ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 18, 2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 35729 of 2001

Dev Prakash Sharma ...Petitioner
Versus
District Inspector of Schools, Aligarh and others ...Respondents

Counsel for the Petitioner:
Sri J.J. Munir

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

U.P. Secondary Education Service Selection Board Act- compulsory retirement- within 60 days from suspension the committee of management send proposal to the DIOS- who fixed the date for hearing- held- DIOS has no jurisdiction-DIOS- only a Post Office to send the relevant papers to the Board who is only competent to take decision.

Held- Para 2

The proposal of punishment of teacher by the Committee of Management can be approved or disapproved only by U.P. Secondary Education Service Selection Board under the provisions of U.P. Secondary Educations Service Selection Board Act 1982 and the District Inspector of Schools has nothing to do in the matter, District Inspector of Schools is only the Post Office to transmit the relevant papers to the Board.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent no. 1 and Sri H.P. Singh, learned counsel for the respondent no. 2 and perused the counter affidavit filed by Smt. Manju Singh.

2. In paragraphs no. 13 and 14 of the counter affidavit, it is stated by Smt. Manju Singh, District Inspector of Schools concerned that since the Committee of Management has already passed a resolution, within sixty days from the date of suspension and submitted the proposal of punishment in the form of compulsory retirement of the petitioner Dev Prakash Sharma, thereafter District Inspector of Schools has fixed dates for hearing the petitioner and the Committee of Management, as required, before making the approval/ disapproval to the proposed compulsory retirement of the petitioner Dev Prakash Sharma. This statement is contrary to law and cannot be accepted. The proposal of punishment of teacher by the Committee of Management can be approved or disapproved only by U.P. Secondary Education Service Selection Board under the provisions of U.P. Secondary Education Service Selection Board Act 1982 and the District Inspector of Schools has nothing to do in the matter. District Inspector of Schools is only the Post Office to transmit the relevant papers to the Board.

3. It is also settled by the Full Bench of this Court that in the matter of suspension of a teacher, the District Inspector of Schools does not become functions- officio and can even pass orders after expiry of sixty days and can still decide the matter of approval of suspension.

4. In the facts and circumstances of the case, the only decision that can be

taken is that of the approval of suspension till the matter of punishment is finally approved or disapproved by the Selection Board. In this view of the matter, the impugned order dated 26th July, 2001 deserves to be quashed so far as it directs the payment of salary to the petitioner. Petitioner shall continue to be suspended. He will be entitled for subsistence allowance.

5. In view of what has been stated above, the relief that can be granted to the petitioner is that the impugned order dated 26th July, 2001 passed by the District Inspector of Schools, Aligarh is quashed. Smt. Manju Singh, District Inspector of Schools, Aligarh shall pay Rs. 2500/- as costs to the petitioner.

6. With the aforesaid observation, this writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 19658 of 2001

Kant Kumar Singh ...Petitioner
Versus
Gomti Gramin Bank and another ...Respondents

Counsel for the Petitioner:
Sri Bheem Singh
Sri Ashook Khare

Counsel for the Respondents:
Sri A.K. Singh
S.C.

Constitution of India- Article 226- No absolute legal proposition can be laid down that if a misconduct is alleged to be committed subsequent to a selection then that misconduct cannot be the basis for with-holding the promotion- Appointment/promotion can certainly be held up until the person is cleared of the charge.
Held- (Para-4)
Case referred to- 1998 SCC (L&S) Page 884

The petitioner is an officer in a bank where the highest standard of discipline and integrity has to be maintained. The allegation of embezzlements is subsequent to the meeting of the selection committee, in our opinion, the petitioner's promotion must be held up until he is cleared of that charge.

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

1. Heard learned counsel for the parties.

2. The petitioner has claimed that he has been selected for promotion from officer scale- 1 to officer scale 2 in the respondent bank. It appears that subsequently a charge sheet has been issued to the petitioner making allegation of embezzlement of Rs.1,22,000/-. In our opinion, until and unless the petitioner is exonerated in the enquiry there is no question of his promotion particularly, when the petitioner is an officer in bank where the highest degree of discipline and integrity is required to be maintained in order to maintain public confidence in the bank.

3. Learned counsel for the petitioner submitted that the selection committee held its meeting prior to the memorandum which has been issued to the petitioner and he has relied on the decision of the Supreme Court in Union of India vs.

Sudha Salhan 1998 S.C.C. (L&S) 884, copy of which is Annexure 17 to the petition. On the strength of this decision, learned counsel for the petitioner submitted that the petitioner's name could not have been kept in sealed cover as the memorandum was given subsequent to the D.P.C. In our opinion, the aforesaid decision of the Supreme Court is distinguishable. No absolute legal proposition can be laid down that if a misconduct is alleged to be committed subsequent to a selection then that misconduct cannot be the basis for withholding the promotion. Take for an example of a case where an employee is selected for promotion but he commits murder before he could get appointment/promotion order. In our opinion, in such cases the appointment/ promotion can certainly be held up until the person is cleared of the charge.

4. In the present case the petitioner is an officer in bank where highest standard of discipline and integrity has to be maintained. The allegation of embezzlement is subsequent to the meeting of the selection committee in our opinion, the petitioner's promotion must be held up until he is cleared of that charge.

5. In the circumstances of the case we dispose of this petition with the direction to the authority concerned that the enquiry against the petitioner must be completed preferably within two months of production of a certified copy of this order before the authority concerned in accordance with law. If the petitioner is exonerated in the enquiry he may be promoted. The petitioner will cooperate in the enquiry.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 20, 2001

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

Civil Misc. Writ Petition No. 41020 of 2001

M/s Gokul Dairy and others ...Petitioners
Versus
State of U.P. through the District Magistrate, Allahabad and others
...Respondents

Counsel for the Petitioners:
Shri Bushra Maryam
Shri K.P. Agarwal

Counsel for the Respondents:
S.C.
Shri Pankaj Bhatia

Rules of the Court- Rule 7 – Chapter XXII- the order dismissing the first writ petition operates as res-judicata between the parties and the person against whom the order has been passed has got no right to file second petition on the same facts. (Held in para 14).

Cases relied on-
1995 (3) SCC P. 757
AIR 1986 SC P.391
1990 (1) AWC P.732

I am of the view that the petitioners are guilty of concealment and misstatement of material facts, violation of orders passed by this Court, violation of Rule 7 of Chapter XXII of the Rules of Court, abuse of process of Court and they have not approached this Court with clean hands as they have been attempting to usurp the money of the Bank.

(Delivered by Hon'ble R.H. Zaidi, J.)

1. Heard learned counsel for the petitioners, Mr. Pankaj Bhatia, Advocate,

who has appeared for respondent no. 4 and also perused the record.

2. By means of this petition filed under Article 226 of the Constitution of India, petitioners pray for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to get the claim of the bank satisfied first by sale of properties, which have been mortgaged, the details of which, are stated to have been given in the recovery certificate, contained in Annexure-3, not to use any other coercive measure, more particularly, the arrest of the petitioners till the claim of the respondent bank is not satisfied by sale of the properties. Further, to command the respondents not to initiate any recovery proceedings in pursuance of the recovery certificate, contained in Annexure-2 to the writ petition.

3. The relevant facts of the case giving rise to the present petition, in brief, are that on an application made by the petitioners to the respondent no. 4, the Bank of India, Branch Sulemsarai, Allahabad, a loan of Rs. 13.50 lacs was sanctioned for establishing of a dairy farm, in the name of Gokul Dairy Farm. The amount of loan was disbursed and paid to the petitioners after performing the formalities of execution of agreement of loan etc. There is noting on the record to show that dairy business was at all started by the petitioners but according to them the said business failed and diary was closed. The petitioners failed to repay the amount of loan. Consequently, a recovery certificate for an amount of Rs. 17,65,773.00 was issued by the Bank to the Collector, Allahabad in accordance with the provisions of U.P. Agriculture Credit Act to recover the said amount as arrears of land revenue. On 24.8.2001, the order of attachment was passed in the recovery proceedings and the petitioners were directed not to transfer the property in dispute in favour of other persons. Thereafter, a citation and sale proclamation are stated to have been issued by the authorities. The petitioners, challenging the validity of the aforesaid order, firstly filed Writ Petition no. 23269 of 1999. The said writ petition was disposed of finally by this Court by the judgment and order dated 28.5.1999. This Court permitted the petitioners to make a representation to the respondent no. 3 (in the said petition) and directed the said respondent to decide the same within the time specified (two weeks). The recovery proceedings were directed to remain stayed during the said period subject to the condition petitioners deposit an amount of Rs. 5 lacs by 1st July, 1999, Rs. 5 lacs by 1st August, 1999, Rs. 5 lacs by 1st September 1999 and the balance by 1st October 1999. The petitioners were also directed not to alienate the property movable or immovable till the entire amount is paid and that in case of default the entire amount could be realized as arrears of land revenue. Apparently, the order passed by this Court was in favour of the petitioners but petitioners instead of obeying it, filed Special Appeal No. 504 of 1999 against the said decision. The special appeal was disposed of by this Court on 28.6.1999 with the direction that in case the appellants file any objection before the recovery officer the same shall be considered and disposed of expeditiously by means of the reasoned order within a period of two weeks from the date of production of a certified copy of the said order. In other respect the judgment under challenge was maintained by the Division Bench. The petitioners

even then did not obey the orders passed by the Division Bench and filed another Writ Petition no. 27565 of 2000 in violation of the provisions of Rule 7 Chapter XXII of the Rules of the Court. Legally, the said writ petition was not maintainable but this Court taking very lenient view in the matter, permitted the petitioners to deposit Rs. 5 lacs in cash or by bank draft on or before 20th May, 2001. It was further observed that if the said deposit was not made, the writ petition shall be deemed to have been dismissed and the said order shall come to an end. It was also observed that if the said amount is paid, the petitioners shall be at liberty to make a representation to the Manager of the Bank alongwith the proof of deposit of money which shall be decided by the Manager and if any amount was found outstanding against the petitioner, same shall be paid by 15th September, 2001 in three monthly installments. On payment of whole amount the recovery certificate was directed to be recalled. It was also observed that in case of default on the part of the petitioners the writ petition shall be deemed to have been dismissed. The order was directed to stand automatically vacated and recovery proceedings to stand renewed as on date. The petitioners instead of complying with the aforesaid order filed a Civil Misc. Application in Writ Petition no. 27565 of 2000 for extension of time to deposit the amount in question. This Court again taking a lenient view in the matter extended the time to deposit the amount in question by one month. The time schedule given in the earlier order was accordingly modified by order dated 15.5.2001. The aforesaid orders are contained in Annexure 7,8,9 and 10 to the writ petition. It may also be pointed out that inspite of the aforesaid orders the petitioners did not deposit the amount in question or part thereof, on the other hand, they have also stated to have filed Original Suit no. 26 of 2000 for permanent injunction against the Bank. The fact of filing of suit has deliberately been concealed in the writ petition. However, this has been disclosed in the counter affidavit filed on behalf of the respondent no.4 in the contempt proceeding initiated against petitioners no.2 to 4, but it is not know whether the suit was still pending or not.

4. The present petition has again been filed under Article 226 of the Constitution of India for the above mentioned reliefs.

5. Learned counsel appearing for respondent no. 4 raised a preliminary objection to the maintainability of the present petition. It was vehemently urged that the present petition was barred by the provisions of Rule 7 of Chapter XXII of the Rules of the Court, which prohibits filing of successive petitions on the same facts, which is legally not maintainable and was liable to be dismissed. He stated the facts of filing of writ petitions, special appeal, misc. application and the suit referred to above, in detail. It was urged that the petitioners failed to comply with the directions given by this Court. They have deliberately concealed the material fact of filing the Suit No. 26 of 2000 and deliberately misstated the facts that this was the first writ petition and the petitioners had not approached this Hon'ble Court earlier in either writ jurisdiction or any other jurisdiction. It was also stated that the petitioners have deliberately violated and flouted the orders passed by this Court, they have

abused the process of the Court and they did not approach this Court with clean hands as they wanted to usurp the money of the Bank. According to him the present petition was liable to be dismissed with special costs. It was also stated by the learned counsel for the respondents that at present an amount of Rs.20,28,161/- was outstanding against the petitioners which is to be recovered as arrears of the land revenue by the authorities below on the basis of recovery certificate issued by the Bank in accordance with law.

6. On the other hand, Mr. K.P. Agarwal, Senior Advocate appearing for the petitioners, submitted that in the present case provisions of Rule 7 of Chapter XXII, of the Rules of the Court have got no application. The writ petition filed by the petitioners was legally maintainable and under the facts and circumstances of the present case it deserves to be allowed.

7. I have considered the submissions made by the learned counsel for the parties and also perused the record.

Rule 2 of Chapter XXII of the Rules of the Court provides as under:-

(only relevant quoted)

"Such affidavit (or affidavits) shall be restricted to facts which are within deponent's own knowledge [and such affidavit shall further state whether the applicant has filed in any capacity whatsoever, any previous application or applications on the same facts and, if so, the orders passed thereon.]"

8. In paragraph no. 3 of the writ petition, which has been verified by the deponent (Ramji Pandey) on his personal knowledge it has been stated as under:

(only relevant quoted)

"This is the petitioner's first writ petition. He had not approached this Hon'ble Court earlier either in writ jurisdiction or any other jurisdiction."

9. The petitioners themselves have disclosed in the writ petition the facts of filing of Writ Petition no. 23269 of 1999. After disposal of the said writ petition the fact of filing of Special Appeal no. 504 of 1999 and thereafter filing of Writ Petition No. 27565 of 2000 and also the fact of filing of Misc. Application No. 46082 of 2001 in writ petition no. 27565 of 2000 which was disposed of on 15.5.2001. The petitioners have thus deliberately filed the self-contradictory and false affidavit. Filing of false affidavit is a serious matter. A reference in this regard may be made to the decisions of the Apex Court in **Dhananjay Sharma Vs. State of Haryana and others, reported in 1995 (3) SCC 757.** In the aforesaid decisions the view taken by the Apex Court is that filing of a false affidavit amounts to the Criminal contempt and not only the author of the affidavit but also the person who has filed the affidavit is liable to be punished. Earlier in a Full Bench decision, this Court has also taken serious view in the matter of concealment of material facts. A reference in this regard may be made to the decision in **Asiatic Engineering Company Vs. Acchu Ram, reported in AIR 1951 Allahabad 746 (FB).** Further, in **Brij Mohan Rice Mill, Kishni, Mainpuri and others Vs. Regional Manager, U.P.F.C., Agra and another, 1997 (3) A.W.C. 1458,** it was ruled by this Court as under:-

"and such affidavit shall further state whether the applicant has filed in any capacity whatsoever, any previous application or applications on the same facts and, if so, the orders passed therein."

Thus, the above quoted provision inserted under Chapter XXII, Rule 2 of the Rules of the Court are quite comprehensive. As per this provision the bounden duty cast on every petitioner is to disclose in his petition as to whether in any capacity whatsoever, he has filed any previous petition or application on the same facts or the matter in issue and if so he is further bound to disclose the orders passed thereon. Here the terms 'previous application or applications' used in the above quoted provision includes pending and decided both. Therefore, it is immaterial whether the previous petition is pending or has been disposed of. The fact remains, that once petition is filed, irrespective of the fact whether it is pending or disposed of, the petitioner would be bound to disclose the same in subsequent petition. In our considered opinion, if the petitioner does not disclose about the filing of previous petition and the orders passed thereon, it would amount to concealment of material fact and such petitioner would be guilty of filing false affidavit and would be liable to be dealt with according to law."

10. Thus the petitioners if prosecuted, in view of the aforesaid decisions, may be held guilty of criminal contempt. In Brij Mohan's case (supra) this Court, in paragraph 31 after discussing in detail the question of concealment of relevant facts concluded as under:-

"31. In view of the discussions made above, we hold that it is mandatory for each and every petitioner to state in first paragraph of the writ petition as to whether he in any capacity whatsoever, had filed any previous application/ petition in the same matter, on the same facts or similar facts and if so, the orders passed thereon and the consequence of its noncompliance would be that such petitioner would be treated to have concealed material fact and has not approached this Court with clean hands and would be liable to be dealt with strictly in accordance with law."

11. So far as the submission of the learned counsel for the respondents that the present petition was hit by Rule 7 of Chapter XXII of the Rules of the Court is concerned, the same is also well founded. Rule 7 of Chapter XXII of the Rules of the Court provides as under:-

"**7. No second application on same facts.-** where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

12. The aforesaid Rule came for consideration and interpretation in the case of Abdul Ghaffar and another Vs. Ishtiyaque Ahmad and another reported in 1989 A.L.J. page 297, wherein it was ruled by this Court that even if the first petition is rejected for default and not on merits, there is clear prohibition in Rule 7, noted above, that the second application shall not be competent on the same facts.

In Brij Mohan's case (supra) after considering and relying upon the decisions in Forward Construction Co. and others Vs. Prabhat Mandal (Regd.),

Andheri, A.I.R. 1986 S.C. 391; B.S.M. Samiti, Roorkee Vs. D.M., Hardwar and others (1995) 2 U.P. Local Bodies Education Cases 1182; M/s Munna Industries Vs. State of U.P. and others 1994 A.L.J. 1116 and Anand Kumar Gupta Vs. State of U.P. and others (1993) 1 U.P. Local Bodies Education Cases 165, it was ruled that Rule 7 of Chapter XXII of the Rules of the Court prohibits filing of successive petitions under Article 226 of the Constitution of India.

13. Similar view was taken in 1990 (1) AWC 732. Even the Apex Court in AIR 1986 SC 391 was pleased to rule that the order dismissing the first writ petition operates as res-judicata between the parties and the person against whom the order has been passed has got no right to file second petition on the same facts.

14. In view of the aforesaid discussion, I am of the view that the petitioners are guilty of concealment and misstatement of material facts, violation of orders passed by this Court, violation of Rule 7 of Chapter XXII of the Rules of Court, abuse of process of Court and they have not approached this Court with clean hands as they have been attempting to usurp the money of the Bank. They, therefore, do not deserve any sympathy; but looking to the fact that contempt proceedings have already been initiated against the petitioners, which are pending disposal in this Court. I do not consider it necessary at this stage to impose special cost or to direct initiation of proceedings for criminal contempt. I simply admonish the petitioners not to commit such mistakes, as pointed out above again, failing which they will have to suffer very serious consequences. It is further directed that this order shall be without prejudice to the contempt proceedings, which are pending against the petitioners and will not affect them adversely in any manner.

15. In view of the aforesaid discussions, the writ petition fails and is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2001

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

Civil Misc. Writ Petition No. 49798 of 1999

Ram Anurag Verma, Zila Pichhare Varg Kalyan Adhikari, Sultanpur and others
...Petitioners
Versus
State of Uttar Pradesh and others
...Respondents

Counsels for the Petitioners:
Sri R.N. Singh
Sri Ashok Khare
Sri A. Kumar
Sri Tarun Verma

Counsel for the Respondents:
C.S.C.
Sri Kripa Shankar Singh

Constitution of India, Article 226- appointment on Deputation – on the post of Zila Pichhra Varg Kalyan Adhikari – under U.P. Backward Classes Welfare Department (Gazetted) Officers Service Rules 1998- admittedly post in Question falls within the preview of Public Service Commission – Regular Vacancy advertised- Can not be questioned by such deputanits held- No right- direction issued to make necessary amendment if Government think proper.

Held- Paras 9 and 10

In the circumstances, therefore, the petitioners are not entitled to the reliefs claimed herein and the writ petitions are liable to be dismissed without prejudice to the benefits which the petitioners might have earned had they remained in their parent department during all this period.

It is, however, added by way of clarification that it is always open to the respondents to provide for absorption of the deputationists if it is considered expedient so to do by the State Government.

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

1. Petitioners in this bunch of 14 writ petitions have, inter alia, prayed for issuance of writ of certiorari quashing the U.P. Backward Classes Welfare Department (Gazetted Officers) Service Rules, 1998 (in short the Rules) in so far as it excludes from the Rules the clause pertaining to absorption/continuation of those officers who have been working from the very inception of the Department on ad-hoc basis; a writ, order or direction in the nature of certiorari quashing the order dated 31.8.1999 where by the petitioners representation for absorption has been rejected; a writ, order or direction in the nature of mandamus commanding the respondents not to fill up the posts of Zila Pichhare Varg Kalyan Adhikari on the basis of recommendation of the U.P. Public Service Commission; a writ, order or direction not to fill up the posts held by the petitioners as 'Zila Pichhara Varg Kalyan adhikari' and not to interfere, in any manner, with their functioning as 'Zila Pichhara Varg Kalyan Adhikari' in the Backward Classes Welfare Department; and a writ, order or direction in the nature of mandamus commanding the U.P. Public Service Commission not to proceed with the final selection in respect of the posts of District Backward Class Welfare Officer held by the petitioners herein on ad-hoc basis.

2. Facts necessary to highlight the controversy stated briefly are these. Petitioners herein were working in their respective Departments as confirmed employees. It would appear that on the creation of a new Department known as Backward Class Welfare Department w.e.f. 12.8.1995, an advertisement was issued in the newspaper to the effect that appointments for the functioning for the new Directorate in the new Department will have to be made, at the divisional/district levels on the gazetted and non gazetted temporary posts indicated in the notification, for the period commencing from the date of notification or the date of appointment, whichever happens to be later, and ending on 29.2.1996 unless terminated earlier. A letter dated 20.9.1995 was issued from the office of the Chief Secretary, U.P. Government, Lucknow visualizing there that the appointments on the post of gazetted and non-gazetted posts in the new Department would be made on temporary basis on transfer/deputation from other departments. According to the said communication, 53 posts of District Backward Class Welfare Officer were vacant in various districts. Another letter dated 18.12.1995 was issued by the Chief Secretary to various Secretaries and other departmental heads informing them that appointments on the gazetted posts of District Backward Classes Welfare Officer would have to be made on the recommendation by the U.P. Public

Service Commission but since it would take time, appointments might be made by way of transfer/deputation from other departments such as Vikas Vibhag, Chikitsa Vibhag, Shiksha Vibhag, Shiksha Vibhag and officers who have had sufficient experience and were willing to go to the present posts might be selected for appointment on service transfer/deputation basis. The petitioners, it is alleged, applied and were selected for appointment to the posts of District Backward Classes Welfare Officer which they accepted in the hope that they would later on be absorbed in the department. It is further alleged that though the petitioners are appointed on deputation but no deputation allowance was ever paid to them. Selection, it is further alleged, was made after due recommendation by the departmental selection committee.

3. Respondents, however, issued an advertisement dated 11.1.1999 in the newspaper Rashtriya Sahara inviting applications for regular appointments to the 52 posts of Backward Classes Welfare Officer through Public Service Commission on the basis of a preliminary/final Examination. Pursuant to the said advertisement U.P. Public Service Commission completed the selection the final result of which, it is alleged, was expected to come in the first week of May, 2000. Some of the petitioners, it is alleged, preferred representations to the Director, Backward Class Welfare Department to the effect that a provision was made for absorption in the draft Niyamawali known as U.P. Adhinastha Seva Chayan Ayog Vaiyaktik Sahayak Niyamawali, 1995, but the Public Service Commission in exercise of powers under Article 320 of the Constitution of India declined to approve of the clause providing for absorption of deputationist in the U.P. Backward Class Gazetted Officers Service Rules, 1998. The representation having been rejected by the State Government vide impugned order dated 31.8.1999 (annexure no. 13) to the writ petition no. 49798 of 1999 and the petitioners have approached this Court for the aforesaid reliefs.

4. We have had heard Sri R.N. Singh, Senior Advocate for the Petitioners and Sri Ashok Khare, Senior Advocate representing the candidates who claimed to have been selected by the Public Service Commission for the appointment to the posts aforestated. We have also heard Sri Kripa Shankar Singh representing the State.

5. Legal position well settled is that a government servant on deputation can be reverted to his parent department at any time in that he does not get any right to be absorbed on the deputation post.[1] In the absence of statutory rules providing for absorption of a deputationist in the borrowing department, absorption. If made, would be contrary to law and violative of Articles 14 and 16 of the Constitution of India. The Posts of District Backward Classes Welfare Officer concededly falls within the purview of Public Service Commission and it being not disputed that the petitioners herein were appointed on the posts on the basis of service transfer/deputation with specific stipulation that it would continue till availability of candidates selected by the Commission or further order whichever

[1] Rati Lal B.Soni & ors. Vs. State of Gujrat & others AIR 1990 SC 1132

event might happen earlier, acquired no right, in the absence of statutory provisions, to be absorbed. The right to absorption claimed by them is impermissible. A deputationist can claim right to be considered for absorption only if the rules provide for absorption and not otherwise.[2]

6. It has, however, been submitted by Sri R.N. Singh that upon regard being had to the services rendered by the petitioners, the Government ought to have directed their absorption in the department in which they have been serving on deputation with a view to avoiding 'undue hardship' by invoking the provision of relaxation as visualized by Rule 26 of the Service Rules, Shri Ashok Khare submits that Rule 26 has no application to conditions of recruitment, Rule 26 of the Uttar Pradesh Backward Classes Welfare Department (Gazetted Officers) Service Rules, 1998 may be quoted hereunder:

"Relaxation from the conditions of Service – Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that where a rule has been framed in consultation with the Commission, that body shall be consulted before the requirements of that rule are dispensed with or relaxed."

7. It cannot be gainsaid that if the Rules provide for absorption of employees on deputation then such employees do have a right to be considered for absorption in accordance with Rules[3] but the Rules in the instant case do not provide for any absorption in that the provisions contained in Rule 26 providing for relaxation pertain to 'conditions of service' which is district from 'conditions of recruitment' We find substance in the submissions made by Sri Ashok Khare that the power of relaxation under Rule 26 is confined to 'conditions of service' and it does not authorize relaxation of any rule regulating 'conditions of recruitment'. In Syed Khalid Rizvi and others Vs. Union of India and others[4] it has been held that "conditions of service may be classified as salary, confirmation,. Promotion, seniority, tenure or termination of service etc…" Rule 3 of the Residuary Rules therein conferred the power to relax rules and regulations in certain cases where the Central Government was satisfied that the operation of any rule made or deemed to have been made under the Act, or any regulation made under any such rule regulating the conditions of service" of persons appointed to an all India Service, causes "undue hardship" in any particular case. Construing the said rule, the Apex Court held as under:

"Rule 3 empowers the Central Government to relieve undue hardship

[2] G.Muniyappa Naidu Vs. State of Karntaka & ors. (1976) 4 SCC 543

[3] Rameshwar Prasad Vs. M.D.U.P.Rajkiya Nirman Nigam Ltd. 7 ors. 1999 (83) FLR 442

[4] 1993,Supp (3) SCC575

caused. due to unforeseen or unmerited circumstances. The Central Government must be satisfied that the operation of the rule or regulation brought about undue hardship to an officer. The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused. That too in an individual case. The Central Government on its satisfaction of those conditions, have been empowered to relieve such undue hardship by exercising the power to relax the condition. It is already held that the conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed."

8. It may be pertinently observed that one Mahendra Singh who was similarly appointed to the service on deputation filed a writ petition, being Writ Petition no. 55 (S/B) of 2001, in the Lucknow Bench of the Court seeking issuance of a writ in the nature of mandamus commanding the opposite parties thereto to absorb him to the post of District Pichhra Varg Kalyan Adhikari and for that purpose to amend the service rules. A Division Bench of this Court held, that in view of the fact that the petitioner was appointed purely on ad-hoc basis till availability of a candidate selected by the Commission and since regularly selected candidates had become available, the State Government had no option but to repatriate the petitioner to his parent department and accordingly dismissed the writ petition and vacated the interim order passed therein. In the appointment letters issued to the petitioners it was specifically provided that they would be repatriated to their parent departments on candidates selected by the Public Service Commission becoming available. In the circumstances there can not be any estoppel against State. The view taken by the Government that in the absence of any Rules, absorption of the petitioners in the cadre is impermissible, cannot be termed arbitrary or whimsical and, therefore, cannot be faulted. It is not disputed that the petitioners have not lost their lien in their parent departments. The decision in **Nitasha Paul Vs. Mahrishi Dayanand University, Rohtak & others,** [5] relied on by Sri R.N. Singh has no application to the facts of the present case. In the circumstances, therefore, the petitioners are not entitled to the reliefs claimed herein and the writ petitions are liable to be dismissed without prejudice to the benefits which the petitioners might have earned had they remained in their parent department during all this period,

9. It is, however, added by way of clarification that it is always open to the respondents to provide for absorption of the deputationists if it is considered expedient so to do by the State Government. Absorption of deputationists, it cannot be gainsaid involves and requires taking of a policy decision at the end of the State Government and once decision is taken to regularise the services of deputationists, appropriate rules may be made in that regard. That is the purport of the letter dated 9.3.1998 of the joint Secretary, Public Service Commission, Uttar Pradesh to Secretary, U.P. Government Pichhare Varg Kalyan Annubhag-1, Lucknow. The said letter, in our opinion, would not operate as a bar to making of

[5] JT 1996 (1) SC 636

appropriate Regularisation Rules either by amending the existing Rules or otherwise.

In the result, therefore, the petitions fail and are dismissed with costs on parties subject, of course, to above observations.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 6, 2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 39189 of 2001

Mewa Ram and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri Syed Wajid Ali

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Selection for special B.T.C.- Rejection on candidature on the ground they have obtained B.Ed. Degree from Kumaun University which out of state of U.P.- held not proper Kumaun University still governs with the Provisions of U.P. State Universities Act 1975 apart from law laid down by the Court reported in 2000 (2) UPLBEC-1340.

Held – Para 4

In this regard, two factors are relevant to be kept in mind, first that Kumaun University, Nainital is still regulated and governed by the provisions of U.P.State Universities Act, 1975 and secondly in view of the law laid down by this (sic) in the case of Upendra Rai Versus State of U.P. and others, reported in 2000 (Vol.2) U.P. L.B.E.C. 1340, even assuming that petitioner Mewa Ram has passed his B.Ed. Degree from an University outside State of U.P., which is established under law, his application form can not be declared as not maintainable as this condition has been held to be ultra vires by the Division Bench of this Court in the aforesaid case of Upendra Rai (supra).

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

1. Heard Sri Syed Wajid Ali, learned, counsel appearing on behalf of the petitioners and learned Standing Counsel representing the respondents.

2. This petition has been filed by two petitioners, namely, Mewa Ram and Mahipal Singh for the relief that their applications for selection for Special BTC pursuance to the advertisement dated 14.8.2001,Annexure-5 to the writ petition, as amended from time to time may not be rejected only on the ground that the petitioners, who have passed their B. Ed. course from Kumayun University, which now from part of Uttaranchal State.

3. It is submitted that petitioner no. 2 has passed his B.Ed. examination in the year 1999. At that time, State of Uttaranchal has not come into existence, which came into existence in the month of November, 2000 by U.P. State Reorganisation Act, 2000, therefore at that time the petitioner no.2 who has passed his B.Ed. course from Kumaun University. Nainital can not be said to be passed the degree from an University situated outside the State of U.P. and in this view of the matter his application can not be rejected on the ground that he has not passed his B.Ed. degree from an University situated within the State of U.P.

4. Coming to the case of petitioner no.1 Mewa Ram, who is said to have passed his B.Ed. degree from Kumaun University, Nainital in the year 2001. The result of B.Ed. examination, according to the assertion made by the petitioner was declared before the month of July, 2001. At that time the State of Uttaranchal has come into existence, therefore the petitioner can not claim that he has passed his B.Ed. degree from an University situated in State of U.P.. In this regard, two factors are relevant to be kept in mind, first that Kumaun University, Nainital is still regulated and governed by the provisions of U.P. State Universities Act, 1975 and secondly in view of the law laid down by this (sic) in the case of Upendra Rai Versus State of U.P. and others, reported in 2000 (Vol.2) U.P.L.B.E.C. 1340, even assuming that petitioner Mewa Ram has passed his B.Ed. degree from an University outside State of U.P., which is established under law, his application form can not be declared as not maintainable as this condition has been held to be ultra vires by the Division Bench of this Court in the aforesaid case of Upendra Rai (supra). In this view of the matter, the writ petition succeeds and is allowed. The respondents are directed to accept and consider the application forms of the petitioners for the Special B.T.C. training and recruitment pursuant to the advertisement for which they have applied and their application forms shall not be rejected only on the ground that they have not passed their B.Ed. degree course from an University situated within the State of U.P.

With the aforesaid observations, the writ petition is finally disposed of. There will be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD JANUARY 3,2002

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

Criminal Revision No. 9 of 2002

Suresh Kumar Upadhayay and another ...Revisionists
Versus
State of U.P. and another ...Respondents

Counsel for the Revisionists:
Sri S.S. Tripathi
Sri A.P. Tiwari

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure- Section – 207 Framing of charges by Fast Track Court without giving the copy of statement- despite of demand. Held not proper- approach of the Court highly deprecable.

Held – Para 5

In the circumstances, the accused is entitled to the statement of the informant (complainant), who is a material witness in the case. The approach of the trial court appears to be extremely highhanded in not providing that statement before framing the charge. Such an approach is highly deprecable and is not seen with any compassion. The trial court is, there fore, directed to act within the precinct of law and be not unnecessarily arbitrary and authoritative ignoring the provisions law.

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

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

2. The trial is pending before the fast tract Court. Fast Tract does not mean injustice to the accused. There is a specific direction by this Court by its order dated 3.12.2001 to supply a copy of the statement of the complainant to the accused before framing the charge. The application filed on behalf of the accused that his counsel has gone out to Lucknow in connection with a marriage and will not be available on the date on which the fast Tract Court is framing charge. It was also contended as a fact that copy of the statement under Section 161 Cr.P.C. of the complainant was not provided to him as yet.

3. In the circumstances, the order framing charge ought not to have been passed by the trial court. The dispensation of Justice should not be made post haste. It must give an indication that justice is being done not only for the sake of doing it but also must appear to have been done to the party, who is going to be affected by this kind of dispensation of justice. The trial court is, therefore, directed to provide a copy of the statement of the complainant for which he is entitled under the law under Section 207 Cr.P.C.

4. It is a sessions trial. As a matter of fact even the commitment could not be made unless the papers under Section 207 are provided to the accused persons. Section 207 (iii) Cr.P.C. provides as under:

"(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding there from any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173. "

5. In the circumstances, the accused is entitled to the statement of the informant (complainant), who is a material witness in the case. The approach of the trial court appears to be extremely highhanded in not providing that statement before framing the charge. Such an approach is highly deprecable and is not seen with any compassion. The trial court is, therefore, directed to act within the precinct of law and be not unnecessarily arbitrary and authoritative ignoring the provisions (sic) law.

6. In the circumstances adverted to above, the trial court is directed to provide the applicant a copy of the statement of the informant within seven days. He will also be afforded an opportunity of amendment of charge, for which the applicant shall make an application, if any such change or amendment is felt required. Before proceeding with the trial, the trial court will look into that application and after due application of mind shall pass necessary orders.

With these observations, this revision-application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD DECEMBER 13, 2001

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

Civil Misc. Writ Petition No. 14073 of 2000

Kari Naimuddin ...Petitioner
Versus
Commissioner, Meerut Division, Meerut and others ...Respondents

Counsel for the Petitioner:
Sri V.S. Sinha

Counsel for the Respondents:
Sri Prem Chandra

Constitution of India, Article 226-Writ Petition challenging the validity of order passed u/s 23/39 of Land Revenue Act, - held not maintainable.

Held - Para 5

It is well settled in law that against the orders passed under Sections 33/39 of the U.P. Land Revenue Act, a petition under Article 226 of the Constitution of India is legally not maintainable. A reference in this regard may be made to the decisions of this Court in Narain Singh Vs. Additional Commissioner, Meerut and others, reported in (1999) 2 CRC page 342, Brahma Deo and others Vs. Board of Revenue, U.P. and others, reported in 1986 R.D. page 302 and Jai Pal Singh Vs. Board of Revenue and others, reported in 1956 A.W.R. 518.

(Delivered by Hon'ble R.H. Zaidi, J.)

1. Present petition arises out of the proceedings under Sections 33/39 of the U.P. Land Revenue Act and is directed against the judgments and orders dated 15.6.1999 and 4.1.2000 passed by the respondents no.3 and 1 respectively.

2. It appears that in the mutation proceedings, the petitioner has applied for interim relief. Application for grant of interim relief was rejected by respondent no. 3. Consequently, the petitioner filed a revision before the Commissioner against the order passed by respondent no.3. The Commissioner also declined to grant the interim relief. Thereafter, the petitioner filed Writ Petition no. 1286 of 2000 which was disposed of by this court by judgment and order dated 8.1.2000 with the observation that the revisional Court shall endeavour to dispose of the revision finally as early as possible. The commissioner although did not decide the revision, but rejected the application for interim relief by the impugned order dated 04.01.2000. Hence, the present petition.

3. Learned counsel appearing for the petitioner vehemently urged that the revision filed by the petitioner is still pending disposal. Therefore, there was no justification for the revisional Court not to grant the interim relief. The order passed by the respondent no.1 was, as such, liable to be quashed. On the other hand, learned counsel appearing for the respondents submitted that the revision filed by the petitioner was dismissed. Thereafter, an application filed to recall the said order was also rejected. According to him, no application to recall the said order has been filed although aforesaid fact was known to the petitioner. It was also urged by the learned counsel for the respondents that the order under challenge is revisable. If the petitioner felt aggrieved by the said order, he could approach the U.P. Board of Revenue, against the impugned order and could file a revision. Petitioner having not filed the revision against the impugned order the same became final. The present petition under Article 226 of the Constitution of India is, therefore, legally not maintainable.

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

5. Admittedly, the first petition was filed and dismissed by this Court for all practical purposes as this Court refused to

interfere with the order and directed the revisional Court to decide the revision expeditiously. Secondly, the alternative remedy by way of revision is available to the petitioner. The petitioner having not exhausted the alternative remedy approached this Court straight away, therefore, the present petition is also legally not maintainable on the ground of availability of alternative remedy. Thirdly, the proceedings under Sections 33/39 of the U.P. Land Revenue Act are summary in nature. The title of the parties to the property in dispute is not decided in the said proceedings. It is well settled in law that against the order passed under Section 33/39 of the U.P. Land Revenue Act, a petition under Article 226 of the constitution of India is legally not maintainable. A reference in this regard may be made to the decisions of this court in Narain Singh Vs. Additional commissioner, Meerut and others, reported in (1999) 2 CRC page 342; Brahma Deo and others Vs. Board of Revenue, U.P. and others, reported in 1986 R.D. page 302 and Jai Pal Singh Vs. Board of Revenue and others, reported in 1956 A.W.R. 518.

6. For the facts and reasons given above, the present petition fails and is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 05, 2001

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

Civil Misc. Writ Petition No. 39963 of 2001

Gopal Yadav ...Petitioner
Versus
Special Judge (Anti corruption)/A.D.J., Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Singh

Counsel for the Respondent:
Sri Faheem Ahmad
S.C.

U.P. Urban Building (Regulations of Letting Rent and Eviction) Act 1972 - cost of suit- what includes-amount of court fee ½ counsel fee on a contested side-amount of court fee payable on the basis of rate of rent.

Held- Para 9

The question for consideration of this court is as to whether the cost of suit, apart from others include (i) actual amount of court fee paid by the plaintiff, and (ii) ½ counsel fee on a contested suit (as submitted by the learned counsel for the land lord-respondent) or the amount of court fee which would have been payable on the basis of the rate or rent pleaded by the Defendant in the written statement (and, after parties have lead evidence, court finally found to be correct).

Case law discussed:
1981 ARC-502
1981 ALS-26
1981 (7) ALR-225
1986 ARC-195
1996 (2)-188

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

1. Heard Sri Ajay Kumar Singh, learned counsel for the petitioner and Sri Faheem Ahmad, Advocate on behalf of Respondent nos. 2 and 3 and perused the record.

2. Gopal Yadav, tenant-petitioner, has approached this court by filing present writ petition under Article 226, Constitution of India, seeking to challenge judgment and order dated August 22, 2001 (Annexure-1 to the Writ Petition) passed in SCC Revision no. 17 of 1999 passed by Additional District and Sessions Judge Varanasi exercising Revisional jurisdiction under Section 25. Provincial small Causes Court Act, whereby the revision filed by landlord-plaintiff/Respondent nos.2 and 3 was allowed the judgment and order dated 30.1.1999 passed by Judge Small Causes Court in J.S.C.C. Suit no. 18 of 1987 (Naseem Ahmad *Versus* Gopal Yadav) was modified and the said suit was dismissed to the extent of the relief sought by the plaintiff for evicting the tenant-petitioner (Annexure-4 to the Writ Petition).

3. The tenant-petitioner had earlier filed writ petition no. 4587 of 2001 (Gopal Yadav *versus* Special Judge (A.C.) / Additional District and Sessions Judge Varanasi-(exercising powers of revisional court under Section 25, Provincial Small Causes Court Act) against the Revisional judgment and order dated 4.11.2000. This Writ Petition was allowed by this court vide judgment and order dated 12.2.2001 with the direction to the revisional court to decide afresh specifying separately different heads under which deposit is to be made towards `cost of the suit' contemplated under Section 20(4) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972 U.P. Act No. XIII of 1972 (for short called `the Act'). The revisional court in compliance to the said judgment and order 12.2.2001 decided the revision afresh the present impugned judgment and order dated 22.8.2001 (Annexure-1 to the Writ Petition).

4. The petitioner has annexed copies of the charts-submitted by the Tenant (Petitioner) and the landlord (contesting respondent) indicating the amount required and deposited according to them under Section 20 (4) of the Act (Annexure VI and VII respectively).

5. Comparing these two charts annexed with the writ petition it is clear that there is no dispute about the amount of rent due for 18 months (1.7.1983 to 30.4.1988) @ Rs. 15/- per month. Both the plaintiff-landlord and the defendant-tenant have shown it as Rs. 870/-. The defendant-tenant (Petitioner) in his chart has shown, under the Head of `cost of suit' claims to deposit of certain amounts in lieu of towards court fee, lawyers fee, process fee and registry (postage charges). The said chart does not include or refer to the amount for expenses incurred by the landlord towards Stamp on Vakalatnama, the clerkage and the typing charges.

6. Learned counsel for the petitioner attempted to demonstrate that the amount of interest deposited by the tenant was short by a very-very thin margin i.e. Rs. 7.48 only and that certain amounts, like clerkage and typing charges, were not required to be deposited by the tenant as costs of the suit under law.

7. Learned counsel for the petitioner has failed to dispute the proposition that `Cost of Suit' shall include `Court fee' paid by the plaintiff and lawyers ½ fee on contested side.

8. Learned counsel for the petitioner however, submitted that the amount of court fee required to be deposited under section 20(4) of the Act ought to be the amount of court fee which would have been payable on the basis of amount of rent claimed by the defendant as also subsequently found to be correct by both the courts below and not the actual amount of court fee paid by the plaintiff-landlord as per his pleadings and the reliefs claimed by him.

9. The question for consideration of this court is as to whether, the `cost of suit', apart from others include (i) actual amount of court fee paid by the plaintiff, and (ii) ½ counsel fee on a contested suit (as submitted by the learned counsel for the landlord-respondent) or the amount of court fee which would have been payable on the basis of the `rate of rent' pleaded by the Defendant in the written statement (and, after parties have lead evidence, court finally found to be correct).

10. The learned counsel for the petitioner has referred to the case of **Lakshmi Narain Sharma *versus* Arjun Deo Dhawan and others, 1981 Allahabad Rent Cases 502 (Hon'ble N.D. Ojha, J.)** wherein the court had an occasion to consider the meaning, extent and scope of the expression `amount of rent due from him'. The court had no opportunity to consider the question now posed before it in the present case and referred to above. The tenant shall run a risk of being deprived of protection of the Section 20(4) of the Act.

11. Para 3 and 4 of the Judgment in the case of Lakshmi Narain Sharma's for convenience, reproduced-

"3. Having heard counsel for the parties, I am of the (sic) submission made by counsel for respondent no.1 is well founded. Two requirements of section 20(4) of the Act are of significance. One is that the payment, tender or deposit of the amount mentioned in the said sub-section has to be made by a tenant "Unconditionally" and the other is that what is to be deposited by the tenant is to be amount "due from him". In this connection it would be useful to refer to sub-section (6) of Section 20 of the Act which reads as follows:

(6) Any Amount deposited by the tenant under sub-section (4) or under Rule 5 of Order XV of the First Schedule to the Code of Civil Procedure, 1908 shall be paid to the landlord forthwith on his application without prejudice to the parties' pleadings and subject to the ultimate decision in the suit."

12. To me it appears that the purpose of sub-section (4) and (6) of S. 20 read together is that whatsoever amount was due from the tenant according to him has to be deposited unconditionally so that the said amount may be paid to the landlord forthwith. If in regard to a particular item mentioned in section 20(4) there was a dispute, it was open to the tenant to deposit such amount which according to him was due from him and not necessarily the amount claimed by the landlord. In respect of such a deposit if ultimately the benefit of Section 20(4) of

the Act, notwithstanding the fact that the deposit made by him was not of the whole amount claimed by the landlord, because the amount deposited by him would in view of the finding recorded in the suit represent the amount due from the tenant. If on other hand, his defence is found to be false and the amount claimed by the landlord is found to be correct, the tenant would be denied the benefit of sub-section (4) notwithstanding the deposit of the lesser amount which he may have made under Section 20(4) of the Act. In Har Prasad *versus* Dharma Deo, 1981 ALJ 216: 1981 Alld. Rent Cases 26, it has been held that (at p. 217): (at p. 26 of Alld. Rent Cases).

13. "The test that seems to have been laid down by the Supreme Court as well as by the learned Single Judge, in the cases relied upon by the respondent, is that the money deposited should be readily available to the landlord. A reading Original Suit (sic) sub-section (4) of Section 20 leads to the same conclusion. It waives ejectment. "if the tenant unconditionally pays or tenders to the landlord or deposits in court the entire amount of rent and damage for use and occupation of the building". It is clear that the amount has to be paid to landlord or at least to be tendered to him or it has to be deposited in the court, Sub-section (6) of Section 20 lays down that if any amount has been deposited by tenant either under sub-section (4) of that section or under Rule 5 of Order 15 C.P.C. that has to be paid to the landlord without prejudice to the parties pleadings and subject to the ultimate decision of the suit. The amounts so deposited are certainly available to the landlord as soon as the deposit is made."

14. As is apparent on the plain language of sub-section (4) of section 20 of the Act it contemplates payment, tender or deposit not only of the amount of rent due but also damages for use and occupation of the building calculated at the same rate as rent and payable up to the date on which the deposit under the said sub-section is made. The petitioner at no point of time seems to have disputed his liability to pay damages at the rate of Rs. 8 p.m. which was the admitted rate of rent, from the date of the institution of the suit till the date of the deposit under section 20 (4) of the Act. Consequently the said amount was admittedly due from him. He no doubt deposited this amount but attached a condition even in regard to this amount that the same may be kept in deposit meaning thereby that the same may not be paid to the landlord respondent no. 1 till the suit was finally decided. The deposit even of the admitted amount of damages as such was not made by the petitioner unconditionally even though it was due from him. Further even in regard to the arrears of rent claimed by the landlord in the notice of demand, the finding recorded by the authorities below is that the petitioner had failed to substantiate his defence that he had paid the said amount to the Munim of the respondent no.1. The precondition attached by the petitioner that the said amount may be kept in deposit till the suit was decided was, therefore, even in regard to this amount not justified. For all these reasons I am of the view that the respondent no.2 and 3 cannot be said to have committed either any manifest error of law or error of jurisdiction in taking the view that the deposit made by the petitioner had not been made unconditionally as contemplated by Section 20(4) of the Act and that he was

consequently not entitled to the benefit of the said sub-section in the matter of passing a decree for eviction against him."

15. As noted above, the aforesaid decision does not deal with the question in hand.

16. Learned counsel for the petitioner also referred to the following decisions. Relevant extracts/passages, for convenience quoted.

1. 1981 (7) ALR 225 - Rama Kant *versus* Surya Nath Nagar (para) Hon'ble S.D. Agarwal, J.)

"……The question as to whether a tenant is entitled to the benefit of Sub-clause (4) and whether he should be relieved from his liability for eviction has to be considered, after the court on examining the evidence on record, comes to the conclusion that the amount legally due has been paid, tendered or deposited by the tenant as prescribed by sub-clause (4) of Section 20 of the Act……The court has to decide the question of the applicability of Section 20, sub-clause (4) of the Act only after the evidence has been recorded in a case where there is a dispute in regard to the rate of rent and then only after determining the rate could further determine whether the benefit can be given or not under sub-clause (4) of the Act. The Court has to record a finding as to what was the rate of rent and then only determine whether the benefit of sub-clause (4) could be given to the tenant or not. The above intention of the Legislature is clear from another provision, namely, Order 15, Rule 5 C.P.C. added by the State of U.P. in relation to striking off defence for non-deposit of admitted rent…"

17. Under Order 15 Rule 5 C.P.C. the tenant is obliged to deposit only the rent admitted by him to be due. This means that even if the landlord claims a higher amount of rent the tenant is liable to deposit such rent as has been admitted by him in the written statement to be due. Once he deposits that amount his defence can not be struck off. Under this provision, however, no adjudication is necessary by the Court on the basis of evidence, neither any evidence need be recorded for determining the question whether the defence should be struck off or not. If the tenant deposits the admitted rent as stated in the written statement then his defence can not be struck off.

18. The specific words used in Order 15 Rule 5 C.P.C. "admitted by him to be due" indicates that in the absence of such words in clause (4) of Section 20 of the Act it was not intended that the tenant was obliged only to deposit the rent at the admitted rate. In my opinion what has to be deposited under sub-clause (4) of Section 20 of the Act is what is legally due from the tenant and then only he can be relieved of the liability for eviction against him. If the landlord claims more amount then what was due it need not be deposited by the tenant

19. **(2) 1986 (1) ARC 195-Kachan Singh versus Additional District and Sessions Judge, Dehradun and another, (K.C. Agarwal, J.)**

"3……On the first date of hearing, the petitioner deposited the sum of Rs. 530/-. The details of the deposit, as mentioned by the petitioner himself were as follows:-

(a) Rent demanded--------
(b) Interest ----------
(c) Cost of the suit---------

(d) Counsel's half fee------
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(8) Next comes the question of compliance of sub-section (4) of Section 20 of the Act…..In the counter affidavit, the break up given by respondent no. 2 is of the following items :

(a) Court fee paid on the plaint……
(b) Rent and damages…….
(c) Cost of notice;
(d) Interest of 9 per cent per annum on item (b)……..
(e) Counsel fee
(f) Cost of Regd. A/D envelope meant for service of summons:
(g) Process fee
(h) Court Fee paid on 5-C2
(i) Court fee paid on 6-C2;
(j) Court fee paid on 7-C 2
(k) Typing charges of plaint and copies and application

……
……

10. Respondent 2 had claimed the cost of the notice in the suit. There was no specific denial to this para in the written statement. That apart, the question is as to what is the amount which the tenant will be obliged to deposit under sub section (4) of Section 20 in order to avail the benefit conferred by it. The liability upon tenant is to deposit the landlord's costs of the suit…….If a tenant wants to get the benefit, he has to deposit the amount claimed by the landlord, unless it is demonstrated that any one of the items made in the suit were frivolous or wholly unfounded. If that is not done the tenant would not be entitled to get the benefit of sub section (4) of section 20. The legislature did not intend to any adjudication by the landlord * (to be read as Court*) at the first date of hearing. The provision was made for the benefit of the tenant, and to give another opportunity to save his tenancy. If the tenancy. If the tenant wants to save his tenancy he will have to deposit the amount claimed in the suit but if the amount is frivolous the tenant may not be denied of the benefit of sub section (4) of Section 20 on the ground of having not deposited the amount. But where, as here the cost of the notice was Rs. 50/- and nothing could be shown to me that it was frivolous amount, non-deposit of the same appears to me is fatal to the petitioner. The expression "landlord's cost in respect thereof" would include the cost of the notice also. Apart from the aforesaid item of Rs. 50/- the defendant further did not deposit the item claimed by the plaintiff respondent 2 as item nos. (f) to (k) in the judgment. Even the amount of interest deposited was deficient by Rs. 3.48. In this view the deposits made by the defendant could not confer upon him the benefit of subsection (4) of Section 20 (emphasis laid by me on underlined portion.).

20. **(3) 1996(2) ARC 188 - Sardar Amrik Singh *Versus* IVth Additional District Judge, Kanpur Nagar and others (Sudhir Narain, J.)**

"5. ……The second submission of the learned counsel for the petitioner is that the petitioner had deposited the entire arrears of rent with cost etc. prior to the first date of hearing and was entitled to the benefit of Section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 ……He has given the details of the amount which he was required to deposit under Section 20(4) of the Act…… The trail court held that the amount deposited by the petitioner was conditionally one and therefore he was not entitled to the benefit of the deposit made by him under Section

20(4) of the Act. The petitioner in his written statement has stated that the rate of rent was Rs. 175/- per month and not Rs. 300/- per month as claimed by the plaintiff. He in the written statement, however, did not state that he had deposited amount under Section 20(4) of the Act conditionally.

6. In paragraphs 15 to 45 he categorically stated that after service of summons on him, he deposited entire amount in the court before first date of hearing and is entitled to get benefit of section 20(4) of the Act……The Petitioner had deposited rent for the period 1.10.1985 to 31.8.1988 as claimed in the suit as the rate of Rs. 300.00 per month. The view taken by respondents nos. 1 and 2 that the Petitioner had deposited the rent at the rate of Rs. 300.00 per month conditionally is not correct.

7. Learned counsel for the Respondent then urged that the cost of the suit was not correctly included by the Petitioner. Cost of the suit should be taken as given in the decree after it is passed by the court. This contention of learned counsel for the Respondent is not correct. Clause (b) of explanation added to sub section (4) of Section 20 of the Act provides that the expression……"cost of the suit" includes one half of the amount of counsel's fee taxable for a contested suit. Cost of the suit will be such as the plaintiff might have incurred by the date of first hearing which includes court fee. Counsel's fee and other expenses incurred by the plaintiff…… (underlined by me to lay emphasis)

(4) 1980 ALJ 384 - Kailash Chandra Nigam versus Smt. Gayatri Devi (Hon'ble N.D. Ojha, J.)

"3. The only point which has been urged by the counsel for the applicant in support of this revision is that the applicant was not required to deposit costs of the suit insofar as the relief for arrears of rent and damages was concerned. According to counsel for the applicant. Section 20(4) contemplates deposit of only such costs which had been incurred by the plaintiff-landlord on the relief for eviction only.

4……Considerable emphasis is placed by the counsel for the applicant on the circumstances that in the opening para of Section 20(4) the words used are : "in any suit for eviction" and not in any suit for eviction, arrears of rent and damages."…… The expression "cost of suit" has been defined in Explanation (b) of Section 20(4). According to that definition this expression includes one-half of the amount of counsel's fee taxable for a contested suit. The cost of the suit contemplated by Section 20 (4) would, therefore, be half of the amount of counsel's fee taxable for a contested suit plus the amount of court fee paid by the plaintiff and as such other cost as he may have incurred up to the date of the first hearing of the suit. What Section 20 (4) of the Act contemplates is that if the entire amount of the rent and damages for use and occupation of the building due from him together with interest thereon at the rate of nine per cent per annum and the landlords' costs of the suit in respect section 30 (1) of the Act is paid or deposited by him at the first hearing of the suit, the tenant was entitled to an order relieving him against his suit for ejectment as well as arrears of rent and damages on account of the conduct of the tenent in not complying with the notice of demand, there appears to be no reason to

hold that the legislature contemplated deposit of only such amount towards the item of court-fee paid by the plaintiff which was payable on the relief of eviction only and not that portion thereof which was payable for the relief of rent and damages (underlined by me to lay emphasis).

5…Consequently I am of the opinion that the expression `cost of the suit in respect thereof, used in Section 20 (4) of the Act includes the amount of court-fees paid by the plaintiff not only on the relief for eviction but also on the relief for arrears of rent and damages."

21. I find no relevance of the aforesaid decisions as the court had no occasion to consider the question in the light of the submission of the learned counsel for the petitioner in the present case. However, the underlined passages in the aforequoted passages of the above decisions `suggest' an answer against the contention of the petitioner.

Section 20(4) of the Act reads:

"In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays or [tenders to the landlord or deposits in court] the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground.

Provided that nothing in this sub-section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition any residential building in the same city, municipality, notified are a or town area.

[Explanation. - For the purpose of this sub-section—

(a) the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant;

(b) the expression "cost of the suit" includes one-half of the amount of counsel's fee taxable for a contested suit.]

The relevant portion of Section 20(4) of the Act has been underlined:

22. The legislature has used the expression "……Landlord's costs of the suit….." and that it avoided to use expression "which would have been finally found payable" or "which should have been finally found to be payable on the reliefs granted by the Court".

23. Learned counsel for the Petitioner submitted that the aforesaid provision is beneficial piece of legislation to confer benefit upon the tenant and it should be interpreted accordingly.

24. In my considered opinion aforesaid aimed to confer provision is not solely benefit upon `tenant' only but to confer benefit upon both landlord and tenant. Secondly this court cannot do violence with a given statutory provision while interpreting it and particularly when there is no for ambiguity in the language requiring interpretation.

25. Perusal of the impugned judgment and order, with reference to the charts annexed with the writ petition as Annexure 6 and 7 to the writ petition clearly show that considerable amount of Court fee as well as half lawyer's fee on taxable side and clerkage have not been deposited by the tenant-petitioner.

26. It is abundantly clear that tenant has not deposited the required amount towards "landlords" costs of the suit contemplated under Section 20(4) of the Act and, therefore, he cannot claim benefit of Section 20(4) of the Act and protect himself from eviction from the accommodation in question.

27. In view of the above, I find no manifest error apparent on the face of record in the impugned judgment and order dated 22.8.2001 (Annexure-1 to the Writ Petition) passed by special Judge (Anti-Corruption) Additional District and Session Judge, Varanasi/Respondent no. 1. Petition lacks merit.

Consequently, Writ Petition is, accordingly, dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 7, 2002

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

Civil Misc. Writ Petition No. 24325 Of 2001

Sunil ...Petitioner
Versus
District Magistrate, Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna
Sri D.K. Singh

Counsel for the Respondent:
Sri S.M. Misra
A.G.A.

Constitution of India, Article 226, Art 21-Habeas Corpus Petitions detention order-confined for period of year-challenged made-petitions pending for the last more and more year-almost become infructuous by efflux of time-court expressed its great concern-about shortage of judges-constitutional authorities equally responsible for delay in appointment of judges.

Held - Para 6

The Supreme Court in the Second Judge's case, Supreme Court Advocates on Record Association Vs. Union of India AIR 1994 SC 268 observed that since the date of retirement of a High Court Judge is known the entire process of filling in the vacancy to be caused by the retirement should be completed before one month of the date of the retirement so that on the very next day after the retirement the new appointee can start functioning and in this way the work of the court does not suffer. This was the regular practice during British days and for some time after Independence. However it appears that a complete go by has been given to the aforesaid nine Judges decision of the Supreme Court, and the plight of this court is a glaring example of this. Some times 300 cases are listed before a Judge and it is physically impossible that a Judge can decide 300 cases in one day. We are informed that some other High Courts also are in similar plight because the vacancy of the Judges have not been filled in. We earnestly request the Constitutional authorities concerned in the selection and appointment of High Court Judges to take the matter in all seriousness and promptitude realizing

the gravity of the situation and fill up the vacancies at the earliest.

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

1. In Habeas Corpus petition No. 24325 of 2001 the impugned detention order was passed on 18.12.2000 by which the petitioner was ordered to be detained for a period of one year. That period of one year has expired and hence this petition has become infructuous and is dismissed as such.

2. It is deeply regrettable that this habeas corpus petition and several other petitions listed before us today (mentioned above), have become infructuous because the period of detention has expired. We are informed that a large number of habeas corpus petitions were dismissed as infructuous in November and December last year.

3. The Supreme Court has observed that Article 21 is the most basic of all the fundamental rights in the Constitution as individual liberty is a precious right. It is deeply regrettable that habeas corpus petitions are not being heard and the petitions are becoming infructuous, as the cases were not heard before the expiry of the detention period. There was a time in this Court when the habeas corpus petitions used to be finally disposed off within a week or 10 days of filing of the same, and that is how it should be. However, what is seen in recent times is that habeas corpus petitions are becoming infructuous.

4. Similarly, many bail applications have been pending for 2 to 3 years in this court. Criminal appeals filed in 1980 are being taken up for hearing today. Government appeals are pending for 5 years for admission. Learned standing counsel informed us that stay vacation applications are pending in this Court for years, but could not be taken up for hearing, due to shortage of judges.

5. This Court has a total strength of 95 Judges but at present there are only 47 incumbents (including in Lucknow bench) and two more retirements are taking place within a month. This is one of the main reasons that the cases are not being disposed of speedily.

6. The Supreme Court in the Second Judge's case Supreme Court Advocates on Record Association Vs. Union of India, AIR 1994 SC 268 observed that since the date of retirement of a High Court Judge is known the entire process of filling in the vacancy to be caused by that retirement should be completed before one month of the date of the retirement so that on the very next day after the retirement the new appointee can start functioning and in this way the work of the court does not suffer. This was the regular practice during British days and for some time after Independence. However it appears that a complete go by has been given to the aforesaid nine Judges decision of the Supreme Court, and the plight of this Court is a glaring example of this, where vacancies have continued for years. Sometimes 300 cases are listed before a Judge and it is physically impossible that a Judge can decide 300 cases in one day. We are informed that some other High Courts also are in similar plight because the vacancies of the Judges have not been filled in. We earnestly request the Constitutional authorities concerned in the selection and appointment of High Court

Judges to take the matter in all seriousness and promptitude realizing the gravity of the situation and fill up the vacancies at the earliest.

7. Let the Registrar General of this Court send a copy of this order to all the concerned constitutional authorities forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 16, 2002

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

Civil Misc. Writ Petition No. 2157 of 2002

Lalji Shukla ...Petitioner
Versus
Election Commission of India and others ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri Ravi Kiran Jain
Sri Rishi Chandra

Counsel for the Respondent:
S.C.
Sri Pradeep Kumar
Sri S.K. Mendiratta
Sri S.N. Srivastava

Constitution of India, Article 324(c) - Direction of Election Commission of India dated 28.12.2001 - Transfer of those Class I Police Officers who are working for last 4 years continuously in the same District-but not be posted in their home district-whether such direction is contrary to provisions of Article 324 (1) of the Constitution. Held-No.

Held - Para 6

A perusal of the said provision shows that the Election Commission is incharge of the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections of the Parliament and to the State Legislature. The words `Superintendence, direction and control' and the words' conduct of elections' are very wide words and thus they give power to the Election Commission to do all that is necessary to ensure free and fair elections so that the will of the people can be expressed thereby. In our opinion the impugned directions of the Election Commission are well within the powers conferred to it by Article 324 (1) of the Constitution of India.

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

1. Heard Shri U.N. Sharma, learned counsel for the petitioners, Shri S.K. Mendiratta and Shri S.N. Srivastava for the Election Commission and Shri Pradeep Kumar for the State Government.

2. This writ petition has been filed against the impugned order of the Election Commission of India dated 28.12.2001, Annexure-1 to the writ petition and the subsequent transfer order dated 13.1.2002, Annexure-2 to the writ petition.

3. The petitioners are U.P. Government servants, petitioner no.1 is the S.P. City and petitioner no.2 is Addl. S.P. (Yamuna Paar) Allahabad. Both the petitioners have been posted at Allahabad for more than four years. Petitioner no.1 joined as Addl. S.P. City on 25.4.1998 and prior to that he was posted in 42 Bn. P.A.C. Naini, Allahabad and he has admittedly completed more than four years in Allahabad District. Similarly petitioner no.2 was posted as addl. S.P. (Yamuna Paar), Allahabad on 25.4.1998

and prior to that he was posted as Addl. S.P. City Allahabad and thus admittedly he has also completed more than four years at Allahabad.

4. The petitioners are challenging the impugned directives of the Election Commission of India dated 28.12.2001. Paragraph 3 of the said directive states that the Commission has directed those officers who have completed more than four years of stay in the same district should not be posted in their home district. In compliance with this directive of the Election Commission of India, the impugned transfer order has been passed.

5. Learned counsel for the petitioners submits that the impugned directive of the Election Commission of India is arbitrary and beyond the powers vested in it under Article 324 of the Constitution of India. We do not agree with this submission. Article 324 (1) of the Constitution states as under:-

"The superintendence, direction and control of the preparation of the electoral rolls, for, and the conduct of, all elections of Parliament and in the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

6. A perusal of the said provision shows that the Election Commission is incharge of the superintendence, direction and control of the preparation of the electoral roll for, and the conduct of, all elections of the Parliament and to the State Legislature. The words 'superintendence, direction and control' and the words `conduct of elections' are very wide words and thus they give power to the Election Commission to do all that is necessary to ensure free and fair elections so that the will of the people can be expressed thereby. In our opinion the impugned directions of the Election Commission are well within the powers conferred to it by Article 324(1) of the Constitution of India.

7. Learned counsel for the petitioners submits that the impugned directive is arbitrary. We do not agree. We have been informed by Sri Mendiratta, leaned counsel for the Election Commission that the reason for issuance of the above directive was that those officers who have completed four years in a particular district may have developed liaison with the politicians and other influential persons of the district and hence it would be conducive for ensuring fair elections that they should be moved out. Sri Mendiratta also stated that the same directive was issued in the election of 1998 and all elections thereafter which were conducted by the Election Commission. The same directives have also been issued for all other States where elections are being currently held, namely, Uttaranchal, Manipur and Punjab.

8. We are of the opinion that the impugned directive of the Election Commission is valid as it does not discriminate between different officers but a uniform directive has been issued for all the officers who have completed four years of stay in the same district, to move out. This directive appears to be quite reasonable. In our opinion this court does not sit in appeal over such orders of the Election Commission, and all that it

can see is whether the directive is absolutely whimsical, arbitrary or malafide. No allegation of malafide has been made in this petition against the Election Commission.

9. In Tata Cellular Vs. Union of India, reported in AIR 1996 S.C. 11 it has been held by the Supreme Court that the scope of interference in administrative orders by the Court is very limited. In our opinion the impugned order is not a judicial or quasi judicial order but it is purely administrative in nature. Hence the scope of interference by the court in such case is limited, and it can only see whether the order is arbitrary or malafide. We are of the opinion that it does not suffer from any such defect. Merely because this court could have taken a different view that is not a good reason for interfering with such administrative order. This court is not testing the wisdom of the Election Commission. The Election Commission is a specialized body which is politically neutral and has experience in conducting elections and ordinarily it is for the Commission to decide what would be conducive for a fair election. Moreover, this Court does not ordinarily interfere with policy matters, unless the policy is clearly illegal.

10. Sri U.N. Sharma, learned counsel for the petitioner has relied on the decision of Supreme Court in M.S. gill Vs. Chief Election Commission in AIR 1978 SC 851 and has submitted that the respondent cannot supplement the reasons given in the impugned order. In our opinion this decision is distinguishable because the impugned order does not give reasons at all. Hence there is no question of supplementing the reasons given in the impugned order. There are various kinds of administrative orders which often give no reasons e.g. transfer or suspension orders, and it cannot be said that these orders are illegal merely because no reason has been given in them or because the respondents filed a counter affidavit giving reasons for the transfer or suspension, etc.

11. For the above reasons, we find no merit in this petition. It is accordingly dismissed.

12. Let a copy of this order be given, if possible today, to the parties on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JANUARY 11,2002

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE R.P. MISHRA, J.

Civil Misc. Writ Petition No. 38161 of 2001

Deepak Kumar ...Petitioner
Versus
Collector, Gautam Budh Nagar and others ...Respondents

Counsel for the Petitioner:
Sri Vinod Sinha
Sri S.P. Singh

Counsel for the Respondents:
Sri Pradeep Kumar
Sri Sidhartha
S.C.

Constitution of India, Article 226 readwith Land Acquisition Act Section 18-Compensation – Scope of Mandamus – Seeking direction to the Assistant Collector to give compensation – in view of provision of Section 18, unless the

reference is decided – compensation cannot be given.

Held-Para 5

The facts mentioned above would show that there is a serious dispute of title between the petitioner and respondent No. 3. The petitioner claims that his name had been recorded prior to the issuance of notification under Section 4(1) of the Land Acquisition Act. Sub-Clause (b) of Section 17(3-A) of the Act provides that the Collector shall make payment of amount of compensation unless he is prevented by someone or more of the contingencies mentioned in Section 31(2), section 31(2) lays down that if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of compensation in the Court, to which a reference under Section 18 would be submitted. In view of this clear provision in the Act, the compensation should not be paid to any of the parties till the reference is decided by the Court.

(Delivered by Hon'ble G.P. Mathur, J.)

1. This writ petition under Article 226 of the Constitution has been filed praying that a writ of mandamus be issued to respondent no. 2 not to make payment of any compensation to respondent no. 3 and to make payment of compensation of the land in dispute to the petitioner as per the compromise dated 12.10.1999 entered into between the petitioner and respondent no. 3. A further prayer has been made that respondent no. 2 be commanded to decide the representation dated 27.10.2001 and 9.11.2001 filed by the petitioner forthwith in accordance with law.

2. We have heard learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1 and 2 and Sri Siddhartha for respondent no. 3.

3. A suit under Section 229-B of U.P.Z.A. & L.R. Act was filed by Smt. Anju, respondent No. 4 against Savitri Devi respondent no. 3 for declaration that she is bhumidhar of the land in dispute which has been acquired subsequently under Land Acquisition Act. The suit was decreed ex-parte on 26.4.1996. Thereafter the petitioner Deepak Kumar and Smt. Anju (respondent no. 4) exchanged their holdings in accordance with Section 161 of U.P.Z.A. & L.R. Act after permission had been granted by the Assistant Collector on 11.7.1997. The respondent no. 3 moved an application for setting aside the exparte decree dated 26.4.1996 and also preferred an appeal. A revision was also filed before the Commissioner against an order passed in proceedings for setting aside the exparte decree. In revision a compromise was entered into between the petitioner and respondent no. 3 as the petitioner had on account of exchange of holding got the holding of respondent no. 4. Under the compromise, the petitioner agreed to pay Rs. 17,50,000/- to respondent no. 3. According to the petitioner he had paid Rs. 2,50,000/- to respondent no. 3 by a bank draft and the balance amount was paid by several cheques. These cheques were dishonoured. The appeal filed against the judgment and decree dated 26.4.1996 was allowed by the Commissioner by the order dated 25.10.1999. By this order, the exparte decree was set aside and the suit was remanded for a fresh decision. This suit has been dismissed by the trail court on 04.10.2001 on the ground that the land in dispute has already been acquired by the state Government. Against this decree, the

petitioner has again preferred an appeal before the Commissioner, which is pending.

4. The land has been acquired by issuing notifications under sections 4(1) and 6 read with Section 17 of the Land Acquisition Act. Since the urgency provisions under Section 17 have been invoked the state has to pay eighty percent of the estimated amount of compensation to the person interested in view Section 17(3-A) of the Land Acquisition Act. A supplementary affidavit has been filed wherein it is averred that the amount regarding which the dispute has arisen is being paid under Section 17(3-A) of the Land Acquisition Act. The present writ petition has been filed praying that a direction may be issued to the Additional Collector (Land Acquisition) to make payment of the aforesaid amount of compensation to the petitioner, in view of the compromise which had been entered into between the petitioner and respondent no. 3 on 12.10.1999.

5. The facts mentioned above would show that there is a serious dispute of title between the petitioner and respondent No. 3. The petitioner claims that his name had been recorded prior to the issuance of notification under Section 4(1) of the Land Acquisition Act. Sub-Clause (b) of Section 17(3-A) of the Act provides that the Collector shall make payment of amount of compensation unless he is prevented by someone or more of the contingencies mentioned in Section 31(2), section 31(2) lays down that if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of compensation in the Court, to which a reference under Section 18 would be submitted. In view of this clear provision in the Act, the compensation should not be paid to any of the parties till the reference is decided by the Court.

6. We, therefore, direct that the compensation amount shall not be paid to any party. The Collector may deposit the amount in Court in accordance with sub-clause (2) of Section 31 of the Land Acquisition Act.

The writ petition is allowed in the manner indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JANUARY 3, 2002.

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

Civil Misc. Writ Petition No. 481 of 1977

Ram Roop and another ...Petitioner
Versus
The Deputy Director of Consolidation, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri S.N. Singh
Sri A.K. Rai

Counsel for the Respondents:
Sri Ram Niwas Singh
S.C.

U.P. Consolidation of Holdings Act Section 48 – Power of Revisional Court – application for Amendment – based on absolutely new case-Allowed by Consolidation Officer by erypic order – set a side by D.D.C. held-proper-new case based on such facts already available can not be permitted by amendment.

Held-Para 6

The Consolidation Officer allowed the amendment application by passing a cryptic order and permitted the petitioners to set up a new case, which is not permissible under the law. The Deputy Director of Consolidation on a revision filed by the contesting respondents rectified the mistake an rightly allowed the revision and dismissed the amendment application. It is well settled in law that a new case based upon the facts which were available to the plaintiff at the time of filing of original plaint but were not pleaded in the original plaint, cannot be permitted to be set up by way of amendment. A reference in this regard may be made to the decisions in Basanti devi Vs. Vijaya Krushna Patnaik and others, reported in AIR 1976 Orissa 218, fakir Charan Monhanty Vs. Krutibas Kar, reported in AIR 1984 NOC 284 and Full Bench decision of Madhya Pradesh High Court in Lazarus Chhindwara Vs. Smt. Lavina Lazarus, Indore and others, repoted in AIR 1979 MP 70 (FB) and also a decision of this Court in Gayatri Devi Vs. Om Prakash Gautam and others, reported in AIR 1985 Alld 356.

(Delivered by Hon'ble R.H. Zaidi, J)

1. Heard learned counsel for the parties.

2. By means of this petition filed under Article 226 of the Constitution of India, petitioner prays for issuance of a writ, order or dierection in the nature of certiorari quashing the order dated 10.1.1977 passed by the Deputy Director of Consolidation.

3. The relevant facts of the case giving rise to the present petition, in brief are that the dispute relates to Khata No. 169 of village Bhatpurwa Khurd, dictrict Varansai for shot the land in dispute. In the basic year both parties, i.e. the petitioners and Smt. Daulati, wdom of Bechan were recorded over the land in dispute. On the receipt of Form No. 5, issued by the consolidation authorities, the petitioners filed their objections claiming that the land in dispute belonged to them exclusively and that the name of Smt. Daulati was liable to be expunged from revenue papers. It was pleaded that the land in dispute was originally owned by Smt. Mangari, widow of Chauthi that Smt. Mangari had two sons, Jokhan and Bechan who died during the life time of Smt. Mangari, that the name of Smt. Daulati, wife of Bechan who was alive, was wrongly recorded in the revenue papers and that the petitioners were in adverse possession of the land in dispute. It was also pleaded that Smt. Daulati entered into an agreement to sell the land in dispute in favour of the petitioners after acquiring bhumidhari rights. She also received from them sufficient sale consideration; but subsequently acting illegally executed baksheeshnama in favour of Smt. Maharani and Smt. Sona but the petitioner continued in possession of the land in dispute. Therefore, it was prayed that the names of contesting respondents be expunged from the revenue papers. The objection filed by the petitioner was contested by the respondents who have denied the case set up by the petitioners and claimed that they were entitled to ½ share in the land in dispute. The petitioners thereafter also filed an application for amendment of their objections, mainly pleading that Smt. Daulati illegally surrendered some land in favour of the Zamindar and also executed a document to that effect. The petitioners thereafter got executed a sale deed from the Zamindar and became

exclusive owners of the land in dispute. Other consequential amendments in the objections were also sought. The amendment application was objected to and opposed by Smt. Daulati. However, the same was allowed by the Consolidation Officer by Judgement and order dated 30.6.1976. Challenging the validity of the order passed by the Consolidation Officer, the contesting respondents filed a revision before Deputy Director of Consolidation. The Deputy Director of Consolidation has reversed the findings recorded by the Consolidation Officer and allowed the revision by his judgment and order dated 10.1.1977. Hence the present petition.

4. Learned counsel for the petitioners vehemently urged that the judgment and order passed by the Deputy Director of Consolidation is wholly illegal and without jurisdiction. It was urged that the Deputy Director of Consolidation had no jurisdiction to reverse the findings recorded by Consolidation Officer and to allow the revision, therefore, the order passed by the Deputy Director of Consolidation was liable to be quashed. On the other hand, learned counsel for the respondent supported the validity of the order passed by the Deputy Director of Consolidation. It was urged that by means of the amendment the petitioner wanted to set up a wholly new case for which there was absolutely no basis either in the pleadings or otherwise and the same was not necessary for resolving the controversy involved in the case, therefore, the Deputy Director of Consolidation was right in allowing the revision and in dismissing the applicant for amendment. The writ petition, according to him has got no force and is liable to be dismissed with costs.

5. I have considered the submissions made by the learned counsel for the parties and also perused the record.

6. It is not disputed that the land in dispute was owned by the common ancestor of the parties i.e. Smt. Mangari, who had two sons Jokhan and Bechan. It is also not disputed that Smt. Daulati is the widow of Bechan. Thus, legally she was entitled to ½ share in the land in dispute. Originally the petitioners have taken pleas of adverse possession and execution of an agreement of sale in their favour by Smt. Daulati but subsequently they wanted to change their case and to plead that Smt. Daulati has surrendered the land in dispute in favour of Zamindar and from the Zamindar the petitioners got executed some document in their favour on the basis of which they claimed that they were sole/exclusive owners/bhumidhars of the land in dispute. Through the pleas taken by them by amendment they wanted to set up a new case. The Consolidation Officer allowed the amendment application by passing a cryptic order and permitted the petitioners to set up a new case, which is not permissible under the law. The Deputy Director of Consolidation on a revision filed by the contesting respondents rectified the mistake and rightly allowed the revision and dismissed the amendment application. It is well settled in law that a new case based upon the facts which were available to the plaintiff at the time of filing of original plaint but were not pleaded in the original plaint, cannot be permitted to be set up by way of amendment. A reference in this regard may be made to the decisions in Basanti Dei Vs. Vijaya Krushna Patnaik and others, reported in AIR 1976 Orissa 218, Fakir Charan Monhanty Vs. Krutibas Kar,

reported in AIR 1984 NOC 284 and Full Bench decision of Madhya Pradesh High Court in Lazarus Chhindwara Vs. Smt. Lavina Lazarus, Indore and others, reported in AIR 1979 MP 70 (FB) and also a decision of this Court in Gayatri Devi Vs. Om Prakash Gautam and others, reported in AIR 1985 Alld 356.

7. It is not pleaded by the petitioners that the facts which were to be pleaded by means of amendment were not in their knowledge at the time when the original objection was filled by them. The Deputy Director of Consolidation after taking into consideration the entire material on the record rightly held as under:-

"वर्तमान मुकदमें में विपक्षीगण की ओर विलम्ब का कोई कारण नहीं बताया गया और न ही प्रस्तावित तरमीम का कोई औचित्य बताया गया । तनकीह बनाने के बाद और विशेषकर जब एकपक्ष की शहादत भी समाप्त हो चुकी है तो संशोधन स्वीकार करने का कोई औचित्य नहीं है । इस तरमीम से विपक्षीगण ने बिल्कुल नया वाद आधार लिया है । एकरारनामा की बात समाप्त कर दी गयी है और दस्तवरदारी एवं बन्दोबस्त का अभिवचन लिया गया है जिसकी अनुमति नहीं दी जा सकती । चकबन्दी अधिकारी ने जो आदेश पारित किया वह त्रुटिपूर्ण है मैं उनके द्वारा व्यक्त किए गए मत से सहमत नहीं हूँ निगरानी में बल है । फलस्वरूप निगरानी स्वीकार की जाती है। चकबन्दी अधिकारी का आदेश दिनॉक ३०.६.७६ निरस्त किया जाता है विपक्षीगण का तरमीम प्रार्थना पत्र अस्वीकार किया जाता है। सम्बन्धित च०अ० के समक्ष पक्षगण १७.१.१६७७ को उपस्थित हों।"

8. I fully agree with the view taken by the Deputy Director of Consolidation. The parties cannot be permitted to change their cases by amending their pleadings and set up new cases unless, of course, the amendment is necessary for resolving the controversy involved in the case. The amendment sought by the petitioners in the present case was not necessary for resolving the controversy involved in the case. The finding recorded by the Deputy Director of Consolidation are based on relevant evidence on the record and do not suffer from any illegality or infirmity. The writ petition, therefore, has got no merits, the same fails and is hereby dismissed. The interim order, if any, granted by this Court is hereby discharged.

Since the matter has become very old because of the interim order granted by this Court, the Consolidation Officer, if the work of consolidation is going on in the district otherwise the competent authority, is directed to decide the case expeditiously preferably within a period of two months from the date a certified copy of this judgement is communicated to him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 4, 2002.

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

Civil Misc. Writ Petition No. 43947 of 2001

Anuradhika ...Petitioner
Versus
Additional District Judge, Azamgarh and another ...Respondents

Counsel for the Petitioner:
Sri A. Khare
Sri J.P. Singh

Counsel for the Respondents:
Sri R.K. Yadav
S.C.

Constitution of India-Article 226 – to do full justice between the parties, order for

inspection of ballot papers is necessary and imperative. In case on hand it cannot be said that inspection of ballot papers has been ordered by Election Tribunal for fishing and roving inquiry.

(Held in para 11)
Case Law Relied on 1985 All C.J. P. 196

The Election Tribunal has committed no error in arriving at a consideration that to do full justice between the parties order for inspection of ballot papers is necessary and imperative. The Election Tribunal instead of taking idealistic view it has taken pragmatic view directing inspection, of ballot papers to do full justice between the parties. In the case on hand it cannot be said that inspection of ballot papers has been ordered by Election Tribunal for fishing and roving inquiry, therefore, I decline to issue a prerogative writ making the order impugned dated 13.12.2001 ineffective.

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

1. Heard the learned counsel for the petitioner.

2. Perused the order impugned dated 13.12.2001 passed by the Election Tribunal a copy whereof is filed and marked as Annexure-7 to the writ petition.

3. By filing the instant writ petition the petitioner questions the legality and validity of the order impugned passed by Additional District Judge (Court No. 1), Azamgarh whereby inspection of ballot papers is directed in an election petition filed by respondent no. 2.

4. With the assistance of the learned counsel for the petitioner Sri Ashok Khare, I have gone through the order passed by the Election Tribunal. The Election Tribunal has given cogent and convincing reasons in support of its order impugned. I am objectively satisfied that the order impugned passed by the Election Tribunal is eminently just and proper. By passing the impugned order, the Election Tribunal intended to do material justice between the parties. The Election Tribunal has committed no error in passing the order impugned relying on catena of decisions rendered by High Court and Supreme Court.

5. It is submitted by the learned counsel for the petitioner that indefinite allegations cannot be basis for directing inspection of ballot papers. It is urged by the learned counsel for the petitioner that inspection of ballot papers in an election petition can be ordered only if election petition contains an adequate statement of all the material facts on which the allegation of irregularity or illegality in counting is founded supported with evidence to prima-facie believe that there has been mistake in counting. Lastly, it is submitted the Election Tribunal can order for inspection of ballot papers only in such or situation condition where passing such order is imperatively necessary to decide the dispute and to do complete justice between parties. In support of his aforesaid contention he placed reliance on a decision rendered by the learned Single Judge of this Court in case of Ashok Jain Advocate Vs. XIIIth Additional District Judge, Agra and others, reported in 2000(1) JCLR 281 (Allahabad).

6. There is no quarrel with the aforesaid submissions made by the learned counsel for the petitioner, but in the facts and circumstances of the present case all these conditions precedent are satisfied. It is revealed from perusal of

Election Petition (Annexure-2 to the Writ petition) that it is specifically averred in the Election Petition that during counting of votes four ballot papers were found with special marks by which electors of these votes can be identified. Out of four votes, one vote was rejected, but three votes were counted in favour of petitioner which is perse illegal within the meaning of Rule 26(3)(d) of U.P. Kshettra Panchayats (Election of Pramuks and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994. For ready reference the aforesaid rule is quoted hereinbelow:

Rule 26 – Procedure at the counting

(1)…….

(2)…….

(a) ……

(b) ……

(c) ……

(3) A ballot paper shall be rejected as invalid on which

(a) ……

(b) ……

(c) ……

(d) any mark is made by which the voter may afterwards be identified.

7. From discussion made hereinabove, there is adequate statement of all material facts on which the allegation of irregularity in counting is established and upon which impugned order for inspection of ballot papers is founded.

8. Coming to the second condition precedent as suggested by the learned counsel for the petitioner Sri Ashok Khare to the effect that the allegations are to be proved for believing that there has been a mistake in counting. Suffice it to say in this regard that expression 'proved' is defined under Section 3 of Indian Evidence Act which reads thus:

"**Section 3, proved** – A fact is said to be proved when after considering the matter before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particulars case to act upon the supposition that it exists". In the present case from attending facts and circumstances the Election Tribunal has committed no error in believing that there was irregularity in counting of votes.

9. As regards last condition precedent about prima facie satisfaction of the Election Tribunal directing inspection of ballot papers imperatively necessary to decide the dispute to do complete and effective justice between the parties, it is held that the Election Tribunal for its prima facie satisfaction has given cogent and convincing reasons, with which I am at one.

10. My aforesaid view is buttressed from a decision rendered by Full Bench of this Court in case of Ram Adhar Singh Vs. District Judge, Ghazipur and others, reported in 1985 All.C.J. 196, wherein the learned Judges constituting the Full Bench ruled in paragraph 12, which reads thus:

Paragraph 12 –

"In case of Bhabhi Vs. Sheo Govind and others (AIR 1975 SC 2117), the Supreme Court approved the principles for inspection of ballot papers laid down in Ram Sewak's case (supra) and after noticing its decisions in the cases of Dr. Jagit Singh Vs. Giani Kartar Singh (AIR 1966 SC 773), Jitendra Bhadur Singh v.

Krishna Behrai (AIR 1970 SC 276), Shashi Bhushan v. Prof. Balraj Madhok (AIR 1972 SC 1251), Sumitra Devi v. Shri Sheo Shanker Prasad Yadav (AIR 1973 SC 215), Beliram Bhalaik v. Jai Behari lal Kachi (AIR (sic) SC 283), Baldeo Singh v. Teja Singh (AIR 1975 SC 693) and **Suresh Prasad Yadav v. Jai Prakash Mishra (AIR 1975 SC 376)**, the Court observed thus:

"Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection or for that matter sample inspection of the ballot papers:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purpose of fishing out materials."

11. From the discussion made hereinabove the Election Tribunal has committed no errors in arriving at a consideration that to do full justice between the parties order for inspection of ballot papers is necessary and imperative. The Election Tribunal instead of taking idealistic view it has taken pragmatic view directing inspection, of ballot papers to do full justice between the parties. In the case on hand it cannot be said that inspection of ballot papers has been ordered by Election Tribunal for fishing and roving inquiry, therefore, I decline to issue a prerogative writ making the order impugned dated 13.12.2001 ineffective.

Upshot of the aforesaid discussions is that the instant petition lacks merit and it is hereby dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 13, 2001.

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Civil Misc. Application No. 6411 of 2001

Haribabu ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Udai Narain Khare

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code-section 482 – In cases of rape and outraging modesty of a woman, recalling the victim for evidence requires some exceptionally serious grounds.

(Held in para 6)
Case referred – (2001) 2 JIC Page 459

Merely because the witness could not be properly examined or cross examined earlier due to negligence or carelessness or incompetence, he should not be summoned repeatedly for giving evidence, unless the Court feels that the interest of justice would suffer irreparably and gravely, and even in such a situation the inconvenience of the recalled witness should be compensated by 'realistic' costs payable to the witness.

(Delivered by Hon'ble Sushil Harkauli, J.)

1. Persons who have witnessed a crime are extremely reluctant in giving evidence. Prosecution witnesses are turning hostile every day. If the administration of criminal justice is to be saved from total collapse, a drastic change in the mind set is needed for the Judges, lawyers, litigants and the police.

2. When a witness comes to depose before the court in a criminal trial, he is doing public service to the criminal justice system. While the Judge, the lawyer is paid for the time he devotes to litigation, and the litigant has a personal interest in the litigation no remuneration is paid to the witness for his time and effort. He has no personal interest or stake in the litigation. The witness is therefore entitled to receive all respect and protection for doing that service to the society.

3. It is essential having regard to reluctance on the part of people to give evidence in the present times, that the police should create a "witness protection culture" and give out a very clear impression by their consistent conduct that if the accused threatens or tampers with the witnesses (before or after the evidence) he will not be spared by the police, just as earlier there used to be a clear impression given by the police that if the accused touches a policeman he will not be spared. It is only on such a firm impressions that the State will be able to deter the problem of hostile witnesses in criminal trials.

4. It is most undesirable that after giving evidence, the witness be left at the mercy of the persons against whom he has deposed in his evidence.

5. Equally it is the duty of the Courts, counsel and the parties to litigation to realize and appreciate the inconvenience of the witnesses and not to summon and re-summon the witnesses in a casual manner to suit the convenience of individual lawyers, litigants or for that matter even the Courts.

6. Merely because the witness could not be properly examined or cross examined earlier due to negligence or carelessness or incompetence, he should not be summoned repeatedly for giving evidence, unless the Court feels that the interest of justice would suffer irreparably and gravely, and even in such a situation the inconvenience of the recalled witness

should be compensated by 'realistic' costs payable to the witness.

7. In respect of the present case U/s 354/504 IPC & 3(1) (x) SC/ST Act, I have heard learned counsel for the applicant who has relied upon the decision in the case of a learned Single Judge of this Court in the case of Jokhan Patel Vs. State of U.P. (2001) 2 JIC 459.

8. The facts of this case are that in Sessions trail no. 96 of 1998 an application was moved by the accused for recalling PW-2 Smt. Mamta for further cross examination. She is the lady who is alleged to have been molested by the accused. The only vague ground mentioned in the application was that during the earlier cross- examination certain main points were left out from being asked. The Addl. Sessions Judge has rejected the said application on the ground of vagueness.

9. In cases of rape and outraging modesty of a woman, recalling the victim for evidence requires some exceptionally serious grounds. Therefore, I am of the opinion that the impugned order passed by the Sessions Judge does not call for interference under the inherent powers of this Court. Having regard to these facts, the decision relied upon does not help the applicant. The present application under section 482 CR.P.C. is accordingly dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED THE ALLAHABAD: 08.01.2002

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

Civil Revision No. 211 of 2000

Makkhan Lal Jaiswal and others
...Revisionists
Versus
Executive Engineer, I. and Planning Division, Allahabad and others
...Opposite Parties.

Counsel for the Revisionist:
Sri Vimlesh Srivastava

Counsel for the Opposite Parties:
Sri R.D. Singh.

Code of Civil Procedure Order, 20 Rule 12 – Whether the provision of 0.22 r. 12 is applicable in execution proceeding? Held – 'No' but after the death of decree holder-the hairs must be brought on record – fresh application for execution – not maintainable.

Held – Para 8

This principle will equally apply to the decree holder. Therefore, the execution cannot proceed till the heirs of the decree holder are brought on record in her place.

Case law discussed:
AIR 1957 All 647
AIR 1955 Cal 573

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

1. Smt. Vidyawati Gupta, who was the owner and landlady of House No. 17/25 Hemilton Road, Allahabad filed Suit No. 93/79 for eviction and recovery of arrears of rent against the Executive Engineer, Investigation and Planning

Division of State of Uttar Pradesh. There was an office of Executive Engineer in the premises. Sri M.A. Majid was posted as Executive Engineer and was living in a portion of the premises and he was also made a party in the Suit. The Suit was decreed on 13.04.1982; that decree has been put to execution by Smt. Vidyawati Gupta, who has since died on 15.12.1982. However the execution is being prosecuted by respondent no. 1 Sri Rajesh Pandey. He claims that Smt. Vidyawati Gupta left Smt. Meera Gupta and Sri Rakesh Gupta as her heirs; that Smt. Meera Gupta and Sri Rakesh Gupta executed the power of attorney in his favour to execute the decree. Therefore, he is entitled to execute the decree and has filed general power of attorney executed in his favour.

2. The Present revisionists filed objections in the execution, which were treated as objections under Section 47 C.P.C. They allege that they have purchased the property from Smt. Meera Gupta and Sri Rakesh Gupta, heirs of Smt. Vidyawati Gupta; that. Therefore the decree cannot be executed by Smt. Vidyawati Gupta or by her general power of attorney holder. It was further pleaded that Smt. Vidyawati Gupta died on 15.12.1982 whose heirs have not been impleaded and therefore the execution cannot proceed; that there is no general power of attorney in favour of the opposite party no. 2 to execute the decree.

3. The learned Addl. District Judge, before whom the execution is pending considered the objections. She has held that paragraph 18 of the general power of attorney of Meera Gupta and Rakesh Gupta authorize opposite party no. 2 to execute the decree. Therefore, Rajesh Pandey, opposite party no. 2 is entitled to execute the decree. The learned Addl. District Judge, therefore, has rejected the objections of the revisionists by order, dated 29.02.2000. Aggrieved by it, the present revision has been filed.

4. I have heared Sri Vimilesh Srivastava, learned counsel for the revisionists and Sri R.D. Singh, learned counsel for the opposite party no. 2.

5. The first point raised before me in this revision is that execution of the decree was filed by Smt. Vidyawati Gupta is execution case no. 14/82. Admittedly, Smt. Vidyawati Gupta had died on 15.12.1992. Her heirs has still not been substituted in the execution. It is true that in the light of the provisions of Rule 12 of Order 22 C.P.C., the provisions of Order 22 C.P.C. does not apply to the execution proceedings and the execution cannot abate on the death of the decree holder, but the question is as to whether from this provision it can be concluded that execution can proceed after the death of the decree holder without substitution of his heirs. The reply will certainly be in negative. There must be somebody to prosecute the proceedings and the execution proceedings cannot be proceeded till the heirs of the decree holder are substituted. The decree holder, who moved application for execution died as back as in the year 1982. Her heirs have still not been substituted. The natural question is as who will prosecute the execution proceedings.

6. In Manmohan Dayal & others Vs. Kailash Nath & others Air 1957 Allahabad, Page 647, Division Bench of this Court has observed that if an execution is already pending at the

instance of the decree holder, his legal representative, after his death need not make a fresh application for execution and it is sufficient that they apply for continuation of the proceedings in the pending execution.
(under-lined by me)

7. The other decision relevant to the point is of the Division Bench decision of Calcutta High Court in Smt. Raj Lakshmi Dassi vs. Bonomali and others AIR 1955 Calcutta, Page 573. In this case the judgment-debtor had died during the pendency of the execution. His legal representatives were not brought into record. It was held that the Court cannot proceed with the execution.

8. This principle will equally apply to the decree holder. Therefore, the execution cannot proceed till the heirs of the decree holder are brought on record in her place.

9. In view of this, the other points raised in this revision do not require decision at this stage. The revision is, therefore, fit to be allowed.

10. The revision is, accordingly, allowed and the impugned order is quashed. The matter is sent back to the Executing court who will provide opportunity for substitution of the heirs of deceased decree holder and thereafter shall proceed with the execution in accordance with law and shall also decide the objections of the present revisionists according to law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2001

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

Second Appeal No. 798 of 2001

Indrapal ...Defendant-Appellant.
Versus
Shankar Lal ...Plaintiff-Respondent

Counsel for Appellant:
Sri Faujdar Rai
Sri Chandra Kumar Rai

Counsel for the Respondents:
Sri H.P. Tripathi

Cooperative Land Development Banks Act 1964 – Section 22 – Agreement to Sale – the land already mortgage with Bank stood redeemed after repay of entire amount of loan suit for specific performances – both the Courts below recorded concurrent findings to the effect – held – section 22 (i) has no application.

Held – Para 9

As already pointed out above both the courts below have recorded concurrent findings that in the present case the mortgage made in favour of the bank stood discharged on account of entire amount of loan with interest thereon having been paid to the bank. In view of this findings bar created by Section 22 stood removed and thus there was no legal Impediment in enforcing the agreement in question. Sub section (2) of Section 22 has no application to the facts of the present case as no lease was granted nor rights created by virtue of the agreement in question in contravention of sub-section (1) of Section 22.

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

1. Heard Sri Faujdar Rai for defendant – appellant and Sri H.P. Tripathi for plaintiff – respondent.

2. This second appeal is by defendant against whom respondent filed suit for specific performance of an agreement of sale of plot no. 74 situated in village Dharamapur Abdalpur pergana and Tehsil Soraon, district Allahabad. According to the plaintiff's case the said agreement was executed by appellant and he had received a sum of Rs.4,800=00 as earnest money and balance of Rs.4,000=00 was paid before sub-registrar at the time of registration of agreement. He was always willing to perform his part of contract but the defendant was not coming forward to execute the sale deed, hence plaintiff sent registered notice dated 26.02.1985 whereupon defendant refused to execute the sale deed. Left with no alternative, plaintiff-respondent filed the present suit.

3. In his written statement defendant-appellant denied the execution of the agreement and further took a plea that since the property in question stood mortgaged with U.P. Sahkari Land Development Bank, the property in question could not be transferred in favour of the plaintiff on account of bar created under Section 22 of the Cooperative Land and Development Bank, Act 1964.

4. On appraisal of evidence the trail court recorded a categorical finding of fact that the agreement was executed by the defendant–appellant in favour of plaintiff-respondent. Defendant filed appeal and during the pendency of appeal an additional issue was framed whether the property in dispute was mortgaged in the year 1981 by defendant in favour of U.P. Sahkari Land Development Bank, Soraon Branch and if so whether mortgage was still existing. If so, what was its effect. The issue was then remitted to the trail court for giving a finding thereon. After recording evidence of the parties the trail court decided the said issue holding that the property in dispute was of course mortgaged with the said Bank by the defendant but the mortgage stood redeemed as the entire loan alongwith interest has been paid to the bank.

5. The lower appellate court on receiving the said finding invited objections of the parties and by the impugned judgment dismissed the appeal.

6. Learned counsel for the appellant firstly submitted that as far as issue of execution of agreement in question is concerned the trail court gave a cryptic finding. On going through the judgment of the trail court, I do not agree with the submission of the learned counsel. It is also significant to note that before the lower appellate court learned counsel for the appellant made a concession that execution of agreement in question was not disputed. Be that as it may, it would further appear from the judgment of the lower appellate court that the learned Judge despite the above concession went through the evidence of the parties and affirmed the finding of the trail court that the agreement in question was duly executed by the defendant-appellant.

7. The second submission made before this Court by the learned counsel for the appellant is that once the trail court

had recorded a finding on the remitted issue that the property in question had been mortgaged by the defendant, the agreement in question was not enforceable in view of the provisions of Section 22 of the U.P. Cooperative Land Development Banks Act, 1964 (hereinafter referred to as the 'Act').

A perusal of the order of the trail court deciding the remitted issue would further indicate that on the basis of evidence on record the court also had come to the conclusion that the property which was mortgaged earlier stood discharged on account of payment of loan with interest to the Bank.

8. Before appreciating the submission of the learned counsel for the appellant it may be relevant to mention here that the U.P. Cooperative Land Development Banks Act 1964 was amended from time to time by U.P. Act No. 27 of 1978, No. 3 of 1979, No. 16 of 1989 and NO. 19 of 1994. The long title of the Uttar Pradesh cooperative Land Development Banks Act, 1964 was substituted with the words 'U.P. Sahkari Krishi and Gram Vikas Banks' Act Amended Section 22 of the said Act reads as under:

"***22. Restriction on mortgagors' power to lease or to create other rights in the mortgaged and charged property.*** – *Notwithstanding anything containecd in the Transfer of Property Act, 1882, or any other law for the time being in force no property in respect of which a charge, hypothecation or mortagage has been made in favour of a (Gram Vikas Bank) or the (Uttar Pradesh Gram Vikas Bank) shall be sold or otherwise transferred by the person making the charge, hypothecation or mortgage until the entire amount of loan or advance taken by him from the (Gram Vikas Bank) or the (Uttar Pradesh Gram Vikas Bank) together with interest thereon is paid to the Bank and any transaction made in contravention of this section shall be void:*

Provided that, if a part of the amount borrowed by a member is pai9d, the (Uttar Pradesh Gram Vikas Bank), or as the case may be, the (Gram Vikas Bank) with the approval of the (Uttar Pradesh Gram Vikas Bank) may, on application from the member release from the mortgage, charge or hypothecation created or made in favour of the bank, such part of the property or interest therein as it may deem proper with due regard to the security of the balance of the amount remaining outstanding from the member.

(2) Any lease granted or rights created in contravention of the provisions of sub-section (1) shall be void."

9. A perusal of the above provision will indicate that sub-section (1) thereof creates a bar in respect of transfers made by the person whose property has been hypothecated or mortgaged with the bank. This bar however is not absolute for all time to come in as much as the bar gets removed as soon as the entire amount of loan or advance taken by the person concerned together with interest thereon is paid to the bank. As already pointed out above both the courts below have recorded concurrent findings that in the present case the mortgage made in favour of the bank stood discharged on account of entire amount of loan with interest thereon having been paid to the bank. In

view of this finding bar created by Section 22 stood removed and thus there was no legal impediment in enforcing the agreement in question. Sub-section (2) of Section 22 has no application to the facts of the present case as no lease was granted nor rights created by virtue of the agreement in question in contravention of sub-section (1) of section 22.

10. For the above reasons, this appeal is dismissed as no substantial question of law is involved therein.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2002

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

Second Appeal No. 2218 of 1985

Allahabad Development Authority, Allahabad and others ...Appellants
Versus
Sri Ram Prakash Pandey and others ...Respondent

Counsel for the Appellants:
Sri Ashok Mohiley

Counsel for the Respondents:
Sri K.N. Tripathi
Sri Vinod Mishra
Sri A.S. Diwaker

U.P. Urban Planning and Development Act 1973 – Section 27 Jurisdiction of civil court – applications for section of map – remained pending – Notice to raise the construction given – not replied – construction raised with Notice – Demolition order – without Notice w/o opportunity of hearing – held – illegal, suit is only the proper remedy.

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

1. The respondent no. 1 filed the suit against the appellants and respondent no. 2 for injunction to restrain them from demolishing the house in dispute no. 33/2 Stanley Road, Allahabad. It is contended that the respondent no. 1 purchased plot no. 36 from Hari Mohan Tandon on 03.12.1980. He submitted a plan for sanction for construction of the house before the appellant on 14.09.1981. It was not sanctioned and, therefore, the respondent no. 1 on 16.12.1981 served a notice on the appellant that he want to start the construction and, therefore, either the plan be sanctioned or if there is any objection he may be informed. No reply was given by the appellant. Therefore, on 27.12.1981 the respondent no.1 again served a notice that he is starting the constructions. The constructions were complete regarding which the information was given and the house was given number 33/2 Stanley Road, Allahabad and was also assessed to house tax. However, later on the appellant treated the constructions as illegal and served notice for demolition. The respondent no.1 was ready to compound the matter but the request for compounding was also rejected, hence the suit was filed. The appellants contested the suit and it is contended that the house has been constructed without sanction of the plan and, therefore, it is liable to be demolished. It was further pleaded that the civil court has no jurisdiction to try the suit.

2. The trail court has held that the appellants have no right to demolish the house and the court has jurisdiction to try the suit. The suit was decreed by the trail court. The appeal preferred by the

appellant was also dismissed. Therefore, the appellant has preferred this second appeal.

3. The second appeal was admitted on the following substantial question of law:

"Whether the Civil Court had jurisdiction to entertain the suit in view of the provisions contained in the U.P. Urban Planning & Development Act, 1973"?

4. I have heard Sri Ashok Mohiley, learned counsel for the appellants and Sri A.S. Diwaker, learned counsel for the respondents.

5. This appeal was admitted only on one question of law and the parties have confined their arguments to the said question only. It is contended that the suit is not maintainable in view of the provisions of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'the Act'). The perusal of the provision show that section 15 deals with the application for permission to raise construction and also regarding grant of permission. Section 15-A deals with the completion certificate. The material section which has been referred to is section 27 which provided for the order regarding demolition of building. Clause (2) provide that if the order of demolition of building is passed by the Development authority, the aggrieved person may appeal to the Chairman. Clause (3) provide that the Chairman can decide the matter. Clause (4) provide that the decision of the Chairman on the appeal and, subject to only such decision, the order under sub-section (1), shall be final and shall not be questioned in any Court.

6. The other provision referred to is Section 37 of the Act which provide that every decision of the Chairman on appeal, and subject only to any decision on appeal (if it lies and is preferred), the order of the vice-Chairman or other officer under section 15, or section 27, shall be final and shall not be questioned in any court. Sub-Clause (4) of Section 41 of the Act further provide that every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court.

7. On the basis of these provisions, it has been argued that the provisions of the Act are self contained and they provided appropriate remedy to the person aggrieved. Therefore, the jurisdiction of the civil court is expressly barred and the court cannot entertain the suit under section 9 C.P.C. Learned counsel in support of the argument has referred to the few cases:

8. The first case is Jitendra Nath Biswas Versus M/s Empire of India and Ceylone Tea Co, A.I.R. 1990 Supreme Court, 255. This was case regarding industrial dispute. The suit was filed for reinstatement and back wages. It was held that the relief cannot be granted to the Civil Court and the jurisdiction is barred.

9. The second case referred to is The Premier Automobiles Ltd. Versus Kamlakar Shantaram Wadke, A.I.R. 1975 Supreme Court, 2238. In this case also the jurisdiction of the Civil Court was held to be barred in cases where the dispute is in regard to industrial disputes.

10. The third case referred to is The State of West Bengal Versus The Indian Iron and Steel Co. Ltd., A.I.R. 1970 Supreme Court, 1298. In this case, it was held that the jurisdiction of the Civil Court is barred in the matter of levy of tax as special Tribunal has been created.

11. The fourth case referred to is Annamreddi Bodayya Versus Lokanarapu Ramaswamy, A.I.R. 1984 Supreme Court 1726. In this case, it was held that the question of the "ryot" can be decided by the Settlement Officer only and jurisdiction of the Civil Court is barred.

12. I have considered the law laid down in all these cases. They are on different points and have no direct application in the facts of the present case. It may be also mentioned that in the State of West Bengal, the Apex Court has held that "where the statute gives a finality to the orders of the special tribunals in the matter of levy of tax, the civil court's jurisdiction may be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit". Therefore, in the light of this observation it is to be seen whether the jurisdiction of the civil court is barred in the present case.

13. Learned counsel for the respondent has also referred to the decision reported in A.I.R. 1969 Supreme Court, 78 Dhulabhai versus State of Madhya Pradesh. In this case the provision of Section 9 C.P.C. were exhaustively considered and the principles regarding exclusion of jurisdiction of the Civil Court were laid down. Principle no. 1 alone is important in the present case which is as follows:

"(1) Where the statue gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provision of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure".

14. This provide that the jurisdiction is barred only if there is adequate remedy to do what the civil court would normally do in a suit. This was also the view expressed in the case of State of West Bengal (supra). In view of this, it is to be seen whether the jurisdiction of the civil court is excluded.

15. Section 27 provide for service of notice for the demolition of the building. However, it is contended by the respondent that no notice was served. No procedure has been prescribed nor there is any provision for producing evidence. Therefore, the remedy provided under section 27 of the Act cannot be said to be an adequate remedy so as to infer that the jurisdiction of the civil court is barred.

16. I, therefore, find that the jurisdiction of the civil court to decide the suit is not barred.

17. No other point has been pressed in this appeal.

The appeal is, therefore, without merit and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 07, 2002.

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 30035 of 2001

Rajesh Kumar Misra ...Petitioner
Versus
Registrar, Co-operative Societies U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Singh
Sri Wasim Alam

Counsel for the Respondents:
Sri Q.H. Siddiqui
Sri B.N. Singh
Sri Rakesh Tiwari
S.C.

Constitution of India – Article 226 – Compassionate appointment – an applicant for compassionate appointment does not have any right to claim a particular appointment. The Service conditions of the respondent Bank are governed by the U.P. Co-operative Societies Service Regulations, 1978 according to which no appointment can be made in the bank without approval of U.P. co-operative Institutional Board. Since the Board did not give approval to the petitioner's appointment. Obviously the petitioner had no right to get that appointment. The adhoc appointment of the petitioner as Manager (Law) does not give him any right to the post. (Held in para 5).

An applicant for compassionate appointment does not have any right to claim a particular appointment. The post of Manger (Law) falls in class-II category, hence the petitioner has no right for appointment to that post under Dying in Harness Rules.
Case relied on – A.I.R. 1996 SC P. 1961

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

1. This Writ petition has been filed praying for a writ of certiorari to quash the impugned order dated 19.07.2001 Annexure-9 to the writ petition and letter dated 19.06.2001 Annexure-10 to the writ petition.

2. We have heard learned counsel for the parties.

3. The petitioner's father was working as Senior Manager in U.P. Sahkari Gram Vikas Bank and died in harness on 09.08.1998. The petitioner is a law graduate and he applied for appointment under the Dying in Harness Rules vide application dated 09.09.1998 Annexure-1 to the writ petition. By order date 04.02.1999 the Registrar wrote to the Managing Director that the petitioner does not possess the requisite qualification for appointment, vide Annexure-2 to the writ petition. Thereafter the a petitioner met the Administrator of the Bank and applied for appointment to some post lower than Senior Manager. He also applied for the appointment as Manager (Law) on compassionate ground to the Administrator. The Administrator then wrote to the Managing Director to issue appointment letter of the post of Manager (Law) vide Annexure 3 to the writ petition. Consequently the appointment letter was issued to the petitioner as Manager (Law) vide Annexure-4 to the writ petition. A perusal of this letter shows that the petitioner was appointment on ad hoc capacity and subject to the

approval of the U.P. Co-operative Industrial Service Board. This letter was amended on 22.03.1999 vide Annexure-5 to the writ petition. The petitioner joined as Manager (Law) at Banda vide Annexure-6 to the writ petition and he has been working on that post and was granted increment vide Annexure-7 to the writ petition. However, by order dated 19.07.2001 and 19.06.2001 Annexure-9 and 10 to the writ petition the petitioner was reverted to the post of Accountant. It is alleged that this was done without giving opportunity of hearing to the petitioner. Aggrieved this writ petition has been filed.

4. A counter affidavit has been filed in which it was stated in the paragraph5 that the appointment of persons dying in harness can only be considered for group – 'C' and 'D' post which are outside the purview of Public Service Commission vide G.O. dated 30.11.1989 Annexure-C.A.-1 to the counter affidavit. In paragraph 7 of the counter affidavit it is stated that the petitioner's appointment was only temporary and ad hoc and subject to the approval of the Service Institutional Board and the Board did not approve petitioner's appointment even on ad hoc basis as Manager (Law). True copy of the letter dated 11.07.2001 of the Board in this connection is Annexure C.A.-3 to the counter affidavit. In paragraph 9 it is stated that the petitioner was not neither eligible nor qualified for the post of Manager (Law) which is a group – 'B' post. In paragraph 11 of the counter affidavit it is stated that the petitioner has been appointed as Assistant Accountant in accordance with the relevant Rules.

5. In our opinion, the petitioner has no right to be appointment as Manager (Law) under the Dying in Harness Rules. The service conditions of the respondent bank are governed by the U.P. co-operative Societies Service Regulations, 1975 according to which no appointment can be made in the bank without approval of U.P. Co-operative Institutional Board. Since the Board did not give approval to the petitioner's appointment, obviously the petitioner had no right to get the appointment. The ad hoc appointment of the petitioner as Manager (Law) does not give him any right to the post. Moreover as held by the Supreme court in *State of Bihar Vs. Samsuz Zotia A.I.R. 1996 SC 1961* an applicant for compassionate appointment does not have any right to claim a particular appointment. In our opinion, the post of Manager (Law) falls in class-II category, Hence the petitioner has no right for appointment to the post under Dying in Harness Rules.

6. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2002

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No.33653 of 1996

Smt. Champa Devi and another
...Petitioners
Versus
Rent Control and Eviction Officer (1st), Allahabad and another ...Respondents

Counsel for the petitioners:
Sri R.N. Singh
Sri Anand Kumar Gupta
Sri K.L. Grover

Counsel for the Respondents:
Sri S.N. Verma,
Sri V.N. Agrawal,
S.C.

U.P. Act No. 13 of 1972-U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972—whether the proceeding pending before the enactment of U.P. act No. 5 of 1995 will effect the proceeding pending on the date of enforcement of the amended Act. Held – No.

Held—Para 4

Accordingly, the answer to the question referred would be that clause (g) to Section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and eviction) Act, 1972, inserted in the Act by Section 2 of U.P. Act No. 5 of 1995, will not affect the proceeding pending on the date of enforcement of U.P. Act No.5 of 1995.

(Delivered by Hon'ble D.S. Sinha, J.)

1. Heard Sri R.N. Singh, learned Senior Advocate, appearing for the petitioners, Sri S.N. Verma, learned Senior Advocate, representing the respondent No. 2 and Sri V.N. Agrawal, learned Standing Counsel of the State of U.P. appearing for the respondent No.1 Sri K.L. Grover, learned Senior Advocate, appearing for the petitioner in connected Writ Petition no. 27958 of 1998, Punjab National Bank Vs. VI Addl. District Judge, Gorakhpur and others, has also been heard.

2. Following question of law, on reference by a learned Single Judge, is up for consideration before this bench:

"Whether clause (g) to Section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (herein after referred to as U.P. Act No.13 of 1972) which has been inserted in the Principal Act. by Section 2 of U.P. Act No. 5 of 1995 will affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995?."

3. The learned counsels appearing for the parties agree and submit that the question referred by the learned Single Judge has been conclusively answered by the decision of the Hon'ble Supreme Court of India rendered in M/S Ambalal Sarabhai Enterprises Ltd. Versus M/S. Amrit Lal & Co. Anr., reported in Judgments Today 2001 (7) S.C. at page 477, and in the light of this decision, the answer to the question has to be in negative.

4. Accordingly, the answer to the question referred would be that clause (g) to Section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 inserted in the Act by Section 2 of U.P. Act No. 5 of 1995, will not affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995.

5. Let the record of this case and other cases clubbed with this case be transmitted to the appropriate Bench for decision in the light of the answer recorded above.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2002

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

Civil Misc. Writ Petition No. 231 of 2002

Chandrajit Raj Bhar ...Petitioner
Versus
District Magistrate and others
...Respondents

Counsel for the Petitioner:
Sri R.N. Sharma

Counsel for the Respondents:
Sri Ateeq Ahmad Khan
S.C.

U.P. Panchayat Raj Act—section 95 (1) (g) the preliminary enquiry was not held by the District Panchayat Raj officer under the statutory Rules 1997 nor the explanation of the petitioner was called for and considered by District Magistrate before passing the impugned orders as envisaged under section 95 (1) (g) of the said Act—the orders impugned are perse illegal (Held in Para 11.)

In the present case, the order impugned passed by District Magistrate depriving the petitioner from his financial and administrative powers and functions and appointment of three members Committee is founded on a report submitted by the Assistant Engineer PWD, Pilibhit. Which is perse illegal within the meaning of Rules 2 (c), 4 and 5 of the Rules of 1997. The District Magistrate has no jurisdiction to deny reasonable opportunity of showing cause to the petitioner before passing the impugned order as envisaged under second proviso of Section 95 (1) (g) of Act of 1947.

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

1. Heard the learned counsel for the petitioner.

2. Perused the averments made in the Writ Petition.

3. The present petition is posted today for admission. but with the consent of the learned counsel for the parties I propose to decide it on merits at admission stage.

4. By filing the instant writ petition the petitioner is seeking a relief for quashing the order impugned dated 2.11.2001 (Annexure-8 to the writ petition) and order dated 26.12.2001 passed by the District Magistrate, Pilibhit under Section 95 (I) (g) of U.P. Panchayat Raj Act, a copy whereof is filed and marked as Annexure 10 to the writ petition, on the ground interalia that no preliminary enquiry has been held against him by District Panchayat Raj Officer under the Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up. Pradhans and Members) Enquireis Rules 1997 (hereinafter referred as Rules of 1997) to arrive at a prima facie conclusion that he has committed financial and other irregularities and no opportunity of showing cause has been afforded to him against the action proposed within the meaning of second proviso of Section 95 (1) (g) of U.P. Panchayat Raj Act. (herein after referred as Act of 1947) which provides that no action shall be taken under clause (f) and clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed. By order dated 2.11.2001 the petitioner is deprived of to perform his

financial and administrative powers and functions where as by order dated 26.12.2001 three members committee is ordered to be appointed to perform financial and administrative powers and functions until petitioner is exonerated of the charges in the final enquiry.

5. It is evident form a bare perusal of the order impugned in the present case that the preliminary enquiry was not held by the District Panchayat Raj Officer under the statutory Rules 1997 nor the explanation of the petitioner was called for and considered by District Magistrate before passing the impugned orders as envisaged under Section 95 (1) (g) of the said Act, I am of the view that both the orders impugned are perse illegal of the ground discussed here in below.

6. Rule 4 of the Rules of 1997 provides that District Magistrate on whom power of State Government is delegated on the receipt of complaint or report referred to in Rule 3 or otherwise order to the District Panchayat Raj Officer to conduct a preliminary enquiry with a view to finding out if there is prima facie case for a formal final enquiry in the matter. Under sub-rule (2) of Rule 4 of the Rules of 1997 the District Panchayat Raj Officer is to conduct the preliminary enquiry as expeditiously as possible and submit his report to the District Magistrate within fortnight of his having been so ordered by District Magistrate.

7. Rule 5 of the Rules 1997 further provides that where the District Magistrate is of the opinion, on the basis of the report referred to in sub rule (2) of Rule 4 or otherwise that a final enquiry should be held against a pradhan or UP-Pradhan or Member under the proviso to clause (g) of subsection (1) of Section 95 it shall by an order ask the Enquiry Officer to hold the final enquiry. The Expression Enquiry Officer has been defined under section 2 (C) of the Rule of 1997. The Rule 2 (C) of the said Rules reads as under:

"2 (c) 'Enquiry Officer' means an officer not below the rank of District Panchayat Raj Officer., appointed as such by the State Government."

8. It is not disputed before this Court that power of State Government is delegated to all District Magistrates of State.

9. A Close scrutiny of Section 95 (1) (g) of Act of 1947 reveals that under the aforesaid Section the first action is contemplated to remove a pradhan. Up Pradhan or Member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti or a Panch, Sahayak Sarpanch or Srpanch or a Nayaya Panchyat on the grounds enumerated under subclauses (I) to (V), whereas under first proviso of the said Section another action is contemplated in between initiation of proceeding for removal and actual removal of a Pradhan or Up Pradhan to deprive him from his administrative and financial powers and functions. It is further provided that after passing of order under Section 95 (I) (g) of the Act 1994, a Pradhan or Up Pradhan shall cease to exercise and perform the financial and administrative powers and functions which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by District Magistrate. Thus after passing of order

under Section 95 (1) (g) by District Magistrate depriving a Pradhan Up Pradhan from his financial and administrative powers and functions during the pendency of final enquiry of removal, financial and administrative powers of a Pradhan or Up Pradhan is to be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by District Magistrate provided in a preliminary enquiry held by an officer not below the rank of District Panchayat Raj Officer, a Pradhan or Up Pradhan is prima facie found to have committed financial or other irregularities.

10. A conjoint reading of Section 95 (I) (g) of Act of 1947 read with Rules 2 (c), 4 and 5 of the Rules of 1997 leads towards an inescapable conclusion that the District Magistrate considering the preliminary enquiry report submitted by the District Panchayat Raj Officer and explanation if any submitted by a Pradhan or Up Pradhan is to pass a speaking order either depriving a Pradhan or Up Pradhan from performing his financial and administrative powers and functions or refused to pass such order on merits of each. It is held that a Pradhan or Up Pradhan can not be deprived of his financial and administrative powers and functions in a perfunctory manner as has been done in the present case against the mandatory provisions envisaged under section 95 (I) (g) of Act of 1947 and statutory Rule of 1997, unless statutory preliminary enquiry is held by the District Panchayat Raj Officer and in that enquiry he is prima facie found to have committed financial and other irregularities. Secondly the Pradhans or Up Pradhans before being deprived of to perform their financial and administrative powers and functions are also entitled to show cause to the preliminary enquiry where in prima facie they are found to have committed financial or other irregularities. Thirdly, after receipt of preliminary enquiry report from District Panchayat Raj Officer, if in such preliminary enquiry a Pradhan or Up Pradhan is prima facie found to have committed financial and other irregularities a copy of preliminary enquiry is to be made available to such delinquent Pradhan or Up Pradhan asking his explanation, but if in preliminary enquiry conducted by District Panchayat Raj Officer nothing is found against him, question of depriving of financial or administrative powers and functions does not arise.

11. In the present case, the order impugned passed by District Magistrate depriving the petitioner for his financial and administrative powers and functions and appointment of three members Committee is founded on a report submitted by the Assistant Engineer P.W.D. Pilibhit, which is perse illegal within the meaning of Rules 2 (c) 4 and 5 of the Rules of 1997. The District Magistrate has no jurisdiction to deny reasonable opportunity of showing cause to the petitioner before passing the impugned order s envisaged under second proviso of Section 95 (1) (g) of Act of 1947.

12. As a result of the aforementioned discussion the instant writ petition succeeds and it is allowed. The enquiry report submitted by the Assistant Engineer P.W.D. Pilibhit and the order passed by the District Magistrate dated 2.11.2001 (Annexure-8 to the writ petition) are hereby quashed. The matter is sent back to the District Magistrate

Piliphit to pass an order in accordance with law in the light of observations made herein above in body of order.

13. Till order in accordance with law is not passed by District Magistrate, Pilibhit, the respondents are hereby restrained from interfering in exercising and performing the financial and administrative powers and functions of the petitioner as elected village Pradhan of Gram Panchayat Bundhi Bhur Block Puranpur District Piliphit.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2002

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

Civil Misc. Writ Petition No. 44 of 2002

Bobby alias Javed Khan and another
...Petitioners
Versus
State of U.P. and others...Respondents

Counsel for the Petitioners:
Sri Nasiruzzaman

Counsel for the Respondents:
A.G.A.

Constitution of India Article 226 Directions issued to all the Chief Medical Officers/ Superintendents to be followed before issuing age certificate of a girl any violation thereby may entail serious consequences.

(Held is para 9).

Coming to the present case, we are of the considered opinion that the FIR in case crime no.321 of 2001 P.S. Sirsaganj District Firozabad under Section 363 and 366 IPC cannot be quashed. It is, however, provided that arrest of the petitioners shall be stayed for a period of six weeks from today within which they shall produce km. Sangeeta before the investigating officer who shall get her medically examined by way of ossification test for ascertaining her age besides recording her statement under Section 161 Cr.P.C. on receipt of the medical report, the investigating officer will be free to proceed with the investigation in the manner as provided under law.

(Delivered by Hon'ble R.K. Dash, J.)

1. These two petitioners arraigned as accused for the offence punishable under Sections 363 and 366 I.P.C. in case crime no. 321 of 2001 P.S. Sirsaganj District Firozabad have filed this writ petition under Article 226 of the Constitution seeking quashing of the FIR and restraining the police to arrest them in the aforesaid case. Briefly stated the prosecution case as borne out from the FIR, copy where of at annexure-5, is that on 12th November, 2001 Km Sangeeta aged about 14 years daughter of Sanjeev Kumar, the informant had been to market during day hours but did not return. A search was made in course of which two persons namely, Sunil and Shivkant disclosed that they had seen Sangeeta going with present petitioners. The informant made a written complaint to the police on the basis of which the aforesaid case has been registered under Section 363 and 366 I.P.C.

2. The case of the petitioners as stated in the writ petition is that the informant, father of Sangeeta was tenant under their father and both the families had cordial relationship. Both Javed khan and Sangeeta were intensely lovelorn which drove them to a marriage.

According to the petitioners, the marriage was performed on 15th November, 2001 and 'Nikahnama' was executed accordingly. Besides, on the legal advice both of them entered into a written agreement admitting marriage and this agreement was preceded by a certificate issued by the Chief Medical Officer, Etah who upon examination certified Sangeeta to be aged about 19 years.

3. Learned Counsel appearing for the petitioners strenuously urged that in view of the background facts as narrated in the writ petition that Sangeeta is a major girl being aged 19 years as opined by the Doctor and she having married to petitioner no. 1 on her free will, investigation taken up by the local Policy pursuant to the FIR lodged by her father should be brought to a halt and the whole criminal proceedings should be quashed. Per contra, learned A.G.A submitted that it is too early to accept the defense plea that Sangeeta is major and that she left the parental home and married to petitioner no.1 on her own volition. He further contended that medical certificate produced by petitioner no.1 in support of age of Sangeeta cannot be accepted on its face value when the investigation is in embryo.

4. Undisputedly the allegations as made in the FIR, copy where of at annexure-5, prima-facie make out a cognizable offence requiring investigation by the police. It is the settled position of law that at the time of registration of a case pursuant to the report, the police cannot go into the correctness or otherwise of the allegations made therein. Therefore, when the report reveals commission of a cognizable offence, it is obligatory of the concerned police officer to register a case and then proceed with the investigation if he has reason to suspect that an offence has been committed. The expression "reason to suspect of commission of a cognizable offence, it is obligatory of the concerned police officer to register a case and then proceed with the investigation if he ahs reason to suspect that an offence ahs been committed. The expression "reason to suspect of commission of a cognizable offence" as appearing in Section 157 is not there in Section 154 Cr. P. C. Therefore, when any information regarding commission of a cognizable offence is received, the Officer-in-Charge of the concerned police station cannot refuse registration of a case. In that view of the matter, the allegation in the present case being that Km. Sangeeta was minor when she was enticed away by the petitioners and this being a cognizable offence, it is incumbent upon the police to investigate the same.

5. The defence plea that Km. Sangeeta was major at the relevant time and that she left her parental home on her own volition and married to petitioner no.1 cannot be accepted on its face value and the whole criminal proceedings and the FIR cannot be quashed. It has come to our notice that in large number of cases of this nature, the accused having kidnapped a girl approached the Chief Medical Officer to obtain a certificate as to the age of the girl and being armed with such certificate moved this Court to direct the Chief Judicial Magistrate or any other Magistrate to record the statement of the girl under Section 164 Cr. P.C. and then quash the F.I.R.

6. Recording of statement of witness under Section 164 Cr. P. C. and

examination of the victim girl by the Doctor for ascertaining her age by ossification test are part of investigation. The function of the Court and investigating agency are well defined and well demarcated. No one should tread over the jurisdiction of the other. It has been well settled by a decision of the Apex Court in Jogindra Nahak Vs. State of Orissa reported in (2000) 1 SCC 272 that statement of an witness under Section 164 Cr. P. C. cannot be recorded by the Magistrate un-sponsored by the investigating officer. So far issuance of certificate of age of the victim by the Chief Medical Officer is concerned, it is contended by the learned A.G.A. that such certificate is issued on the basis of the letter no. 4362 dated 26th August, 1986 of the Secretary, Health Department, Government of U.P. The said letter has been brought to our notice where in paragraph 1 (d), it is provided that Chief Medical Officer can issue age certificate as mentioned therein. The said Government Order in our opinion, is being misused and misapplied by the Medical Officer and he being hand-in-gloves with the kidnapper issues Certificate of age of the victim girl to protect him form the criminal proceedings. It is not the intention of the State Government that Chief Medical Officer without ascertaining the necessity of age certificate can examine. In the present case, it appears form the certificate, Copy where of at annexure-3, that Chief Medical Superintendent, Etah on the basis of X-ray report opined that Sangeeta was aged about 19 years. A Photograph of a girl to whom the Medical Superintendent identified as Sangeeta is attached to such Certificate. The X-ray was conducted by the Radiologist, District Hospital, Etah. Questions arise as to who met the expenses of the X-ray in as much as, whether x-ray was done at the State's expense or at the expense of Sangeeta or somebody else and further who identified the girl to the Radiologist whose x-ray was done. In other words, whether in fact Sangeeta appeared before the Radiologist and her x-ray was done or someone else impersonated herself as Sangeeta. In a case under Sections 363 and 366 I.P.C., determination of age of the victim girl is one of the main factors to bring home the charge to the accused. It is, therefore, the duty of the investigating officer to get the victim girl examined by the doctor by way of ossification test and in that process no one can complain the identity of the girl.

7. Taking all the above aspects into consideration, we are of the view that issuance of such certificate by the Chief Medical Superintendent, Etah (annexure-3) either on asking of Sangeeta or Bobby alias Javed Khan, petitioner no. 1 amounts to interference with the process of investigation. We, therefore, feel it expedient to give the following directions to be followed before issuing age certificate of a girl if asked for:

(i) that as and when an application is filed by a girl or any body else on her behalf for issue of age certificate, the Chief Medical Officer/ Superintendent concerned shall ask for an affidavit of the applicant indicating the necessity of such certificate and whether any report has been made to the police alleging kidnapping/abduction;

(ii) that the Police Station under which the girl usually resides with her parents shall be noticed to inform as

to whether any case has been registered alleging kidnapping/ abduction of the girl.

(iii) that the parents and in their absence near relations of the girl shall be noticed at the expense of the petitioner to appear at the time of medical examination. If it is reported by the police that on the basis of a complaint, FIR has been registered under Section 363 & 366 I.P.C. or for any other offence, the Medical Officer shall refuse to examine the girl and issue certificate of age.

8. The directions as aforesaid shall be strictly followed by all the Medical Officers of the State and any violation there of may entail serious consequence. The Principal Secretary of Heath Department, Government of U.P. is directed to communicate this Judgement to the Chief Medical Officer /Chief Medical Superintendents for compliance.

9. Coming to the present case, we are of the considered opinion that the FIR in case Crime no. 321 of 2001 P.S. Sirsaganj, District Firozabad under Section 363 and 366 I.P.C. cannot be quashed. It is however, provided that arrest of the petitioners shall be stayed for a period of six weeks form today within which they shall produce Km. Sangeeta before the Investigating Officer who shall get her medically examined by way of ossification test for ascertaining her age besides recording her statement under Section 161 Cr. P.C. On receipt of the medical report, the investigating officer will be free to proceed with the investigation in the manner as provided under law.

10. With the above observation and direction, the writ petition stands finally disposed of. Registry is directed to send a copy of this judgement to Principal Secretary, Health Department, Government of U.P. for Compliance.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2002

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE R.P. MISHRA, J.

Civil Misc. Writ Petition No. 585 of 2001

Bhola Nath and others ...Petitioners
Versus
State Bank of India , Branch Sirsa, Sirsa Bazar and others ...Respondents

Counsel for the Petitioners:
Sri R.N. Kesari

Counsel for the Respondents:
Sri A.K. Mishra
S.C.

Constitution of India, Article 226—Scope and Limitations- Power of the Court- discretionary one- if the barrower given undertaking to deposit the amount for stay of recovery proceeding – bound by said condition- in case of default—court declined to interfere—held- can not be claimed as matter of right.

Held—para 6

Therefore, it is absolutely necessary that such borrowers who have undertaken or have been directed to deposit some amount as a condition for staying the recovery proceedings must be held strictly bound by the said conditions and in the event of non–compliance of the conditions imposed, this Court will be fully justified in declining to grant the relief under Article 226 of the

Constitution as the proceedings under the said provision are discretionary in nature and can not be claimed as matter of right.

Case law discussed:

AIR 1988 Alld.-156 (DB)
2001 ALR-156 (FB)

(Delivered by Hon'ble G.P. Mathur, J.)

1. This writ petition under Article 226 of the Constitution has been filed for quashing of the citation dated 29.12.2000 asking the petitioners to deposit Rs.8,76,449/-.

2. The petitioners no. 1 to 4 are partners of petitioner no. 5 which is a registered partnership firm carrying on business in Sirsa Bazar. Allahabad. The firm opened a current account in the State Bank of India. Branch Sirsa Bazar and was granted a cash-credit facility with a limit of Rs.6 Lakhs. An overdraft facility was also provided by the bank. It appears that the petitioners did not keep their account in order and did not deposit the dues of the bank. The bank accordingly sent a certificate to the Collector to recover the amount under U.P. Public Moneys (Recovery of Dues) Act. 1972. The Collector accordingly initiated proceedings to recover the amount as arrears of land revenue and Tehshildar Meja, thereafter issued a citation to the petitioners asking them to deposit the amount which has been impugned in the present writ petition.

3. Sri R.N. Kesari, learned counsel for the petitioners has submitted that the provisions of U.P. Public Money s (Recovery of Dues) Act. 1972 can not be invoked to recover the dues of the bank. He has placed reliance on a Full Bench decision in Smt. Sharda Devi Versus State of U.P. 2001 A.L.R. 156, wherein it has been held that a banking company can recover only such loan under U.P. Public Moneys (Recovery of Dues Act 1972, which has been advanced or paid under a State Sponsored Scheme and not any other type of loan. Learned counsel has urged that since the petitioners had not been given loan under any State Sponsored Scheme but had been given a cash credit facility, the dues of the bank cannot be recovered under the aforesaid Act. There can be no quarrel with the proposition of law urged by the learned counsel for the petitioners. The petitioners had not been given any loan by the State Bank of India under any State Sponsored Scheme but had been given a cash-credit facility and, therefore, the provision of U.P. Public Moneys (Recovery of Dues) Act, 1972, cannot be availed of in order to recover the dues of the bank. But the question still remains whether in the facts and circumstances of the case. The petitioners are entitled to claim such a relief in the present writ petition under Article 226 of the Constitution.

4. This petition was heard for admission by a Division Bench on 8.1.2001 when an interim order was passed and the relevant portion thereof is being reproduced below:

"Shri R.N. Kesari learned counsel for the petitioner made a statement that the petitioner made a statement that the petitioners will deposit Rs.2,00,000/= (Rupees two lacs) in Cash or by bank draft with the Branch Manager, State Bank of India. Sirsa. Allahabad and another amount of Rs.2,00,000-(Rupees two lacs) in Cash or by bank draft with the said Branch Manager on or before 10.2.2001 and 10.3.2001 respectively,

whereafter he proposes to file a representation which may be decided by the said Bank in accordance with law and rules and the guidelines issued by the Reserve Bank of India from time to time.

Shri A.K. Mishra, appearing for the Bank has said that for the same relief the petitioner had filed a suit which has also been dismissed and appeal is pending. To this Shri Kesari Stated that the suit was only for interest amount and in case a settlement is reached, the petitioner will withdraw the appeal.

Relying upon the aforesaid statement of Shri Kesari the recovery proceedings are stayed till 10.2.2001 to enable the petitioner to deposit rupees two lacs in cash or by Bank draft with the branch manager concerned of the said bank. In the event of non-payment, the recovery proceedings shall stand automatically renewed on 11.2.2001 and Interim Stay Application in writ petition shall be deemed to be dismissed……"

5. When the case was taken up for hearing learned counsel for the bank made a statement that the petitioners did not comply with the aforesaid order and did not deposit any amount. The fact that the petitioners did not deposit any amount has also been admitted by Sri R.N. Kesari learned counsel for the petitioners. When the petitioners were threatened with the recovery of Rs. 8,76,449/=, they filed the writ petition. On the representation made by the petitioners that they will deposit some amount the recovery proceedings were stayed on the condition that they will deposit Rs.2 lakhs by 10.2.2001 and a further sum of Rs. 2 lakhs by 10.3.2001. By this process the petitioners were able to prevent their arrest and also attachment and sale of their properties. In M/S Lal and Kumar Versus State of U.P. A.I.R. 1998 Alld. 156 a Division Bench observed that overshooting a cash credit limit and running an overdraft offends the contract between the borrower and the bank and thus the equity was against the borrower and consequently, his writ petition challenging the recovery proceedings was liable to be dismissed. This decision was considered by the full Bench in Smt. Sharda Devi Versus State of U.P. (supra) and after noticing the provisions of the Act. It was observed as follows:

"……It is true that exercise of jurisdiction under Article 226 of the Constitution is discretionary in nature and the Court may refuse to exercise discretion in favour of a person if it finds that equity is against him or it will result in miscarriage of justice. While exercising its powers, the Court must keep in mind the well-settled principles on which such high prerogative writs are issued. At the same time it must be kept in mind that we are governed by rule of law and all actions taken must be supported by law. It cannot, therefore, be laid down as a principle of universal application that even though the proceedings initiated for recovery of the loan as arrears of land revenue are without jurisdiction as the loan does not fall within the purview of the Act yet the Court would shut its eyes and decline to exercise jurisdiction under Article 226 of the Constitution only on the ground that the borrower owes money to the bank. In a proper case the court would not hesitate to issue appropriate writ as the facts and circumstances of the case may justify."

6. When the Tehsildar proceeds to recover certain amount from a person as

arrears of land revenue, he issues a citation to him for his appearance and can take steps to arrest and detain the person in civil prison and also to attach and sell other properties of the defaulter. It is common knowledge that if the defaulter is able to secure even a temporary or time bound stay order against the recovery proceedings, he is able to delay the process of recovery for a long period as the Tehsil authorities lay off their hands. The Collector and the Tehsildar are busy persons and have to perform many government functions. They are over-burdened with work and unless the creditor is keenly pursuing the matter they normally do not revive the recovery proceedings immediately after expiry of the time bound stay order. It is common experience that some clever defaulters who manage to get even a time bound stay order by making a small deposit or giving an undertaking to deposit the amount are thus able to forestall the recovery proceedings for a long time. Therefore, it is absolutely necessary that such borrowers who have undertaken or have been directed to deposit some amount as a condition for staying the recovery proceedings must be held strictly bound by the said conditions and in the event of non-compliance of the conditions imposed, this Court will be fully justified in declining to grant the relief under Article 226 of the Constitution as the proceedings under the said provisions are discretionary in nature and can not be claimed as a matter of right.

7. In the present case, the admitted position is that the conditions on which the recovery proceedings were stayed by this Court have not been complied with by the petitioners. In fact, the petitioners did not deposit any amount at all. It appears that the petitioners made a false statement on 8.1.2001 with the sole aim of getting a stay order. Not only the petitioners did not deposit the amount within the time fixed by this Court but they have not done so even later on or till the time when the writ petition was taken up for hearing. There is no explanation at all why the petitioners did not comply with the statements made by them. We are, therefore, clearly of the opinion that the conduct of the petitioners has been very unfair and the statement regarding making of deposit was made with the sole aim of getting a stay order. Therefore, in the facts and circumstances of the case, this Court would be fully justified in not granting any relief under Article 226 of the Constitution in favour of the petitioners.

For the reasons mentioned above, the writ petition is dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 7.1.2002

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

Civil Misc. Writ Petition No. 226 of 2002

Udai Singh Bhanuvanshi ...Petitioner
Versus
Sri Kunj Behari Tewari. ...Respondent

Counsel for the Petitioner:
Sri Raj Kumar Jain
Sri Rahul Jain

Counsel for the Respondent:

U.P. Urban Buildings (Regulation of Lettings Rent and Eviction) Act 1972-Section 21 (i) (b) Release application-can only be made by the land lord-

application made by Mr. 'A' on the basis of will deed to release rent as land lord- held- perfectly right.

Held- Para 17

Court has consistently held that the accommodation required by the land lord for his family members, like month-in-law, daughter-in-law etc. (not strictly covered by the definition of family in the Act, the requirement or need in lieu of land lords' guest, attendant, servant, etc.) shall be the need of land lord. Reference may be made to the following decisions of this Court:

Case law discussed:

1978 ARC-394
1983 (2) 143
1996 (2) ARC-14
AIR 1981 SC 1113
1998 (1) ARC 449
1999 (1) AWC 795
1988 (2) ARC 430

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

1. Udai Singh Bhanuvanshi, petitioner, who is the tenant of residential accommodation on the first floor of house no. 118408 Kaushalpuri, Kanpur Nagar (for short called 'the Accommodation') comprising of two Rooms. One Store, Dochatti, Verandah, Aagan and Bath room at the rate of Rs. 60/- per month has approached this Court by filing present writ petition under Article 226 of the Constitution of India and seeks to challenge the judgement and order dated August 25, 2001 (Annexure-7 to the writ petition) allowing land lord's Rent Appeal No. 243 of 1995 (Kunj Behari Tewari Versus Udai Singh Bhanuwanshi) under Section 22 U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called 'the Act') arising out of the judgment and order dated November 8, 1995 passed by Prescribed Authority under Section 21 (1) (a) of the Act in Rent Control Case No. 157 of 1993. (Kunj Behari Versus Udai Singh) dismissing the release application filed by the land lord Kunj Bheari, son of Brahm Dutt Tewari, under Section 21 (1) (a) of the Act (Annexure- 6 to the writ petition).

2. Admittedly, the petitioner shows that the 'Accommodation' is in the tenancy of the petitioner, Father of the petitioner was tenant and Smt. Sukh Devi and Ram Dayal Awasthi were the land lords. Aforementioned Ram Dayal Awasthi executed a 'will' with respect to the premises including 'the accommodation' in favour of Vinod Behari and Shyam Behari sons of Bhram Dutt, Ram Dayal Awasthi having died, said Vinod Behari and Shyam Behari inherited the property through the will. Kunj Behari Tewari respondent another son of said Braham Dutt Tewari (real brother of Vinod Behari and Shyam Behari) claimed to be the owner/landlord of certain property including 'the accommodation' by virtue of court decree dated 14.1.1991 in Suit No. 1310 of 1989 (Kunj Behari Versus Shyam Behari) passed by Ist Additional Civil Judge, Kanpur Nagar. The said Kunj Behari filed release application dated 2.4.1994 before the Prescribed Authority under Section 21 of the Act claiming to be the land lord.

3. It is categorically mentioned in the release application that registered notice dated September3, 1993 was sent through Advocate to the petitioner-tenant and same was served upon the petitioner on September 9, 1993 (Para 2 of the release application Annexure -2 to the writ petition- PP 31 of the writ paper book). Release claimed for personal use

of the land lord vide release application under section 21 of the Act. The contesting respondent petitioner-tenant filed written statement. Parties led evidence in support of their respective cases.

4. The Prescribed Authority rejected the release application primarily on the ground that Kunj Behari Tewari failed to establish his status as owner /landlord.

Feeling aggrieved, Kunj Behari Tewari filed Rent Appeal No. 243 of 1995 and the said rent appeal has been allowed by Additional District Judge, Court No. 8 Kanpur Nagar, vide judgment and order dated 25.8.2001.

5. After discussing the affect of the partition decree between Kunj Behari Tewari and aforementioned Vinod Behari and Shyam Behari as well as the registered notice dated September 3, 1993 sent to the tenant-petitioner by registered post, keeping in view the fact that Kunj Behari Tewari was authorized assigned the rights to realize rent as 'landlord' of the accommodation from the tenant with respect to the accommodation in question and the tenant was further required to pay rent to said Kunj Behari Tewari.

6. In lower appellate court's judgment (at Particular page 66 of the writ petition) shows that Kunj Behari Tewari was authorized not only to realize the 'rent' but also authorized to realize the same in his capacity as land lord of the accommodation vis-a-vis the tenant-petitioner.

7. The learned counsel for the petitioner submitted that under Section 21 (1) (a) of the Act the land lord alone, who is the owner of the accommodation, can maintain application for release under section 21 (1) (a) of the Act against his tenant. The learned counsel for the petitioner has laid emphasis on the expression 'occupation by himself' used in Section (1) (a) of the Act and argued that it is the owner as land lord who can claim release of an accommodation in possession of some one as tenant. And not a person who is authorized merely to realize rent or accept rent on behalf of owner/landlord.

8. I am not in agreement with the submissions made on behalf of the petitioner in this respect being misconceived.

Relevant extract of Section 21 (1)(a) of the Act read as:

9. "The Prescribed Authority may on an application of the land lord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely ….."

10. Section 3 (j) of the Act defines the term 'land lord' and reads:

"3(j) 'land lord ' in relation to a building means a person to whom its rent is or if the building were let, would be, payable and includes, except in clause (g), the agent or attorney, or such person."

11. If the expression 'except in clause (g)' is extracted from the aforesaid definition of the term 'land lord' will read' a person to whom its rent is payable and includes the agent or attorney or such person.

12. No where under the Act, term 'owner' has been used. Thus the concept of 'ownership' has no nexus nor relevant while dealing with the expression 'landlord', tenant or their inter se rights and obligations. There is no ambiguity in the relevant provisions of the Act. Hence this Court has no occasion to interpret the said Act by adding or extracting or otherwise to ascertain intention of the legislature while interpreting aforementioned provisions in 'The Act'.

13. The learned counsel for the petitioner emphasized that in the instant case Kunj Behari Tewari was given limited/restricted right only to realize 'rent' on behalf of the land lord and, therefore, he cannot claim to be treated as land lord for the purposes of maintaining 'Release Application' under section 21 of the Act.

14. The aforesaid submission of the learned counsel for the petitioner is in ignorance of the appellate court finding in its judgment to the effect that Kunj Behari Tewari was authorized to realize rent as land lord. The observation of the said court on the basis of the registered notice dated September 3, 1993 has not been assailed before me. There is no pleading or ground to assail this finding in the writ petition. Petitioner has not filed copy of the said notice alongwith the writ petition to enable the court to peruse the contents of the said notice of its own and find out for itself whether said finding is against record. Petitioner has made no grievance against the observation of the appellate court on the above point.

15. Learned counsel for the petitioner seeks to place reliance on the following decisions:

1. 1978 ARC-394 Prem Chandra Pachit versus IInd. Additional District Judge, Saharanpur and others.
2. 1983 (2) ARC 143- Smt. Sughra Begum versus Sri Ram and others.
3. 1996 (2) ARC 14- Smt. Ved Rani Diwan and another versus VIIIth Additional District Judge, Ghaziabad and others.
4. AIR 1981 SC 1113 M.M. Quasin versus Manohar Lal Sharma and others.

16. The decision in the case of Prem Chandra Pachit (supra) lays down that the need of 'Manager' required for running a 'Lodge' by the land lord cannot be equated with the need of the land lord.

17. I am not in agreement with the ratio of the aforesaid decision since in my opinion need of the land lord for accommodating 'Manager' would be the need of the land lord himself. This Court has consistently held that the accommodation required by the land lord for his family members, like mother-in-law, daughter-in-law etc. (not strictly covered by the definition of family in the Act, the requirement or need in lieu of land lord's guest, attendant, servant, etc.) shall be the need of land lord. Reference may be made to the following decisions of this Court:

1998(1) ARC 449(Para 10)(S.R. Singh,J.)
1999 (1) AWC 795 (Sudhir Narain, J.)
1999 (1) AWC 424 (J.C. Gupta, J.)
1988 (2) ARC 430 (R.K. Gulati, J.)

18. Since the aforesaid question is not arising it is not necessary for me to decide this question in this case and or refer the matter for hearing by larger Bench. The question regarding

correctness of the ratio laid down in the case of Prem Chand Pachit may be decided in some other appropriate case and occasion.

19. In the cases of Smt. Sughra Begum, Smt. Ved Rani Diwan and M.M. Quasim (supra) this Court held that an agent or such other person cannot maintain release application under section 21 (1)(a) of the Act. The facts of the above cases are clearly distinguishable from the facts of the case in hand. In the present case in hand. Kunj Behari Tewari, who filed release application was authorized to realize rent as land lord and thus his status as the owner/landlord of the accommodation, as already discussed above, cannot be questioned or assailed in the present proceedings.

No other point has been raised or pressed.

The writ petition fails and dismissed in limine.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.2.2002

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

Special Appeal No. 170 of 1997

Sanjay Pratap Singh ...Appellant
Versus
The Consolidation Commissioner, Lucknow and others ...Respondents

Counsel for the Appellant:
Mr. Ravindra Singh

Counsel for the Respondents:
Mr. Ran Vijay Singh

Constitution of India, Article 14- Discrimination- claim for compassionate appointment on the Post of Consolidator- authorities offered appointment on the post of clerk while those claimants with lesser qualification appointed on the post of consolidator-held action on the part of State Government amounts discrimination- direction issued to give appointment on the post of Consolidator.

Held- Para 4

However, the appellant- writ petitioner has produced necessary record and relevant documents by way of filing a supplementary affidavit wherein he has mentioned that the post of Consolidator was filled up, subsequently under the provisions of Dying in Harness Rules from amongst the candidates who had lesser qualification than the appellant. We are of the view that such act on the port of the State Government amounts of discrimination, arbitrariness and violative of Article 14 of the Constitution of India. In our view, the learned Single Judge did not correctly assess the position and dismissed the writ petition. We are of the view that the appellant-writ petitioner should be given appointment on the post of Consolidator in event such post is available. The order dated 24.2.1997 passed by the learned Single Judge is set aside. The Special Appeal and writ petition are allowed with the aforesaid directions and observations.

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

1. Heard Sri Ravindra Singh learned counsel for the appellant and Sri Ran Vijay Singh, learned Standing Counsel for the respondents.

2. This Special Appeal is directed against the order dated 24.2.1997 dismissing the writ petition of the appellant. The appellant- writ petitioner had applied for under the provisions of Dying in Harness Rules and claimed appointment on the post of Consolidator. His father was working as Consolidation Officer (Class II Gazetted Officer) being higher in rank to that of consolidator. However, the appellant moved a writ petition challenging the act of the State Government in appointing him as a clerk and claiming that he is entitled to be appointed as a Consolidator under the rule itself.

3. It is the contention of the appellant that he is eligible to be appointed as Consolidator having requisite qualification but he has been denied of the same and on the other-hand, the persons who have lesser qualification than the appellant and also applied later on were given appointment on the post of Consolidator.

4. The learned Single Judge, rejected the case of the appellant- writ petitioner on the ground that his case could not be substantiated. However, the appellant - writ petitioner has produced necessary record and relevant documents by way of filing a supplementary affidavit wherein he has mentioned that the post of Consolidator was filled up, subsequently under the provision of Dying in Harness Rules from amongst the candidates who had lesser qualification than the appellant. We are of the view that such act on the part of the State Government amounts to discrimination, arbitrariness and violative of Article -14 of the Constitution of India. In our view, the learned Single Judge did not correctly assess the position and dismissed the writ petition. We are of the view that the appellant-writ petitioner should be given appointment on the post of consolidator in the event such post is available. The order dated 24.2.1997 passed by the learned Single Judge is set aside. The Special Appeal and Writ petition are allowed with the aforesaid directions and observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.2.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 4293 of 1999

Ram Murat ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri P.P. Srivastava
Sri D.V. Singh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- if the license of fire arm is cancelled on the ground of the involvement in criminal case, and once licensee was acquitted, those cases could not furnish material for cancellation of his license.
Held - Para 2)

On the date on which the Commissioner passed his order, it cannot be said that the cancellation of license was in the public interest and this fact could not be substantiated by the State.
Cases relied on-
J.I.C. (1999) 2 P. 732
1996 AWC (supp.) P. 46

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

1. By means of the present writ petition under Article 226 of the Constitution of India, the petitioner has challenged the orders dated 5.6.1997 and 1.1.1999, Annexure-4 and 9 to the writ petition, respectively, passed by licensing authority as well as the appellate authority cancelling the petitioner's fire -arm license on the ground that the petitioner is involved in criminal case being case crime no. 141 of 1996, under Sections 307/323/504/506 I.P.C., registered at police station Munderwa, district Basti, which is pending before the Court below and a charge sheet, in this connection, has been submitted. With regard to the aforesaid criminal case, during the pendency of the present writ petition this Court was of the opinion that the order cancelling the license of the petitioner's fire -arm shall remain stayed. This interim order has been passed by this Court on 5th of February, 1999. It is submitted by learned counsel for the petitioner that the trial of the aforesaid case, referred to above, being Sessions Trial No. 347 of 1999 has resulted into the acquittal of the petitioner from the aforesaid charge vide order dated 29.1.2001 passed by VIth Additional District Judge, Basti, a copy of judgement and order dated 29.1.2001 has been annexed as Ananexure-1 to the rejoinder affidavit.

2. Learned counsel for the petitioner has relied upon a decision of this Court reported in JIC (1999) 2 page 732- **Lalji Versus Commissioner Kanpur Division, Kanpur**, in which learned Single Judge relying upon the earlier decision of this Court reported in **1996 (Supp.) AWC, 46- Anil Kumar Singh Versus District Magistrate, Pratapgarh and others, (W.P. No. 878 of 1979, decided on 22.9.1994)** has held that if the license of fire arm is cancelled on the ground of the involvement in criminal case, and once licensee was acquitted, those cases could not furnish material for cancellation of his license, therefore on the date on which the Commissioner passed his order, it cannot be said that the cancellation of license was in the public interest and this fact could not be substantiated by the State.

3. In this view of the matter and also on the facts and circumstances stated above, this writ petition deserves to be allowed and is accordingly allowed. The orders dated 5.6.1997 and 1.1.1999, passed by respondent nos. 3 and 2, (Annexure-4 and 9 to the writ petition) are hereby quashed. However, partiers shall bear their own costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 1.2.2002

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

Criminal Appeal No. 473 of 1981

Kansa alias Kansraj ...Appellant(In Jail)
Versus
State of U.P. ...Opposite party

Counsel for the Appellants:
Sri Pratap Narain Misra

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

Criminal Procedure Code- Section 374- Criminal Appeal -identification- parade was held more than 15 days after the arrest- The prosecution had not advanced any reason in not holding the identification parade promptly- held- unless there is good reason for delay, the

value regarding the evidence of identification gets adversely affected.

Held- Para 24

There is also no evidence that when the appellant was brought before the court for taking remand, every precaution was taken to conceal his identity from the witnesses. In the absence of any corroborating evidence it is difficult to place implicit reliance on the identification made at the test identification parade. Therefore, the appellant is entitled to the benefit of doubt and acquittal. The appeal thus, succeeds.

(Delivered by Hon'ble U.S. Tripathi, J.)

1. This appeal has been directed against the judgement and order dated 17.2.1981 passed by Sri D.C. Srivastava, the then Addl. Sessions Judge, Gyanpur, district Varanasi in S.T.No. 9 of 1980, convicting the appellant under section 396 IPC and sentencing him to undergo R.I. for a period of seven years and to pay a fine of Rs. 500/-. In default of payment of fine he was further sentenced to undergo one year R.I.

2. The prosecution story, briefly stated was as under:

3. Raj Narain (PW 4) had his house at village Pandeypur, P.S. Suriyawa, district Varanasi, Ram Adhar deceased was a uncle of Raj Narain (PW 4). On the night of 16.10.1979. Raj Narain was sleeping in his varandah of Dalan. Ram Adhar, deceased was sleeping out side the house under a Neem tree. Ladies of his house were sleeping inside the house. At about 10-11 p.m. 10-11 dacoits armed with country made pistols, lathis and torches came to the house of Raj Narain (PW 4). The dacoits caused injuries to Raj Narain (PW 4). On his alarm Ram Adhar, deceased woke up and tried to save him. One of the dacoits caused lathi injury on him and other one fired country made pistol. Thereafter the dacoits broke open the main door of the house and by entering into the house started looting the house hold properties including the ornaments of the ladies and clothes. Hearing the alarm Jagdamba (PW 1), Ram Singar (PW 3) and others came to the spot, flashing their torches. One Harihar set fire in the nearby hut, which emitted sufficient light. The inmates of the house and the witnesses recognized the faces of the dacoits in the light of the torches and flames of burning hut. When the accused left the spot, Raj Narain (PW 4) came to Ram Adhar and found him dead.

4. Raj Narain (PW 4) prepared report Ext. Ka.-1 of the occurrence and came to the police station Suriyawa in the same night at 4.00 a.m. and lodged the report , Chick F.I.R. Ext.Ka.-10 was prepared by constable Sri Nath, who made an endorsement of the same at G.D report, Ext. Ka-11 and registered a case under Section 396 I.P.C against unknown persons.

5. Raj Narain (PW 4) was sent to Primary Health Centre Suiryawa for medical examination, where he was medically examined at 7.30 a.m. on 17.10.79 by Dr. Rajendra Mani Tripathi (PW 12), who found one incised wound on the left side of root of neck, two lacerated wounds on left side of chest and right side of chest respectively, five abrasions and one contusion.

6. The investigation of the case was taken up by Sri Ram Sanjeevan Singh (PW 13). The I.O. proceeded to the spot along with the police force. The dead body of Ram Adhar was lying on the spot. Inquest of the dead body was conducted and inquest report and other relevant papers were prepared. Thereafter the I.O. went to Primary Health Centre, Suriyawa, where he interrogated Raj Narain (PW 4). He again came to the spot and interrogated Smt. Ganga Devi (PW 2) and other witnesses. He inspected the place of occurrence and prepared site plan Ext. Ka-12. He also took into possession blood stained and simple earth and prepared recovery memo Ext.Ka-14. He inspected the lantern and prepared recovery memo. Sample of burnt ashes of hut was also taken into possession and recovery memo Ext. Ka-16 was prepared. The I.O. also recovered empty cartridge and blasted cracker from the spot and prepared recovery memo Ext.Ka-17 and 18. He also inspected the boxes from which articles were looted and prepared recovery memo Ext.Ka-19. The I.O. also inspected the torches of Laxmi Narain and Om Prakash and prepared inspection memo Ext. Ka-21. A bag and a laungi left by the dacoits were also found on the spot, which were taken into possession by the I.O. vide recovery memo Ext. Ka-22. On 18.10.79, the I.O. interrogated Jagdamba Prasad (PW 1) and Ram Singar (PW 3).

7. The autopsy on the dead body of Ram Adhar was conducted on 18.10.79 at 7.30 a.m. by Dr. J.S. Pawar (PW 10). Who found the following ante mortem injuries on the person of the deceased:

8. Gun shot wound of entry 7 cm. X 6 cm x chest on right side of chest 1 cm to the right of nipple. No blackening and charring.

9. The internal examination showed 4th and 5th ribs below injury no. 1 ruptured. The right lung and membrane were also ruptured. 27 small pellets and one wad were recovered below injury no. 1. In the opinion of the Doctor cause of death was shock and haemorrhage as a result of ante mortem injuries. The Doctor prepared post report Ext. Ka-8.

10. On 19.10.79, the I.O. Sri Ram Sanjeevan Singh (PW 13) got information that one dacoit was coming from side of Janghai Railway Station, who was having illicit arms. Believing on the above information he collected the witnesses and laid ambush in the Nali towards south of Primary Pathshala Harhua. At about 7.30 a.m. the appellant was seen coming with a bag in his hand. On the pointing out of the informer he was intercepted and apprehended. On his personal search he was found in possession of one country made pistol and two live cartridges. Recovery memo was prepared on the spot and the appellant was made Bapardah and was sent to jail in Baparda condition.

11. The identification of the appellant was conducted by Shri Noor Mohammad (PW 14), the then SDM, Gyanpur, district Varanasi on 20.11.79 at Sub Jail Gyan Pur. The appellant was correctly identified by Jagdamba Prasad (PW 1), Ganga Devi (PW 2), Ram Singar (PW 3), Lalita Devi and Kashi Prasasd out of seven witnesses who had gone to identify him. The SDM prepared identification memo Ext. Ka-26.

12. On receipt of the identification memo and on completion of remaining

investigation, the I.O. challaned the appellant through charge sheet Ext.Ka-34 under section 396 I.P.C.

13. The case of the appellant was committed to the Court to Sessions and he was charged and tried for the offence punishable under section 396 I.P.C. He pleaded not guilty and contended that he was falsely implicated on account of enmity with the police as he was once acquitted in another dacoity case.

14. The prosecution in support of its case examined Jagdamba Prasad (PW 1). Smt. Ganga Devi (PW 2), Ram Singar (PW 3), Raj Narain (PW 4) and Kashi Prasad (PW 9) as witnesses of fact, besides, SI. Shankar Das (PW 5), Constable Ram Bachan Yadav (PW 6), Constable Bhibani Yadav (PW 7), Constable Raj Narain Singh (PW 8), Dr. J.S. Pawar (PW 11), Dr. Rajendra Mani Tripathi (PW 12), Ram Sanjeevan Singh, I.O. (PW 13) and Noor Mohammad, SDM, (PW 14) as formal witnesses. The appellant did not adduce any evidence in his defence.

15. The learned Sessions Judge on considering the evidence of the prosecution held that the prosecution succeeded in establishing beyond doubt that the appellant was one of the dacoits in the dacoity in question in which one of the dacoits killed Ram Adhar during the commission of dacoity. Therefore, his guilt for the offence punishable under section 396 I.P.C. was fully established. With these findings he convicted him under section 396 I.P.C. and sentenced as mentioned above.

16. The appellant has challenged his above conviction and sentence in this appeal.

17. Heard Sri P.N. Misra, learned Senior Counsel for the appellant, learned A.G.A. for the respondent and perused the record.

18. According to the prosecution on the night of 16.10.79 at about 11.00 p.m. a dacoity took place in the house of Raj Narain (PW 4) and during course of dacoity one of the dacoits killed Ram Adhar, deceased. The appellant has not disputed the factum of dacoity in the house of Raj Narain (PW 4) on the night of the occurrence and death to Ram Adhar in the said dacoity. The prosecution examined Jagdamba Prasad (PW 1), Smt. Ganga Devi (PW 2), Ram Singar (PW 3) and Kashi Prasad (PW 9) as witnesses of fact. All the above witnesses have categorically stated that on the night of occurrence 10-11 dacoits raided the house of Raj Narain (PW 4), caused injuries to Raj Narain and Ram Adhar and by breaking open the main door entered into the house and looted the household properties. The I.O. Shri Ram Sanjeevan Singh (PW 13), visited the spot on the next morning. Dr. Pawar (PW 13) conducted the autopsy on the dead body of Ram Adhar and found gun shot injuries on his person, which resulted into his death. The I.O. also found blood, broken boxes, one empty cartridge and one blasted cracker on the spot. The recovery of above things on the spot and the medical evidence fully corroborated the evidence of ocular witnesses on the factum of dacoity and death of Ram Adhar in the said dacoity. Therefore, the prosecution successfully proved the factum of dacoity on the night of

occurrence in the house of Raj Narain and death of Ram Adhar during the course of dacoity.

19. The evidence against the appellant is only that of identification, therefore, it is to be considered whether there was sufficient light on the spot and the witnesses had opportunity to recognize the face of the dacoits.

20. The ocular witnesses named above had stated that inside the house a lighted lantern was emitting light, that the witnesses who came from the village, namely, Jagdamba Prasad (PW 1), Ram Singar (PW 3) and Kashi Prasad (PW 9) had their torches. They also stated that some dacoits were also having torches and were flashing the same during the course of dacoity. It has also come in the evidence of the above witnesses that one Hari Nath had set fire in the hut near the house of Raj Narain, which emitted sufficient light on the spot and the faces of dacoits were seen in the said light. The I.O. also inspected the lantern and torches of the witnesses. He had also collected sample of burnt ashes from the spot. The place where the hut was burnt was at a distance of only 13 paces from the main door of Raj Narain. It is also in the evidence of the witnesses that the dacoits were entering into and coming out of the house during the course of dacoity. The dacoits also caused injuries to Raj Narain (PW 4), who had sustained lacerated wound, incised wounds, contusion and abrasions, which shows that he had come into close contact of the dacoits. The dacoits had also entered into the house and lady members had also opportunity to see the faces of the dacoits. In this way the prosecution has successfully proved that there was sufficient light on the spot and witnesses had full opportunity to recognize the faces of the dacoits.

21. In the identification parade, the appellant was correctly identified by Jagdamba Prasad (PW 1), Ganga Devi (PW 2), Ram Singar (PW 3), Lalita Devi and Kashi Prasad. According to the evidence of Noor Mohammad (PW 14) these witnesses had not committed any mistake. Thus, the performance of the above witnesses who identified by the appellant in the test identification parade was cent percent. The prosecution had examined Jagdamba Prasad (PW 1), Smt. Ganga Devi (PW 2), Ram Singar (PW 3) and Kashi Prasad (PW 9). However, Ram Singar (PW 3) stated in his evidence that prior to identification in the Jail he had seen the appellant at Durgaganj Bazar. He was declared hostile.

22. Learned counsel for the appellant contended that admittedly the dacoity took place on 16.10.1979 and the appellant was arrested on 19.10.1979, but his identification was conducted on 20.11.1979 i.e. after about a month and, therefore, by that time the memory of the witnesses regarding features of the dacoits have faded from their mind, specially when there is no evidence on record to show that the witnesses identified the appellant by any special identifying feature and, therefore, the identification was due to some extraneous aid such as the appellant was shown to the witnesses after his arrest. Learned counsel placed reliance on Apex Court's decision in Satrughana alias Satrughana Parida and others Vs. State of Orrissa, 1995 Supp (4) Supreme Court Cases 448.

23. In the above case appellant Ravin Kandy was arrested on November

22, 1982 and other appellants were arrested on November 12, 1982. The identification parade was held on December 10, 1982 i.e. more than 15 days after the arrest. The prosecution had not advanced any reason in not holding the identification parade promptly. Held, that unless there is good reason for delay the value regarding the evidence of identification gets adversely affected. This dilution to the evidentiary value of the identification by the witnesses who claimed to have seen the accused on the night of the occurrence almost one and half month back, who did not in their statement before the police or in the first information report reveal any special features for the identification, is a matter which weighs against the prosecution. It must be remembered that the accused persons are required to be produced before the court latest with 15 days of their arrest and therefore, it would be reasonable to infer that they were so produced. There is nothing on record to show that the prosecution had taken care to ensure that their identity was not revealed when they were taken to the court and produced as required by law. In these circumstances when the prosecution witnesses had admitted in their oral statement that they had not noticed any special identifying features, it becomes unsafe to place implicit reliance on the evidence regarding identification emanating from the proceedings at the test identification parade. In these circumstances since there is no other corroborative evidence, their Lordships found it difficult to place implicit reliance on the identification made at the test identification parade. Their Lordships were, therefore, of the opinion that the appellants were entitled to benefit of doubt.

24. In the instant case there is no evidence to show that the prosecution witnesses had noticed any special identifying features of the appellant. They had simply stated that they saw the appellant at the time of dacoity and in the identification parade and not in between it. In the instant case as mentioned above the dacoity took place on 16.10.79, the appellant was arrested on 19.10.79 and identification parade was conducted on 20.11.79 i.e. after a month of his arrest. There is also no evidence in this case that the appellant was not produced in the court for obtaining remand in between his lodging in the jail and conducting of Identification. There is also no evidence that when the appellant was brought before the Court for taking remand, every precaution was taken to conceal his identity from the witnesses. Thus, the contingency pointed out by the Apex Court in the above noted case are fully applicable to the facts of the present case and in these circumstances I have no option but to hold that in the absence of any corroborating evidence it is difficult to place implicit reliance on the identification made at the test identification parade. Therefore, the appellant is entitled to the benefit of doubt and acquittal. The appeal thus, succeeds.

25. The appeal is accordingly allowed. Conviction and sentence of the appellant under section 396 I.P.C. is set aside and he is acquitted of the said offence. He is on bail granted by this Court. He need not surrender. His bail bonds are cancelled and sureties discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 2770 of 1985

Rameshwar and another ...Petitioners
Versus
The VIIth Upper District and Sessions Judge, Deoria & others ..Opposite Parties

Counsel for the Petitioners:
Sri Jokhan Prasad

Counsel for the Respondents:
S.C.

Constitution of India, Article 226/227- jurisdiction- suit for cancellation of sale deed and injunction- whether the suit is triable by the civil court or by Revenue Court- held- only the civil court has jurisdiction.

Held- Para 4

Heard learned counsel for the parties. Sri Jokhan Prasad learned counsel for the petitioners has argued that in view of the law, which will depend on the allegations in plaint and also the relief clause and in view of the recent Supreme Court decision reported in J.T. 2001 (Vol.2) SC, 573- Sri Ram and another Versus Ist Additional District Judge and others, wherein the Supreme Court has affirmed the decision of Full Bench decision reported in 1989 RD21- Ram Padarath and others Versus IInd Additional District Judge, Sultanpur and others, the law laid down by Supreme Court and after going through the relief clause, the view taken by the revisional Court is not correct and suffers from the manifest error.

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

1. Petitioners-plaintiffs filed suit no. 392 of 1982 before the Court Munsif, Deoria with the following reliefs:-

"१. यह कि वसदूर डिग्री बैनामा २२–१२–८१ वहक वादीगण बनाम प्रतिवादी गण मंसूखा करने की डिग्री प्रदान किया जावे ।

२. यह कि वसदूर डिग्री इम्तनाई दवामी प्रतिवादी सं० एक को सर्वथा के लिए मना किया जावे कि हस्व तफसील जैसा विवादित आरालियात में किसी प्रकार की मुजाहिमत न करें और न कब्जा दखल हम वादीगण में अवरोध उत्पन्न करें ।

३. यह कि हम वादीगण की प्रतिवादी नं० एक से खर्चा मुकदमा व वकील मेहनताना दिलाने की डिग्री प्रदान किया जावे ।

४. यह कि अलावा या बजाय दादरसी मजकूरावाला के वादीगण जिस किसी अन्य दादरसी के मुस्तहल करार पाये जावे उसकी भी डिग्री वहक वादीगण बनाम प्रतिवादी गण सादिर कर गया जावे।"

2. An objection was filed by the defendants before the trial Court that the suit is not cognisable before the civil Court, therefore the same should be rejected and the petitioners-plaintiffs be relegated to the revenue Court. The trial Court decided the said suit in favour of the plaintiffs that the suit is cognizable by the civil Court.

3. Being aggrieved by the aforesaid order, the defendants preferred a revision before the revisional Court and the revisional Court arrived at and recorded findings that the suit is not cognisable by the civil Court, therefore the suit may be dismissed and the petitioners-plaintiffs

may be directed to go to the revenue Court.

4. Heard learned counsel for the parties. Sri Jokhan Prasad, learned counsel for the petitioners has argued that in view of the law, which will depend on the allegations in plaint and also the relief clause and in view of the recent Supreme Court decision reported in **J.T. 2001 (Vol.2) S.C., 573 – Shri Ram and another Versus Ist Additional District Judge and others,** wherein the Supreme Court has affirmed the decision of Full Bench decision reported in **1989 R.D., 21- Ram Pradarath and others Versus IInd Additional District Judge, Sultanpur and others**, the law laid down by Supreme Court and after going through the relief clause, the view taken by the revisional court is not correct and suffers from the manifest error of law.

5. In view of what has been stated above, it is abundantly clear that the suit is cognisable by the civil Court and in this view of the matter, the order dated 5.11.1984, Annexure-3 to the writ petition, passed by the revisional Court is liable to be set aside and is hereby quashed.

With the aforesaid observation, the writ petition is allowed. There will, however, be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2002

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

Civil Misc. Writ Petition No. 5594 of 2002

Rajpal Singh alias Rajveer Singh
...Petitioner
Versus
Abdul Haq Khan and another
...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar

Counsel for the Respondents:
Sri Atiq Ahmad Khan

U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972- Section 22 power of the Appellate Court- finding of fact recorded by the Prescribed Authority- can not be interfered by the appellate authority- unless there is some material irregularity.
Held- Para 14
It is now well settled that the Appellate Court while reversing the judgment of lower court must deal with the reasoning given by the court below. Whether land lord had bona fide and real intention to leave Delhi and to settle at Bulandshahr in the context of the circumstances that his wife was treated at Delhi, was a relevant consideration and on which the Prescribed Authority has placed reliance. Hence it was incumbent upon the Prescribed Authority to deal with the said aspect of the matter and to record a finding after considering the relevant material with reference to the same in absence of it, the finding recorded by the Appellate Court is vitiated which cannot be sustained.
Case law discussed:
1996 (2) All.R.C. 479

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

1. Heard Sri Pradeep Kumar, learned counsel for the Petitioner as well as Sri Atiq Ahmad Khan, learned counsel for the contesting respondent no. 1.

2. The Petitioner, who happened to be the tenant in the residential accommodation popularly known as Haq Lodge, situate at Civil Lines, Near City Board, Office/Civil Hospital-Bulandshahr City, District- Bulandshahr, seeks to challenge the impugned judgment and order dated 10-12-2001 (Annexure-7 to the Writ Petition) passed by the Appellate Authority in exercise of its jurisdiction under Section 22 of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 for short called 'the Act', allowing Rent Control Appeal No.4 of 1995. Abdul Haq Khan versus Rajpal Singh alias Rajveer Singh and others, allowed the release application under section 21(1)(a) of the Act, initially rejected by the Prescribed Authority under Section 21 (1) (a) of the Act, vide, judgment and order dated 10.3.1995 (Annexure-3 to the Writ Petition).

3. The release application dated 7.12.1992 under section 21 (1) (a) of the Act was filed by the landlord- Abdul Haq Khan, the respondent no. 1 primarily on the allegation that he retired in the year 1988 as Professor from Jamia Milia University at Delhi and required the house for his own need. It was also mentioned that original tenant Jai Pal Singh died on 6.12.1991 and petitioner alone lived in the tenanted accommodation, hence in the release application petitioner alone was impleaded and other heirs of deceased tenant were not impleaded. The release application was registered as P.A. Case no. 7 of 1991.

4. The tenant Petitioner filed objection against the release application contending, inter-alia amongst others, that the house in question was not genuinely and bonafide required by the landlord, since he had no intention to settle at Bulandshahr and reside in the accommodation in question, particularly in view of the fact that after retirement from the University in the year 1988, landlord continued to reside at Delhi. The tenant also alleged that landlord had other accommodation at his ancestor's village Jalal Nagar, District- Bulandshahr and also at Delhi in the name of his daughter.

5. The landlord denied to have any house of his own at Delhi. The Prescribed Authority held that landlord had ancestral residential accommodation in his ancestors village at Jalalpur, District-Bulanshahr and that he lived at Delhi in the house belonging to his daughter. The Prescribed Authority apart from the above also found that wife of the landlord was under going medical treatment at Delhi for last seven years and that the landlord under the said circumstance, cannot afford to shift to Bulandshahr. The Prescribed Authority held that landlord had no bona fide need or genuine intention to settle at Bulandshahr. On the question of comparative hardship also, the Prescribed Authority held in favour of the tenant.

6. Feeling aggrieved landlord filed Rent Control Appeal No. 4 of 1995-Abdul Haq Khan versus Raj Pal Singh alias Rajveer Singh and others under section 22 of the Act.

7. During pendency of the appeal, landlord initially filed certain documents by way of additional evidence which were taken on record under the Appellate Court's order dated 5.2.1996 (quoted in para 9 of the petition).

8. Landlord again filed certain documents paper no.25 Ga and 27 Ga for being taken on record as additional evidence. Order sheet of 10.5.1996 of the appellate Court shows that these documents be placed before the Court on the date fixed.

9. The petitioner contends that neither these documents were admitted on record nor opportunity was given to the tenant for filing evidence in rebuttal.

10. The case is being decided finally at the admission stage itself on the basis of the record of the petition itself as agreed and consented by the learned counsels for the parties.

11. The appellate authority discussed the evidence on record and came to the conclusion that no house existed, at the relevant time, in ancestral village, the landlord had no occasion to settle there and the landlord could not be directed to go and settle in the village. The Appellate authority found that house no. 633 Zakir Nagar, Delhi belonged to his daughter whose children were grown up. The Appellate Court further noted that the tenant- petitioner had failed to file evidence to prove that house no. 399, Gali No. 9 near Zamia Milia University, Zakir Nagar, New Delhi (wherein the landlord was presently residing) belonged to the landlord and that the tenant had failed to file any substantial clinching evidence from Nagar Nigam etc. in support of his case.

12. The Appellate Authority, however, in para 20 of the appellate judgment mentioned that there was no dispute that the landlord had retired in 1988 as Professor in Zamia Milia University, New Delhi and in 1989 he had to leave the house belonging to the employer. The Appellate Authority, from this circumstance, came to the conclusion that the landlord required the house in question for him and his family members and that his need was bona fide and genuine and consequently, finding on the question of bona fide need recorded by the Prescribed Authority was reversed.

13. The Appellate Authority, however, did not at all consider the circumstance and the material on record on which the Prescribed Authority had relied upon, namely the illness and treatment for last seven years of the wife of the landlord at Delhi.

14. It is now well settled that the Appellate Court while reversing the judgment of lower Court must deal with the reasoning given by the court below. Whether landlord had bona fide and real intention to leave Delhi and to settle at Bulandshahr in the context of the circumstance that his wife was treated at Delhi, was a relevant consideration and on which the Prescribed Authority has placed reliance. Hence it was incumbent upon the Prescribed Authority to deal with the said aspect of the matter and to record a finding after considering the relevant material with reference to the same. In absence of it, the finding recorded by the Appellate Court is vitiated which cannot be sustained.

15. Learned counsel for the Petitioner Sri Pradeep Kumar has placed reliance on a decision in the case of **Gyan Chand (deceased) by Sheela Devi and others L.Rs. versus Additional District Judge, Budaun and others** 1996 (2) Allahabad Rent Cases page 479. Para 23 of the said reported judgment reads:

"……The Appellate Authority did not record the reasons for reversal of the findings recorded by Prescribed Authority. It has not been stated as to why the Appellate Authority did not agree with the findings recorded by the Prescribed Authority. Therefore, the impugned order passed by it, is contrary to the provisions of sub-rule (7) of the Rule 34 of the Rules framed under the Act……"

In para-8 of the same reported judgment, the learned Single Judge observed that:

"……..The Appellate Authority while confirming, varying or rescinding the order, will have to act judicially and in accordance with law. The Appellate Authority will have to record the reason for passing the said order particularly while passing an order of reversal."

16. In the aforesaid reported case, the learned Single Judge also relied upon a decision in the case of **Ram Niwas Pandey versus VIII Additional District Judge Kanpur and others, 1982 (1) A.R.C. 246,** wherein the Court held:

"…….The Appellate Court was recording a finding of reversal as such it was to take into consideration all the relevant facts and factors, which were taken into consideration by the Prescribed Authority."

17. The learned Single Judge again referred to another decision in the case of **Mohd. Nanhey Mian versus IVth Additional District Judge, Aligarh 1982 (2) A.R.C. 527** and quoted:

"……The Lower Appellate Court appears to have made a mess of the entire things, it after citing certain cases, came to an abrupt conclusion that prima facie the need of the son of the landlord was established. When he was reversing the judgment of the Prescribed Authority, it was incumbent upon him to meet the reasons recorded by the Prescribed Authority, while deciding the case."

18. In the present case as noted, the Appellate Authority did not categorically refer to the reasoning recorded by the Prescribed Authority and there is not even an iota of material to show that Appellate Authority before recording contrary finding on the basis of same material, had proceeded to decide the case after applying its mind to the reasons given by the Prescribed Authority.

19. The landlord retired in the year 1988 and after four years in the year 1992, filed release application without pleading the cause of delay in filing release application or specifying the circumstances for not moving it promptly on or before 1988, though it was an important and relevance circumstance to find out whether the landlord had bona fide and genuine intention to settle at Bulandshahr.

20. The Appellate Court has not at all considered and applied its mind to the said aspect of the case.

21. In view of the above, impugned judgment and order dated 10.12.2001 (Annexure-7 to the Writ Petition) passed by the Additional District Judge (Court No.3) Bulandshahr in Rent Control Appeal No. 4 of 1995 (Abdul Haq Khan versus Rajpal Singh alias Rajveer Singh and others) suffers from manifest error apparent on the face of record and cannot be sustained. Consequently, impugned judgment and order dated10.12.2001 passed by Additional District Judge (Court No.3), Bulandshahr in Rent Control Appeal No. 4 of 1995- Abdul Haq Khan versus Rajpal Singh alias Raj Veer Singh and others, is quashed, and the case is remanded to the lower Appellate Court for deciding the matter afresh in accordance with law and keeping the above observations in mind. The parties shall have right to raise their grievance, if any, including the opportunity to meet the additional evidence, if no opportunity was afforded in the past to meet the same.

22. The Appellate Authority shall decide the rent control appeal, in pursuance of the present judgment, as expeditiously as possible, preferably within six months from the date of receipt of a certified copy of this judgment.

23. Considering the facts of the case, I direct that the rent control appeal in question shall be heard by the concerned District Judge himself.

24. The petition stands allowed subject to the observations and directions made above.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4 FEBRUARY, 2002

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

Civil Misc. Writ Petition No. 3009 of 2002

R.K. Gupta ...Petitioner
Versus
The Chairman/Managing Director and others ...Respondents

Counsel for the Petitioner:
Sri Vivek Misra

Counsel for the Respondents:
Sri Anil Mehrotra
Sri S.P. Mehrotra

Constitution of India- Article 226- the petitioner who was posted under U.P. Rajya Vidyut Nigam Ltd., continues to remain on deputation in the corporation despite his absorption in U.P. Power Corporation Ltd.

Held- Para 9

The petitioner in fact been given promotion and hence we see no reason to interfere with the impugned orders. Moreover, this is not a fit case for exercise of discretion of power under Article 226 of the Constitution of India.

Case referred
1977(2) SLR 551
1965 AIR SCR 241

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

1. This writ petition has been filed against the impugned order of transfer dated 18.12.2001 (Annexure-1 to this petition) and the relieving order dated 7.1.2002 (Annexure-2 to this writ petition).

2. The petitioner was posted as Executive Engineer at Panki Thermal Power Station, Panki, Kanpur under the U.P. State Electricity Board. The U.P. Electricity Reforms Act, 1999 trifurcated the Board into three Corporation namely U.P. Power Corporation Limited; U.P. Rajya Vidyut Utpadan Nigam Ltd. And U.P. Rajya Jal Vidyut Utpadan Nigam. A transfer scheme, 2000 was framed in exercise of powers conferred by section 23 of the said Act. Photostat copy of the relevant part of the Transfer Scheme is Annexure-5 to the petition. Clause 6 (6) of the Transfer Scheme states that initially the personnel of the Board shall continue on provisional basis in the place where they were posted on the date of the transfer subject to certain terms and conditions. Thereafter, the U.P. Power Corporation Ltd. in consultation with the two other Transferee Corporations and the State Government has to finalise the permanent absorption of the personnel specified in Schedule H and I of the Scheme taking into account the suitability, ability and experience of the personnel, number and nature of vacancies and other relevant factors. For this purpose the U.P. Power Corporation in consultation with the above mentioned authorities has to constitute a Committee which has to make recommendations and thereafter the U.P. Power Corporation Ltd. again in consultation with the above mentioned authorities has to take a decision on the transfer and permanent absorption of the relevant personnel taking into account the recommendation of the Committee. By Notification dated 9.1.2001 (Annexure-7 to the petition) the U.P. Power Corporation Ltd. in pursuance of the provision of Clause 6 (6) of the Transfer Scheme decided to finally absorb certain employees whose names are given therein but with certain conditions. One of the condition was that these employees of U.P. Power Corporation Ltd. may be placed on deputation with the U.P. Vidyut Utpadan Nigam Ltd. till 31.3.2002 or earlier.

3. The petitioner had opted for employment in U.P. Power Corporation Ltd. vide Annexure-8 to the petition and his grievance is that since he has been finally absorbed in the service of U.P. Power Corporation Ltd. he cannot be sent on deputation without his consent to U.P. Vidyut Utpadan Nigam Ltd. By means of the impugned order dated 18.12.2001 Annexure-1 to the petition the petitioner was promoted as Deputy General Manager and sent on deputation to U.P. Rajya Vidyut Utpadan Nigam Ltd. Vide order of U.P. Power Corporation Ltd. Dated 10.12.2001 (Annexure-9 to the petition).

4. In paragraph 15 of the counter affidavit it is stated that the U.P. Rajya Vidyut Utpadan Nigam Ltd. had sent a letter dated 20.6.2001 to the U.P. Government mentioning about the shortage of Officers in its service because of which it was not possible to run the Thermal power Project. By letter dated 23.11.2001and reminder the Vidyut Utpadan Nigam has requested U.P. Government to extend the deputation period. Photostat copies of the relevant letters in this connection are Annexure-5 CA 3,4 and 5 to the Counter Affidavit.

5. In paragraph 17 of the counter affidavit it is stated that the office memo dated 9.1.2001 itself provides for continuance of deputation till 31.3.2002 and thus there was no question of getting any consent from the petitioner.

6. Learned counsel for the petitioner submitted that the petitioner cannot be sent on deputation against his wish and for this purpose he has relied on the decision of the Gujrat High Court in ***Bhagwati Prasad Versus State of Gujrat 1977 (2) SLR 551*** he further relied on the Notification dated 27.3.1968 issued by the U.P. State Electricity Board vide Annexure-RA-1 to the Rejoinder Affidavit.

7. On the other hand, Sri S.P. Mehrotra learned counsel for the respondents has relied on the decision of the Supreme Court in ***C. Beepathuma and others v. Velasari Shankaranarayana Kadmbolithaya AIR 1965 SC 241*** and he has contended that the petitioner cannot approbate and reprobate. By the order dated 9.1.2001 the petitioner was finally absorbed in U.P. Power Corporation Ltd. subject to the terms and conditions mentioned in the said order. The said order specifically provided that if the Engineer Officers who stood absorbed in U.P. Power Corporation Ltd. were posted on 9.1.2001 in U.P. Rajya Utpadan Nigam Ltd. they were to continue to remain on deputation to the said Corporation upto 31.3.2002 despite their absorption in U.P. Power Corporation Ltd. Hence the petitioner who was posted at Panki Thermal Plant, Kanpur which has now come under the U.P. Rajya Vidyut Nigam Ltd. continues to remain on deputation in that Corporation despite his absorption in U.P. Power Corporation Ltd. The order dated 9.1.2001 is a composite order and the petitioner cannot claim the benefit of part of it while not accepting another part. Similarly the petitioner on accepting his promotion as Deputy General Manager by order dated 10.12.2001 is also bound by the conditions mentioned in the said order, namely he was to remain on deputation with U.P. Rajya Vidyut Utpadan Nigam Ltd. Thus both the orders dated 9.1.2001 and 10.12.2001 are composite orders and cannot be accepted in part only.

8. In our opinion the contention of the learned counsel for the respondent appears to be correct, since it is supported by the aforesaid decision of the Supreme Court in C. Beepathuma's case (supra). Moreover, since a new Scheme had come into force regarding production and distribution of electricity in U.P. obviously there has to be some flexibility in the matter for some period. After all the generation and supply of electricity has to continue in the State. The U.P. Rajya Vidyut Utpadan Nigam Ltd. is experiencing shortage of Officers who had experience in production of electricity. We see no reason to interfere with the order placing the petitioner on deputation with the said Corporation since he was working at Panki Thermal Plant, Kanpur which does the work of production of electricity and hence he must be having experience in the matter. The decision of the Gujrat High Court on which reliance has been placed by the learned counsel for the petitioner is therefore distinguishable.

9. The petitioner in fact been given promotion and hence we see no reason to interfere with the impugned orders. Moreover, this is not a fit case for exercise of discretion of power under Article 226 of the Constitution of India. The petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.1.2002

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

Criminal Misc. Writ Petition No. 5351 of 2000

M/s. Bhopal Sugar Industries Ltd. and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.S. Shukla
Sri P.K. Sinha
Sri Narul Huda

Counsel for the Respondents:
A.G.A.
Sri D.S. Tewari
Sri H.N. Mehrotra
Sri Shankar Suan

Cr.P.C. – Section 482-Objection filed by the accused against Summoning Order for recalling the same- not maintainable- when the remedy is already provided to an accused under Section 245 (2) Cr.P.C., a parallel remedy can not be allowed to be availed by him by filing objections.
Held – Para 8

This Court finds that the objections filed by the petitioners before the Magistrate concerned for recalling the summoning order were not maintainable for two reasons. Firstly, that this court while deciding application under section 482 Cr.P.C. had already held that the summoning order was passed by the Magistrate concerned after application of judicial mind and had rejected the contention of the accused persons that complaint was not maintainable, and Secondly, no such objections were permissible under law in view of Full Bench decision of Ranjeet Singh (supra).
Case law relied:
2000 Cr.L.J. 2738

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

1. By means of this writ petition, petitioners have prayed for quashing the orders dated 12.5.2000 and 24.8.2000 passed by Judicial Magistrate, Ghaziabad and Additional Session Judge, Ghaziabad respectively. A further prayer has been made for issuing a writ of certiorari quashing the complaint of case no. 3386 of 1997, Dabur India Ltd. Vs. M/s B.S.I. Ltd. And others and the entire proceedings initiated on the basis of the said complaint, which are pending before I Additional Chief Judicial Magistrate, Ghaziabad.

2. The court has heard Sri P.K. Sinha for the petitioners, learned A.G.A. for the State and S/Sri D.S. Tiwari, H.N. Mehrotra and Shankar Suan for respondents no. 2 and 3.

3. The relevant facts are that respondents nos. 2 and 3 have filed a criminal complaint against the petitioners for proceeding against them under Section 420 I.P.C. and Sections 138/141 of the Negotiable of Instruments Act. After recording statement of the complainant under Section 200 Cr.P.C. and holding inquiry under Section 202 Cr.P.C., the concerned Magistrate on 29.11.97 passed an order summoning petitioners as accused persons in respect of the aforesaid penal offences. The petitioners challenging the said order and the maintainability of complaint, filed an application under Section 482 of the Code of Criminal Procedure invoking inherent powers of this court for quashing the summoning order and for dropping the

proceeding against them which were pending in the court below. This application was dismissed by a learned Single Judge of this court, Hon'ble R.K. Singh, J. by the order dated 24.2.1999. Against this order the petitioners filed S.L.P. No. 1063/99 but the same was dismissed as withdrawn on 13.8.99. It further appears that thereafter the petitioners through their counsel filed objection before the Magistrate for recalling the summoning order dated 29.11.97. This objection was dismissed by the learned Magistrate by the impugned order dated 12.5.2000. Against this order the petitioners filed revision before the Session Judge which too has been dismissed by the impugned order dated 24.8.2000. Against these two orders the present writ petition has been filed.

4. At the outset learned counsel for the contesting respondents raised an objection regarding maintainability of this writ petition. It is submitted by them that when on an earlier occasion this court has rejected the petitioners application made under Section 482 Cr.P.C. against the summoning order and the S.L.P. filed against the said order has been also dismissed by the Apex Court, no objection for recalling the summoning order was maintainable before the Magistrate concerned. It is further urged that in any view of the matter there is no provision in the Code of Criminal Procedure for recalling summoning order and therefore, in this view of the matter also objection filed by the petitioners before the Magistrate concerned, was not legally maintainable, consequently this writ petition deserves to be dismissed.

5. Copy of the order whereby petitioners claim made under Section 482 Cr.P.C. was rejected by this court, has been annexed as Annexure-13 to the writ petition. A perusal of this order leaves no room for doubt that the application was decided on merit. After noting the various submissions made by parties counsel, this court carefully perused the summoning order dated 29.11.97, the complaint petition and other annexures which were placed from the side of the petitioners. The Hon'ble Judge rejected the submissions made on behalf of the petitioners, and it was observed:—

"The complaint petition is statement of fact which is to be examined by the court where the case will be heard according to the procedure of law under the Code of Criminal Procedure. The parties will have ample opportunity to adduce evidence in support of the complaint or in defence of the accused. The cases relied upon by Mr. Chaudhary noted above have been carefully studied. Those cases are clearly distinguishable from the facts of the present case. At this stage this Court is not inclined to observe anything which may go against any party of this case in the trial before the court below. The facts are there which the court below will examine in the light of the evidence adduced by the parties. The impugned order discloses application of judicial mind and the argument of Mr. Chaudhary on this score is rejected."

The operative portion ran as under:

"This Criminal Miscellaneous Petition is accordingly dismissed. The matter is left for decision by the court below. The interim order dated 22nd April, 1998 passed by this Court stands discharged."

6. Sri Sinha learned counsel for the petitioners submitted that this court had

left the matter open for decision by the court below, therefore, when the petitioners had filed objections for recalling the summoning order they should have been decided on merit. On the other hand Sri D.S. Tiwari learned counsel for the respondents submitted that the expression *"the matter is left for decision by the court below"* cannot be construed narrowly. What this court meant that the matter was left for decision in trial by the court below in accordance with law. He submitted that in view of Full Bench decision of this court in **Ranjeet Singh and others Vs. State of U.P. reported in 2000 Crl. L.J. 2738**, the objection filed on behalf of the petitioners before the Magistrate were not legally maintainable. In this decision it was held that the accused cannot be relegated to the remedy under Section 204 of the Code of Criminal Procedure to approach the Magistrate and satisfy him that the process in the case ought not to have been issued. Challenging the order of issuing process before the court issuing the said process is in fact requiring the arms of the clock to move anti-clockwise which does not happen or at least should not happen. A parallel trial cannot be allowed to commence before the actual trial begins.

7. When an order of summoning is passed it is always open for the accused to appear before the Magistrate concerned in compliance of the said order and to make a prayer to discharge him. Under Chapter XIX a definite procedure has been laid down in relation to the cases instituted otherwise than on police report. Section 244 provides that when, in any warrant case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Sub-section (1) of Section 245 then provides that if, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. Sub-Section (2) of Section 245 however provides that it is open for a Magistrate to discharge the accused at any previous stage of the case if, for reasons to be recoded by Magistrate, he considers the charge to be groundless. Therefore, when this remedy is already provided to an accused under Sub-Section (2) of Section 245 a parallel remedy cannot be allowed to be availed of by him by filing objections against the summoning order and for recalling the same. This view of mine is fully supported by the aforesaid Full Bench decision.

8. For the reasons stated above, this court finds that the objections filed by the petitioners before the Magistrate concerned for recalling the summoning order were not maintainable for two reasons. Firstly, that this court while deciding application under Section 482 Cr.P.C. had already held that the summoning order was passed by the Magistrate concerned after application of judicial mind and had rejected the contention of the accused persons that complaint was not maintainable, and Secondly no such objections were permissible under law in view of Full Bench decision of Ranjeet Singh (supra).

For the above reasons, this writ petition fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.1.2002

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

Civil Misc. Writ Petition No. 16616 of 2001
Anand Kumar ...Petitioners
Versus
Union of India, through its Secretary and others ...Respondents

Counsel for the Petitioner:
Sri Somesh Khare

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

Constitution of India-Compassionate appointment-father died 30.5.94-claim made after 8 years – Findings about financial conditions recorded most soundful. Not entitled for appointment.

Held – Para 2

This Tribunal has held that the petitioner's financial condition is not bad and hence it is not fit case for granting compassionate appointment. The Tribunal has referred to the family pension etc. which the petitioner's family is getting as well as the rent from houses, as well as the plots in several towns. It is settled law that compassionate appointment may be granted only when the financial condition of the family is bad vide Umesh Kumar Nagpal Vs. State of Haryana (1994) 4 SCC 138, but in this case the finding of fact is that it is not bad. Moreover the petitioner's father died on 30.5.94 i.e., almost 8 years ago and hence this is not a fit case for passing any mandamus under Article 226 of the Constitution since the purpose of giving compassionate appointment is that there is an immediate financial crisis in the family, vide Haryana State Electricity Board Vs. Naresh J.T. 1996 SC 542. The writ petition is hence dismissed.

Case law discussed:
1994(4) SCC 138
J.T. 1996 S.C.-542

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

Heard learned counsel for the parties.

1. The petitioner's father was a Senior Divisional Manager in the Department of Telecommunication who died in harness on 30.5.94. The petitioner's mother made an application that her son, the petitioner, should be given an appointment under Dying in Harness Rules vide Annexure 1. However the application was rejected on 26.2.96 vide Annexure 4 in which it was stated that the case for compassionate appointment has been considered by a High Power Committee and it has been decided that the case of the petitioner is not a fit one for appointment in relaxation of the recruitment rules. Thereafter representation dated 21.2.97 wa made vide Annexure 5 but it was rejected on 15.1.98 vide Annexure 6. The petitioner then approached the Central Administrative Tribunal which directed the Chief General Manager to reconsider the request of the applicant vide its order Annexure 7. The petitioner subsequently gave a representation dated 14.10.99 but it was rejected on 20.1.2002 vide Annexure 8. The petitioner then approached the Tribunal which dismissed his petition on 15.3.2001 vide Annexure 9. Hence this writ petition is filed.

2. We have carefully perused the impugned order of the Tribunal and find no illegality in the same. The Tribunal has held that the petitioner's financial

condition is not bad and hence it is not a fit case for granting compassionate appointment. The Tribunal has referred to the family pension etc. which the petitioner's family is getting as well as the rent from houses, as well as the plots in several towns. It is settled law that compassionate appointment may be granted only when the financial condition of the family is bad, vide Umesh Kumar Nagpal Vs. State of Haryana (1994) 4 SCC 138, but in this case the finding of fact is that it is not bad. Moreover the petitioner's father died on 30.5.94 i.e. almost 8 years ago and hence this is not a fit case for passing any mandamus under Article 226 of the Constitution since the purpose of giving compassionate appointment is that there is an immediate financial crisis in the family, vide Haryana State Electricity Board V. Narseh J.T. 1996(2) S.C. 542. The writ petition is hence dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 5817 of 1997

Sheo Shankar ...Petitioners
Versus
Central Government Industrial Tribunal cum Labour Court and another ...Respondents

Counsel for the Petitioner:
Sri Prakash Padia
Dr. R.G. Padia

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

Constitution of India-Article 226-The appropriate Government in the case of employees of the Central Government in the Central Government – the reference in such cases by the State Government is bad in law.

Held – Para 3

The labour Court relied upon the aforesaid definition, in my opinion rightly arrived at the conclusion that the respondent-Labour Court Vth, Kanpur does not have jurisdiction as the State Government has no jurisdiction to refer the dispute under Section 4 K.

Case law relied:
2001 AIR- SCW P.2685
1999 Alld. law report P.735

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

1. This writ petition under Article 226 of the Constitution of India was heard by me on 3rd of January, 2002 and after hearing the learned counsel for the parties, I dismissed the writ petition for reasons to be recorded later on. The reasons for the dismissal of the aforesaid writ petition are as under.

2. The facts which are not in dispute are as follows. That petitioner's father Ram Nath, who was an employee of Central PWD, Kanpur and was posted as Waterman, died while in service; that in view of the circumstances after the death of petitioner's father, petition was appointed as a muster role employee on compassionate ground; that while the petitioner was working as muster role employee, the petitioner's mother, namely, widow of deceased Ram Nath, sought an employment under dying in harness rules and she was appointed under dying in harness rules with the employer Central PWD, Central Region, Kanpur as peon. As a consequence thereof the

petitioner, who was appointed on the compassionate ground, in the circumstances petitioner's services were terminated by the Assistant Engineer vide his order dated 24.3.1996. Being aggrieved by the said order, the petitioner Sheo Shanker raised a dispute which is registered as I.D. Case No. 155 of 1989 before the Labour Court, U.P., Kanpur, but the same was dismissed as no reference was made. It is on the another application that the matter was referred by the State Government under Section 4 K of the U.P. Industrial Disputes Act to the respondent-Labour Court Vth, Kanpur. The aforesaid facts are not in dispute that on the pleadings of the parties, a preliminary objection was raised by the employer as to whether the labour Court Vth, Kanpur has Jurisdiction to give answer to the reference. In view of the fact that the petitioner alleges to be an employee of the Central PWD, which is a department of the Central Government and therefore in the case of the petitioner even assuming, though not admitting that the dispute was in existence, the appropriate government should be the Central Government and not the State Government. The aforesaid preliminary objection found favour with the labour Court, which has relied upon Section 2-A of the Industrial Disputes Act, 1947, which reads as under:—

"2-A. Dismissal etc., of an individual workman to be deemed to be an industrial dispute.—Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman any dispute or difference between that workman and his employer connected with or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."

3. The labour Court relied upon the aforesaid definition, in my opinion, rightly arrived at the conclusion that the respondent-Labour Court Vth, Kanpur does not have jurisdiction as the State Government has no jurisdiction to refer the dispute under Section 4 K as has been done in the present case. The reference was answered against the workman on the ground of the aforesaid findings recorded on the preliminary objection without entering into the merits of the case.

4. It is this order, which is being challenged by the petitioner in the present petition. Learned counsel for the petitioner stated that the labour Court has erred, the nature of appointment of the petitioner, which was on compassionate ground and he relied upon a Division bench decision of this Court reported in **1999 Allahabad Law Report (Vol. 35) page 735 – Ravi Karan Singh *Versus* State of U.P. and others,** wherein it has been held that the appointment under the dying in harness rules is a regular appointment and therefore petitioner's termination cannot be done except after holding an enquiry upon the charges against the petitioner. Learned counsel for the petitioner goes on to submit that this having not been done, the order of the labour Court Vth, Kanpur is erroneous and suffers from the manifest error of law. Suffice it to say that from the facts stated above, it is clear that the ratio of the decision relied upon the petitioner is not applicable to the facts of the present case. The petitioner, who was appointed immediately after the death of his father

on compassionate ground, ceased to continue when his mother has been given appointment under dying in harness rules as peon. In view of the above, it cannot be said that the petitioner's appointment was under dying in harness rules and this was also not a pleading before the labour Court. It also clear that under dying in harness rules only one of the family member is entitled for appointment.

5. In any view of the matter, since the labour Court has found that the appropriate Government in the case of employees of the Central Government, as the petitioner claims to be the reference by the State Government, is bad in law. To meet this finding of the labour Court, learned counsel for the petitioner has relied upon a decision reported in **2001 A.I.R. SCW page 2685—Sapan Kumar Pandit Versus U.P. State Electricity Board and others,** passed in civil appeal no. 471 of 2001 (arising out of SLP (Civil) No. 2648 of 2000), decided on 24.7.2001 by the apex Court, wherein the apex Court has ruled that once the State Government refers the dispute under Section 4 K of the U.P. Industrial Disputes Act, 1947, it is not within the domain of the labour Court to say that he will not enter in the dispute as the reference was made after un-due delay. Needless to say that the aforesaid decision relied upon by the learned counsel for the petitioner is in different context and is not relevant to the present case.

6. In view of what has been stated above, this writ petition has not merits and is accordingly dismissed. The interim order, if any, stands vacated. There will, however, be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHBAD 01.02.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 29451 of 1996

M/S Laxmirattan Cotton Mills, Kanpur ...Petitioner

Versus

Labour Court (IV) U.P. Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri Devendra Pratap

Counsel for the Respondents:
Sri D.P.Singh
Sri Rajesh Tiwari
S.C.

Constitution of India- Article 226- Even if there is no post, the Labour Court can issue a direction for creation of the post designating the pay scale- the reference is maintainable in respect of the workman drawing wages less then Rs.1600/-.

Held – Para 3

The Labour Court has considered the pleadings of the parties and evidence on record and arrived at a conclusion that the workman is performing his similar duties which were normally performed by the Assistant Engineer in the other department of the employer. In this view of the matter, the labour Court has allowed the workman concerned to be designated as Assistant Engineer and even if there is no such post, it is open to the employer to create the post of the similar capacity and pay the salary of the pay scale, which is being drawn by otherd Assistant Engineers in other department of the employer.

Case Law Referred
1977 FLR-147

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

1. By means of the present writ petition under Article 226 of the Constitution of India, the petitioner-employer has challenged the award of the Labour Court dated 05.02.1996, Annexure-10 to the writ petition, in adjudication case No. 80 of 1989. The facts leading to the filing of present writ petition are that the State Government vide its order dated 14th June, 1989 as amended on 04.09.1989 referred the following dispute under Section 4-K of the U.P. Industrial Disputes Act, 1947 of adjudication before the Labour Court.

"क्या सेवायोजकों द्वारा अपने श्रमिक अरूण प्रकाश पुत्र श्री शंकर लाल पद सिविल ओवरसियर को उनके कार्य के अनुसार सहायक अभियन्ता का पदनाम एवं वेतनमान रू० ६५०–१२०० न दिया जाना उचित। तथा/अथवा वैधानिक है? यदि नहीं तो संबंधित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है। किस तिथि से तथा किस अन्य विवरण सहित?"

2. The Parties have exchanged their written statements and rejoinder affidavits and adduced their evidence. The Labour Court after considering the evidence on record and on the basis of the pleadings of the parties arrived at a conclusion that the workman concerned is entitled for the relief claimed for.

3. Learned counsel appearing on behalf of the petitioner-employer has argued that the Labour Court has not considered the objection regarding the maintainability of the reference before the Labour Court on the ground that the workman concerned was not covered by the definition of employee as according to the re-instatement he has claimed the wages, which is higher than Rs. 1,600/- per month and further that the designation being Supervisor, he is superior. The labour Court has recorded a finding that at the time of reference, the workman was drawing wages in the pay scale of Rs. 500-900 and has not drawn mote than Rs. 1,600/-. In this view of the matter, the labour Court has further considered the nature and duties performed by the workman concerned as supervisory. The aforesaid question was though dealt with by the labour Court, but has not been re-determined at the employer as argument before this Court since it is finding of fact. The further contention of the employer-petitioner is that the post of Assistant Engineer (Civil) is not in existence in the employer's establishment and therefore the demand of designating the workman as Assistant Engineer (Civil) cannot and should not be granted by the Labour Court. The Labour Court has considered the pleadings of the parties and evidence on record and arrived at a conclusion that the workman is performing his similar duties, which were normally performed by the Assistant Engineer in the other department of the employer. In this view of the matter, the Labour Court has allowed the workman concerned to be designated as Assistant Engineer and even if there is no such post, it is open to the employer to create the post of the similar capacity and pay the salary of the pay scale, which is being drawn by other Assistant Engineers in other department of the employer. This Court has held in the case reported in 1997 F.L.R. 147- Nagar Mahapalika, Gorakhpur Versus Labour Court, Gorakhpur in which the learned Judge has considered the authority and arrived at a conclusion that even if there is no post, the labour court can issue a direction for creation of the post designating the pay-scale. Further contention on behalf of

learned counsel for the petitioner is that the Labour Court has not considered this aspect of the matter that the workman concerned has himself admitted in his statement that he is drawing the pay-scale of Rs. 2000-3500 and therefore he could not have treated to be a workman. This, in fact, is misleading statement of the workman. The workman has said that he is entitled for the pay scale of Rs. 2000-3500 when he will be assuming charge though at present he is drawing pay-scale of Rs. 500-900. No other point was argued by the learned counsel for the petitioner.

4. In view of the arguments advanced by the learned counsel for the petitioner and also for the reasons aforestated in this judgement, this writ petition deserves to be dismissed and is hereby dismissed. There will be no order as to costs. The interim order, if any, stands, vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2002

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

Special Appeal No. 98 of 2002

Anwar Ali ...Petitioner
Versus
Prescribed Authority/Sub Divisional Officer, Chunar, District Mirzapur and others ...Respondents

Counsel for the Petitioner:
Sri Avanish Mishra

Counsel for the Respondents:
Sri S.P.Singh
Sri Ran Vijay Singh
S.C.

U.P. Panchayat Raj Act 1947 Section 12 C (i) (b) – Recounting not to be ordered-unless it materially affect the result of election.

Held – Para 6

In view of the foregoing discussions, the judgement and order dated 21.1.2002 passed by the learned Single Judge is hereby set aside and the order dated 26.12.2001 passed by the Sub Divisional Magistrate is hereby quashed. The writ petition as well as the Special Appeal are allowed. However, there shall be no order as to costs.

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

1. We have heard Shri Avanish Mishra learned counsel for the appellant-writ petitioner, Shri S.P.Singh learned counsel for the respondent no. 5 and Shri Ran Vijay Singh learned Standing Counsel for the other respondents.

2. This Special Appeal is directed against the judgment and order dated 21.01.2002 passed by the learned Single Judge dismissing the writ petition. In the writ petition, the writ petitioner- appellant has challenged the order of the Sub-Divisional Magistrate directing for recounting of the votes.

3. It is the contention of the writ petitioner that he has won by eight votes whereas the dispute raised by the respondent no.6-herein, is with regard to two votes. The contention of Mrs. S.P. Singh learned Counsel for the respondent no. 5 is that there was inaccuracy in mathematical calculation, which resulted in apparent error to two votes, in as much as, in all, 1166 number of votes were

shown to be polled whereas actually 1168 number of votes were polled.

4. We have considered this aspect of the matter, Even assuming the contention of Mr. S.P. Singh to be correct if the two votes are taken into account the result of the election will not materially be affected. It is well settled proposition of Election law that recounting, as a matter of course, should not be directed. Recounting can only be directed where the alleged material irregularity affects the result if recounting is done. From the perusal of the irregularity, which has been alleged in the petition, it can be seen that the result of the election shall not materially be affected. In fact, Section 12-C (1) (b) of U.P. Panchyat Raj Act, 1947, incorporated the relevant provision of the Representation of the People Act, 1951. Section 12-C(1) (b) of the U.P. Panchayat, Raj Act, 1947 is given below:

"12-C Application for question the elections. (1) The election of a person as Pradhan or as member of Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that-

(a) ……

(b) That the result of the election has been materially affected-

(i) by the improper acceptance or rejection of any nomination; or

(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder.

The aforesaid provision is in parimateria with the provision of Section 100(1)(d) of the Representation of the People Act, 1951 which is given below:

"100. Grounds for declaring election to be void-(1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) ……

(b) ……

(c) ……

(d) that the result of the election, in so far as it concerns a returned candidate has been materially affected --

(i) by the improper acceptance of any nomination, or

(ii) by any correct (corrupt) practice committe in the interest of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act the High Court shall declare the election of the returned candidate to be void.

5. It is well settled on the basic of several decisions of the Apex Court unless the result of election is affected, there is no scope for recounting. The same view should also be made applicable in the case, in hand, while interpreting the provisions of Section 12-C (1)(b), and it is apparently clear that even assuming that two votes which has been alleged by the respondent no. 5 should have been included in the number of votes, and both the votes have gone in favour of the respondent no. 5, even then, the same would not have materially affected the result of the election since the writ petitioner had won by eight votes. In that view of the matter, we are of the view that the Sub Divisional Magistrate has

committed apparent error in directing for the recounting of votes

6. In view of the foregoing discussions, the judgement and order dated 21.01.2002 passed by the learned single Judge is hereby set aside and the order dated 26.12.2001 passed by the Sub Divisional Magistrate is hereby quashed. The writ petition as well as the Special Appeal are allowed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.2.2002

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

Civil Misc. Writ Petition No 27581 of 1999

Moti Lal Gupta ...Petitioner
Versus
Central Administrative Tribunal, Allahabad Bench, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Tripathi
Sri S.K. Tripathi

Counsel for the Respondents:
S.C.

Constitution of India, Article 227- Practice and Procedure Scope for interference- Judgement passed by Tribunal under challenge- on ground out of 10 points only three points have been discussed- it shall be presumed that each and every points have been discussed- if so feel that any point not dealtwith- may approach before the same Tribunal for reconsideration.

Held – Para 4

If learned counsel for the petitioner wants to urge that some other points were pressed before the Court/Tribunal but have not been dealt with, he should approach the same court or tribunal and if he can satisfy it that such points were in fact pressed the Court Tribunal can reconsider its order.

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

1. Heard learned counsel for the parties.

2. The petitioner has challenged the impugned order of the Central Administrative Tribunal dated 15.4.1999 (Annexure-1 to the writ petition).

3. We have carefully perused the impugned order and find no illegality in the same. The Tribunal has observed that there was break in the petitioner's service, and since he did not complete ten years service, therefore, he is not entitled for pension.

4. Learned counsel for the petitioner had urged that certain points were urged before the tribunal, which have not been considered by the Tribunal. It is well settled that if certain points are not mentioned in the judgement of the court or tribunal, it will be deemed that they were never pressed by the learned counsel for the petitioner. The presumption in law is that the Court or Tribunal deals with all the points which are pressed. It often happens that 10 points are taken in a petition but only 3 points are pressed. Naturally the Court/Tribunal will deal with only these 3 points. If learned counsel for the petitioner wants to urge that some points were pressed before the Court/Tribunal but have not been dealt with then he should approach the same

court or tribunal, and if he can satisfy it that such points were in fact pressed the Court/Tribunal can reconsider its order.

5. We, therefore, give liberty to the petitioner to approach the Tribunal in this connection, and if he does so the Tribunal will decide the application expeditiously in the light of the observations made above.

6. The writ petition is disposed off accordingly.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.2.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 54236 of 1999

Habib ...Petitioner
Versus
State of Uttar Pradesh through District Magistrate, Rampur and others ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Singhal
Sri K.M. Tripathi

Counsel for the Respondents:
S.C.

Arms Act-section 17 and 18- mere involvement in criminal case cannot in any way effect the public security or public interest and the order canceling or revoking the license of fire has been set aside. (Held in para 3)
Cases relied on – 1978 A.W.C. 122
1972 A.L.J. 573

The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.

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

1. By means of the present writ petition under Article 226 of the Constitution of India, petitioner has challenged the orders dated 31.5.1999 passed by the District Magistrate, Rampur and the order dated 7.9.1999 passed by the Commissioner, Moradabad Division, Moradabad Annexure-1 and 3 to the writ petition, respectively, under the provisions of Section 17 and 18 of the Arms Act, cancelling the licence of his fire-arm.

2. Heard learned counsel for the petitioner and the learned Standing Counsel representing the respondents. Learned counsel for the petitioner contends that the petitioner has been served with a show cause notice under Section 17 of the Arms Act asking him to show cause as to why his fire arms licence may not be cancelled and in reply thereto he filed his objection stating therein that he was never involved in criminal case and he has not misused his gun as is alleged in the show cause notice. The further contention of the petitioner's counsel is that two cases under Crime Nos. 174 of 1993 and 178 of 1998 at police station Bilashpur and Milak Khanam, respectively, District Rampur have been registered against six persons of the locality, including the petitioner and in which he has been falsely implicated by the police due to enmity. It is on the basis of the aforesaid F.I.R., the petitioner has been served with the aforesaid show cause notice. A perusal of the order of revocation of the licence

demonstrates that the petitioner is a person connected with the crime, referred to above, and therefore he is not the person with whom the fire arm should be retained in public interest. The appellate authority has also taken the same view, thus this writ petition.

3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the license under Arms Act, has been dealt with by a Division Bench of this Court reported in **1978 A.W.C.122- Sheo Prasad Misra Versus The District Magistrate, Basti and others,** wherein the Division Bench relying upon the earlier decision reported in **1972 A.L.J. 573- Masi Uddin Versus Commissioner, Allahabad**, found that mere involvement in criminal case cannot in any way affect the public security or interest and the order cancelling or revoking the license of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above-mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.

4. There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-1 and 11 to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm license. It is submitted by petitioner's counsel that the petitioner has been acquitted of the charges.

5. In this view of the matter, if there is nothing else, which may disentitle the petitioner for renewal of his fire-arm license, the respondents are directed to renew the fire-arm license of the petitioner. The writ petition deserves to be allowed and is hereby allowed. The orders dated 31.5.1999 and 7.9.1999 (Annexure-1 and 3 to the writ petition) passed by respondent no. 1 and 2 are quashed subject to the aforesaid directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 6125 of 1997

Smt. Raj Kumar Devi and others ...Petitioners

Versus

Motor Accident Claims Tribunal Upper District Judge, IInd District Jaunpur and others ...Respondents.

Counsel for the Petitioners:
Sri B.R. Yadav
Sri D.S.P. Singh

Counsel for the Respondents:
Sri Dinesh Pathak
Sri H.O.K. Srivastava
Sri H.P. Misra
S.C.

Motor Vehicles Act- 1939 – section 110-D-Claim petition – the review application cannot be entertained either under the old Act or under the new Act. Since there is no specific provision to review the revision, which is to be created under

only statute, the Tribunal has no power to review the same (Held in para 3)

Cases regarded –
A.I.R. 1966 SC 641
R.D. 1997 P. 562
A.L.R. (34) 1998 P. 456

In this view of the matter, the order of the Tribunal, impugned in the present writ petition dated 28.11.1996 is not supported by any law and therefore deserves to be quashed.

(Delivered by Hon'ble Anjani Kumar J.)

1. By means of the present writ petition under Article 226 of the Constitution of India, petitioners Smt. Raj Kumari & others have challenged the order dated 28.11.1996, Annexure-1 to the writ petition, passed by Motor Accident Claims Tribunal/Upper District Judge, IInd, district Jaunpur, respondent No. 1 in Misc. Case No. 17 of 1996. The petitioners, who were claimants before the Motor Accident Claims Tribunal, Jaunpur, which shall hereinafter be referred to as 'Tribunal' filed a claim petition under Section 110-D of the Motor Vehicles Act, 1939 before the Tribunal and the Tribunal after hearing the parties have given an award awarding a sum of Rs. 2,64,600/- in favour of the petitioners-claimants vide its order dated 22.7.1994 in M.A.O. No. 11 of 1987. Thereafter, the owner and driver of the said vehicle i.e. respondent nos. 2 and 4, instead of filing an appeal under section 110-D of the Act, filed a restoration application before the Tribunal and the Tribunal after giving full opportunity of hearing to the respondent nos. 2, 3 and 4 has modified the earlier award dated 22.7.1994 by which the award has been reduced from Rs. 2,64,600/- to Rs. 2,04,600/- vide its order dated 23.8.1996. Thereafter the owner of the vehicle, the respondent no. 2 filed a review application before the Tribunal and the claimants have filed their objections to the said review application, on which the Tribunal after going through the records accepted the review application and directed that claim to be retried again vide its order dated 28.11.1996. Against this order, the present writ petition has been filed by the petitioners. This Court vide its order dated 21.2.1997 has stayed the further proceedings in claim petition in question.

2. I have heard learned counsel appearing on behalf of the petitioners as well as the contesting respondents and also learned counsel for respondent no. 3, New India Assurance Company, Jaunpur. In my opinion, the Tribunal has committed an error of law; firstly when it reduced the earlier award dated 22.7.1994 thereby reducing the amount of compensation from Rs. 2,64,600/- to Rs. 2,04,600/- vide its order dated 23.8.1996, but that is not under challenge in the present writ petition. Coming to the challenging of the impugned order, Sri D.S.P. Singh, learned counsel for the petitioners argued that in the facts and circumstances of the case the Tribunal has committed an error in accepting the review application filed by the owner of the vehicle and directed to be retried the award which is, upon a perusal of the order impugned in the present writ petition, because of discovery of certain evidences coming into existence. Learned counsel for the petitioners has relied upon a Division bench decision of this Court reported in **1998 (34) A.L.R., 456 – New India Assurance Co. Ltd. Versus Smt. Bimla Devi and Others,** wherein this Court relying upon the earlier decision of Supereme Court reported in **A.I.R. 1966**

S.C., 641 – Harbhajan Singh Versus Karan Singh and the decision of Full Bench of this Court reported in **1997 R.D., 562 – Smt. Shivragi Versus Deputy Director of Consolidation**, has held that the review application cannot be entertained either under the old Act or under the new Act. The Division Bench further relying upon the two decisions, referred to above, has observed that since there is no specific provision to review the revision, which is to be created under only statute, the Tribunal has no power to review the same. In this view of the matter, the order impugned in the present writ petition deserves to be quashed.

3. Sri Dinesh Pathak, learned counsel for the respondent no.3 argued firstly; the maintainability of the writ petition instead of filing of an appeal, which has been answered by a Division Bench (supra). Sri Pathak has further relied upon a decision of learned single Judge of this Court **reported in 1995 (2) Transport and accidents Cases, 464** but in view of the Division bench decision, I am bound by the decision of the Division Bench. In this view of the matter, the order of the Tribunal, impugned in the present writ petition dated 28.11.1996 is not supported by any law and it therefore deserves to be quashed.

4. In view of what has been stated above, this writ petition deserves to be allowed and is hereby allowed. The order dated 28.11.1996, Annexure-1 to the writ petition, passed by Motor Accident Claims Tribunal, Jaunpur, is set aside. The petitioners will be entitled for their costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2002

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

Civil Misc. Writ Petition No. 5979 of 2002

Sardar Harbir Singh ...Petitioner
Versus
Additional District Judge, Court No. 14, Meerut and others ...Respondents.

Counsel for the Petitioner:
Sri Ravi Kant
Sri Amit Krishan

Counsel for the Respondents:
S.C.
Sri Pankaj Mithal

U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 – Section 21 (i) (a) Release Application-tenant possessing residential accomodation in same city-tenant can not object the release application.

Held- Para 15

Besides the above, in the explanation of Section 21 (1) (a) of the Act, is attracted and tenant cannot object to the release application filed by the land lord as he has acquired a residential building – wherein his son is admittedly living.

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

1. The dispute relates to residential accommodation – House No. 254-255. Ghoshi Mohalla, Lal Kurti, Meerut Cant. Meerut. The accommodation, on the ground floor, consists of two rooms. The said house consists of ground floor and first floor. On the ground floor, Landlady has in her possession the following accommodation: Two rooms – 17` x 8`

approx. 14x9 ½ approx., one kitchen 3 ½ ' x 3 ½ ' approx. On first floor one room with asbestos cement roof cover 9' x 10' approx. with open roof – 9' x 17' approx. The petitioner tenant has in his possession following accommodation – One room – 14' x 8 ½ ' approx. Kitchen – 3.9' x 4 ½ ' approx. The following amenities are common – Gallery, Latrine and Bath.

2. The family of the landlady undisputedly consist of the following: -

1. Smt. Vimla Agarwal - Landlady
2. Avinash Agarwal - Husband of Landlady
3. Atul - Son of Landlady
4. Wife of Atul- Daughter in law of Landlady
5. One Child
6. Km. Abha
7. Km. Asha both unmarried daughters of Landlady
8. Smt. Alka - Married daughter of the landlady

3. According to the Landlady, the tenant (petitioner) had acquired another residential House No. 1/264 L.I.G. Shradhapuri, Kanker Khera, Meerut on the basis of agreement of sale executed by its owner Prem Kumar Yadav. It has also come on record that said house had a shop at Kanker Khera, Meerut which is in the possession of the tenant-petitioner. It has come on the record that the said agreement of sale has been executed by said Prem Kumar Yadav in favour of wife of the petitioner tenant who also obtained possession in pursuance to the said agreement of sale. It has also come on record that the son of the tenant-petitioner Gurmeet Singh with his family is living in the said house and has also a shop therein for selling of articles of day to day use.

4. The perusal of the judgment and order dated 9.12.1997 passed by Prescribed Authority (Annexure-2 to the petition) also shows that Deepak Singh another son of the tenant petitioner is an attesting witness to the said agreement of sale and that he is resident of another House namely, 117, Arya Nagar. Kankar Khera Meerut.

5. The landlady Smt. Vimla Agarwal, respondent no. 3, filed an application under Section 21(1) (a), U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called the Act), for seeking release of aforesaid house 254-255 situate at Lal Kurti, Meerut for obtaining accommodation in the tenancy of the petitioner on the ground that she required the same for self and her family and her need was bonafide and genuine and she was to suffer more hardship as compared to the petitioner in case of rejection of release application. Parties led evidence and Prescribed Authority on the basis of record allowed the said release application vide judgment and order dated 9.12.1997 (Annexure-2 to the writ petition) on the ground that tenant petitioner had acquired another vacant state residential building in the same city on the basis of the agreement and it is admitted fact that son of tenant-petitioner had been living in the said residential building (1/264 Shraddhapuri, Kanker Khera, Meerut). The objection against release at the instance of tenant petitioner is not maintainable in view of Section 21 (1) explanation (1) which reads:

"Where the tenant or any member of his family (who has been normally residing with or is wholly dependent on him) has built or has otherwise acquired

in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained……"

6. The Prescribed Authority came to the conclusion that need of the landlady was genuine and bona fide and that she was to suffer more hardship as compared to the tenant-petitioner if release was refused. The Prescribed Authority, consequently, allowed the release application in favour of the landlady.

7. Feeling aggrieved, the petitioner-tenant filed Rent Appeal No. 18 of 1998 – Sardar Harbir Singh Versus. Smt. Vimla Agarwal. During the pendency of the appeal, two reports of court Amin's were brought on record. Copies of Amin's report dated 25.11.1998 and 24.7.1999 have been filed as Annexure 3 and 4 to the writ petition.

8. From the perusal of the Amin's report dated 25.11.1998 (Annexure-3 to the writ petition) two things clearly transpire:

(i) That the number of rooms available with the Landlady are only three, both on ground floor and first floor.
(ii) The tenant had acquired residential building in the same city where his son was found living with his family.

9. Amin's report (Paper No. 27 Ga) noted that the room on the first floor-measured 9' x 10' approx. and used as Store room. It was in deplorable condition (i.e. not worth habitation). The Appellate Authority on the basis of evidence on record affirmed finding of the Prescribed Authority on this issue of the need of genuine and bona fide of the landlady as well as the finding on the issue comparative hardship in favour of the landlady.

10. Not being satisfied, tenant has preferred the present writ petition seeking to challenge judgment and order dated 9.12.1997 (Annexure-2 to the petition) passed by Prescribed Authority under Section 21 (1) (a) of the Act and the judgment and order dated 22.1.2002 passed by Appellate Authority/Additional District Judge, Court No. 14, Meerut, respondent No.1 dismissing the Rent Appeal No. 18/98 under Section 22 of the Act (Annexure-9 to the Writ Petition).

11. The only argument made on behalf of the petitioner is that the Commissioner's report could not be relied upon without referring to the objections filed by the petitioner against them. The copies of the said objection have been filed in the shape of affidavits of the petitioner dated 27.8.1999 and 13.9.1999 (Annexures 5 and 7 to the writ petition).

12. The argument of the learned counsel for the petitioner, though attractive superficially only one will on deeper scrutiny, find no force in it. The Commissioner's report was relevant only for finding proving the factual condition of the one room on the first floor.

13. This Court has independently considered the respective cases of the parties and found that there is no dispute regarding the accommodation vis-à-vis family members of the landlord & the tenant.

14. It is clear that there are at least three units in the family of the landlady. At least, one room for landlady and her husband, one room for her son Atul and his wife with one children, and third room for two grown up daughters is required to be used as their Bed-Rooms. The room, said to be available at the first floor (with Asbestos Cement roof-measuring 9' x 10' approx.) cannot be said to be worth-habitation. A family, like that of the landlady, will certainly require one more room for being used as store and miscellaneous purpose. Landlady cannot be directed to live in one room alone without any other room like Drawing Dining; etc.

15. Besides the above, in the explanation of Section 21(1) (a) of the Act, is attracted and tenant cannot object to the release application filed by the landlord as he has 'acquired' a residential building – wherein his son is admittedly living.

16. The contention of the learned counsel for the Petitioner that said Explanation in the Act applies only when the tenant acquires a residential building by maturing title is misconceived and against the express intent borne out from the said provision. This explanation uses the expression 'ACQUIRES' which means 'defacto' possession-irrespective of title or status-and may be as an allottee or licensee.

17. In view of the above, I find no manifest error apparent on the face of record in the impugned orders nor find it a fit case for interference by this Court in exercise of its jurisdiction under Article 226, Constitution of India.

18. At the end learned counsel for the petitioner has, however, filed an affidavit giving unequivocal condition with a free will that he shall vacate the accommodation in question provided six months time is granted to him from the date of this judgment to deliver peaceful and vacant possession to the landlady.

19. In view of the above undertaking given by the petitioner through his son Deepak Singh, who is deponent of the said affidavit on record, I direct that the petitioner shall handover peaceful possession of the accommodation in question on or before 31.8.2002 subject, however, to the following conditions are promptly complied by the parties to which the learned counsel for the parties have assured on instructions of their clients being taken to comply with the same:-

1. The tenant petitioner shall file before the concerned Prescribed Authority, on or before **8.3.2002** an application along with his affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter.

2. Petitioner-tenant shall not be evicted from the accommodation in his tenancy upto **31.8.2002.** Tenant-petitioner his representative assignee etc. claiming through him or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question on or before **31.8.2002** to the landlord or landlord's nominee/representative (if any, appointed and intimated by the landlord) by giving prior advance notice and notifying to the landlord by Registered A.D. post (on his last

known address or as may be disclosed in advance by the landlord in writing before the concerned Prescribed Authority) time and date on which Landlord is to take possession from the tenant.

3. Petitioner shall on or before **8.3.2002** deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past if any, as well as the rent for the period ending on the **31.8.2002.**

4. Petitioner and everyone claiming under him undertake not to 'change' or 'damage' or transfer/alienate/assign in any manner, the accommodation in question.

5. In case Tenant/Petitioner fails to comply with any of the conditions/or direction/s contained in this order, landlord shall be entitled to evict the Tenant-Petitioner forthwith from the accommodation in question by seeking police force through concerned prescribed authority.

6. If there is violation of the undertaking of anyone or more of the conditions contained in this order the defaulting party shall pay Rs. 25000/- (Rupees Twenty Five Thousand only) as damages to the other party, besides rendering himself liable to be prosecuted for committing grossest contempt of the Court.

20. The writ petition is dismissed subject to the above conditions and observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2002

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

Civil Misc. Writ Petition No. 32780 of 2001

Saurabh Gupta Minor son of Sri Ashok Kumar Gupta ...Petitioner
Versus
The Chairman Councilling Board/C.P.M.T. and another ...Respondents

Counsel for the Petitioner:
Sri Swapnil Kumar
Sri Saurabh Gupta
(In Person)

Counsel for the Respondents:
Sri Ashutosh Srivastava

Constitution of India – Article 226 –A candidate who appeared in CPMT Examination in disabled category was required to come in merit list but his candidature was subject to his fitness declared by the Board – Once he was found fit by the Board and the earlier Board had not found him unfit, the procedural requirements was complete. (Held – Paras 11 & 13)

The respondents cannot be permitted to take advantage of their own omission of not issuing a certificate. Once the petitioner was found suitable, it was immaterial whether he was examined by the Board before or after the counseling In any case, it was during pendency of the Writ petition in the court and it shall be deemed that it was the first medical test of the petitioner.

The respondents are directed to admit the petitioner in M.B.B.S. course within three weeks from the date a certified copy of this order is produced before respondent no. 1

(Delivered by Hon'ble V.M. Sahai, J.)

1. The petitioner appeared in CPMT Examination 2001 under physically handicapped category. In the result the petitioner's over all rank was 2126 and his rank in physically handicapped category was 18. He was required to produce a certificate at the time fo counselling from the special medical board (in brief Board) constituted by the respondents in accordance with clause 3 (Chha) of the brochure that he was medically suitable to pursue medical studies. The first counselling was scheduled to be held on 25.9.2001. In paragraph 5.3 of the brochure the dates of counselling were mentioned. It is not disputed by the respondents that the petitioner appeared before the board on 15.9.2001 whereas counselling was scheduled to commence from 25.9.2001. The board did not issue medical certificate to the petitioner. It further did not issue any rejection certificate to him that he was medically unfit to persue medical education. The petitioner was running before the board for issuance of medical certificate, but for the reasons best known to the board, he was neither issued any medical certificate nor rejection order. However, the petitioner appeared in the first counseling on 25.9.2001 along with medical Certificate issued by the Chief Medical Officer, Ghaziabad but his candidature was not accepted by the respondents on the ground that the medical certificate of the board was not available.

2. The petitioner had filed this petition on the ground that out of 18 candidates under physically handicapped category the petitioner was at serial number 5 of the merit list, as other candidates did not appear for counselling. He was entitled for M.B.B.S. seat but due to arbitrary action of the board in not issuing him medical certificate, he has been deprived of admission to M.B.B.S. course. This fact is not denied by the respondents in the counter affidavit that the petitioner was at serial number 5 in the merit list and was entitled for admission. This court passed an interim order on 27.9.2001 directing respondents to keep one seat reserved for the petitioner under physically handicapped category.

3. While the writ petition was pending second counselling was to be held on 8.1.2002. The petitioner appeared before the board on 22.12.2001. The board issued a medical certificate to the petitioner that he was a physically handicapped candidate and his disability was not such that he was unfit to receive medical education. The petitioner had filed the medical certificate before this court by means of a supplementary affidavit and since one seat was already reserved as per interim order of this court, the petitioner did not appear in the second counselling. He claims admission on M.B.B.S. seat as per his standing in the merit list.

4. Sri Swapnil Kumar the learned counsel for the petitioner has urged that due to fault of the board in not issuing medical certificate to the petitioner, he has been deprived of his admission on M.B.B.S. seat. However, subsequently the board has issued medical certificate to him, therefore, as per interim order of this court, he is entitled for admission to M.B.B.S. course.

5. Sri Ashutosh Srivastava the learned counsel for the respondents has vehemently urged that the petitioner was rejected by the first board and no rejection certificate or order is required to be issued. Since one seat was directed to be reserved by this court, the respondents have reserved one seat in BDS course, therefore, the petitioner cannot be given M.B.B.S. seat.

6. It is not disputed that the petitioner is a physically handicapped candidate and his rank in physically handicapped category was 18 and when he appeared in first counselling his rank was at serial number 5 as other candidates did not appear. Therefore, he was entitled for M.B.B.S. seat in the first counselling. But the seat was not allotted to the petitioner nor he was granted admission, on the ground that the board constituted by the respondents had not issued any medical certificate to him. Subsequently, in December, 2001 the board issued medical certificate to the petitioner.

7. In Paragraph 19 of the counter affidavit filed by the Director General, Medical Education and Training, U.P., it is stated…" The petitioner failed to submit such a certificate at the time of counselling held on 25.9.2001 Consequently no allotment of seat under (07) category could be made in his favour. It is further submitted that the Special Medical Board is required to issue a certificate only when it is satisfied that a candidate is physically handicapped upto a certain percentage and can pursue Medical Education. It does not issue a certificate otherwise."

8. It is thus not disputed that the petitioner was not allotted a seat because he could not produce Handicapped Certificate from the Board constituted on 15.9.2001. There was no other reason. Paragraph 3 (chha) of the brochure reads us under:-

"(छ) विकलांग अभ्यर्थियें को सुरक्षित सीटों पर एम०बी०बी०एस० / बी०डी०एस० / बी०ए०एम०एस० / बी०एच०एम०एस० / बी०यू०एम०एस० पाठयक्रमों में पाठयक्रम / कालेज आवंटन के लिए अभ्यर्थियों को अपनी चिकित्सा परीक्षा मेडीकल कॉलेज में तदर्थ गठित विशेष मेडिकल बोर्ड से करानी होगी तथा उक्त बोर्ड द्वारा इस श्रेणी की आरक्षित सीटों के समक्ष उसके अभ्यर्थन के सम्बन्ध में दिया गया निर्णय अन्तिम रूप से मान्य होगा। उक्त विशेष बोर्ड के गठन के सम्बन्ध में आवश्यक निर्देश महानिदेशक, चिकित्सा शिक्षा द्वारा अलग से जारी किये जायेंगे। मेडिकल बोर्ड लिखित परीक्षा का परिणाम घोषित होने के पश्चात काउंसिलिंग के पहले बैठेगा। मेडिकल बोर्ड के समक्ष केवल उन्हीं अभ्यर्थियों को उपस्थित होना होगा जिन्होंने इस श्रेणी हेतु आवेदन किया हो और जो लिखित परीक्षा की मेरिट के आधार पर विकलांग की श्रेणी में काउंसिलिंग हेतु आमंत्रित किये जायेंगे। केवल महानिदेशक, चिकित्सा शिक्षा उत्तर प्रदेश द्वारा गठित मेडिकल बोर्ड द्वारा दिया गया प्रमाण–पत्र ही मान्य होगा। यदि बोर्ड की राय में किसी अभ्यर्थी की विकलांगता इस सीमा तक है कि वह चिकित्सा शिक्षा ग्रहण नहीं कर सकता है तो ऐसे अभ्यर्थी प्रवेश हेतु अर्ह नहीं होंगे।"

9. It gives the procedure for constitution of the Board and the manner of exercise of its power. What is important is that the decision of the Board on disability has been made final. It is further provided that if in the opinion of the Board the disability of any candidate is to such extent that he cannot persue medical education then such a candidate would not be entitled for admission. The requirement of taking decision coupled with the expression " If in the opinion of the Board" makes it obligatory for the Board to issue a certificate or an order. In

absence of any order of rejection the Board shall be deemed in law to have failed to perform the duty imposed on it. When any rule, order or provision provides for giving decision or makes the opinion final and such decision or opinion effects rights of a person then the opinion and decision has to be recorded in writing and must be communicated. The stand in the counter affidavit filed by the Director that the Board was not required to issue a certificate of rejection cannot be accepted. It is held that the Board whenever does not find any physically handicapped candidate unfit for pursuing medical education it will issue an order refusing to issue certificate expressing its opinion, otherwise it shall be deemed that the test as required has not been held.

10. Therefore, the appearance of petitioner before the Board in September, 2001 was of no consequence. The next Board was announced for 22.12.2001. Counselling is linked with seats available for allotment in M.B.B.S. The Board was constituted. The petitioner appeared before it. He was found eligible for pursuing medical education. A Certificate was issued to him. The petitioner, therefore, satisfied all the requirements and he was entitled for allotment of a seat in M.B.B.S.

11. Sri Ashutosh Srivastava argued that the petitioner having appeared before the Board on 22.12.2001 for which counselling was to take place on 8.1.2002 in which he did not appear, therefore, he cannot be allotted any seat. The argument ignores that the petitioner had approached this court against the rejection of his candidature in the counselling held on 25.9.2001 only because he was not issued a certificate by the Board. During pendency of the writ petition, the petitioner was found suitable and eligible for medical studies. A candidate who appeared in CPMT examination in disabled category was required to come in merit list, but his candidature was subject to his fitness declared by the Board. Once he was found fit by the Board and the earlier Board had not found him unfit, the procedural requirement was complete. And the respondents cannot be permitted to take advantage of their own omission of not issuing a certificate. Once the petitioner was found suitable, it was immaterial whether he was examined by the Board before or after the counselling. In any case, it was during pendency of the writ petition in the court and it shall be deemed that it was the first medical test of the petitioner.

12. Sri Ashutosh Srivastava further argued that a seat has been reserved for the petitioner in B.D.S. course. It is not the case of respondents that there is no seat in M.B.B.S. course. Further the petitioner had filed this petition in September, 2001 and had sought quashing of the order dated 25.9.2001 and for a direction to respondents to keep one seat for him in M.B.B.S. This court by interim order on 27.9.2001 directed respondents to reserve one seat for him in the category of physically handicapped. The respondents could not go behind this order which had to be understood in the context of the writ petition.

13. In the result, this petition succeeds and is allowed. The respondents are directed to admit the petitioner in M.B.B.S. course within three weeks from the date a certified copy of this order is produced before respondent no. 1.

14. The parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.2.2002

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

Civil Misc. Writ Petition No. 41123 of 1997

Tribeni Prasad Patel ...Petitioner
Versus
Union of India, through Secretary of Ministry of Labour/Shram Mantralaya New Delhi ...Respondents

Counsel for the Petitioner:
Sri I.N.Singh
Sri Ajay Yadav

Counsel for the Respondents:
Sri S.C.
Sri Himanshu Tiwari

Constitution of India, Article 227. Reference- Rejected on the ground of delay of 13 years- supporting documents not considered- Rejection order quashed- direction issued to decide the matter on merit.

Held – Para 13

In the light of aforesaid discussions the order of the respondent no. 4 gives a firm impression to the court that the explanation as has been given by the petitioner vide para 8 of the affidavit (Annexure-8) to the writ petition supported by documents Annexure A to F) have not been taken into consideration and it appears that in ignorance thereof just by a casual observation that he has raised the issue after a lapse of nearly 13 years without furnishing any justifiable reason for the delay' the reference have been refused. On the facts and circumstances and in view of aforesaid, I am of the view that the matter requires fresh consideration by the respondent no. 4 in respect of the claim of the petitioner without being influenced by the observations as made in this judgement.

Case law discussed:
AIR 1959 SCC 1217
AIR 1970 SC-1205
2000(2) AWC 923

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

1. By means of this writ petition, petitioner has prayed for issuance of a writ in the nature of Certiorari quashing the orders dated 31.10.1996 (Annexure-I) and 22.8.1997 (Annexure-2) to the writ petition) passed by respondents 2 and 4 respectively.

2. The petitioner claims to have been appointed as Class IV employee in the Allahabad Bank in the district Bulandshahr on 11.2.1981 on the death of his father Jagannath Prasad who was a confirmed Class IV employee in the said Bank. It has been stated that having worked for 89 days, without any rhyme or reason petitioner was asked not to work. In view of the aforesaid fact petitioner states that he approached the concerned authorities from time to time but his claim for continuance was not considered on account of which he has to make a detailed representation on 8.5.1995 raising industrial dispute against the illegal and arbitrary order of termination of his service. As the petitioner happened to be a poor person and not being in a position to contest his case before the respondent No. 2 he gave authority letter dated 8.5.1995 authorising the General Secretary of the U.P. Bank Employees Union to represent his case and to sign documents/papers etc. on his behalf. It is

said that notice was issued in respect to the petitioner's claim upon which a counter affidavit was filed by the respondent No. 3 to which petitioner also filed rejoinder affidavit on 31.8.1996. Respondent No. 2 after considering the facts vide its order dated 31.10.1996 (Annexure-1 to the writ petition) rejected the conciliation proceedings and an information was sent in this respect to the appropriate government who by its order dated 22.8.1997 (Annexure-2 to the writ petition) refused to make reference to the Industrial Tribunal for adjudication of the petitioner's claim on the ground that no industrial dispute exists and the claim has been laid by the petitioner after lapse of 13 years. It is these two orders dated 31.10.1996 and 22.8.1997 (Annexures 1 and 2 to the writ petition respectively) which has made the petitioner aggrieved to come up before to (sic) court.

3. Heard learned counsel for the parties and perused the pleadings as has been set forth in this petition and the material as has been placed on the record.

4. During the course of arguments both learned counsel joined the issue only on the ground i.e. the rejection of the petitioner's claim for reference on the ground of delay.

5. Learned counsel for the petitioner has vehemently argued that under the Act no period has been prescribed for referring the dispute to the Labour Court and therefore, the rejection of the petitioner's claim for making reference on the ground of delay is quite uncalled for. In the alternative it has been argued that plausible explanation has been offered on behalf of the petitioner, explaining the delay in approaching the respondent No. 2 but the same has not been noticed by the respondent No. 4 and in a most arbitrary and cryptic manner the order has been passed. Learned counsel for the petitioner submits that on the facts of the present case as the petitioner was engaged to meet the hardship of family who was starving on the death of the petitioner's father who was Class IV employee in the Allahabad Bank and therefore, petitioner's case was liable to be considered in sympathetic manner, on the merits but its rejection on the technical ground of delay is not at all justified. Learned counsel for the petitioner in support of his contention has placed reliance on the decision reported in 2000 (5) Supreme, 235 (Sapan Kumar Pandit Vs U.P. State Electricity Board and others), AIR 1959 SC 1217 (M/S Shalimar Works Ltd. V. Their Workmen) and AIR 1970 SC 1205 (M/S Western India Watch Co. Ltd. Vs The Western India Watch Co. Workers Union).

6. Learned counsel who appeared for the Bank in response to the aforesaid submissions, argued that on the facts of the present case it is fully clear that petitioner has presented his claim after about 13 years and therefore, the respondents have rightly refused to make reference as acceptance of the petitioner's contention will amount to revive the matter which has already became stale. Learned counsel for the respondents in support of his contention places reliance on the decision reported in 2000 (2) AWC 923.

7. The question which requires attention of this Court is that:-

(i) Whether any time (limitation) has been prescribed for the appropriate government for referring the dispute

or any matter appearing to be connected with or relevant to the dispute to a labour court.

(ii) If time (limitation) is provided, then whether it can be stretched for any uncounted number of years, having no boundary.

8. The question as arises for consideration, has already been considered and settled by the decision of the Apex Court. The survey of cases as has been relied from both sides, make the position clear that although no time limit has been prescribed for the government to make reference but the use of the words 'at any time' has a significance and that gives an handle to the government to make reference at any time, if it feels that the dispute exists. This exercise makes obligatory for the government to apply its mind to explanation given by the employee, for coming late with the prayer for reference.

9. After referring to large number of earlier decisions the Apex Court in case of Sapan Kumar Pandit (Supra) in paragraph 15 has observed thus:-

"There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons it does not cause the dispute to wane into to total eclipse. In this case when the Government have chosen to refer the dispute for adjudication under Section 4K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its relief. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

10. The aforesaid observation of the Supreme Court clearly casts the duty on the government to apply its mind and to consider that whether the dispute ceased to exist or it may still alive though not galvanized by the workmen or union on account of other justifiable reason. It is in the backdrop of this principle that there is no limitation prescribed for making reference but on the facts of each case that whether workmen has made the dispute alive or it has become stale, the cases are to be scrutinized. Now let us examine and test the decission of respondent on the aforesaid principle.

11. The petitioner has stated in para 16 of the writ petiton that he has given full justification for the delay. In this connection a further reference can be made to the pleadings as had come before the respondent No. 2 vide rejoinder affidavit filed by the petitioner dated 31.8.1996 (Annexure-8 to the writ petiton). Para 8 of the said affidavit reads like this:-

"The contents of Para 8 are not admitted and we reiterate that the petition/claim is very much tenable and the same cannot be termed as stale claim. The dispute could be raised at this late

stage on 8.5.1995 because till that time the applicant was making representing the bank's management from time to time and in absence of their reply of the correspondence of the bank, I could not decide the time of action to get the justice done till the date of raising dispute. Now having no alternative, I preferred to raise the dispute before your honour to ensure justice in the case through your kind intervention. In support of the above contention, Photostat copies of the representations are annexed as Annexure 'A" to Annexure-'F'"

12. The aforesaid pleadings of the petitioner makes it clear that he has taken a definite stand that he has been making representation after representation to the Bank management from time to time and was waiting for its disposal and in the absence of the reply of the correspondences he was not in a position to decide the time of action and as large number of similarly situated employees, were absorbed and continued he was also hopeful but as long delay had taken place he having no alternative preferred to raise the dispute. In this connection petitioner had also annexed copies of the representations as annexures A to F along with his rejoinder affidavit filed before respondent No. 2. There appears to be no denial in respect to the fact and detail as mentioned in para 8 of the affidavit (which is annexed as Annexure 8 to the writ petition), on behalf of the respondents either before the respondent No. 2 or even before this court. Thus the matter will have to be judged taking the facts into consideration that the petitioner has been making representation and have been approaching the bank management from time to time. To substantiate this version he had also appended copy of correspondences as annexures A to F with the said affidavit. The order of the respondent No. 4 dated 22.8.1997 by which reference has been refused merely states that petitioner has raised the issue after a lapse of nearly 13 years without furnishing any justifiable reason for the delay. On a reading of this reason as has been given by respondent No. 4 in his order it appears that the explanation as was given by the petitioner, supported with the documents have not been analysed and no reason has been assigned for rejecting the explanation and the stand of the petitioner about continuous approaches to the bank management by moving representation. There is nothing on record to show that Bank has denied the factum of filing of representation as there appears to be no supplementary counter affidavit before respondent No. 2 In view of this it appears that respondent No. 4 have not properly attended the issue by making the required consideration which was crucial for forming an opinion for making reference. The facts as has come on the record vide para 3 of the writ petition that petitioner was given appointment on the death of his father who was a Class IV employee in the Bank has also not been denied by the respondents which is clear from the reply as is contained in para 5 of the counter affidavit. Petitioner has also stated in para 10 and 15 of the writ petition that number of candidates, similarly situated to the petitioner and appointed even much after him, have been absorbed which shows the pick and choose on the part of the respondents. The petitioner has challenged the action of the Bank of not continuing him, on various grounds as has been taken before the authorities and also before this court but as the dispute has not been referred by the government solely on

the ground of delay this court need not to go into the merits of the petitioner's claim and his entitlements as it will be premature. In the light of aforesaid discussions the order of the respondent No. 4 gives a firm impression to the court that the explanation as has been given by the petitioner vide para 8 of the Affidavit (Annexure-8 to the writ petition supported by documents Annexure A to F) have not been taken into consideration and it appears that in ignorance thereof just by a casual observation " that he has raised the issue after a lapse of nearly 13 years without furnishing any justifiable reason for the delay" the reference have been refused. On the facts and circumstances and in view of aforesaid, I am of the view that the matter requires fresh consideration by the respondent No. 4 in respect to the claim of the petitioner without being influenced by the observations as made in this judgment.

14. For the reasons stated above, this writ petition succeeds and is allowed. Impugned order of the respondent No. 4 dated 22.8.1997 (Annexure-2 to the writ petition) is hereby quashed. The matter is remanded for a fresh consideration in accordance with law.

Parties will bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 1, 2002

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

Civil Misc. Writ Petition No. 5016 of 2002

Jag Pal Singh Bhatt ...Petitioner
Versus
State of U.P. through District Magistrate and another ...Respondents

Counsel for the Petitioner:
Sri V.K. Jaiswal

Counsel for the Respondent:
S.C.

Constitution of India, Article 226-Official accommodations-must be vacated forthwith after transfer or retirement-the petitioner can not continue to occupy the official accommodation after his transfer.

Held - Para 4

The petitioner cannot continue to occupy the official accommodation at Ghaziabad since he has been transferred from there he should have by now looked for some private accommodation at Gautam Budh Nagar. A large number of petitions have come to this Court filed by the Government employees who have not vacated the official accommodation even after transfer/retirement. We cannot approve of this kind of practice.

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

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

2. The petitioner is Assistant Manager in District Industries Center and

he has been transferred from Ghaziabad to Gautam Buddh Nagar. However, he has not yet vacated the official accommodation in his possession at Ghaziabad. He has challenged the impugned order of the District Magistrate, Ghaziabad dated 26.4.2001 Annexure-4 to the writ petition by which the petitioner has been ordered to be evicted from the said accommodation.

3. It is deeply regrettable that the petitioner is still retaining the official accommodation at Ghaziabad although he has been transferred to Gautam Budh Nagar a long time back. If a government servant does not vacate the official accommodation after his transfer/retirement his successor will have no place to live in.

4. Learned counsel for the petitioner has stated that the petitioner has not been allotted any accommodation at Gautam Budh Nagar. Be that as it may, the petitioner cannot continue to occupy the official accommodation at Ghaziabad since he has been transferred from there. He should have by now looked for some private accommodation at Gautam Budh Nagar. A large number of petitions have come to this Court filed by the government employees who have not vacated the official accommodation even after transfer/retirement. We cannot approve of this kind of practice.

5. The petition is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 13, 2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 16930 of 1998

Gauri Shankar ...Petitioner
Versus
District Judge, Maharajganj and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Mishra
Sri Bajrangi Mishra
Sri Adeel Ahmad Khan

Counsel for the Respondents:
S.C.

Land Acquisition Act-Section 18-Objection was filed by the petitioner immediately after receiving the notice pertaining to the compensation award-Neither the objection was decided nor any reference has been made by the Collector-the Collector was directed to decide the objection.
Held - Para 6
The writ petition succeeds and is allowed. The orders dated 18.3.1998 and 6.4.1988, Annexure-1 and 2 to the writ petition, are hereby quashed. The Collector, Maharajganj is directed to dispose of the petitioner's objection dated 9.5.1985 under Section 18 of the Land Acquisition Act on merits by a reasoned order after affording opportunity to the petitioner within period of three months from the date of presentation of a certified copy of this order before him.

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

1. The present writ petition under Article 226 of the Constitution of India

has been filed by the petitioner with the following relief:-

"(I) to issue a writ, order or direction in the nature of certiorari quashing the orders passed by the respondent nos. 1 and 4 dated 18.3.1998 and 6.4.1988, respectively;

(II) to issue a writ, order or direction in the nature of mandamus commanding the respondents no. 1 to 5 to make reference of petitioner's claim under Section 18 of Land Acquisition Act.

(III)to issue any other suitable writ, order or direction, as this Hon'ble Court may deem fit and proper to meet the ends of justice.

(IV) to award cost of the writ petition to the petitioner."

2. The facts leading to the filing of present writ petition are that in the year 1983, petitioner's land as well as the lands belonging to other persons were acquired by the State Government for the purposes of construction of the office of Sub-Divisional Officer, Mahrajganj. The Land Acquisition Officer/District Magistrate, Gorakhpur has given an award on 16.4.1985 by which the amount pertaining to the said land of petitioner was determined to the extent of Rs. 11,426.44. It is submitted by petitioner's counsel that petitioner has received a notice on 8.5.1985 pertaining to the aforesaid compensation award and immediately on 9.5.1985 he filed his objection as contemplated under Section 18 of the Land Acquisition Act, which was served in the office of respondent no.4 on the same day. It is stated that the said objection of the petitioner has not been decided, nor any reference has been made by the Collector. Being aggrieved with the same petitioner filed writ petition numbered as writ petition no. 20511 of 1989 before this Court, in which this Court while disposing of the said writ petition has passed the following order, the operative portion thereof reads as follows:-

"In view of the above, we direct the Collector, Gorakhpur/Land Acquisition Officer to consider the objection, if any, filed by the petitioner on 9.5.1985 (Annexure-1 to the supplementary affidavit) filed today, a receipt thereof has been filed as Annexure-1 to the supplementary affidavit. In case, any such objection has been filed, the same will be dealt with in accordance with law within a period of two months from the date of receipt of a certified copy of this order.

With these observations, the writ petition is disposed of."

3. Inspite of the aforesaid mandamus being communicated to the respondents, it is alleged by the petitioner that his application under Section 18 has not been disposed of. Thereafter petitioner filed another writ petition numbered as writ petition no. 28100 of 1995, in which this Court vide its order dated passed the following final order the operative portion thereof reads as follows:-

"Having heard learned counsel for the parties, we, in the interest of justice, dispose of this writ petition with this direction that if the aforementioned application is still pending, then the Land Acquisition Officer respondent no. 2 shall dispose it of. We also clarify that this order shall not be construed to mean that

we are expressing any merit in the aforementioned application, which is required to be adjudicated by the Respondent no. 2. We also clarify that if there is any other order staying further proceedings in that event our order shall not be given effect to and that if the records have not been dispatched to District Mahrajganj, after bifurcation of District Gorakhpur, in that event the records will be sent to the corresponding Land Acquisition Officer, for doing the needful in accordance with law."

4. Inspite of this order again being communication to the respondents, it is alleged by the petitioner that since his application under Section 18 of the Act has not been decided, nor any reference has been made in this regard, he therefore filed fresh application on 28.1.1998 as stated in the impugned order. By the impugned order dated 18.3.1998 the said application dated 28.1.1998 has been rejected, though the same was supported by an affidavit along with an application under Section 5 of the Limitation Act. The petitioner has stated that for the first time the information of rejection of his objection dated 9.5.1985 was communicated to the petitioner on 3.12.1997. Thereafter he was searching out the papers from 4.12.1997 to 4.1.1998 and when the papers were not traced in the office, he filed an application on 5.1.1998, pursuance whereof the file was made available for inspection on 23.1.1998. The petitioner has applied for the copy of the said documents on the same day, which were made available to him on 24.1.1998. Since 25.1.1998 was Sunday and 26.1.1998 was a holiday on account of Republic Day, he came on 27.1.1998 and filed a reference on 28.1.1998. The application filed by the petitioner has been rejected by the District Judge vide its order dated 18.3.1998 relying upon the decision in the case of **Kakabai *Versus* Land Acquisition Officer/District Collector, reported in A.I.R. 1956 Punjab, 231,** which says that where the applicant knew it that if the collector is not sending the reference to the District Court as contemplated under Section 18 of the Act, he should have presented the petition before this Court or before Hon'ble High court but the same has not been done by the petitioner, nor he has taken any steps before the reference becomes barred by time. In this view of the matter, since now the matter has been more than 13 years old, the same cannot now be accepted and reference be made. The petitioner has given in detail with meticulous accuracy of the dates and a perusal thereof makes it clear that the petitioner cannot be said to be slept over in pursuing his application or reference and in fact it is admitted by the respondents that against the award dated 8.5.1985, petitioner's objection was filed on 8.5.1985. In this view of the matter, it cannot be said that the application under Section 18 of the Act was filed beyond time. The petitioner has filed two writ petitions, as stated above, first in the year 1989 and second in the year 1995 with the prayer that his application under Section 18 of the Act may be disposed of. However, in the present impugned order it has been stated that the objection of the petitioner has been disposed of much earlier than the filing of the first writ petition before this Court. The order dated 6.4.1988 rejecting the objection filed by the petitioner on 9.5.1985 has been annexed as Annexure-2 to the writ petition, a perusal whereof would clearly demonstrates that the same cannot be said to be an order on merits as the

respondents have refused to refer the matter to the District Judge concerned while dealing with the objection raised by the petitioner. In this view of the matter, in my opinion, the petitioner has made out a case for getting his objection under Section 18 of the Act decided on merits by the respondent/collector, which has not been done inspite of the long history stated hereinbefore.

5. Apart from the reasons stated above, the order dated 18.3.1998 also suffers from the manifest error of law, inasmuch as the petitioner having satisfactorily explained the reasons in the second application could have been referred or in case the Collection wanted to refuse it, he should have dealt with it in accordance with law in the light of the objection raised by the petitioner. Even the order dated 6.4.1988 is a laconic order which has been passed without application of mind.

6. In this view of the matter, the writ petition succeeds and is allowed. The orders dated 18.3.1998 and 6.4.1988, Annexure-1 and 2 to the writ petition, are hereby quashed. The Collector, Mahrajganj is directed to dispose of the petitioner's objection dated 9.5.1985 under Section 18 of the Land Acquisition Act on merits by a reasoned order after affording opportunity to the petitioner within a period of three months from the date of presentation of a certified copy of this order before him. However, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 26, 2002

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

Civil Misc. Writ Petition No. 545 of 2002

Smt. Babli Alias Maya and another ...Petitioner

Versus

State of U.P. through Home Secretary, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Tej Pal

Counsel for the Respondents:
Sri A.K. Verma
A.G.A.
Sri Anoop Singh
Sri U.K. Saxena

Constitution of India, Article 226-The question as to whether petitioner no.1 is minor or major, shall have a vital bearing - the divergence in the two medical opinion - a three Member Medical Board was constituted. Even a major girl or woman can not invoke any fundamental right to live with a male who is having a wife and child.

Held - Para 21 & 22

The Constitution of India vide Article 23 (1) forbids immoral traffic. So does the Prevention of Immoral Traffic Act. The Indian Penal Code and the Hindu Marriage Act does not permit bigamy. Section 18 of the Hindu Marriage Act also prescribes punishment for violation of conditions specified in Clauses (iii) of Section 5. This Constitutional court if proceeds to permit them to lead a marital life it will apparently mean perpetuating bigamy, which is an offence under Sections 494 and 495 of the

Indian Penal Code as well as Section 17 of the Hindu Marriage Act, 1955.

Further as a guardian of the Constitution of India so far as this State is concerned, we cannot brush aside the fundamental right of the wife and child of petitioner no. 2 to lead a meaningful life guaranteed to them under Article 21 of the Constitution of India and other rights available under the provisions of the Hindu Marriage Act and we must uphold rights giving liberty to them to ventilate their grievances, if and when raised by them, before any appropriate Authority or Court, which is bound to adjudicate them in accordance with law.

(Delivered by Hon'ble Binod Kumar Roy, J.)

1. The petitioners have come up with prayers to quash (i) the First Information Report dated 4th December, 2001 appending its Zerox copy along with typed copy as Annexure-1 drawn up on the information of own younger brother of Petitioner no. 1 named Shiv Kumar, son of Santosh Singh, giving rise to registration of Case Crime No. 665 (wrongly stated in the prayer portion as 664) of 2001 under Section 363, 506 and 364 I.P.C. (ii) the Police investigation in relation to the aforementioned case and (iii) to command the Respondents not to interfere with their liberty to lead their marital life and take petitioner no. 1 in custody and handover to Respondent no. 3.

2. The impugned First Information Report states, interalia, to this effect:- at about 5:00 A.M. early morning the Informant's elder sister Babli (=Petitioner no.1) aged 16 years and Maternal Grand-Mother went out of the Village for easing out; after some time he, too, went for easing; about 150 meters, away from the Village, he saw that Badmash after pushing away her Maternal-Grand-Mother, forcibly putting her sister Babli in a Marshal Deluxe vehicle belonging to Petitioner no. 2 Om Veer singh after tearing her cloths, where he rushed; he was threatened by Katta and Aslahon and was asked that if he will cry then he will be murdered and thus he could not cry to save her sister; Petitioner no.2, Driver Mahipal Singh, Jagveer Singh, Karua, Ashok and two other unknown were on the vehicle, which they drove away; later-on his Tau Ashok Kumar came and was apprised of the entire facts; her sister was taken away with intention of either kidnapping or committal of rape; he has come alongwith his Tau to get his report lodged, which be registered and action taken against the aforesaid persons and his sister be traced out.

3. The petitioners assert, interalia, to this effect:- Petitioner no.1 is major aged about 20 years; she has been medically examined by the Chief Medical Officer, Mainpuri, who found her age 20 years, a true copy of her Medical Certificate is being filed as Annexure-2; petitioner no.2 is aged about 25 years, literate and has passed Intermediate; both are Hindus and Yadav by caste; being unmarried they were entitled to marry each other in view of Section 5 of the Hindu Marriage Act and in September, 2001 they married out of free consent according to Hindu rites; their marriage is valid under Section 5 of the Hindu Marriage Act; both also prepared an Ekrarnama on 14.12.2001 of their marriage which has been verified by the Notary, District Etah, a true copy of which is being filed as Annexure-3; after marriage both of them are living as husband and wife; respondent no. 3 is brother of petitioner no. 1, who despite the fact that even though petitioner no. 1

had become major took no pain for her marriage due to ulterior reasons which was the precise reason for petitioner no. 1 to marry petitioner no. 2 out of her free will and consent; respondent no. 3 on account of village partybandi did not relish her marriage and maliciously and falsely lodged the false, fabricated and absurd First Information Report on which no truthful person can place reliance and thus in view of the decision in P.S. Rajya Vs. State, Supreme Today 1996(4) 445 is liable to be quashed; Nani or the compainant himself had not received any injury; it has been falsely stated that clothes of petitioner no. 1 were torn; there is no allegation in the First Information Report that kidnapping was done for commission of murder; the investigation has been handed-over to respondent no. 2 Head Constable K.P. Singh, who is not authorized under Paragraph 51 of the U.P. Police Regulation; the entire investigation is illegal in view of T.T. Antony Versus State of Kerala 2001(5) Supreme Today 131; even though petitioner no.2 has not committed any offence at all yet the Investigating Officer is trying to arrest him as well as petitioner no. 1 and handover the latter to respondent no. 3.

3.1. This writ petition incorporates only two grounds:- (A) `Because no offence is made out (B) `Because fundamental rights of the petitioners are being violated'.

4. When this writ petition came up for admission before a Division Bench on 29th January 2002, the following order was passed:-

"Sri Tejpal learned counsel for the petitioners states that before this writ petition could come up for admission, both the petitioners have been arrested by police. Petitioner no. 2 is an accused in the case in question while Smt. Babli alias Maya is said to be the girl who is alleged to have been kidnapped by petitioner no. 2. According to the petitioner's case she is major and has married petitioner no.2 of her own volition.

Issue notice to respondent no.2 with a direction to produce petitioner no. 1 Smt. Babli alias Maya before this Court on the next date of listing.

Sri Kumar respondent no. 3 who is represented by Sri Rajeev Sharma holding brief of Sri Anoop Singh is also directed to produce Smt. Babli alias Maya before this court in case she has been handed over to him by the investigation officer of this case.

List on 18th February, 2002.

In the meantime respondent no.3 may file counter affidavit.

5. Thereafter, on 18th February, 2002 this writ petition was placed before us. What happened before us in court stands reflected in our order dated 18.2.2002, which reads as follows:-

"In terms of the court's order dated 29.1.2002 Babli alias Maya is being produced before us. She makes statements to this effect before us:- She had married petitioner no. 2 Om Veer Singh of her own sweet will and not under anyone's enticement or coercion; that the statements made in the writ petition to the contrary have been made by her under threat and coercion of her killing by her father Santosh Singh, her uncles Rakesh Singh and Kamlesh singh; her father's

elder brother Ashok Singh and a man who is present in Court in yellow clothes with turban on his head whose name she does not known but identifies in court who has been visiting her house for the last about two months and doing some *tantra-mantra*, and her cousin Vinod Kumar son of Ashok Singh; that they also threatened her that if the Court sends her to Nari Niketan she will be got killed there also; and that they have got kept arms inlawyer's Chamber no. 19.

In the larger interest of justice we direct the police authorities deputed in the court premises to visit lawyer's chamber no. 19 atonce to find out as to whether any arm has been kept in lawyer's chamber no. 19 or not and if it has been kept, to lodge a F.I.R. atonce against the persons concerned and thereafter the police will act in accordance with law.

We are required to rise at 3.15 P.M. so as to assemble in the Full Court reference. Thus it is not possible for us to proceed with this case any further today.

Having regard to the peculiar facts and circumstances, in the larger interest of justice, we direct the Registrar-General of the Court to send petitioner no. 1 at once to Nari Niketan where she will be given all possible protection so that no one could coerce her or make any attempt to kill her, who shall be further produced before us tomorrow at 10.00 A.M. for hearing this case further directing the Senior Superintendent of Police, Allahabad to do the needful in this regard.

We also direct the police authorities in the peculiar facts and circumstances to release petitioner no. 2 forthwith on furnishing Bail bonds of Rs. 5000/- with two sureties of the like amount to the satisfaction of Chief Judicial Magistrate, Hathras who has been arrested in Case Crime no. 665 of 2001 under sections 363, 504, 364 I.P.C., P.S. Sikandar Rau, District Hathras.

The person in yellow dress and turban on his head discloses his name as Narain Das son of Sri Parmanand Resident of Village Binarua, P.S. churkhi, District Jalaun. The other two persons present in court disclose their names as Ashok Kumar son of Hari Mohan and Shiv Kumar son of Santosh Kumar both residents of village Sarai, P.S. Sikandra Rau, District Hathras. The aforementioned three persons identified by the petitioner no. 1 thus prima facie had committed contempt of this court in giving threats to her of being killed and make incorrect statements and have apparently obstructed the administration of justice of this Court and thus we initiate proceedings under Article 215 of the Constitution of India against all of them who are also forwarded before the Registrar-General of the Court for furnishing undertaking that they will produce themselves tomorrow.

This Criminal writ petition and Article 215 contempt proceedings both shall be heard further tomorrow. It is needless to clarify that this Division Bench constituting Allahabad High Court itself has plenary power under the Constitution of India to initiate proceedings in contempt under Article 215 of the Constitution of India for which no rules have been framed under the Rules of the Court and is competent to deal with such a situation *suo moto.*

Before parting for the day we point out that Sri Udai Karan Saxena, who has entered appearance on behalf of Babli alias Maya aforementioned, sought withdrawal as the counsel from this case but at the moment it will not be desirable to pass any order in that regard for the present.

The office is directed to send a copy of this order to (i) Nari Neketan, Allahabad and (ii) Senior Superintendent of Police, Allahabad, in course of the day, for a follow up action.

The office is further directed to hand over a copy of this order to Sri A.K. Verma, learned A.G.A., in course of the day for its intimation to and follow up action by the Chief Judicial Magistrate, Hathras."

6. Thereafter we had heard Mr. Tejpal, the learned counsel for the petitioners and Sri A.K. Verma, the learned A.G.A. on 19.2.2002 and had passed the following order:-

"The Registrar General of the Court informs us that Hon'ble the chief Justice is aware of the problem concerning security of the Court premises which includes the Bar Associations and has already taken some decision. Since Hon'ble Chief Justice of this Court is the administrative head and already in seisin of the threat perception we are of the view that for the present no order on the judicial side of this Court is required to be passed. We give liberty to the Registrar General to inform Hon'ble Chief Justice of the events which had taken place yesterday which stands recorded in our order dated 18th February, 2002 and recovery of the live cartridges and the Country made pistol as orally reported to by the police.

2. Petitioner No.1 Babli alias Maya has been produced before us. She wants to make some further statements. We direct her to make her statements before the Registrar General of the Court, who shall either record himself or get the same recorded by some other Registrar of the Court. Her statements will be recorded in the presence of the contemners.

3. We also direct the contemners, who are present before us to make their statements, if they so like, before the Registrar General of the Court, who shall get the statements recorded personally or through some other Registrar of the Court.

4. After recording of the statements of Petitioner No. 1, she shall be taken to Nari Niketan, Allahabad to be produced tomorrow before us once again.

5. We are being informed by the learned A.G.A. Sri A.K. Verma that Case Crime No. 25 of 2002 under Section 25 Arms Act Police Station Cantt. District Allahabad has been instituted against the contemners. He after perusal of our order dated 18.2.2002 states that apart from Section 25 Arms Act the person concerned have prima facie committed offences under Section 342, 504 and 506 I.P.C. also.

6. Since the contemners against whom criminal prosecution has been launched are required to be produced before the C.J.M., Allahabad or any other competent Magistrate after their statements are recorded, they shall be taken by the Police to be produced before the C.J.M.,

Allahabad or any other Competent Court for a follow up action but they shall be produced by the Police once again tomorrow before us.

7. Put up tomorrow for further hearing this writ proceedings as well as the contempt proceeding awaiting receipt of the statements."

7. It appears that Joint Registrar (Confidential) Sri N.K. Singh recorded the statements of Petitioner No. 1 and three of the contemners.

8. On 20.2.2002 after further hearing Sri Tejpal and Sri Verma we had passed the following order:-
"The Registry has forwarded the statements of Petitioner No. 1 and other three persons in a sealed cover. We direct our Bench Secretary, to open it for our perusal.

2. Yesterday on the basis of the statements made by Sri Verma, learned A.G.A., before us we had passed our order, the relevant part of which, reads as follows:-

"5. We are being informed by the learned A.G.A. Sri A.K. Verma that Case Crime No. 25 of 2002 under Section 25 Arms Act Police Station Cantt. District Allahabad has been instituted against the contemners. He after perusal of our order dated 18.2.2002 states that apart from 25 Arms Act the persons concerned have prima facie committed offences under Section 342, 504 and 506 I.P.C. also.

6. Since the contemners against whom criminal prosecution has been launched are required to be produced before the C.J.M., Allahabad or any other competent Magistrate after their statements are recorded, they shall be taken by the Police to be produced before the C.J.M., Allahabad or any other Competent Court for a follow up action but they shall be produced by the Police once again tomorrow before us."

3. Today we are being informed by Sri Verma, learned A.G.A., that the aforementioned Case Crime No. Is 31 of 2002 and not 25 of 2002 and that it was registered only against Ashok Kumar Yadav alias Ashok Kumar Singh, Son of Harimohan Singh, Resident of Village Sarai Mahamai Salawat Nagar, Police Station Sikandra Rau, District Hathras, who has been described by petitioner no. 1 before us as Ashok Singh who is her father's elder brother; that Ashok Kumar Yadav alias Ashok Singh aforementioned was produced before the Chief Judicial Magistrate, Allahabad who remanded him in judicial custody till 3rd March, 2002 and is in Jail from where he has been taken to the Court in terms of the directions made by us.

4. Sri Verma, learned A.G.A., also informs us that Respondent No. 2 the Investigating Officer of Case Crime No. 665 of 2001, which is sought to be quashed has not contacted him even though he was directed by the Court's order dated 29th January, 2002 to produce Petitioner No. 1 Smt. Babli alias Maya before this Court on 18th Febraury, 2002 or even till date and obviously in not adhering to comply with the directions of this Court aforementioned he has prima facie undermined the authority of the Court.

5. However, as prayed for by the learned Government Advocate Sri R.P.

Dubey, indulgence is granted to Respondent No.2 to explain his conduct in this regard, who shall appear in Court on Monday dated 25th February, 2002 alongwith his entire papers of investigation at 10:00 A.M. when this case will be taken up for further hearing.

6. Sri R.P. Dubey, learned Government Advocate, takes up a stand that due to some misunderstanding on the part of the Police authorities and the absence of the copy of the order dated 18th February, 2002, wherein the statements made by the petitioner no.1 before us have been referred to, the First Information Report could not be bonafide registered against the remaining persons under appropriate Sections of the Indian Penal Code which shall be corrected/rectified in course of the day and the remaining persons shall also be produced before the Chief Justice Magistrate, Allahabad for a follow up action.

7. Respondent No. 3, Shiv Kumar, Son of Santosh Singh, Resident of Village Sarai Mahamia, Salawat Nagar, Police Station Sikandra Rau, District Hathras has been apparently described incorrectly as Shri Kumar. He has been produced before us. He claims his age about 14 years, though in his statement made before the Registry he has asserted his age to be 15 and half years. Thus, he prima facie appears to be a juvenile.

Accordingly, we direct the local Police to release him on bail in the Case Crime in question in which he is likely to figure after taking a personal bond of Rs. 1,000/- (Rupees One thousand only) from his father's elder brother Ashok Kumar Yadav, subject to further order of the Court.

8. Petitioner No. 1 in her statement before the Registry of the Court has stated that she knew Om Veer Singh (Petitioner No. 2) for the last three years who is having a wife and son living.

In this view of the matter we are prima facie of the view that the alleged marriage of Petitioner No. 1 with Petitioner No. 2 is void in law being contrary to the provisions of Section 5 of the Hindu Marriage Act even though she asserts that she is bearing a child through Om Veer Singh.

We order that Petitioner No. 1 shall be taken to Nari Niketan till further orders to the contrary clarifying that she will be produced before us, if and when we pass an order in that regard directing further that the person and property, if any which she is carrying, shall be protected by the Police authorities in terms of our earlier order.

9. The contemners except the juvenile once will be produced on Monday dated 25th February, 2002 for further hearing of the writ proceeding and the contempt proceedings so that article of charges in regard to committal of Criminal contempt be framed in their presence.

10. If anyone applies for having a certified copy of the statements made by the four persons concerned, he shall be supplied the same as per the law.

11. Let a copy of this order be handed-over to Mr. A.K. Verma, learned Additional Government Advocate/Mr. R.P. Dubey, learned Government Advocate, in course of the day for its intimation to and follow up action by the authority concerned."

9. In his Counter Affidavit Respondent No. 2 the I.O. Kripal Singh has stated, inter alia, that he has recorded the statements of the Constable clerk Pradeep Kumar, the first Informant Shiv Kumar, Ashok Kumar, Smt. Hardai (the grand mother), Rakesh Kumar and Santosh Singh; that he also did the spot inspection and prepared site plan; that on 9.12.2001 he also recorded the statement of accused Jagveer Singh but the investigation was transferred from him to Manoj Kumar Singh the sub-Inspector; and that thereafter he handed-over the entire case diary to Manoj Kumar Singh the sub-Inspector.

10. In his Counter Affidavit the sub-Inspector Manoj Kumar Singh has stated, inter alia, that he moved an application before the Magistrate for initiating proceeding under Sections 82/83 Cr.P.C. on which non-bailable warrant was issued against the accused persons; on 26.1.2002, when he was in search of the victim Km. Babli and the accused Om Veer Singh at about 4:35 P.M. arrested them near Sikandara Railway Station and recorded their statements; Km. Babli filed an application that she wanted to go alongwith her father then on that very day she was permitted to go alongwith her uncle Ashok Kumar, who was directed to produce her for her medical examination and X-ray on 28th January, 2001; On 28th January Km. Babli was brought to the Police Station, but she declined to give her statement due to her illness and then she was sent for her medical examination and X-ray, on 30th January he obtained the medical report of the C.M.O.; the Statement of the victim was recorded under Section 164 Cr.P.C. on 2nd February which he could see on 4th February, 2002; and that after perusing all the records including the statements of the victim as well as the medical report he has added Section 363, 366, 506 I.P.C. but the investigation is still going on after completion of which the report will be submitted before the competent court.

11. What had happened before us on 25th February, 2002 stands reflected in our order, which reads thus:-

"Mr. A.K. Verma, learned Additional Government Advocate, files a Counter Affidavit sworn by Kripal Singh, who was the earlier Investigations Officer and another Counter Affidavit sworn by the subsequent Investigating Officer which are being kept on the record.

2. Mr. Verma also produces two X-rox copies of the Police diary which are being kept on the record.

3. Mr. Tejpal, learned counsel for the petitioners, challenges the correctness of the Medical examination of the petitioner no. 1 and the opinion given by the doctor that petitioner no. 1 is aged 17 years as stated in the Police diary whereas according to the medical examination and the certificate granted by the C.M.O., Mainpuri as contained in Annexure-2 to the writ petition, she is aged 20 years.

4. We also put on record the stand of the Investigating Officer that he had arrested the petitioners near Hathras Railways Station which fact has been disputed by Sri Tejpal, learned counsel for the petitioners, stating that in fact the petitioners were arrested by the Police of Police Station Colenlganj, town and District Allahabad on 23.1.2002 from Aman Hotel, Mohalla Katra nearby the Lower court where they were staying

which fact has also been published in form of a news item at page 3 of the newspaper named `Amrit Prabhat' Allahabad dated 24.1.2002 which is being produced by him and kept on the record and that this fact was also apprised to the Court on 29th January, 2002 on which a direction was issued to the Investigating Officer (Respondent no. 2) to produce petitioner no. 1 and that as a face saving device deliberately incorrect entries have been made in the Police diary.

5. In this back ground we, for the present in the interest of justice, direct the Senior Superintendent of Police, Allahabad to see that the records of Police Station Colonelganj of 23.1.2002 are produced before us to find out as to whether entries in the Police diary which have been produced before us are fictitious, forged and fabricated.

6. The Senior Superintendent of Police, Allahabad will also see that through some responsible Police Officer petitioner no. 1, who is presently in Nari Niketan, is produced before us tomorrow.

7. The contemners who have been produced before us shall be re-produced tomorrow.

8. Put up tomorrow for further hearing.

9. The office is directed to serve a copy of this order on Sri Verma, learned A.G.A. if possible in course of the day who is authorized by us to inform the substance of this order to Senior Superintendent of Police, Allahabad for compliance of the direction aforementioned."

12. Today what happened before lunch before us stands reflected in our order, which reads as follows:-

"26.2.2002 - In terms of our direction the General Diary entries made in the General Diary of the Police Station Colonelganj, Allahabad from 17th January, 2002 to 25th January, 2002 has been produced by Sri A.K. Verma, learned A.G.A. Entry No. 44 of which is at page 90 of the General Diary shows arrival of Sub Inspector Manoj Kumar Sharma, constable no. 648 Suresh Chandra and Constable No. 10 Bhagari Prasad from Hathras in connection with the case crime no. 665 of 2001 under section 363/366/364 I.P.C. and returned back. This entry has been recorded at 18.35 that is to say 6:35 P.M. in the evening which prima facie corroborates the statement of petitioner no. 1 that she was arrested from Allahabad and belies the claim of the Police investigation that she was arrested in the manner as indicated in the Police Diary.

Accordingly, in the interest of justice, we direct the S.H.O., P.S. Colonelganj to be present in Court at 1:45 P.M. to have his version in this regard.

After dictation of the aforementioned order 15 minutes was granted to the I.O. Sub Inspector Manoj Kumar Sharma and the Head Constable (No. 153) Ram Lal to rethink over the correctness of their statements made before us as well as in the Police Diary. Mr. A.K. Verma, learned A.G.A., after some talks with them informs us that it is a fact that the petitioner no. 1 as well as petitioner no. 2 both were arrested at Allahabad.

We give a chance to the I.O., S.I. Manoj Kumar Sharma to make his statements on oath by way of a supplementary affidavit while adjourning the further hearing of these two proceedings to be resumed today at 1.45 P.M."

13. After lunch Mr. A.K. Verma, filed an Affidavit of the Investigating Officer stating that the figure `25' is a typographical error in lieu of `24' as mentioned in the earlier part of Paragraph-2 and that the I.O. who has tendered his unqualified apology has left himself at our mercy and that he be exonerated and pardoned.

14. Mr. Tej Pal contended that in view of the fact that petitioners being major had married lawfully much before the alleged occurrence, therefore, the entire accusations in the impugned F.I.R. are false and it is liable to be quashed, the petitioner's fundamental rights enshrined under Article 21 of the Constitution of India, which guarantees them to lead a meaningful married life cannot allowed to be breached, and thus the reliefs prayed for be granted.

15. Mr. A.K. Verma contended as follows:- In view of the statements made in the Counter Affidavits of the two I.O.s this writ petition is liable to be dismissed. In any view of the matter in view of the statements made by petitioner no. 1 herself before the Joint Registrar of the Court she has married petitioner no. 2, who was a married person and having his wife and a child living and thus the case set-forth in paragraph 7 of this writ petition that petitioner no. 2 was unmarried is absolutely a false statement; since the petitioner no. 2 is already having a wife, the alleged marriage of petitioner no. 1 with petitioner no. 2 was void and nullity in the eye of law; true it is that mistake has been committed by the present I.O. in the diary in showing the arrest of the Petitioners nearby Hathras Railway Station, whereas they were apprehended at Allahabad in that regard to which has filed his Affidavit and has tendered unqualified apology and grant of mercy and pardon for his exoneration but the materials collected by him during investigation which have been mentioned in the Diary prima facie shows that petitioner no. 1 on examination by the C.M.O., Hathras, was found to be aged about 17 years only and thus there is no question of giving of her any consent whatsoever in law so as to give a handle to petitioner no. 2 to escape the investigation and if charge sheet is submitted the consequent trail and thus this writ petition is fit to be dismissed.

16. Sri Tej Pal, on the other hand, replied that petitioner no. 2 had married petitioner no. 1 after divorcing his first wife as per the custom prevalent in their caste, which is permissible under Section 29(2) of the Hindu Marriage Act, 1955. He took up a stand that the Petitioners are prepared to file a Supplementary Affidavit in this regard bringing on record the relevant pleadings. Alternatively, he contended that since the Doctor's report, appended as Annexure-2, shows Petitioner no.1 as major, therefore, she is entitled to reside with her husband petitioner no. 2 as his wife invoking her fundamental right to lead a meaningful life as enshrined under Article 21 of the Constitution of India. He also emphasized that no Counter Affidavit having been filed by the Respondents therefore the

statements made by the petitioners on oath be accepted as correct.

17. Mr. Verma replied that in terms of the order dated 29.1.2002 the Petitioners were required to take steps to serve Respondent no.2 who has been impleaded by his name and that both I.O.s have appeared and filed Counters and the case diary when they were apprised of our order for production of the Diary.

18. This issue as to whether petitioner no. 1 is minor or major, which is a question of fact and shall have a crucial effect should not be adjudicated in this summary proceeding under Article 226 of the Constitution of India specially when the Chief Judicial Magistrate, Hathras is in seisin of the case, which, when properly contested by petitioner no. 2, can be appropriately adjudicated.

19. In Pargraph-7 of this writ petition it has been asserted by the petitioners that both of them were unmarried and entitled to marry each other in view of Section 5 of the Hindu Marriage Act. The statement to the effect that petitioner no. 2 was unmarried cannot be accepted by us in view of the clear cut statement made by petitioner no. 1 hereself in her statement before the Joint Registrar of the Court in terms of our directions that petitioner no. 2 was married and having his wife and child.

Apparently, the petitioners have taken recourse to falsehood in this regard. The statement made by petitioner no. 1 that petitioner no. 2 was married and having a wife and a child has not been dubbed as incorrect by Mr. Tejpal before us. We, however, in the peculiar facts and circumstances do not intend to issue notices to the petitioners for showing cause as to why a proceeding in contempt be not initiated against them for swearing a false affidavit and that a prosecution be launched for perjury.

20. The belated statement of Mr. Tej Pal that before performing his marriage with petitioner no. 1 petitioner no. 2 has divorced his first wife as per the custom does not require our scrutiny. The law is well settled that plea of custom is required to be taken and proved. No such pleading having been taken in this writ petition that as per the custom petitioner no.2 had divorced his first wife we do not feel persuaded to adjourn this case and give a handle to the petitioners to introduce a new case after we had recorded a finding on 20.2.2002 that prima facie the marriage is void. Significant in this context that the petitioner no. 1 had also stated that the petitioners had married with consent of the wife of Petitioner No. 2.

21. The argument made by Mr. Tej Pal that the petitioners are entitled to reside as married husband and wife invoking Article 21 of the Constitution of India does not appeal to us at all. Firstly the question as to whether Petitioner No. 1 is minor or major shall have a vital bearing. Secondly, even a major girl or woman cannot invoke any fundamental right to live with a male who is having a wife and child. The Constitution of India vide Article 23 (1) forbids immoral traffic. So does the Prevention of Immoral Traffic Act. The Indian Penal Code and the Hindu Marriage Act does not permit bigamy. Section 18 of the Hindu Marriage Act also prescribes punishment for violation of conditions specified in Clauses (iii) of Section 5. This

Constitutional Court if proceeds to permit them to lead a marital life it will apparently mean perpetuating bigamy, which is an offence under Section 494 and 495 of the Indian Penal Code as well as Section 17 of the Hindu Marriage Act, 1955. The two decisions of the Apex Court cited by the petitioners are of no help to them. Thus for the aforesaid reasons we reject grant of the prayers.

22. Further as a guardian of the Constitution of India so far as this State is concerned, we cannot brush aside the fundamental right of the wife and child of petitioner no. 2 to lead a meaningful life guaranteed to them under Article 21 of the Constitution of India and other rights available under the provisions of the Hindu Marriage Act and we must uphold their right giving liberty to them to ventilate their grievances, if and when raised by them, before any appropriate Authority or Court, which is bound to adjudicate them in accordance with law.

23. In view of the divergence in the two medical opinion we, in the interest of justice, constitute a three Member Medical Board comprising (i) the Principal of the S.N. Medical college, Agra as its Chairman (ii) Head of the Department of Orthopedics of the S.N. Medical College as its Member and (iii) Head of the Department of Gynecology of the S.N. Medical as its 2nd Member, which will examine petitioner no. 1 after obtaining Radiological Report (Ossification of Bones Test of petitioner no. 1) from their Radiology Department and opinion of their Radiologist whether petitioner no. 1 was minor or major on 4.12.2001. The Medical Board shall be obliged to give its Report keeping in mind the decisions of the Supreme court that such a report does not conclusively prove the correct age of a person and that there are chances of error of one or two years on either side, which shall be forwarded to the C.J.M., Hathras. The costs in this regard has to be met by petitioner no. 2.

24. The admission of the Investigating Officer before us that he has committed mistake in showing the arrest of the Petitioners nearby Hathras Railways Station coupled with the fact that since petitioner no. 1 had not committed any offence she could not have been arrested at all added by contradictory medical opinions brought on our record in regard to which we have constituted a Medical Board and since the question of minority and/or majority of petitioner no. 1 shall have a vital bearing in the interest of justice, we direct the Superintendent of Police, Hathras to get further investigation done by a Police Officer not below the rank of a Deputy Superintendent of Police, who shall proceed with the further investigation of the Case Crime in question only after the receipt of the report of the Medical Board, aforementioned.

25. Petitioner no. 1 was taken to Nari Niketan, Allahabad. She has expressed a desire before us that she will like to reside with her Maternal Uncle Prem Singh son of Yadram, Resident of Village Onni, Police Station Mehrar, District Etah (U.P.) and/or Yadram himself who is her Maternal-grand-father, if we do not allow her to reside with petitioner no. 2. She will remain in Nari Niketan, Allahabd for three days. Her Maternal Uncle and/or Maternal Grand Father aforementioned shall be at liberty to visit Nari Niketan, Allahabad to take her away for her living with them, who

shall produce her before the Chief Judicial Magistrate, Hathras within one week for sending her to the Medical Board for the purpose already indicated earlier. In the event of their failure to take petitioner no. 1 from Nari Niketan the Hathras Police will take her before the C.J.M., Hathras for doing the needful in accordance with law.

26. Our direction to release petitioner no. 2 vide order dated 18.2.2002 shall remain in operation till the receipt of Report of the Medical Board of the C.J.M., Hathras.

27. The Criminal Case instituted by the Allahabad Police shall proceed in accordance with law.

28. As prayed for by Mr. U.K. Saxena, Advocate, who has filed subsequently a further Vakalatnama of petitioner no. 1, his appearance is cancelled.

29. In regard to the security of the premises of this court we have already directed the Registrar General to appraise Hon'ble the Chief Justice, who is administrative head of the court, for doing the needful and in that view of the matter no further direction of ours is required.

30. The General Police Diary of Police Station Colenganj, Allahabad is being returned back to Mr. A.K. Verma, learned Additional Government Advocate.

31. Let a copy of this order be dispatched forthwith to the Chief Judicial Magistrate, Hathras for a follow up action by the Medical Board and him as well.

32. Let a copy of this order be also handed over to Mr. A.K. Verma, learned Additional Government Advocate, forthwith, for its intimation to and follow up action by the Superintendent of Police, Hathras.

33. This writ petition is disposed of accordingly, but without cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2002

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

Criminal Misc. Application No. 1189 of 2002

Pintu and another ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri R.P. Singh Yadav

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

Cr.P.C. in Section 482 – the accused can not be debarred from adducing evidence in defence simply because while recording their statement under Section 313 Cr.P.C., they answered in negative to a question whether they want to adduce evidence.

Held-Para 8

The fact that the accused has stated in reply to question no. 10 that they do not want to adduce any evidence in defence is of no avail. They cannot be debarred from adducing evidence in defence on that score. The learned Additional Sessions Judge, therefore, shall pass an order under S.232 Cr.P.C. and thereafter call upon the petitioners to enter on their

defence and adduce evidence in defence under Section 233 Cr.P.C. In case, the petitioners after the order is passed under Section 232 Cr.P.C. wishes to produce evidence in defence, they shall be permitted to produce evidence in defence. This procedure shall be followed by the learned Additional Sessions Judges notwithstanding that the petitioners have said in reply to the question that they do not want to produce any evidence in defence.

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

1. The applicants are accused in S.T.No. 1302 of 1999 State Vs. Pintu and another, under Section 376 I.P.C. pending in the court of XI Addl. Sessions Judge, Bulandshahr. In the case, the statements of the applicants were recorded under Section 313 Cr.P.C. on 25/07/2001. One of the questions, which was question no. 10, put to the applicants was whether they want to adduce evidence in defence. The reply given to this question by the applicants was in negative.

2. Thereafter, the applicants moved an application that the statements under Section 313 Cr.P.C. were recorded in the absence of the their counsel; that the reply to question no. 10 in negative has been recorded by mistake, that they want to adduce oral as well as documentary evidence in defence. The request has been rejected by the impugned order, dated 08/01/2002 by the trail court. Aggrieved by it, this petition has be preferred.

3. I have heard Sri R.P.S. Yadav, learned Counsel for the petitioners and the learned A.G.A.

4. The argument that wrong reply to the question no. 10 was recorded by the learned Addl. Sessions Judge cannot be accepted. However, for this reason the applicants cannot be debarred from producing oral or documentary evidence in defence.

5. The procedure for trail before a court of Sessions has been provided in Chapter XVIII of the Code of Criminal Procedure, 1973 consisting of Sections 225 to 237 Cr.P.C. Sections 231 and 233 of the code provide that Sessions Judge after recording the entire evidence of the prosecution and examining the accused and hearing the prosecution and the defence may record the order of acquittal if he considers that there is no evidence that the accused has committed the offence. Section 233 further provides that if no order of acquittal is recorded under Section 232 Cr.P.C.; the accused shall be called upon to enter on his defence and to adduce any evidence he may have in support thereof. For the purpose of clarity Sections 232 and 233(1) Cr.P.C. are reproduced below :

"Section 232: Acquittal – If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.

Section 233(1) : Entering upon defence – Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof."

6. From the perusal of the provisions of Chapter XVIII the Code of Criminal Procedure, 1973, especially Sections 232 & 233 Cr.P.C., it is apparent that the

question whether the accused want to produce evidence in defence should not be put to the accused while recording statement under Section 313 Cr.P.C. Therefore, question no, 10 was wrongly put to the petitioners while examining them under Section 313 Cr.P.C.

7. In view of the above provisions the question – Whether the accused want to adduce evidence in defence should not have been put to the accused while recording statement under Section 313 Cr.P.C. in Sessions trail. After the prosecution evidence is recorded and the statement of the accused is also recorded an order should be passed under Sections 232 Cr.P.C. If the accused are not acquitted by that order on the ground that there is no evidence that the accused committed the offence, only then the accused should be called upon to enter into his defence and adduce any evidence he may have in support thereof as provided under Section 233 CR.P.C.

8. In view of what have been said above, The fact that the accused has stated in reply to question no. 10 that they do nowt want to adduce any evidence in defence is of no avail. They cannot be debarred from adducing evidence in defence on that score. The learned Additional Sessions Judge, therefore, call upon the petitioners to enter on their defence and adduce evidence in defence under Section 233 Cr.P.C. In case, the petitioners after the order is passed under Section 232 Cr.P.C. whishes to produce evidence in defence, they shall be permitted to produce evidence in defence. This procedure shall be followed by the learned Additional Sessions Judges notwithstanding that the petitioners have said in reply to the question that they do not want to produce any evidence in defence.

The petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2002

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

Civil Misc. Writ Petition No. 3002 of 2002

Daya Shanker Singh ...Petitioner
Versus
State of U.P. through Principal Secretary (Irrigation)and others ...Respondents

Counsel for the Petitioner:
Sri R.C. Singh

Counsel for the Respondent:
S.C.

Constitution of India – Article 226 – a vigilance enquiry – No writ as against a vigilance enquiry as it does not give rise to any cause of action.

Held – Para 2

A vigilance enquiry is only in the nature of a preliminary enquiry is only for the subjective satisfaction of the employer. It is possible that some fresh evidence or material may have become available to the department implicating the petitioner in some misconduct that may not have been available earlier. Hence there is no absolute bar to holding of a fresh enquiry, even assuming that he was exonerated earlier, provided there is some fresh material. Learned counsel for the petitioner has relied on the G.O. dated 20/12/65 in support of his submission that after an employee has been exonerated in an enquiry a fresh enquiry or a vigilance enquiry cannot be

held. We are of the opinion for the reasons given above that the said G.O. is only directory and not mandatory in nature.

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

1. The petitioner has challenged a vigilance enquiry. In our opinion no writ lies against a vigilance enquiry, since such enquiry doses not give rise to any cause of action against which the petitioner can be aggrieved.

2. Learned counsel for the petitioner has submitted that on the same charges the petitioner was exonerated in a disciplinary enquiry and hence subsequently a vigilance enquiry cannot be held. We do not agree with this submission. A vigilance enquiry is only is the nature of a preliminary enquiry and hence the petitioner can have no grievance as a preliminary enquiry is only for the subjective satisfaction of the employer. It is possible that some fresh evidence or material may have become available to the department implicating the petitioner in some misconduct that may not have been available earlier. Hence there is no absolute bar to holding of a fresh enquiry, even assuming that he was exonerated earlier, provided there is some fresh material. Learned counsel for the petitioner has relied on the G.O. dated 20/12/65 in support of his submission that after an employee has been exonerated in an enquiry a fresh enquiry or a vigilance enquiry cannot be held. We are of the opinion for the reasons given above that the said G.O. is only directory and not mandatory in nature.

3. The with petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 14, 2002

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

Civil Misc. Writ Petition No. 741 of 2001

M/s P.N.C. Construction Company Limited ...Petitioner
Versus
State of U.P. through Institutional Finance Secretary, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Bharat Ji Agarwal
Sri P.K. Misra
Sri Piyush Agrawal

Counsel for the Respondents:
Mr. Kesarwani
Dr. R.G. Padia
S.C.

Constitution of India, Article 226/22 – Writ Petition maintainability – order proceeding found totally illegal – writ petition – held maintainable.

Held – Para 15

The contention of the learned Standing Counsel that at this stage only notice has been issued and, therefore, this petition does not lie at this stage is also of no substance for the reason that it is well settled legal position that this court can entertain the writ petition and may pass appropriate order. Since we have already concluded in the forgoing paragraphs of this judgment that the impugned notice is without jurisdiction, this Court can entertain the writ petition while exercising its jurisdiction under Articles 226/227 of the Constitution of India and the petitioner cannot be relegated to the jurisdiction of the assessing authority to

show cause and explain the position before him.

(Delivered by Hon'ble S.R. Alam-J.)

1. This petition under Article 226 of the Constitution is directed against the notice dated 09.05.2001 issued by the Trade Tax Officer. Sector 14, Agra calling upon the petitioner to appear before him on 16.05.2001 and to file written reply as to why the recognition certificate issued under sub Section (2) Section 4-B of U.P. Trade Tax Act (hereinafter referred to as the Act) be not cancelled.

2. We have heard Shri Bharat Ji Agarwal, learned senior counsel appearing for the petitioner. Mr. Kesarwani, Learned Standing Counsel appearing for respondents no. 1 to 3 and Dr. R.G. Padia, learned counsel appearing for respondents no. 4 & 5.

3. It appears that the petitioner is a public limited company incorporated under Indian Companies Act, 1956 and registered under the U.P. and Central Sales Tax Act. It entered into a contract with National Highway Authority of India, New Delhi for the construction of 4/6 lane of national highways of north, south, east and west of the Agra Gwalior section NH-3 and for laning of 24 kms To 41 kms of Agra Bholpur section of NH-3 in the State of U.P. besides that work of maintenance and repair of NH-2-U.P.-3 in the State of U.P. was also given. It was also awarded work by the Construction Division, Agra and Mathura for strengthening and widening the road and maintenance and repairs of certain roads. It applied for grant of recognition certificate under section 4-B of the Act for the purchase of raw material for manufacture of hot mix material in its hot mix plant. The Trade Tax Officer rejected the request of the petitioner against which an appeal was preferred before the Deputy Commissioner (Appeals), Trade Tax, which was also dismissed vide order 24.04.1997. The aggrieved petitioner thereafter preferred second appeal no. 75 of 1997 before the Trade Tax Tribunal, Agra. The learned Trade Tax Tribunal, Agra having heard the parties found that the hot mix material is manufactured by the appellant-petitioner in the hot mix plant from cement, sand grits, bitumen etc. for the construction of roads. It is also found that for manufacturing hot mix material recognition certificate is granted to M/s National Highway Construction Company, Mathura and M/s Oriental Construction Engineers Ltd., Mathura. The learned Tribunal, therefore, allowed the appeal and directed the assessing authority to grant recognition certificate for the purchase of raw material against Form 3-B at a concessional rate of tax. Consequently, the Trade Tax Officer/Assessing authority issued recognition certificate in favour of the petitioner for the purchase of bitumen, furnace oil. H.S.D. and lubricant. The petitioner thereafter pursuant to the recognition certificate purchased various raw materials against Form 3-B. The Commissioner, Trade Tax U.P., however, issued circular on 17.01.2001 intimating that the purchase of the materials, which are used in the construction of road, cannot be made against Form 3-B. It was followed by another circular dated 23.02.2001 to the effect that the recognition certificate issued under Section 4-B of the Act to the dealer with regard to purchase of bitumen, chemical compound and grits against Form 3-B

should be reviewed by the issuing authority. Pursuant to the aforesaid circular the impugned notice date 19.05.2001 is issued as to why the same should not be cancelled.

4. Shri Bharatji Agarwal, learned counsel for the petitioner contended that the goods used in execution of works contract like construction of buildings or construction of roads amounts to sale of goods and, therefore, requisite declaration forms can be given for the purchase of raw material in respect of such contracts. It is further argued that the revenue did not challenge the order of the learned Trade Tax Tribunal passed in second appeal preferred by the petitioner by filing revision as provided under Section 11 (1) of the Act and, therefore, order of the Tribunal dated 19.07.1997 attained finality and the recognition certificate granted pursuant thereto cannot not now be cancelled on the basis of the circular issued by the Commissioner, Trade Tax. It is also submitted that the petitioner has accepted the contract keeping in view the cost of purchase of bitumen and other materials against Form 3-B as it holds a valid recognition certificate under Section 4-B (2) of the Act and now if the recognition certificate is cancelled in that event he will have to purchase raw materials such as bitumen etc, by paying tax at the rate of 20% rendering whole contract in viable and it may be compelled to stop the construction.

5. On the other hand, Shri Kesarwani, Learned Standing Counsel opposed the writ petition and submitted that the impugned order is merely a notice calling upon the petitioner to show cause and therefore, this petition is premature and the appropriate remedy available to the petitioner is to raise all the contentions before the Assessing Authority. He, however, contended that the goods manufactured by the petitioner cannot be sold either in the State or in the course of interstate trade as provided under sub Section (2) of Section 4-B of the Act nor the final product of the petitioner is for sale hence the benefit of Section 4-B of the Act is not available to the petitioner. In short the submission is that the goods manufactured by the petitioner is not intended to be sold and, therefore, benefit of Section 4-B cannot be extended to the petitioner and the impugned notices for cancellation of recognition certificate has rightly been issued.

6. We have considered the submissions made on both sides, Admittedly; the petitioner is manufacturing hot mix materials out of different raw materials purchased against Form 3-B issued to the petitioner in pursuance of the recognition certificate granted under Section 4-B (2) of the Act. It is also not disputed in the counter affidavit filed by the department that the hot mix materials manufactured by the petitioner is used in carrying on the works of the construction, repairing and maintenance of roads.

7. The scope of tax on sale and purchase of goods is enlarged after the new definition introduced in clause 29-A of Article 366 of the Constitution. Accordingly, Section 3-F was inserted by U.P. Act No. 25 of 1985 in the U.P. Trade Tax Act providing for levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of work contract. The definition of sale given in the Act was

also substituted and defined in clause (h) of Section 2 as under:

2(h) "sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes-

(i) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire-purchase or any system or payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;]"

8. Therefore, the goods used in execution of work contract are deemed to be sold, 'Goods' is defined in Section 2 (d) of the Act in the following terms;

"goods" means every kind or class of movable property and includes all materials commodities and articles involved in the execution of a works contract, and growing crops grass, trees and thing attached to or fastened to anything permanently attached to the earth which under the contract of sale are agreed to be served but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department."

'Manufacture' is also defined under Section 2 (c-1) of the Act which is as under:

"manufacture" means producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adopting any goods; but does not include such manufacture or manufacturing processes as may be prescribed."

9. In the case in hand, the activity of petitioner is to manufacture hot mix material from different raw materials such as bitumen, concrete, grits, chemicals etc. in its hot mix plant. For the purpose the petitioner has got four hot mix plants and after processing the raw materials in the hot mix plant, the produce which comes out is entirely different product than those used as raw materials in the process of manufacturing and is known as hot mix material which is used in the construction of roads or its repairing. The Trade Tax Tribunal in its order dated 19.07.1997 found that the petitioner manufactures hot

mix material in hot mix plants by using different materials and it is used in the construction of roads which amounts to sale under the definition of sale given in the Act and thus, the petitioner satisfies the condition laid down in Section 4-B (2) of the Act for grant of recognition certificate.

10. In paragraphs 4,7,10 and 16 of the writ petition, it has specifically been pleaded that the hot mix material manufactured by the petitioner is used in the repair, maintenance and construction of roads in the execution of work contract and this has not been specifically denied in the counter affidavit filed on behalf of the department. The stand taken in the counter affidavit, in short, is that the goods manufactured by the petitioner, i.e., hot mix materials is not intended to be sold, hence the benefit of Section 4-B of the Act is not available to him, which cannot be accepted in view of the legal position that the goods used in execution of work contract are deemed to be sold. Therefore, looking to the activities of the petitioner which is not specifically denied even before this Court in the counter affidavit, we are of the view that the petitioner fulfils the requirement of law for availing the benefit of section 4-B of the Act.

11. The recognition certificate under Section 4-B (ii) of the Act was granted to the petitioner pursuant to the order of the learned Trade Tax Tribunal dated 19.07.1997 in Second Appeal No. 75 of 1997 for the purchase of raw material against Form 3-B with effect from 1st of March, 1997, i.e. from the date of application and respondents did not challenge the order of the learned Trade Tax Tribunal by preferring revision under Section 11 of the Act, thus it became final and binding on the parties.

12. It is well settled legal position that the Revenue Officers are bound by the decision of the appellate authority. The Trade Tax Tribunal being appellate authority. The Trade Tax Tribunal being appellate authority, its order is binding upon the assessing Authority and the revenue who functions under the jurisdiction of the Tribunal. The Apex Court in the case of ***Union of India and others Versus Kamlakshi Finance Corporation Limited*** reported in AIR 1992 SC page 711 held that the principles of judicial discipline require that the order of the appellate authorities should be followed unreservedly, by the subordinate authorities and if this healthy rule is not followed the result will only be undue harassment to assessees and chaos in administration of tax laws.

13. The Apex Court in the case of ***Authorised Officers (Land Reforms) Vs. M.M. Krishnamurthy Chetty***, reported in 1998 Vol. 9 SCC 138, held that it is well settled that even order which may not be strictly legal, become final and are binding between the parties if they are not challenged before the superior court. Similar view was again reiterated by the Apex Court in the case of ***V. S Charati Vs. Hussein Nhanu Jamadar (Dead) by LRS***, reported in 1999 vol. 1 SCC 273 and in para 9 of that judgement it was observed that a decision simply because it may be wrong would not thereupon become a nullity it would continue to blind the parties unless set aside. Therefore, the respondents having not challenged the order of the learned Sales Tax Tribunal dated 19.07.1997 is bound by the same.

14. Beside that from a perusal of the impugned notice dated 09.05.2001, it is apparent that the proceeding for cancellation of recognition certificate is being initiated on account of two circulars dated 07.01.2001 and 23.02.2001 issued by the Commissioner of Trade Tax, U.P., Lucknow. There is no allegation in the notice that the petitioner has violated any terms or conditions of the recognition certificate or it is being misused, nor it is alleged that the raw materials purchased on the basis of recognition certificate are not being utilized in the construction of road pursuant to the work, contract. Had it been the case where it has been found that the assesses or the petitioner has misused the recognition certificate or not used the raw material purchased against Form 3-B for the purpose it has been issued, in that event, the assessing authority or the competent authority could have initiated proceeding for cancellation of recognition certificate. But merely on the basis of the aforesaid two circulars issued by the Commissioner of Trade Tax much after the grant of recognition certificate, which in our view, cannot be enforced with retrospective effect, it does not justify initiation of proceedings for cancellation of the recognition certificate granted pursuant to the order of the Sales Tax Tribunal which was never challenged by the department by filing revision under Section 11 of the Act and thus, the order of the learned Tribunal became final and binding on the parties and now it is not open for the revenue to sit over the judgment on the basis of aforesaid two circulars. By not filing revision against the order of the learned Tribunal, it would be deemed that the revenue has accepted the order and now it cannot turn around to nullify the order which they could have very well assailed in appropriate proceeding provided under the Act itself. In that view of the matter, the order of the learned Tribunal is binding on the revenue and the impugned notice is without jurisdiction.

15. The contention of the learned Standing Counsel that at this stage only notice has been issued and, therefore, this petition does not lie at this stage is also of no substance for the reason that it is well settled legal position that where the order or proceeding is wholly without jurisdiction, this court can entertain the writ petition while exercising its jurisdiction under Articles 226/227 of the Constitution of India and the petitioner cannot be relegated to the jurisdiction of the assessing authority to show cause and explain the position before him, specially when the statement of facts averred in the writ petition is not denied so far as it relates to the activities of the petitioner, and also in the absence of any allegation regarding misuse of the recognition certificate. That apart, the assessing authority, i.e. Trade Tax Officer, Sector 14, Agra respondent no. 3 being subordinate to the Commissioner of Trade Tax, is bound by the circulars and, therefore, asking the petitioner to give show cause pursuant to the notice would be illusory and an empty formality.

16. Learned Standing Counsel pointed out that in Writ Petition No. 970 of 2001 – M/s Khattar & Co., Pvt. Ltd. Vs. State of U.P. & others, this Court against the order of Assistant Commissioner (Assessment-9), Trade Tax, Agra, cancelling the certificate issued under Section 4-B of the Act, refused to entertain the writ petition and directed that petitioner to exhaust alternative remedy by way of appeal

provided under Section 9 of the Act. The record of writ petition no. 970 of 2001, was also placed before us along with the instant writ petition. A perusal of the record shows that in the case that writ petition was preferred against the final order dated 30.07.2001 cancelling the recognition certificate. It further appears that earlier that notice was issued under Rule 25-Ka (9) to show cause as to why the recognition certificate should not be cancelled for violating the provision of section 4-B of the Act, pursuant to which show cause was filed before the assessing authority and thereafter, by a reasoned order dated 30.07.2001, the recognition certificate was cancelled. Since in that case final order was passed, therefore, this Court directed to exhaust the statutory remedy of appeal, whereas in the casein hand, there is no allegation of violation of any terms and conditions of the recognition certificate or of the provisions contained in Section 4-B of the Act nor there is any allegation of misuse of recognition certificate or of Form 3-B and the petitioner approached this Court immediately after issuance of notice instead of submitting to the jurisdiction of the assessing authority. Therefore, the case of the present petitioner cannot be equated with that of writ petition no. 970 of 2001.

17. In view of the discussions made above the writ petition succeeds and is allowed. The impugned notice dated 09.05.2001 and the proceeding initiated pursuant thereto, are quashed. There shall, however, be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABD 14.03.2002

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

Special Appeal No. 71 of 2001

Keshav Prasad Lal ...Appellant
Versus
State of U.P. and others ...Respondents.

Counsel for the Appellant:
Smt. Poonam Srivastava

Counsel for the Respondents:
Sri Umesh Kumar Pandey
S.C.

U.P. Consolidation Lekhpal Service Rules 1978 – Section 24- Retirement where the Rules is silent – Provision of Government servant Rule applicable after the revision of pay Scale – considering the qualification, nature of work, the Lekhpals are much qualified and doing ministerial work – they are class III employees – retirement at the age of 58 held proper.

Held – Para 13

The functions and duties of Consolidation Lekhpal is almost of ministerial nature such as to collect agricultural statistic in respect of Kharib and rabi crops every year during the period the village remains under the consolidation operation, to prepare statement in CH forms 7 regarding the amount of land revenue payable on new holdings and also to prepare revised annual register in Ch form II incorporating all the orders relating to rights and liabilities in respect of the land etc. which are of clerical nature. Besides that qualification for appointment to the post of Consolidation Lekhpal is high school, with a training

certificate of Patwari or Lekhpal whereas the qualification for Group 'D' employees in Rule of 1985 in Class 5 only. So far as peon, messenger, Cyclostyle Operator and other post is concerned no educational qualification is required in terms of Rule 6 of Rules of 1985. Therefore because of inconsistency in regard to duties and function, apart from qualification of Group 'D' posts Rules of 1985 shall prevail over Rules of 1978, which is a specific rule framed prior to the enactment of Rules of 1985 by virtue of the provisions contained in Rule 3. It is also not in dispute that the pay scale of the petitioner appellant was revised in 1986 and he was allowed scale of Rs. 950/- to Rs.1500/-. The State Government reclassified the posts on the pattern of classification made by the Central Government and only the posts carrying the scale of pay, the maximum of which did not exceed Rs.1150/- were classified as Group 'D' post vide G.O. dated 19th May, 1989. Therefore, the benefit of proviso to Fundamental Rule 56(3) is not available to the petitioner appellant by reason of explanation to the proviso as status of the post of, Consolidation Lekhpal was changed on account of revision of the pay scale.

(Delivered by Hon'ble S.R. Alam, J.)

1. This special appeal is preferred against the judgment and order of the learned Single Judge dated 19.01.2001 in Writ Petition No. 2354 of 2001 whereby the learned Single Judge dismissed the writ petition challenging the office order/notice dated 23.12.2000 retiring the petitioner with effect from 31.01.2001 on attaining the age of 58 years.

2. The short question involved in the present appeal is as to whether the age of retirement of Consolidation Lekhpal is 60 years or 58 years.

3. We have heard Smt. Poonam Srivastava learned counsel appearing on behalf of the appellant and Sri U.P. Pandey, learned Standing Counsel on behalf of the State-respondents. With the permission of the Court they have also filed their written arguments, which are on record.

4. It appears that the petitioner-appellant was appointed as Consolidation Lekhpal on 11.10.1979 in the pay scale of Rs.330-7-365-8-381-405-9-450/- in the district of Basti. It is not in dispute that his date of birth is 10.01.1943. He was, however, served with the office order/notice dated 23rd January, 2001 informing that in view of Rule 5 of volume II part-II to IV of Financial Hand Book and also in view of the instructions issued from time to time by the State Government he would retire on 31.01.2001 on attaining 58 years of age. Being aggrieved the petitioner challenged the aforesaid order/notice before this Court by moving Writ Petition No. 2354 of 2001 on the ground, inter alia, that the post of Consolidation Lekhpal belongs to Group-D posts as described under Rule 2 of the Uttar Pradesh Consolidation Lekhpal Services Rules, 1978 and, therefore, in view of the provisions contained in Rule 56 of Fundamental Rules he can only be superannuated on attaining 60 years of age. The learned Single Judge having heard learned counsel for the parties and relying on a judgment of this Court in the case of **Rajendra Prasad Tiwari Versus State of U.P. & others** reported in 2000(4) Educational Service Cases 2309 (Allahabad) held that after the revision of the pay-scale with effect from 1st January, 1996 the petitioner ceased to be an employee belonging to 'Group-D'

Category and, therefore, he cannot continue in service up to age of 60 years.

5. Smt. Poonam Srivastava, learned counsel appearing for the appellant contended that the post of Consolidation Lekhpal being non gazetted it comprises of 'Group-D' posts as provided under the U.P. Consolidation Lekhpal Service Rules, 1978, the age of retirement of Consolidatin Lekhpal would be 60 years in view of the provisions contained in Fundamental Rules, 56. The submission in short is that in view of the amendment in Rule 56 (a) of the Fundamental Rules by U.P. Fundamental (First Amendment) Rule, 1987 the petitioner being appointed prior to 05.11.1985 is entitled to continue in service till he attains the age of 60 years. Learned counsel further sought to distinguish the judgment of this Court in the case of **Rajendra Prasad Tiwari Versus State of U.P. and others (supra)** relied by the learned Single Judge in the order under appeal and submitted that the said order is in respect of Tube Well Operator who were earlier classified as 'Group-D' Employee but subsequently by Government Order dated 31.08.1989 they are classified as 'Group-C' Employee on account of revision of their pay-scale and therefore, it is contended that the reliance on the aforesaid judgment by the learned Single Judge is mis-conceived and it does not apply in the facts and circumstances of the present case.

6. On the other hand, learned Standing Counsel submitted that upon the revision of the pay-scale with effect from January, 1986 the 'Samta Committee' constituted by the State Government recommended for re-classification of the State Government's Employees on the pattern of the classification made by the Central Government according to which the posts, having maximum of scale of pay of Rs.4000/- or more came in Group-A and maximum of scale of pay of Rs.2900/- or more but less than Rs.4000/- came in Group-B and maximum of the scale of Rs.1150/- or more but not exceeding Rs.2900/- were placed in Group-C and the posts carrying scale of pay the maximum of which did not exceed Rs.1150/- were placed in Group-D posts. It is submitted that since the Consolidation Lekhpals are in the pay scale of Rs.950-1500/- therefore they are Group-C Posts and their age of retirement in 58 years. It is also submitted that after revision of the pay scale of the State Governments Employees re-classification of groups have been made on the basis of scale of pay. The posts of Consolidation Lekhpals are in the pay scale of Rs.950-1500/- and it comes in 'Group-C', hence their age of retirement is 58 years. He further placed reliance on the judgment rendered in the case of **S.S. Sharma Versus Tehsildar and others reported in 1993(2) UPLBEC 1029** and submitted that the Lekhpals do not perform manual function and their duty is only to maintain revenue records, they cannot be treated 'Group-D' Employees. He also placed reliance on the judgment rendered in the case of **Dharam Pal Singh Pipil Versus Executive Engineer, Tube Well Division, Bulandshahr reported in ALR 1997 (29) 351** and in the case of **R.P. Tiwari Versus State of U.P. & others reported in 2000 (3) UPLBEC 2683** and submitted that in view of the work and function of the petitioner and his pay scale he belongs to 'Group-C' and, therefore, the learned Single Judge has rightly held that the petitioner ceased to be an employee belonging to 'Group-D' Category and cannot claim as a matter of

right to continue in service up to the age of 60 years.

7. The State Government has framed specific Rules in respect of Consolidation Lekhpals called as the Uttar Pradesh Consolidation Lekhpals Service Rules, 1978 (in short Rules of 1978). In the above rule the status of Lekhpals, its strength, source of recruitment, qualification, procedure for recruitment etc. are provided but the age of superannuation is not provided. Rule 24, however, provides that the matters not specifically covered by these rules or by special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State, Rule 24 reads as under:

"**24 Regulations of other matters**:- In regard to the matters not specifically covered by these rules or by special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with affairs of the State."

8. Since the Rules 1978 is silent in respect of age of retirement of Consolidation Lekhpal, it would be governed by the rules, regulations and orders applicable generally to the State Government Employees.

9. Fundamental Rule 56 (a) amended in 1987 prescribes the age of retirement of Government servants which is as under:

"56 (a) Except as otherwise provided in other clauses of this rule, every government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years. He may be retained in service on the after the day of retirement on superannuation with the sanction of the Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances:

Provided that a government servant, recruited before November 5, 1985 and holding the Group 'D' post shall retire from service on the afternoon of the month in which he attains the age of 60 (sixty) years.

Explanation- The above proviso shall not be applicable in those cases where the status of a post/posts referred to in the above proviso, has been changed after February 27, 1982 and categorized in higher Group of post/posts".

10. The age of retirement of government servants in general is 58 years. However, proviso to 'Rule' 56 (a) made exception in respect of government servants of Group 'D' appointed prior to 05.11.1985 and only they are to be superannuated on attaining 60 years of age. The explanation to the proviso is very significant. It provides that the proviso shall not be applicable in those cases where the status of a post/posts referred to in the proviso, has been changed after February 27, 1982 and categorized in higher group of post/posts. Therefore, only those government servants of Group 'D' who are appointed prior to 05.11.1985 and their status is not changed after February 27, 1982 will retire on attaining the age of 60 years and unless both the conditions are satisfied a

government servant cannot continue beyond the age of 58 years.

11. The State Government has also framed rules in respect of Group 'D' employees called as "Group 'D' Employees Services Rules, 1985" (in short Rules of 1985) under the proviso to Article 309 of the Constitution of India, which came into force w.e.f. 16.03.1985. Rule 2 of the above rules provides that it shall apply to all Group 'D' posts in all the subordinate offices. Subordinate Offices are defined in clause (h) of Rule 4 of the Rules 1985, which includes all the offices under the control of the Government of Uttar Pradesh excluding the Secretariat. Offices of the State Legislature, Lokayukt, Public Service Commission, High Court, Subordinate Courts under the control and superintendence of High Court, Advocate General and the Establishment under the control of the Advocate General. The petitioner appellant is an employee of the consolidation department, which is subordinate office under the control of the State Government and, therefore, Rules of 1985 is applicable in respect of its employees belonging to Group 'D', Rule 3 of Rules of 1985 provides that it will have overriding effect over specific rules made prior to it. It reads as under:

"3. Overriding effect of these rules; In the event of any inconsistency between these rules and a specific rule or rules pertaining to any of the aforesaid posts in any department –

(i) the provision contained in these rules shall prevail to the extent to the inconsistency in case the specific rules were made prior to the commencement of these rules; and

(ii) the provisions contained in the specific rules prevail in case they are made after the commencement of these rules"

12. Thus, the provisions of this rule shall prevail, to the extent of inconsistency in case the specific rules were made prior to the commencement of this rule. But where the specific rules are made after the Rules of 1985 then the provisions of such specific rules shall prevail. The specific Rules of 1978 for Consolidation Lekhpals was notified and came into force w.e.f. 29th July, 1978 which although provides that Consolidation Lekhpals Service comprises Group 'D' posts but since it came into force much before the Rules of 1985 and, therefore, in the event of any inconsistency in respect of any provision the Rules of 1985 shall prevail over it.

13. The various categories of Group 'D' employees are mentioned in Rule 6 of the Rules of 1985, which are Peon, Messanger, Chaukidar, Mali, Farrash, Sweeper, Waterman Bhishti, Tindal, Thelaman, Record Lifter, Peon-Jamadar, Daftari/Bookbinder/Cyclostyle Operator, Farrash Jamadar, Sweeper Jamadar, Head Mali and every other non-technical posts. Therefore only those employees who perform menial nature of work they belong to Group 'D' posts. On the other hand as it appears from various provisions of the Uttar Pradesh Consolidation of Holding Act, 1953 and the Uttar Pradesh Consolidation of Holding Rules, 1954 the functions and duties of Consolidation Lekhpal is almost of ministerial nature such as to collect agricultural statistic in respect of Kharif and rabi crops every year during the period the village remains under the consolidation operation to

prepare statement in CH form 7 regarding the amount of land revenue payable on new holdings and also to prepare revised annual register in CH form 11 incorporating all the orders relating to rights and liabilities in respect of the land etc., which are clerical nature. Besides that, qualification for appointment of the post of Consolidation Lekhpal is high School, with a training certificate of Patwari or Lekhpal whereas the qualification for Group 'D' employees in Rule of 1985 is class 5 only. So far as Peon, Messenger, Cyclostyle Operator and other post is concerned no educational qualification is required in terms of Rule 6 of rules of 1985. Therefore, because of inconsistency in regard to duties and functions, apart from qualification of Group 'D' posts Rules of 1985 shall prevail over rules of 1978, which is a specific rule framed prior to the enactment of Rules of 1985 by virtue of the provisions contained in Rule 3. It is also not in dispute that the pay scale of the petitioner appellant was revised in 1986 and he was allowed scale Rs.950/- to 1500/-. The State Government reclassified the posts on the pattern of classification made by the Central Government and only the posts carrying the scale of pay, the maximum of which did not exceed Rs.1150/- were classified as Group 'D' post vide G.O. dated 19th May 1989. Therefore, the benefit of proviso to Fundamental Rule 56(3) is not available to the petitioner appellant by reason of explanation to the proviso as status of the post of, Consolidation Lekhpal was changed on account of revision of the pay scale.

14. The learned Single Judge relying on a Judgment in the case of **Rajendra Prasad Tiwari versus State of U.P. and others (supra)** has found that the petitioner on account of revision of his pay scale w.e.f. 01.01.1986 ceased to be an employee belonging to Group 'D' category and, therefore, he cannot claim as a matter of right to continue in service up to the age of 60 years.

15. Learned counsel for the petitioner has placed reliance on the judgment and order dated 09.04.1999 of the learned Single Judge in the case of **Har Govind Sahai Saxena Versus State of U.P. through Collector and others** in Writ Petition No. 30347 of 1998 a copy whereof is enclosed as Annexure-3 to the affidavit filed in support of the special appeal. In our view, they are of no help to the appellant for the reason that in that judgment the effect of the revision of scale and the re-classification of the post vide G.O. dated 19th May, 1989 has not been considered. Further Rules of 1985 framed in respect of Group 'D' employee has also not been noticed. Therefore, we are of the view, that the learned Single Judge has rightly held that upon revision of the pay scale and re-classification of the post the petitioner ceased to be Group 'D' employee. In that view of the matter, the order under appeal does not call for any interference.

In the result, the appeal fails and is accordingly, dismissed but without cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.3.2002

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

Civil Misc. (PIL) Writ Petition No. 9976 of 2002

Smt. Durga ...Petitioner
Versus
Election Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri Shitla Prasad Pandey

Counsel for the Respondents:
Sri Ranvijai Singh
S.C.

Constitution of India, Article 239 (b) readwith- Representation of people Act 1951 Chapter II Section 80 A. 81 and 100- Election Petition- validity of election can be challenged only by way of election petition- writ petition not maintainable.

Held- Para 7

We are of the view that it is well settled by several decisions of the apex court that there is no scope for granting relief in such cases under Article 226 of the Constitution and proper remedy for the petitioner is to file an election petition under the Act.

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

1. Heard Sri Shitla Prasad Pandey, learned Advocate for the petitioner and Sri Ranvijay Singh, learned standing counsel for the respondents.

2. In this writ petition the petitioner has prayed for holding fresh election in two polling booth nos. 291 and 292 in village Sisaura Kala Anshik situated in 221 Dhanapur Vidhan Sabha Constitutency district Chandauli.

3. In our view the writ petition is not maintainable in view of Article 329 (b) of the Constitution of India, which is set out herein below:

" 329 (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

4. That apart, in our view, appropriate remedy is to file an election petition under Chapter II of the Representation of the People Act, 1951 (hereinafter referred to as the Act). The relevant sections, i.e. Section 80, 80-A, 81 and 100, in the said Chapter are set out herein below:

"80. Election Petitions *– No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.*

80A. High Court to try election petitions – (1) The Court having jurisdiction to try an election petition shall be the High Court.

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice shall, from time to time, assign one or more Judges for that purpose:

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

(3) The High Court in its discretion may , in the interests of jusice or convenience, try an election petition, wholly or partly , at a place other than the place of seat of the High Court.

***81. Presentation of petitions** – (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty-five days from , but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.*

Explanation- In this sub-section, 'elector' means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2)Omitted.

(3)Every election petition shall be accompanied by as many copies thereof there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be true copy of the petition.

***100. Grounds for declaring election to be void**. (1) Subject to the provisions of sub-section (2) if the High Court is of opinion –*

(a) that on the date of his election a returned candidate was not qualified , or was disqualified , to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963) or,

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with ;the consent of a returned candidate or his election agent, or

(c) that any nomination has been improperly rejected, or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) by the improper acceptance of any nomination , or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent.

(b) (Omitted).

(c) That the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election, and

(d) That in all other respects the election was free from any corrupt

practice on the part of the candidate or any of his agents, then the High Court may decide that the election of the returned candidate is not void.

5. It is clear from the aforesaid provisions of section 80 of the Act that no election shall be called in question except by an election petition. The High Court under section 80A of the Act has been empowered to try an election petition. Under section 81 of the Act not only a candidate but an elector also can present an election petition. The petitioner being elector or voter of the constituency in question can file an election petition under section 81 of the Act. So far as the allegation made by the writ petitioner is concerned that she was not allowed to caste vote, we are of the view that section 100 (1)(d)(iv) of the Act shall apply in the facts and circumstances of the case and the petitioner has remedy of an election petition.

6. Learned Advocate for the petitioner has relied upon a judgment in the case of Bar Council of Delhi and another vs. Surjeet Singh and others reported in (AIR 1980 SC 1612). This decision relates to an election of Bar Council, Delhi governing Advocates Act and Bar Council of Delhi Election Rules. In the facts and circumstances of the present case this case does not have any relevance. The other decision cited by the learned Advocate for the petitioner in the case of K.Venkatachalam vs. A. Swamickan and another reported in (JT 1999 (3) SC 242) also does not apply to the facts and circumstances of the present case. It was specifically held by the Supreme Court in paragraph 19 of the said judgment that when the poll or re-poll process is on for election to the Parliament or Legislative Assembly, High Court cannot exercise its jurisdiction under Article 226 of the Constitution and that remedy of the aggrieved parties is under the Act read with Article 329 (b) of the Constitution. The Act provides for challenge to an election by filing the election petition under section 81 on one or more grounds specified in sub-section (1) of Sections 100 and 101 of the Act.

7. We are of the view since it is well settled by several decisions of the apex court that there is no scope for granting relief in such cases under Article 226 of the Constitution and proper remedy for the petitioner is to file an election petition under the Act.

8. Accordingly the writ petition stands dismissed being not maintainable.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.3.2002

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

Special Appeal No. 127 of 2002

R.C. Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Someshwari Prasad

Counsel for the Respondents:
Sri Sabhajeet Yadav
S.C.

Constitution of India, Article 226- Service law- Suspension order- challenged as no formal enquiry pending- complaint of corruption

preliminary departmental enquiry report- the basis of suspension- can not be interfered.

Held- Para 8

It is clear from the said judgment that mere existence of complaint of corruption is not sufficient or relevant. However, in the instant case not only the complaint have been looked into but a preliminary inquiry was also conducted and on the basis of the preliminary report the department has already contemplated full fledged inquiry. Under such circumstances, in our view, the decision does not really come in aid of the learned counsel for the appellant.

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

1. Heard Sri Sidheshwari Prasad Srivastava, learned Senior Counsel appearing on behalf of appellant. Sri Sabhajeet Yadav, learned Standing counsel appearing on behalf of the respondents.

2. This special appeal is directed against the order passed by the learned Single Judge dated 1.2.2002 in writ petition, which was filed challenging the suspension order wherein the learned Single Judge has held that the inquiry proceeding contemplated shall be concluded within four months and in the event the proceeding can not be concluded in spite of the cooperation of the writ petitioner it will be open to the writ petitioner to apply for revocation of the suspension order.

3. Learned Senior Counsel has argued before us that contemplated inquiry means inquiry must have been initiated and in support of his contention he has relied upon the judgment and decision of a Division Bench of this Court in the case of State of U.P.and others v. Rajendra Shankar Nigum and others 1974 CAN 263 and has laid strong emphasis on the portion of the judgment, which reads as under:

"The expression 'an inquiry is contemplated' refers to the formal disciplinary inquiry held under rule 55 of the Rules."

4. Relying upon the said decision learned counsel has submitted that the learned Single Judge should have quashed the impugned order of suspension and should not have directed the inquiry to be concluded. He has also submitted before us that the order of the learned Single Judge directing inquiry to be completed is without jurisdiction and as such the order passed by the learned Single Judge should be set aside.

5. It is well settled that unless an inquiry is contemplated or an inquiry, is pending, suspension order cannot be passed. However, in the instant case the impugned order itself shows that the inquiry is under contemplation in respect of the charges mentioned in the order. The judgment and decision relied upon by the learned Senior Counsel, in our view, does not really assist him. In this connection we may take note of the relevant portion of the aforesaid judgment wherein a Division Bench judgment of this Court in the case of **S.C. Kharbanda versus State of U.P.** Para 14 of the judgment reads as under: -

"14. The material and relevant expression in Rule 49-A is 'an inquiry is contemplated or is proceeding'. The term 'contemplated' is not a term of art. It has been used in its plain ordinary meaning.

The shorter Oxford Dictionary, Volume I at page 380 defines the word 'contemplated' to mean have in view, to expect, to take into account as a contingency. It indicates a stage where an inquiry into the conduct of a Government servant is imminently expected with a view to impose some punishment upon him. On receipt of complaints against the conduct of a Government servant the competent authority sets in motion an informal inquiry to certify the correctness of the allegations or to collect material with a view to hold a disciplinary inquiry so that if the alleged misconduct is established suitable punishment be awarded. The inquiry which will result in imposition of punishment can be said to be expected or contemplated. When the Government sets in motion its machinery for investigating the alleged complaints so that it may hold a formal inquiry more properly the formal inquiry is clearly contemplated, and the power to suspend comes into play. In S.C. Kharbanda v. State of U.P. a Division Bench observed:

"The mere fact that a preliminary enquiry has been admittedly instituted is proof positive of the fact that the departmental enquiry is contemplated. Were it otherwise, the authorities would decline to undertake the preliminary enquiry."

6. According to this decision, the power to suspend will accrue when an informal inquiry has been instituted.

7. In our view, it is also necessary to take note of paragraph 16 of the judgment relied upon by the learned Senior Counsel. It reads as under:

"16. The order of suspension passed against Sri R.S. Nigam the respondent in Special Appeal No. 114 of 1973 only mentions that the Government has received serious complaints of corruption from which doubt about his honesty and integrity has arisen. The existence of such serious complaints is to our mind not relevant and material for the purpose of the Note. If the Government desired that it was not feasible to retain the charged officer at his post it was open to it to pass an order of suspension in the exercise of its inherent power. The only difference would have been that the officer would have been entitled to full pay and allowance. Since no circumstances making out a case of emergency or of exceptional circumstances have been even attempted to be established we deem it unnecessary to express a concluded opinion upon this aspect of this case."

8. It is clear from the said judgment that mere existence of complaint of corruption is not sufficient or relevant. However, in the instant case not only the complaint have been looked into but a preliminary inquiry was also conducted and on the basis of the preliminary report the department has already contemplated full-fledged inquiry. Under such circumstances, in our view, the decision does not really come in aid of the learned counsel for the appellant.

9. In our view, the learned Single Judge has also given sufficient opportunity to the appellant. Since the learned Single Judge in the order has provided that in the event in spite of the co-operation of the appellant-writ petitioner the inquiry is not completed it is open for him also to make an application for cancellation of inquiry

under such circumstances, we do not find any merit in the Special Appeal.

The Special Appeal being without any merit fails and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD APRIL 3, 2002

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

Special Appeal No. 865 of 1999

Sugreev Singh Desuriya ...Appellant
Versus
The Central Government of India and others ...Respondents

Counsel for the Appellant:
Sri Sugreev Singh Desuriya
In Person

Counsel for the Respondents:
Sri S.K. Rai
Sri K.D. Nag
S.C.

Air Force Rules 1969- Rule 15 and 24- Policy to discharge the habitual offenders Airman- Policy can not be said ultra vires or illegal.

Held-Para 8

Sri S.K. Rai, learned Additional Standing Counsel, however, submitted that the appellant- writ petitioner had been given entries in Red and Black ink in his conduct book and when it increased to more than four, a warning letter was issued to him to mend his ways. When another red entry was goven, he was issued a show cause notice to show cause as to why he should not be discharged to which the appellant- writ petitioner replied and thereafter he was discharged from service. He further submitted that this policy of Discharge of Habitual Offender applied by the Indian Air Force, has been subject matter of consideration before the Hon'ble Supreme Court in the case of Union of India and others vs. Corporal A.K. Bakshi and another reported in A.I.R. 1996 SC 1368. The Hon'ble Supreme Court has upheld the order of discharge on the basis of this policy. He further submitted that in the said policy the basic idea in the said policy is that recurring nature of punishment for misconduct imposed on an air man renders him unsuitable for further retention in the Air Force and is not by way of punishment for the mis conducts for which he has already been punished. The policy cannot be said to be ultra- vires or illegal.

(Delivered by Hon'ble R.K. Agarwal, J.)

1. Special Appeal No. 865 of 1999 has been filed by the appellant writ petitioner, Sugreev Singh Desuriya, against the Judgment and order dated 24.11.1995 passed by the learned Single Judge, whereby, the learned Single Judge, dismissed the Misc. Writ Petition No. 3320 of 1991 with the following observations:

"In my opinion as the petitioner has not prayed for any relief against any punishment order either minor or major, but apprehending some punishment he has prayed for direction to the respondents not to discharge the petitioner prematurely.

The main grievance shown by the petitioner with regard to the warning contained in Annexure No. 23, which refers to previous action taken against the petitioner and the warning by itself is not indicative of the ultimate order of discharge. In my opinion the warning issued to the petitioner as contained in the

letter dated 5th April 1990, is only to warn so that he may improve and mend himself by which his good acts and discipline maybe reflected. In my opinion this warning by itself is neither any punishment nor any cognizance can be taken for interference in exercise of powers under Article 226 of the Constitution.

With regard to the administrative actions there is departmental remedy provided, which the petitioner has already availed. The petitioner has not prayed for quashing of any punishment awarded to him or any adverse order passed against him in the present writ petition. Moreover, as stated earlier, the petitioner has been discharged from service and whatever objection he has to raise the same can be looked into at the time of hearing of the validity of the action of discharge from the service."

For the above reasons, the petition is dismissed."

2. Special Appeal No. 867 of 1999 has been filed by the appellant-writ petitioner Sugreev Singh Desuriya against the judgment and order dated 18.1.1996 passed by the learned single Judge in Writ Pettiion No. 4231(S/S) of 1992, whereby, the learned Single Judge had dismissed the writ petition with the following observations:

"The main relief claimed by the petitioner in the present petition appears to be for quashing the order of discharge and for his continuance in service. The other reliefs relating to promotion etc. claimed in the petition could be considered only after the petitioner has been reinstated in services.

In so far as the challenge to the warning letter issued to the petitioner, the warning by itself is neither any punishment nor in any manner it effects the reputation of the petitioner or casts any stigma or imputation. The warning has been issued to warn the petitioner to be careful and to mend his ways and activities as already sufficient adverse material has been placed on the service record and his case may be considered on the basis of service for action discharge.

In my opinion, the warning does not in any manner prejudice the petitioner's case nor does it cast any stigma on his character and conduct. In fact the warning letter was given with the intention to warn the petitioner to be more cautious and be more careful in performance of his duties. The previous warning establishes the bonafides of the action taken against the petitioner and is in conformity with the rules and correct procedure.

The award of the punishment entries are borne out from the material on record and thus punishment entries having been provisionally awarded against which the petitioner has already been afforded adequate opportunity to defend himself.

Coming to the order of discharge I am of the opinion that adverse material placed on record by the respondents fully justified, their caution and specially when in defence service an outstanding merit and discipline is required. The adverse material indicates that the respondents were fully justified in taking the above action. In my opinion, the order is neither arbitrary nor based on irrelevant considerations and nor there is non-application of mind by the concerned authority. The grounds raised in the

petition do not establish that the impugned order suffers from any illegality or infirmity. The petition is devoid of merit and is accordingly dismissed."

3. Both the appeals are taken up together, as they relate to the same writ petitioner-appellant and are being decided by a common judgment.

4. We have heard the appellant-writ petitioner, Sugreev Singh Desuriya in person and Sri S.K.Rai, learned Additional Standing Counsel for the Central Government.

5. Briefly stated the facts giving rise to the present appeals are as follows:

6. The appellant- writ petitioner was at the relevant time holding the rank of Air Corporal, a non Commissioned Officer in the Indian Air Forece. According to the appellant-writ petitioner, he had been protesting against the illegal action of the respondents. He had been given adverse remarks and minor punishments in the conduct-sheet on account of bias and prejudice of the Superior Officers without any fault on his part. He had already made representation to the higher authorities against the adverse remarks and minor punishments, but no action had been taken by the higher authorities. According to him in some cases the authorities did not even apply their mind and without looking to the correct facts have rejected the representation, whereas some of them had remained undecided. The appellant-writ petitioner has been discharged from service under the provisions of Rule 15, Clause-(2) (g) (ii) contained in Chapter-VII of the Air Force Rules 1969. It appears that the appellant-writ petitioner was awarded 14 days confinement to camp on 26.7.1985, which was entered in red ink in his conduct sheet. He was reprimanded on 27.5.1987 and 1.11.1987. He was again severely reprimanded on 21.1.1988 and 29.1.1988, which were written in red ink. He was issued a warning on 5.4.1990 informing him that he is on the threshold of becoming a habitual offender and one more punishment entry (either red or black) will result in discharge from the service. Thus, he was warned to mend himself and act in a manner of good order and discipline. The appellant-writ petitioner failed to improve and he was serverely reprimanded on 15.6.1991 and on 24.9.1991, which were entered in red ink in his conduct sheet. After giving a show cause notice and considering his explanation, the appellant-writ petitioner was discharged from service on 14.11.1991 on the ground of **'Services no longer required and unsuitable retention for Air Force'**.

7. The appellant-writ petitioner submitted before us that he was charged falsely on all the occasions and tried summarily in an arbitrary manner. He ought to have been tried by Court Martial, where he would have got opportunity to know the charges framed against him, entitled to cross examine witnesses and make statement in his defence, the denial of which had resulted in gross violation of justice. He further submitted that he had made representation against the adverse entry/censure warning issued to him which were not considered at all and even when the application for redressal of his grievances filed by him for disposal was pending, a warning letter was issued to him on 5.4.1990, which is wholly illegal

and arbitrary. He futher submitted that rule 15 and 24 of the Air Force Rules 1969, as also the confidential policy of Habitual Offenders Airman (Discharge) adopted by the Indian Air Force is ultra-vires and arbitary. According to him the respondent cannot discharge him from service on the basis of some confidential policy, which was not made known to him. Thus, he submitted that the order of discharge is liable to be set aside.

8. Sri S.K. Rai, learned Additional Standing Counsel, however, submitted that the appellant-writ petitioner had been given entries in 'Red and Black ink' in his conduct book and when it increased to more than four, a warning letter was issued to him to mend his ways. When another red entry was given, he was issued a show cause notice to show cause as to why he should not be discharged to which the appellant-writ petitioner replied and thereafter he was discharged from service. He further submitted that this policy of Dishcarge of Habitual Offender applied by the Indian Air Force, has been subject matter of consideration before the Hon'ble Supreme Court in the case of Union of India and others V.Corporal A.K. Bakshi and another reported in A.I.R. 1996 SC-1368. The Hon'ble Supreme Court has upheld the order of discharge on the basis of this policy. He further submitted that in the said policy the basic idea in the said policy is that recurring nature of punishment for misconduct imposed on an air man render him unsuitable for further retention in the Air Force and is not by way of punishment for which he as already been punished. The policy cannot be said to be ultra vires or illegal.

9. It is not in dispute that the following entries were given to the appellant-writ petitioner in his Conduct Book:

Date of Offence	**Nature of Miscconduct**	**Punishment awarded**
26.7.1985 (AC)	(a) Failed to carry out the duties of key orderly of this squardron properly in that he handed over the keys to an unauthorized person 653001 A.C. Sharma (Elect./Fet) without proper authority on 26 July, 1985 (b) Reporting late to wring control Registry for collection/despath of official main pertaining to this squadron while on mail orderly duty (c) While on Mail orderly duty, misplaced the two copies of SRO (No. 28&29) on 30 July, 1989	**14 days Confinement to Camp**
27.5.1987	Absented himself from duty at 7.00 hrs on 27.5.1987 and reported back to duty at 7.00 hrs on 28.5.1987 total absence 23 hrs 59 mts. (Black ink)	**Reprimand**
1.11.1987	Failed to book	**Reprimand**

	in/in the Airmen book out/ in Register at 2359 on 1.11.87. Till he booked at Main Guard Room at 7.30 hrs. on 2.11.1987. (Total absence of 7.00 hrs. and 31 mts.) (Blue ink)	
21.1.1988	1. Disobeying the orders of 223417 F MWO Kalimullah by preparing ac C-1140 instead ac C-1119 & C1164 2. Used insubordinate language to Sqn. Ldr. N.K. Jain, a Superior Officer by saying ' I am working for the nation and I am not doing my personal work' (Red ink)	**Severely Reprimanded**
29.1.1988	Addressed three Personal application dated 29.1.1988,2.2.1988 directly to the AOC-in –C,/AF. 2.Use insubordinate language and criticizing Superior Officer that is WG CDR O.P.Sharma (Red ink)	**Severely Reprimanded**

10. He was issued a warning on 5.4.1990. Thereafter, again an entry in red ink 'Severely Reprimanded' was made in his conduct book on 15.6.1991 for an offence committed on 2.5.1991 and again on 24.9.1991 for an offence committed on 9.8.1991.

11. The policy for discharge as reproduced by the Hon'ble Supreme Court in the case of Union of India Vs. A.K.Bakshi (Supra) provides that the Airman, who meet anyone of the following individual criteria are to be treated as habitual offenders and considered for discharge under Rule 15(2)(g)(ii) of the Air Force Rules 1969.

[a] Total number of punishment entries six and above including red and black ink entries.

[b] Four red ink punishment entries

[c] Four punishment entries (red and black ink entries included) for repeated commission any one specific type of offence such as disobedience, insubordination, AWL, breaking out of camp, offence involving alcohol, mass indiscipline, use of abusive/ threatening language etc.

12. The Hon'ble Supreme Court in the case of Union of India vs. A.K. Bakshi (supra) has upheld the order of discharge based upon the aforesaid policy. The Hon'ble Supreme Court has held as follows:

"The punishments referred to in the policy for discharge are punishments that have been imposed for misconduct under the releveant provisions of the Act and the Rules. The policy for discharge envisages that in cases where an airman has been awarded such punishments six times, he is to be treated as a habitual offender and action for his discharge from service should be taken against him under Rule

15(2)(g)(ii) of the Rules. This action for discharge is not by way of punishment for the misconducts for which he has already been punished. The basic idea underiying the policy for discharge is that recurring nature of punishments for misconduct imposed on an airman renders him unsuitable for further retention in the Air force. Suitability for retention in the Air Force has to be determined on the basis of record of service. The punishments that have been imposed earlier being part of the record of service have to be taken into consideration for the purpose of deciding whether such person is suitable for retention in the Air Force. The discharge in such circumstances is, therefore, discharge falling under rule 15(2)(g)(ii) and it cannot be held to be termination of service by way of punishment for misconduct falling under Rule 13 of the Rules. We are, therefore, unable to agree with the High Court that termination of services on the basis of the policy for discharge does not constitute discharge under Rule 15(2)(g)(ii) but amounts to removal for misconduct under Rule 18 of the Rules.

It is not disputed that in both these cases the procedure prescribed under the policy for discharge has been followed. The order for discharge of the respondents thus do not suffer from any infirmity and the Division Bench of the High Court was in error in setting aside the said orders."

13. The appellant-writ petitioner falls under one of the aforesaid categories. The respondents have followed the procedure fo giving a warning as also issuing a show cause notice after he again incurred a red ink entry in the conduct book and after considering the explanation had discharged him from service, which cannot be said to be contrary to the policy of discharge of habitual offender.

14. The contention of the appellant-writ petitioner is that the aforesaid policy is ultra-vires and illegal, cannot be accepted, Inasmuch as he had failed to show any illegality in the said policy. The procedure followed for discharging of a habitual offender is in conformity with the principles of natural justice, equity and fair play, as at the initial stage a warning is issued to the person concerned to mend the ways and thereafter a show cause notice is also given before discharging an air man.

15. So far as the contention that Rule 15 of the Air Force Rules 1969 are ultravires and illegal is concerned, we do not find any illegality in the said Rules.

16. It may also be mentioned here that for the minor punishment awarded to the appellant-writ petitioner, he was given adequate opportunity of placing his defence and the same was in accordance with the Rules and the Procedure provided by the various orders. The learned Single Judge has found that the appellant-writ petitioner has been given full opportunity to represent against the award of minor punishment for his misconduct. Moreover all his representations made against the minor punishments have been rejected by the authorities. Therefore, no exception can be taken to the procedure adopted by the respondents.

17. So far as the question as to whether the appellant-writ petitioner ought to have been tried by a Court-Martial and not in a summary manner

under section 82 of the Act is concerned, it is open to the authorities to proceed either under section 73 or under section 82 against the appellant-writ petitioner. If it has been proceeded under section 82 of the Air Force Act 1950, it cannot be said that the minor punishment awarded to the appellant-writ petitioner is without jurisdiction.

18. In view of the foregoing discussions, we do not find any infirmity in the judgment and order passed by the learned Single Judge. Both the Special appeals fail and are dismissed.