ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 1.8.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE K.N. SINHA, J.

Crl. Misc. Writ Petition No.4188 of 2002

Virendra Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Sukhendu Pal Singh
Sri Tejpal

Counsel for the Respondents:
A.G.A.

Criminal Law Amendment Act-section 10 and Indian Penal Code- section 506- Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by a notification any part of the amended even by a U.P. Act unless the assent of the Present is taken vide Article 254 (2) of the Constitution. The notification of 1989 purports to amend a Central Act (the Cr.P.C. of 1973) even without the assent of the president. (Held in para 10)

We are of the opinion that the notification dated 31.7.1989 issued under section 10 of the Criminal Law Amendment Act, 1932 making Section 506 I.P.C. cognizable and non bailable is illegal.

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

1. Heard learned counsel for the petitioners and learned Government Counsel.

2. This petition has been filed against the First Information Report dated 12.7.2002 (Annexure-1 to the writ petition) under Section 506 I.P.C. In this F.I.R. the allegation is that the petitioners are threatening to kill the first informant.

3. It is not necessary for us to quash the F.I.R. in view of the observations and directions made below.

4. Section 506 I.P.C., as mentioned in the first schedule to the Code of Criminal Procedure, 1973, is declared to be a non-cognizable and bailable offence. However, it appears that by U.P. Govt. notification No. 777/VIII 9-4 (2)-87 dated July 31, 1989, published in the U.P. Gazette, Extra, Part-4, Section (kha) dated 2nd August, 1989 it was declared to be a cognizable and non-bailable offence. This notification states as follows:

"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act No. XXIII of 1932) read with Section 21 of the General Clauses Act, 1897 (Act No.10 of 1897) and in super session of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act No.2 of 1974) be cognizable and non-bailable."

5. The above notification purports to have been issued under Section 10 of the Criminal Law Amendment Act 1932. Section 10 (1) of the said Act states as follows:-

"The State Government may, by notification in the Official Gagette, declare that any offence punishable under Ss. 186, 188, 190, 228, 295-A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall, notwithstanding anything contained in Code of Criminal Procedure, 1898, be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

6. Section 10 (2) of the Act states:

"(2) The (State Government may, in like manner and subject to the like conditions, and with the like effect declare that an offence punishable under section 188 or section 506 of the Indian Penal Code shall be non-bailable."

7. Section 10 of the Criminal Law Amendment Act, 1932 gives power to the State Government to declare certain offences including section 506 IPC to be cognizable and non-bailable and on issuance of the said notification the Code of Criminal Procedure, 1898 shall stand amended accordingly.

8. Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by a notification any part of the Criminal Procedure Code 1973. Since the Cr.P.C. of 1898 has been repealed by section 484 of the Cr.P.C. Act, 1973 we are of the opinion that section 10 of the Criminal Law Amendment Act, 1932 has become redundant and otiose. Hence in our opinion no notification can now be made under section 10 of the Criminal Law Amendment Act, 1932. Any such notification is illegal for the reason given above. Hence we declare notification no. *777/VIII-9 4(2)-87, dated July 31, 1989*, published the U.P. Gazette, Extra Part 4 Section (Kha) dated 2nd August, 1989 by which section 506 IPC was made cognizable and non-bailable to be illegal. Section 506 IPC has to be treated as bailable and non-cognizable offence.

9. There is another reason also why the aforesaid notification of 1989 is illegal. The Cr.P.C. of 1973 is a Parliamentary enactment. An Act can only be amended by another Act or by an Ordinance , not by a simple notification. Moreover, a Central Act cannot be amended even by a U.P. Act unless the assent of the President is taken vide Article 254 (2) of the Constitution. The notification of 1989 purports to amend a Central Act (the Cr.P.C. of 1973) even without the assent of the President.

10. It is surprising that while sections 323, 324 and 325 I.P.C. are bailable offences the State Government has chosen to declare by this illegal notification of 1989 that Section 506 IPC is a non bailable and cognizable offence. This means that if person breaks someone's hand or attacks him with a knife on his leg or hand he will be granted bail by the police on his mere request, but if he gives a threat he will be arrested and will have to apply for bail to the Court. This is an anomalous situation. At any event, we are of the opinion that the notification dated 31.7.1989 issued under section 10 of the Criminal Law amendment Act, 1932 making section 506 IPC cognizable and non bailable is illegal.

11. This petition is disposed off accordingly.

12. Let a copy of this order be sent by the Registrar General of this Court to the Principal Home Secretary, Principal Law Secretary and the D.G.P., U.P. The D.G.P. will communicate it to all S.S.Ps. and S.Ps. in the State, who in turn will communicate it to all Station Officers of police stations in the State. A copy shall also be sent to all the District Judges of this State.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.7.2002

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

Writ Petition No. 10837 of 1984

Moinuddin ...Petitioner
Versus
Board of Revenue, U.P. at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Rajendra Pd. Srivastava
Ch. N.A. Khan

Counsel for the Respondents:
Sri Triveni Shankar
S.C.

U.P. Z.A. & L.R. Act- Section 198 (4)- cancellation- of allotment- the property in dispute admittedly being the evacuee property, the same could not be subject matter of allotment under the Act nor the respondents no. 1 and 2 could pass any order against the order passed by the authorities under the aforesaid Acts.

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

1. By means of this petition filed under Article 226 of the Constitution of India,, petitioner prays for issuance of a writ, order or direction in the nature of certiorari quashing the order dated 26.2.1976 passed by the Additional Commissioner, respondent no. 2, and the order dated 6.6.1984 passed by the Board of Revenue, U.P., at Allahabad in the proceedings under section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, for short the Act against the petitioner.

2. The relevant facts of the case giving rise to the present petition, in brief, are that plot nos. 38/2, 2,55,56 and 201/168 of village Birbhan alias Malikan Gaon, Pargana Bahariabad, district Ghazipur for short ' the land in dispute' are the subject matter of dispute in the present case. The land in dispute was originally owned by Mohammad Tariq, Smt. Abdi Bibi and Kamal Ahmad who migrated to Pakistan in the year 1947 or thereafter. On their migration from India to Pakistan the land in dispute was declared as evacuee property under the Administration of Evacuee Property Act. The land in dispute was thereafter acquired by the Government of India vide Government of India, Ministry of Rehabilitation Notification no. 1/3/1157-B-111, November 26, 1957 under section 12 of the Displaced Persons (compensation and Rehabilitation) Act, 1954, for short the 1954 Act, as it is evident from Annexure 1 to the writ petition and Annexure RA 1 to the rejoinder affidavit after following the procedure prescribed under the law. The land in dispute was ultimately sold in favour of the petitioner and sale certificate was issued in his favour by the Managing Officer/Assistant Custodian, Lucknow, on 5.8.1970. After purchase of the land in dispute the petitioner came to know that the said land, without following the procedure prescribed under the law and in

contravention of the provision of the 1954 Act was allotted in favour of the contesting respondents no. 4 to 9. The petitioner, therefore, immediately thereafter applied for cancellation of the allotment under section 198 (4) of the Act. The application for cancellation was filed mainly on the grounds that the evacuee property could not be allotted and the allotment was made without following the procedure prescribed for the same in contravention of the provisions of the Act as well as the rules framed thereunder. On the application filed by the petitioner the Collector issued notices to the contesting respondents who contested the application claiming that the allotment was made in their favour in accordance with the law. Parties produced evidence in support of their cases. The statement of Likhpal Sri Sheo Poojan Chaubey was also recorded. The Additional Collector from the material on the record, recorded findings on the material issues against the contesting respondents. It was held that the allotment was made without following the procedure prescribed under the Act. No list of land less persons was prepared and allotment was made in favour of kith and kin of the Pradhan and also in favour of the Up Pradhan of the village in contravention of the provisions of Section 28 of the U.P. Panchayat Raj Act. Having recorded the said findings, the allotment was cancelled by the Additional Collector and damages were also imposed upon the contesting respondents by its judgment and order dated 26.7.1975. Challenging the validity of the order passed by the Additional Collector the contesting respondents filed a revision before the respondent no.2. The respondents no. 2 took the view that the Additional Collector has held that the allotment was made in contravention of the provisions of the Rules framed under the Act, it should have also decided the other issues involved in the case. He, therefore, by his judgment and order dated 26.2.1976 made a reference to the respondent no. 1 recommending it to set aside the order of the Additional Collector and to remand the case to the Additional Collector for decision afresh. The respondent no. 1 neither accepted nor rejected the reference but the said respondent itself proceeded to decide the case on merit and ultimately by judgment and order dated 6.6.1984 allowed the revision. Paragraphs no. 8 and 9 of the said judgment (operative portion) are quoted below:-

"8. In view of the above, the revision application is allowed. The impugned order passed by the learned Additional Collector dated 26.7.1975 is set aside and the proceeding is dropped and the patta of the applicants is held valid.

9. Let the trial court's record be sent to it at once for necessary action."

3. As stated above, the present petition has been filed challenging the validity of the orders passed by respondents no. 1 and 2.

4. Learned counsel for the petitioner vehemently urged that the land in dispute was admittedly evacuee property. From the documentary evidence on the record, it is conclusively proved that the said land was acquired by the Central Government under section 12 of the 1954 Act and thereafter the same was sold in favour of the petitioner. Therefore, the land in question could not, in any view of the matter, be allotted to the contesting respondents. The entire proceedings of allotment were void ab initio. It was also

urged that the allotment was made in favour of the contesting respondents in contravention of the provisions of the Act and the Rules framed thereunder, the same was illegal and was rightly set aside by the trial court after recording the findings on the preliminary issues which were sufficient to dispose of the case finally. It was also contended that the respondent no. 2 has acted illegally in making a reference for remanding the case for decision of other issues involved in the case particularly when the decision on the preliminary issues was sufficient to decide the case finally and that the respondent no. 1 has acted illegally and in excess of its jurisdiction in neither accepting nor rejecting the reference but allowing the revision himself that too completely ignoring the statutory provisions of the Act, rules framed thereunder and of the 1954 Act. The writ petition, according to him, was liable to be allowed.

5. On the other hand, learned counsel appearing for the contesting respondents supported the validity of the orders passed by the respondents no. 1 and 2 . It was urged that allotment of the land in dispute in favour of the contesting respondents was made after following the procedure prescribed under the law and that the order passed by the Courts below were quite valid and legal. The writ petition, therefore, deserves to be dismissed.

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

7. From the material on the record, it is evident that the land in dispute was the evacuee property before the same was transferred in favour of the petitioner. It was so recorded in the revenue papers. It is also evident that the land in dispute was acquired under section 12 of the 1954 Act by the Central Government. It is also apparent that after acquision, the land in dispute was sold in favour of the petitioner. Section 12 (2) (3) (d), Section 27 and 36 of the 1954 Act and Section 46 of the Administration of Evacuee Property Act are relevant for the purposes of the present case, which are quoted below:-

"12. Power to acquire evacuee property for rehabilitation of displaced persons:- (1)….
(2) On the publication of a notification under sub section (1) the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.
(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notification referred to in sub section (1) in respect of-
(a)…….
(b)…….
(c)…….
(d) any particular evacuee property
… … …

"27. Finality of orders- Save as otherwise expressly provided in this Act, every order made by any officer or authority under this Act, including a managing corporation, shall be final and shall not be called in question in any Court by way of an appeal or revision or in any original suit, application or execution proceeding."

"36. Bar of Jurisdiction- Save as otherwise expressly provided in this Act, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Central Government or any officer or authority appointed under this Act is empowered by or under this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

"46. Jurisdiction of civil courts barred in certain matters- Save as otherwise expressly provided in this Act, no civil or revenue court shall have jurisdiction.

(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property , or
(b) ……..
(c) to question the legality of any action taken by the custodian- General or the Custodian under this Act, or
(d) in respect of any matter which the Custodian- General or the Custodian is empowered by or under this Act to determine."

8. A reading of the above noted statutory provisions show that Section 12 of the 1954 Act confers power upon the Central Government to acquire the evacuee property which was, as stated above, acquired by means of a notification issued by the Central Government . Section 27 of the said Act provides that every order made by any officer or authority under the said Act including a managing corporation shall be final and shall not be called in question in any Court by way of an appeal or revision or in any original suit, application or execution proceeding. Thus, the orders passed acquiring the land in dispute became final. Section 36 of the said Act specifically provides that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Central Government or any officer or authority appointed under this Act is empowered by or under this Act to determine, and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. Similarly, Section 46 of the Administration of Evacuee Property Act, bars the jurisdiction of the civil and revenue courts to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property to question the legality of any action taken by the Custodian- General or Custodian under the said Act to determine.

9. Thus, in the present case, the property in dispute admittedly being the evacuee property, the same could not be subject matter of allotment under the Act nor the respondents no. 1 and 2 could pass any order against the order passed by the authorities under the aforesaid Acts. Further, Section 195 of the Act provides as under :

"195. Admission to land- The Land Management Committee with the previous approval of the Assistant Collector in charge of the sub division shall have the right to admit any person as Bhumidhar with non transferable rights to any land (other than land being in any of the classes mentioned in Section 132) where -
(a) the land is vacant land,

(b) the land is vested in the Gaon Sabha under section 117,. Or
(c) the land has come into the possession of land Management Committee under section 194 or under any other provision of this Act.

10. The land in dispute is not covered by any one of the aforesaid clauses of Section 195. Therefore, the same could not be subject matter of allotment under any provision of the Act. The allotment of the land in dispute in favour of the contesting respondents was, thus, made wholly without jurisdiction and on the basis of the same the contesting respondents can not get any right in the land in dispute. Further, according to the findings recorded by the Additional Collector, the provisions of Rules 173 and 174 of the Rules framed under the Act were not followed and the provisions of Section 28 of the UP Panchayat Raj Act were violated. Neither there was announcement of beat of drum in the circle of the Gaon Sabha in which the land is situate at least seven days before the date of meeting of the Land Management Committee for admission of the land regarding number of plots, their areas, the date of which admission/allotment was to be made nor the list of landless persons was prepared nor other provisions contained under Rules 174, 175 and 176 were followed and allotment was made in violation of the provisions of section 28 of the UP Panchayat Raj Act, as stated above. Thus, the allotment was totally illegal and without jurisdiction. It may also be noted that the respondent no. 2 made a reference to the respondent no. 1 to accept the reference and to remand the case. The respondent no. 1 could either accept or reject the reference but it had no jurisdiction to decide the case himself and allow the revision finally. The orders passed by the respondents no. 1 and 2 are illegal and without jurisdiction, therefore, they are liable to be set aside. Normally, after setting aside the two orders,. I should have remanded the case to the trial court but in view of the above noted discussion and in view of the fact that the land in dispute is admittedly evacuee property, which was acquired by the Ministry of Rehabilitation vide notification dated 26.11.1957 and thereafter sold to the petitioner, no useful purpose will be served by remanding the case to the Court below as the court below can not go against the orders passed by the authorities constituted under the 1954 Act and under the Administration of Evacuee Property Act. It is, however, observed that it will be open to the contesting respondents to approach the competent authority under the 1954 Act for ventilation of their grievance, if any, if they are so advised and if it is legally permissible within one month from today.

11. Subject to what has been stated above, this petition succeeds and is allowed with costs. The orders dated 6.6.1984 (Annexure-IV) and 26.2.1976 (Annexure-111) are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.7.2002

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 1397 of 1986

Mahabir Prasad Pathak ...Petitioner
Versus
The Labour Court, Allahabad and another ...Respondents

Counsel for the Petitioner:
Mr. K.P. Agarwal
Ms. Mahima Maurya

Counsel for the Respondents:
Sri V.R. Agarwal
S.C.

Constitution of India- Article 226- petitioner was absent for more than a year without any sanctioned leave and when asked, he did not present himself for examination by the company's Medical Officer. Coupled with this was the fact which has come on record; that the petitioner continued to work as a field officer of Peerless Insurance Company Limited and earned higher Commission than usual during the period of absence. The Labour Court has considered the case of the petitioner in details and has also examined the evidence adduced by the parties before arriving at its findings.

(Held in para 7)

The petitioner could not be permitted to work at two places and by working with another establishment during the period when he absented himself, allegedly on a medical ground, he has cheated his employer. Accordingly I do not find any reason to interfere with the award given by the Labour Court.

Case Law Referred:
(I) 1998 (79) F.L.R. 233
(II) 1993 (67) F.L.R. 111

(Delivered by Hon'ble Vineet Saran, J.)

1. By means of this writ petition, the petitioner is challenging the award dated 31st July, 1985 passed by the Labour Court, Allahabad.

2. Briefly, the admitted facts of this case are that the petitioner was appointed on 3.10.1967 as a fitter in the respondent-company, G.E.C. India Limited. Thereafter on 17.10.1968 the service of the petitioner was confirmed as fitter and on 3.9.1970 the petitioner was promoted to the post of Junior Inspector. While working as Junior Inspector, the petitioner absented himself from 1.10.1982 to 26.11.1983. According to the petitioner he had absented himself from duty because of illness but his absence for more than a year was admittedly without any leave application. Thus on 26.11.1983, the service of the petitioner was terminated and in compliance with the provisions of section 6-N of the U.P. Industrial Disputes Act, 1947, the employer gave him one month's salary in lieu of notice. The said payment was made by the respondent no. 2 by cheque which was accepted by the petitioner.

3. Subsequently, the petitioner raised an industrial dispute under section 4-K of the U.P. Industrial Disputes Act, 1947 which was referred to Labour Court, Allahabad. The terms of reference were as follows:

"KYA SEWAYOJAKON DWARA APNE SHARAMIK MAHABIR PRASAD PATHAK, JUNIOR INSPECTOR KI SEWAYEN DINANK 26.11.1983 SE SAMAPT KIYA JANA UCHIT TATHA/ATHWA WAIDHANIK HAI YADI NAHIN TO SAMBANDHIT SHRAMIK KYA LABH/ANUTOSH (RECEIVE A PANE KA ADHIKARI HAI, TATHA ANYA KIS VIVRAN SHIT."

4. After exchange of pleadings and appraisal of evidence, the Labour Court gave a finding that the petitioner absented himself from duty w.e.f. 1.10.1982 to 26.11.1983 without any sanctioned leave. It was submitted by the petitioner that during this period he was unwell and

hence could not attend his duties. When the workman petitioner submitted medical leave application, the employer directed him to present himself for examination before the company's Medical Officer but the petitioner did not respond nor did he present himself for examination. Further it is not disputed by the petitioner that he was serving as field officer with the Peerless Insurance Company since 1978. This fact came to light during the proceedings before the Labour Court. It was also not disputed by the petitioner that during the period 1982-83 i.e. when he was absent from duties, he earned a commission of about rupees forty to forty-five thousand from Peerless Insurance Company. It is also admitted by the petitioner that even after the termination of service in the year 1983, he continued to work as field officer of the Peerless Insurance Company and was earning his commission there. At the time when the service of the petitioner was terminated in the year 1983 he was getting the salary of Rs.700/- to 800/-. Admittedly, the commission income which he was getting during the period of absence in the year 1982-83 was much more than his salary. On the excuse of medical leave the petitioner absented himself from work at the office of the respondent company but continued to work with Peerless Company and earned higher commission.

5. I have heard Ms. Mahima Maurya holding the brief of Mr. K.P. Agarwal, learned senior counsel for the petitioner and Sri V.R. Agarwal for the contesting respondent no. 2. The findings of fact as stated above have not been disputed by the learned counsel for the petitioner. However, it has been submitted by her that since there was no provision in the Standing Order that the workman cannot do any part time work after working hours, the service of the petitioner cannot be terminated on this ground. It was also contended by her that the services of the petitioner cannot be automatically terminated without giving any opportunity of hearing or conducting any domestic enquiry by the employer. In support of her argument she has placed reliance on two decisions of the Supreme Court reported in 1998 (79) F.L.R. 233- (*Uptron India Limited v. Shamim Khan*); and 1993 (67) F.L.R. 111- (*D.K. Yadav v. J.M.A. Industry Limited*).

6. I have considered the said decisions of the Supreme Court and am of the view that the same do not apply to the facts of this case. In this case it is not disputed by the petitioner that he was absent for more than a year without any sanctioned leave and when asked, he did not present himself for examination by the company's Medical Officer. Coupled with this was the fact which has come on record, that the petitioner continued to work as a field officer of Peerless Insurance Company Limited and earned higher commission than usual during the period of absence. The Labour Court has considered the case of the petitioner in details and has also examined the evidence adduced by the parties before arriving at its findings.

7. In the light of the circumstances enumerated above, I agree with the finding arrived at by the Labour Court that the petitioner could not be permitted to work at two places and by working with another establishment during the period when he absented himself, allegedly on medical ground, he has cheated his employer. Accordingly I do

not find any reason to interfere with the award given by the Labour Court.

8. In the result, the petition fails and is dismissed. There shall be no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.8.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 2022 of 1996

State of U.P. ...Petitioner
Versus
The Labour Court, U.P., Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Prabodh Gaur
S.C.

Counsel for the Respondents:
Sri Pankaj Srivastava
Sri A.C. Srivastava
Sri R.B. Singhal

Industrial Disputes Act, 1947, Section 6 (N)- Retrenchment Cessation of employment of work man amounts to retrenchment u/s 6-N of the Act- Petr end to wages.

Held- Para 4 and 5

That cessation of an employment for whatsoever reason amounts to retrenchment and the least that is required from the employer is to comply with the provisions of section 6-N of the Act (See. 1982) 1 Supreme Court Cases 645 L. Robert D' Souza vs. Executive Engineer, Southern Railway and another).

The wages to the respondent no. 2 workman amounts to retrenchment.

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

1. By means of this petition the State of U.P. has challenged the Award of the Labour Court, U.P., Allahabad, dated 27.4.1995 in Adjudication case no. 108 of 1990. The fact is that several adjudication cases were made by different workmen before the Labour Court but the facts of the above Adjudication case are picked up in the present writ petition.

2. It is an admitted case that the concerned workman, respondent No. 2, had worked with the petitioner from 1982 to 1989. Thereafter his services were terminated. It is also admitted and not disputed by the petitioner that before terminating the services of the workman concerned neither any notice had been given on him nor the provisions of section 6-N of the Industrial Disputes Act have been complied with.

3. The case of the petitioner is that the Barage system, where the workman was employed, has since been shifted from Allahabad to Mirzapur, no work remained at Allahabad. Therefore, all the workmen, including the respondent No. 2, were transferred to Mirzapur and asked to report there. Since they have not reported at Mirzapur their services were terminated. In this view of the matter the learned Standing Counsel for the petitioner has submitted that his is not a case covered by the definition of expression 'retrenchment' in Section 6-N and, therefore, it was not obligatory on the part of the employer to comply with the provisions of section 6-N of the Act. In fact, the employer has not terminated their services, as alleged, but these workman are not reporting for duty at

Mirzapur. Therefore, it is not a case of retrenchment.

4. So far as the cessation/ abandonment law relating retrenchment is concerned, it is clear from a series of decisions of the Apex Court as well as this Court that cessation of an employment for whatsoever reason amounts to retrenchment and the least that is required from the employer is to comply with the provisions of section 6-N of the Act (see: (1982) 1 Supreme Court Cases 645, L. Robert D' Souza Vs. Executive Engineer, Southern Railway and another).

5. In view of the law aforesaid laid down by the Apex Court the action of the petitioner in not paying the wages to the respondent No.2- workman amounts to retrenchment. Thus the Reference has been rightly answered in favour of the workman by the Labour Court. The Award does not require any direction from this Court. With the above directions, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 474 of 1988

Iqbal Ahmad, Assistant Teacher ...Petitioner

Versus

District Inspector of Schools, Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Prakash Gupta
Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act- Promotion to L.T. Grade and Lecturer Grade- G.O. declaring CT grade as Dying Cadre on completion of 10 years service in CT grade and the teacher becomes entitled to automatic promotion in LT grade.

(para 9)

Petr even though qualified for promotion to lecturer grade, but not being promoted by DIOS, direction issued to DIOS to give approval for promotion of the petitioner. A counter affidavit has also been filed on behalf of DIOS, Allahabad, in which it has been stated that there is no doubt that the Management has power to promote the petitioner which does not have any concern with the DIOS. There is no denial in the counter affidavit that the post of Lecturer is to be filled only by way of promotion and the petitioner is only a qualified teacher to be promoted in Lecturer grade.

In view of the facts stated above, the writ petition succeeds and is allowed. The District Inspector of Schools is directed to pass appropriate orders on the papers in respect of the petitioner sent to him for approval of the promotion of the petitioner in pursuance of the resolution on of the committee of management dated 15.7.95 recommending the promotion of the petitioner in Lecturer grade, within a period of two months from the date of production of a certified copy of this order. No order as to costs.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard the learned counsel for the petitioner and the learned Standing Counsel and perused the records.

2. Majidia Islamia Inter College, Allahabad (herein after called as the Institution). It is a minority institution and

is recognized under the U.P. Intermediate Education Act.

3. The petitioner was appointed in C.T. grade in the Institution on 17.7.1972 for teaching English subject. One Noor Ahmad Khan L.T. grade teacher, who was teaching the same subject to High School classes, went on long leave and thereafter resigned from his post in the year 1977.

4. Under Regulation 6 of Chapter-II of the Regulations framed under U.P. Intermediate Education Act, a teacher, who is working in C.T. grade and having put in five years continuous substantive service, is entitled for promotion, provided he possesses prescribed minimum qualification for teaching the subjects required in L.T. grade.

5. The qualification for teaching English as a subject in High School classes is that the teacher should be trained and possesses Bachelor of Arts degree with English Literature as a subject. It is alleged that the petitioner is a trained teacher and B.A. with English Literature, History, Economic and General English as subjects and as such he is fully qualified for being promoted in L.T. grade teacher under Regulation 6 of the Regulations in clear vacancy, which had occurred on account of resignation of permanent incumbent Noor Ahmad in the year 1977.

6. It is submitted that papers of the petitioner were sent for approval of his appointment in L.T. grade to the D.I.O.S. in the month of July, 1977, but the approval was not granted on the pretext that the Institution was not having requisite strength of students. However, the petitioner was continued by the Management to teach High School classes in English subject.

7. In the mean time, one Ale Ahmad Abdi, who was also a permanent L.T. grade teacher and was teaching English in High School classes, was promoted on the post of Lecturer in the year 1982 causing a substantive vacancy in L.T. grade.

8. The grievance of the petitioner by means of the present writ petition is that though he was entitled for promotion in L.T. grade, but due to delay in the matter by the respondents, he has been deprived of the promotion. The petitioner filed the present writ petition for a direction in the nature of mandamus directing the respondents to promote the petitioner in L.T. grade. The writ petition was admitted and notices were issued to the respondents on 7th September, 1988.

9. During the pendency of the writ petition, a Government Order was issued in the year 1989 by which C.T. grade was declared as dying cadre and it was provided in the G.O. that on completion of ten years service in C.T. grade, a teacher will become entitled for promotion in L.T. grade automatically. In view of the G.O. dated 3.2.89 this Court by an interim order dated 3.2.89 directed the Management of the Institution to pay the salary to the petitioner in L.T. grade with effect from 1982. The interim order dated 3.2.89 is quoted below:

"In respect of the fact that time was granted to the respondents to file a counter affidavit. No counter affidavit has been filed till this date.

The respondents are directed to pay to the petitioner the salary of L.T. grade

since 1982. The entire amount is to be paid within a period of two months from today. The future salary of the petitioner shall also be paid by 7th of succeeding month.

Sd/- Hon. M.P.Singh, J.
3.2.89"

10. In view of the interim order passed by this Court, the question regarding promotion in L.T. grade has thus become redundant.

11. It is submitted that during the pendency of the writ petition, one A.H. Siddiqui, a permanent Lecturer, retired on 30.6.1995 again causing vacancy on 1.7.1995 and further that the Committee of Management by resolution dated 15.7.95 has recommended the name of the petitioner for promotion in Lecturer grade. The Committee has also submitted/forwarded all the relevant papers to the D.I.O.S. Allahabad for approval of his appointment.

12. A counter affidavit has also been filed on behalf of D.I.O.S. Allahabad, in which it has been stated that there is no doubt that the Management has power to promote the petitioner which does not have any concern with the D.I.O.S. There is no denial in the counter affidavit that the post of Lecturer is to be filled only by way of promotion and the petitioner is only a qualified teacher to be promoted in Lecturer grade.

13. However, respondent no. 1, the District Inspector of Schools did not pass any order on the papers for approval for promotion of the petitioner in Lecturer grade. He, on the other hand, asked the Management that since the matter for promotion is pending in the writ petition, the orders ought not to have been passed.

14. In view of the facts stated above, the writ petition succeeds and is allowed. The District Inspector of Schools is directed to pass appropriate orders on the papers in respect of the petitioner sent to him for approval of the promotion of the petitioner in pursuance of the resolution of the Committee of Management dated 15.7.95 recommending the promotion of the petitioner in Lecturer grade, within a period of two months from the date of production of a certified copy of this order. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2002

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

Special Appeal No. 140 of 1996

Ram Kinkar Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri H.N. Singh

Counsel for the Respondents:
Sri Sabhajeet Yadav
S.C.

Constitution of India, Article 226- Revision of Pay Scale - post of staff instructor- appointment under Provincial Kshiksha Dal- created by G.O. dated 12.12.64-appointed on 14.1.64- Pay scale of other state government employees revised w.e.f. 1979- but the Government accepted the Revision of Pay Scale w.e.f. 1.1.86- No justification

for discrimination- Held- entitled for revision of Pay w.e.f. 12.7.79.

Held- Para 8

There is no justification for the State Government not to revise the pay scale w.e.f. 12.7.79 when the benefit of the revised pay scale has been given to all the State Government employees and such an action of the State Government is arbitrary and discriminatory being violative of Article 14 of the Constitution of India and thus cannot be sustained.

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

1. Shri Ram Kinkar Tripathi, the appellant writ petitioner, has filed the present special Appeal against the judgment and order dated 5.1.1996, passed by the learned single Judge, whereby the writ petition filed by him, has been partly allowed with the following directions:-

"In that view of the matter, the claim of the petitioner succeeds to the extent that he is entitled to get the revised pay with effect from 1.1.1986. No other question having been urged in this writ petition, this writ petition is allowed only with the direction that the respondents are directed to make payment of all arrears to the petitioner with effect from 1.1.1986. Such arrears are to be paid within a period of three months from the date of production of a certified copy of this order."

2. We have heard Shri H.N. Singh, learned counsel for the appellant writ petitioner and Shri Sabhajeet Yadav learned standing counsel for the respondents.

3. Shri H.N. Singh, learned counsel for the appellant writ petitioner submitted that the appellant writ petitioner was initially appointed as Staff Instructor under the Provincial Shiksha Dal on 24.2.1964. Provincial Shiksha Dal was amalgamated with the Education Department and the services of the appellant writ petitioner was placed under the control of Director of Education (Basic). According to him the Provincial Shiksha Dal was abolished in the year 1972 and all the staff were absorbed with the department of Basic Education. The appellant writ petitioner was getting the pay scale of Rs.175-250 in the year 1972. The pay scale of State Government employees was revised in the year 1979 and again w.e.f. 1st January, 1986. According to the counsel due to some omission the pay scale of Staff Instructor was not revised, whereupon the appellant writ petitioner approached this court by filing Civil Misc. Writ Petition No. 15187 of 1985 which was disposed by this court vide judgment and order dated 28.3.1988 with the direction to the Additional Director of Education to decide the case of the petitioner, if possible, within two months from the date of service of a certified copy of the judgment upon him.

4. Pursuant to the aforesaid direction given by this court, the Addl. Director of Education vide letter dated 19th July, 1989, written to the Joint Secretary, Education Govt. of U.P. Lucknow stated that the pay scale of Rs.175-250 in which the appellant writ petitioner was placed on 1.8.1972 was equivalent to the pay scale which the drivers were getting and since the pay scale of the drivers have been raised on 1st July, 1979 to Rs.330-495 the same pay scale be given to the appellant writ petitioner. When a final decision was

not being taken by the competent authority, the appellant writ petitioner filed a Contempt Petition No. 6746 of 1981 against the then Additional Director of Education (Basic). However, the said contempt petition was dismissed vide order dated 1.5.1991.

5. The petitioner again approached this court by filing Civil Misc. Writ Petition No. 26287 of 1991 for issue of a writ of mandamus commanding the respondent nos. 1 and 2 i.e. the State of U.P. through the Education Secretary U.P. Lucknow and the Director of Education (Basic) Lucknow to revise pay scale of the appellant writ petitioner w.e.f. 1.7.1979 and to pay arrears of his salary. The said writ petition has been decided by the learned Single Judge by the impugned judgment and order dated 5.1.1996 on the basis of G.O. dated 4.10.1991 by which the State Government had granted the benefits of the revised pay scale to the appellant writ petitioner w.e.f. 1.1.1986.

6. The learned counsel has submitted that there is no dispute that the pay scale of all the State Government Employees had been revised w.e.f. 1.7.1979 and, thus, there is no question of not giving the benefits of the revised pay scale to the appellant writ petitioner from the date. According to him even though the pay commission had not specifically recommended the revision of the pay scale of the Staff Instructor working in the Basic Education Department, they cannot be denied the benefits of the revision of the pay scale in as much as they are entitled for such revised pay scale which other persons are getting who were placed in the same pay scale in other posts of other department or that department.

7. Shri Sabhajeet Yadav, learned Standing Counsel, however, submitted that since the pay scale of the appellant writ petitioner had not been revised he is not entitled to get the revised pay scale w.e.f. 1.7.1979 and in view of the G.O. dated 4.10.1991 he has rightly been given the benefit of the revised pay scale w.e.f. 1.1.1986.

8. Admittedly, the appellant writ petitioner had been appointed on the post of Staff Instructor in the Provincial Shiksha Dal and after its amalgamation with the Basic Education Department he was getting the pay scale of Rs.175-250. The pay scales of all the Government employees have been revised by the State Government w.e.f. 1.7.1979. By the Govt. Order dated 4.10.1991 the revision of pay scale of Staff Instructor was effected w.e.f. 1.1.1986 or from the date of creation of the post whichever is later. It appears that the post of Staff Instructor was created on 12.12.1964. Even though the revision of pay scale took place in the year 1979 and 1986 but the appellant writ petitioner's pay scale was not revised. He is entitled for revision of pay scale when the pay scale of all other State Government employees have been revised. The State Government has not given any reason for fixing the cut off date for revising the appellants pay scale w.e.f. 1.1.1986 and not earlier when the revision took place in respect of other category of the staff. There is no justification for the State Government not to revise the pay scale w.e.f. 12.7.1979 when the benefit of the revised pay scale has been given to all the State Government employees and such an action of the State Government is arbitrary and discriminatory being

violative of Article 14 of the Constitution of India and thus cannot be sustained.

9. In view of the foregoing discussions, the Special Appeal succeeds and is allowed. The respondent no. 1 is directed to fix the pay scale of the appellant writ petitioner w.e.f. 1.7.1979 within 2 months from the date of communication of this order and pay the entire arrears of salary which is found due and payable within one month thereafter.

10. The judgment and order of the learned Single Judge dated 5.1.1996 is modified to the extent mentioned above.

However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2002

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

Civil Misc. Writ Petition (P.I.L.) No. 15066 of 2000

U.P. Urdu Development Organization and another ...Petitioners

Versus

Government of India through its Secretary and others ...Respondents

Counsel for the Petitioners:
Sri M.S. Haque
Sri Ravinder Singh
Sri Parwaz Ulum (In Person)

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

U.P. Official language Act 1951 as amended by Uttar Pradesh Official (Amendment) Act 1989- Section 3 - Notification dated 7.10.89- State Government notified 7 purposes about which urdu language be treated as second official language nor the urdu comes within the definition of Regional language- No Mandamus can be issued for printing of form money order, telegram form. Accounts opening form withdrawal form and other postal forms simultaneously in Urdu apart from Hindi and English.

Held- Para 7 and 9

From reading of the aforesaid paragraph, it is clear that where the Regional language is different from Hindi, the form should be printed in regional language also. The petitioners have failed to establish that the Urdu is regional language of the State of U.P.

Constitution empowers the legislature of the State of adopt by law any one or more of the languages for use in the State to be used for or any of the official purposes of that State. It is not in dispute that the Urdu language has been declared as the second official language in the State of U.P. for such purpose as may be notified. By the notification referred to above, which specifies only seven purposes for which Urdu language is to be used. Thus it cannot be said that for all purposes Urdu language has been declared as second official language or is to be treated as regional language in the State of U.P.

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

1. This writ petition has been filed by U.P. Urdu Development Organization through its Hony. General Secretary Dr. Parwaj Ulum, and Dr. Parwaz Ulum in his individual capacity under Article 226 of the Constitution of India, seeking the following reliefs:-

(i) to issue a writ, order or direction in the nature of writ of mandamus commanding the respondents to provide Money Order Form and other Forms in trilingual i.e. Hindi, Urdu and English simultaneously meant for the use of Public in Uttat Pradesh as per the "ORDER REGARDING THE OFFICIAL LANGUAGE POLICY" Chapter II Order 2.20 (A);

(ii) issue a writ, order or direction in the nature of writ of mandamus commanding the respondents to provide a common facility for public of Uttar Pradesh so that Registered Letters, Speed Post Letters and Parcels addressed in Urdu Language be received by the post offices through out the Uttar Pradesh in compliance of Central Govt. Official Language Policy;

(iii) to issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to provide a common facility to entertain grievances/complaints/ representations in Urdu Language in compliance of Article 350 of the Constitution of India, 1950;

(iv) to issue a writ order or direction in the nature of mandamus commanding the respondents to make at least one appointment of Urdu Educated Person/ Urdu Translator in each and every post Offices of Uttar Pradesh so that Central Govt. Official Language Policy "(THE ORDER REGARDING THE OFFICIAL LANGUAGE POLICY) Chapter 2 Order 2.20(A) and Article 350 of the Constitution of India be fully complied with.

(v) to issue any other writ, order or direction in any of the nature which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(vi) to award the cost of the petition to the petitioners against the respondents."

2. We have heard Dr. Parwaz Ulum, petitioner no.2 in person on behalf of petitioner no. 1 also and Shri Subodh Kumar learned Standing counsel for the respondents.

3. According to the petitioners, there is no adequate facility for Urdu speaking public in the various Post offices in the State of U.P. to receive letter/complaint/registered letter addressed in Urdu because of non availability of Urdu educated Employee/ Urdu Translator, despite the fact that Urdu has been declared the second official language in the State. The petitioners raised their grievance to different post offices located in Allahabad City, wherein there was general suggestions for providing an adequate facility for public in its Post Offices for entertaining work in Urdu. The petitioners also made similar representation to the various authorities of the State as also of the Central Government but all their efforts did not bear any fruit. According to the petitioners, the Department of Official Language, Ministry of Home Affairs, Government of India has issued Manual regarding the use of official language Hindi Chapter 2 of the Manual deals with Official Language Policy. Paragraph 2.20 (A) deals with the printing of Money Order Forms and other Forms meant for the use of public in regional languages. It provides for printing of forms in Hindi, English and regional language if it is different from Hindu. Thus, according to the petitioners, Urdu

being the second official language in the State of U.P., Money Order Forms, telegram Forms, Accounts Opening Forms, Withdrawal Forms and other postal forms for use of public, should be printed in Hindi, English and Urdu simultaneously. The petitioners also relied upon the Uttar Pradesh Official Language (Amendment) Act 1989 by which Section 3 of the U.P. Official Language Act, 1951 was amended and new Section 3 was inserted by which Urdu language was declared to be second official language and also the notification dated 7.10.1989 issued by the State Government declaring the purpose for which the Urdu is to be used as second official language. The petitioners also relied upon the Government Order dated 16.3.1989 issued by the State Government by which all the Department of the State Government were directed to do the work in Urdu and also for the purpose notified in the Notification dated 7.10.1989. The reliance is also placed on the provisions of sub-section 4 of Section 3 read with Section 8 of the Official Language Act 1963 for the preposition that the Central Government has been authorized to make rules for carrying out the purpose of the Act and, therefore, Forms ought to have been made in Urdu Language also and accepted in the Government Offices.

4. Shri Subodh Kumar learned Standing Counsel, however submitted that Urdu has been declared second official language in the State of U.P. for such purposes as may be notified by the State Government and the State Government by notification dated 7.10.1989 had notified only 7 purposes for which Urdu is to be treated as second official language in the State. Thus, he submitted that the Urdu has not been declared full-fledged second official language in the State of U.P. It is also not a regional language and, therefore, there is no obligation upon the respondents to print the forms in Urdu also.

5. After hearing the rival submissions as mentioned above, we find that the Urdu has not been declared the second official language in the State of U.P. for all purposes. Section 3 of the U.P. Official Language Act, 1951 which was inserted by the U.P. Official Language (Amendment) Act, 1989, provided for use of Urdu language as second official language for such purposes as may be notified by the State Government from time to time. By Notification No. 4171/XXI-89-1. 1980, dated 7.10.1989, the Governor had notified only the following 7 purposes for which Urdu language shall be used as second official language:

1. entertaining petitions and applications in Urdu and replies thereof in Urdu,

2. receiving documents written in Urdu by the Registration Office.

3. publication of important Government Rules, Regulations and Notifications in Urdu also.

4. issuing Government Orders and circulars of public importance in Urdu also.

5. publication of important Government advertisements in Urdu also.

6. publication of Urdu translation also of the Gazette.

7. exhibition of important signposts in Urdu.

6. The U.P. Official Language Act, 1951 as amended by the U.P. Official Language (Amendment) 1989 does not make Urdu as second official language for all purposes in the State of U.P. By virtue of Notification dated 7.10.1989 Urdu language is to be used for specified purposes only. From perusal of the aforesaid purposes as mentioned above, notified by the Government of U.P. for which Urdu language is to be used, it is clear that it does not cover forms which are to be used by the postal authorities of the Central Government. Thus, it is not correct to say that Urdu has been declared as second official language in the State of U.P. for all purposes and the respondents ought to print and receive the forms in Urdu language also and further to appoint Urdu known person for such purposes, in their offices. So far as paragraph 2.20 (A) of Chapter 2 of the Manual regarding the use of official language Hindi brought out by the Department of Official Language Ministry of Home Affairs, Government of India, is concerned, it only provides for printing of Money Orders Forms and other Forms meant for the use of public in regional language. Paragraph 2.20 (A) is reproduced below:

"**2.20(A) Printing of Money Order Forms and other forms meant for the use of Public in regional languages.**

(i) Where it is possible without unduly increasing the size of the forms, such forms should be printed in Hindi, English and the regional language if it is different from Hindi. In such matters the question of extra expenditure should not be an important consideration.

(ii) If any section in these forms are required to be filled in within a Central Government office or are required for audit offices, such sections need not be translated into regional languages and should be printed in Hindi/English only.

(iii) Longer forms, for example, the income tax and customs forms, should be printed separately in Hindi-English and the regional language. In these forms also the exception mentioned in (ii) above should apply."

7. From reading of the aforesaid paragraph, it is clear that where the Regional language is different from Hindi, the forms should be printed in regional language also. The petitioners have failed to establish that the Urdu is regional language of the State of U.P..

8. The petitioners also referred to the provision of Article 345 and 347 of the Constitution of India and submitted that Urdu should be deemed to be the regional language in the State of U.P. and it has been declared second official language in the State of U.P.

9. The submission is misconceived in as much as Article 345 of the Constitution empowers the legislature of the State to adopt by law any one or more of the languages for use in the State to be used for or any of the official purposes of that State. It is not in dispute that the Urdu language has been declared as the second official language in the State of U.P. for such purpose as may be notified. By the notification referred to above, which specifies only seven purposes for which Urdu language is to be used. Thus, it cannot be said that for all purposes Urdu language is to be used. Thus, it cannot be

said that for all purposes Urdu language has been declared as second official language or is to be treated as regional language in the State of U.P.

10. The reliance placed by the petitioners on the money order form published in regional language viz in Gujrat (Gujrati), Maharashtra (Marathi), Andhra Pradesh (Telgu), Tamilnadu (Tamil), Kerala (Malyalam) West Bengal (Bengali) and in Punjab (Gurmukh/Punjabi) is of no assistance to the petitioners as in these States the languages mentioned in the bracket are the regional languages of the respective States whereas in the State of U.P. Urdu has not been declared or treated as a regional language at all.

11. The reference made to sub-section 4 of Section 3 read with Rule 8 of the Official Languages Act 1963 is also misplaced. Sub-section 4 of Section 3 of the Official Language Act, 1963 reads as follows:

"(4) Without prejudice to the provisions of sub-section (1) or sub-section (2) or sub-section (3) the Central Government, may, by rules made under section 8, provide for the language/ languages to be used for the official purpose of the Union including the working of any Ministry, Department. Section or Office and in making such rules, due consideration shall be given to the quick and efficient disposal of the official business and the interests of the general public and in particular, the rules so made shall ensure that person serving in connection with the affairs of the Union and having proficiency either in Hindi or in the English language may function effectively and that they are not placed at a disadvantage on the ground that they are not placed at a disadvantage on the ground that they do not have proficiency in both the language."

12. Section 8 empowers the Central Govt. to make rules for carrying out purposes of the Act. From the conjoint reading of subsection 4 of Section 3 of the Official Languages Act 1963 and Section 8, it does not follow that the Central Government is under obligation under law to direct the printing and receiving of forms and carry out the work in Urdu in its offices in the State of U.P.

In view of the foregoing discussions, we do not find any merit in this petition and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 21, 2002

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

Civil Misc. Writ Petition No. 1970 of 2002

Sarva Krishna Ajay Kumar Agrawal ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Arun Tandon

Counsel for the Respondent:
Sri Chandra Shekhar Singh
S.C.

Uttar Pradesh Sheera Niyantran Adhiniyam, 1964- Scope and meaning of Section 7-A- the first part of the sentence i.e. who requires molasses for his distillery' is very clear and admit no doubt that only that person can apply

who require molasses for his distillery. Thus application by dealer or Handling agent for purpose of any distillery is ruled out-Section 7-A contemplates application by a person who requires the molasses for his distillery or for his industrial development. Application by a dealer is ruled out under section 7-A in view of the Scheme of the Act and the Rules. (Held in para 25).

We are satisfied that the application of the petitioner was rightly rejected. The fact that sugar is hundred percent free and there is no control on the price can in no manner dilute the applicability of section 7 A it is clear that the petitioner is conscious of applicability of Section 7 A abd he can succeed only when his application comes within the four corners of Section 7A. Thus the third submission of the counsel for the petitioner can also not be accepted and we hold that the application of the petitioner was rightly rejected.

Case Law referred:

(i) AIR 1952 Cal. 852,853
(ii) 1995 (I) SCC Page 745

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri Arun Tandon counsel for the petitioner and Sri Chandra Shekhar Singh, learned standing counsel appearing for the State respondents.

2. This writ petition has been filed by the petitioner praying for quashing of the orders 27th May, 2002 passed by the Controller of Molasses/Excise Commissioner, U.P. Allahabad. A further prayer has been made commanding the respondents to reconsider the application of the petitioner afresh for grant of permission under Section 7 A of the Uttar Pradesh Sheera Niyantran Adhiniyam 1964.

3. Brief facts giving rise to this writ petition are as follows:

4. Petitioner is a firm registered under the U.P. Sales Tax Act. Petitioner claimed to be dealer/handling agent of molasses. Petitioner claims that earlier by the order of Controller molasses he was allotted different quantity of molasses. Petitioner further claims that he has also been granted "No objection" certificate for export of molasses out of the State. Petitioner filed an application under Section 7-A of the U.P. Sheera Niyantran Adhiniyam, 1964 praying that he be granted permission for 1,00,000 quintals of molasses. He has stated in his application that the said molasses will be sold to the distilleries and the industrial establishment of the State of Uttar Pradesh and out side the State of Uttar Pradesh. The petitioner had also filed a writ petition No. 1751 of 2002 after filing the aforesaid application. When the writ petition came for hearing on 15.5.2002 learned standing counsel made statement that the order has already been passed on the application of the petitioner which shall be communicated. The writ petition was dismissed with liberty to the petitioner to challenge the said order in appropriate proceedings. After the aforesaid order petitioner was issued letter dated 27.5.2002 intimating that that his application under Section 7-A has been rejected. In the order dated 27.5.2002 it has been stated that under Section 7-A of the Act only such person can give an application who required molasses for its distilleries or for industrial development. Order further states that the application given by the petitioner does not come under Section 7-A since the petitioner has not claimed that he required for his own distillery or for industrial development.

The said order dated 27.5.2002 has been challenged in this writ petition.

5. Sri Arun Tandon counsel for the petitioner challenging the aforesaid order dated 27.5.2002 made following submissions:

1. Under section 7-A there is no prohibition in granting an application of a person who is a dealer and requires the molasses for it being sold for purposes of industrial development. The respondents have misinterpreted Section 7-A and has illegally rejected the application.

2. The petitioner and other similarly situated dealers in earlier years were granted permission, reference has been made to the orders of the Controller dated 11.4.1989, 20.6.1989 annexures 11 and 12 to the writ petition.

3. State of Uttar Pradesh by Government order has lifted control on price and distribution of molasses hence no restriction can be imposed in free sale of molasses.

6. Learned standing counsel refuting the submissions of the counsel for the petitioner supported the order dated 27.5.2002 and contended that under Section 7-A the petitioner is not eligible for grant of any permission for molasses. It was contended that under Section 7-A no dealer or handling agent can be granted permission to lift the Molasses. The standing counsel contended that only that person can apply who requires molasses for his distillery or for any purpose of industrial development. It was contended that since the petitioner do not require the molasses for his distillery or for any purpose of industrial development by himself, he cannot make an application.

7. We have heard counsel for the parties and perused the record. The main issue which has arisen in this writ petition is regarding true scope and meaning of Section 7-A of the Uttar Pradesh Sheera Niyantran Adhiniyam, 1964. For considering the submission raised by the counsel for the petitioner it is necessary to examine the provisions of Section 7-A and other provisions of the Act and the Rules to find out the real object and scope of the Act and the Rules. Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 (hereinafter called as the Act, 1964) was enacted to provide in public interest for the control of storage, gradation and price of molasses produced by Sugar Factories in Uttar Pradesh and the regulation of supply and distribution thereof. Section 2 (d) of the Act defines molasses which means the heavy, dark coloured viscous liquid produced in the final stage of manufacture of sugar by vacuum pan, from sugar cane or gur, when the liquid ask such or in any form or admixture contains sugar. Section 5 provides preservation of molasses by the occupier of sugar factory. Section 7-A of the Act deals with manner and procedure regarding Application for molasses, Section 7-A is quoted below:-

"7-A. Application for molasses_____

(1) Any person who requires molasses for his distillery or for any purpose of industrial development may apply in the prescribed manner to the Controller specifying the purpose for which it is required.

(2) On receipt of an application under sub-section (1) and after making such inquiries in the matter as he may think fit, the Controller may make an order under Section 8.

(3) In disposing of an application under sub-section (1) the Controller shall consider____,
(a) the general availability of molasses;
(b) various requirements of molasses;
(c) the better utilization to which molasses may be put in the public interest;
(d) the extent to which the requirements of the applicant are genuine;
(e) reasonable likelihood or otherwise of the molasses that may be obtained by the applicant being diverted to purposes other than those specified in the application and where the application is rejected in whole or in part, he shall record reasons therefore)

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

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

8. Section 8 of the Act deals with sale and supply of molasses. Under section 8 the Controller of molasses require the occupier of sugar factory to sell and supply in the prescribed manner such quantity of molasses to such person as may be specified in the order. Section 8 of the Act is quoted as below:-

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

(a) shall require supply to be made only to a person who requires it for his distillery or for any purpose of industrial development:

(aa) may require the person referred to in clause (a) to utilize the molasses supplied to him under an order made under this section for the purpose specified in the application made by him under sub-section (1) of Section 7-A and to observe all such restrictions and conditions as may be prescribed;

(b) may be for the entire quantity of molasses in stock or to be produced during the year or for any portion thereof; but the proportion of molasses to be supplied from each sugar factory to its estimated total produce of molasses during the year shall be the same throughout the State save where, in the opinion of the Controller, a variation is necessitated by any of the following factors;

(i) the requirements of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost;

(ii) the requirements for other purposes of industrial development within such area; and

(iii) the availability of transport facilities in the area;

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

9. Section 10 deals with maximum prices of molasses. Section 11 and 12 deal with offences and penalties. Section 17 of the Act provides for maintenance of accounts and furnishing of returns etc. by sugar factory and other persons to whom molasses is supplied. Section 17 is quoted below:-

"17. Maintenance of accounts and furnishing of returns, etc. _____
Every occupier of a sugar factory and every person to whom molasses is supplied by such occupier shall be bound
_____

(a) to maintain such registers, records, instruments as may be prescribed;

(b) to furnish all such information and returns relating to the production and disposal of molasses in such manner, to such persons and by such dates as may, by order, be prescribed by the Controller;

(c) to produce, on demand by an Excise Officer not below the rank of a Sub-Inspector (Exercise), registers, records, documents, instruments and chemical reagents which he is required to maintain under the provisions of this Act or the rules or orders made thereunder."

10. Rules have been framed, namely, Uttar Pradesh Sheera Niyantran Niyamavali, 1974 (hereinafter to be referred as "Rules, 1974"). Chapter II of the Rules deals with preservation of molasses. Chapter III deals with supply and distribution. Rule 12 provides that the occupier of every sugar factory shall submit to the Controller by August 31st each molasses year a statement in Form M.F. 9 specifying an approximate estimate of the quantity of molasses to be produced in a sugar factory during the molasses year. Rule 13 deals with estimate of requirement of molasses for distillation and industrial purposes. Rule 16 deals with Arrangement for the lifting of molasses by the allottee. Rule 22 is relevant for the purpose. Rule 22 as amended by notification dated 16th August, 1993 is quoted as below:-

"*22. Sale or supply of molasses to distilleries and other persons for industrial development,*_____
The molasses produced in a sugar factory shall be sold or supplied only to distilleries or other persons bona fidely requiring it for purposes of industrial development."

11. Prior to the aforesaid amendment Rule 22 was as under:-

"22. Reservation of entire stock of molasses for distillation and other purposes of industrial development (Section 8). *(1) All stock of molasses produced in a sugar factory shall be deemed to have been reserved for supply to distilleries or other persons requiring it for purposes of industrial development*

and no stock of molasses produced in a sugar factory shall be sold or otherwise disposed of by the occupier of any sugar factory except in accordance with an order in writing from the Controller.

(2) The Controller shall release any stock of molasses in favour of occupier of a sugar factory only when the same is not required for distilleries or for other purposes of industrial development."

12. Rule 29 provides for manner of taking samples and procedure for settlement of dispute relating to grades of molasses. Rule 29 (4) which is relevant for the present purposes is extracted below:-

"29 (4) In the case of transport by road, if the allottee receiving molasses from a sugar factory is not satisfied with the grade declared by the sugar factory it may apply in writing to the Sub-Inspector, Excise or the Excise Inspector, molasses of the area in which the sugar factory is situated along with the testing fee to get the molasses of the storage tank from which the molasses was supplied by the sugar factory or the molasses was loaded in lorry or thela tested by the officer authorized under sub-rule (3) for declaration of its correct sugar contents. The price shall be according to the grade declared by such authorized officer. In case a lower grade is declared, the sugar factory will be bound to refund the allottee any extra payment realized along with the testing fee of such authorized officer. The provisions of sub-rules (1) to (3) shall also apply in the cases regarding taking of samples by the Resident Sub-Inspector, Excise or Excise Inspector, as the case may by."

13. Rule 33 provided for registers to be maintained and statement to be submitted by distilleries, out-still licensees and other allottees. Rule 33 is quoted below:-

"33. Register to be maintained and statements to be submitted by distilleries, out-still licensees and other allottees, _____ (1) The owners of distillers shall maintain a record of all molasses received, utilized for distillation and the balance in a register in Form M.F. 6, Parts I and II as appended to these rules and shall submit to the Controller a true monthly abstract, of the receipt, utilization and balance at the distillery each month in Form M.F. 10 on the 5th of each month following:

(2) In the case of allottee other than distilleries (except out still) the accounts of molasses shall be kept in a register in Form M.F. 6 Part III as given in appended form and allottees shall submit a correct monthly abstract of the same to the Excise Inspector in whose circle the industrial unit lies.

(3) Outstill licensees shall maintain accounts of molasses in Forms M.F. 6 Part III as given in appended forms and shall submit a correct monthly abstract of the same to the Excise Inspector in whose circle the shop lies.

Rule 35 provides for inspection book for inspecting Officer.

14. We have extracted the relevant provisions of the Act and the Rules for purpose of considering the object and scheme of the Act and the Rules which is relevant for understanding the scope and

object of Section 7-A. The key words in Section 7-A are:-

"Any person who requires molasses for his distillery or for any purpose of industrial development may apply ……."

15. The first part of the above sentence i.e. who requires molasses for his distillery' is very clear and admit no doubt that only that person can apply who require molasses for his distillery. Thus application by dealer or Handling agent for purpose of any distillery is ruled out. The contention of counsel for the petitioner is that his application is on behalf of those units which will deals molasses for industrial development. The contention of the counsel is that since he after getting permission will supply to only those units which will use it for industrial purpose, his application is not beyond the scope of Section 7-A. Section 7-A uses the word "require". The Law Lexicon by P. Ramnatha Aiyar, 1997 Second Edition defines the word "require" in following words:-

"Require" means to make necessary; to demand; to ask as of right."

16. Further the word "require" is defined in following words at page 1665:-

"The word "require" is something more than the word 'desire'. Although the element of need is present in both the cases, the real distinction between 'desire' and 'require' lies in the insistence of that need. There is an element of "must have" in the case of "require" which is not present in the case of mere "desire", *Nareshs V. Kanailal Roy Choudhary, AIR 1952 Cal. 852, 853 (W.B. Premises Rent Control (Temporary Provisions) Act, 38 of 1948, S. 11 (1) (f)"*

17. The word "require" is equivalent to "requisite or necessary".

18. It is well settled that for finding out the meaning and purpose of a word used in a statute the context in which it is used is relevant. The definition of word "require" as quoted above means that person applying under Section 7-A must have necessity or need for such requirement. A need for molasses can be by distillery or by any unit for its industrial development. Although in Section 7-A word "who require molasses for his" has been used before distillery but the said words have also to be read while interpreting the other clause that is "for any purpose of industrial development". Thus the person applying should either require for his distillery or for his any purpose of industrial development. From a reading of Section 7-A it is clear that a dealer cannot apply for distillery because before distillery the words "who require molasses for his" have been used. The contention of the appellant is that there is no prohibition in applying by a dealer if his application for the persons who requires molasses for industrial development. The object of Section 7-A has been to check and to provide for supply of molasses to only those persons who are thought fit by Controller of Molasses to be supplied the molasses. Two purposes have been mentioned in Section 7-A i.e. for distillery and for purpose of industrial development. Idea is to supply molasses to limited category of persons who will use for distillery and industrial development. This has been provided so that the distillery and industrial development do not suffer in

their cause by non supply of molasses since quantity produced in sugar factory is limited. Due to this purpose Section 7-A was enacted so that check be made and molasses be not diverted to any other use, if the interpretation as put up by the counsel for the petitioner is accepted then it will be open to any dealer to take all quantity of molasses from sugar factory which is to be used for industrial development and to make them available on a price on his sweet will or not to supply to the persons needing for industrial development according to their reasonable requirement. It will lead to hardship to the persons engaged in industrial development as well as the industrial growth of the State.

19. Analysis of provisions of Act, 1974 further reinforces our view that the application by a dealer under Section 7-A is ruled out. Section 8 sub clause (2) (aa) provides that Controller of molasses may require the person applied for his distillery or for any use of industrial development to utilize the molasses supplied to him for the purposes specified in the application and to observe all such restrictions and conditions as may be prescribed. If the dealer is to be treated as allottee of the molasses who in his turn sell it out to a third person, the observance of the restriction and conditions cannot be observed since molasses are with third persons who are not allotees and are not bound by restrictions provided for in Section 8. The act intends to put restriction and conditions on the person allotted molasses under the Act. The Act do not contemplate observance of the restriction and conditions by a third person to whom allottee sells the molasses. The observance of provisions of Section 8 (2) (aa) will become impossible by a dealer since after sale of it to a third party he cannot observe any condition and restriction which are attached to supply of molasses. Section 11 provides for penalty for contravention of the provisions. Section 17 of the Act as quoted above provide for maintenance of accounts and furnishing of return which is to be done by both Occupier of the factory or every person to whom the molasses are supplied by such occupier. Testing the provision on the basis of interpretation put up by the counsel for the petitioner it will mean that the third party who are sold molasses by a dealer can always take stand that they are not bound to maintain the accounts and furnish the returns since they have not been supplied molasses by occupier. This provision again suggest that the documents, accounts and registers has to be maintained by a person who is supplied molasses which in term means that the supplier is the person who is using the molasses and has to submit accounts and returns regarding supply. The analysis of the aforesaid provision clearly indicate that the provision did not contemplate supply of molasses to a dealer. It contemplates supply of molasses to a distillery or to a person using the molasses for his industrial development and said person is to require to maintain accounts, returns and has to observe conditions and directions issued regarding supply.

20. Analysis of provisions of 1974 Rules also leads to the same conclusions which we have drawn from the analysis of the provisions of the Act 1964. Rule 22 of the Rules make it clear that person applying for molasses should bona fide require the molasses. Rule 22 has been amended and a comparison of amended and unamended Rules suggest that the

amended Rule 22 has clarified that the molasses shall be sold or supplied only to distilleries and other persons bona fide requiring it for the purposes of industrial development. The dealer cannot be said to bona fide require the molasses for industrial development. The dealer may require molasses for earning the profits in his business which is not the object of the Act and the Rules. Further Rule 29 (4) provides that in case of transport by road, if the allottee receiving molasses from a sugar factory is not satisfied with the grade declared by the sugar factory it may apply in writing to the Sub-Inspector, Excise or the Excise Inspector, molasses of the area in which the sugar factory is situated along with the testing fee to get the molasses of the storage tank. Dealer after supply to a third party may not be interested for testing and the third party who is not allottee will face difficulty in proving his right to get molasses tested. The scheme of Rule 29 (4) again suggest that it is allottee who is required to use molasses for his purpose and object to the Grade of molasses. Rule 33 further requires that all registers to be maintained and the statement to be submitted by an allottee. The allottee require to submit monthly extract of the registers in Form M.F. 6 Part III. The dealer who has been supplied the molasses cannot comply the said provisions since he will sell it to third party. Under the Scheme of the Act and the Rules allottee will be only person who is allotted molasses under the orders of the Controller of Molasses. Rights have been given to the allottee for protecting his interest. Further rule 35 provides for inspection book for inspecting officer, dealer cannot maintain inspection book and the requirements of the rule is to maintain inspection book by allottee.

21. The provisions above discussed of the Act and the Rule clearly spells out that the allottee of the molasses has to be a person using the molasses for his distillery or for his any other industrial development. Thus the interpretation of Section 7-A as submitted by the counsel for the petitioner cannot be accepted. It is held that the Section 7-A contemplates application by a person who requires the molasses for his distillery or for his industrial development. Application by a dealer is ruled out under Section 7-A in view of the Scheme of the Act and the Rules.

22. In view of the aforesaid discussion the first submission of the counsel for the petitioner is not acceptable and Section 7-A of the Act cannot be interpreted as suggested by the counsel for the petitioner.

23. Coming to second submission of the counsel for the petitioner that the petitioner and other similarly situated dealers were granted permission in earlier years but the fact that in earlier years petitioner was granted permission by Controller of Molasses, cannot be a basis of right for issue of writ of mandamus. In view of interpretation of Section 7-A which we have taken that dealer cannot make an application for allotment of molasses under Section 7-A. The apex court in 1995 (1) Supreme Court Cases page 745 **Chandigarh Administration and another Vs. Jagjeet Singh and others** has held in paragraph 8 as under:-

"Generally speaking the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be a ground for issuing writ in favour of the

petitioner on the plea of discrimination. If the order in favour of other person is found to be contrary to law and not warranted in the facts and circumstances of the case, such order cannot be made basis of issuing a writ compelling the respondent authority to repeat the illegality or pass another unwarranted orders."

24. In view of what has been said above, the second submission of the counsel for the petitioner can also not be accepted.

25. Coming to the last submission of the counsel for the petitioner that the molasses has now been decontrolled. No restriction can be made on the sale and supply of molasses. The petitioner has relied to the order of the Controller of molasses dated 7.7.2000 Annexure-8 to the writ petition by which paragraph 5 (2) of the earlier order issued by the Controller of molasses was modified. A mere look to the order dated 7.7.2000 Annexure-8 to the writ petition shows that it refers to G.O. dated 26.6.2000. According to which control of price and distribution of molasses has been lifted. The fact that the price is not controlled by the State Government is not relevant for the purpose of Section 7-A. The order dated 5.7.2000 also refers that control of distribution has been lifted. A copy of the said Government order dated 26.6.2000 has not been brought on record by the counsel for the petitioner. Further the order dated 7.7.2000 is an order shown to have been issued in exercise of power under Section 8 of the Act by the Controller. The petitioner himself has brought on record the order of the Controller after the order dated 7.7.2000 i.e. order dated 22.12.2000 and 3.1.2000 of the Controller of molasses Annexure-9 and 10 to the writ petition. Looking to the aforesaid order dated 3.1.2002 it is clear that the State Government for the year 2001-2002 has made sale of molasses 100% free which means that all the molasses can be sold by sugar factories. The said order, however, has put certain restriction on the import of molasses and regarding payment of administrative fee. Section 8 empowers the Controller of molasses to require occupier of the sugar factory to sell and supply in the prescribed manner such quantity of molasses as specified in the order. However, from the orders issued even subsequent to 22.6.2000 it is clear that the control is still exercised by the Controller of molasses regarding sale and supply of molasses. In any view of the matter Section 7-A is still in force. The petitioner himself has made an application under Section 7-A. The question in the writ petition has arisen as to petitioner's application has rightly been rejected or not. For the reasons which we have given above we are satisfied that the application of the petitioner was rightly rejected. The fact that sugar is hundred percent free and there is no control on the price can in no manner dilute the applicability of Section 7-A. Petitioner's claim in the writ petition is to be considered in accordance with Section 7-A From the fact that the petitioner himself has made an application under Section 7-A it is clear that the petitioner is conscious of applicability of Section 7-A and he can succeed only when his application comes within the four corners of Section 7-A. Thus the third submission of the counsel for the petitioner can also not be accepted and we hold that the application of the petitioner was rightly rejected.

26. In view of the foregoing discussions and the reasons given we do not find any merit in this writ petition. The writ petition is accordingly dismissed. No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.9.2002

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

Special Appeal No. 948 of 2002

Smt. Ramawati Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.C. Singh
Sri S.P. Yadav

Counsel for the Respondents:
Sri Ranvijay Singh

U.P. Panchayat Raj Act, 1947- Section 95 (1) (g)- Proviso- financial power of village Pradhan- only can be ceased by the District Magistrate only- District Panchayat Adhikari has no such power- order passed by DPRO stopping the operation of Bank account- amounts to ceaser of financial power of village Pradhan- can not sustain in eye of law.

Held- para 7

The rule it appears that it is only District Magistrate who can exercise such power and the District Panchayat Raj Officer has no such power to stop operation of Bank Account which in effect amounts to taking away the financial power. Accordingly the District Panchayat Raj Officer has no jurisdiction or authority under law to exercise such power and the exercise of such power is absolutely arbitrary accordingly the order dated 22.6.2002 passed by respondent no. 4 is quashed.

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

1. Heard Sri R.C. Singh, learned counsel for the appellant and Sri Ranvijay Singh, learned counsel for the State – respondent.

2. This special appeal is directed against the order passed by the learned Single Judge in writ no. 35676 of 2000 dated 29.8.2002, where the impugned order dated 21/22.6.2002 passed by District Panchayat Raj Officer, Kushinagar at Padrauna has been challenged.

3. The learned Single Judge held that stoppage of Bank Accounts does not amount to seizure or taking away of financial power. We are unable to agree with such view taken by the learned Single Judge. In effect when an order has been passed stopping the operation of the Bank Account, the same takes away the financial power of the Pradhan, such order can only be passed by the District Magistrate.

4. Section 95 (1) (g) Proviso of the U.P. Panchayat Raj Act 1947 gives power to cease financial and administrative power of Pradhan.

"Section 95. Inspection- (1) The State Government may –
(a) ……
(b) ……
(c) ……
(d) ……
(e) ……
(f) .....

(g) ("remove a Pradhan, Up-Pradhan or member of a Gram Panchayat ") or a joint committee or Bhumi Prabhandhak, Samiti (***) or a Panch Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he –

(i) absents himself without sufficient cause from more than three consecutive meetings or sittings.
(ii) refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving more turpitude.
(iii) Has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance as such is not desirable in public interest or
(iv) Being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in polities, or
(v) Suffers from any of the disqualification mentioned in clauses (a) to (m) of Section 5-A.

(Provided that where in an enquiry held by such persons and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such 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 the State Government.)"

5. Rules have been framed namely the U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) enquiry Rules 1997. The enquiry which is referred to in section 95 (1) (g) proviso is enquiry which is held in accordance with 1997 Rules. Rule 4 of the aforesaid Rule refers to preliminary enquiry. Rule 4 is quoted as below :

"4. Preliminary Enquiry- (1) The State Government may 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 find out if there is a prima facie case for a formal inquiry in the matter.

(2) The District Panchayat Raj Officer shall conduct the preliminary inquiry as expeditiously as possible and submit his report to the State Government within a fortnight of his having been so ordered."

6. It has been stated before us that power under section 95 (1) (g) of U.P. Panchayat Raj Act has been delegated to the District Magistrate and the order under Section 95 (1) (g) can only be passed by the Collector.

7. On proper interpretation of the said section and the rule it appears that it is only District Magistrate who can exercise, such power and the District Panchayat Raj Officer has no such power to stop operation of Bank Account which in effect amounts to taking away the financial power. Accordingly the District Panchayat Raj Officer has no jurisdiction or authority under law to exercise such power and the exercise of such power is absolutely arbitrary accordingly the order dated 22.6.2002 passed by respondent no. 4 is quashed.

8. The view which we have taken above practically disposes of the writ

petition. The order passed by the learned Single Judge is set aside and the special appeal is allowed. Both the writ petition and the special appeal including application for interim relief before us stands disposed of.

9. It is however made clear that this order shall not prevent the competent authority under the aforesaid Act to take appropriate step in accordance with law if the situation so permits.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

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

Special Appeal No. 519 of 2000

Ram Ugrah ...Petitioner
Versus
State of UP and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava

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

Constitution of India, Article 226- Service law-Absorption- appellants earlier worked as Collection peon w.e.f. 1.2.67 to 1.8.75- after retrenchment again- applied for absorption on 12.12.86 while G.O. dated 28.5.81 providing relaxation of upper age limit for 10 years was already in operation- entitled for absorption- direction issued for consideration within 3 months.

Held- para 12

Vide Government order dated 21.7.84, the benefits provided in the Government order dated 23.5.81 was extended till 22.5.87. From a perusal of paragraph 2 kha of the Government order dated 6.7.77 it is clear that the State Government had relaxed the upper age limit in the case of absorption of employees retrenched from Class III and IV posts to the extent the services rendered prior to retrenchment and for the period after retrenchment. However, under the Government order dated 23.5.81 the relaxation of upper age limit, as provided in the earlier Government order dated 6.7.1977, was continued subject to the maximum relaxation of age of ten years only. It is not in dispute that when the appellants- writ petitioners made an application for absorption on 12.12.86 there was relaxation in Upper age limit for a maximum period of ten years, and therefore, they were liable to be considered for absorption by giving age relaxation of ten years, as held by a Division Bench of this Court in the case of Ganga and another v. Chief Development Officer and others. (supra).

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

1. Special Appeal No. 519 of 2000 has been filed by Ram Ugrah against the judgment and order dated 14.7.2000 passed by the learned single Judge in civil misc. writ petition no. 29840 of 2000, whereby the learned Single Judge has dismissed the writ petition and held that there is no error in the decision making process so far as the discretion exercised by the authorities in the matter of the age relaxation is concerned.

2. Special Appeal No. 520 of 2000 has been filed by Ram Sumer against the judgment and order dated 14.7.2000 passed by the learned Single Judge in civil misc. writ petition no. 29839 of 2000, whereby the writ petition has been dismissed with similar observation.

3. Since both the special appeals raise common question of law, they have been heard together and are being decided by a common judgment.

4. Ram Urgah, appellant in Special Appeal No. 519 of 2000 was appointed as collection peon for realization of Takavi revenue in the agriculture department on 1.2.967. He worked regularly till 1.8.1975. Thereafter, he was retrenched.

5. Ram Sumer, appellant- writ petition in special Appeal No. 520 of 2000 worked as temporary peon for realization of Takavi revenue in agriculture department from 1.7.1969 to 31.8.1975, when he was retrenched. It appears that some vacancy occurred in Gandak Samadesh Kshetra Vikas Scheme under Pariuyojana Adhikari, Gorakhpur, whereupon, both the appellants made applications for absorption vide application dated 12.12.86. According to the appellants- writ petitioners, their cases were not considered and instead were assured that in the next vacancy, they shall be absorbed.

6. When after waiting for a considerable period, the services of both the appellants – writ petitioners were not absorbed, they approached this Court by filing separate writ petitions being civil misc. writ petition no. 3791 and 3790 of 1989 respectively, which were disposed of by separate judgment and orders dated 25.4.1997 with a direction to make representations to be decided by the authority concerned by a speaking order within two months. The appellants- writ petitioners made separate representations on 15.5.97, which was, however, rejected by the Deputy Director of Agriculture, Gorakhpur, vide identical order dated 5.5.2000. The writ petitions challenging the aforesaid order have been dismissed by the learned Single Judge by the impugned judgement and orders.

7. We have heard Sri A.K. Srivastava, learned counsel for the appellant and Sri Ran Vijay Singh, learned standing counsel for the respondents.

8. The learned counsel for the appellant- writ petitioner submitted that it is not in dispute that both the appellant-writ petitioners have worked as a peon (a class –IV post) in the Agriculture Department for more than six years and they were retrenched not on account of their fault, but in view of the policy decision taken by the State Government. They were entitled for absorption. According to the learned counsel for the appellants- writ petitioners, since, both the appellants- writ petitioners have worked for considerable long period and they have attained the status of a permanent employee and in any event they acquired the right of permanent absorption in terms of the various Government orders dated 6.7.1977, 21.12.1981 and 21.7.1984. They were also entitled for relaxation of upper age limit for absorption. Learned counsel for the appellants – writ petitioners has relied upon a Division Bench decision of this court in the case of Ganga and another v. Chief Development Officer, Gorakhpur (writ petition no. 7590 of 1987), decided on 5.5.1988, wherein this court under similar circumstances had held that when petitioner no. 1 therein had applied for reemployment on his application dated 20.9.1986, he could not be ignored in pursuance of the Government order dated 23.5.1981, as it mentions that there is no

impediment of age, but merely that a retrenched employee must seek reemployment within a span of ten years since when he was last employed. According to the learned counsel for the appellants – writ petitioners, the appellants- writ petitioners are entitled for age relaxation and therefore, they ought to have been absorbed.

9. Sri Ran Vijay Singh, learned standing counsel, however, submitted that the earlier application filed by the appellants- writ petitioners before the Project Administrator, Gandak Samadesh Kshetra Vikas Pariyojana, Gorakhpur, in the year 1981, could not be considered, as it was an independent project and nothing to do with the Agriculture Department. So far as the representation/application dated 12.12.1986 given by the appellants- writ petitioners are concerned, he submitted that vide Government order dated 6.7.1977, the relaxation in upper age limit was provided for absorption of retrenched employee. The Government order was effective for a period of three years, which was further extended vide Government order dated 23.5.1981 and 21.7.1984 by which the relaxation continued only upto 22.5.1987. Since there was no vacancy in the year 1986, therefore, no action could be taken on the said representations. Subsequently, vide Government order dated 22.10.1991 the relaxation of upper age limit for absorption of retrenched employee was not extended and it was decided to close the absorption of retrenched employee and on a reference being made in respect of the appellants- writ petitioners and other similarly situated employees of Gorakhpur Division, the State Government took a decision not to relax the upper age limit and to abide by its earlier decision, which was duly communicated vide letter dated 29.1.99. The learned standing counsel also took a plea of laches in approaching this court. He further submitted that creation of the post and absorption of surplus retrenched employee is the sole prerogative of the State Government and there being no violation of any Constitutional provisions or any Act or Rules, the Court should decline to interfere under Article 226 of the Constitution of India.

10. Having heard the learned counsel for the parties, we find that there is no dispute that both the appellants- writ petitioners are the retrenched employee of the State Government and are entitled for being absorbed on priority basis in accordance with the relevant Government orders issued by the state Government from time to time. The question is as to whether the upper age limit fixed for appointment on a class –IV post shall be applicable or stands relaxed. Vide Government order dated 6.7.1977, which dealt with absorption of employees retrenched from class III and class IV posts, the State Government had relaxed the upper age limit. Paragraph 2-K of the said Government order is reproduced below :

"RELAXATION OF AGE LIMIT- Aise karmchariyon ne jitane varsh ki seva apani chhatani ke purva ki ho thatha jitani awadhi ke liye vah chhatani ke karan seva se bahar rahe ho utane varsh ki aayu seema se un he chhot pradan ker di jaye."

11. The benefits provided under the aforesaid Government order was applicable till 5.7.1980. To redress the grievance of the retrenched employees,

who have not been absorbed till then, the State Government vide Government order dated 23.5.81 again relaxed the upper age limit. Paragraph 2 kha of the Government order dated 23.5.1981 is reproduced below:

"Maximum relaxation in age limit- Aise karmchariyon ne jitney varsh seva apani chhatani se purva ki ho tatha jitney avadhi ke liye vah chhatani ke karan seva se bahar rahe ho utane varsh ki adhiktam aayu seema se unhe chhott pradan kar di jaye parantu pratibandh yah hai ki yah avadhi kisi bhi dasha me 10 varsh se adhik nahi hogi."

12. Vide Government order dated 21.7.1984, the benefits provided in the Government order dated 23.5.1981 was extended till 22.5.1987. From a perusal of paragraph 2 ka of the government order dated 6.7.1977 it is clear that the State Government had relaxed the upper age limit in the case of absorption of employees retrenched from class III and class IV posts to the extent the services renders prior to retrenchment and for the period after retrenchment. However, under the Government order dated 23.5.1981, the relaxation of upper age limit, as provided in the earlier Government order dated 6.7.1977, was continued subject to the maximum relaxation of age of ten years only. It is not in dispute that when the appellants-writ petitioners made an application for absorption on 12.12.1986, there was relaxation in upper age limit for a maximum period of ten years, and therefore, they were liable to be considered for absorption by giving age relaxation of ten years, as held by a Division Bench of this court in the case of Ganga and another v. Chief Development Officer and others (supra).

13. The learned single Judge was not correct to hold that the application for relaxation in the age has been rejected keeping in view the Government order dated 29.1.99. The said Government order would not be applicable in the present case, inasmuch as the application was made by the appellants- writ petitioners in the year 1986, when there was relaxation in upper age limit provided by the Government orders dated 23.5.1981 and 21.7.1984. In this view of the matter the Division Bench decision of this Court dated 5.5.88 in the case of Ganga and another v. Chief Development Officer and others (supra) would be fully applicable.

14. So far as the question of laches on the part of the appellants- writ petitioners, as raised by the learned standing counsel is concerned, it may be mentioned here that the appellants- writ petitioners had applied in the year 1986 and when the matter was kept pending before the authorities, they approached this court by filing separate writ petitions in the year 1989, which was disposed of in the year 1997 with a direction to the appellants- writ petitioners to make a representation before the concerned authority, which was decided only on 5.5.2000, which decision was challenged immediately by the appellants- writ petitioners before this court by filing writ petitions. Thus, there is no laches on the part of the appellants – writ petitioners so as to oust them from invoking the extra-ordinary jurisdiction under Article 226 of the Constitution of India.

15. The plea that the appointment/ absorption is a policy decision to be taken

by the State Government and the court should not interfere in it, is not applicable in the facts and circumstances of the present case. The Court is not interfering in any policy decision with respect to absorption/appointment of an employee, taken by the State government. It is only considering the matter in the light of the policy decision taken by the state government, as contained in the Government order dated 23.3.1981 and 21.7.1984 and had come to the conclusion that the appellants – writ petitioners are entitled for relaxation of upper age limit for a maximum period of ten years.

16. In view of the foregoing discussion, both the appeals succeed and are allowed.

17. The impugned judgment and order passed by the learned Single Judge is set a side. The order dated 5.5.2000 passed by the Deputy Director of Agriculture is set aside. The respondents are directed to consider the question of absorption of both the appellants- writ petitioners by giving them age relaxation of ten years as on 12.12.1986 i.e. from the date of making of the application within three months from the date a certified copy of this order is produced before them.

18. In view of the foregoing discussions, both the appeals succeed and are allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

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

Special Appeal No. 724 of 1994

Bajrangi Pandey and another...Petitioner
Versus
State of Uttar Pradesh and another
...Respondents

Counsel for the Appellants:
Sri H.S.N. Tripathi

Counsel for the Respondents:
Sri Sabhajit Yadav
S.C.

High Court Rules- Chapter VIII Rule 5 – Revised pay scales of stenographers on the basis of recommendations of the second pay commission- all those stenographers who are attached with the Head of Minor Department were held to be entitled to the revised pay scale.

Held- para 11

We hold that the learned Single Judge was not justified in arriving at conclusion that the revised pay scale of Rs.570-1100 is applicable only to those stenographers who are attached with the District Judge Members of Tribunal and Chairman of Co operative Tribunals. The appellants writ petitioners are, therefore, entitled to be placed in the revised pay scale of Rs.570-1100.

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

1. The present special appeal has been filed by Bajrangi Pandey and Ram Mohan Singh against the judgment and order dated 6th September, 1994 passed by the learned Single Judge in Civil Misc.

Writ petition no. 5389 of 1982 dismissing the writ petition and holding that the clause (iii) of the Notification dated 29.9.1981 is not applicable in the case of the appellant- writ petitioners.

2. Briefly stated the facts giving rise to the present case are that the appellants-writ petitioners are holding the post of Stenographers and posted in the office of Superintending Engineer, Circle V & XVIII at Allahabad. The pay scale of the post of stenographer on which the appellants- writ petitioners are working was Rs.250/- 425/-. The State Government constituted Second Pay Commission for considering the revision of the pay scales of its employees. The recommendation made by the Second Pay Commission has been accepted by the State Government vide Notification dated 29.9.1981. The second pay commission recommended the following pay scale of the stenographers, which has been accepted by the State Government.

"(ग) जो आाशुलिपिक इस समय रू०२५०–४२५ के वेतनमान में हैं उन्हें रू०४७०–७३५ का पुनरीक्षित वेतनमान दिया जाय तथा जो आशुलिपिक इस समय रू०३००–५०० के वेतनमान में हैं उन्हें रू०५१५–८६० का साधारण वेतनमान और रू०६८०–६२० का सेलेक्शन ग्रेड दिया जाय । साथ ही छोटे विभागों के विभागाध्यक्ष जिन्हें रू०१८४०–२४०० के वेतनमान में रखा गया है, बड़े विभागों के अतिरिक्त विभागाध्यक्ष, जिला अधिकारी, जिला जज, अधिकरण के सदस्य तथा सहकारिता अधिकरण के अध्यक्ष से सम्बद्ध आशुलिपिकों को रू०५७०–११०० का वेतनमान दिया जाय परन्तु जिला अधिकारी और जिला जज से सम्बद्ध आशुलिपिकों को विशेष वेतन न दिया जाय । मण्डलायुक्त, बड़े विभागों के विभागाध्यक्ष, अधिकरणों के अध्यक्ष (सहकारिता अधिकरण को छोड़कर) से सम्बद्ध आशुलिपिकों को रू०६२५–१३६० का वेतनमान दिया जाय।"

3. Both the appellant- writ petitioners are working as stenographer in the office of the Superintending Engineer who is head of the department in the pay scale of Rs.1840- 2400. The case of the appellants- writ petitioners are that they are entitled for the pay scale of Rs.570-1100. However, the Deputy Secretary vide order dated 14.4.1982, directed that the appellants- writ petitioners are entitled for the pay scale of Rs.470-735. No order was passed by the State Government on the representation made by the appellants-writ petitioners.

4. Before the learned Single Judge, it was contended on behalf of the appellants- writ petitioners that they are working in the office of the Superintending Engineer, who is the Head of the Department, in the pay scale of Rs.1840-2400 and as per clause (Ga) of the Notification dated 29.9.1981 they are entitled for the pay scale of Rs.570-1100. On the other hand, the stand taken by the State was that a harmonious interpretation has to be given to the various clauses of the report of the Second Pay Commission, wherein, the pay scale of various stenographers have been revised and fixed and reference to the pay scale of the Head of Department which has been given in clause (Ga) cannot be read in the main part and it is not in the dispute that the appellants- writ petitioners were getting the pay scale of Rs.250-425 prior to the revision and, therefore, they have rightly been placed in the pay scale of Rs.470-735. It was further contended that the pay scale of Rs.570 –1100 is provided only to those stenographers who are working in the office of the District Judge, Member of the Tribunals and Chairman of Co-operative Tribunal and not to other stenographer, though they may be

working under the officers who are in the pay scale of Rs.1840-2400.

5. The learned Single Judge held that the pay scale of Rs.570–1100 is to be provided only for those stenographers who are working in the offices of District Judge, Member of Tribunals, Chairman of Co-operative Tribunal. The pay scale of officers concerned has also been given to clarify their position. The learned Single Judge held that the nature of the work of stenographers, the quality of work of the stenographers, to be shared and confidence to be maintained by the stenographers who are working with the District Judges, Members of Tribunals or the Chairman of the Co-operative Tribunals stand on different footings than those who are working under the Administrative Officers. The nature of work, efficiency, confidence, quality of work of those stenographers who are working under the class of the officers enumerated of clause (iii) of the notification dated 29.9.1981 is altogether of much higher standard and stand on much higher pedestal than those stenographers who are working under the officers mentioned in clause (i).

6. We have heard Sri H.S.N. Tripathi learned counsel for the appellant- writ petitioners and Sri Sabhajit Yadav learned standing counsel for the State respondents.

7. The learned counsel for the respective parties have raised the same submissions and contentions before us as were raised by them before the learned single judge. In the present Special Appeal the only question for consideration is regarding clause Ga.of Para 4 of the notification dated 29.9.1981 issued by the State Government, wherein the recommendation made by the Second Pay Commission revising the pay scale of stenographers have been accepted. Clause Ga. has already been reproduced above. It provides new/revised pay scale to the following categories of stenographers (i) those stenographers currently in the pay scale of Rs.250-425 shall be given Rs.470-735 in revised pay scale, (ii) those stenographers who are currently in the pay scale of Rs.300-500 shall be given pay scale of Rs.515-860 in the revised pay scale and selection grade of Rs.680-920, (iii) those stenographers who are attached with the Head of Minor Department except Head of Major Department, District Magistrate, District Judge, Members of Tribunals and Chairman of Co-operative Tribunals, shall be given pay scale of Rs.570- 1100 in the revised pay scale, but stenographers attached with District Magistrate and District Judge shall not get Special pay (iv) Stenographers attached with Divisional Commissioner, Head of Major Departments, Chairman of Tribunals excluding Co-operative Tribunals shall get pay scale of Rs.625-1360.

8. From a reading of the aforesaid recommendations of the Second Pay Commission, it is clear that the Second Pay Commission had recommended the revised pay scales of Stenographers by placing them in four categories. There may be stenographers in the pay scale of Rs.250-425, but may not be attached with the Head of Minor Department placed in pay scale of Rs.1840-2400. In respect of such categories of stenographers, according to the Second Pay Commission's report, which has been accepted by the State Government, they shall get revised pay scale of Rs.470-735.

However, those stenographers who are in the pay scale of Rs.250-425 but are attached with the office of Head of Minor Department placed in the pay scale of Rs.1840-2400 shall be given revised pay scale of Rs.570-1100. Thus, the pay scale of Rs.570-1100 has been given to all those stenographers who are attached with the Head of Minor Department placed in pay scale of Rs.1840-2400, Head of Departments excluding Major Department, District Magistrate, District Judge, Members of Tribunal and Chairman of Co-operative Tribunals.

9. It is not in dispute that the Superintending Engineer with whom, the appellant- writ petitioners have been attached as stenographers has been declared as Head of the Department for the purpose of U.P. Fundamental Rules in Part 1, and Part 2 and subsidiary Rules in Part 3.

10. It is also not in dispute that the Superintending Engineer, P.W.D., is placed under the pay scale of Rs.1840-2400. Thus, the case of the appellant- writ petitioners clearly fall within the aforesaid sub-category and they are entitled to be placed in the revised pay scale of Rs.570-1100. The contention of the learned standing counsel that the reference to pay scale of Head of Minor Department, i.e. 1840-2400, is of no consequence, cannot be accepted in as much as in the aforesaid sub category of the stenographers, there is specific mention that all Head of Minor Department placed in the pay scale of Rs.1840-2400 and stenographers attached with such Head of Department, are entitled to the revised pay scale of Rs.570-1100.

11. In view of the aforesaid discussions we hold that the learned Single Judge was not justified in arriving at conclusion that the revised pay scale of Rs.570-1100 is applicable only to those stenographers who are attached with the District Judge, Members of Tribunal and Chairman of Co-operative Tribunals. The appellants- writ petitioners are, therefore, entitled to be placed in the revised pay scale of Rs.570-1100.

12. In the result, the Special Appeal succeeds and the same alongwith writ petition are allowed. The judgment and order of the learned Single Judge is set aside and the order dated 14.4.1982 passed by the Deputy Secretary Government of U.P. in so far as it relates to the fixation of revised pay scale of the petitioners is quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

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

Special Appeal No. 319 of 1997

Yogendra Ram Chaurasiya ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Prakash Padia

Counsel for the Respondents:
Sri Ravi Prakash Srivastava
S.C.

High Court Rules- Chapter VIII Rule 5- appointment under Dying in Harness Rules- any appointment made under the provisions of Dying in Harness Rules is to

be treated as a Permanent appointment and not a temporary appointment- the provisions of U.P. Temporary Government servant (Termination of Services) Rules 1975 will not apply to such appointments. (Held in para 9)

Case law referred-

1991 (I) ALR 754, 1993 (I) LLJ 798, 1991 (II) UPLBEC 995, 1991 (17) ALR 247

We hold that the appointment of the appellant writ petitioner is to be treated as permanent appointment and not a temporary appointment. The nature of appointment will not effect the writ petitioner, even if the appellant writ petitioner has accepted the terms and conditions of the appointment which mentioned as temporary appointment. The nature of appointment of the appellant- writ petitioner having been held to be permanent appointment, the appellant-writ petitioner is entitled to the constitutional safeguards as provided in Article 311 of the Constitution of India. In the present case the procedure laid down in Article 311 (2) of the Constitution of India, has not been followed before terminating the service of the appellant- writ petitioner, in as much as neither the appellant had been informed about the charges leveled against him nor any enquiry was conducted before terminating his services nor he was given opportunity of hearing nor the authorities have invoked any of the clauses mentioned in proviso to Article 311 (2) of the Constitution of India for dispensing with the requirement of holding the enquiry.

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

1. The present Special Appeal has been filed by Yogendra Ram Chaurasiya against the judgment and order dated 5.5.1997 passed by the learned Single Judge, where the learned Single Judge has dismissed the writ petition of the appellant on the ground that the appellant-writ petitioner was purely a temporary employee and even for the short period he was under employment there was several complaint against him as is evident from the perusal of annexures CA 1 to CA 7 to the counter affidavit.

2. Briefly stated facts giving rise to the present case are that the father of the appellant- writ petitioner late Telhu Baryee was working as a Lasker of 92 U.P. Battalion, N.C.C. at Ghazipur. He died while he was in service. The appellant writ petitioner being his son was given appointment on compassionate ground. The appellant was given appointment on 30.4.1994. It was mentioned in the appointment order that his appointment would be temporary subject to the termination under U.P. Temporary Government Servants (Termination of Service) Rules 1976. The appellant- writ petitioner accepted the said appointment and consequently he was posted as a Lasker of 92 UP Battalion, N.C.C. at Ghazipur. It appears that there was certain complaint against him for which warning was also issued and subsequently, vide order dated 23.3.1995, his services were terminated under the provisions of U.P. Temporary Government Servants (Termination of Service) Rules 1975, while giving him amount equivalent to the amount of his pay plus allowance for the period of notice of one calendar month. The appellant writ petitioner challenged his termination order dated 23.5.1995 in the writ petition which has been dismissed by the learned Single Judge vide the impugned order under appeal.

3. We have heard Sri Prakash Padia learned counsel for the appellant and Sri Ravi Prakash Srivastava learned standing counsel for the respondents.

4. The learned counsel for the appellant submits that the appointment of the appellant was made on compassionate grounds under the provisions of Dying in Harness Rules, which appointment cannot be treated as temporary appointment and rather it was permanent appointment and, therefore, the services could not have been terminated under the provisions U.P. Temporary Government Servants (Termination of Service) Rules 1975. He relied upon the decision in the case of Ravi Karan Singh vs. State of U.P. and others reported in 1991 (1) ALR 754. He further submitted that since the appointment of the appellant- writ petitioner is to be a permanent appointment, his services could have been terminated only after complying with the provisions of Article 311 of the Constitution of India viz. after issuing charge sheet, holding enquiry and giving opportunity to defend his case. In the alternative, he submitted that even if the appointment of the appellant writ petitioner is taken to be a temporary appointment since the enquiry was pending against him, and the order of termination had been passed in the wake of such an enquiry, the order of termination is not simplicitor but casts stigma and, therefore, it was necessary for holding a full-fledged enquiry in which opportunity of hearing should have been given to the petitioner, and this having not been done, the impugned order is illegal.

5. The learned standing counsel, however, submitted that the appellant writ petitioner was appointed purely on temporary basis as would be clear from the appointment letter itself and such terms and conditions of the appointment letter was accepted by the appellant- writ petitioner hence he is estopped from contending that his appointment was not a temporary appointment but a permanent one. He submitted that the appellant is not entitled for the protection of constitutional safe guards as provided under Article 311 of the constitution of India. He also submitted that the services of the appellant- writ petitioners had been terminated simplicitor and there is no stigma. According to him the termination order has not been passed in the wake of any enquiry pending against the appellant writ petitioner but on review of his work and conduct.

6. Having heard the learned counsel for the parties, we find that in paragraph 3 of the writ petition the appellant- writ petitioner had categorically stated that the respondent no. 3 therein, issued appointment letter to the petitioner on the post of Lasker of 92 UP Battalion, N.C.C. at Ghazipur under the provisions of Dying in Harness Rules. The appointment letter has been filed as Annexure-1 which itself mentions as ‘ appointment of Dependent of Deceased Employees”. In the counter affidavit filed by Lt. Col. S.N. Upadhyaya, respondent no. 3 in the writ petition, the contents of para 3 of the writ petition were not disputed. Thus, it is established from the material on record, that the appointment had been made on compassionate ground under the provisions of Dying in Harness Rules.

7. The Division Bench of this Court in the case of Ravi Karan Singh has held that **"an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment, then it will follow that soon after the appointment the service can be terminated and this**

will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment, and hence the provisions of U.P. Temporary Government Servant (Termination of Services) Rules 1975 will not apply to such appointments."

8. The aforesaid matter was considered by the Division Bench on reference being made by a learned Single Judge of this Court disagreeing with the decisions in the cases of Budhi Sagar Dubey vs. D.I.O.S., (1993 (1) LLJ 798), Gulab Yadav Vs. State of U.P. and others (1991 (2) UPLBEC 995) Dhrendra Pratap Singh vs. D.I.O.S. and others (1991 (17) ALR 24).

9. In view of the decision of this Court in the case of Ravi Karan Singh with which we respectfully agree, any appointment made under the provisions of Dying in Harness Rules is to be treated as a permanent appointment and not a temporary appointment. This is also clear from the Government order dated 23.1.1976 filed as annexure 2 to the writ petition wherein it has been mentioned that the dependent of deceased employee appointed on compassionate ground under the provisions of Dying in Harness Rules should not be retrenched even where the strength of the employee is being reduced. Thus, we hold that the appointment of the appellant writ petitioner is to be treated as permanent appointment and not a temporary appointment. The nature of appointment, will not effect the writ petitioner, even if the appellant writ petitioner has accepted the terms and conditions of the appointment which mentioned as a temporary appointment. The nature of appointment of the appellant- writ petitioner having been held to be permanent appointment, the appellant writ petitioner is entitled to the constitutional safeguards as provided in Article 311 of the Constitution of India. In the present case the procedure laid down in Article 311 (2) of the Constitution of India, has not been followed before terminating the services of the appellant writ petitioner, in as much as neither the appellant had been informed about the charges leveled against him nor any enquiry was conducted before terminating his services nor he was given opportunity of hearing, nor the authorities have invoked any of the clauses mentioned in provision to Article 311 (2) of the Constitution of India for dispensing with the requirement of holding the enquiry.

10. Since we have come to the conclusion that the appointment of appellant- writ petitioner was a permanent appointment, it is not necessary to go into the question as to whether the order of termination was simplicitor one or it casts stigma or not.

11. In view of the foregoing discussions, the order dated 25.3.1995 terminating the services of the appellant writ petitioner and the order dated 5.5.1997 passed by the learned Single Judge cannot be sustained and are hereby set aside. The writ petition and the Special Appeal stand allowed. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.9.2002

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 19751 of 1992

Chandra Pratap Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri S. Farman Ahmad Naqvi

Counsel for the Respondents:
Sri Vinaya Malviya
S.C.

Constitution of India- Article 226- The petitioner would be entitled to possess a second licence unless there is a valid reason for not granting the same on merits. In the present case, the District Magistrate has not given any reason whatsoever on merits but for the reason that the Government order bars a person to hold a second arms licence, - There cannot be a blanket bar on possessing two or more arms licences or weapons by a person except for sufficient reasons.

Held in para 9

Having considered the submissions of learned counsel for the parties and having perused the record, I am of the view that the impugned order dated 5.5.1992 of the District Magistrate, Fatehpur is directed to reconsider the case of the petitioner in the light of the directions given and observations made above. It is further directed that the petitioner shall not be required to deposit his pistol till the District Magistrate decides his application.

(Delivered by Hon'ble Vineet Saran, J.)

1. The petitioner was granted pistol licence on 5.7.1975. Thus he possessed a pistol. The licence was due for renewal in 1981 and the renewal applications of the petitioner remained pending for one reason or the other. It was only on 16.1.1990 that the District Magistrate rejected the application of the petitioner for renewal of the pistol licence, not on merits but on the ground that the application was filed after much delay without there being a satisfactory explanation for the same. Against the said order of the District Magistrate, the petitioner filed an appeal before the Commissioner, Allahabad Division, Allahabad. The appeal was also dismissed on 29.5.1990. Challenging the said orders, the petitioner filed writ petition no. 22751 of 1990, which was decided on 30.1.1991. This Court ordered that the petitioner may file a fresh application for grant of licence, which was directed to be considered and decided by the District Magistrate within four months. The petitioner was permitted by this Court to continue to possess the pistol till disposal of the application.

2. In pursuance of the aforesaid order of this Court, the petitioner filed an application on 18.4.1991 for grant of fresh licence. The District Magistrate called for a report from the police of the area but the same was not submitted within the stipulated time. By virtue of the provisions of Section 13 of the Indian Arms Act, the District Magistrate then proceeded to decide the application of the petitioner without the police report. Vide order dated 5.5.1992, relying on the provisions of the Government order no. 1083 dated 13.03.1992, the District

Magistrate rejected the application of the petitioner for grant of pistol licence merely on the ground that he was already in possession of the another weapon licence i.e. SBBL/DBBL gun. The petitioner was also directed to deposit the pistol.

3. This petition has been filed challenging the aforesaid order dated 5.5.1992 of the District Magistrate, Fatehpur. By means of an interim order passed in this writ petition, the impugned order of the District Magistrate, in so far as it directed that the pistol would be forfeited in favour of the state, was stayed.

4. I have heard Sri S. Farman Ahmad Naqvi learned counsel for the petitioner and Sri Vinaya Malviya, learned standing counsel on behalf of the respondents.

5. It is not disputed that the petitioner was granted a licence for SBBL/DDBL gun in the year 1986, which has been renewed from time to time and is still valid. It may be noteworthy to mention that the petitioner was granted a fresh SBBL/DBBL gun licence and the same was also renewed during the period when the petitioner was refused renewal of the pistol licence. It is also relevant that in the years 1986 and 1989 the police submitted its report of the petitioner with regard to the renewal of his licence. It was only in 1988 that the police had submitted its report against the petitioner wherein also there was no criminal case reported to be registered or pending against the petitioner, but merely a vague charge had been levelled that the petitioner was a person of rash and angry tempermant. In a subsequent report of the police dated 31.12.1991 (Annexure 9 to the writ petition) which was filed in response to the renewal application of the SBBL/DBBL. Licence of the petitioner., it was reported that the petitioner had good moral character and no criminal case was pending against him. Even the Tehsildar of the area had, on 24.9.1991, recommended that the petitioner required the gun for his safety.

6. The order dated 5.5.1992 of the District Magistrate impugned in this writ petition has to be examined in the light of the aforesaid reports of the authorities, more so because the District Magistrate proceeded to decide the application of the petitioner without any fresh report of the police. The police report dated 31.12.1991 submitted just a few months before the passing of the impugned order cannot be ignored especially when the filing of the same has not been denied in the counter affidavit filed by the respondents.

7. The Government Order dated 13.3.1992 which has been relied upon by the District Magistrate mentions that if an applicant does not possess an arms licence then he would be entitled to the relaxation of the bar imposed by the Government order dated 16.12.1985. In my opinion, the same would not prohibit the licensing authority to issue a fresh second licence or to renew another licence of the applicant. The petitioner would be entitled to possess a second licence unless there is a valid reason for not granting the same on merits. In the present case, the District Magistrate has not given any reason whatsoever on merits but for the reason that the Government Order bars a person to hold a second arms licence, which as stated above, is not the correct position. There cannot be a blanket bar on

possessing two or more arms licences or weapons by a person except for sufficient reasons.

8. It has further been submitted that the petitioner has been in possession of the pistol all throughout till date but no untoward incident has been reported nor any charge has been levelled against the petitioner with regard to misuse of the arms possessed by him.

9. Having considered the submissions of learned counsel for the parties and having perused the record, I am of the view that the impugned order dated 5.5.1992 of the District Magistrate deserves to be quashed. The District Magistrate, Fatehpur is directed to reconsider the case of the petitioner for grant of a pistol licence and to pass appropriate orders on the application of the petitioner in the light of the directions given and observations made above. It is further directed that the petitioner shall not be required to deposit his pistol till the District Magistrate decides his application.

10. With the aforesaid observations and directions, the writ petition is allowed but without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 6.9.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 40394 of 1999

Ujagar Singh ...Petitioner
Versus
Commissioner, Bareilly Division, Bareilly and another ...Respondents

Counsel for the Petitioner:
Sri V.K. Dixit

Counsel for the Respondents:
S.C.

Arms Act- Cancellation of Gun licence- on alleged involvement in criminal case u/s 307 IPC and SC/ST Act. During pendency of writ petition- petitioner got fair acquittal- No grounds for cancellation of fire arms exist- cancellation order quashed.

Held- Para 3

A perusal of the orders passed by the licensing authority as well as by the appellate authority clearly demonstrate that since the petitioner was involved in a criminal case under Section 307 IPC and SC/ST Act, which has been registered as case crime no. 294 of 1996, his license has been registered as case crime no. 294 of 1996, his license has been cancelled. Learned counsel for the petitioner has filed a supplementary affidavit, wherein he has annexed a certified copy of the judgment and order dated 7.11.2001 as Annexure SA 1, passed in Sessions Trial No. 677 of 1998 out of case crime no. 294 of 1996. A bare reading of the aforesaid judgment would make it clear that the petitioner has been acquitted of the charges, which have been leveled against him. In this view of the matter, now there is no

material on the basis of which the petitioner's firearm licence may continue for revocation and also there is no ground is existence to continue for revocation of the petitioner's fire arm licence. In this view of the matter, the orders passed by the licensing authority as well as the appellate authority 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 order passed by the licensing authority under the provisions of the Arms Act, whereby the licensing authority has cancelled the fire arm license of the petitioner and on appeal, the appellate authority met with the same fate and that is why this writ petition.

2. Heard learned counsel appearing on behalf of the petitioner and the learned Standing Counsel representing the respondents.

3. A perusal of the orders passed by the licensing authority as well as by the appellate authority clearly demonstrate that since the petitioner was involved in a criminal case under section 307 IPC and SC/ST Act, which has been registered as case crime no. 294 of 1996, his license has been cancelled. Learned counsel for the petitioner has filed a supplementary affidavit, wherein he has annexed a certified copy of the judgment and order dated 7.11.2001 as Annexure SA-1, passed in Sessions Trial No. 677 of 1998, out of Case crime no. 294 of 1996. A bare reading of the aforesaid judgment would make it clear that the petitioner has been acquitted of the charges, which have been levelled against him. In this view of the matter, now there is no material on the basis of which the petitioner's fire arm licence may continue for revocation and also there is no ground in existence to continue for revocation and also there is no ground in existence to continue for revocation of the petitioner's fire arm licence. In this view of the matter, the orders passed by the licensing authority as well as the appellate authority deserve to be quashed and are hereby quashed.

4. In view of what has been stated above, this writ petition is allowed. The impugned orders dated 27.12.1997 and 7.7.1999 passed by Respondents 2 and 1, respectively (annexure 2 and 1 to the writ petition) are hereby quashed. In case the petitioner's gun has been deposited pursuance to the cancellation of his licence, the same may be returned immediately to the petitioner. Needless to say that the petitioner is entitled for renewal of his licence. However, on the facts and circumstances of the case, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.9.2002

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 36875 of 2002

Ram Pal Singh ...Petitioner
Versus
Sachiv, Garavpur Kisan Sewa Sahakari Samiti and others ...Respondents

Counsel for the Petitioner:
Sri Rajiv Gupta

Counsel for the Respondents:
S.C.

Cooperative Societies Act- Section 128- the Registrar within the meaning of section 2 (r) read with section 3 of the Act has power to annal any resolution passed by the committee of management, or the general body of the cooperative society. Under clause (ii) of section 128 of the Act, the Registrar has power to cancel any order passed by an officer of the cooperative society.

Held in para 12

In view of this, the petitioner may seek appropriate relief under section 128 of the U.P. Cooperative Societies Act, 1965 against the said order dated 26.7.2002 and the resolution dated 18.7.2002 referred to in the said order dated 26.7.2002. The writ petition is, therefore, liable to be dismissed on the ground of availability of an alternative remedy to the petitioner. The writ petition is accordingly dismissed on the ground of alternative remedy.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. This writ petition has been filed by the petitioner under Article 226 of the Constitution of India, interalia, challenging the order of termination dated 26th July 2002 (Annexure no. 1 to the writ petition.).

2. From the allegations made in the writ petition, it appears that a surprise inspection of Kisan Sewa Sahkari Samiti Ltd. Garavpur was made by the District Assistant Registrar, Sahkari Samiti, UP Phule Nagar, respondent no.4 on 6.9.2001. The inspection report dated 6.9.2001 was submitted in this regard by the said District Assistant Registrar, Sahkari Samiti U.P. Jyotiba Phule Nagar, respondent no. 4. A copy of the said inspection report dated 6.9.2001 has been filed as annexure no. 2 to the writ petition.

3. Thereafter, a charge sheet dated 24.12.2001 was served on the petitioner by the Secreary/Enquiry Officer, Garavpur, Kisan Sewa Sahkari Samiti Limited, Tehsil Hasanpur, district Jyotiba Phule Nagar. A copy of the said charge sheet dated 24.12.2001 has been filed as annexure no. 3 to the writ petition.

4. It further appears that the petitioner submitted his reply dated 23.1.2002 to the said charge sheet. A copy of the said reply dated 23.1.2002 has been filed as annexure no. 5 to the writ petition.

5. In the meanwhile, it appears that an FIR dated 29.1.2002 under sections 420/409 IPC was also lodged against the petitioner.

6. It appears that the enquiry officer after considering the said reply dated 23.1.2002 submitted by the petitioner found the charges against the petitioner to be proved.

7. Thereafter, the order dated 26.7.2002 was passed, interalia, terminating the services of the petitioner. A copy of the said order dated 26.7.2002 has been filed as annexure no. 1 to the writ petition.

8. The said order dated 26.7.2002, inter alia, mentioned that a resolution dated 18.7.2002 had been passed in the matter of the petitioner.

9. I have heard learned counsel for the petitioner and learned standing counsel representing respondent no. 3 and 4.

10. Having considered the submissions made by the learned counsel

for the parties, I am of the opinion that the petitioner has got an alternative remedy under section 128 of the U.P. Cooperative Societies Act, 1965 (in short the Act). The said section 128 of the Act provides as follows:

"Registrar's power to annual resolution of a cooperative society or cancel order passed by an officer of a cooperative society in certain cases- The Registrar may-
(i) annual any resolution passed by the committee of management or the general body of any cooperative society, or
(ii) cancel any order passed by an officer of a cooperative society.

if he is of the opinion that the resolution or the order, as the case may be , is not covered by the objects of the society , or is in contravention of the provisions of this Act, the rules or the bye laws of the society, whereupon every such resolution or order shall become void and inoperative and be deleted from the records of the society."

11. In view of the provisions of clause (i) of Section 128 of the Act, the Registrar within the meaning of section 2 (r) read with section 3 of the Act has power to annual any resolution passed by the committee of management, or the general body of the cooperative society. Under clause (ii) of section 128 of the Act, the Registrar has power to cancel any order passed by an officer of the cooperative society.

12. In view of this, the petitioner may seek appropriate relief under section 128 of the U.P. Cooperative Societies Act, 1965 against the said order dated 26.7.2002 and the resolution dated 18.7.2002 referred to in the said order dated 26.7.2002.

13. The writ petition is, therefore, liable to be dismissed on the ground of availability of an alternative remedy to the petitioner. The writ petition is accordingly dismissed on the ground of alternative remedy.

14. In case, the petitioner approaches the Registrar under section 128 of the U.P. Cooperative Societies Act, 1965, the Registrar will decide the matter expeditiously.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.8.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 36661 of 1995

Ram Dayal Gupta ...Petitioner
Versus
District Inspector of Schools, Firozabad and another ...Respondents

Counsel for the Petitioner:
Sri Prakash Gupta

Counsel for the Respondents:
S.C.

Service Book- Date of Birth entered in service book is authentic for the purpose of superannuation. Impugned notice quashed and direction given to pay retirement benefit.

Held Para 6

It is settled law that the date of birth recorded in the service book has to be taken as authentic for the purpose of superannuation. The petitioner had

passed the High School Examination before entry in service. The service book also shows the date of birth of the petitioner as 1st October, 1934. Even if the averments made in the impugned notice are taken to be gospel truth recovery cannot be made as the petitioner has actually worked in the institution for the period from 1st July, 1990 to 30th June 1995.

(Delivered by Hon'ble Rakesh Tiwari, J.)

Heard counsel for the parties and perused the record.

1. By means of this writ petition, the petitioner has prayed for quashing the impugned notice dated 29.9.95 (Annexure-6 to the writ petition) given by the Manager Sri P.D. Jain Inter College, Firozabad.

2. By the impugned notice the petitioner has been informed that when the office was preparing his papers after his retirement on 30 June, 1995 pertaining to the retiral benefits it has come to the knowledge that his actual date of birth was 1.10.29. It is alleged that the petitioner had concealed his date of birth and had for ulterior motive gave a wrong date of birth as 1st October, 1934 in the service book and by the aforesaid act he has taken benefit of five years. He has thus illegally withdrawn wages for the period from 1 July, 1990 to 30 June, 1995 amounting to Rs.2,80,706.00. The petitioner was directed to submit his explanation with 3 days failing which legal action was to be taken.

3. He was appointed on 13.7.59 on probation for one year in L.T. grade in Sri P.D. Jain Inter College, Firozabad for teaching biology subject. The petitioner was confirmed and has retired from the college.

4. The petitioner states that his date of birth is 1.10.34. He further states that he had passed the High School examination in the year 1949 from Narain Intermediate College, Sikohabad. He has also annexed Photostat copy of the High School Certificate (Annexure-2 to the writ petition) in which his date of birth is mentioned as 1.10.34. He has also annexed Photostat copy of the service book in which his date of birth was recorded as 1.10.34 according to the petitioner has completed the age of 60 years on 1.10.94 but as this date fell in the midth of the session he continued till the end of session and was retired on 30.6.95.

5. The petitioner further states that he has been given no dues certificate by the Principal of the College, therefore, he is entitled to the post retiral benefits consisting of P.F. etc. on the basis of actual date of retirement on 30.6.95. He further submits that he had submitted the papers for the payment of post retiral benefits but the same has not been paid and instead the petitioner has been served with the impugned notice dated 29.9.95.

6. It is settled law that the date of birth recorded in the service book has to be taken as authentic for the purpose of superannation. The petitioner had passed the High School examination before entry in service. The service book also shows the date of birth of the petitioner as 1 October, 1934. Even if the averments made in the impugned notice are taken to be gospel truth recovery cannot be made as the petitioner has actually worked in the institution for the period from 1st July, 1990 to 30 June, 1995.

7. The petitioner has relied upon a decision of the Division Bench of this Court in **Adhishasi Abhiyanta Electricity Rihand and Hydel Civil Division UP State Electricity Board Allahabad and another vs. Shitla Prasad and another, 1194 AWC-468** in which it has been held that finality attaches to the date of birth as recorded in the service book and the same cannot be disturbed on a subsequent plea by the employee that it has been wrongly recorded. The date of birth recorded in the service book of an employee is final and shall be taken to be his correct date of birth. I am of the firm opinion that the date of birth of an employee recorded in the High School Certificate before his entry in service is to be taken as authentic date of birth.

8. In view of the aforesaid facts I hold that the date of birth of the petitioner is 1 October, 1934 and he is entitled to the post retirement benefits which can not be withheld by the respondents on the basis of the ground taken in the impugned notice.

9. In view of the above, the writ petition succeeds and is allowed. The respondents are directed to pay all the retirement benefits to the petitioner on the basis of his date of birth recorded as 1.10.34 along with 12% interest within a period of three months from the date of production of a certified copy of this order.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEP. 18, 2002

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE Y.R. TRIPATHI, J.

Crl. Misc. Writ Petition No. 3249 of 2002

Mohd. Ashraf ...Petitioner
Versus
Sushri Mayawati, Chief Minister, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Khan Saulat Hanif
Sri S.M.A. Kazmi
Sri Ravinder Sharma

Counsel for the Respondents:
A.G.A.

Constitution of India- Article 226- The normal rule is not to interfere with the investigation and criminal proceedings, except when the complaint or the F.I.R. broadly read, does not disclose any offence and can be termed as abuse of process of law- there are clear allegation of two shots having been fired by the petitioner on him- The F.I.R. relates the incident in requisite details with the names of the witnesses being also given there. The matter requires probing by investigation and the incident cannot be taken to be unbelievable and imaginary at this stage simply because it is a case of 'no injury'. (Held in para 17).

The FIR is question discloses the commission of cognizable offences and that at this stage no mala fides can be held to be involved in the lodging of the said FIR, the petitioner is not entitled for any relief. We do not locate any merit in this writ petition for the detailed discussion made in the proceeding paragraphs.

Case Law Referred:
1992 SCC (Cri) 426

2000 SCC (Cri) 70
1996 SCC (Cri) 150
1997 Cr. L.J. (Cri) 63
(1981) 1 SCC 608
(2000) 8 SCC 437

(Delivered by Hon'ble M.C. Jain, J.)

1. Against the petitioner, respondent no. 5 Mohd. Ashraf son of Ataullah has lodged an F.I.R. on 22.6.2002 at 2.15 P.M. at P.S. Kareli, district Allahabad which has resulted in registering of a case against him and others under sections 147,148,149,307,504,506 and 387 I.P.C., Annexure 1 to the writ petition. The petitioner has filed this petition claiming the following reliefs:

"i) to issue a writ, order or direction in the nature of Certiorari quashing the first information report dated 22.6.2002 in Case Crime No. 156 of 2002, under Section 147, 148, 149, 307, 504,506,387, I.P.C., Police Station Kareilly, District Allahabad contained in Annexure 1 to the writ petition.

ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties directing them not to arrest the petitioner in Case Crime No. 156 of 2002 under Section 147,148,149,307,504,506,387, I.P.C. Police Station Kareilly, Allahabad.

iii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties directing them to entrust the investigation of Case Crime No. 156 of 2002, Under Section 147,148,149, 307,504,506, 387 I.P.C., Police Station Kareilly, Allahabad, to CBI or any other independent investigating agency.

iv) to issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case, to which the petitioner may be found entitled in law."

2. The allegations in the F.I.R. are that on 22.6.2002 at about 12.30 P.M., the petitioner opened two shots on him (respondent no. 5) from his pistol. By providence, he escaped unhurt as he ran shouting towards Gaush Nagar. The F.I.R. makes reference to some earlier incident of July last year that M.L.A. Ateeq Ahmad had got him attacked in respect of which he had lodged the F.I.R. at P.S. Dhoomanganj, district Allahabad. The said M.L.A. had commanded him not to tender evidence in that case, but he had not succumbed to that pressure. At the time of present incident, he was allegedly present at his plot of Beniganj, '60' ft. Road with Kalloo when the petitioner with his father, Naseem son of Kallan, Sharif, Puttan Baba and Ali Ahmad @ Phutter came to him and again pressurized to take back his case as otherwise he would be done away with. He retorted back that come what may, he would not take back his case. Then at the exhortation of his father and associates, the petitioner opened two shots on him.

3. We have heard Sri S.M.A. Kazmi, learned counsel for the petitioner in sufficient details and learned A.G.A. in opposition. It is urged by the learned counsel for the petitioner that it is an unusual co-incidence that in the incident of 22.6.2002 forming the subject matter of the F.I.R. in question, respondent no. 5 escaped unhurt and it was so even in the earlier alleged incident of July last year as is clear from the reading of the F.I.R. itself. It is reasoned that it is a clear

pointer that an imaginary incident has been coined by respondent no. 5 to roap in the petitioner. According to the learned counsel for the petitioner, respondent no. 5 is repeatedly filing false F.I.Rs against the petitioner and his other family members, because the petitioner happens to be the brother of M.L.A. Ateeq Ahmad.

4. It may be pointed out that in this writ petition, the Court is concerned with the F.I.R. of Crime no. 156 of 2002 relating to incident of 22.6.2002. We are of the opinion that it is no strange coincidence that respondent no. 5 escaped unhurt. There are clear allegation of two shots having been fired by the petitioner on him. The F.I.R. relates the incident in requisite details with the names of the witnesses being also given there. The matter requires probing by investigation and the incident cannot be taken to be unbelievable and imaginary at this stage simply because it is a case of 'no injury'.

5. It has vehemently been argued for the petitioner that he happens to be the brother of M.L.A. Ateeq Ahmad who is politically opposed to the present Chief Minister Sushri Mayawati and that respondent no.5 is being politically utilized by her to slap false cases against M.L.A. Ateek Ahmad and his other family members to settle the scores of political vendetta and the present F.I.R. is a part of that scheme and chain.

6. Learned counsel for the petitioner has invited our attention to Annexure 8 to the writ petition which is said to be the copy of proceedings of the Legislative Assembly dated 17th May 2002. It is sought to be emphasized with its help that when the petitioner was pointing out the ideological framework of the present Chief Minister, she threatened that she would ensure that tears would come to his eyes.

7. So far as the alleged statement or threat of the present Chief Minister on the floor of the Legislative Assembly on 17.5.2002 is concerned, suffice it to say that the same cannot prima facie and rationally be interpreted as her mala fides against the petitioner's brother for getting him and his family members getting implicated in false criminal cases.

8. It is also pertinent to state that difference of ideology and policies are not unusual amongst the persons connected and associated with politics. But the same does not permit the fanciful inference that one or the other would go to the level of implicating his adversary in false criminal cases through commoners having no moorings. To our mind, it is too far fetched to hold at this stage that the petitioner has been falsely implicated in this case by respondent no. 5 at the instance of the present Chief Minister of the State, Sushri Mayawati because he happens to be the brother of M.L.A. Ateeq Ahmad who is politically opposed to her. It may be stated that the case requires investigation as per the provisions of Criminal Procedure Code as the F.I.R. discloses commission of cognizable offence including that of attempt of murder under section 307 I.P.C.

9. Regarding the allegation of *mala fides* in the lodging of present F.I.R. by respondent no. 5 as the tool of the present Chief Minister of the State, learned counsel for the petitioner has invited our attention to the case of *State of Haryana and others Vs. Bhajan Lal and others*

1992 SCC (Cri) 426 in which norms have been laid down where extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 Cr.P.C. can be exercised by the Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Emphasis has been laid from the side of learned counsel for the petitioner on the following two norms categorized in the said ruling at serial nos. (5) and (7):

"(5) Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. Considering the allegations made against the petitioner in the present F.I.R., we are of the view that it cannot be said without stretching imagination to an unlimited extent that they (the allegations) are so absurd and inherently improbable on the basis of which no prudent person can even reach a conclusion that there was sufficient ground for proceeding against the petitioner. It also cannot be held at this stage that the F.I.R. in question has been lodged with *mala fides*. It does disclose commission of cognizable offences and no interference, in our considered opinion, is called for by this court in exercise of extraordinary prerogative writ jurisdiction under Article 226 of the Constitution of India to quash the F.I.R. in question. The law must take its own course. Quashing of the F.I.R. cannot be sought on this premise either that the allegations made are incorrect or false according to the petitioner. The extraordinary jurisdiction under Article 226 of the Constitution of India cannot be exercised for this purpose. We need not labour much on the point that the High Court does not ordinarily enter into the factual controversy in writ jurisdiction. When the F.I.R. discloses commission of cognizable offence (s), as is the case here, there is no ground for interference by the High Court to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. The case has to go through the ordinary system of law.

11. The Supreme Court has held in the case of ***Manohar M. Galani V. Ashok N. Advani, 2000 SCC (Cri) 70*** that the High Court is not justified in quashing the F.I.R. by an elaborate discussion on merit of the matter.

12. The normal rule is not to interfere with the investigation and criminal proceedings, except when the complaint or the F.I.R. broadly read, does not disclose any offence and can be termed as abuse of process of law. If prima facie an offence is disclosed in the F.I.R., the High Court would decline to interfere with the statutory functions of the investigating agency and to quash the criminal proceedings.

13. As to the allegations of *mala fides*, we have indicated above that there is no justification whatsoever at this stage to accept the same. Moreover, in the case of ***State of Maharashtra Vs. Ishwar***

Piraji Kalpatri and others 1996 SCC (Cri) 150 the Supreme Court has held that *mala fides* or animus of a complainant or prosecution is not relevant at the initial stage for quashing criminal proceedings. If on the basis of the allegations in the complaint a prima facie case is made out, the High Court has no jurisdiction to quash the proceedings. It is not justified in judging the probability, reliability or genuineness of the allegations made. If the complaint which is made is correct and the offence had been committed, which will have to be established in a court of law, it is of no consequence that the complaint was by a person who was inimical or that he was guilty of *mala fides*. If the ingredients which establish the commission of the offence exist, then the prosecution cannot fail merely because there was an animus of the complainant or prosecution against the accused. The allegations of *mala fides* may be relevant while judging the correctness of the allegations or while examining the evidence. But the mere fact that the complainant is guilty of *mala fides* would be no ground for quashing the prosecution.

14. So far as the question of transfer of investigation to an independent agency is concerned, we would like to observe that normally the investigation should be done by the local police. The mere allegation that the local police would not investigate the case properly does not entitle the accused to pray for handing over the investigation to some other agency. In the case of ***CBI Vs. Rajesh Gandhi 1997 Cr.L.J. (Cri) 63***, the Supreme Court has held that the decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with.

15. Learned counsel for the petitioner has then referred to the case of ***Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and others (1981) 1 SCC 608***, wherein it was observed as under:

"Principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to the fundamental rights enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must, therefore, be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person."

16. Another ruling cited is ***Dadu alias Tulsidas vs. State of Maharashtra (2000) 8 SCC 437***. Stress has been laid on head-note 'H' which is to the following effect:

"Constitution of India-- Arts. 226 and 32- Judicial Review- Held, is the heart and soul of the constitutional scheme-Judiciary is the ultimate interpreter of the Constitution and has the

assigned task of determining the extent and scope of the powers conferred on each part of the Government and thus ensure that no branch transgresses its Limits."

17. Indeed, the principles of interpretation of constitution and the constitutional philosophy enunciated by the Apex Court of the land through the above cited rulings do not brook any dispute. But the point of the matter is that having regard to the facts and circumstances of the present case that the F.I.R. in question discloses the commission of cognizable offences and that at this stage no *mala fides* can be held to be involved in the lodging of the said F.I.R., the petitioner is not entitled for any relief. We do not locate any merit in this writ petition for the detailed discussion made in the proceeding paragraphs.

18. We accordingly dismiss this writ petition.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.9.2002

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

Special Appeal No. 1000 of 2002

Satya Prakash Srivastava ...Petitioner
Versus
The Director General (Fire Services), U.P. and others ...Respondents

Counsel for the Petitioner:
Sri O.P. Singh
Sri Anil Kumar Srivastava
Sri Swarn Kumar Srivastva

Counsel for the Respondents:
Sri S.J. Yadav
S.C.

Constitution of India- Article 226- There is no Rule which provides that one can not keep beard. Our country is governed by Rule of Law and matters are to be decided according to the provisions of law in that behalf and not on likes or dislike of an individual Officer howsoever high position he may be having. (Held in para 2)

The representation made by writ petitioner should have been decided on the basis of merit and we accordingly set aside the rejection order dated 9.7.2002 passed by Director General Fire Services U.P. The Director General shall decide the matter afresh after hearing the writ petitioner and pass appropriate orders recording reasons.

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

1. Sri O.P. Singh learned Senior Advocate assisted by Sri Anil Kumar Srivastava Advocate appears for appellant and Sri S.J. Yadav learned Standing counsel appears for State Respondents.

2. This Special Appeal is directed against an order passed by learned single Judge whereby learned single Judge dismissed the writ petition. It appears that the writ petitioner was aggrieved since his representation against the order of transfer was rejected only on the ground that the Director General Fire Services, U.P. took the view that he was in shabby condition with long beard and hair which displayed indiscipline and immaturity. That is not a ground on which transfer was effected. There is no Rule which provides that one can not keep beard. Our country is governed by Rule of Law and matters are to be decided according to the provision

of law in that behalf and not on likes or dislike of an individual officer howsoever high position he may be having. We are surprised to find such a finding from an officer of such a high rank. Just because a person has joined the police force, there can not be any compulsion upon him that he can not keep beard. Be that as it may, we feel that the representation made by writ petitioner should have been decided on the basis of merit and we accordingly set aside the rejection order dated 9.7.2002 passed by Director General Fire Services U.P. The Director General shall decide the matter afresh after hearing the writ petitioner and pass appropriate orders recording reasons.

3. The order of rejection dated 9.7.2002 stands quashed. Both the Special appeal and the writ petition are allowed. The order passed by the learned single judge dated 29.8.2002 is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

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

Civil Misc. Writ Petition No.37657 of 2002

Brij Mohan Singh ...Petitioner
Versus
District Panchayat Raj Officer and others ...Respondents

Counsel for the Petitioner:
Sri Murtuza Ali
Sri S.C. Verma

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

Civil Procedure Code- Order VIII Rule 11 (d)- If the suit is not maintainable and is barred under the statute, the proper course for the petitioner shall be to make an application before the civil judge for rejection of plaint.

Held- (Para 4)

It is clear from the aforesaid provision that if the suit is barred under any particular statute, it is open to the defendant to make application for rejection of the plaint. Since the petitioner is defendant in the suit, he shall be at liberty to make such application under Order VII Rule II (d), if he is so advised, before the Civil Judge concerned and in case such application is made it shall be disposed by the learned Civil Judge as early as possible after hearing the plaintiff and other defendants in accordance with law. It is made clear that we have not adjudicated the case upon merit and the learned Civil Judge shall be at liberty to proceed in accordance with law. The writ petition which has been treated as an application under Article 227 of the Constitution stands dismissed subject to the observations made above.

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

Present: Sri Murtuza Ali and Sri S.C. Verma learned counsels for the petitioner and Shri Ran Vijay Singh learned standing counsel for the respondents.

1. This petitioner first moved before the learned Single Judge as an application under Article 226 of the Constitution of India. The learned Single Judge felt that the application would lie under Article 227 of the Constitution of India. Accordingly, the matter came up before us today. However, we find that the prayers made in the writ petition cannot apply to an application under Article 227

of the Constitution of India. Be that as it may, the contention of the learned counsel for the petitioner is that the order passed in civil suit on the basis of which the Panchayat Raj Officer has passed the impugned order is not proper in view of the fact that the civil suit itself is not maintainable and barred under the provisions of the U.P. Panchayat Raj Act.

2. If the suit is not maintainable since it is barred under the specific statute, in our view there is adequate remedy under the Code of Civil Procedure itself and proper course for the petitioner shall be to make an application before the Civil Judge for rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Misc. Writ Petition No. Procedure. The learned counsel for the petitioner fairly conceded to the view taken by us in the matter and has submitted the proper course in such circumstances is to make an application for rejection of the plaint under Order VII Rule 11 (d) of the Code of Civil. Procedure which is set out herein below:

3. **11. Rejection of plaint:** The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;
(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
(c) where the relief claimed is property valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
(d) where the suit appears from the statement in the plaint to be barred by any law:

4. It is clear from the aforesaid provision that if the suit is barred under any particular statute, it is open to the defendant to make application for rejection of the plaint. Since the petitioner is defendant in the suit, he shall be at liberty to make such application under Order VII Rule 11 (d), if he is so advised, before the Civil Judge concerned and in case such application is made it shall be disposed by the learned Civil Judge as early as possible after hearing the plaintiff and other defendants in accordance with law. It is made clear that we have not adjudicated the case upon merit and the learned Civil Judge shall be at liberty to proceed in accordance with law. The writ petition which has been treated as an application under Article 227 of the Constitution stands dismissed subject to the observations made above.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.9.2002

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 11095 of 1994

Virendra Singh and others ...Petitioners
Versus
The Additional Commissioner and others ...Respondents

Counsel for the Petitioners:
Sri Ganga Prasad
Sri Mahendra Narain Singh
Sri Vinod Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- even though the order dated 30.10.1992 may have been passed on merit, it is not disputed that before the prescribed authority the petitioner was not heard before passing of the said order. Valuable rights of the petitioners have been affected because of having been denied an opportunity of hearing. (Held in para 5)

(Delivered by Hon'ble Vineet Saran, J.)

1. This writ petition has been filed challenging the orders dated 30.10.1992 and 9.2.1993 passed by respondent no. 2 Prescribed Authority, Firozabad, and also order dated 18.2.1994 passed by respondent no. 1, Additional Commissioner (Administrative) Agra Division, Agra.

2. The brief facts of the case are that in pursuance of the notice under section 10 (2) of U.P. Imposition of Ceiling on Land Holdings Act (hereinafter referred to as the Act) certain land of the petitioners was declared surplus by the prescribed authority vide order dated 27.2.1990. Against the said order the petitioners filed an appeal before respondent no. 1, Additional Commissioner (Administrative) Agra Division, Agra, which was allowed and the matter was remanded back to the prescribed authority on 28.5.1992. The prescribed authority on 30.10.1992 upheld its decision given on 28.12.1974. On the said date, learned counsel appearing for the petitioners could not appear before the prescribed authority and hence the order was passed ex-parte. After passing of the aforesaid order the petitioners filed restoration application which was also rejected by the prescribed authority on 9.2.1993. Against the aforesaid orders dated 30.10.1992 and 9.2.1993 passed on the restoration application, the petitioners filed an appeal before the Additional Commissioner (Administrative) Agra Division, Agra, respondent no. 1, which was also dismissed on 18.2.1994 primarily on the ground that the order dated 30.10.1992 had been passed on merits.

3. I have heard Sri Mahendra Narain Singh, learned counsel appearing for the petitioners as well as the learned Standing Counsel appearing for the respondents.

4. It is not disputed that after remand of the case, the order dated 30.10.1992 was passed by the prescribed authority without hearing the petitioners even though the case may have decided the case on merits. The petitioner did not get an opportunity of hearing.

5. Having heard learned counsel for the parties and on perusal of the record, in my view, even though the order dated 30.10.1992 may have been passed on merit, it is not disputed that before the prescribed authority the petitioner was not heard before passing of the said order. Valuable rights of the petitioners have been affected because of having been denied an opportunity of hearing. Thus, in the circumstances the orders dated 30.10.1992 and 18.2.1994 passed by prescribed Authority, Firozabad, and the Additional Commissioner (Administrative) Agra Division, Agra, are set aside and the case is remanded back to the Prescribed Authority, Firozabad, respondent no. 2 for being decided afresh on merits after giving an opportunity of hearing to the parties.

6. The writ petition is allowed. However, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2002

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

Civil Misc. Writ Petition No. 22712 of 2002

Devkinandan ...Petitioner
Versus
Civil Judge(Senior Division) and others ...Respondents

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

Counsel for the Respondents:
Sri Rajesh Chandra Gupta
S.C.

Constitution of India, Article 226- Practice and Procedure- forcible ejectment of a tenant-plea taken about the expiry of the period of tenancy- held- such action of putting lock on the shop- illegal-except in accordance with law even a person in rank of trespasser can not be ejected- petition allowed- Specific directions issued to remain in possession.

Held- Para 10

It has been held by the Supreme Court in Samir Sobhan Sanyal vs. Track Trade Pvt. Limited AIR 1996 SC 2102 that a tenant cannot be dispossessed without due process of law. Even assuming that the period of tenancy has expired, one cannot take law into one's own hand and forcibly throw out the erstwhile tenant but may file a suit for eviction. Instead of filng the suit the respondents 5 and 7 placed their lock in the shop in question which in our opinion was wholly illegal.

Case Law discussed:
AIR 1996SC 2102 relied on

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

1. The writ petition has been filed for a mandamus directing the respondents 2,3 and 4 to help the respondents 5 to 8 to interfere in the peaceful possession of the petitioner over the shop in dispute. It has also been prayed that the respondent no. 1 be directed to open the lock placed on the shop of the petitioner and to ensure that the injunction order dated 4.7.2001 in suit no. 308 of 2001 is complied with.

2. Heard learned counsel for the parties.

The petitioner has alleged that he was a tenant of a shop called 'Bhaiyaji General Store' in Gautam Buddha Nagar. It is alleged that this shop was owned jointly by respondent 5,6,7 and 8 who entered into a family settlement whereby the respondent no. 6 became the sole owner of the said shop and a room which is situated on its western side. The petitioner purchased this shop from the respondent no. 6 vide sale deed executed on 18.4.2001 by the respondent no. 6 in favour of the petitioner. True copy of the sale deed is Annexure 3 to the writ petition.

3. In paragraph 11 of the writ petition it is stated that on 17.6.2001 the respondent no. 5 and 7 sent hooligans (gundas) and anti social elements to vacate the shop and hence the petitioner submitted a complaint before the S.H.O. Dadri, Gautam Buddha Nagar but nothing was done. True copy of the complaint

dated 23.6.2001 is Annexure-7 to the writ petition.

4. In paragraph 12 of the writ petition it is alleged that the respondent no. 5 and 6 forcibly locked the shop of the petitioner on 10.7.2001 with the help of S.H.O., respondent no. 4 although the petitioner had obtained an injunction order dated 4.7.2001 in civil suit no. 308 of 2001 vide Annexure 9 to the writ petition. Thus the respondents deliberately flouted the injunction order dated 4.7.2001 passed by the Civil Judge, Senior Division, Gautam Buddha Nagar by forcibly locking the shop of the petitioner with the help of respondent no. 4. It is alleged in paragraph 13 of the writ petition that the respondent no. 4 had indulged in corrupt practices and threatened him making demands. The order dated 4.7.2001 directs the parties to maintain status quo.

5. It is stated in paragraph 16 of the writ petition that the petitioner had supplied copy of the injunction order dated 4.7.2001 to respondents 5, 7 and 8 but they refused to take the copy. The petitioner also submitted a representation to the District Magistrate on 10.10.2001 but to no avail. True copy of the representation is Annexure-10 to the writ petition. The petitioner also gave a copy of the injunction order dated 4.7.2001 to the S.S.P. and S.D.M., Gautam Buddha Nagar but no action was taken. The petitioner had filed writ petition no. 14356 of 2002 in this Court and this Court by order dated 16.4.2002 had directed the concerned authority to decide his representation within a month. It was not decided. In paragraph 20 of the writ petition it is alleged that the respondents 5,7 and 8 had caused substantial damage to the shop. The petitioner had also filed contempt proceedings against the respondents. The petitioner has also moved the National Human Rights Commission alleging that he has been tortured by the Police.

6. A counter affidavit has been filed by the respondent no. 7 on behalf of the respondent no. 5. In paragraph 3 of the same it is stated that after 6.3.2001 the petitioner was not a tenant in the house in question. The shop in question was given on rent on 24.8.1998 by the respondent no. 5 to the petitioner under a written rent deed for one year from 24.8.1998 to 23.8.1999 and thereafter it was given on rent to the petitioner from 6.3.2000 to 5.3.2001 but thereafter the petitioner was no more the tenant of the house in question. In paragraph 4 it is denied that the respondents 5 and 7 have made any agreement or sale deed in favour of the petitioner. It is alleged that the respondent no. 6 and 8 are in collusion with the petitioner. The sale deed is alleged to be collusive and the respondent no. 5 has filed a suit for cancellation of the sale deed. It is alleged in paragraph 8 of the writ petition that on 5.3.2001 the respondents 5 and 7 had taken possession of the shop in question. The injunction order dated 4.7.2001 is an exparte order without hearing the respondent 5 to 7. The petitioner tried to take possession back from the respondents 5 and 7 with the help of local police in the garb of the order dated 4.7.2001 but he could not succeed.

7. A rejoinder affidavit has been filed and it is stated that the petitioners tenancy was not terminated. The petitioner purchased the disputed shop from Pramod Kumar who was co-sharer

of the 1/4th share. It is denied that there is any collusion. In paragraph 9 of the rejoinder affidavit it is stated that the possession of the shop is with the petitioner but the respondents had placed their lock over the shop in possession of the petitioner and thus had taken the law into their own hands.

8. On the facts of the case we are satisfied that the petitioner version is correct and that the respondents 5 and 7 illegality placed their lock on the shop in possession of the petitioner. Thus the respondents have taken the law into their own hands. We do not believe the version of the respondent that the possession of the shop was taken by the respondents 5 and 7 on 5.3.2001. In fact the electricity registration certificate was issued by the electricity Department in favour of the petitioner on 3.7.2001 vide Annexure-6 to the writ petition. If the possession had been taken by the respondent no. 5 and 7 on 5.3.2001 there would have been no occasion for the petitioner to obtain the electricity registration certificate or to file an FIR dated 23.6.2002 Annexure 7 to the writ petition in which it is stated that the respondents are threatening to take possession of the shop. There was also no occasion for the petitioner to have filed the injunction suit. In the plaint of the suit copy of which is Annexure-8 to the writ petition it is mentioned that the respondents came to the petitioners shop on 17.6.2001 and 30.6.2001 armed with lathis and dandas and tried to evict the petitioner but were unsuccessful on those occasions. It was prayed that the respondents be restrained from evicting the petitioner from the shop in dispute.

9. On the facts of the case we are satisfied that the possession was with the petitioner and the respondents have illegally put their lock in the said shop in order to deprive the petitioner.

10. It has been held by the Supreme Court in Samir Sobhan Sanyal vs. Tracks Trade Pvt. Limited A.I.R. 1996 SC 2102 that a tenant cannot be dispossessed without due process of law. Even assuming that the period of tenancy has expired, one cannot take law into ones own hand and forcibly throw out the erstwhile tenant but may file a suit for eviction. Instead of filing the suit the respondents 5 and 7 placed their lock in the shop in question which in our opinion was wholly illegal.

11. In the circumstances, we allow this writ petition and direct that the lock placed by the respondents be removed immediately by the police and the petitioner be allowed to continue in possession of that shop in question. No order as to costs.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 1.10.2002

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

Habeas Corpus Petition No. 14932 of 2002

Dinesh Yadav ...Petitioner
Versus
State of UP and others ...Respondents

Counsel for the Petitioner:
K.D. Tiwari
Sri Vijendra Singh

Counsel for the Respondents:
Sri A.K. Singh

A.G.A.

Constitution of India, Article 226, Detention Order- passed under National Security Act- District Magistrate without considering the representation, rejected on the ground that the State Government has approved it- held- illegal- although the allegations are very serious in nature but with heavy hearted the court is bound quash the detention order on technical ground.

Held- para 5

Although we are allowing this petition, we are doing it with a heavy heart because the allegations against the petitioner are serious as he is involved in dealing with fake currency notes which is adversely affecting the economy system of our country. However, since the law of Habeas Corpus is a technical law we have to allow this petition.

Case law discussed.

2002 UP Crl. Rulings 718
1995 SCC (Crl) 643

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

1. Heard learned counsel for the parties.

2. The petitioner has challenged the impugned detention order dated 9.1.2000 Annexure-1 to the petition, passed under the National Security Act.

3. In our opinion this petition deserves to be allowed on the ground that the District Magistrate did not apply his mind independently while rejecting the representation of the petitioner. He rejected it only on the ground that after approval of the detention order by the State Government the District Magistrate was not empowered to consider the said representation. This has been stated in paragraph 4 of the counter affidavit of the then District Magistrate.

4. It has been held by this court in ***Idrish vs. Secretary, Ministry of Home Affairs, 2002 UP Crl. Rulings 718 (para 4)*** that the District Magistrate must independently apply his mind while deciding the representation, and he cannot reject it only on the ground that the State Government has approved the detention order. This court in ***Lallan Goswami vs. Superintendent, Central Jail, Naini has also taken this view. vide Habeas Corpus Petition No. 32229 of 2002 decided on 30.9.2002***, following the decision of the Supreme Court in ***Kamlesh Kumar v. Union of India 1995 SCC (Crl.) 643*** where it has been held that the right of the detenue to make a representation to the District Magistrate is in addition to his right to make representation to the State Government and the Central Government.

5. Although we are allowing this petition, we are doing it with a heavy heart because the allegations against the petitioner are serious as he is allegedly involved in dealing with fake currency notes which is adversely affecting the economy system of our country. However, since the law of Habeas Corpus is a technical law we have to allow this petition.

6. It is, therefore, not necessary to go into other submission. The petition is allowed. The petitioner shall be released forthwith unless required in some other criminal or preventive detention case.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.9.2002

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

Special Appeal No. 32 of 1998

Laxmi Shanker Misra ...Appellant
Versus
District Inspector of Schools and others ...Respondents

Counsel for the Appellant:
Sri Ch.N.A.Khan
Sri M.K. Tiwari

Counsel for the Respondents:
Sri Ranvijay Singh
Sri A.K. Misra
Sri D.N. Misra
Sri S.N. Misra
S.C.

U.P. Intermediate Education Act 1921- chapter II- Regulations, read with UP Secondary Education Service Commission Rules- 1983 rule 9- Adhoc promotion on the post of lecturer Sanskrit- petitioner/Appellant's promotion - Disapproved by the DIOS on the ground of beyond 40% quota- subsequent approval of the Respondent no. 4 by Direct appointment- held- illegal- Neither the Management, nor the Respondent no. 4. Nor the DIOS disputed the eligibility of the appellant.

Held- Para 15

In view of the law laid down by Full Bench of this Court in Km. Radha Raizada's case (supra), if a qualified teacher is available for promotion, the post cannot be filled up by direct recruitment on adhoc basis. It is not suggested that petitioner was not qualified for promotion rather his claim was resisted on the ground that 40% quota being filled up, the petitioner is not entitled for promotion and on that basis management proceeded to make adhoc appointment. Management proceeded to make adhoc appointment . Management's clear stand in its counter affidavit to the writ petitioin was that resolution passed in favour of the petitioner- appellant on 4th September, 1993 giving him promotion as lecturer in Sanskrit was under mistake since 40% promotion quota was already filled up. In view of the aforesaid, the adhoc appointment of respondent no. 4 by direct recruitment was void and contrary to provisions of Removal of difficulties order, 1981 and the law laid down by Full Bench in Km. Radha Raizada's case (supra). The District Inspector of Schools who was requested to approve appellants promotion on adhoc basis was under misconception that approval cannot be granted since 40% promotion quota has been filled and in that premises he proceeded to fill the post by direct recruitment. The order of District Inspector of Schools dated 24 May, 1988 approving the appointment by direct recruitment of respondent no. 4 cannot be sustained and is hereby quashed.

(Delivered by Hon'ble Ashok Bhushan,J.)

1. Heard Chaudhary N.A. Khan, Advocate appearing for the appellant and Sri Ranvijay Singh, learned standing counsel appearing for respondent no. 1.

2. This special appeal has been filed by the appellant against the judgment and order dated 16 December, 1997 passed by learned single judge in writ petition no. 15741 of 1988 (Laxmi Shanker Misra vs. District Inspector of Schools, Allahabad and others) by which judgment the writ petition filed by the appellant was dismissed.

3. Facts of the case giving rise to this special appeal, briefly stated, are Lal Bahadur Shashtri Inter College, Dharwara, Allahabad (hereinafter referred to as institution) is a recognized institution under the U.P. Intermediate Education Act, 1921 receiving aid from the State Government. The institution is also governed by UP Secondary Education Service Selection Board Act, 1982 (hereinafter referred to as 1982 Act). Aditya Prasad Nautiyal who was working as lecturer Sanskrit, retired on 30th June, 1983 causing a substantive vacancy on the post of lecturer Sanskrit. The appellant was working as confirmed L.T. grade teacher in the institution appointed with effect from 8th July, 1968. The appellant who is Master of Art with Sanskrit claimed promotion on the post of lecturer caused due to retirement of Aditya Prasad Nautiyal. The committee of management passed a resolution on 4th September, 1983 promoting the appellant as lecturer Sanskrit. The resolution was also passed to the effect that approval of adhoc promotion of the petitioner be obtained from District Inspector of Schools in accordance with the provisions of Removal of difficulties order. It appears that resolution was forwarded to the District Inspector of Schools. The District Inspector of Schools did not grant any approval to said promotion but raised an objection vide letter dated 14 May, 1987 to the effect that according to Rule promotion is made under 40% promotion quota. It was stated that the resolution of the committee of management for filing the post by promotion appears to be in excess of 40% promotion quota. The details were asked by the District Inspector of Schools as to which lecturers are working under promotion quota and which lecturers are working under direct recruitment. The committee of management in between passed a resolution for giving adhoc appointment to respondent no. 4, Shaym Narain Pandey, as lecturer Sanskrit on 24 January, 1987. The information of adhoc direct recruitment of respondent no. 3 has been made under section 18 of UP Act No. 5 of 1982 who has already been appointed on 1 November, 1986 which may be approved. The District Inspector of Schools by an order dated 24 may, 1988 approved the adhoc appointment of respondent no. 4 under section 18 of UP Act No. 5 of 1982 for the current academic session up to 20 May, 1988. The appellant filed a writ petition giving rise to this special appeal challenging the order dated 24 May, 1988 passed by District Inspector of Schools. In the writ petition the appellant prayed for a writ of mandamus directing the respondents not to interfere with the working of the appellant as lecturer Sanskrit and also a mandamus for payment of salary. By prayer no. iv it was claimed that mandamus be issued to Secondary Education Service Commission, Allahabad to promote the petitioner-appellant on the post of lecturer in Sanskrit on regular basis under 40% quota. In the aforesaid writ petition, counter affidavit was filed by the Management as well as respondent no. 4, Shyam Narain Pandey including supplementary counter affidavits and supplementary rejoinder affidavits. The writ petition was dismissed by learned single Judge vide its judgement and order dated 16 December, 1997 against which the present special appeal has been filed.

4. Learned single Judge while dismissing the writ petition of the appellant recorded following findings. –

(i) 40% promotion quota in the institution was already complete and the post which fell vacant due to retirement of Aditya Prasad Nautiyal on 30 June, 1983 was not under 40% promotion quota, hence the appellant could not have been promoted as lecturer Sanskrit.

(ii) There is nothing on the record to indicate that the resolution dated 4 September, 1983 was adopted after complying with the mandatory requirement of notifying the substantive vacancy to the Commission. The first intimation to the District Inspector of Schools appears to have been made on 20 March, 1987. The petitioner was never appointed even on adhoc basis as lecturer on the vacancy caused due to retirement of Aditya Prasad Nautiyal. He was simply deputed to take up the Sanskrit subject in Class XI and XII prior to 15 June, 1987.

5. The counsel for the appellant challenging the judgment of learned single Judge raised following submissions in support of this appeal –

(i) For adhoc promotion as lecturer Sanskrit 40% quota was not to be looked into and all the posts in the institution including the post of lecturer Sanskrit was to be filled up only by adhoc promotion as required by provisions of U.P. Secondary Education Service Commission (Removal of Difficulties) order, 1981 and the issue is fully covered by the Full Bench judgment of this Court in ***Km. Kumari Radha Raizada and others vs. Committee of Management Vidyawati Darbari Girls Inter Coillege and others***, 1994 All. L.J. 1077.

(ii) The adhoc appointment of respondent no. 4 which was made by direct recruitment was void and contrary to the law laid down by Full Bench in **Km. Radha Raizada's** case (supra).

(iii) The appellant having already given promotion by resolution dated 4th September, 1983, the post was not vacant to make any adhoc appointment by direct recruitment.

6. Sri Ranvijay Singh, learned standing counsel, opposing the above submissions of counsel for the appellant, has submitted that promotion could only be made against 40% vacancies of lecturer. 40% promotion quota in the lecturer grade being already filled up, appellant has no right to be promoted. Learned standing counsel submitted that in view of the fact that promotion quota being already filled up no error was committed by the respondents in making adhoc appointment of respondent no. 4 by direct recruitment.

7. We have heard the submissions of both the counsel and perused the records including the record of the writ petition. There is no dispute of facts between the parties. The submissions raised by counsel for the appellant being interrelated are being considered together.

8. Before proceeding to consider relevant submissions of counsel for the parties, it is appropriate to look into the pleading and foundation which has been laid by the appellant in the writ petition for his claim. It was stated in paragraph 4 of the writ petition that petitioner was appointed as L.T. grade teacher on 8th July, 1968 and was confirmed on 8th July, 1969. In paragraph 5 of the writ petition, it was claimed that petitioner is senior most assistant Teacher in L.T. grade with

M.A. Sanskrit. The seniority list was enclosed as Annexure-1 to the writ petition which shows that the name of petitioner is at serial no. 2, however, the person at Serial No. 1 is M.A. in Hindi and hence the petitioner was senior most L.T. grade teacher with M.A., in Sanskrit. In paragraph 6 and 7 of the petition it was stated that there were six posts of lecturers in the institution and two posts of lecturer come under 40% quota and are to be filled up by promotion. In paragraph 10 of the writ petition, it was stated that resolution was passed by committee of management on 4th September, 1983 promoting the petitioner on the post of lecturer in Sanskrit under Removal of Difficulties Order, 1981- 82.It was stated that committee of management authorized the Manager to obtain approval of District Inspector of Schools, Allahabad. It was stated that with effect from 4th September, 1983, the petitioner was working as lecturer in Sanskrit. It was claimed in paragraph 13 and 14 of the writ petition that Manager sent reminders dated 19th March, 1987 and 15th June, 1987 to the U.P. Secondary Education Service Commission, UP Allahabad through the District Inspector of Schools. In paragraph 17 of the writ petition, it was stated that the post of lecturer in Sanskrit has been filled up by promotion of the petitioner under Removal of Difficulties Order, 1981-82. The approval order dated 24 May, 1988 giving approval to adhoc appointment of respondent no. 4 was challenged in the writ petition. Copy of the resolution of committee of management dated 4th September, 1983 was enclosed as Annexure-2 to the writ petition. The said resolution unanimously resolved that Manager may send all relevant papers to the District Inspector of Schools, Allahabad for approval of adhoc promotion of the petitioner under Removal of difficulties order within one week. Annexure-3 to the writ petition is claimed to be letter by Manager to the UP Secondary Education Service Commissioner for approving promotion of the petitioner under 40% quota.

9. In the counter affidavit filed by the Manager, Kedar Nath Tripathi, it was admitted that resolution was passed on 4th September, 1983 for promotion of the petitioner on the post of lecturer Sanskrit but it was claimed in paragraph 13 of the counter affidavit that said resolution was by mistake since vacant post was not a post within 40% promotion quota. It was stated that 40% promotion quota was already filled up since Radhey Krishan Pandey and Shyam Behari Sharma have already been promoted under 40% quota, Letters dated 19th March, 1987 and 15th June, 1987 alleged to be written by Manager was denied. The resolution dated 24th January, 1987 and the letter dated 24th January, 1987 were claimed to have been sent by the Manager and it was stated that respondent no., 4 has also worked as lecturer Sanskrit. The order of District Inspector of Schools dated 24th May, 1988 was defended. It has been stated that committee of management has further passed resolutions on 15 May, 1988 and 31 July, 1988 continuing respondent no. 4 as adhoc lecturer in Sanskrit.

10. From the findings recorded by learned single Judge as extracted above, it is clear that learned single Judge has held that 40% promotion quota has been filled up since two lecturers, namely Radhey Krishna Pandey and Sri Shyam Behari Sharma are already working under promotion quota. Learned single Judge

while recording the aforesaid finding has considered the relevant materials on the record. The said finding having been recorded after considering the materials on the record, we do not find any error in the said finding. According to Uttar Pradesh Secondary Education Service Commission Rules, 1983 where any vacancy is to be filled up by promotion all teachers working in L.T. or C.T. grade, who possess the minimum qualifications shall be considered for promotion to the lecturer or L.T. grade. Under Chapter-II Regulation 5, as it existed at the relevant time, 40% posts of lecturer were required to be filed up by promotion. In view of the aforesaid, the prayer no. iv of the appellant praying mandamus to Secondary Education Services Commission, Allahabad to promote the petitioner on the post of lecturer in Sanskrit on regular basis under 40% quota has rightly been refused by learned single Judge.

11. The submission of counsel for the appellant is to the effect that for adhoc promotion of the petitioner as lecturer Sanskrit 40% quota was not required to be adhered to and every vacancy in the lecturer grade has to be filled up by Adhoc promotion first and only thereafter the post can be filled up by direct recruitment. The provisions of UP Secondary Education Service Commissioner (Removal of Difficulties) order, 1981 in paragraph 4 (2) provides as under -

"4 (2) Every vacancy in the post of a teacher in lecturer grade may be filled by promotion by the senior most teacher of the institution in the trained graduate (LT) grade."

Paragraph 5 sub para (1) of the said order, 1981 provides as under -

"5 (1) Where any vacancy cannot be filled by promotion under paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

12. The full Bench in **Km. Radha Raizada's** case (supra) after considering the provisions of UP Act No. 5 of 1982 and the Removal of Difficulties orders had laid down that every vacancy in the post of teacher in lecturer grade shall be filled up by promotion of senior most teacher and where any vacancy cannot be filed up by promotion only then adhoc appointment by direct recruitment can be resorted. The Full Bench approved the earlier Division Bench of this court in **Charu Chandra Tiwari v. D.I.O.S. (1990) 1 UPLBEC 160**. Paragraphs 37 and 38 of the Full Bench judgment in **Km. Radha Raizada's** case (supra) are extracted below:

"37. When a substantive vacancy has been notified to the commission and duly selected teacher is not available for appointment, controversy has arisen as to whether the management is required to appoint teacher either by direct recruitment or by promotion. The power of adhoc appointment either by direct recruitment or by promotion can be exercised only when the management has notified the substantive vacancy to the Commission and the commission has failed to recommend the name of suitable candidate within one year from the date of such notification or the posts of teacher has actually remained vacant for more than two months. Thus one of the two conditions is sine qua non for enabling

the management to exercise the power to appoint a teacher on adhoc basis, either by promotion or direct recruitment in the institution. If the condition is absent, such power to appoint on adhoc basis either by promotion or direct recruitment is not available to the management of the institution. In case the precondition is found to be present, the management is first required to fill up the substantive vacancy by promotion on adhoc basis from amongst the senior most teachers of the institution. Paragraph 4 of the First Removal of Difficulties order provides that every vacancy in the posts of teacher in lecturer grade shall be filled up by promotion of the senior most teachers in the institution in the trained graduate. Similarly, every vacancy in the post of in the trained graduate (grade) is to be filled by promotion by the senior most teacher of the institution from the trained undergraduate grade (CT grade) (Now we are not concerned with it since it is reported abolished).

38. Paragraph 5 of the First Removal of Difficulties order provides that where any vacancy cannot be filled by promotion under paragraph 4 of the order, same may be filled by direct recruitment. Thus, it is mandatory on the part of the Management to first fill up the vacancy by promotion on the basis of seniority alone. This method has to be resorted to as the teachers are available in the institution and any other method of recruitment may cause disturbance in teaching of the institution which may affect the career of students. Another reason why the vacancy has to be filled by adhoc appointment by promotion is that it is a short term appointment in the sense that shortly a duly selected teacher would be available for appointment against the said vacancy. So long the posts can be filled under paragraph 4 of the order by promotion, it is not open to the Management to take resort to the power to appoint adhoc teacher by direct recruitment under paragraph 5 of the First Removal of Difficulties order. In charu Chandra Tiwari vs. District Inspector of Schools, (1990) 1 UPLBEC 160: (1990 Lab IC NOC 129) it was held that the management has to fill the vacancy by adhoc promotion of a senior most teacher of the same institution qualified for such appointment and adhoc appointment through direct recruitment is permissible only in case no such teacher in institution is available. I am, therefore, of the view that the existing substantive vacancy which has been notified to the Commission and the condition provided under section 18 of the Act is present, the vacancy has to be filled up first by promotion from amongst senior most of teacher in next lower grade.'

13. From the pleadings in the writ petition, as noted above, and the content of the resolution dated 4th September, 1983, it is clear that management has resolved to seek approval of the petitioners' promotion on adhoc basis from District Inspector of Schools, Furthermore, the District Inspector of Schools in his letter dated 14 May, 1987 had observed that promotion of the petitioner appears to be beyond 40% quota of promotion. Rule 9 of UP Secondary Education Service Commission Rules, 1983 which existed at the relevant time provided approval by the Commission of substantive promotion. It is further to be noted that Full Bench in the aforesaid judgment of **Km. Radha Raizada's** case (supra) had also held that for adhoc promotion no approval is

required by District Inspector of Schools. The Full Bench held that in case senior most teacher has not been promoted, adequate power is given to the District Inspector of Schools under the U.P. High School and Intermediate Colleges (Payment of salaries of teachers and other employees) Act, 1971 to make enquiry in this respect and stop salary. Paragraph 39 of the Full Bench in **Km. Radha Raizada's** case (supra) is extracted below-

"39. There is another aspect of the matter as to whether any approval or prior approval of the District Inspector of Schools is required for adhoc appointment by promotion or not. Neither the Act nor the provisions of Removal of Difficulties Order provide for such prior approval or approval by the District Inspector of Schools in case of such adhoc appointment by promotion. There is another reason for not taking approval of the District Inspector of Schools of such appointment because teacher working in the institution is already approved and thus no further or subsequent approval is needed for it and only intimation to the District Inspector of Schools is required to be given regarding such appointment. See Ram Kripal Pandey v. District Inspector of Schools, Faizabad (1989) 2 UPLBEC 98. However, if it is found that senior most teacher has not been promoted, adequate power is given to the District Inspector of Schools under the U.P. High School and Intermediate Colleges (Payment of salaries of teachers and other employees) Act, 1971 (hereinafter referred to as Payment of salary act) to make enquiry in this respect. If found illegal, it goes without saying that he can stop payment of salary to such promotee."

14. From the material on the record, it appears that District Inspector of Schools was under misconception that for adhoc promotion also 40% quota has to be looked into and since 40% quota was filled up, there is no occasion for approval of adhoc promotion of the petitioner - appellant. Learned single Judge in his judgement has also held that since 40% promotion quota was already filled up, the petitioner- appellant was not entitled for appointment as lecturer in Sanskrit on adhoc basis. Last paragraph of the judgment of learned single judge clearly suggest that learned single Judge considered and rejected the claim of the petitioner for promotion on adhoc basis. Last paragraph of the judgment of learned single Judge impugned in this special appeal is extracted below -

"In conclusion I find that the petitioner was never appointed and could not have been appointed as a lecturer in Sanskrit on adhoc basis against the vacancy caused on account of retirement of Aditya Prasad Nautiyal on 30 June, 1983. The petitioner, therefore, is not entitled to any reliefs claimed by him. The petition is devoid of any merit and substance and is accordingly dismissed. Interim order passed in the present petition stands vacated."

15. In view of the law laid down by Full Bench of this Court in **Km. Radha Raizada's** case (supra), if a qualified teacher is available for promotion, the post cannot be filled up by direct recruitment on adhoc basis. It is not suggested that petitioner was not qualified for promotion rather his claim was resisted on the ground that 40% quota being filled up, the petitioner is not entitled for promotion and on that basis

Management proceeded to make adhoc appointment. Management's clear stand in its counter affidavit to the writ petition was that resolution passed in favour of the petitioner- appellant on 4th September, 1983 giving him promotion as lecturer in Sanskrit was under mistake since 40% promotion quota was already filled up. In view of the aforesaid, the adhoc appointment of respondent no. 4 by direct recruitment was void and contrary to provisions of Removal of Difficulties Order, 1981 and the law laid down by Full Bench in **Km. Radha Raizada's** case (supra). The District Inspector of Schools who was requested to approve appellant's promotion on adhoc basis was under misconception that approval cannot be granted since 40% promotion quota has been filled and in that premises he proceeded to fill the post by direct recruitment. The order of District Inspector of Schools dated 24 May, 1988 approving the appointment by direct recruitment of respondent no. 4 cannot be sustained and is hereby quashed.

16. The next question which is to be considered is that in view of the facts of the present case to what relief the appellant is entitled. As noted above, adhoc promotion of the petitioner did not require any prior approval of the District Inspector of Schools. Learned single Judge has also recorded a finding in the order that there is nothing on the record to prove that requisition was sent to the District Inspector of Schools before 4th September, 1983 on which date resolution was passed in favour of the appellant. Learned single Judge has found that for the first time intimation to the District Inspector of Schools was sent on 20 March 1987. In view of the aforesaid, it will be appropriate that petitioner will be held entitled for adhoc promotion from the date when the District Inspector of Schools approved the adhoc appointment of respondent no. 4 i.e. 24th May, 1988. In view of the fact that there is dispute of fact as to who functioned during the period as lecturer, it is appropriate that petitioner- appellant be treated to be adhoc lecturer in Sanskrit with effect from 24 May, 1988 but there being dispute regarding working of the post, it is appropriate to direct that petitioner-appellant's salary may be fixed in lecturer grade giving benefit of proforma fixation and salary already paid to respondent no. 4 during the period he worked should also not be recovered from respondent no. 4 or from the petitioner- appellant if he has been paid any salary in lecturer grade. Salary of appellant in lecturer grade be fixed within a period of one month from the date of receipt of this order and appellant be paid salary in lecturer's grade from the date of this order.

17. In view of the foregoing discussions, this appeal is partly allowed to the extent as indicated above. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.9.2002

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Civil Misc. Contempt Petition No. 1205 of 2002

Wasim Ahmad and others ...Applicants
Versus
Sri Ram Saroop Gupta and another
...Opposite parties

Counsel for the Applicants:
Sri Bhagwati Prasad Singh

Sri Vivek Kumar Singh

Counsel for the Respondents:
S.C.

Contempt of Court's Act- Section 12- wilfull disobedience- Treasury Officer refused to obey the order passed by the execution court on the ground-the CMO is the drawing and disbursing Authority- the objection raised by T.O. held baseless- direction issued by execution court-steps into the shoes of drawing and disbursing authority- disobedience not deliberate-no further action in contempt required.

Held- Para 3 and 6

I am of the opinion that the contention of the Chief Treasury Officer is based upon a misconception of the legal position. Firstly, Order 21 Rule 56 of the Code of Civil Procedure which is a statutory provision will over ride the financial rules, Secondly, when the court attaches any fund lying with the Chief Treasury Officer and directs for payment of the same under order 21 Rule 56 of the Code of Civil Procedure, the Court to the extent of those amounts directed to be paid, steps into the shoes of drawing and disbursing Officer.

The disobedience of the order of the executing court on part of the Chief Treasury Officer was not deliberate and thus apart from the direction given above, no further action in this contempt petition is called for.

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

1. To satisfy a decree of the Court certain amounts lying in the treasury in the salary account of the CMO Allahabad, were attached by the executing court. Subsequently the executing court directed the Chief Treasury Officer to draw and make payment of certain amounts out of that attached amount to the decree holder. The said direction was not complied with and accordingly this Contempt Petition was filed.

2. The counter affidavit filed in this contempt petition by Sri Ram Swarup Gupta, Chief Treasury Officer, Allahabad, states by way of defence that the amount could not be paid pursuant to the order of the executing court because the CMO Allahabad who was the drawing and disbursing officer (DDO), did not submit the bill. According to the contention advanced on behalf of the Chief Treasury Officer, he is the custodian of funds allocated by the State Government to the particular account of the DDO, to be drawn and disbursed in accordance with the financial rules. Hence he finds himself unable to comply with the orders of the executing Court.

3. Having considered the matter, I am of the opinion that the contention of the Chief Treasury Officer is based upon a misconception of the legal position. Firstly, Order 21 Rule 56 of the Code of Civil Procedure which is a statutory provision will over-ride the financial rules. Secondly, when the Court attaches any fund lying with the Chief Treasury Officer and directs for payment of the same under Order 21 Rule 56 of the Code of Civil. Procedure, the Court to the extent of those amounts directed to be paid, steps into the shoes of drawing and disbursing officer.

4. The position is some what similar to the case where the defendant in a suit for specific performance does not execute the required sale deed and the Court steps into the shoes of judgment debtor and executes the sale deed on his behalf,

which is valid as if the same has been executed by the judgment debtor himself.

5. Thus the Chief Treasury Officer will treat the executing court as the drawing and disbursing officer and will accordingly draw and pay the amount to the decree holder within three weeks from today.

6. In view of what has been stated above I am of the opinion that the disobedience of the order of the executing Court on part of the Chief Treasury Officer was not "deliberate", and thus apart from the direction given above, no further action in this Contempt Petition is called for.

7. Therefore, with the aforesaid direction this contempt petition is disposed of finally.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.9.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 28185 of 1998

Vishnu ...Petitioner
Versus
State of U.P. through Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Jaiswal

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Cancellation of fire arms- on the ground of involvement in criminal cases- during pendency of Appeal- petitioner got fair acquittal- Dismissal of appeal on new ground of suspection of criminal activities- held- illegal cancellation order quashed.
Held- Para 2

The appellate authority in its order impugned in the present writ petition has noticed the fact that the petitioner has no doubt been acquitted in both these criminal cases on the basis whereof the petitioner's firearm licence was revoked, but the appellate authority has dismissed the petitioner's appeal on the ground which is neither relevant for the revocation of the licence, nor the petitioner was served with a notice and was asked to explain as to why his aforesaid firearm licence should not be revoked. In this view of the matter, the appellate authority has carved out a new case in its order, which has never been taken by the licensing authority for revocation of the firearm licence of the petitioner.
Case law discussed:
1978 AWC-122
1972 ALJ-573
2002 (i) 501

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

1. The petitioner, who is a license of a firearm D.B.B.L. gun, approaches this Court by means of the present writ petition under Article 226 of the Constitution of India against the order passed by the Licensing Authority/District Magistrate, Meerut dated 13.08.1993, whereby the licensing authority revoked the aforesaid licence issued to the petitioner. A perusal of the notice as well as the impugned order revoking the firearm licence of the petitioner demonstrate that the licence of firearm of the petitioner has been revoked on the ground that he was involved in two criminal cases, which are case crime no. 39 of 1991 and 1 of 1992, under different sections of I.P.C. Aggrieved by the

aforesaid order of the revocation of the firearm licence, the petitioner preferred an appeal before the appellate authority. The appellate authority vide its order dated 14.07.1998 dismissed the petitioner's appeal and upheld the order of revocation passed by the licensing authority. It is these two orders, which have been challenged by the petitioner by means of present writ petition.

2. Learned counsel appearing on behalf of the petitioner submitted that during the pendency of the appeal before the appellate authority, petitioner has filed the judgment of the Session trial arising out of case crime no. 39 of 1991, in which he has been acquitted by the Session Judge concerned and also the order of the XIIth A.C.J.M., Meerut in case crime no. 1 of 1992, in which the petitioner was also acquitted, therefore on the date when the appeal was heard the ground on which the firearm licence was revoked was no more in existence and the appellate authority has erred in law in dismissing the petitioner's appeal. The appellate authority in its order impugned in the present writ petition has noticed the fact that the petitioner has no doubt been acquitted in both these criminal cases on the basis whereof the petitioner's firearm licence was revoked, but the appellate authority has dismissed the petitioner's appeal on the ground which is neither relevant for the revocation of the licence, nor the petitioner was served with a notice and was asked to explain as to why his aforesaid firearm licence should not be revoked. In this view of the matter, the appellate authority has carved out a new case in its order, which has never been taken by the licensing authority for revocation of the firearm licence of the petitioner.

3. Learned Standing Counsel tries to justify the orders passed by the appellate authority as well as the licensing authority but in view of the recent decision delivered by me in civil misc. writ petition no. **28240 of 1998- Raghuvir Singh Vs. Commissioner, Jhansi Division, Jhansi and others**, (*decided on 13.09.2002*), wherein I have relied upon two Division Bench decisions reported in 1978 A.W.C. page 122- **Sheo Prasad Misra Vs. The District Magistrate, Basti and others;** and 1972 A.L.J., page 573- **Masi Uddin Vs. Commissioner, Allahabad** and also my judgement reported in 2002 **(1) Judicial Interpretation on Crimes, page 501 Iftikhar Khan Vs. State of U.P. and others**, wherein this Court has held that mere involvement in a criminal case cannot, in any way, affect the public security or public interest and also is not sufficient for revocation of the firearm licence of the licensee, coupled with the fact that the petitioner has already been acquitted in the aforesaid two criminal cases. In this view of the matter, without entering into any further argument, this petition deserves to be succeeded and the orders of the licensing authority as well as the appellate authority deserve to be quashed.

4. In view of what has been stated above, this writ petition succeeds and is allowed. The orders dated 13.08.1993 and 14.07.1998 passed by the licensing authority and the appellate authority, Annexure-1 and 5 to the writ petition, are quashed. The firearm of the petitioner, if deposited, shall be returned to the petitioner alongwith the licence forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.9.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE V.N. SINGH, J.

Civil Misc. Writ Petition No. 32540 of 2001

Lt. Col V.S. Chhauker (IC-38789P)
...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Col. Sri R.A. Pandey (Retd.)

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- This Court is very reluctant to interfere in army matters as that would interfere with Army discipline. It is only in very rare cases that this Court will interfere in army matters. Under the Army Act, Rules and Regulations there is a detailed procedure about giving adverse entry and making representation/complaint against, and the petitioner can avail of the same. (Held in para 9).

In para 4 of the counter affidavit of respondent nos. 1,2 and 3 it is stated that the petitioner's statutory complaint is pending before respondent no. 1. We therefore direct respondent no. 1 to decide the said complaint by a speaking order within two months of production of certified copy of this order.

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

1. This writ petition has been filed against the impugned order dated 9.5.2002, Annexure 2 to the petition and for a mandamus directing the respondents to promote the petitioner to the rank, of Colonel and to set aside from the petitioner's dossier his complete ACR for the period 1.6.98 to 31 May, 99.

2. Heard learned counsel for the parties.

3. It is alleged in para 7 of the writ petition that in June 98, during the absence of the Commanding Officer respondent no. 5, the petitioner while officiating as CO noticed that approximately Rs. 2 lacs unaccounted cash was lying with the Subedar Major. The petitioner apprised about it to the CO as soon as he returned from leave. The CO did not take kindly to this saying that it was already in his knowledge and threatened to spoil the petitioner's ACR if he raked up the matter. Thereafter theCO became vindictive towards the petitioner and started harassing him including social boycott of the petitioner's family. The petitioner then sought an interview with the Brigade Commander. The correspondence exchanged between the Brigade Commander, the CO and the petitioner on this issue between 18.11.98 to 1.4.99 is attached as Appendices A to O of the petitioner's statutory complaint enclosed as Annexure 1. In para 9 of the petition it is alleged that the petitioner was granted interview by the Brigade Commander on 2.12.98, during which he apprised the latter about the unaccounted funds saying that without a Court of Inquiry the extent and responsibility for the unaccounted funds could not be pinpointed. The Brigade Commander asked the petitioner to put up the complaint in writing. This further infuriated the CO, who again threatened to spoil the petitioner's ACR if he did not withdraw the complaint. It is alleged that later the respondent no. 4 pressurised the petitioner into withdrawing the complaint

and gave an assurance that the petitioner would not be harmed.

4. In para 10 of the petition it is alleged that Selection Board was held in December, 1998 and the petitioner was intimated that he was approved for promotion to the rank of Colonel. In para 12 it is alleged that the respondent no. 5 wrote the petitioner's ACR for the period 1.6.98 to 31.5.99 on 1.6.99 wherein he lowered petitioner's Box Grading to 7 points as compared to 8 points awarded by the same IO in the previous ACR. The petitioner was also communicated the order of the respondent no. 5. The petitioner submitted a non statutory complaint dated 9.8.99 which was rejected by the order dated 12.1.2000. The petitioner was intimated the drop in Performance vide letter dated 9.5.2000. It is alleged in para 18 of the petition that subsequent to the Drop in Performance two outstanding ACRs have been earned by the petitioner from his present unit. Vide Annexure 3 and 4. The petitioner was subsequently denied promotion. Hence he filed this writ petition.

5. A counter affidavit has been filed by the respondent no. 5. In para 4 of the counter affidavit the allegation in para 7 of the writ petition were denied, and it is stated that the allegation regarding unaccounted money in the Regiment is totally false, concocted and misleading. In fact in the absence of respondent no. 5 in the capacity of Officiating CO, the petitioner did not command the Regiment effectively leading to a situation where the troops welfare was neglected. The petitioner was performing the duties of Account Officer since Dec. 1997 and he had authenticated its entry and rendered certificates to quarterly audit boards thrice that all transactions were correct. In para 6 it is stated that based on petitioner's complaint two special audit boards were ordered after allegation by Commander 96 Infantry Brigade. Three audit boards were ordered after petitioner's allegation. All the Boards found that the allegations were totally baseless.

6. A counter affidavit has also been filed on behalf of respondent nos. 1,2 and 3. We have perused the same. In para 3 it is stated that the selection Boards are constituted to assess the suitability of all eligible officers of a batch for promotion to the next rank. Such officers are given Special Review with one more report in addition to the reports with which he has already been considered. Although the petitioner had been approved for promotion as Colonel by the Selection Board in June, 1998, subsequently he was given a remark of drop in performance and hence he cannot be promoted. It is alleged that if in the opinion of the Military Secretary during the intervening period between approval for promotion and actual promotion the officer does not maintain satisfactory level of performance it is treated as a case of drop in performance. Such officers are given a Special Review. In para 6 it is stated that there is nothing on record to support the contention of the petitioner to establish that the then CO (respondent no.5) became vindictive and started harassing him. In para 11 it is stated that consequent to establishment of drop in performance of the petitioner vide his confidential report, the petitioner was taken off the senior command course, after drop in performance was approved on 4.8.2001 by the Military Secretary. In para 12 it is stated that the petitioner's non statutory

complaint was considered by the GOC and rejected.

7. A rejoinder affidavit has been filed. We have perused the same.

8. In Writ Petition No. 35296 of 1997 decided on 13.2.2002 (Major Ranabir Singh versus Union of India and others) this court observed that it is very reluctant to interfere in army matters as that would interfere with army discipline. We are in agreement with the aforesaid Division Bench decision. It is only in very rare cases that his court will interfere in army matters. Under the Army Act, Rules and Regulations there is a detailed procedure about giving adverse entry and making representation/complaint against it, and the petitioner can avail of the same. It is not for this Court to consider whether the drop in performance given to the petitioner was justified or not as that is the task of the appropriate army authority. Moreover, there are disputed questions of fact in this case, and hence writ is not the appropriate remedy.

9. In para 4 of the counter affidavit of respondent nos. 1,2 and 3 it is stated that the petitioner' statutory complaint is pending before respondent no. 1. We direct respondent no. 1 to decide the said complaint by a speaking order within two months of production of certified copy of this order.

10. With the aforesaid observation, this writ petition disposed off.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.9.2002

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

Special Appeal No. 498 of 1999

U.P. State Bridge Corporation Ltd. and others ...Appellant

Versus

U.P. Rajya Setu Nigam Sanyukta Karmchari Sangh ...Respondents

Counsel for the Appellants:
Sri V.R. Agrawal
Sri A.K. Gupta
Sri P.N. Rai

Counsel for the Respondents:
Sri Arun Prakash

Chapter VIII Rule 5 of High Court Rules- U.P. State Briedge Corporation is a State within the meaning of Article 12 of the Constitution of India. It is supposed to act reasonably and not arbitrarily. The services of the respondents writ petitioners have been terminated without even giving show cause notice or opportunity of hearing before passing the impunged orders of termination. Thus, the impugned orders have been passed in gross violation of Principles of natural justice, fair play and equity and have rightly been quashed by the learned Single Judge.

In view of the foregoing discussions, we do not find any merit in these Special Appeals and they are dismissed.

Case Law Referred:
1995(5) SCC 75
1993 L.I.C. 651
AIR 1995 S.C. 1163
2000 (1) E.S.C. (Alld.) 165

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

Both these Special Appeals have been filed by U.P. State Bridge Corporation Limited (hereinafter referred to as the Corporation) against the judgment and order dated 18.5.1999 passed by the learned Single Judge, in Civil Misc. Writ Petition No.4043 of 1996 and Civil Misc. Writ Petition No. 36071 of 1995, whereby the learned Single Judge has allowed these writ petitions filed by the respondents writ petitioners and declared the order dated 9.1.1996 contained in annexure 9, order dated 30.10.1995 and 4.11.1995, contained in annexures no. 6 and 6-A to the writ petition, as void ab-initio, non-est, and quashed the same. The learned Single Judge also held that the respondents-writ petitioners shall be deemed to be in service and be treated as on continuous service with all notional benefits except however, that they would not be entitled to any payment of arrears for the period during which they did not work actually. Except that each of them would be entitled to a compensation for the whole period assessed at Rs.5,000/- each.

Briefly stated facts giving rise to the present Special Appeal are that in writ petition no. 36071 of 1996, service of 168 workmen were terminated by an order dated 30.10.1995, while in writ petition no. 4043 of 1996 services of 66 workmen were terminated by an order dated 9.1.1996 published in Hindi daily Dainik Jagran on 12.1.1996. In both the cases, the termination was effected by striking off the names of the respective workmen from the rolls in terms of clause L-2-12 of the standing orders for workmen employed in the Corporation.

According to the respondents-writ petitioners, they were on strike for a considerable period through sitting dharna and various other modes in support of their demands for bonus and other claims whereas as per the appellants, no notice of such dharna or strike was ever given to the appellants by the Union, on the other hand, the Union had been adopting illegal means impermissible in law despite the corporation's requests to the workers to return to work. In these background, the names of two groups of workmen involved in the two writ petitions were struck off from the rolls.

Before the learned Single Judge, the following preliminary objections were raised:

1. The writ petition is not maintainable since the writ petitioners are seeking to enforce their alleged legal right arising out of standing orders which has no statutory force as has been held in the case of Rajasthan State Road Transport Corporation Vs. Krishna Kant (1995 (5) SCC 75) and as such the action of the respondents cannot be amenable to writ jurisdiction;

2. The dispute as to whether the names can be struck off on account of continuous absence of the workers is a question of fact viz. whether they were on strike of unauthorized absence could be adequately dealt with before the Labour Court or Industrial Tribunal when this court is not capable of determining such question of fact, the writ petition is not maintainable on the ground of alternative remedy;

3. The petitioners had sought for leave to amend the writ petition seeking to

incorporate the prayer challenging the vires of clause L-2-12 of the standing order which was since granted on 18.9.1996, in writ petition no. 36071 of 1996 from which Special Appeal No. 212 of 1996 preferred by the respondents is pending before the Division Bench while this court had allowed the amendment on 17.7.1998 in writ petition no. 4043 of 1996 and had listed both the matters on 6.8.1998 and as such this writ petition cannot be maintained to challenge the vires of the said clause of the standing order;

4. Since certified standing order has no statuory force as has been held in the case of Rajasthan State Road Transport Corporation (Supra), the vires cannot be challenged under Article 226 of the Constitution and as such the writ petition in relation thereto cannot be maintained;

5. The individual workmen had not come and the Union which is an unregistered one could not maintain the writ petition on behalf of the individual workmen;

6. The same very order dated 30.10.1995 was challenged by means of writ petition no. 2317 of 1996 by one Shri Anand Prakash one of the worker whose case is also sponsored in this proceeding and the said writ petition having been dismissed on 9.5.1996, the writ petition challenging the same order is barred by the principles of res-judicata.

In reply to the preliminary objections, the contentions of the respondents-writ petitioners were that even though the action taken under the standing order cannot be challenged through writ proceedings in the present case, U.P. State Bridge Corporation being the State within the meaning of Article 12 of the constitution, it is amenable to writ jurisdiction. It was further stated that its action can very well be challenged in writ jurisdiction as it is a State within the meaning of Article 12 of the Constitution. According to the respondents-writ petitioners, the bar of alternative remedy is not an absolute bar and where there is no disputed question of fact and the question raised is a question of law apparent on the basis of facts disclosed, the court should not refuse to exercise its jurisdiction in entertaining the writ petition simply on the ground of existing of alternative remedy. More so, here the question of law raised is as to whether the clause L-2-12 of the standing order can be resorted to when the workmen are on strike may be illegal. It was further contended that even though the amendment in writ petition no. 36071 of 1995 was under challenge in Special Appeal but no interim order has since been granted nor further proceedings of the said writ petition has been stayed by the appellate court, therefore, it is open to the Court to proceed with the writ petition.

According to the writ petitioners, though the standing orders have no statutory force, if it affects the right of the workmen and operate as an unfair labour policy in that event vires of such provision can very well be challenged in writ proceedings. The decision of the Lucknow Bench of this Court in writ petition no. 2317 of 1996 could have operated only against the individual workmen Anand Prakash and not against the rest. Neither against his union. As the said decision having not been on the merit of the case, the question raised in present

writ petitions, having not been decided, the holding of the writ petitions as not maintainable simply on the ground of alternative remedy would not attract the principles of res-judicata.

According to the writ petitions, the union has been registered under the Trade Union Act, is competent to file writ petition before this court espousing the cause of its members.

On merit, the case of the writ petitioners before the learned Single Judge, was that the Corporation had admitted the workmen to be on strike though allegedly on illegal strike and, therefore, the strike having emanated from the means and process for collective bargain accepted in he industrial jurisprudence the workmen cannot be said to be absent within the meaning of the said standing order (L-2-12). It is not abandonment of service but rather a step to enforce their demand, which can never be treated to be an absence within the meaning of the standing order. If such an interpretation is arrived at, it would be counter productive to the accepted principle and demolish one of the best hammer in the hands of the workmen to resort to collective bargaining for the fulfilment of their demand, which is otherwise week but becomes capable of confronting when the employees are collected together against the mighty employer.

On behalf of the Corporation, it was contended that the respondents-writ petitioners continuously absented for more than 13 days and, therefore, it was open to the Corporation to strike off their names from the rolls under the aforesaid standing order. It was further contended that the strike being illegal in the absence of compliance of the required procedure prescribed by the Industrial Dispute Act, the same is to be treated as continuous absence within the meaning of the said clause L-2-12 of the standing order and as such their names could be very well struck off and the respondents-writ petitioners cannot take advantage of the illegal strike to challenge an order passed under the relevant standing order for striking the names of the workmen off the roll treating them to have abandoned their services.

The learned Single Judge, by the impugned judgment and order, has held that the Corporation being State within the meaning of Article 12 of the Constitution of India, its action is to be judge on the touch stone of Article 14 of the Constitution of India and, therefore, the writ petition is maintainable under Article 226 of the Constitution of India. He further held that the alternative remedy is not an absolute bar because of the reason that a State even when discharging non-statutory duties by reason of its being a State is amenable to writ jurisdiction. He further held that where an order is void and the petition does not involve controversial questions of fact, the High Court may not refuse to exercise its jurisdiction and that too after the writ petition was kept pending for considerable period.

It may be mentioned that the writ petitions giving rise to the present Special Appeals, have been filed in the year 1995-96 and they were pending for about four years and, in these circumstances, the learned Single Judge, declined to relegate the writ petitioners for alternative remedy available to them under the provisions of

U.P. Industrial Disputes Act, by raising an industrial dispute.

So far as the effect of pendency of the special Appeal No. 212 of 1996 filed against the order allowing amendment in writ petition no.36071 of 1995 is concerned, the learned Single Judge has held that as no interim order, either staying the operation of the order or staying further proceedings in the writ petitions, was passed by the Division Bench, there is no impediment in deciding the writ petitions, more so, when in one writ petition viz. writ petition no. 4043 of 1996 the order allowing amendment has not been challenged. The learned Single Judge was further of the view that it is not necessary to go into the question of vires of clause L-2-12 of the standing orders and, therefore, the amendment would not come in the way in proceeding with the writ petitions.

So far as the objection regarding the maintainability of the writ petitions by unregistered union is concerned, the learned Single Judge has held that even without being registered and without being recognized as a collective body of workmen, the Union is authorized, entitled and eligible to represent the cause of individual workman in the form of collective-bargain between the workmen and the employer and if it is so, in that event, there cannot be any justifiable reason to deny them the same right when it seeks to invoke writ jurisdiction for its individual members through the Union.

Further, the plea of res-judicata canvassed by the Corporation, was negatived by the learned Single Judge on the ground that the Lucknow Bench of this Court had not determined and decided the issue and decision in these cases would have effect in the dispute before the Industrial Labour Court where Anand Prakash would be pursuing his remedy.

On the merit of the case, the learned Single Judge, has held that the notice of strike is necessary only when the employees are employed in a public utility service and no material has been brought on record to show that the industrial establishment of the Corporation comes within the purview of any of clauses of Section 2 (n) of the Industrial Disputes Act and 2-q of the U.P. Industrial Dispute Act which define the public utility services. He further held that even if notice is required for going on strike, still the provision of Industrial Disputes Act, provides punishment of illegal strike i.e. (i) making a person on illegal strike liable to punishment of imprisonment for a term extending to one month or with fine extending to Rs.50/- or with both and it had not mentioned in the provision to the extent that the period of illegal strike would be a period of unauthorized absence inviting consequence therefore. It has not provided that because of such illegal strike the relationship of employer and employee would cease or the contract of service would cease. In that event the provision relating to clause L-2-12, of the standing orders will not be applicable and the workmen shall be deemed to be in service and the contract of employment shall be deemed to be subsisting. He also held that calling the strike as legal or illegal, but it would not be treated as absence. The learned Single Judge, thus, has found that the impugned orders of termination have been passed in violation of the principle of natural justice, equity undertaken by an Instrumentality or agency of the State

affecting the legal as well as fundamental right with regard to the right to livelihood which is recognized as a right to live within the meaning of Article 21 and as such amenable to writ jurisdiction. Therefore, the writ petitions have been allowed by the learned Single Judge and the orders, which were under challenge in the writ petitions, have been quashed.

We have heard Shri A.K. Gupta learned counsel as well as Shri V.R. Agrawal learned Senior Counsel assisted by Shri P.N. Rai learned counsel for the appellants and Shri Arun Prakash learned counsel for the respondents-writ petitioners.

Shri A.K. Gupta reiterated before us the same preliminary objections, which were raised on behalf of the Corporation before the learned Single Judge.

Shri V.R. Agrawal, however, submitted that the Corporation is engage in construction business and the provisions of Industrial Disputes Act both Central and U.P. are not applicable in case of closure of a construction undertaking, while also raising the preliminary objections. He referred to the proviso to Section 25-O of the Industrial Disputes Act, as also the proviso to Section 6-W of the U.P. Industrial Disputes Act, which excludes the procedure prescribed for closing down an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work. According to him, no permission is required for closing down the eonstruction project and each construction project is treated to be the independent work. Thus, the Corporation was entitled to terminate the services of its workmen engaged for particular project on its completion without following procedure laid down in Section 25-O of the Industrial Disputes Act or Section 6-W of the U.P. Industrial Disputes Act. He also submitted that as the respondents- writ petitioners had absented for more than 10 days and they did not respond to the notice issued to them calling upon them to resume their duties, the provisions of clause L-2-12 of the standing order stood attracted and, therefore, the Corporation was fully justified in terminating their services. According to him, the provisions of Section 6-N of the Industrial Disputes Act or Section 25-F of the Industrial Disputes Act were not attracted, as workmen had not put in continuous service of not less than one year. Thus, the question, as to whether their termination is in violation of the aforesaid provisions, can only be adjudicated by the Labour Court in an Industrial Dispute, where the corporation would be at liberty to produce the material and evidence to show that the provisions of Section 6-N or Section 25-F have not been violated. He relied upon the decision of Madhya Pradesh High Court in the case of Employers in relation to M/s Anand Cinema of M/s Maheshwari and Bernard Vs. Mohan Tiwari and another reported in 1993 L.I.C. 651. He further submitted that Hon. Supreme Court in the case of Hindustan Steel Works Construction Ltd. Etc. Vs. Hindustan Steel Works Construction Ltd. Employees' Union Hyderabad and another reported in AIR 1995 S.C. 1163 has held that "***in the case of a construction company which undertakes construction works wherever awarded does not work and winds up its establishment there and particularly where a number of local persons have to be and are appointed for the purpose of a particular work, mere***

unity of ownership, management and control are not of much significance. The conclusion is inevitable that the units at one place were district establishments. Once this is so, workmen of the said unit had no right to demand absorption in other units on the particular units completing their job. In such a case the fact that the management reserved to itself the liberty of transferring the employees from one place to another, did not mean that all the units of the appellant constituted one single establishment."

Thus, he submitted that the respondents-writ petitioners are not entitled for any relief. The project, in which they worked, has already come to end. He referred to para 10 of the counter affidavit filed on behalf of the Corporation affirmed by Shri K.B. Srivastava on 7.1.1996 wherein it has been averred that the workmen are generally employed at the project site and after completion of the project, the services of such employees authomatically come to end on that particular project.

Further, there cannot be any dispute under the provision of Industrial Dispute Act, as construction is treated to be independent project and when it comes to end the employees who are employed specifically for that project cannot seek adjustment as a matter of right in another construction project undertaken by the Industrial undertaking.

Shri Arun Prakash, however, submitted that the Corporation is State within the meaning of Article 12 of the Constitution of India and, therefore, the writ petition is maintainable. In fact, he adopted the reasoning given by the learned single Judge in support of his submissions. He also submitted that this Court in the case of Pradeep Kumar Vs. U.P. State Sugar Corporation and another passed in Special Appeal No. 596 of 1998, on 6.10.2001, reported in 2002 (1) E.S.C. (All.) 165 has considered in great detail the question as to whether a writ petition is maintainable by the workmen/employees where the employer is a State within the meaning of Article 12 of the Constitution of India and has held it to be maintainable.

He further submitted that the Corporation being the State by acting arbitrarily in terminating the services of the respondents-writ petitioners, in gross violation of principle of natural justice, equity, and fair play and, thus, the learned single Judge, was justified in interfering with the impugned orders.

Having heard the rival submissions, we find that almost all the preliminary objections, raised on behalf of the Corporation, have been considered in great detail by this court, in the case of Pradeep Kumar Singh (supra) and, we are in full agreement with the principles laid down in the case of Pradeep Kumar Singh (supra) and, we do not propose to deal with the same separately again in this case. In this view of the matter, the preliminary objections raised by the learned counsel for the Corporation that the writ petitions were not maintainable, cannot be accepted.

So far as the merit of the case, it is not the case of the Corporation that the orders terminating the services of the respondents-writ petitioners were by way of retrenchment. They had invoked the

provisions of clause L-2-12 of the Certified Standing Orders on the ground that the respondents-writ petitioners had abandoned their services and despite notice they had not turned up for work.

It is not disputed that the Corporation is a State within the meaning of Article 12 of the Constitution of India. It is supposed to act reasonably and not arbitrarily. The services of the respondents-writ petitioners have been terminated without even giving show cause notice or opportunity of hearing before passing the impugned orders of termination. Thus, the impugned orders have been passed in gross violation of principle of natural justice, fair play and equity and have rightly been quashed by the learned Single Judge.

There cannot be any dispute that every construction project is treated to be a separate work and the employees engaged for and working in a particular project cannot seek adjustment or absorption as a matter of right in another project on completion of that project in which they were working.

So far as the question that the respondents-writ petitioners had been engaged for a particular project is concerned, there is no specific pleading by the corporation. General statement has been made that the workmen are generally employed at the project site and after completion of the project; the services of such employees automatically come to end on that particular project. But neither any details of project and employees engaged therein with reference to the respondents-writ petitioners have been given nor their appointment letters have been placed before the Court. Hence, such contention cannot be accepted.

In view of the foregoing discussions, we do not find any merit in these Special Appeals and they are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.10.2002.

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 30545 of 1990

Prem Niwas Mishra ...Petitioner
Verses
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri R.B.D. Mishra
Sri Somesh Khare

Counsel for the Respondents:
S.C.

Constitution of India, Article 311 Service Law-Termination order passed on the ground of lesser realisation of amount - dispite of warning no progress made letter dated 13.1.88 passed by the Board of Revenue relied on - the fact petitioner's appointment made on compassionate ground as collection Amin - even after being temporary basis without show cause notice, without any disciplinary procedure termination order held illegal.

Held—Para 9 and 10.

It appears that the impugned order of termination is not a termination simplicior. The services of the petitioner have been terminated without holding disciplinary enquiry. Further more, the provisions of U.P. Temporary Government Servant (Termination of Service) Rules, 1975 do not apply in case

of a person appointed under the provisions of U.P. Employment of Dependants of Government Servants Dying in Harness Rules as they are deemed permanent as has been held by a Division Bench of this Court in Ravi Karan Singh's case (supra)

In the circumstances, the termination of the service of the petitioner was illegal and against the principle of natural justice and it was passed without holding any disciplinary enquiry.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard counsel for the parties and perused the record.

2. This writ petition is directed against the order of termination dated 24.10.90 passed by the District Magistrate, Pilibhit.

3. The matrix of the case are that the petitioner was appointed as Collection Amin vide orders dated 15.3.84 in Tahsil Bisalpur, district Pilibhit. The appointment of petitions was on compassionate ground under the provisions of U.P. Employment of Dependents of Government Servants Dying-in-Harness Rules, 1974 as the father of the petitioner died in harness.

4. Before coming to the merits of the case it is necessary to see. the backdrop of the case in which the order of termination was passed. The petitioner was given a warning on 30.8.90 by the Tahsildar of the concerned Tahsil for collection of less revenue. Thereafter a show cause notice dated 30.9.90 was given to him for his lackadaisical attitude. In pursuance thereof he submitted his explanation by reply/letter dated 1.10.90. Counsel for the petitioner contends that without considering the reply or the contentions raised therein the impugned order of termination was passed by the District Magistrate/Prescribed Authority, Piliphit. Counsel for the petitioner next contends that the impugned order of termination was passed behind the back of the petitioner depriving him of reasonable opportunity of hearing. He contends that the impugned order of termination in not a termination simplicitor in the circumstances stated above.

5. Counter affidavit has been filed on behalf of the respondents. Placing reliance on letter dated 13.1.88 issued by the board of Revenue it is contended by the standing counsel that before termination of service of Collection Amin no opportunity was required to be given. A copy of this letter has been annexed as Annexed-CA-1 to the counter affidavit. Para 10 of the letter dated 13.1.88 reads reads as under:

"१०– यदि किसी स्थायी/अस्थायी पूर्ण वर्ष कालिक संग्रह अमीन की कारगुजारी निर्धारित मानक से कम पायी जाती है तो उसके संबंध में उक्त परिषद आदेश दिनॉक १४–१०–१९७० के पैरा २२ के उप पैरा १ व २ के अनुसार निम्नवत कार्यवाही की जायः–

(१) यदि सम्बन्धित अमीन अस्थायी हो तो कारगुजारी निर्धारित मानक से कम पाये जाने की स्थिति में सर्वप्रथम पहिले महीने में उसे चेतावनी दी जाय । यदि चेतावनी देने के बाद भी कार्य में अपेक्षित सुधार न हो और उसका पिछला कार्य भी सन्तोषजनक न रहा हो तो पुनः एक या दो बार मौका देने के बाद बिना कारण बताये हुए उसको नियमानुसार नोटिस देकर उसकी सेवायें समाप्त कर दी जाय । यदि अमीन का पिछला कार्य खराब न रहा हो अथवा उसने पहिले की अपेक्षा वसूली बढ़ायी हो तो उसे एक या दो बार कम से कम पुनः मौका दिया जाय । यदि इस प्रकार पर्याप्त अवसर देने के बावजूद भी उसका कार्य निर्धारित स्तर तक न पहुंचे तो फिर उसे मौका देने

की आवश्यकता नहीं है और उसके मामले में भी बिना कारण बताये नियमानुसार नोटिस देकर उसकी सेवायें समाप्त की जा सकती हैं ।

(२) यदि संबंधित अमीन अस्थायी हो और उसकी कारगुजारी निर्धारित मानक से कम पायी जाती है तो सर्वप्रथम यह देख लिया जाय कि उसका पिछला कार्य कैसा रहा है । यदि उसका पिछला कार्य भी खराब रहा हो तो उसकी चरित्र पंजिका में प्रतिकूल प्रविष्टि की जाय । परन्तु उसका पिछला कार्य खराब न रहा हो तो उसे केवल कठोर चेतावनी देकर अपने कार्य में सुधार लाये जाने हेतु एक मौका दिया जाय । यदि चेतावनी के बाद भी अमीन की कारगुजारी निर्धारित स्तर तक नहीं पहुंचती है तो उसकी चरित्र पंजिका में उसके कार्य के प्रति उदासीनता के लिये प्रतिकूल प्रविष्टि दी जाय ।"

6. Sub Clause (1) of Para 10 of the said letter provides that in case any Collection Amin is found to have realized less revenue then a warning has to be issued first. Thereafter even if his work is not up to the mark then he has at least to be given two opportunities to enhance his revenue collection and in that event he does not comply with the standards prescribed, only then his services can be dispensed with without giving him a show cause notice.

7. The contention of the petitioner is that appointment of the petitioner though temporary, was made on a substantive vacancy under the Dying in Harness Rules by the order of the District Magistrate. Counsel for the Petitioner has placed reliance on a case **Ravi Karan Singh Vs. State of U.P. and others, (1999) 3 UPLBEC-2263** in which it has been held that once an appointment on compassionate ground, under the Provisions of Dying in Harness Rules is being made, then his service can not be terminated under Rule 3 of U.P. Temporary Government Servant (Termination of Service) Rules, 1975.

8. Counsel for the petitioner contends that once the petitioner by fiction of law acquires the permanent status, then he could not have been punished without following the procedure prescribed under Article 311 of the Constitution of India. The last submission of the counsel for the petitioner is that the petitioner was given show cause notice but no disciplinary proceeding or enquiry was ever conducted as contemplated under financial Hand Book Chapter-II to IV read along with the amended fundamental Rule-56.

9. It appears that the impugned order of termination is not a termination simplicitor. The services of the petitioner have been terminated without holding disciplinary enquiry. Furthermore, the provisions of U.P. Temporary Government Servant (Termination of Service) Rules, 1975 do not apply in case of a person appointed under the provisions of U.P. Employment of Dependants of Government Servants Dying-in- Harness Rules as they are deemed permanent as has been held by a Division Bench of this Court in **Ravi Karan Singh's** Case (supra.).

10. In the circumstances, the termination of the service of the petitioner was illegal and against the principle of natural justice and it was passed without holding any disciplinary enquiry.

11. The impugned order cannot be sustained and it is, therefore, quashed. The writ petition is allowed with a direction to the respondents to reinstate the petitioner in service forthwith within a

period of 2 weeks from the date of production of certified copy of this order and pay him salary month to month. It will, however, be open to the respondents to take any further such action against the petitioner as they are advised and may pass appropriate order after holding enquiry.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.10.2002.

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

Second Appeal No. 1160 of 2002

Mohan Singh and others ...Appellants
Verses
Nirmala Soni and others ...Respondents

Counsel for the Appellants:
Sri Madhav Jain
Sri Murlidhar

Counsel for the Respondents:
Sri Santosh Kumar

Code of Civil procedure Section 100 Order 47 r.7 (i) second appeal - order passed on review application which resulted to allow the first appeal can be challenged in second appeal.

According to this clause, therefore, the second appeal can be filed against the decree and the order granting review can also be challenged in this said appeal.

Considering the above provisions, I am of the view that since the first appeal has been allowed in pursuance to the decision of review application, therefore, the second appeal is maintainable.

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

1. The suit of the appellants was decreed against which the first appeal was filed, which was dismissed. Thereafter, the application for review was moved, which was allowed and the appeal was also allowed by order dated 16.8.2002. Against that judgment, the present second appeal has been filed.

2. A preliminary objection has been raised by Sri Santosh Kumar, learned counsel for the respondents that the second appeal is not maintainable and Misc. Appeal should have been filed under clause (w) of Rule 1 of Order 43 C.P.C.

3. As against this it has been argued by Sri Murlidhar, learned Senior Advocate that in the Misc. appeal under the above provision the correctness of order of review alone can be challenged. That as by the same order, the first appeal has been allowed and therefore, the second appeal can be filed according to the provisions of section 100 of C.P.C. In which the correctness of the decree can also be challenged and, therefore, have wider scope.

4. It has been argued that the order is a common order and therefore, the appellants are free to avail any remedy. That they have choosen to file this second appeal.

5. Learned Counsel for the appellants has also referred to the clause (1) of Rule 7 Order 47 C.P.C., which is as follows:

"An order of the court rejecting the application shall not be appealable; but

an order granting the application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit."

6. According to this clause, therefore, the Second appeal can be filed against the decree and the order granting review can also be challenged in this said appeal.

7. Considering the above provisions, I am of the view that since the first appeal has been allowed in pursuance of the decision of review application, therefore, the second appeal is maintainable.

List the appeal in the next cause list for hearing on admission.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.10.2002.

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

Civil Revision No. 407 of 2002

Ghaziabad Development Authority
...Revisionist
Verses
Asha Pusp Vihar Awas Samiti
...Respondents

Counsel for the Appellants:
Sri Ajay Kumar Misra

Counsel for the Respondents:
Sri Tarun Agarwala

Code of Civil Procedure section 115- Practice and procedure - preliminary issue regarding limitation in filing revision raised despite of direction the Revisional Court decided matter finally whether is the final order can be held bad? 'No'.

Held—Para 9

There does not appear to be any reason that when the hearing on the entire matter has been concluded, some issue should be decided as preliminary issue. The stage of deciding an issue as preliminary issue has already passed in the present case. Therefore, the revisionist cannot get any advantage of the judgment of the Division Bench of this Court in the present case.

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

1. L.A.R. No. 808 of 1998 is pending in the court of XI th Addl.. District Judge, Ghaziabad. The revisionist who is opposite party in the reference moved an application to decide the issue of limitation and regarding maintainability of the reference and whether the reference is barred by Section 137 of the Indian Limitation Act as preliminary issue. The trial court has refused to decide this issue as preliminary issue. Aggrieved by it, the present revision has been preferred.

2. I have heard Sri A.K. Mishra, learned counsel for the revisionist and Sri tarun Agarwala, learned counsel for the opposite party.

3. It has been argued by Sri A.K. Mishra that the award was given by the collector on 27.7.1991. Reference in the court was made under section 18 of the Act in the yea, 1998 i.e. after seven years, that, therefore, clearly the reference is barred by time and is not maintainable. It is further contended that the request for reference under section 18 can be made

by the claimant within six weeks, but it was not made within six weeks.

4. It is further contended that regarding this reference and many connected references similar question arose and, therefore, writ petition no.3760 of 2002 was filed in the High Court which has been decided on 5.3.2002 by judgment Annexure-5 to the revision that Division bench has directed that "we, therefore, feel persuaded to the view that in case any objection regarding competence or maintainability of reference is preferred on behalf of the petitioners before the court hearing the reference, the court will decide such objection as a preliminary issue."

5. On the basis of this, it has been argued that the reference court has erred in rejecting the direction of the Division Bench.

6. It appears from the judgment of the revisional court and from the arguments advanced by the learned counsel for the opposite party that in this case the evidence of parites has concluded and the case was fixed for hearing arguments. At the stage of argument, the revisionist moved an application 40-C for amendment maintainability that application for amendment was allowed and an issue regarding it was framed. Thereafter, the arguments were heard and the case was reserved for judgment. Thereafter the application was moved by the revisionist 51-C with the copy of the above writ petition, with the request that it may be decided as preliminary issue.

7. The trial court has also observed that the arguments regarding entire reference has been heard thrice and it has been fixed for final judgment.

8. Order XIV Rule 2 C.P.C. does not make it mandatory to decide an issue of law as preliminary issue. However in this case, there is direction of the Division Bench. Fro m the perusal of the order of the Division Bench, it does not appear that it was brought to the notice of the court that entire evidence and the hearing has already been concluded. Therefore, a general direction has been issued by the Division Bench that preliminary objection if raised regarding maintainability, it shall be decided as preliminary issue.

9. There does not appear to be any reason that when the hearing on the entire matter has been concluded, some issue should be decided as preliminary issue. The stage of deciding an issue as preliminary issue has already passed in the present case. Therefore, the revisionist con not get any advantage of the judgment of the Division Bench of this Court in the present case.

10. I do not find any ground to interfere in the impugned order.

The revision fails and is here by dismissed.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2002.

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

Civil Misc. Stay Extension Application 80063 of 2002

In

Civil Misc. Writ Petition No. 22025 of 2001

Iqbal Husain ...Petitioner

Verses

District Judge, Moradabad and others ...Respondents

Counsel for the Appellants:
Sri Vikram gulati
Sri A.K. Rai
Sri S.N. Singh

Counsel for the Respondents:
Sri Madhur Prakash
S.C.

High Court Rules-Rule 13 and 14 Practice and procedure Time Bound Stay order whether the extension application can be decided by the same Bench who passed the stay order or by any judge - if the order passed after hearing to both parties- The essential order be passed by the same Judge if available- in otherwise case shall not be treated tied up can be entertained by any judge sitting in appropriate Bench.

Held- Para 7

Already held that in such cases application for extension of stay if not maintainable. But fresh application for stay can be filed. The question is whether such application can be decided by any judge or it can be listed only before the judge who gr4anted time bound stay order. For this purpose the two rules are to be so read as to operate harmoniously. In my opinion, in all such cases where interim order is granted after hearing, may be standing counsel only, it would not be an ex party order and if the interim order is time bound etc. it ceases to be operative for any of the reasons then the remedy of the petitioner would be to move fresh application for stay and it whould be listed before the same judge who had passed the interim order unless he is not available.

1994 (i) ALR 32
1998 (c) AIRC-526
1998 (c) ESC-367
2001(f) UPLBEC -693
1992 (2) SCC-644

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

1. The short questions that arise for consideration in this application are, what is the effect of time bound stay order? Whether a time bound stay order can be extended after its expiry ?

2. The brief facts are that the predecessor of the respondents filed a suit for arrears of rent and ejectment against Rijwan, which was decreed ex parte on 28.4.1993. Revision filed by Rijwan was also dismissed on 24.2.1997. In execution the petitioner filed objection under Order XXI Rule 97, 98 and 101 read with section 151 C.P.C. The objection was allowed on 28.5.2000 and execution was rejected by the trial court. The respondents filed an appeal and revision, which were allowed by a common order on 10.5.2001 the petitioner challenged the order dated 10.5.2001 by filing the instant writ petition. This court on 8.6.2001 granted interim order and stayed the operation of the impugned judgment till the next date of listing and directed the matter to be listed in the third week of July 2001. On 18.7.2001 this court extended the stay order passed on

8.6.2001 till 31.8.2001. The petitioner moved another application for extension of stay on 30.4.2002, stating that the court ordered on 18.7.2001 to list this case in the week commencing 20.8.2001 but the case could not be listed and thereafter there was strike of lawyers in the High Court. It is prayed that the stay order dated 8.6.2001 as extended on 18.7.2001 be extended.

3. I have heard Shri Vikram Gulati, learned counsel for the petitioner and Shri Madhur Prakash, learned counsel appearing for respondents and standing counsel.

4. The question is as to what is the effect of time bound stay order? I have given my anxious consideration to the question. Learned counsel for the petitioner has placed reliance on the decisions of this court in Ashiq Ali V. Mohd. Shakeel and others 1985 (3) Lucknow Civil Decisions 362; Shamboo Nath Singh Yadav v. State of U.P. 1994 (1) ALR 32; Ram Abilash Mishra v. Cane Commissioner and others 1998 (1) ESC 367 and Vishnu Dutt Sharma and others v. Regional Joint Director of Education, Agra and others 2001 (1) U.P.L.B.E.C. 693 wherein it has been held that time bound interim order passed either till the next date of listing or for a fixed period would not exhaust or expire on the date fixed by the court . Even if the matter is listed and the case is not taken up the stay order will continue till the court applies its mind to the case. In Dr. Luis Proto Barbosa v. Union of India and others 1992 Supp (2) SCC 644 the apex Court examined whether an interim order granted by the court survives after expiry of the period for which it was granted. The court held,

"The question as to what is the outer terminal point of the operation of the restraint, when the expression" in the meantime" is used is arguable. That expression takes its colour from the context. They are " words of relation and refer not only to a time that is to begin, but to a time which is also to end". It is difficult to say the period of the restraint spilled over October 30, 1990 and the restraint on altering the " status quo" continued…"

5. This decision does not find mention in any of the decisions relied by the petitioner. But it leaves no scope for argument that where the interim order is passed, " in the meantime", it would expire on the date fixed by the court. On this ratio interim order till the next date of listing or till a particular date would expire on the date when it is listed or on the date fixed by the court or on expiry of the period mentioned in the order. It cannot be deemed to be extended or treated to be operative from earlier date. If the case is listed on the date fixed by the court and the stay order is not extended, irrespective of the fact whether the court was able to take up the case or not, the stay order would expire and the respondents would be free to execute the impugned order in absence of extension of the stay. Similar will be the position with regard to the time bound stay order. When a court passes time bound interim order for a particular period then such an order cannot be deemed to be extended, unless another order is passed extending it before expiry of the period for which it was granted or a fresh stay order is passed. Since the stay order granted in favour of the petitioner had expired on 31.8.2001 it did not survive there after. The stay order which had ceased to be

operative could not be extended, consequently the application for extension of stay is not maintainable.

6. The learned counsel for the petitioner then argued that this application may be directed to be placed before the same Hon'ble judge who had passed the earlier interim order. This requires examination of Rule 13 and 14 of Chapter V of the Allahabad High Court Rules 1952 (in brief rules). They are extracted below:-

"13. Subsequent application on the same subject to be heard by the same Bench.-No application to the same effect or with the same object as a previous application upon which a Bench has passed any order other than an order of reference to another Judge or Judges, shall except by way of appeal, ordinarily be heard by any other Bench.

The application when presented by or on behalf of the person by whom or on whose behalf such previous application was made shall give the necessary particulars of such previous application, the nature and the date of the order passed thereon and the name or names of the Judge or Judges by whom such order was passed.

14. Tied up cases.—(1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench.

(2) When a criminal revision has been admitted on the question of severity of sentence only, it shall ordinarily be heard by the Bench admitting it."

7. Rule 13 requires an application to the same effect or for same object to be normally placed before the same judge. Rule 14 provides that an exparte order would not be treated as tied-up to the bench, which passed the order. How to reconcile these two rules where time bound stay order expires. I have already held that in such cases application for extension of stay is not maintainable. But fresh application for stay can be filed. The question is whether such application can be decided by any Judge or it can be listed only before the Judge who granted time bound stay order. For this purpose the two rules are to be so read as to operate harmoniously. In my opinion, in all such cases where interim order is granted after hearing, may be standing counsel only, it would not be an exparte order and if the interim order is time bound etc. it ceases to be operative for any of the reasons then the remedy of the petitioner would be to move fresh application for stay and it should be listed before the same judge who had passed the interim order unless he is not available. In this view of the matter the request of the learned counsel for the petitioner to list the application for extension before the same Hon'ble Judge cannot be accepted. The period, for which stay order was granted having expired before filing of this application, it has become infructuous. The remedy of the petitioner is to move fresh stay application before the same Hon'ble Judge who granted time bound stay order.

Subject to the observations made above, the stay extension application is rejected.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.9.2002

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 1093 of 1992

Rekha and another ...Petitioners
Versus
The Additional Chief Judicial Magistrate and others ...Respondents

Counsel for the Petitioners:
Sri R.S. Misra
Sri Arun Kumar

Counsel for the Respondents:
Sri Shashi Nandan
Sri A.C. Pandey
S.C.

Code of Civil Procedure Section-11- Principle of Resjudicata- whether is applicable in Misc. Proceedings? held- 'Yes' to give the finality of litigation- earlier application to lead additional evidence- rejected validity challenged through writ petition- During pendency of the writ petition- on fresh application- order to give additional evidence cannot be passed.

Held- Para 6

Even though Section 11 of the Code of Procedure may not strictly apply to the present case, the subsequent application filed would certainly be barred by the general principle of res judicata. Once having decided a particular matter in one way at an earlier stage, the courts should not allow the party to reagitate the matter at a subsequent stage of the same proceedings, especially when there was no change in circumstances so as to entail modification or change in the earlier view taken. Finality to a proceedings have to be given at some stage. If a litigant is permitted to keep re agitating the same matter again and again, no finality to the proceedings can ever be given. The general principles of res judicata are broad enough to apply to miscellaneous proceedings and orders passed at different stages of the same litigation.

(Delivered by Hon'ble Vineet Saran, J.)

1. The petitioners had filed a Suit No. 944 of 1986 in the court of Munsif, Deoria, praying for cancellation of the sale deed dated 7.8.1984 executed by respondent no. 3, Bhagwat and for permanent injunction restraining the respondents no. 2 and 3 from interfering with the petitioners' possession over the disputed plot. The respondents contested the suit and vide judgement dated 23.9.1988, the suit of the petitioners was decreed. Respondents no. 2 and 3 filed Civil Appeal No. 208 of 1988 challenging the aforesaid judgement of the Munsif. During the pendency of the appeal, the respondents no. 2 and 3 filed an application for amendment of their written statement. By order dated 22.8.1990, while allowing the amendment, the lower appellate court made it clear that the amendment of the written statement would not entitle the parties to lead fresh evidence. However, on 28.1.1991, an application for leading fresh evidence was filed by respondents no. 2 and 3. The lower appellate court, after hearing the parties, rejected the said application on 5.2.1991. The said respondents filed Civil Misc. Writ Petition No. 9467 of 1991 challenging the aforesaid order dated 5.2.1991.

2. During the pendency of the aforesaid said writ petition, the respondents no. 2 and 3 filed a second application with the same prayer for filing

fresh evidence. After inviting objections and hearing the counsel for the parties, the lower appellate court, on 14.10.1991, allowed the subsequent application for adducing fresh evidence. This writ petition has been filed challenging the aforesaid order of the lower appellate court.

3. I have heard Sri Arun Kumar holding brief of Sri R.S. Misra, learned counsel for the petitioners, as well as Sri A.C. Pandey holding brief of Sri Shashi Nandan, learned counsel for the contesting respondents no. 2 and 3.

4. The contention of the learned counsel for the petitioners is that the amendment application was allowed by the lower appellate court on 22.8.1990 wherein it was specifically stated that because of the amendment, the parties would not be entitled to lead fresh evidence. It was thus urged that the contesting respondents could not thereafter be permitted to lead fresh evidence, as the aforesaid order had not been even challenged by them. Learned counsel further submitted that since such a condition not permitting any fresh evidence had already been imposed, they did not consider it necessary to challenge the order allowing the amendment application. It was also submitted that since the first application had been rejected by the lower appellate court on 5.2.1991, the second application with the same prayer would be barred by general principle of res judicata, which would apply to miscellaneous proceedings and orders passed at different stages of the same litigation. In support of this contention, learned counsel for the petitioners relied on two decisions of the Apex Court rendered in Satyadhyan Ghosal Vs. Smt. Deorajin Debi (A.I.R. 1960 Supreme Court 941); and Prahlad Singh Vs. Col. Sukhdev Singh (A.I.R. 1987 Supreme Court 1145) as well as a Division Bench of this court in Hukum Singh Vs. Prescribed Authority (1980 A.W.C. 639). It was lastly contended that even otherwise there were no sufficient grounds for permitting respondents no. 2 and 3 to lead fresh evidence as required under order 41 rule 27 C.P.C.

5. Sri A.C. Pandey, learned counsel appearing for respondents no. 2 and 3, has submitted that as the amendment had been allowed and a fresh issue was also framed, it was necessary in the interest of justice that the answering respondents be permitted to lead fresh evidence. He further submitted that considering it to be in the interest of justice, the second application for leading the fresh evidence was entertained and allowed by the lower appellate court only after hearing the counsel for the parties. It was urged that the subsequent application would not be barred by the general principle of res judicata.

6. Having considered the submission of the learned counsel for the parties and on perusal of the record, I find that while allowing the amendment application of respondents no. 2 and 3, the lower appellate court had mentioned that no fresh evidence would be led by the parties. Despite that, the contesting respondents filed an application, which was rejected on 5.2.1991. Even though Section 11 of the Code of Civil Procedure may not strictly apply to the present case, the subsequent application filed would certainly be barred by the general principle of res judicata. Once having decided a particular matter in one way at

an earlier stage, the courts should not allow the party to re-agitate the matter at a subsequent stage of the same proceedings, especially when there was no change in circumstances so as to entail modification or change in the earlier view taken. Finality to a proceedings have to be given at some stage. If a litigant is permitted to keep re-agitating the same matter again and again, no finality to the proceedings can ever be given. The general principles of res judicata are broad enough to apply to miscellaneous proceedings and orders passed at different stages of the same litigation.

7. Thus, in my opinion, the order dated 14.10.1991 passed by the lower appellate court allowing the application of respondents no. 2 and 3 for leading additional evidence is liable to be set aside.

8. In the result, the writ petition is allowed and the impugned order dated 14.10.1991 is quashed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.9.2002

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

Civil Misc. Habeas Corpus Petition No. 16503 of 2002

Shaukat Ali ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri M.M. Khan
Sri Nasiruzzaman

Counsel for the Respondents:
Sri Ajit Kumar Singh, Addl. S.C.
Sri D.P. Srivastava
A.G.A.

Constitution of India, Article 226- Detention Order- validity challenged allegation slaughtering cows and calfs- knife and Rod-recovered- court will not permit to disturb communal amity- another Gujrat- No delay in deciding the representation- petition dismissed.

Held- Para 2

Communal amity and harmony are absolutely essential for the progress of the nation. We cannot afford to have another Gujrat in U.P. Slaughter of cow hurts the sentiments of the Hindus and hence should not be committed. In our opinion cow slaughter affects public order because it is likely to incite communal tension. Hence it is not merely a case of law and order. We are also of the opinion that there was no delay in deciding the petitioner's representation. There is no merit in this petition. The writ petition is dismissed.

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

1. The petitioner is challenging the detention order dated 3.1.2002 Annexure 1 to the petitioner under N.S.A. A perusal of the grounds of detention copy of which is Annexure 2, shows that the allegations against the petitioner are that the petitioner had slaughtered a cow and the knife and rods were recovered from him. This incident caused communal tension and hence the impugned detention order was passed.

2. Communal amity and harmony are absolutely essential for the progress of the nation. We cannot afford to have another Gujrat in U.P. Slaughter of cow hurts the sentiments of the Hindus and

hence should not be committed. In our opinion cow slaughter affects public order because it is likely to incite communal tension. Hence it is not merely a case of law and order. We are also of the opinion that there was no delay in deciding the petitioner's representation. There is no merit in this petition. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.10.2002

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

Civil Misc. Writ Petition No. 36788 of 2000

M/s Overseas Agro Products (P) Limited ...Petitioner

Versus

Uttar Pradesh Financial Corporation and another ...Respondents

Counsel for the Petitioner:
Sri Neeraj Tewari
Sri Suneet Kumar
Sri U.N. Sharma

Counsel for the Respondents:
Sri Neeraj Tripathi
Sri Satish Chaturvedi
S.C.

Constitution of India, Article 226- Penal Interest- Principal amount already deposited- Petitioner already apprroched the authorities for no dues certificate- No action taken- following the Principle 'NULLUS COMMODUM CAPERE POTEST BE INJURIA SUA PROPRIA' penal interest can not be charged.

Held- Para 8 and 10

The maxim NULLUS COMMODUM CAPERE POTEST BE INJURIA SUA PROPRIA. No man can take advantage of his own wrong, is based on elementary principles and is fully recognized in Courts of law.

In view of the reasons stated above, we are of the opinion that the UPFC cannot be permitted to charge interest or penal interest and be made to gain by the wrong mistake committed by them.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard the learned counsel for the parties and perused the records.

2. The petitioner is a registered company under the Companies Act, 1956. It purchased M/s Vimla Soft Drinks (P) Ltd. from the U.P. Financial Corporation in auction sale for a sale consideration of Rs.11,50,000/-. The company paid a sum of Rs.5,75,000/- to the U.P.F.C. on 27.6.96 and it was agreed that the balance amount of Rs.5,75,000/- would be paid in two six monthly instalments i.e. first instalment of Rs.2,87,500/- be paid in September, 1996 and the remaining instalment be paid in March, 1997.

3. It is alleged that the petitioner paid Rs.2,95,000/- on 1.10.1996 and made enquiry about remaining balance. It was informed by the U.P.F.C. that Rs.2,02,200/- towards principal and Rs.56,777-92P. towards interest remained due. The total amount of Rs.2,58,977-92P. was paid by petitioner company by cheque dated 31.3.1997 in round figure of Rs.2,59,000/-. In the account of U.P.F.C. the credit balance of Rs.22-08 P. was shown in favour of petitioner company towards interest. This fact is also apparent from Annexure-2 to the writ petition. The petitioner contends that after this final payment, no amount remained due.

4. The company thereafter started production and also approached the Bank of India for financial assistance which required the petitioner to submit no dues certificate in order to facilitate financial assistance. The petitioner approached respondent no. 2 for no dues certificate in respect of the sale-deed/agreement and then was informed that still a balance of Rs.55,600/- towards principal amount and Rs.1,05,205-19 P. towards interest, totaling Rs. 1,60,805-19 P. is due. A recovery letter dated 10.8.2000 was issued by the U.P.F.C. for recovery of the aforesaid amount against the petitioner.

5. The petitioner showing his bonafide informed respondent no. 2 that if there was any calculation mistake on the part of U.P.F.C. in the calculation of principal amount, then it is prepared to pay the short fall of principal amount, but is not responsible for paying any interest thereon, it cannot be made to suffer for mistake of U.P.F.C. In order to establish its bonafide the petitioner company deposited Rs.20,000/- through cheque dated 8.5.2000 and Rs. 35,000/- through cheque dated 20.5.2000, total amounting to Rs.55,600/-.

6. It is contended that instead of issuing no due certificate, the respondents are demanding interest as well as penal interest on the short-fall amount of Rs.55,600/- which the petitioner was not liable to pay as it was due to mistake on the part of U.P.F.C. and the petitioner had never shirked from payment of sale consideration. It is contended that in any case the petitioner had already paid the full sale consideration as well as he had also made good the short fall in the principal amount.

7. It is not in dispute that the petitioner had made an application stating therein that he had made the entire payment on 31.3.1997 as per the statement of account furnished by the U.P.F.C. and if any mistake has crept in the statement of accounts of U.P.F.C., the petitioner cannot be held liable for payment of any amount of interest much-less penal interest thereon. If such interest and penal interest is permitted to be charged by U.P.F.C., it will be against the sound principles of law and encourage the financial organizations to make windfall gain/benefit from their own wrong. The petitioner has paid full amount and short fall even in principal amount of Rs.55,600/- as per the statement of accounts furnished by the U.P.F.C. which could not be paid earlier due to alleged calculation mistake in their account. The petitioner has not defaulted in payment.

8. The maxim NULLUS COMMODUM CARREB INJURIA SUA PROPRIA. No man can take advantage of his own wrong, is based on elementary principles and is fully recognized in Courts of law.

9. The reasonableness of the rule is manifest that a party should not be allowed to take advantage of his own wrong. A wrongdoer ought not to be permitted to any interest muchless penal interest.

10. In view of the reasons stated above, we are of the opinion that the U.P.F.C. cannot be permitted to charge interest or penal interest and be made to gain by the wrong mistake committed by them.

11. The writ petition is allowed and the impugned recovery letter dated 10.8.2000 is quashed. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 24996 of 1992

R.R. Shah ...Petitioner
Versus
Vice Chancellor, University of Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava
Sri Vindhyachal Singh
Sri Pradeep Kumar
Sri B.B. Paul
Sri R.K. Pandey

Counsel for the Respondents:
Sri Manoj Misra
Sri R.K. Tewari
Sri S.N. Upadhyay
Sri S.N. Misra

Constitution of India- Article 226- In case of temporary employee the employer has right to terminate the services of such employee according to terms of contract of service instead of holding enquiry even if the employee had been charged with misconduct. The petitioner did not submit proof of passing intermediate examination, hence his services were liable to be terminated on that ground according to the terms of his appointment. He also did not give any reply to the notice of show cause hence it was not necessary to hold any enquiry.

(Held in para 17)

Thus, in the circumstances of this case no principles of natural justice have been violated. In any case, termination of service is not liable to be interfered in the circumstances of this case and it is not a fit case for exercise of jurisdiction under Article 226 of the Constitution of India.

Case Law referred:
2002 (93) FLR 971
AIR 1999 SC-2583
AIR 1966 SC-828
AIR 2000 SC-2783

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard counsel for the parties and perused the record.

2. The petitioner was appointed on the post of temporary Routine Grade Clerk w.e.f. 1st March, 1981 subject to approval of Director of Education, Allahabad. At the time of joining the said post he had submitted his High School Certificate with a written undertaking that he will pass the Intermediate examination to comply with the requirement of qualification necessary for the post within the limited prescribed time. Inspite of sufficient opportunity to qualify the Intermediate examination he was not able to submit Intermediate examination certificate or mark-sheet.

3. Counsel for the petitioner contends that the services of the petitioner have been terminated without holding any enquiry. It is contended that he has continuously worked as Routine Grade Clerk in William Holland University College till he fell ill on 1.3.1990. It is averred that he sent application for leave w.e.f. 1.3.90 to 30.5.1990, but due to prolong illness and advise of the Doctor he sent application for extension of leave. It is submitted that when the petitioner

was issued a fitness certificate by the Doctor on 31st March, 1992 he went to join his duties but he was not allowed by the concerned authority.

4. It appears from the record that the petitioner was, in the mean time, issued a show cause notice dated 20.3.90 asking him to show cause why his services may not be terminated as he failed to fulfill the minimum educational requirement for the post i.e. Intermediate and further that he was absent from duty for the last 2 months without any notice or application. The petitioner by letter dated 15th April, 1990 sent reply explaining the situation under which the he was appointed on the basis of his educational qualification of High School and further he was under treatment and as such, unable to join his duties. He also alleges that he had worked and performed his duties in the months of January and February, 1990 and signed the Attendance register.

5. The only point canvassed before this Court is that there was no charges of misappropriation and embezzlement of fund against the petitioner. He was terminated from service w.e.f. 15.3.92 in violation of principles of natural justice, without holding any enquiry and without affording any opportunity of being heard to defend himself and prove his ignorance.

6. In the counter affidavit it has been alleged that inspite of many opportunities given to the petitioner to qualify the Intermediate examination he did not pass the examination. He was given the charge of collecting the fee and room rent and other amounts from the inmates of the Hostel. But instead of issuing the receipt from the Hostel, he used to issue fee receipts on a plain paper and used to misappropriate the said amount deposited by the students inmates. A copy of one of similar receipts obtained from one of the students inmates has been annexed as Annexure-CA-1 to the counter affidavit. It is alleged in the counter affidavit that during a surprise check it was found in the year 1988 that the petitioner had deposited deficit amount of Rs.11,155/- and embezzled the same. When the petitioner was asked about this amount he confessed his guilt in his own hand writing by letter dated 7.9.88. A perusal of letter Annexure-CA-2 to the counter affidavit shows that in his confession the petitioner has admitted the embezzlement and had shown his willingness to deposit the said amount in cash by 30th October, 1988. He has also shown his willingness to give back the record and receipt books etc.

7. In para 6 of the counter affidavit it has been stated that the petitioner ran way from the college along with the record and receipt books etc. in January 1990. In these circumstances, a notice was issued asking him to furnish proof of passing Intermediate examination and his unexplained absence from the service to complete the account book and the receipt book of the college and return the misappropriated amount to the principal but even after receiving the said notice on 26.3.90 the petitioner did not submit any reply and allegedly fell ill. It is contended by the respondents that the appointment of the petitioner was temporary on the said post with an undertaking that he would pass the Intermediate examination within the limited time as per mandatory requirement of the statute. It is further contended that he has made manipulations in the attendance register because it was

in his custody and has run away with the records of the college.

8. It is admitted to the parties that for the post of Routine Grade Clerk the minimum qualification is Intermediate pass and the petitioner did not possess minimum qualification and as such, he was only kept as a temporary measures and his appointment was never approved by the Deputy Director of Education, Allahabad. Suffice it to say that the appointment of the petitioner as Routine Grade Clerk was void abinitio, which cannot be legalized merely because the Management was also a party to the illegal appointment.

9. In para 19 of the writ petition it has been stated that the services of the petitioner were terminated without affording any opportunity of being heard to the petitioner. The averments made in para 19 of the writ petition have been replied by the respondents in para 24 of the counter affidavit which reads as under:-

"That the contents of para 19 of the writ petition are absolutely incorrect and denied. In view of the confession made in writing by the petitioner nothing more was needed and the action was taken accordingly as decided by the Executive Committee against the petitioner who was temporary and unqualified."

10. Thus the averments made in para 19 of the writ petition have not only been specifically denied but it has also been stated that in view of the confession made in writing by the petitioner no action was needed.

11. It is also an admitted fact that the petitioner was not qualified for the post and in these circumstances whether principles of natural justice are not attracted in **Kendriya Vidyalaya Sangathan and others Vs. Ajay Kumar Das and others, 2002 (93) FLR 971** it has been held that where order of appointment was invalid, the question of observance of principle of natural justice would not arise.

12. Coming to the question of embezzlement and misappropriation of money it appears from Annexure-CA-2 that the petitioner has in unequivocal terms accepted finding of short deposit of Rs.11,155/- and showed his willingness to deposit the aforesaid amount. The acceptance of the petitioner given in Annexure-CA-2 in this regard is quoted below:

"To,

The Principal
W.H.U. College
Allahabad.

Sir,

On checking the receipt books 1901 to 2000 and 2100 to 2200 along with the show, the fee clerk, the amount deposited less is Rs.11,155/- (Rs. Eleven Thousand one hundred and fifty five only).

The unused receipt books i.e. the counterfoils yet to be checked are from the series 1300 onward but for the two checked.

Solicited that the said documents be provided with for the checking.

Sd/Illegible
7.9.88

To,
The Principal
William Holland University College,
Allahabad.

Respected Sir,

I agree with the finding of short deposit of the amount of Rs.11,155/- (Rupees Eleven Thousand one hundred fifty five only) in the fee collection.

I am willing to pay the gross amount of the four months (May 88 to August 88) and the balance I shall pay in cash by the 31st October 1988.

The records and the Receipt book etc. viz receipt book including Bank deposit slip and the fee Register shall give by 8th of this month.

I am writing the note under no pressure from any body.

Sd/Illegible
(R.R. Shah)
Office Assistant
W.H.U.C."

13. From perusal of Annexure-CA-3 it is apparent that the petitioner has undertaken to further deposit Rs.6093/-. This letter of the petitioner dated 29.9.89 is also relevant and is quoted below:

"To,
The Principal
W.H.U. College,
Allahabad.

Sir,

With due respect I beg to inform you that as you know that I have deposited Rs.11000/- (Rupees Eleven Thousand only) in cash in lieu of 17093/- (Rupees Seventeen Thousand Ninety Three only) deposited short by me during April 83 to July 89. Balance of Rs.6093/- (Rupees Six Thousand Ninety Three only) may be adjusted from my salaries for 10 months i.e. Ist June 88 to March 89 which come to Rs.9217/- (Rupees Nine Thousand Two hundred Seventeen only).

I shall be very grateful for this favour.

Thanking you.
Yours faithfully,

(R.R. Shah)
Office Assistant.

To,
The Principal
Verified and forwarded
Sd/Illegible
29.9.89"

14. In view of unequivocal confession made by the petitioner in the two letters dated 7.9.88 Annexure 2 and 3 reproduced in this judgement and depositing of Rs.11,155/- towards making good embezzlement amount is sufficient and no further enquiry was needed thereafter. Following the ratio laid down by the Apex Court in the case of M.C. Mehta Vs. Union of India, AIR 1999 SC-2583, S.L. Kapoor Vs. Jagmohan, AIR 1981 SC-136 and Gadda Venkateshwara Rao Vs. Govt. of Andhra Pradesh, AIR 1966 SC-828 it is held that the principles of natural justice have not been violated in the instant case as no prejudice can be said to have been caused to him as held by Supreme Court in case of **Aligarh**

Muslim University Vs. Mansoor Ali reported in AIR 2000 SC-2783.

15. He cannot have any legal right or even lien on the post. In so far as the question of violation of principle of natural justice, suffice it to say these principles are not straightjacket formula applicable in all situations.

16. In case of temporary employee the employer has right to terminate the services of such employee according to the terms of contract of service instead of holding enquiry even if the employee had been charged with misconduct. The petitioner did not submit proof of passing Intermediate examination, hence his services were liable to be terminated on that ground according to the terms of his appointment. He also did not give any reply to the notice of show cause hence it was not necessary to hold any enquiry.

17. Thus, in the circumstances of this case no principles of natural justice have been violated. In any case, termination of service is not liable to be interfered in the circumstances of this case and it is not a fit case for exercise of jurisdiction under Article 226 of the Constitution of India.

18. For the reasons stated above, the petition is dismissed.

No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.10.2002

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Criminal Revision No. 1476 of 2002

Sahab Singh ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Ajay Kumar

Counsel for the Opposite Party:
S.C.

U.P. Excise Act, 1910- Section 72 and Criminal Procedure Code 1973- section 397/401-A criminal Revision will lie only against orders passed by "Subordinate Criminal Courts" under the Code of Criminal Procedure- the District Judge while acting as the Appellate authority under U.P. Excise Act is not a "Criminal Court" and he is not exercising powers under the Code of Criminal Procedure while deciding the appeal- In absence of either of these two things criminal revision will not be maintainable against the order passed under section 72(7) of U.P. Excise Act, 1910. (Held in para 8).

Case Laws referred:
AIR 1978 SC 1

Thus I hold that Criminal Revision is not maintainable against such an order.

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

1. Section 72 of U.P. Excise Act, 1910 provides for confiscation proceedings. The confiscation order can be passed by the Collector. Sub-section (7) of Section 72 of the Act provides that against the order of confiscation appeal

lies to such judicial authority as may be appointed in that behalf by the State Government. The State Government has appointed the "***District Judge"*** to hear such appeals.

2. In the present case the petitioner had preferred an appeal before the District Judge which has been decided by the impugned order. Against the order of District Judge the petitioner has preferred this Criminal revision under section 397/401 of the Code of Criminal Procedure 1973.

3. A **criminal revision** will lie only against orders passed by "**subordinate Criminal Courts**" under the Code of Criminal Procedure. The question to be answered for considering the maintainability of this Criminal revision, therefore, is whether the District Judge, passing an order in appeal under section 72(7) of the U.P. Excise Act, 1910, is exercising powers of working under the provisions of the Code of Criminal Procedure or not. There is nothing in the Act or the Rules to indicate that the procedure to be followed by the appellate authority will be the same as prescribed in the Code of Criminal Procedure.

4. There is a clear difference between "**District Judge**" and the "**Sessions Judge**". The decision of Supreme Court in the case of ***Thakur Das Vs. State of Madhya Pradesh, A.I.R. 1978 SC 1,*** which has held that Criminal revision is maintainable against the order of Sessions Judge passed as the appellate authority under section 6-C of the Essential Commodities Act, 1955 is based upon the fact that Judicial Authority appointed under section 6 C was the "Sessions Judge". The use of the words "Sessions Judge" by the Government itself indicated that the Judicial Officer exercising power of Code of Criminal Procedure, has been nominated as the appellate authority.

5. The Code of Criminal Procedure uses the words "Sessions Judge" but instead of those words in the Notification made by the Government under U.P. Excise Act the "District Judge" has been constituted the appellate authority.

6. Thus I see no reason to hold either that the District Judge while acting as the Appellate authority under U.P. Excise Act is a "Criminal Court" or that he is not exercising powers under the Code of Criminal Procedure while deciding the appeal. In absence of either of these two things criminal revision will not be maintainable against the order passed under section 72 (7) of U.P. Excise Act, 1910.

7. Certain decisions which have been cited by the learned counsel for the revisionist have been considered by me. In all of them it has been assumed that criminal revision lies. This question has not been raised or decided as to whether criminal revision is maintainable under Cr.P.C. against an order passed under section 72 (7) of the U.P. Excise Act.

8. Thus I hold that Criminal revision is not maintainable against such an order.

9. At this stage learned counsel for the applicant has submitted that he wants to withdraw this criminal revision to avail such remedy as may be available to him. This criminal revision is accordingly dismissed as withdrawn.

10. Let a copy of this order be issued to learned counsel for the applicant on payment of usual charges within three days. Certified copy of the impugned order may also be returned if demanded by counsel upon furnishing of a typed copy of the same.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.10.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 28777 of 1994

Mohan Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.D. Tripathi
Sri M.M. Siddiqui
Sri J.K. Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service Law- Termination order- petitioner was appointed for period of three years on fixed salary-continued even after expiry of the period-strict in accordance with the terms of appointment termination order passed after giving one month prior salary-held- proper- in absence of seniority list- question regarding working of juniors to the petitioner can not be accepted-even the petitioner can approach before Industrial Tribunal- petition dismissed.

Held- Para 5

The standing counsel has contended that the services of part time tube well operators are not transferable. He submits that the service of the petitioner has been terminated according to the terms and conditions contained in the letter of appointment. He further contends that since the petitioner was not a regular full time tube well operator he was not entitled to salary of full time tube well operator. Lastly, it has been submitted that since the petitioner's appointment was on a particular tube well there is no question of seniority or juniority. Since the tube well operators are appointed against a particular tube well no question of seniority involved in the case.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the parties and perused the record.

2. The present writ petition arises out of the alleged illegal termination of the petitioner by respondent no. 2 from the post of Tube-well operator by the impugned order, dated 17.6.1994.

3. The petitioner was appointed as part-time Tube-well operator at Tube-well No. 22, at Kirawali, district Agra on fixed monthly salary of Rs.299/- by order, dated 22.7.1988. The terms and conditions of petitioner's appointment as given in his aforesaid appointment order are as under:-

"१:– इनकी नियुक्ति पूर्णतः अस्थायी है तथा कार्य सनतोषजनक नहीं पाये जाने पर एक माह को नोटिस देकर किसी भी समय सेवाएं समाप्त की जा सकती हैं।

२:– यह नियुक्ति आवश्यकतानुसार उपकर्म के लिए ही होगी कार्य सनतोषजनक पाये जाने पर ही इनकी नियुक्ति पर पुनः विचार किया जाएगा ।

३:– कार्य भार ग्रहण करने का कोई यात्रा भत्ता देय नहीं होगा ।"

4. The petitioner states that initially years. The salary of the petitioner was increased from Rs.299/- to Rs.560/- per month w.e.f., 1.12.1991. In paragraph '7' to the writ petition, it is stated that all of a sudden, the boring of the Tube-well, on which the petitioner was working, failed and as such the services of the petitioner were terminated by the impugned order, dated 17.6.1994 by giving him one month's salary in lieu of notice. The contention of the petitioner is that 25 Tube-well operators, who are junior to him, have been retained in service whereas his services have been terminated and as such the impugned order is illegal, arbitrary and has also stated that there are several Tube-wells where the posts of Tube-well operators are vacant and the petitioner can be appointed on any of such Tube-wells.

5. The standing counsel has contended that the services of part-time Tube-well operators are not transferable. He submits that the service of the petitioner have been terminated according to the terms and conditions contained in the letter of appointment. He further contends that since the petitioner was not a regular full time operator, he was not entitled to salary of full time Tube-well operator. Lastly, it has been submitted that since the petitioner's appointment was on a particular tube-well, there is no question of seniority or juniority. Since the Tube-well operators are appointed against a particular tube-well, no question of seniority involved in the case.

6. From Annexure-2 to the writ petition, it appears that petitioner's service has come to an end on the failure of the Tube-well in pursuance of Government notification issued in 1953. I have perused he was appointed for a period of three the impugned order and there appears to be no illegality in the same. On the closure of the place of employment, a person, who is employed particularly for that place, will not continue.

7. Apart from the above, the petitioner is a workman. He has not produced any material before this Court to establish the factum that there are several vacancies in other tube-wells which are in operation. He has also not filed any seniority list in support of his contention that juniors to him are working. The appointment of the petitioner was a fixed term appointment for three years and he continued thereafter in the exigency of work. It does not vest him with any legal right to continue at the place of employment on the failure of the Tube-well itself.

8. In view of the above facts, the petition fails and is dismissed. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 4, 2002

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

Civil Misc. writ petition no. 8683 of 1982

Ramraj ...Petitioner
Versus
Deputy Director of Consolidation, Basti and others ...Respondents

Counsel for the Petitioner:
Sri M.D. Misra

Counsel for the Respondents:
S.C.

Consolidation of Holdings Act- Section 52- in view of the provisions of section 52 of the Act and Rule 109-A, the authorities mentioned in Rule 109-A, will have the jurisdiction to decide all questions which arose in those proceedings.

Held in para

Further, the fraud and forgery committed was not only against the petitioner but also upon the Court. The court, therefore, had the jurisdiction to deal with the matter and decide the same. The scope of Rule 109-A is quite wide. For the cases covered by the said rule, the denotification under section 52 of the Act is of no consequence as by the order passed in the said proceedings, the consolidation authorities if they are present in the district, shall be giving effect to the orders passed by the competent consolidation authorities and for that purpose the consolidation operators shall be deemed not to have been closed as provided under sub section 2 of section 52 of the Act. In view of the aforesaid discussion, both these petitions deserve to be allowed.

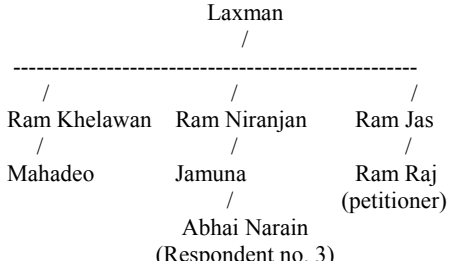
(Delivered by Hon'ble R.H. Zaidi, J.)

1. In both these petitions common questions of law and fact are involved and parties are also the same. They were, therefore, heard together and are being disposed of by this common judgment. Writ petition no. 8683 of 1982 shall be the leading case.

2. By means of this petition filed under Article 226 of the Constitution of India, petitioner prays for issuance of a writ , order or direction in the nature of certiorari quashing the order dated 8.7.1992 passed by the respondent no. 1 allowing the revision filed by the respondent no. 3, under section 48 of the U.P. Consolidation of Holdings Act, for short ' the Act'.

3. The relevant facts of the case giving rise to the present petition, in brief, are that in the basic year khata no. 137 of village Shivasara, district Basti was recorded in the name of the petitioner. Respondent no. 3 filed an objection claiming co-tenancy rights in the said khata. Objection filed by the respondent no. 3 was contested and opposed by the petitioner who pleaded that respondent no. 3 had no share in the said khata. Parties in support of their case produced evidence. The Consolidation Officer after hearing the parties and perusing the material on record, dismissed the objection filed by the respondent no. 3 on 31.7.1976. The order passed by the Consolidation Officer became final as the validity of the same was not challenged by the respondent no. 3 by filing appeal or revision. In lieu of khata no. 137, the petitioner was allotted chak no. 112.

4. In the same village, there were khata nos. 46, 71, 103 and 134 which were recorded jointly in the names of the petitioner and the respondent no. 3 as well as in the name of one Mahadeo. The petitioner as he was a preferential heir on the basis of the following pedigree, claimed the share of Mahadeo as his whereabouts were not known for more than seven years and he was, in the law, presumed to have died civil death. The pedigree of the family is given below :



5. The petitioner on the basis of the above noted pedigree, as stated above, applied for mutation of his name in place of Mahadeo. The application of the petitioner was contested by the respondent no. 3 who claimed right in the land of Mahadeo. The factum of death of Mahadeo was, however, not challenged. The parties produced evidence. The consolidation officer dismissed the objection filed by the petitioner as well as of the respondent no. 3. The said appeals were decided in terms of the compromise by the Settlement Officer Consolidation on 11.11.1976. Under the said compromise, it was conceded that khata no. 137 belonged to the petitioner exclusively. After the aforesaid order was passed, it is pleaded that the respondent no. 3 colluded with the officials of the department and also added khata no.137 in the compromise behind the back of the petitioner. It was on 28.5.1977 that the village where the land in dispute is situate, was denotified under section 52 of the Act. It has also been pleaded that after doing the forgery and interpolation in the compromise , the respondent no. 3 made an appliction before the Consolidation Officer for giving effect to the order dated 11.11.1976. The Consolidation officer, it is stated, without giving any notice to the petitioner, directed to give effect to the said order on 31.7.1979. As soon as the petitioner came to know about the said order, he filed an application on 15.9.1979 stating that fraud was committed by the respondent no. 3 upon the court and upon him by committing interpolation in the compromise, referred to above. The petitioner also filed an appeal against the order of the Consolidation Officer before the settlement officer consolidation. The settlement officer consolidation directed not to give effect to the Parwana Amaldaramad. The respondent no. 3 filed an objection before the settlement officer consolidation contending that the village where the land in dispute was situated, was denotified, therefore, the settlement officer consolidation had no jurisdiction to proceed with the matter. On the question of jurisdiction, a preliminary issue was framed, which was decided by the Settlement Officer Consolidation in favour of the petitioner and it was held that he had the jurisdiction to decide the case on merits in exercise of powers under Rule 109-A read with section 52 of the Act, by order dated 15.8.1980. Challenging the validity of the said order, the respondent no. 3 filed a revision before the Deputy Director of Consolidation. The Deputy Director of Consolidation allowed the said revision by order dated 18.9.1980. It may be stated that in the meanwhile the petitioner filed civil misc. writ petition no. 10620 of 1980, referred to above, challenging the validity of the orders dated 31.7.1979 and 18.9.1980, referred to above, which was admitted and interim order was also granted in favour of the petitioner, which is connected with this petition.

6. The petitioner also filed an appeal against the order of the Consolidation Officer dated 31.7.1979 before the Settlement Officer Consolidation. The Settlement Officer consolidation after hearing the parties recorded clear and categorical finding to the effect that fraud was committed by the respondent no. 3 upon the Court, allowed the appeal and remanded the case to the consolidation officer for decision afresh, by his order dated 19.11.1981. Challenging the

validity of the said order, the respondent no. 3 filed a revision before the Deputy Director of Consolidation, which was allowed on 8.7.1982. Hence the present petition.

7. On this petition, notices were issued to the contesting respondents by this Court. On receipt of the notices, the contesting respondent no. 3 filed a counter affidavit denying the facts stated in the writ petition. The petitioner has also filed a rejoinder affidavit controverting and denying the facts stated in the counter affidavit and reiterating and reasserting the facts stated in the writ petition.

8. Learned counsel for the petitioner vehemently urged that since the matter arose out of the proceedings under Rule 109-A read with Section 52 of the Act, all questions arising out of the said proceedings shall be considered by the authorities dealing with the application under the said rule and section. It is not necessary to file separate suit for the said purpose. The contesting respondent wanted the authorities concerned to give effect to the forged and fictitious orders and obtained orders from the consolidation officer in his favour after the village was denotified under section 52 of the Act. The moment petitioner came to know about the said fact, he filed an application stating that the compromise which was entered into between the parties, was forged by the respondent in collusion with the authorities of the department. The said question could be properly investigated by the authorities concerned. The settlement officer consolidation was, thus right to decide the question of jurisdiction in favour of the petitioner.

9. Section 52 of the Act and Rule 109-A read as under (only relevant quoted) :-

"52. Close of consolidation operations- (1) As soon a may be, after fresh maps and records have been prepared under sub section (i) of Section 27, the State Government shall issue a notification in the official Gazette that the consolidation operations have been closed in the unit and the village or villages forming a part of the unit shall then cease to be under consolidation operations:

Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and recover the cost of operations under this Act.

(1-A) The notification issued under sub section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper.

(2) Notwithstanding anything contained in sub section (1), any order passed by a court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases or proceedings pending under this Act on the date of issue of the notification under sub section (1) shall be given effect to by such authorities, as may be prescribed and the consolidation operations shall, for that purpose, be deemed to have not been closed."

"**109-A.** Section 52 (2)- (1) Orders passed in cases covered by sub section (2) of section 52 shall be given effect to by the consolidation authorities, authorized in this behalf under sub section 2 of section

42. In case there be no such authority the Assistant Collector, incharge of sub division, the Tehsildar, the Naib-Tahsilkdar, the Supervisor, Kanungo and the Lekhpal of the area to which the case relates shall, respectively, perform the functions and discharge the duties of the Settlement Officer, Consolidation, Consolidation Officer, the Assistant Consolidation Officer, the Consolidator and the Consolidation Lekhpal respectively for the purpose of giving effect to the orders aforesaid.

(2) If for the purpose of giving effect to any order referred to in sub rule (1) it becomes necessary to reallocate affected chaks, necessary orders may be passed by the Consolidation Officer, or the Tahsildar, as the case may be, after affording proper opportunity of hearing to the parties concerned.

(3) Any person aggrieved by the order of the Consolidation Officer, or the Tahsildar, as the case may be, may, within 15 days of the order passed under sub rule 2, file an appeal before the Settlement Officer, Consolidation, or the Assistant Collector incharge of the sub division, as the case may be, who shall decide the appeal after affording reasonable opportunity of being heard to the parties concerned, which shall be final.

(4) In case delivery of possession becomes necessary as a result of orders passed under sub rule 2 or sub rule 3 as the case may be, the provisions of Rules 55 and 56 shall, mutates mutandis, be followed."

10. In the present case, the resp;ondent no. 3 claimed that the compromise relied upon by him was entered into between the parties before the village was denotified under section 52 of the Act, was not given effect to in the revenue papers and prayed for giving effect to the said compromise before the Consolidation Officer under Rule 109-A. The consolidation officer without giving any notice to the petitioner directed to give effect to the said compromise vide his order dated 31.7.1979. As soon as the petitioner came to know about the said order, he filed an application on 15.9.1979 stating that fraud and forgery was committed by the respondent no. 3 upon the court and upon him. The order passed by the Consolidation Officer to give effect to the forged compromise was, therefore, liable to be recalled. Simultaneously, the petitioner also filed an appeal against the ex parte order of the Consolidation Officer before the settlement officer consolidation. The settlement officer consolidation after going through the material on record directed not to give effect to the Parwana Amaldaramad. The respondent no. 3 before the settlement officer consolidation contended he had no jurisdiction to decide the appeal. On the objection raised by the respondent no. 3 a preliminary issue was framed regarding jurisdiction of the settlement officer consolidation, which was decided in favour of the petitioner on 15.10.1980. Against the said order, the respondent no. 3 filed a revision which was allowed by the Deputy Director of consolidation by order dated 18.,9.1980 against which writ petition no. 10620 of 1980, connected with this petition, challenging the orders dated 31.7.1979 and 18.9.1980 has been filed in which on 28.11.1980 the following interim order was granted by this court –

"Issue notice.

Until further orders of this court, the operation of the order dated 18.9.80 passed by the Joint Director of Consolidation, Basti shall remain stayed."

11. In the appeal filed by the petitioner against the order passed by the Consolidation Officer on the preliminary issue, i.e., the question of jurisdiction, the settlement officer consolidation after hearing the parties recorded clear and categorical finding to the effect that fraud was committed by the respondent no. 3 upon the court, allowed the appeal and remanded the case to the consolidation officer for decision afresh, by his order dated 19.11.1981. Challenging the validity of the said order, the respondent no. 3 filed a revision before the Deputy Director of Consolidation, which was allowed on 8.7.1982, hence the petitioner filed writ petition no. 8683 of 1982.

12. It is evident from the facts stated above that the proceedings under Rule 109-A started after denotification of the village and that the compromise was entered into between the parties before the village was denotified, therefore, in view of the provisions of section 52 of the Act and Rule 109 A, referred to above, the authorities mentioned in Rule 109-A will have the jurisdiction to decide all questions which arose in those proceedings. The view taken to the contrary by the Deputy Director of Consolidation is manifestly erroneous and illegal. It is contrary to the provisions of Rule 109-A. Further, the fraud and forgery committed was not only against the petitioner but also upon the court. The court, therefore, had the jurisdiction to deal with the matter and decide the same. The scope of Rule 109 A is quite wide. For the cases covered by the said rule, the denotification under section 52 of the Act is of no consequence as by the order passed in the said proceedings, the consolidation authorities if they are present in the district, shall be giving effect to the orders passed by the competent consolidation authorities and for that purpose the consolidation operations shall be deemed not to have been closed as provided under sub section 2 of section 52 of the Act. In view of the aforesaid discussion, both these petitions deserve to be allowed.

13. The abovenoted writ petitions succeed and are allowed. The orders dated 31.7.1979, 18.9.1980 and 8.7.1982 are quashed. The case is remanded to the Deputy Director of Consolidation for decision afresh in the light of the observations made above.

14. A copy of this order may be placed on the record of connected writ petition.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.10.2002

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

Special Appeal No. 308 of 1998

The State of U.P. and others ...Appellants
Versus
Om Prakash Verma ...Respondent

Counsel for the Appellants:
Sri Sabhajit Yadav

Counsel for the Respondents:
Sri R.N. Singh
Sri A.P. Sahi
Sri G.K. Malviya

Sri Anil Bhushan

U.P. High School and Intermediate College (Payment of salaries of teachers and other employees) Act 1971- Section 9 Salary- appointment of L.T. grade teacher on newly sanctioned post- during pendency of approval before State Government- whether the State is liable to pay the salary?

Held- No

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

1. All the six special appeals are taken up and decided together as they arise out of common judgment. D.B. Sant Singh Khalasa Inter College, Partabpura, Agra is minority institution. Certain new sections were opened in this institution in certain classes with the approval of the District Inspector of Schools. Thereafter appointment of different writ petitioners in all these writ petitions which had been decided by the learned Single Judge, were made as teachers in L.T. Grade according to law. Proposals were sent to the Director of Education (Secondary) UP for creation of these posts. Nothing has been done at the level of the Director till date. These facts are not disputed.

2. The grievances of the writ petitioners, who are respondents in these special appeals, are that they had not been paid salary for the respective posts. The plea for non-payment as taken in the counter affidavit, is that the posts, against which they had been appointed, were not sanctioned by the Director of Education (Secondary). The learned Single Judge took into account Section sic of the U.P. High Schools and Intermediate Colleges (Payment of salaries of teachers and other employees) Act, 1971, (hereinafter referred to as the Act) particularly, the definition of teacher as per section 2 (e) of the Act, which includes any other teacher employed in fulfilment of the conditions of recognition of the institution of its recognition in a new subject or a higher class or as a result of opening with the approval of the Inspector of a new section in an existing class, the learned Single Judge has held that since new sections have been opened in certain classes in the institution in question with the approval of the Inspector and the writ petitioners have been appointed as teachers in consequence to the opening of these new sections hence the writ petitions-respondents herein, will be covered by the definition of the term teacher as given under section 2 (e) of the Act and as such the State can not escape the liability of paying their salaries under section 10 of the Act. The learned Single Judge accordingly allowed the writ petitions and directed the D.I.O.S. Agra, to make payment of salary to these writ petitioners from their dates of appointment and also the arrears may be cleared within a period of six months.

3. Feeling aggrieved thereby, the State Government has preferred these Special Appeals and as there was long delay of 299 days, the State Government was directed to pay costs of Rs. 500/- to each of the writ petitioners which has been paid by the State Government. Thus, the delay has been condoned.

4. Heard Sri Sabhajit Yadav learned Standing Counsel for the appellants and Sri R.N. Singh, learned Senior Counsel assisted by Sri A.P. Sahi, and Sri G.K. Malviya and Sri Anil Bhushan learned counsel for the writ petitioners-respondents.

5. Sri Sabhajit Yadav learned Standing Counsel submitted the new posts in an institution is sanctioned by the Director of Education (secondary) and till such time the posts have not been sanctioned by the appropriate authority, the State Government cannot be fastened with the liability for payment of salary to those teachers who are working on unsanctioned posts. According to him creation/approval of additional sections in a particular class in an institution does not ipso facto means that the additional post of teachers to teach in the new sections have also been sanctioned. He relied upon the following decisions:-

1. Mahipal Singh Pawar and others Vs. State of U.P. and Ors. Reported in 1992 (2) UPLBEC 1497.
2. Director of Education and others Vs. Gajadhar Prasad Verma reported in AIR 1995 Supreme Court 1121.
3. Gopal Dubey Vs. District Inspector of Schools, Maharajganj and another reported in 1999 (1) UPLBEC 1(FB)

6. He also referred to paragraph 7 and 14 of the judgment in the case of Mahipal Singh Pawar and others (supra) where a specific question was framed by this court as to whether DIOS who sanctioned running of an additional section or permitting teaching of a new subject in the institution itself amounts to creation of a post for a teacher in that subject, and the Court answered in the negative. Paragraph 14 of judgment is reproduced below:

"14. The provision of section 9 of the High School and Intermediate Colleges (Payment of salaries) Act, 1971, is reproduced as under :

"9. Approval for posts- No institution shall create a new post of teacher or other employee except with the previous approval of the Director, or such other officer as may be empowered in that behalf by the director".

7. The perusal of the aforesaid provision clearly go to show that the fact that the institution is approved and recognized by the Board for the first time or any new subject or Board group or for a higher class or addition of selection to a existing class shall have no effect unless it is approved by the State Government. It is also made clear that the permission to start teaching of a new subject or opening a class or section by DIOS shall be of no consequence unless approved by the State Government e.g. Director of Education. The number of posts for teacher and other employee of an institution is required to be treated and sanctioned by the Director of Education according to the prescribed norms and standard laid by the Education Department. It is the sole domain of the Director of Education to sanction and create posts of teachers and other staff. If the management committee or the DIOS considers and decides the number of posts needed for the institution according to the strength of students, it is of no consequences. The power of creation and sanctioning posts for institution is specified. It cannot be said that the DIOS approved and permitted opening of a section or a class or approved teaching of a new subject, itself would amount to creation of a post, fastening legal and obligation of paying salary to such staff under the Act No. 24 of 1971."

8. He also referred to para 4 of the decision of the Hon'ble Supreme Court in the case of Director of Education vs.

Gajadhar Prasad Verma wherein the Hon'ble Supreme Court has held that so long as prior approval had not been given though the respondent might have been appointed by the management, the government is not obliged to reimburse the salary paid to such person.

9. He further referred to the case of Gopal Dubey (supra) wherein a Full Bench of this Court in para 21 of the judgment has approved the Division Bench decision in the case of Mahipal Singh Pawar. Para 21 of the judgment rendered by the Full Bench in Gopal Dubey's case is reproduced below:

"21. On the other hand, the decision of this court in the case of Mahipal Singh Pawar and others vs. State of UP and others, (1992)2 UPLBEC 1497, has our approval. In that case it was held, inter alia, that a perusal of section 7-A of the UP Intermediate Education Act, 1921 and section 9 of the UP Act 24 of 1971 would clearly go to show ' that the fact that the Institution is approved and recognized by the Board for the first time or any new subject or group or for a higher class or addition of selection (section) to a existing class shall have no effect unless it is approved by the State Government, that is, Director of Education. It was further observed in that decision that section 2 of the payment of salaries Act, provides that the committee of Management is also equally responsible for payment of salary to the teachers employees in their institutions. It is relevant to point out in this connection that section 7-AA of the Intermediate Education Act, enables the management to engage teachers for imparting institutions in any subject or group or subjects for a higher class for which recognition is given or any section of an existing class for which permission is granted under section 7A notwithstanding anything contained in that Act and also in the payment of salaries Act (see Section 7AB). We must not be understood to say that a teacher or other employee appointed by the management for teaching a new class or section or new subject for which recognition has been granted is not entitled to receive salary. What we have held is that before saddling the statement government with financial liability in respect of such posts the approval of the Director has to be obtained. In the absence of such approval, the state government cannot be said to be under any obligation to pay salary to such staff. The view taken by us gains support from the decision of the supreme court. In the case of Director of Education and others v. Gajadhar Prasad Verma, AIR 1995 SC1122, in which the Apex Court, interpreting the provisions of the Payment of Salaries Act, ruled that prior approval of competent officer, for creation of post is a condition precedent for getting reimbursement of the salary of teacher/employee of High School. The relevant observation in paragraph 4 of the judgment is quoted hereunder:

"Be that as it may, the crucial question is whether the school of the respondent can claim reimbursement of the salary of such clerk from the Government? The U.P. High Schools and Intermediate Colleges (Payment of salaries of teachers and other employees) Act of 1971 (for short 'the Act') regulates the payment of the salary by the Government. Section 9 is relevant in that behalf. It provides that no institution shall create a new post of teacher or other employee except with the previous

approval of the Director or such officer as may be empowered in that behalf by the Director. Admittedly, no steps have been taken by the Management to have obtained prior approval of the Director or any other authorized officer for creation of the Director or the empowered officer is a condition precedent and mandatory for creation of an additional post (sic) the Government had before it relevant date of the posts for which the grant of aid was sanction.

10. Therefore, the failure to obtain prior approval disentitles the Management to obtain reimbursement of the salary of such teacher or other employees."

11. Sri R.N. Singh learned Senior Counsel very fairly did not dispute the principles laid down in the aforementioned cases, which are fully applicable to the facts of the present case. He however, submitted that the Director of Education (Secondary) be directed to consider the matter of creation of posts viz. a viz. additional sections/subjects which have been approved by the DIOS. He relied upon a recent decision of the Hon'ble Supreme Court in the case of Lal Bahadur Shastris. Junior High School and another versus State of U.P. and others reported in JT 2002 (5) SC 37 wherein the Hon'ble Supreme Court has given such a direction. Relevant portion of para 7 of the judgment of the Hon'ble Supreme Court is reproduced below :-

"7……..The Director will consider the request of the appellants' school for sanction of additional posts of teachers for the extra sections sanctioned, in accordance with the norms set out in the government orders and executive instructions which were prevailing when the request of the management of the school was received in his office and pass a reasoned order within three months from the date of receipt of the intimation of this order. The Director will give opportunity of hearing to the management of the school or its representative before passing the order."

12. The principles laid down by this court in the of Mahipal Singh Pawar (supra) and Gopal Dubey (supra) and of the Hon'ble Supreme Court in the case of Director of Education vs. Gajadhar Prasad Verma (supra) are fully applicable to the facts of the present case. Thus, we are of the view that the respondent- writ petitioners are not entitled for payment of salary from the state exchequer as the posts on which they are working has not been sanctioned/approved by the Director of Education (secondary) as required under the Act.

13. However since there is no dispute that the respondent writ petitioners are working in the institution since long, the interest of justice shall be best served if similar direction as that issued by the Hon'ble Supreme Court in the case of Lal Bahadur Shastris Junior High School (supra) is also issued in the present cases.

14. We are, therefore, of the view that since the new sections have been created and teachers are required, the Director of Education (secondary) UP shall consider the question of sanctioning the posts according to the norms and guidelines of the State Government, particularly taking into account the students teachers ratio.

15. In this view of the matter, we modify the order passed by the learned Single Judge and direct the Director of Education (secondary) to consider the creation and sanction the posts according to the norms and guide lines issued by the State Government in the manner indicated in our judgment. The special appeals are allowed in part to the extent indicated. If the posts are sanctioned, the writ petitioners who are working for long period shall be absorbed. The impugned order directing the appellant to pay salary to the teachers, however, is set aside. In the event these posts are sanctioned, the respondent- writ petitioners shall be paid salary from the date of sanctioning of the posts. The Director of Education (secondary) shall take a decision within two months from the date of communication of a certified copy of this order.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2002

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

Civil Misc. Writ Petition No. 2699 of 2002

Smt. Geeta Devi ...Petitioner
Versus
State of UP and others ...Resopondents

Counsel for the Petitioner:
Sri O.P. Lohia
Sri S.K. Misra

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

Transfer of Property Act, 1882- Section 55(1) (a)- If the buyer has not taken ordinary care, he is not entitled to seek protection- The principle that buyer has to exercise ordinary care and has to be vigilant while purchasing property is well established.

Held in para 8

We are satisfied that no illegality has been committed by trade tax authority in attaching the property and issuing the sale proclamtion. The trade tax dues were admittedly against Smt. Gayatri Devi who was owner of the house for realization of which house has been attached. The counsel for the petitioner could not show any provision of law to justify interference by us in this writ petition.

Case Law referred:
AIR 1928 Bombay 427
AIR 1962 144

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

1. Heard Sri Om Prakash Lohia, learned counsel for the petitioner and Sri S.P. Kesharwani, learned standing counsel.

2. By this writ petition, the petitioner has prayed for a mandamus against the respondents that they shall not attach and auction the property house no. 987, ward no. 13, Katra, Gursain district Jhansi in pursuant to recovery of arrears of Sales Tax/Trade Tax in the name of M/s Gayatri Traders.

3. The facts of the case as given in the writ petition are: petitioner claims to be sole owner of property house no. 987, ward no. 12, Katra Gursain, district Jhansi and has filed extract of the house assessment dated 7th September, 2002 for the period 1st April, 1996 to 31st March, 2001. It is stated that earlier Smt. Gayatri Devi, who is proprietor of M/s Gayatri

Traders, was the owner of house no. 987. It is stated that attachment and auction notices have been issued by respondent no. 2 for house no. 987 copy of which have been filed as Annexure –3 and 4 to the writ petition. The aforesaid attachment notice shows that house has been attached for realization of trade tax dues from 1993-94 to 1995-96 in consequence of which house was attached. Annexure-4 further mentions that according to record of Nagar Palika, house was in the ownership of Smt. Gayatri Devi prior to 25th March, 1996. Sale proclamation has also been issued for the aforesaid house.

4. The counsel for the petitioner contended that petitioner being sole owner of the property, the house can neither be attached nor sold. It has been submitted that property has been unnecessarily attached for realization of trade tax dues whereas the petitioner has nothing to do with the business of Smt. Gayatri Devi.

5. We have heard counsel for the parties and perused the record. It is not disputed that liability of the trade tax arrears arose out of dues against Smt. Gayantri Devi who was proprietor of M/s Gayatri Traders and was owner of the house. The petitioner in the writ petition has claimed herself to be the sole owner but in whole of the writ petition there is no mention as to by what mode the petitioner became owner. No reference of any sale deed has been mentioned although during oral submission the counsel for the petitioner contended that petitioner purchased the house from Smt. Gayatri Devi. Even if the petitioner purchased the house from Smt. Gayatri Devi she was obliged to make proper enquiry before the purchase. Section 55 (1) (a) of Transfer of Property Act, 1882 provides for the liabilities and the rights of seller and buyer. According to Section 55 (1) (a), the Seller is bound to disclose the buyer any material defect in the property or in the seller's title, which the buyer could not with ordinary care discover. The provision clearly provides that the buyer is to also to take ordinary care to discover material defect in the property or in the seller's title. If the buyer has not taken ordinary care, he is not entitled to seek protection. The principle that buyer has to exercise ordinary care and has to be vigilant while purchasing property is well established and has been recognized in several decisions. In A.I.R. 1928 Bombay 427, ***Harilal Dalsukhram Sahiba vs. Mulchand Asharam***, it was held by the Division Bench of Bombay High Court.

"It is quite clear that, if the plaintiff could with ordinary care have discovered that there was this defect of title, then he cannot plead that there was a failure on the part of the defendant to comply with the obligation laid down in S. 55(1)(a). There has been considerable argument as to whether the plaintiff knew, or could have discovered, that there was such a defect. The subordinate judge has held that he could have discovered the defect, if he had sufficiently investigated the title. Now that in regard to agricultural lands the Record-of –Rights affords such an easy means of investigating questions of title about particular pieces of land, there is dearly not the some difficulty that there is clearly not the same difficulty that there used to be about discovering defects of title with reasonable care. Admittedly, the plaintiff did see the mutation entry Ex. 44, which as regards plot no. 108-1 showed the defendant as the occupant under his

sale deed of August 1918, but the duty of a prudent purchaser does not rest with merely seeing a mutation entry if it does not cover the whole of the land he is purchasing. Moreover the plaintiff is a person of intelligence, who has been a member of the Bombay Legislative Council. I think it would be absurd for this Court to say that in the circumstances he ought not to have ascertained what were the entries in the Record-of-Rights about the two pieces of land and had he done so he would have seen the entry about no. 108-2 and the mortagagees in possession. That would have put him on enquiry as to what these mortagagee rights were. It may be that the defendant had not given him his title deeds. But that does not affect this particular point. With ordinary care he should have pursued his investigation beyond the point he says he did. Both under S. 55 (1) (a) and the definition of notice in S. 2 of the Act there was a want of care or a willful abstention from an enquiry or search which the plaintiff ought to have made, so that, in my opinion, the plaintiff is not entitled to say that there has been fraud on the part of the defendant in regard to this matter."

6. The Madhya Pradesh High Court in AIR 1962 144, ***Ganpat Ranglal Mahajan v. Mangilal Hiralal and another*** has also laid down the same proposition in paragraph 5 of the judgement which is extracted below:

"(5) So far as the applicability of Sec. 55 (1) (a) of the Transfer of Property Act is concerned, the contention of the applicant appears to be correct. Although there is an express recital, in the sale deed that the property is free from mortagage etc. this is not enough. To attract the provisions of S. 55(1) (a) two conditions are necessary; firstly that the buyer should not be aware of the existence of the defect in title, and secondly, that he could not with ordinary care discover the defect. So far as the first condition is concerned, although the applicant vendor in his written statement pleaded that the buyer was aware of the existence of the mortgage, there is no proof of this fact and it must be assumed that the buyer was not aware of the defect. However, the second condition is not satisfied inasmuch as the buyer could have known about the encumbrance by making inquiries in the office of the Registrar. Section 55 (1) (a) of the Transfer of Property Act has, therefore, no application to the present case."

7. From the facts brought on the record, it appears that trade tax dues relate to the period when Smt. Gayatri Devi was owner of the house. The petitioner cannot take any benefit of transfer in the property in view of the specific provisions of section 34 of UP Trade Tax Act. Section 34 of the Trade Tax Act is extracted below:

"34. Transfer to defraud revenue void*. (1) where, during the pendency of any proceeding under this Act, any person liable to pay any tax or other dues creates a charge on or transfers, any immovable property belonging to him in favour of any other person with the intention of defrauding any such tax or other dues, such charge or transfer shall be void as against any claim in respect of any tax or other dues payable by such person as a result of the completion of the said proceedings.*

Provided that nothing in this section shall impair the rights of a transferee in good faith and consideration.

(2) Nothing in sub- section (1) shall apply to a charge or transfer in favour of a banking company as defined in the Banking Regulation Act, 1949 (Act X of 1949, or any other financial institution specified by the State Government by notification in this behalf."

8. We are satisfied that no illegality has been committed by trade tax authority in attaching the property and issuing the sale proclamation. The trade tax dues were admittedly against smt. Gayantri Devi who was owner of the house for realization of which house has been attached. The counsel for the petitioner could not show any provision of law to justify interference by us in this writ petition. However, he prays that one month's time should be granted to make arrangement with the original owner of the premises in question. We are not in a position to grant such indulgence. It is always open to the writ petitioner to approach the original owner and the officials of the State Government praying for time. It is for the authorities concerned to consider the prayer. This court cannot pass any order granting time or issuing any direction in that regard. In our view there is no scope for this court to grant any such indulgence.

9. With the above observation, the writ petition stands dismissed.
