to and relied on Note (d) said to be appended to Section 120 and quoted in paragraph 7 of the writ petition. The counsel for the respondent has read out the aforesaid Note from book, namely, Compendium of Law for Defence Service, the University Book Agency, New Addition 1991. We have examined the aforesaid Note (d) appended to Section 120 in the aforesaid book. The note, which is being relied by counsel for the respondents appears to be note of the author of the book. The aforesaid note is not statutory note which can be said to be part of the Section or the Act. Thus Note (d) of the Act or Section relied by counsel for the respondent cannot be treated to be part of the Act or Section. However, the words "any offence against the officer holding the court" are to be looked into for finding out the true scope and its meaning. Section itself does not define that what are offences against the officer holding the court. Section 3(XVII) defines offence as follows :-

"3(xvii) "offence" means any act or omission punishable under this Act and includes a civil offence as hereinbefore defined."

The offences in respect of property has been defined in Section 52 of the Army Act which is quoted as below :-

"52. Offences in respect of property:- Any person subjeet to this Act who commits any of the following offences, that is to say-

(a) commits theft of any property belonging to the Government, or to any military, naval or air force mess, band or institution, or to any person subject to military, naval or air force law, or

(b) dishonestly misappropriates or converts to his own use any such property; or

(c) commits criminal breach of trust in respect of any such property; or

(d) dishonestly receives or retains any such property in reject of which any of the

offences under clauses (a), (b) and (c) has been committed, knowing or having reason to believe the commission of such offence; or

(e) willfully destroys or injuries any property of the Government entrusted to him; or

(f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person,

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned.

11. In the present case, there is no allegation of any offence with regard to person of the Commanding Officer. The submission of counsel for the respondents is to the effect that since the Commanding Officer was Chairman of the Management Committee running the CSD Canteen, hence allegation of misappropriation regarding the amount will be an offence against the Commanding Officer. The counsel for the respondent has specifically referred to clause 22 of the Standard. Operating Procedure (filed as Annexure-3 to the writ petition). Clause 22 of the Standard Operating Procedure is extracted as below :-

"**2.2 Administration:** A management committee constituted as under will administer, control and run the canteen.

a) C.O. : Chairman
b) OIC Canteen : Any Offr nominated by the C.O.
c) JCO-in-Charge : Any JCO
d) Canteen Staff : Canteen NCO Salesman Canteen Clerk

12. We have carefully perused the Standard Operating Procedure. The aforesaid Standard Operating Procedure provides for several procedural Rules with regard to running of CSD Canteen, Maintenance of Account, Source of Income, Disposal of Canteen Profits. Clause 21 which is relevant for the purpose is extracted below:-

*"**21. Disposal of profits:** On the 5th of every quarter the total net profit of the proceeding Quarter along with its details will be put up for approval of the C.O. by CIC Adm. Op. The distribution of the profit will be completed within a week after the same is approved by the C.O. The profit will be distributed as per following guide lines which may be reviewed, if felt necessary:-*

a) Sub Area Offrs. Mess	-	*10%*
b) JCO Club	-	*5%*
c) Offrs. Amenity	-	*5%*
d) Coy Fund	-	*60%*
e) Capital	-	*20%*

13. From a perusal of various clauses of the aforesaid Standard Operating Procedure, it is clear that Commanding Officer cannot be said to be owner of the assets and the properties of the Canteen. The administration of Canteen is vested in the Management Committee whose constitution is mentioned in Clause-22 and is guided by Commanding Officer for overall policy. Thus the administration of the Canteen is entrusted to a body not on an individual and any offence committed by a person while functioning as Canteen staff cannot be held to be an offence against officer

holding the court. No materials have been brought on the record to show that Commanding Officer is the owner of the assets of the Canteen. Section 52 (a) read with clause (b) as extracted above, makes it clear that theft or misappropriation of any property will be an offence but any offence with regard to property of a mess, band or institution cannot be said to be an offence against the Commanding Officer. Section 120 (2) refers to offence against the Officer holding the court. Officer has been defined in Section 3 (xviii). The definition of officer as given in aforesaid provision refers to persons commissioned, gazetted or in pay as an officer in the regular Army. From the facts of the present case, there is no material to hold that the offence in question can be said to be an offence against the officer holding the court. We find force in the submission of counsel for the appellants that provisions of Section 120 (2) were not attracted in the facts of the present case and summary court martial proceedings could have been proceeded in the present case. In view of the aforesaid discussion, the first submission of the counsel for the appellants has substance.

14. The second submission of the counsel for the appellants is that there is no violation of Rule 129 in the facts of the present case, Rule 129 of the Army Act provides:-

*"**129. Friend of accused.** In any summary court-martial, an accused person may have a person to assist him during the trial, whether a legal advisor or any other person. A person so assisting him may advice him on all points and suggest the questions to be put to witnesses, but shall not examine or cross-examine witnesses or address the court."*

15. Rule 129 provides a measure of protection to an accused person. Under Rule 129 legal advisor or any other person can be chosen by accused person for assisting him. From the facts which have been brought on the record, in the present case, it is clear that it is claimed that in the court-martial proceedings which assembled on 29th July, 1997, the counsel appearing for respondent appeared in the court-martial proceeding. The proceedings were adjourned for 30th July, 1997 on which date counsel for the respondent could not appear and medical certificate was sent by the counsel for adjournment of that date. The Commanding Officer did not grant adjournment and proceeded and concluded the court-martial proceedings on the same day i.e. 30th July, 1997, it has also been brought on the record that one Captain H.R. Chandel was directed by Commanding Officer to act as friend of the accused. The respondent has stated that he objected to appointment of Captain H.R. Chandel as his friend. It is relevant to note that said H.R. Chandel who was appointed as friend of the accused is the same officer who has filed a counter affidavit in the writ petition of the writ petitioner sworn on 21st July, 1997. From the aforesaid, it is clear that on 30th July, 1997 court-martial proceedings were held and concluded and the respondent did not get any assistance as contemplated under Rule 129 of the Army Act. The counsel for the respondent when could not appear on 30th July, 1997 due to his illness, it was appropriate that an opportunity ought to have been given to the respondent to engage another person as friend of accused. The Division Bench of this Court in 1993 Allahabad Weekly Cases 883; **Union of India and others Vs. Sepoy/Driver, Rameshwar**

Mehato has considered the provisions of Rule 129 of the Army Rules. The Division Bench laid down in para 3 which is being extracted below :-

"3 Having considered the record of the trial in the light of the provisions of Rule 129 we find no merit in the contention raised on behalf of the appellants. From a plain reading of Rule 129 it is ineluctively clear that an accused who is being tried in a court martial is entitled to be assisted by a legal advisor or any other person, of his choice for the purposes mentioned therein. In paragraph 25 of the writ petition, the respondent has categorically stated that on 7.3.1984 (the date on which the trial commenced) he asked for the service of a legal practitioner to assist him during his trial by summary court-martial and was prepared to bear the expenses for the same, but even though it was his legal right under the provisions of Rule 129, the appellant No. (commanding officer, 504 ASC Battalion) did not allow his prayer for reasons best known to him. In their counter affidavit the appellants (respondents in the writ petition), while dealing with the complaint made in paragraph 25 of the writ petition stated as under:-

"That the contents of paragraph 25 of the writ petition are incorrect and are denied. As per the Army Act and the Rules Captain A.R. Bhardwaj was detailed as friend of the accused"

From the above pleadings of the parties on the question of compliance of Rule 129 we find no merit in the contention raised that the appellants did not specifically deny the fact that the respondent had asked for a legal advisor. On the contrary they stated that they had appointed a person as friend of the accused. The right to be defended by a lawyer of one's choice is expressly provided for in Rule 129 and, therefore, it was incumbent upon the appellants to provide the respondent with a lawyer of his choice. In case the respondent had not exercised such right the appellants might have appointed a person to assist him as his friend, but as in the instant case the record clearly shows that the respondent had asked for the assistance of a legal advisor and such right was denied, it must be said that the respondent was prejudiced in his defence and the principles of natural justice were violated..

16. From the facts of the present case, it is clear that there was violation of Rule 129 of Army Rules in proceeding with the summary court-martial proceeding on 30th July, 1997. Learned Single Judge has rightly held so. The fact that summary court-martial proceedings were concluded in great haste, within a day, also supports our view that proceedings were concluded without giving opportunity to respondent to avail the benefit of Rule 129. Thus we are of the view that learned Single Judge did not commit any error in recording a finding that there is violation of Rule 129 in the summary court-martial proceedings.

17. The third submission of counsel for the appellants is to the effect that charges were fully proved since respondent himself admitted his guilt and deposited the money. Learned Single Judge while allowing the writ petition has not considered the merits of charges nor recorded any finding on merits of the case. The summary court-martial

proceedings were quashed in view of the reasons given in the judgment. Learned Single Judge in his judgment has also left it open to the appellants to proceed against respondent in accordance with law. In view of this, there is no necessity for considering this submission of the counsel for the appellants. Merit of charges having been not considered by learned Single Judge, the same need not be considered in this appeal.

18. The next submission of counsel for the appellants is that under Article 226 of the Constitution, the Court has limited scope of review. The counsel for the appellants has also relied on various judgments as referred above. In **Bhuwneshwar Singh's** case (supra), in paragraph 13, the Apex Court held as under:-

*"**13.** Keeping in view the limited nature of judicial review in matters arising out of Court Martial Proceedings, it is not only desirable but necessary that the authorities under the Army Act strictly follow the requirements of the Act and the Rules ……."*

19. It is true that the Apex Court in the aforesaid judgment and other decisions cited by counsel for the appellants has held that power of judicial review under Article 226 is for limited purpose and the said power of judicial review cannot be a power of appellate authority permitting the High Court to re-appreciate the evidence. In ***Union of India v. Himmat Singh Chahar's*** case (supra), in paragraph 5, the Apex Court held as under :-

*"**5.** Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the Competent Authority in the Court Martial Proceeding. It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial Proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Art. 226 but that would be for a limited purpose of dinging out whether there has been infraction of any mandatory Provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with the jurisdiction under the Act. The said power of judicial review cannot be a power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is sufficient for the conclusion arrived at by the Competent Authority in the Court Martial Proceedings."*

20. The other decisions cited by counsel for the appellants lays down the same proposition. There cannot be any dispute with the proposition as laid down by the Apex Court in the aforesaid cases. The scope of judicial review is limited and has to be exercised in well defined parameters of judicial review. In the present case learned Single Judge has not interfered with the court-martial proceedings by way of re-appraising the evidence or setting aside the findings. The learned Single Judge has granted the relief

due to violation of Rule 129 of Army Rules and other reasons mentioned in the judgment. The Division Bench of this Court in ***Union of India v. Sepoy/Driver Rameshwar Mahato's*** case (supra)which was also a case of violation of Rule 129 has held that respondent was prejudiced in his defence and principles of natural justice were violated. As laid down by Apex Court in 1990(4) S.C.C. 594; **S.N. Mukherjee v. Union of India** the principles of natural justice are to prevent miscarriage of justice and secure fair play in action. In paragraph 42 of the judgment, the Apex Court while considering the scope of judicial review under Article 226 with regard to court-martial proceedings held as under :-

*"**42**……This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."*

21. Thus we are satisfied that exercise of jurisdiction by learned Single Judge under Article 226 of the Constitution was within the well defined parameters of judicial review.

22. The last submission of the counsel for the appellants was that this Court may clarify that the appellants are entitled to proceed against the respondent in accordance with law as per liberty granted by learned Single Judge in the impugned judgment. The learned Single Judge while allowing the writ petition has himself left it open to the appellants to proceed in accordance with law. The counsel for the respondent contended that now the appellants could not proceed since it will be second trial which is prohibited by Section 121 of the Army Act. Counsel for the respondents further contended that Section 127 of the Army Act which provided for successive trial has been omitted by Army Act, 1992, hence the appellants are not entitled to proceed again.

23. We have examined Section 121 and Section 127. Section 121 provided that where any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence. In the present case when the learned Single Judge has set-aside the summary court-martial dated 30th July, 1997, it cannot be said that conviction of the respondent is still standing. Section 121 contemplates those acquittal and conviction which have attained finality. In the present case when court quashes the conviction, Section 121 cannot be said to be attracted. Section 121 will not come into play when the conviction or acquittal has been quashed by the Court and the Court itself permits the authorities to again proceed in accordance with law. In view of the order passed by learned Single Judge in the writ petition, Section 121 is not attracted. Section 127 provided for successive trial by a criminal court and court-martial. Section 121 covers different contingency. The counsel for the respondent has submitted that the said section 127 has

now been omitted by Army Act, 1992, hence successive trial cannot be made. The submission is without substance. Section 127 covered a contingency regarding successive trial by court-martial or criminal courts. In the present case the question of trial by criminal court has not arisen nor Section 127 is attracted. Further omission of Section 127 has also no effect. Thus, in our opinion, neither Section 121 nor Section 127 creates any fetter in the rights of the appellants to proceed again against the respondent.

24. One more relevant fact is to be noted in the present case. Learned Single Judge in the writ petition granted interim order for one month on 24th June, 1997. The charge-sheet was given to the respondent only on 6th June,1997. The court granted two weeks time to the appellants to file counter affidavit. A counter affidavit was filed by the appellants only on 24th July, 1997 along with the application for vacation of the interim order. The respondent, in the meantime, had already filed an application for extension of interim order on 17th July, 1997. All these facts were brought in the notice of commanding officer who was holding the court. The appellants having themselves not filed counter affidavit within the time allowed by the Court, it was not appropriate to proceed hastily in concluding the court-martial proceedings. The respondent has further informed the Commanding Officer that matter is to be taken on 1st August, 1997 and adjournment was sought only up to 2nd August, 2002. The fact that Commanding Officer was retiring on 31st July, 1997 was not relevant nor was a valid reason for completing the proceedings by 31st July,1997. We are in full agreement with the finding of learned Single Judge that proceedings were concluded with haste which shows that fair opportunity was not given to the respondent.

25. In view of the foregoing discussions, we do not find any good ground to interfere with judgment of learned Single Judge.

This special appeal is dismissed subject to observations as made above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.8.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 547 of 1997

Anil Kumar Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.B. Paul

Counsel for the Respondents:
Sri M. Sarwar Khan
S.C.

(A) U.P. Act No. 5 of 1982- Para 2 explaination III, readwith Section 18- short terms vacancy- what is?- arises out consequent to suspension, adhoc promotion or grant of leave-vacancy caused due to retirement of permanent lecturer- can not be termed as short terms vacancy.

Held- Para 7

The submission of counsel for the appellant that the vacancy in question is short term vacancy and the management

is empowered to make adhoc appointment is not acceptable.
Case law discussed:
1998 UPLBEC 276, 1999 UPLBEC-196, 1988 UPLBEC-223, 1988 UPLBEC-640, 1997 (2) UPLBEC 1284, 2000 (3) ESC 1990

(B) U.P. Act No. 24 of 1992- Section 18 (a) Adhoc appointment after 14.7.92- management has no power either to advertise the vacancy or make any appointment.

Held- Para 10

Thus the adhoc appointment of teachers after 14.7.1992 has to be made in accordance with the provisions prescribed under Section 18 and the Management is neither empowered to issue any advertisement or to constitute selection committee or to recommended any candidate.

(C) U.P. Act No. I of 1993- Section 33- Regularisation- advertisement issued on 5.12.92- selection committee send recommendation on 5.2.93- joined on 10.2.93- Section 18 amended w.e.f. 14.7.92 petitioner appointed much prior to this date- can not be regularised.

Held- Para 14

In the present case the advertisement after which the selection process began was issued on 5.12.1992. The petitioner applied on 21.12.1992 in pursuance of the said advertisement and School selection Committee recommended the petitioner on 5.2.1993 and appointment letter was issued to the petitioner on 5.2.1993 and the petitioner claimed to have joined on 10.2.1993.
Case law discussed:
1994 ALJ-1077 (FB)
1988 UPLBEC-644
distinguished

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri B.B. Paul, learned counsel appearing for the appellant and learned standing counsel appearing for the State-respondents.

2. This Special Appeal has been filed against the judgment dated 2nd July, 1997 of a learned Single Judge in writ petition No. 21698 of 1995 Anil Kumar Sharma vs. State of Uttar Pradesh and others. The learned Single Judge by the impugned judgment has dismissed the writ petition filed by the petitioner appellant.

Brief facts giving rise to this appeal are;

3. Appellant hereinafter referred to as "the petitioner" claims adhoc appointment as Lecturer Geography in Gopi Ram Paliwal Inter College, Aligarh. One Sri S.P. Sharma who was working as Lecturer Geography retired on 30th June, 1991 causing vacancy on the post of Lecturer Geography. The Management claims to have notified the aforesaid vacancy to the U.P. Secondary Education Service Commission and Selection Board. The Management issued an advertisement dated 31.8.1991 in the news paper 'Amar Ujala' inviting applications for adhoc appointment on the post of Lecturer Geography and some other posts. 8th September, 1991 was fixed for the date of interview. Again on 5.12.1992 advertisement was issued in news paper "Aaj" inviting applications for adhoc appointment on the post of lecturer Geography and some other posts. 17th December, 1992 was fixed as the last date for submission of application. A resolution was by the School Selection

Committee on 5.2.1993 selecting the petitioner for adhoc appointment as Lecturer Geography. On the same day appointment letter was also issued to the petitioner by the Manager and the petitioner claims to have joined on 10th February, 1993. On 12th February, 1993 the Manager sent papers to the District Inspector of Schools for approval for payment of salary on the post of Lecturer Geography. Certain correspondence took place between the Manager and the District Inspector of Schools. Ultimately the District Inspector of Schools vide his order dated 29.4.1995 refused to approve the adhoc appointment of the petitioner on the ground that the appointment of the petitioner has been made on permanent vacancy to be filled by direct recruitment. It was stated that the management has no jurisdiction to make appointment on permanent post, which is to be filled by direct recruitment. The petitioner filed a writ petition No. 21698 of 1995 challenging the said order dated 29.4.1995 passed by the District Inspector of Schools. Before the learned Single Judge the contention was raised on behalf of the appellant that since the selection process was initiated before 14.7.1992 on which date Section 18 of the U.P. Secondary Education Service Commission and Selection Board Act, 1992 was amended hence the management was competent to make adhoc appointment and the amended Section 18 has no application. The learned Single Judge vide his judgement dated 2.7.1997 dismissed the writ petition. The learned Single Judge took the view that the selection process was not initiated through advertisement issued on 31.8.1991 since no steps were taken till second advertisement which was published on 5.12.1992, the learned Single Judge held that the selection process started only after second advertisement hence the contention raised by the counsel for the petitioner-appellant is not acceptable. It was held that in the present case selection process had been started after 14.7.1992 hence there is no infirmity in the order of District Inspector of Schools. The aforesaid judgment of the learned Single Judge has been assailed in this Special Appeal.

4. Sri B.B. Paul learned counsel for the petitioner-appellant made following submissions in support of this appeal:-

1. The vacancy on which the petitioner was given adhoc appointment as Lecturer Geography was short term vacancy and the Committee of Management was fully empowered to make adhoc appointment in accordance with the U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981. Reliance has also been placed on judgments of this Court in 1998 UPLBEC 276 **Sri Niwas Singh Vs. District Inspector of Schools, Ghazipur and others** and 1999 UPLBEC 196 **Meena Singh vs. State of Uttar Pradesh and others**.

2. Committee of Management had full jurisdiction to make adhoc appointment since no candidate was recommended by the U.P. Secondary Education Service Commission. Reliance has been placed on judgments of this Court in 1988 UPLBEC 223 **Ravinder Singh Niranjan vs. District Inspector of Schools** and 1988 UPLBEC 640 **Chhatra Pal vs. District Inspector of Schools**.

3. The petitioner who has been working with effect from 10.2.1993 was entitled to be regularised in accordance with Section

33-C of the U.P. Act V of 1982. Reliance has been placed on Full Bench judgment of this Court in 1997 (2) UPLBEC 1284 **Pramila Misra vs. Deputy Director of Education, Jhansi Division Jhansi and others** and 2000 (3) Education Service Cases, 1990 **Smt. Sashi Saxena vs. Deputy Director of Education and others**.

4. Provision of Section 18 as amended by U.P. Act XXIV of 1992 has been deleted by U.P. Act No. 1 of 1993 hence after the said deletion the power of Committee of Management to make adhoc appointment has revived.

5. Learned standing counsel refuting the submissions of the counsel for the appellant supported the judgment of the learned Single Judge and has submitted that the writ petition of the petitioner has rightly been dismissed by the learned Single Judge. Learned standing counsel contended that the Committee of Management had no authority or jurisdiction to make adhoc appointment after 14th July, 1992 and the adhoc appointment of the petitioner made on 5.2.1993 is void and the District Inspector of Schools has rightly refused to approve the said adhoc appointment. He has further submitted that the vacancy on which the petitioner claims adhoc appointment is not a short term vacancy but is substantive vacancy on which after 14.7.1992 the power to make adhoc appointment is only with the Selection Committee constituted under Section 18 (8) of the U.P. Act No.5 of 1982.

6. We have heard counsel for the parties and perused the record. The first submission of the counsel for the appellant is that the vacancy on which the petitioner-appellant was appointed was short term vacancy and the Management has power to make adhoc appointment on short term vacancy. The first issue to be determined in this appeal is as to what is the nature of vacancy on which the petitioner-appellant claims adhoc appointment. This is not disputed that Sonpal Singh who was functioning as Lecturer Geography, retired on 30th June, 1991 causing vacancy on the post of Lecturer Geography. The resolution of Committee of Management dated 11.8.1991 has been brought on record by the appellant himself as Annexure-A1 to the Supplementary affidavit which clearly noticed that Sonpal Singh retired on 30th June, 1991 due to which post of Lecturer Geography is vacant since 1.7.1991. The vacancy of post on which the petitioner claims appointment is substantive vacancy and not short term vacancy. The short term vacancy has been defined in U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981. Paragraph 2 Explanation (iii) defines the short term vacancy in following words:-

"(iii) Short term vacancy which is not substantive and is of a limited duration."

7. Thus the short term vacancy is only that vacancy which is of limited duration and not substantive. Short term vacancy may arise by suspension, adhoc promotion, grant of leave, which may be for a limited duration but a vacancy caused by retirement of a teacher cannot be said to be short term vacancy or of a limited duration. The procedure for adhoc appointment with regard to short term vacancy and the substantive vacancy is different. For filling of short term vacancy

the procedure prescribed under U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981 was applicable, whereas substantive vacancy has to be filled upon Adhoc basis in according with Section 18 of U.P. Act 5 of 1982. The submission of counsel for the appellant that the vacancy in question is short term vacancy and the management is empowered to make adhoc appointment, is not acceptable. The judgment in **Sri Niwas Singh's case** (supra) relied by the counsel for the appellant was with regard to short term vacancy. In that case Daya Shanker Singh senior most lecturer was promoted as adhoc Principal due to which vacancy arose on the post of lecturer, L.T. grade teacher was given promotion as lecturer due to which vacancy in L.T. Grade came into existence. Since the promotion was not confirmed the said vacancy was short term vacancy. In the above facts adhoc appointment was made on that short term vacancy, in view of above facts this court held that the management was empowered to make adhoc appointment in short term vacancy in accordance with the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second), Order, 1981. Another judgment relied by the counsel for the appellant in **Meena Singh's** case (supra) is also a case of short term vacancy. The District Inspector of Schools has rejected the claim in that case on the ground that the Management has no right to appoint teacher on a short term vacancy. Thus the above decision cited by the counsel for the appellant does not support his case. Since the vacancy in the present case is substantive vacancy caused by retirement, the procedure prescribed in U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981, cannot be pressed into service.

8. The counsel for the appellant has next contended that the Management was fully empowered to make adhoc appointment since the Commission did not send any candidate even after intimation of vacancy. The provisions U.P. Secondary Education Service Commission and Selection Board Act, 1982 were substituted by U.P. Act 24 of 1992. Section 18 as substituted with effect from 14.7.1992 is quoted below:-

"18. Adhoc teachers,____ (1) Where the Management has notified a vacancy to the Commission in accordance with the Provisions of this Act, and the post of such teacher has actually remained vacant for more than two months, the Management may appoint by direct recruitment or promotion a teacher, on purely adhoc basis, in the manner hereinafter provided in this section.

(2) A teacher, other than a Principal or Headmaster, who is to be appointed by direct recruitment, may be appointed on the recommendation of the Selection Committee referred to in sub-section (9).

(3) A teacher, other than a Principal or Headmaster who is to be appointed by promotion, may in the manner prescribed be appointed by promoting the senior most teacher possessing prescribed qualification_____

(a) in the trained graduate's grade, as lecturer, in the case of vacancy in lecturer's grade.

(b) in the Certificate of Teaching grade, as a teacher in the trained

graduat's grade, in the case of vacancy in trained graduate's grade.

(4) A vacancy in the post of a Principal may be filled by promoting the senior most teacher in the lecturer's grade.

(5) A vacancy in the post of a Head Master may be filled by promoting the senior most teacher in the trained graduate's grade.

(6) For the purpose of making appointments under sub-section (2) and (3), the Management shall determine the number of vacancies, as also the number of vacancies to be reserved for the candidate belonging to the Scheduled Caste, Scheduled Tribes and other categories in accordance with the rules or orders issued by the State Government in this behalf. If in determining the vacancies it is found that persons belonging to such categories are not holding such number of posts as should have been held by them in accordance with such rules or orders, then the vacancies shall be determined that first and every alternate vacancy shall be reserved for the persons of such categories until the required percentage of posts is held by them.

(7) After determining the number of vacancies as provided in sub-section (6) Management shall within fifteen days from the date of the commencement of the Uttar Pradesh Secondary Education Service Commission and Selection Board (Second Amendment) Act, 1992 intimate the vacancies to be filled by direct recruitment to the District Inspector of Schools. If the Management fails to intimate such vacancies within the said period of fifteen days, the District Inspector of Schools may, after verification from such institution or from his own records, determine such vacancies himself.

(8) The District Inspector of Schools shall, on receipt of intimation of vacancies or, as the case may be, after determining the vacancies under sub-section (7), invite applications, from the persons possessing qualification prescribed under the Intermediate Education Act, 1921 or the regulations made there under, for adhoc appointment to the post of teachers, other than Principal or Head Masters in such manner as may be prescribed.

(9) (a) For each district, there shall be a Selection Committee for selection of candidates for adhoc appointment by direct recruitment comprising:

(i) District Inspector of Schools, who shall be the Chairman,
(ii) Basic Shiksha Adhikari;
(iii) District Inspectress of Girls Schools and where there is no such Inspectress, the Principal of the Government Girls' Intermediate College and where there are more than one such college, the senior most Principal of such Colleges and where there is no such college the Principal of the Government Girls' Intermediate College as nominated by the State Government.
(b) The Selection Committee constituted under clause (a) shall make selection of the candidates, prepare a list of the selected candidates, allocate them to the institutions and recommend their names to the Management for appointment under sub-section (2).

(c) The criteria and procedure for selection of candidates and the manner of preparation of list of selected candidates and their allocation to the he institutions shall be such as may be prescribed.

(10) Every appointment of an adhoc teacher under sub-section (1) shall cease to have effect from the date when the candidate recommended by the Commission or the Board joins the post.

(11) The provisions of Section 21D shall mutates mustandis, apply to the teacher who are to be appointed under the provisions of this section."

10. From Section 18 as amended with effect from 14.7.1992 it is clear that the Management may appoint adhoc teacher by direct recruitment or promotion in the manner provided in that Section. The procedure for direct recruitment on adhoc basis has been provided in sub-section (6) to sub Section (9) of Section 18. Sub-section (6) requires management to intimate the vacancy to be filled by direct recruitment to the District Inspector of Schools. Sub section (8) provides that the District Inspector of Schools after scrutiny shall invite applications from the persons possessing qualification. Sub-section (9) provides Selection Committee for each region consisting of District Inspector of Schools, who shall be the Chairman, Basic Shiksha Adhikari and District Inspectress of Girls Schools. Thus the adhoc appointment of teachers after 14.7.1992 has to be made in accordance with the provisions prescribed under section 18 and the Management is neither empowered to issue any advertisement or to constitute Selection Committee or to recommend any candidate. In the present case the selection process began after advertisement dated 15.12.1992 which advertisement was issued by the Manager. The Selection Committee appointed by the Committee of Management on 5.2.1993 recommended the petitioner who was appointed by the Manager on 5.2.1993. As noted above the Manager has no power to issue advertisement on 5.12.1992 nor School Selection Committee has any power to recommend a candidate. The advertisement as well as the process of selection Committee has been filed as Annexure-CA2 and CA-3 to the counter affidavit filed the Committee of Management. The Selection Committee which recommended the petitioner was not the Selection Committee as contemplated under Sub-section (9) of Section 18. The Full Bench of this Court in **Kumari Radha Raizada and etc. etc. vs. Committee of Management Vidyawati Darbari Girls Inter College and others etc. etc.** reported in 1994 All.L.J. 1077 considered the procedure of adhoc appointment before 14.7.1982 as well as after 14.7.1992. While considering the process of selection by amended Section 18 with effect from 14.7.1992 the Full Bench held in paragraph 46 which is quoted below:-

"A perusal of this new Section would show that it is substantially the same provision excepting the provision for constitution of Selection Committee for selection of candidate for adhoc appointment in place of giving quality point marks as contained in the First Removal of Difficulties Order. In fact what was contained in the First Removal of Difficulties Order has not been brought in the Act, by this amending Act. Thus, the method of adhoc appointment by promotion of teacher remained the same

as it was during the period 14.7.1981 to 13.7.1992. The method of adhoc appointment of Principal and Head Master in the institution also remains the some as it was in the period 14.7.1981 to 13.7.1992 (first period). Similarly, the provision in respect of appointment against the short term vacancy also remains the same as it was in 14.7.1981 to 13.7.1992. The only change that has been brought by the new Section 18 is in respect of method of adhoc appointment by direct recruitment. Under sub-section (8) of Section 18 the District Inspector of Schools on receipt of intimation of vacancy or as the case may be after determining the vacancy in sub section (7) is required to invite application from the person possessing qualification prescribed in the Intermediate Education Act or the regulations framed there under for adhoc appointment to the post of teacher. Under sub section (9) of Section 18 a Selection Committee is to be constituted for a selection of candidate for adhoc appointment by direct recruitment comprising of District Inspector of Schools as Chairman, Basic Shiksha Adhikari and District Inspectress of Girls Schools. The Selection Committee constituted is further required to make selection of the candidate and prepare a list of selected candidate and allocate them to the institution and recommend their name to the Management for appointment. This is in brief the procedure which is required to be undergone where the adhoc appointment is to be made by the direct recruitment.If the adhoc appointment by direct recruitment is made under sub-section (9) of Section 18, no further approval of the District Inspector of Schools for such appointment is required."

11. Counsel for the appellant has placed reliance on the case of **Ravindra Singh Niranjan vs. District Inspector of Schools and others** reported in 1988 UPLBEC 223. In the aforesaid case the Division Bench of this court considered the provisions of Section 18 as it stood before 1988. The aforesaid Division Bench is not attracted in the facts of the present case since the aforesaid Division Bench had no occasion to consider the provisions of Section 18 as amended with effect from 14.7.1992. The Court took the view in that case that till the Board is not constituted Section 18 of the Act would be applicable in the case of appointment of a teacher in C.T. grade where the District Inspector of Schools does not make appointment under U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981. The aforesaid case has no application in the facts of the present case and does not help the appellant in any manner. Another case relied by the counsel for the appellant is **Chhatra Pal vs. District Inspector of Schools** reported in 1988 UP LBEC 640 in which this Court considered the adhoc appointment which was made in the year 1985 i.e. under unamended Section 18. The aforesaid case is also not applicable in the facts of the present case since the Court in that case had no occasion to consider the amended Section 18 with effect from 14.7.1992 and the power of adhoc appointment thereafter.

12. The third submission of the counsel for the appellant was with regard to claim of regularization under section 33-C of the U.P. Act No. V of 1982. Section 33-C contains provision for regularization of certain adhoc appointment. Section 33-C(1) is quoted below:-

"33-C(1) Any teacher who_____
(a)(I) was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than August 6, 1993 on adhoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(II) was appointed by promotion on or after July 31, 1988 but not later than August 6, 1993 on adhoc basis against a substantive vacancy in the post of a Principal or Headmaster in accordance with Section 18;

(b) possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with the provisions of the Intermediate Education Act, 1921;

(c) has been continuously serving the Institution from the date of such appointment upto the date of the commencement of the Uttar Pradesh Secondary Education Service Commission (Amendment) Act, 1998;

(d) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under sub-Section (2);

shall be given substantive appointment by the Management."

13. A look of above provision makes it clear that the regularization of only that teacher is to be considered who was appointed by direct recruitment in accordance with Section 18. The benefit of Section 33-C can be available only when his adhoc appointment was made in accordance with Section 18. In the present case when the appointment of the appellant itself has not been accepted as valid appointment made under section 18 of U.P. Act No. V of 1982 there is no question of considering the case of the appellant for regularization. The writ petition was filed by the petitioner-appellant challenging the order of the District Inspector of Schools refusing to accept the adhoc appointment of the petitioner. When the adhoc appointment of the petitioner itself was not valid and not accepted the consideration of question of regularization is out of question. In view of the fact that petitioner's adhoc appointment has not been accepted to be in accordance with Section 18 of U.P. Act No. V of 1982 the application of Section 33-C is out of question. The reliance placed by the counsel for the petitioner on Full Bench of this Court in the case of **Pramila Misra vs. Deputy Director of Education and others** (supra) is misplaced. In the case of **Pramila Misra** the question was regarding entitlement of adhoc appointment to continue on conversion of such vacancy to a permanent vacancy. The case of **Pramila Misra** is not attracted to the facts of the present case. Similarly reliance placed by the appellant's counsel on the decision of this Court in the case of **Smt. Sashi Saxena** (supra) is also not attracted. In the case of **Smt. Sashi Saxena** the court was considering the consequence when a short term vacancy is converted into substantive vacancy. In **Smt. Sashi Saxena's** case there was no dispute regarding adhoc appointment. The case of **Smt. Sashi Saxena** does not help the appellant.

14. The last submission of the counsel for the appellant is that the power of Committee of Management to make

adhoc appointment will revive after deletion of Section 18 by U.P. Act No. 1 of 1993. The U.P. Act No. 1 of 1993 came in force with effect from 7.8.1993 by notification issued in accordance with Section 1(2) of U.P. Act No. 1 of 1993. In the present case the advertisement after which the selection process began was issued on 5.12.1992. The petitioner applied on 21.12.1992 in pursuance of the said advertisement and School Selection Committee recommended the petitioner on 5.2.1993 and appointment letter was issued to the petitioner on 5.2.1993 and the petitioner claimed to have joined on 10.2.1993. Even according to own submission of counsel for the appellant the deletion of Section 18 will be with effect from 7.8.1993. Thus all process including the appointment of the petitioner took place much before 7.8.1993. Thus Section 18 as amended with effect from 14.7.1992 was very much in force at all relevant time and the deletion of Section 18 by U.P. Act No. 1 of 1993, does not help the appellant in any manner. The Full Bench of this Court had in **Kumari Radha Raizada's** case (supra) occasion to consider the above aspect of the matter and has held that the date for enforcement of U.P. Act No. 1 of 1993 is 7.8.1993. Considering all procedure for adhoc appointment after 14.7.1992 and the effect of U.P. Act No. 1 of 1993 the Full Bench laid down in paragraph 26 as under:-

"26. In short it was made open to the management of the institutions to make adhoc appointment of teachers against substantive vacancies either by promotion or by direct recruitment after following the procedure laid down in the Removal of Difficulties Order issued under Section 33 of the Act by the State Government. Subsequently by U.P. Act No. 24 of 1992 Section 18 of the Act was amended and was substituted by new Section 18. This amendment came into force on 14.7.1992. The substituted Section 18 provided the manner and method of adhoc appointment of a teacher in the institutions either by promotion or by direct recruitment. A Selection Committee for selection of candidates for adhoc appointment was required to be constituted considering (consisting) of District Inspector of Schools, Basic Shiksha Adhikari and the District Inspectress of Girls of Schools. In pith and substance the only departure from earlier procedure was that the adhoc appointment by direct recruitment was required to be done by a Selection Committee constituting three officials. Thereafter U.P. Legislature passed an Act known as U.P. Secondary Education Service Commission and Selection Board Amendment Act, 1992 being U.P. Act No. 1 of 1993. This Act was published in the U.P. Gazette on 6th January 1993. Sub-section (2) of Section 1 of this Act provided that the Act shall come into force on such date as the State Government may by notification appoint in this behalf and different dates may be appointed for different provisions. This amendment Act brought several amendments in the Principal Act. Since I am not concerned with all the provisions of this amendment Act, I will notice only those provisions which are relevant for the purpose of my answer to questions referred. By Section 11 of U.P. Act No. 1 of 1993 the reference of Section 18 occurring in Section 16 of the Act was omitted and Section 13 of the amending Act further provides that Section 18 of the Principal Act shall be omitted. The State Government by a notification dated 7.8.1993 in exercise of its power under

sub-section (2) of Section 1 of U.P. Act No. 1 of 1993 appointed 7.8.1993 as the date on which the said Act except Section 13 shall come into force. The result of this notification is that although Section 18 is still continuing. Section 16 is not subject to the provisions of Section 18 of the Principal Act. Thus any appointment made under section 18 is void under Sub-section (2) of Section 16 of the Act. Thus no adhoc appointment can now be made under Section 18 of the Act which although omitted by U.P. Act No. 1 of 1993 but still continuing."

15. In view of the above facts it is clear that the deletion of Section 18 as amended with effect from 14.7.1992 is of no avail to the petitioner. The amended provision of Section 18 enforced with effect from 14.7.1992 was fully operative during which the petitioner claims adhoc appointment. Petitioner's adhoc appointment having not been made in accordance with Section 18, the appointment is void and has rightly been not approved by the District Inspector of Schools.

16. In view of the foregoing discussions we do not find any merit in any of the submissions raised by the counsel for the appellant. The learned Single Judge has rightly held that the Committee of Management had no jurisdiction to make selection and appoint petitioner as adhoc lecturer.

17. We do not find any merit in the Special Appeal and the same is dismissed accordingly. No order as to cost.

ORIGINAL JURISDICTION
DATED: ALLAHABAD

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 1970 of 2002

Sarva Krishna Ajay Kumar Agrawal
...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Arun Tandon

Counsel for the Respondents:
Chandra Shekhar Singh, S.C.

U.P. Sheera Niyantran Adhiniyam 1964- Section 5 and 7-A-22 supply of molasses- person applying for molasses- not requiring bonafidely- not entitled- dealer can not be termed as bonafiedly requiring person for distilleries or use of Industrial establishment- application rightly rejected.

Held- Para 17

Rules clearly spells out that the allottee of the molasses has to be a person using the molasses for his distillery or for his any other industrial development. Thus the interpretation of Section 7-A as submitted by the counsel for the petitioner cannot be accepted. It is held that the Section 7-A contemplates application by a person who requires the molasses for his distillery or for his industrial development.

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri Arun Tandon counsel for the petitioner and Sri Chandra Shekhar Singh learned standing counsel appearing for the State respondents.

2. This writ petition has been filed by the petitioner praying for quashing of the orders 27th May, 2002 passed by the Controller of Molasses/Excise Commissioner, U.P. Allahabad. A further prayer has been made commanding the respondents to reconsider the application of the petitioner afresh for grant of permission under Section 7 A of the Uttar Pradesh Sheera Niyantran Adhiniyam 1964.

Brief facts giving rise to this writ petition are as follows:

3. Petitioner is a firm registered under the U.P. Sales Tax Act. Petitioner claimed to be dealer/handling agent of molasses. Petitioner claims that earlier by the order of Controller molasses he was allotted different quantity of molasses. Petitioner further claims that he has also been granted "No objection" certificate for export of molasses out of the State. Petitioner filed an application under Section 7-A of the U.P. Sheera Niyantran Adhiniyam, 1964 praying that he be granted permission for 1,00,000 quintals of molasses. He has stated in his application that the said molasses will be sold to the distilleries and the industrial establishment of the State of Uttar Pradesh and out side the State of Uttar Pradesh. The petitioner had also filed a writ petition No.1751 of 2002 after filing the aforesaid application. When the writ petition came for hearing on 15.5.2002 learned counsel standing counsel made statement that the order has already been passed on the application of the petitioner which shall be communicated. The writ petition was dismissed with liberty to the petitioner to challenge the said order in appropriate proceedings. After the aforesaid order petitioner was issued letter dated 27.5.2002 intimating that that his application under Section 7-A has been rejected. In the order dated 27.5.2002 it has been stated that under Section 7-A of the Act only such person can give an application who required molasses for its distilleries or for industrial development. Order further state that the application given by the petitioner does not come under Section 7-A since the petitioner has not claimed that he required for his own distillery or for industrial development. The said order dated 27.5.2002 has been challenged in this writ petition.

4. Sri Arun Tandon counsel for the petitioner challenging the aforesaid order dated 27.5.2002 made following submissions:-

1. Under section 7-A there is no prohibition in granting an application of a person who is a dealer and requires the molasses for it being sold for purposes of industrial development. The respondents have misinterpreted Section 7-A and has illegally rejected the application.

2. The petitioner and other similarly situated dealers in earlier years were granted permission, reference has been made to the orders of the Controller dated 11.4.1989, 20.6.1989 annexures 11 and 12 to the writ petition.

3. State of Uttar Pradesh by Government order has lifted control on price and distribution of molasses hence no restriction can be imposed in free sale of molasses.

5. Learned standing counsel refuting the submissions of the counsel for the petitioner supported the order dated 27.5.2002 and contended that under

Section 7-A the petitioner is not eligible for grant of any permission for molasses. It was contended that under Section 7-A no dealer or handling agent can be granted permission to lift the Molasses. The standing counsel contended that only that person can apply who require molasses for his distillery or for any purpose of industrial development. It was contended that since the petitioner do not require the molasses for his distillery or for any purpose of industrial development by himself, he cannot make an application.

6. We have heard counsel for the parties and perused the record. The main issue which has arisen in this writ petition is regarding true scope and meaning of Section 7-A of the Uttar Pradesh Sheera Niyantran Adhiniyam, 1964. For considering the submission raised by the counsel for the petitioner it is necessary to examine the provisions of Section 7-A and other provisions of the Act and the Rules to find out the real object and scope of the Act and the Rules. Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 (hereinafter called as the Act, 1964) was enacted to provide in public interest for the control of storage, gradation and price of molasses produced by Sugar Factories in Uttar Pradesh and the regulation of supply and distribution thereof. Section 2(d) of the Act defines molasses which means the heavy, dark coloured viscous liquid produced in the final stage of manufacture of sugar by vacuum pan, from sugarcance or gur, when the liquid ask such or in any form or admixture contains sugar. Section 5 provides preservation of molasses by the occupier of sugar factory. Section 7-A of the Act deals with manner and procedure regarding Application for molasses. Section 7-A is quoted below:-

"7-A Application for molasses

(1) Any person who requires molasses for his distillery or for any purpose of industrial development may apply in the prescribed manner to the Controller specifying the purpose for which it is required.

(2) On receipt of an application under sub-section (1) and after making such inquiries in the matter as he may think fit, the Controller may make an order Section 8.

(3) In disposing of an application under sub-section (1) the Controller shall consider:---
(a) the general availability of molasses;
(b) various requirements of molasses;
(c) the better utilization to which molasses may be put in the public interest;
(d) the extent to which the requirements of the applicant are genuine;
(e) reasonable likelihood or otherwise of the molasses that may be obtained by the applicant being diverted to purposes other than those specified in the application and where the application is rejected in whole or in part, he shall record reasons therefore)

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

(5) The occupier shall be entitled to receive 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."

7. Section 8 of the Act deals with sale and supply of molasses. Under section 8 the Controller of molasses require the occupier of sugar factory to sell and supply in the prescribed manner such quantity of molasses to such person as may be specified in the order. Section 8 of the Act is quoted as below:-

"8. Sale and supply of molasses:_____
(1) The Controller (with the prior approval of the State Government by order require) may the occupier or 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:-

(a) shall require supply to be made only to a person who required 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 for the purpose specified in the application made by him under sub-section (1) of Section 7-A and to observe all such restrictions and conditions as may be prescribed.

(b) may be for the entire quantity of molasses in stock or to be produced during the year or for any portion thereof; 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 State save where, in the opinion of the Controller, a varation is necessitated by any of the following factors;

(i) the requirements of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost;
(ii) the requirements 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 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)."

8. Section 10 deals with maximum prices of molasses. Section 11 and 12 deal with offences and penalties. Section 17 of the Act provides for maintenance of accounts and furnishing of returns etc. by sugar factory and other persons to whom molasses is supplied. Section 17 is quoted below:-

"17. Maintnance of accounts and furnishing of returns, etc.;_____
Every occupier of a sugar factory and every person to whom molasses is supplied by such occupier shall be bound_____

(a) to maintain such registers, records, instruments and reagents as may be prescribed;

(b) to furnish all such information and returns relating to the production and disposal of molasses in such manner, to

such persons and by such dates as may by order, be prescribed by the Controller;

(c) to produce, on demand by an Excise Officer not below the rank of a Sub-Inspector (Excise), registers, records, documents, instruments and chemical reagents which he is required to maintain under the provisions of this Act or the rules or orders made there under."

9. Rules have been framed namely, Uttar Pradesh Sheera Niyantran Niyamavali, 1974 (hereinafter to be referred as "Rules, 1974"). Chapter II of the Rules deals with preservation of molasses. Chapter III deals with supply and distribution. Rule 12 provides that the occupier of every sugar factory shall submit to the Controller by August 31st each molasses year a statement in Form M.F.9 specifying an approximate estimate of the quantity of molasses to be produced in a sugar factory during the molasses year. Rule 13 deals with estimate of requirement of molasses for distillation and industrial purposes. Rule 16 deals with Arrangement for the lifting of molasses by the allottee. Rule 22 is relevant for the purpose. Rule 22 as amended by notification dated 16th August, 1993 is quoted as below:-

"22. Sale or supply of molasses to distilleries and other persons for industrial development,_____ The molasses produced in a sugar factory shall be sold or supplied only to distilleries or other persons bona fidely requiring it for purposes of industrial development."

Prior to the aforesaid amendment Rule 22 was as under:-

"**22Reservation of entire stock of molasses for distillation and other purposes of industrial development (Section 8).** (1) All stock of molasses produced in a sugar factory shall be deemed to have been reserved for supply to distilleries or other persons requiring it for purposes of industrial development and no stock of molasses produced in a sugar factory shall be sold or otherwise disposed of by the occupier of any sugar factory except in accordance with an order in writing from the Controller.

(2) the Controller shall release any stock of molasses in favour of occupier of a sugar factory only when the same is not required for distilleries or for other purposes of industrial development."

10. Rule 29 provides for manner of taking samples and procedure for settlement of dispute relating to grades of molasses. Rule 29 (4) which is relevant for the present purposes is extracted below:-

"29(4) In the case of transport by road, if the allottee receiving molasses from a sugar factory is not satisfied with the grade declared by the sugar factory it may apply in writing to the Sub-Inspector, Excise or the Excise Inspector, molasses of the area in which the sugar factory is situated along with the testing fee to get the molasses of the storage tank from which the molasses was supplied by the sugar factory or the molasses was loaded in lorry or thela tested by the officer authorized under sub-rule (3) for declaration of its correct sugar contents. The price shall be according to the grade declared by such authorized officer. In case a lower grade is declared, the sugar factory will be bound to refund the

allottee any extra payment realized alongwith the testing fee of such authorized officer. The provisions of sub-rules (1) to (3) shall also apply in the cases regarding taking of samples by the Resident Sub-Inspector, Excise or Excise Inspector, as the case may be."

11. Rule 33 provides for registers to be maintained and statement to be submitted by distilleries, out-still licensees and other allottees. Rule 33 is quoted below:-

"33. Register to be maintained and statements to be submitted by distilleries, out-still licensees and other allottees;_____(1) the owners of distillers shall maintain a record of all moasses received, utilized for distillation and the balance in a register in Form M.F. 6, Parts I and II as appended to these rules and shall submit to the Controller a true monthly abstract of the receipt, utilization and balance at the distillery each month in Form M.F. 10 on the 5th of each month following.

(2) In the case of allottee other than distilleries (except out still) the accounts of molasses shall be kept in a register in Form M.F. 6 Part III as given in appended forms and allottees shall submit a correct monthly abstract of the same to the Excise Inspector in whose circle the industrial unit lies.

(3) Outsill licensees shall maintain accounts of molasses in Form M.F. 6 Part III as given in appended forms and shall submit a correct monthly abstract of the same to the Excise Inspector in whose arde the shop lies.

Rule 35 provides for inspection book for inspecting Officer.

12. We have extracted the relevant provisions of the Act and the Rules for purpose of considering the object and scheme of the Act and the Rules which is relevant for understanding the scope and object of Section 7-A. The key words in Section 7-A are:-

"Any person who requires molasses for his distillery or for any purpose of industrial development may apply……."

13. The first part of the above sentence i.e. who requires molasses for his distillery' is very clear and admit no doubt that only that person can apply who require molasses for his distillery. Thus application by dealer or Handling agent for purpose of any distillery is ruled out. The contention of counsel for the petitioner is that his application is on behalf of those units which will deals molasses for industrial development. The contention of the counsel is that since he after getting permission will supply to only those units which will use it for industrial purpose, his application is not beyond the scope of Section 7-A. Section 7-A uses the word "require". The Law Lexicon by P. Ramnatha Aiyar, 1997 Second Edition defines the word "require" in following words:-

"Require" means to make necessary; to demand to ask as of right"

Further the word "require" is defined in following words at page 1665:-

"The word "require" is something more than the word 'desire'. Although the element of need is present in both the

cases, the real distinction between 'desire' and 'require' lies in the insistence of that need. There is an element of "must have" in the case of "require" which is not present in the case of mere "desire" *Namshs V. Kanailal Roy Choudhary AIR 1952 Cal. 852, 853 (W.B. Premises Rent Control (Temporary Provisions) Act 38 of 1948 S. 11(1)(f)"*

The word "require" is equivalent to "requisite or necessary".

14. It is well settled that for finding out the meaning and purpose of a word used in a statute the context in which it is used is relevant. The definition of word "require" as quoted above means that person applying under Section 7-A must have necessity or need for such requirement. A need for molasses can be by distillery or by any unit for its industrial development. Although in Section 7-A word "who require molasses for his" has been used before distillery but the said words have also to be read while interpreting the other clause that is "for any purpose of industrial development". Thus the person applying should either require for his distillery or for his any purpose of industrial development. From a reading of Section 7-A it is clear that a dealer cannot apply for distillery because before distillery the words "who require molasses for his" have been used. The contention of the appellant is that there is no prohibition in applying by a dealer if his application for the persons who requires molasses for industrial development. The object of Section 7-A has been to check and to provide for supply of molasses to only those persons who are thought fit by Controller of Molasses to be supplied the molasses. Two purposes have been mentioned in Section 7-A i.e. for distillery and for purpose of industrial development. Idea is to supply molasses to limited category of persons who will use for distillery and industrial development. This has been provided so that the distillery and industrial development do not suffer in their cause by non supply of molasses since quantity produced in sugar factory is limited. Due to this purpose Section 7-A was enacted so that check be made and molasses be not diverted to any other use, if the interpretation as put up by the counsel for the petitioner is accepted then it will be open to any dealer to take all quantity of molasses from sugar factory which is to be used for industrial development and to make them available on a price on his sweet will or not to supply to the persons needing for industrial development according to their reasonable requirement. It will lead to hardship to the persons engaged in industrial development as well as the industrial growth of the State.

15. Analysis of provisions of Act, 1974 further re-enforces our view that the application by a dealer under Section 7-A is rule out. Section 8 sub clause (2) (aa) provides that Controller of molasses may require the person applied for his distillery or for any use of industrial development to utilize the molasses supplied to him for the purposes specified in the application and to observe all such restrictions and conditions as may be prescribed. If the dealer is to be treated as allottee of the molasses who in his turn sell it out to a third person, the observance of the restriction and conditions cannot be observed since molasses are with third persons who are not allotees and are not bound by restrictions provided for in Section 8. The act intends to put restriction and conditions on the person

allotted molasses under the Act. The Act do not contemplate observance of the restriction and conditions by a third person to whom allottee sells the molasses. The observance of provisions of Section 8 (2) (aa) will become impossible by a dealer since after sale of it to a third party he cannot observe any condition and restriction which are attached to supply of molasses. Section 11 provides for penalty or contravention of the provisions. Section 17 of the Act as quoted above provide for maintenance of accounts and furnishing of return which is to be done by both Occupier of the factory or every person to whom the molasses are supplied by such occupier. Testing the provision on the basis of interpretation put up by the counsel for the petitioner it will mean that the third party who are sold molasses by a dealer can always take stand that they are not bound to maintain the accounts and furnish the returns since they have not been supplied molasses by occupier. This provision again suggest that the documents, accounts and registers has to be maintained by a person who is supplied molasses which in term means that the supplier is the person who is using the molasses and has to submit accounts and returns regarding supply. The analysis of the aforesaid provision clearly indicate that the provision did not contemplate supply of molasses to a dealer. It contemplate supply of molasses to a distillery or to a person using the molasses for his industrial development and said person is to require to maintain accounts, returns and has to observe conditions and directions issued regarding supply.

16. Analysis of provisions of 1974 Rules also leads to the same conclusions which we have drawn from the analysis of the provisions of the Act 1964. Rule 22 of the Rules make it clear that person applying for molasses should bona fide require the molasses. Rule 22 has been amended and a comparison of amended and unamended Rules suggest that the amended Rule 22 has clarified that the molasses shall be sold or supplied only to distilleries and other persons bonafide requiring it for the purposes of industrial development. The dealer cannot be said to bona fide require the molasses for industrial development. The dealer may require molasses for earning the profits in his business which is not the object of the Act and the Rules. Further Rule 29 (4) provides that in case of transport by road, if the allottee receiving molasses from a sugar factory is not satisfied with the grade declared by the sugar factory it may apply in writing to the Sub-Inspector, Excise or the Excise Inspector, molasses of the area in which the sugar factory is situated along with the testing fee to get the molasses of the storage tank. Dealer after supply to a third party may not be interested for testing and the third party who is not allottee will face difficulty in proving his right to get molasses tested. The scheme of Rule 29 (4) again suggest that it is allottee who is required to use molasses for his purpose and object to the Grade of molasses. Rule 33 further requires that all registers to be maintained and the statement to be submitted by an allottee. The allottee require to submit monthly extract of the registers in Form M.F.6 Part III. The dealer who has been supplied molasses cannot comply the said provisions since he will sell it to third party. Under the Scheme of the Act and the Rules allottee will be only person who is allotted molasses under the orders of the Controller of Molasses. Rights have been given to the allottee for protecting

his interest. Further rule 35 provides for inspection book for inspecting officer, dealer cannot maintain inspection book and the requirements of the rule is to maintain inspection book by allottee.

17. The provisions above discussed of the Act and the Rules clearly spells out that the allottee of the molasses has to be a person using the molasses for his distillery or for his any other industrial development. Thus the interpretation of Section 7-A as submitted by the counsel for the petitioner cannot be accepted. It is held that the Section 7-A contemplates application by a person who requires the molasses for his distillery or for his industrial development. Application by a dealer is ruled out under Section 7-A in view of the Scheme of the Act and the Rules.

18. In view of the aforesaid discussion the first submission of the counsel for the petitioner is not acceptable and Section 7-A of the Act cannot be interpreted as suggested by the counsel for the petitioner.

19. Coming to second submission of the counsel for the petitioner that the petitioner and other similarly situated dealers were granted permission in earlier years but the fact that in earlier years petitioner was granted permission by Controller of molasses, cannot be a basis of right for issue of writ of mandamus. In view of interpretation of Section 7-A which we have taken that dealer cannot make an application for allotment of molasses under Section 7-A. The apex court in 1995 (1) Supreme Court Cases page 745 **Chandigarh Administration and another Vs. Jagjeet Singh and others** has held in paragraph 8 as under:-

"Generally speaking the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be a ground for issuing writ in favour of the petitioner on the plea of discrimination. If the order in favour of other person is found to be contrary to law and not warranted in the facts and circumstances of the case, such order cannot be made basis of issuing a writ compelling the respondent authority to repeat the illegality or pass another unwarranted orders. "

In view of what has been said above, the second submission of the counsel for the petitioner can also not be accepted.

20. Coming to the last submission of the counsel for the petitioner that the molasses has now been decontrolled. No restriction can be made on the sale and supply of molasses. The petitioner has relied to the order of the Controller of molasses dated 7.7.2000 Annexure-8 to the writ petition by which paragraph 5 (2) of the earlier order issued by the Controller of molasses was modified. A mere look to the order dated 7.7.2000 Annexure -8 to the writ petition shows that it refers to G.O. dated 26.6.2000. According to which control of price and distribution of molasses has been lifted. The fact that the price is not controlled by the State Government is not relevant for the purpose of Section 7-A. The order dated 5.7.2000 also refers that control of distribution has been lifted. A copy of the said Government order, dated 26.6.2000 has not been brought on record by the counsel for the petitioner. Further the order dated 7.7.2000 is an order shown to have been issued in exercise of power under section 8 of the Act by the

Controller. The petitioner himself has brought on record the order of the Controller after the order dated 7.7.2000 i.e.order dated 22.12.2000 and 3.1.2000 of the Controller of molasses Annexure -9 and 10 to the writ petition. Looking to the aforesaid order dated 3.1.2002 it is clear that the State Government for the year 2001-2002 has made sale of molasses 100% free which means that all the molasses can be sold by sugar factories. The said order, however, has put certain restriction on the import of molasses and regarding payment of administrative fee. Section 8 empowers the Controller of molasses to require occupier of the sugar factory to sell and supply in the prescribed manner such quantity of molasses as specified in the order. However, from the orders issued even subsequent to 22.6.2000 it is clear that the control is still exercised by the Controller of molasses regarding sale and supply of molasses. In any view of the matter section 7-A is still in force. The petitioner himself has made an application under Section 7-A. The question in the writ petition has arisen as to petitioner's application has rightly been rejected or not. For the reasons which we have given above we are satisfied that the application of the petitioner was rightly rejected. The fact that sugar is hundred per cent free and there is no control on the price can in no manner dilute the applicability of Section 7-A. Petitioner's claim in the writ petition is to be considered in accordance with Section 7-A. From the fact that the petitioner himself has made an application under Section 7-A and he can succeed only when his application comes within the four corners of Section 7-A . Thus the third submission of the counsel for the petitioner can also not be accepted and we hold that the application of the petitioner was rightly rejected.

21. In view of the foregoing discussions and the reasons given above we do not find any merit in this writ petition. The writ petition is accordingly dismissed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 23, 2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 223 of 1993

Sita Ram ...Petitioner
Versus
District Inspector of Schools and others ...Respondents

Counsel for the Petitioner:
Shri A.N. Tripathi

Counsel for the Respondents:
Shri Ran Vijay Singh, S.C.

U.P. Intermediate Education Act 1921- Section 16 f (i)- Salary- appointment of C.T. grade Teacher- unless approved by the DIOS- not entitled for salary from State fund.

Held- Para 10

Unless the appointment of a teacher is approved, he does not acquire the status of teacher nor entitle to salary from the State fund.

Case law discussed:
1997 (10) SCC. 715- Relied on.

U.P. Intermediate Education Act-S-16-GG- Regulation- appointment as C.T. grade teacher on 25.6.72 again joined on 1.7.75- appointment never approved by the DIOS- not entitle for Regularisation.

Held - Para 16 and 19

We have already considered the claim of the petitioner and have taken in view that since petitioner's appointment was never approved by District Inspector of Schools, he never acquired the status of teacher, when the petitioner never acquired the status of teacher in any capacity, the question of regularisation of his services does not arise. The claim of regularisation as contended by counsel for the appellant in wholly misconceived. Petitioner having never acquired status of teacher there is no question of his being considered for regularisation.

(Delivered by Hon'ble Ashok Bhusan, J.)

1. Heard Sri A.N. Tripathi, learned counsel appearing for the appellant and Sri Ran Vijay Singh, learned standing counsel for the respondent.

2. This appeal has been filed by the appellant against judgement dated 16.11.1992 passed in writ petition no. 9876 of 1988 Sita Ram versus District Inspector of Schools, Gorakhpur and another. The learned Single Judge vide his judgement dated 16.11.1992 dismissed the writ petition.

Facts giving rise to this appeal briefly stated are:

3. Jawahar Shiksha Niketan Uchchtar Madhyamik Vidyalaya, Jangal Baban. Bhaura Bari, Gorakhpur is an institution governed by U.P. Intermediate Education Act 1921.

The appellant hereinafter referred as petitioner claims to have been appointed as untrained Teacher in C.T. grade in pursuance of appointment letter dated 25.6.1972. The appointment letter which has been filed by the petitioner discloses that said appointment was up to 20.5.1973. Further case of the petitioner is that he was allowed to continue even after 20.5.1973 and was sanctioned one year leave from 1.7.1974 to 30.6.1975 for under going L.T. Training, petitioner was permitted to join the institution on 1.7.1975. In the year 1975 it is stated that headmaster of the institution made certain appointment in C.T. grade. The petitioner alongwith certain other teacher challenged those appointment in this Court by means of writ petition no. 11192 of 1975 which was dismissed by this Court on 29.10.1976. Petitioner also filed a civil suit no. 345 of 1978 alongwith four other persons, application for interim injunction was rejected by the Trial Court, appeal against which order was also dismissed. The suit thereafter was dismissed in default. Petitioner claims to have submitted several representation to the District Inspector of Schools for regularization of his service and for payment of his salary. The District Inspector of Schools vide his letter dated 2.3.1988 wrote to the petitioner that suit no. 347 of 1978 filed by the petitioner and the appeal having been dismissed on 3.10.1978, there is no need to give any decision by District Inspector of Schools. After the order dated 2.3.1998, petitioner filed writ petition no. 9876 of 1988 in which affidavits were exchanged between the parties and writ petition was ultimately dismissed on 16.11.1992. Against the order dated 16.11.1992 present special appeal has been filed. Learned Single Judge in his judgement dated 16.11.1992 while dismissing the writ petition of the petitioner gave following reasons for dismissal of the writ petition.

i) The petitioner's earlier writ petition no. 11192 of 1975 by which the appointment of certain teachers was challenged has already been dismissed by this Court on 19.10.1976, in that writ petition, the relief sought by the petitioner was that they were validly appointed teachers and are entitled in their salary. Suit no. 345 of 1978 was also filed by the petitioner which was dismissed subsequent to rejection of interim injunction application, in view of the earlier litigation, the writ petition filed by the petitioner is not maintainable and is liable to be dismissed on this ground alone.

ii) In the counter filed by the management, the appointment letter filed by the petitioner is stated to be forged and fabricated. It was stated in the counter affidavit that one Sita Ram s/o Jokhu Ram was appointed as untrained temporary teacher who later proceeded on leave and thereafter never returned. The petitioner Sita Ram who is not son of Rambali was never appointed. Management further stated that it never allowed the petitioner to work or recommended his case for regularization. Petitioner except for a bare denial did not bring any material to substantiate the denial. Allegations involved highly disputed question of the fact and cannot be resolved in proceeding under Article 226.

4. Sri A.N. Tripathi, learned counsel for the appellant raised following submissions in support of this appeal:

(i) The earlier writ petition no. 11192 of 1975 filed by the petitioner was dismissed on the ground of non joinder of necessary party, hence the same will not preclude the petitioner from filing the present writ petition. Suit No. 345 of 1978 was dismissed in default which also will does not operate as res-judicata in the present writ petition.

(ii) The District Inspector of Schools did not decide the claim of the petitioner on merit where as the decision on merits of the case was to be given by District Inspector of Schools also did not give any opportunity to the petitioner before passing the order dated 2.3.1988.

(iii) The petitioner has become entitled for regularization in accordance with the provision of Section 16-GG of U.P. Intermediate Education Act 1921.

(iv) The learned Single Judge was required to decide the claim of regularization of the petitioner and ought to have remitted the mater for fresh decision by the District Inspector of Schools.

(v) Ram Sunder, Purnmansi and Dhupraj who were similarly situated and were juniors have been regularised under section 16 GG where as petitioner has been discriminated.

5. The learned Standing Counsel refuted the submissions of counsel for the appellant and has submitted that petitioner's writ petition has rightly been dismissed by Learned Single Judge. The learned Single Judge referred to the counter affidavit filed on behalf of District Inspector of Schools in the writ petition in which it was stated that alleged appointment of the petitioner has never been approved and there was no resolution of the Committee of management to appoint the petitioner. The learned standing counsel also submitted

that petitioner was never appointed in the Institution as temporary teacher and it was one Sita Ram s/o Jokhu who was appointed on temporary basis as untrained teacher, he took leave and thereafter never returned. It was submitted that petitioner has not come with clean hands and is not entitled for any relief. On the basis of dismissal of earlier writ petition of the petitioner, it has been contended that present writ petition is barred. The learned standing counsel further submitted that in view of the dismissal of the suit of the petitioner he cannot agitate the matter again in this writ petition.

6. We have heard counsel for both the parties and have perused the records. The thrust of submission of the counsel for the appellant in this appeal is that his case has not been considered by the District Inspector of Schools as well as Learned Single Judge on merit and it was rejected only on the ground of dismissal of earlier writ petition and suit of the petitioner. The counsel for the appellant emphatically submitted that petitioner has become entitled for regularization under 16 GG of U.P. Intermediate Education Act.

7. In view of the above submission made by counsel for appellant, before adverting to the question as to whether by dismissal of earlier writ petition as well as the suit of the petitioner he is precluded from agitating the matter, we thought it is appropriate to consider the case of the petitioner on merits also.

8. From the facts brought on record of the special appeal, it is clear that petitioner is basing his claim on the appointment letter dated 25.6.1972 issued by the Manager which has also been appended as annexure -1 to the Stay application. The said appointment was upto 20.5.1973. The next document filed by the petitioner is copy of his letter dated 26.6.1974 addressed to the Manager praying for one year leave from 1.7.1974 to 30.6.1975, on the said letter there is endorsement of the Manager. The next document relied by the petitioner is his letter dated 1.7.1975 addressed to the Manager that he has passed L.T. Training and he may be permitted to join. On the said letter there is undated endorsement of the Manager that permission is given for joining. Neither there is any document on the record, nor any pleading on part of the petitioner that his appointment was ever approved by District Inspector of Schools. As submitted by learned standing counsel, the District Inspector of Schools in his counter affidavit has specifically stated that petitioner's appointment was never approved by District Inspector of Schools.

9. The appointment of the teacher in recognized institution is governed by the provision of U.P.Intermediate Education Act 1921. Section 16 F of the U.P.Intermediate Education Act as it existed prior to amendments made by U.P. Act No. 26 of 1975 is quoted as below :

"16-F (1) Subject to the provisions hereinafter specified, no person shall be appointed as a Principal, Headmaster of teacher in a recognized institution unless he
(a) possesses the prescribed qualifications or has been exempted under sub section (1) of section 16-E.
(b) has been recommended by selection committee constituted under sub section (2) or (3) , as the case may be , of the said

section and approved, in the case of Principal or Headmaster by the Regional Deputy Director, Education, and in the case of a teacher by the Inspector.

Provided that if the Inspector is satisfied that for any institution no candidate, who possesses all the prescribed qualifications is available for appointment he may permit the institution to employ as a temporary measure any suitable person for a period not exceeding one year. Such period may be extended with the prior approval of the Inspector.

Provided also that in the case of leave vacancy or of a vacancy occurring for a part of the session of the institution it shall be lawful for the Committee of Management to appoint a Principal, Headmaster or teacher if information of such an appointment is immediately conveyed to the Inspector.

10. From the aforesaid provision, it is clear that no person can be appointed as a teacher in a recognized institution unless he has been recommended by selection committee constituted under sub section (2) or (3) and approved by the Inspector . Proviso to 16 F (1) gives power to the Inspector to permit the Institution to employ a Teacher as a temporary measure for a period not exceeding one year and further in case of the leave vacancy occurring for the part of session, management may make appointment with intimation to the Inspector. Petitioner does not claim appointment on leave vacancy or any vacancy for a part of session. Unless the appointment of a teacher is approved, he does not acquire the status of teacher nor entitle to salary from the State fund.

11. Apex court in 1997(10) SC C 715 State of U.P. & others versus Damyanti Singh and others held in paragraph 4-

"4. We directed the respondents to produce the record of the returns given by the Management with regard to the teachers working in the institution after the up gradation w.e.f. 14.7.1977. The records have been placed before us. The records indicate that for the year 1977-78 and 1978-79, admittedly, the name of the first respondent does not find place. With regard to 1979-80, it is seen that she was working against a leave vacancy. On 9.9.1982, the approval consisting of 9 names in respect of the teachers working in the High School was given but it did not mention the name of the first respondent. This factual position was also accepted by the District Judge but he held that she cannot be penalized for the mistake of the Management in not sending the name of the first respondent. We fail to appreciate the view taken by the District Judge and approved by the High Court as correct. The official reports reflect the correct. State of affairs. Since the approval of the authorities is required under the U.P. Intermediate Education Act, 1921, after up gradation of the school with effect from 14.7.1977, it would be axiomatic that appointment of the staff working in the school would get approved by the competent authority. Otherwise, the same cannot be recognized and treated as regular so as to be entitled to receive aid from the Government."

12. It has also come on the record that there was dispute regarding Management and Principal in the year 1975 has made appointment of certain teachers. The petitioner unsuccessfully

challenged the appointment made by the Principal in the earlier writ petition. Petitioner has neither pleaded nor brought any material to show that his appointment was ever approved by the District Inspector of Schools.

13. The first submission which has been raised by the counsel for the appellant is that dismissal of earlier writ petition no. 11192 of 1975 will not preclude him in filing the present writ petition. He further contended that suit no. 345 of 1978 in which petitioner was one of the plaintiff was dismissed in default, hence the present writ petition is not barred. As observed above, instead of resting our judgement on the reasons given by learned Single Judge that present writ petition is barred we have proceeded to examine the claim of appellant on merit. In view of the fact we have considered the matter on merit, there is no need to decide the question as to whether dismissal of earlier writ petition and the suit of petitioner will preclude him from filing the writ petition. In view of we having examined the matter on merit, this issue is not decided in the present appeal.

14. The second submission of the counsel for the appellant is that District Inspector of Schools ought to have decided the matter on merit after giving opportunity. In view of the fact that we ourselves have examined the claim of the petitioner on merit, there is no need to decide as to whether the District Inspector of Schools was justified in not deciding the claim of petitioner on merit merely on the ground that suit filed by the petitioner was dismissed.

15. The third submission of the counsel for the appellant is based on his claim of regularization under section 16 GG of U.P. Intermediate Education Act. Petitioner claimed that since he was appointed on 25.6.1972 and thereafter again joined on 1.7.1975 and continued in the institution, he became entitled for regularization under section 16 GG.

16. We have already considered the claim of the petitioner and have taken the view that since petitioner's appointment was never approved by District Inspector of Schools he never acquired the status of teacher, when the petitioner never acquired the status of teacher in any capacity , the question of regularisation of his services does not arise.

17. After amendment made by U.P. Act No. 26 of 1975 regarding procedure of making appointment of teacher, there was difficult being felt in appointment teachers for time being, hence U.P. Secondary Education (removal of difficulties) order 1975 was issued on 18.8.1975. The aforesaid difficulty order provided for making an ad hoc appointment by selection committee. Several other difficulties orders were issued thereafter.

18. Section 16 GG provided for regularization of Ad hoc teachers appointed between 18.8.1975 and 30.9.1976. Section 16 GG sub clause (1) is quoted as below:

"16 GG- ***Regulation of appointment of adhoc teachers*** *- (1) Notwithstanding anything contained in Sections 16 E, 16 F and 16 FF, every teacher of an institution appointed between August 18, 1975 and September 30, 1976 (both dates inclusive) on adhoc basis against a clear vacancy and possessing prescribed qualifications*

or having been exempted from such qualifications in accordance with the provisions of this Act, shall with effect from the date of commencement of this section, be deemed to have been appointed in a substantive capacity, provided such teacher has been continuously serving the institution from the date of his appointment up to the commencement of this section.

19. From his own case of the petitioner, petitioner was appointed on 25.6.1972 and thereafter again claims to have joined on 1.7.1975. Thus petitioners' claim even according to his own case was not of appointment between 18.8.1975 and 30.9.1976, hence section 16 GG is not attracted. The claim of regularization as contended by counsel for the appellant is wholly misconceived. Petitioner having never acquired status of teacher there is no question of his being considered for regularization.

20. The fourth submission of counsel for the petitioner that Single Judge ought to have decided the claim of regularization and ought to have remitted the matter to the District Inspector of Schools is also to be considered. The Learned Single Judge has considered the submission which were raised before him. From the perusal of judgment, it is clear that no such claim was even raised that petitioner is entitled to be regularised under section 16 GG. Further , the learned Single Judge and parties have filed their affidavits, it was not necessary for Learned Single Judge considered the claim of the petitioner and considered the affidavits filed in the writ petition. In view of the fact that all relevant facts were brought before learned Single Judge to have again directed the District Inspector of Schools to examine the matter. This submission of counsel for the appellant also does not help the appellant.

21. The last submission of the counsel for the appellant is that certain similarly situated teachers were regularised where as petitioner has been discriminated. Petitioner has to succeed in the writ petition on the strength of his own case. The details regarding appointment of other teachers have not been brought in the appeal to even consider the above plea of appellant. Appellant's appointment letter alongwith the appeal shows that his appointment was by the Manager only on temporary basis initially up to 20.5.1973. There is no order of the District Inspector of Schools permitting the petitioner to continue or approving his appointment. The circumstances and facts under which some other teachers were regularised are not relevant nor can help the petitioner in the present case. The petitioner who is seeking relief from this Court has to bring material to satisfy the Court that his appointment was made in accordance with the procedure prescribed in the U.P. Intermediate Education Act. In view of this petitioner is not entitled to get any benefit from the above submission.

22. In view of foregoing discussion , none of the submission raised by counsel for the appellant has any merit. We have examined the claim of the petitioner on merit. We have come to conclusion that petitioner's appointment was never approved as required under provision of U.P. Intermediate Education Act 1921. Petitioner has failed to prove that he was validly appointed. Learned Single Judge did not commit any error in rejecting the writ petition.

23. We do not find any good ground in this special appeal to interfere with the order of Learned Single Judge or to grant any relief to the petitioner. The special appeal fails and is dismissed accordingly. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19. 08.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No.1005 of 1997

Anil Kumar Tiwari ...Appellant
Versus
Executive Engineer, Tube Well Division, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri D.K. Mishra

Counsel for the Respondent:
Sri Ran Vijai Singh, S.C.

(A) Constitution of India, Article 226 Service Law- Cancellation of appointment order- appellant appointed as Part time tube well operator pursuant to demicile certificate of a particular village subsequently it was found that the certificate is not correct-show cause notice issued- in reply the appellant could not prove to be the resident of that particular village- cancellation of appointment held-proper-writ court can not act as Appellate court.

Held- Para 7

The petitioner was given opportunity to show cause and the respondents after the show case notice were satisfied that petitioner is not resident of village Tarna Tarni. In view of the above, it was open to the respondents to arrive at a finding with regard to residence of the petitioner. The scope of challenge regarding residence of the petitioner is very limited. This Court under Article 226 of the Constitution cannot re-asess the evidence or to substitute its finding with that of the finding of the authorities.

(B) Constitution of India, Article 226- opportunity of hearing- appointment letter issued on the basis of certificate submitted by the employee regarding permanent resident of village Tarn Tarni- after considering the reply submitted pursuant to show cause notice- appointment cancelled whether before passing the cancellation of appointment opportunity of hearing is must ? Held- 'No'.

Held- Para 6

The disciplinary enquiry is required to be held when a person is punished on account of any misconduct. The respondents having not awarded any kind of punishment to the appellant and only having cancelled the appointment of the petitioner, there was no occasion for holding disciplinary enquiry.

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It is true that before passing the order of cancellation of appointments in the present case, the petitioner was entitled for an opportunity. The show cause notice dated 14the February, 1991 was given to the petitioner to which reply has also been filed by the petitioner. Hence not holding of enquiry in the present case does not vitiate the order cancelling the appointment. The second submission of counsel for the appellant thus cannot be accepted.

Case law discussed:
2002 (2) ESC 247

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri D.K. Misra, counsel for the appellant and Sri Ran Vijai Singh, Standing counsel appearing for the respondents.

2. This special appeal has been filed challenging the judgement dated 19.11.1997 of learned Single Judge in writ petition no. 37249 of 1991 (Anil Kumar Tiwari Vs. Executive Engineer and another). By the aforesaid judgement learned Single Judge dismissed the writ petition filed by the appellant.

3. Brief facts giving rise to this special appeal are, the appellant (hereinafter referred to as petitioner) filed the writ petition challenging the order dated7th December, 1991 by which appointment of the petitioner as Part time tube well operator was cancelled. Petitioner's case in the writ petition was that petitioner is resident of village Taran Tarni. He applied for appointment as Part time tube well operator. According to relevant orders governing the appointment of part time tube well operator, it was required that tube well operator must belong to village where tube well is situate and if command area of tube well is more than one village then the person of nearest village will be given preference. The petitioner claiming himself to be resident of village Taran Tarni applied for being appointed as part time tube well operator. The petitioner filed a domicile certificate and was appointed as part time tube well operator in the year 1987. The Sub Divisional Officer, Chail sent a letter dated 8 September, 1988 that petitioner is not permanent resident of village Taran Tarni. A show cause notice dated 14 February, 1991 was issued to the petitioner by Executive Engineer stating that petitioner was appointed on basis of his application in which he claimed himself to be resident of village Taran Tarni. It was stated that petitioner gave wrong information regarding his residence and obtained appointment order. The petitioner was asked to show cause within fifteen days failing which necessary action be taken against the petitioner. The petitioner submitted a reply denying the allegation and claimed that he is resident of village Taran Tarni. By order dated 7th December 1991 his appointment as part time tube well operator was cancelled on the ground that he is not permanent resident of village Taran Tarni. Consequently direction was issued to relieve him from his duties as part time tube well operator. The petitioner filed writ petition against the said order dated 7th December, 1991 in which counter affidavit was filed on behalf of the respondents by Assistant Engineer. One Rajendra Singh also got himself impleaded as respondent no. 3 in the writ petition. Learned Single Judge vide his judgement dated 19th November, 1997 has dismissed the writ petition of the petitioner. Learned Single Judge rejected both the submissions of counsel for the petitioner. Learned Single Judge has stated that the order was passed after giving opportunity to the petitioner and the claim of the petitioner regarding violation of Article 16 of the Constitution of India is unfounded. Against the said judgement dated 19th November, 1997, the present special appeal has been filed by the petitioner.

4. The counsel for the petitioner raised three submissions challenging the said order. The counsel for the petitioner submitted that requirement of residence in the particular village for purposes of appointment of part time tube well operator is violative of Article 16 of the Constitution. He has submitted that no restriction can be made for appointment on the basis of residence. The second

submission of counsel for the petitioner is that no enquiry was held before passing the termination order. He submitted that neither any date was fixed in the enquiry nor any enquiry was held. The counsel for the petitioner has placed reliance on a Division Bench judgement of this court in 2002 (2) ESC 247, **Safat Ullah vs. Commissioner, Varanasi Division, Varanasi and others**. The third submission of counsel for the petitioner is that petitioner has filed several materials before the authorities which have not been considered while taking the decision.

5. We have heard counsel for the parties and perused the record. The first submission of counsel for the petitioner that no restriction on the basis of resident of a particular village can be imposed in condition of appointment has to be considered. Along with the appeal, the petitioner has brought on the record the executive instructions providing for procedure of appointment of part time tube well operator. Annexure- 10 to the affidavit discloses that it is one of the condition for appointment of a part time tube well operator on basis of said condition claiming himself to be resident of village Taran Tarni where the tube well is claimed to be situated. The petitioner was given appointment accepting his claim that he is resident of village Taran Tarni. The petitioner having taken benefit of aforesaid condition is seeking employment, he is now estopped from challenging the aforesaid condition which was attached to the appointment as part time tube well operator. From the other conditions which have been mentioned in Annexure 10 to the affidavit, it appears that the period of working of a part time tube well operator is only from 9.30 to 12.00 which is clear from condition no. 6. It further provides that after the aforesaid hour, the person is entitled to do his own work but has to be available in the command area. Looking to the nature of duties, the condition requiring the part time tube well operator to be resident of same village cannot be said to be unreasonable. In any view of the matter since petitioner himself took benefit of the said condition, it is not open for him to challenge the said condition. Learned Single Judge has dealt with this argument and has rightly rejected the said contention. We do not find any error in the findings of the learned Single Judge rejecting the above contention of the petitioner.

6. The second submission of counsel for the petitioner is that no enquiry was held before passing the impugned order. From the order impugned, it is clear that the by order cancelling the appointment of the petitioner on the ground that he is not resident of village Tarna Tarni, the respondents have not awarded any punishment on any misconduct of the petitioner. The disciplinary enquiry is required to be held when a person is punished on account of any misconduct. The respondents having not awarded any kind of punishment to the appellant and only having cancelled the appointment of the petitioner, there was no occasion for holding disciplinary enquiry. It is true that if the respondents intended to punish the petitioner for misconduct, it was obligatory for the respondents to hold disciplinary enquiry. However, since the respondents have not punished the petitioner, it was not obligatory for them to hold an enquiry. The decision of Division Bench of this Court in Safat Ullah's case (supra) is not attracted in the facts of the present case. In the said case

after disciplinary enquiry, the petitioner of that case was dismissed from service after the enquiry report by Enquiry Officer. His appeal too was dismissed. In view of the aforesaid facts, the Division Bench of this Court held that holding of enquiry is necessary. The aforesaid judgement being a judgement pertaining to case of dismissal after the enquiry is not attracted in the present case. It is true that before passing the order of cancellation of appointment in the present case, the petitioner was entitled for an opportunity. The show cause notice dated 14 February, 1991 was given to the petitioner to which reply has also been filed by the petitioner. Hence not holding of enquiry in the present case does not vitiate the order cancelling the appointment. The second submission of counsel for the appellant thus cannot be accepted.

7. The last submission of counsel for the petitioner that petitioner submitted several documents which have not been considered by the respondents has to be looked into. From the show cause notice given to the petitioner, it is clear that it was claimed by the respondents that petitioner is not resident of village in which he has been appointed as part time tube well operator. The residence in the village being condition precedent for grant of appointment, the said issue went to very eligibility of the petitioner for appointment. The petitioner was, thus made aware of the grounds on which the respondents were proceeding to take action. This is not a case in which petitioner has been taken by surprise or his appointment has been cancelled on a ground which was never disclosed to him. The petitioner was given appointment on the basis of domicile certificate given by the revenue authorities in his favour which was filed by him. The revenue authorities themselves subsequently wrote to the department that the certificate of domicile given to the petitioner is not correct as is apparent from the averments made in the counter affidavit. After the aforesaid letter from the revenue authorities, the department initiated proceeding against the petitioner. The respondents after making necessary enquiry were satisfied that certificate of domicile filed by the petitioner was not correct. The petitioner was given opportunity to show cause and the respondents after the show cause notice were satisfied that petitioner is not resident of village Tarna Tarni. In view of the above, it was open to the respondents to arrive at a finding with regard to residence of the petitioner. The scope of challenge regarding residence of the petitioner is very limited. This court under Article 226 of the Constitution cannot re assess the evidence or to substitute its finding with that of the finding of the authorities. It cannot be said in the present case that there was no material at all to come to the conclusion that petitioner is not resident of village Tarna Tarni. The report of revenue officer was with them and one of the letters of the District Magistrate was also referred to in the show cause notice. In this appeal also we have examined the materials which have been brought on the record by the petitioner claiming him to be resident of village Taran Tarni. The counsel for the petitioner during hearing has referred to the voter list copy of which has been annexed as Annexure 8 to the affidavit. The aforesaid voter list pertains to the year 1993. The voter list of 1993 may not be relevant while deciding the question as to whether in the year 1987, the petitioner was resident of village in question or not.

8. Learned Counsel for the petitioner has also submitted that the letter of District Magistrate dated 24 October, 1991 which is referred to in the impugned order was never supplied to the petitioner.It is to be noted that by show cause notice, the petitioner was informed that there is a challenge to his claim of resident of village Tarna Tarni and one letter of District Magistrate was referred. The burden to prove that petitioner is resident of village Tarna Tarni was clearly on him since he sought employment on basis of said fact. When the show cause notice was issued to the petitioner to prove that he is resident of village Taran Tarni, unless the petitioner satisfied the respondents by any cogent proof that he is resident of village Taran Tarni, no error can be said to have been committed by the respondents in cancelling his appointment. It is true that it would have been better if the letter of the Collector dated 24 October, 1991 was informed to the petitioner but in view of the facts of the present case and the issue which was raised in the writ petition that petitioner is resident of a particular village we are not inclined to interfere with the order impugned in the writ petition. The learned Single Judge has also considered the pleadings of the parties and the materials brought before the Court and has rightly dismissed the writ petition.

9. We have also looked into the materials brought in the appeal in support of claim of the petitioner that he is resident of village Taran Tarni and are satisfied that petitioner has failed to prove the said fact by any cogent evidence. With regard to claim of petitioner on the basis of voter list of 1988-89, it is to be noted the name of the petitioner in the said voter list was refuted and reliance was placed on the report dated 24.5.1990 of Gram Pradhan as well as report of the Assistant Election Officer which were filed along with the counter affidavit of respondent no. 3 in the writ petition.

10. In view of the aforesaid facts, this Court under Article 226 of the Constitution of India rightly refused to adjudicate the disputed questions of fact. In view of the above, no error can be said to have been committed by learned Single Judge in dismissing the writ petition. None of the submissions raised by the counsel for the petitioner has any merit. No good grounds have been made out to interfere with the judgement of learned Single Judge. There is no merit in the special appeal.

The special appeal fails and is dismissed. No order as to the cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 45 of 2001

Ram Laxman Prasad ...Petitioner
Versus
Director Bal Vikas Evam Pushtahar, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Ram Laxman Prasad (in person)

Counsel for the Respondents:
Sri Sabhajeet Yadav, S.C.

Constitution of India, Article 226- Dismissal order- appellant's conviction- stayed by Hon'ble Supreme Court against

the judgment of High Court- Disciplinary Proceeding initiated on the grounds- Dispite of conviction, the appellant moved application for leave on the pretext of illness of his wife, and several other charges levelled- after full fledge enquiry- after considering the reply submitted pursuant to show cause notice- Dismissal order passed- by exercising power under 226, the Court can not act as an Appellate authority. However it is open for the appellant to approach before the Departmental Authority if acquitted by Hon'ble Supreme Court.

Held- Para 7

We are of the view that there is no error in the judgment of the learned Single Judge in dismissing the writ petition of the appellant. However, in view of the fact that the charge No. 1 and charge No. 3 refer to the conviction of the appellant in the aforesaid criminal case, it is observed that in case the appellant is acquitted in the criminal case in his appeal pending before the apex court, it will be open to him to approach the disciplinary authority bringing the aforesaid fact in the notice of the disciplinary authority and it will be open to the disciplinary authority to pass such orders as it may think proper in the facts of the present case. We, however, make it clear that the acquittal, if any, will not automatically entitle the appellant to claim reinstatement. This liberty which we have given to the appellant to approach the disciplinary authority in case of acquittal has been due to the fact that criminal conviction has been referred to in the charge sheet and some charges in the charge sheet have stemmed from the conviction of the appellant in criminal case.

Case Law discussed:

AIR 1995 SC 1364 Relied on
AIR 1989, SC 1185
AIR 1995 SC 1364

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri Ram Laxman Prasad appellant appearing in person and Sri Sabhajeet Yadav, learned standing counsel appearing for the respondents.

2. This appeal has been filed against the judgment dated 14.12.2000 passed by the learned Single Judge in Civil Misc. Writ Petition No. 46153 of 1999 Ram Laxman Prasad vs. Director, Bal Vikas Sewa and Pushtahar, U.P. and others. By the judgment dated 14.12.2000 the learned Single Judge has dismissed the writ petition filed by the petitioner challenging the dismissal order dated 21.8.1999 passed by the Director Bal Vikas Sewa and Pushtahar, U.P. Lucknow.

The fact giving rise to this appeal briefly stated are;

3. The appellant was initially working as constable in Provincial Armed Constabulary. On account of participation of the appellant in the Provincial Armed Constabulary revolt of 1973, his services were dismissed under the provision of proviso to Article 311 (2) of the Constitution of India. Criminal proceedings were also initiated in which the appellant claimed to have acquitted in the year 1979 against which State filed an appeal in the High Court. The appellant was successful in getting appointment on daily wages as driver in 1983 in Bal Vikas Sewa and Pushtahar at Basti. The services of the appellant as driver were regularised on 26.2.1984. Thereafter he continued to work in the Department of Bal Vikas Sewa and Pushtahar in the State. Criminal Appeal filed on behalf of the State in the High Court was allowed by the judgment

dated 25.3.1998 convicting the appellant and other persons with rigorous imprisonment for a period of seven years. The petitioner-appellant moved an application on 5.5.1998 praying for casual leave upto 8th May, 1998 on the ground of illness of his wife. The appellant was arrested on 30th May, 1998 in view of his conviction by the High Court and remained in prison from 30.5.1998 to 29.10.1998. The appellant was bailed out under the orders of the Supreme Court dated 16th October, 1998 in Special leave to appeal (criminal) against the judgment of the High Court. Disciplinary proceedings were initiated against the appellant by issuing charge sheet dated 25.2.1999 and supplementary charge sheet dated 3.4.1999. Four charges were levelled against the appellant in the charge sheet dated 25.2.1999 including the charge No. 1 which was to the effect that on account of conviction and sentence of seven years' rigorous imprisonment the appellant was detained in prison from 30th May, 1998 which conduct of the appellant was against the Government Servant Conduct Rules and his integrity is doubtful. Charge no. 2 was to the he effect that by concealing the fact he took leave from 5.5.1998 to 8.5.1998 on the ground of illness of wife. The third charge was to the effect that even though he was sent to jail on 4.5.1998 but with intent to mislead the department applications were sent by the appellant praying for grant of leave and salary. The fourth charge was to the effect that the appellant did not deposit the key of the government vehicle due to which there was hindrance of discharge of government functions. Additional charge no.1 was to the effect the certificate dated 4.2.1974 claimed to be issued by the Commandant 26th Provincial Armed Constabulary Battalion, Gorakhpur is fictitious. Second charge was again to the effect that the appellant obtained employment on the basis of certificate dated 4.2.1974 which has been found to be forged. The third charge was to the effect that the appellant was convicted and sentenced to three years rigorous imprisonment by the Additional District Judge, Gorakhpur vide order dated 9.3.1979 and the appellant concealed the relevant fact from the Department at the time of his selection as driver. After receiving the charge sheet the appellant wrote to the Director that the Enquiry Officer who is Zila Karya Kram Adhikari, Basti be changed. The said prayer of the appellant was not accepted by the Director and the appellant was informed of the aforesaid fact and asked to submit his explanation. Petitioner submitted his reply to the charge sheet on 14.6.1999 and thereafter the Enquiry Officer submitted enquiry report on 19.6.1999. The appellant was issued show cause notice by the letter dated 22.6.1999 by which copy of the enquiry report was also sent to the appellant. The appellant submitted reply to the show cause notice vide his letter dated 9.8.1999. The disciplinary authority vide its order dated 21st September, 1999 dismissed the appellant from service. The disciplinary authority held that the charges are proved against the appellant and the appellant obtained service in the department by concealing the relevant fact and by preparing forged certificate hence he cannot be allowed to continue in service. Against the order dated 21.9.1999 the appellant filed Civil Misc. Writ Petition No. 46153 of 1999 which has been dismissed by the learned Single Judge vide his order dated 14.12.2000. Learned Single Judge held that the charges against the appellant were proved

in the disciplinary enquiry, learned Single Judge held that the charges having been proved against the petitioner in the enquiry, the order of dismissal against the appellant has rightly been passed. Against the aforesaid judgment the present appeal has been filed.

4. The appellant who has appeared in person challenging the impugned order, has submitted that the enquiry against him has not been held in accordance with the principle of natural justice. He submitted that the Enquiry Officer was not impartial and he has already written several letters for change of the Enquiry Officer. It was submitted that the appellant did not conceal any material fact from the department. He contended that the certificate filed before the department dated 4.2.1974 was genuine certified issued by the officiating commandant Sri B.B.Seth. He contended that the charge against the appellant have not been proved and the punishment of dismissal is not in accordance with law. It has been contended that against the order of High Court allowing government appeal vide judgement dated 25.03.1998, the appellant has already been bailed out. Other charges have been denied.

5. Learned Standing counsel replying the submissions of the appellant has submitted that the dismissal order has rightly been passed after holding the disciplinary enquiry, learned standing counsel submitted that the appellant having been convicted by criminal court has rightly been dismissed. He has submitted that the fact that the appellant has been granted bail by the apex Court, does not in any way affect the conviction. He has also placed reliance on the judgement of apex Court in **Deputy Director of Collegiate Education Madras** vs. **S. Nagar Meera** reported in AIR 1995 SC 1364. The learned standing counsel further contended that the enquiry having been held in accordance with the principle of natural justice and the findings arrived at on the basis of materials, this Court under Article 226 of the Constitution cannot sit in appeal over the decision of disciplinary authority and the quantum of punishment can also not be interfered with. Reliance has also been placed on the case of **Union of India** vs. **Parmanand** reported in AIR 1989 SC 1185.

6. We have heard the appellant in person as well as the learned standing counsel appearing for the respondents. We have also perused the records of this appeal. The order of the disciplinary authority is based on materials on record including the enquiry report.. The enquiry officer found all the charges proved against the appellant. The submission of the appellant that the enquiry has not been held in accordance with the principle of natural justice since the Enquiry Officer was not changed inspite of he having submitted application for change of the Enquiry Officer, has no effect on the enquiry, because the prayer to change the Enquiry Officer was considered and refused by the Director. No materials have been brought on record to draw any inference that the Enquiry Officer was biased with the appellant. The contention that the Enquiry Officer was himself complaintant cannot be accepted. The letters of the Zila Karya Kram Adhikari which are mentioned in the charge sheet were the reports pertaining to facts and events and cannot be treated to be complaints against the appellant. The findings on charges by the disciplinary

authority are based on materials. This Court under Article 226 of the Constitution cannot interfere with the findings on charges. We have noticed from the record that after submissions of reply to the charge sheet no oral enquiry took place. The reply to the charge sheet was submitted by the appellant on 14.6.1999 and the Enquiry Officer submitted enquiry report on 19.6.1999. However, since the appellant in his reply to the charge sheet has not specifically prayed for holding of an enquiry nor offered to give any oral evidence or to cross examine any witness, we need not think it necessary to examine the aforesaid matter any further. It is not disputed that the appellant has been convicted by the High Court for the offences under Sections 147,148,149,342, 120B, 504,506,338, 353, 307,395,394 and 427 Indian Penal Code; 6/7 Provincial Armed Constabulary Act, and 25/27 Arms Act by the order dated 26.3.1998, although the appellant has been bailed out under the orders of the apex Court and the appeal is pending but as laid down by the apex Court in AIR 1995 SC 1364 (**Deputy Director Collegiate Education Madras vs. S. Nagur Meera**) the effect of granting bail or even stay of sentence has no effect on the conduct which led to his conviction. In the present case although charge No. 1 of the main charge sheet and charge No. 3 of the additional charge sheet refers to and rely the conviction of the appellant by criminal court but the dismissal is not based solely on the conviction by the criminal court. The other charges against the appellant have been found proved.

7. After giving our thoughtful consideration to the facts of the case, we are of the view that there is no error in the judgment of the learned Single Judge in dismissing the writ petition of the appellant. However, in view of the fact that the charge No. 1 and charge no. 3 refer to the conviction of the appellant in the aforesaid criminal case, it is observed that in case the appellant is acquitted in the criminal case in his appeal pending before the apex Court, it will be open to him to approach the disciplinary authority bringing the aforesaid fact in the notice of the disciplinary authority and it will be open to the disciplinary authority to pass such order as it may think proper in the facts of the present case. We, however make it clear that the acquittal, if any, will not automatically entitle the appellant to claim reinstatement. This liberty which we have given to the appellant to approach the disciplinary authority in case of acquittal, has been due to the fact that criminal conviction has been referred to in the charge sheet and some charges in the charge sheet have stemmed from the conviction of the appellant in criminal case.

8. In view of what has been said above, we do not find any good ground to interfere with the judgement of the learned Single Judge. This appeal is dismissed subject to observations and liberty as given above. No order as to costs.

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