ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 14820 of 1991

Santosh Kumar Khare ...Petitioner
Versus
Govind Ballabh Pant Social Sciences Institute, Allahabad and others
...Opposite Parties

Counsel for the Petitioner:
Sri R.K. Jain

Sri L.C. Srivastava

Counsel for the Opposite Parties:
Sri Prakash Padia

Constitution of India, Article 226- Service Law- Regularisation Petitioner engaged as Research Assistant/Filed investigator- continued for long spell of time w.e.f. 17.2.83 to 31.12.90- No extension granted thereafter appointment purely on temporary basis in particular project–held – Regularisation can not be claimed-but considering his experience direction issued to give appointment on priority basis.

Sl. No.	Name of post and project	Duration From	To	Salary
1.	Research Investigator in Socio-Economic Profile of Agricultural Labourers in Bundelkhand Region of U.P."	17.2.83	30.4.84	600/-
2.	Research Investigator in "Impact of Modern Industry in Hill Region of U.P."	14.5.84	30.6.85	Do
3.	Research Assistant in "Social Forestry in Eastern UP and Bundelkhand	1.7.85	30.6.85	1000/-
4.	Research Assistant in "Growth Differentials Between Electrified and Non-electrified Villages A Case Study of Three Selected District in U.P."	15.10.85	5.5.86	850/-
5.	Research Assistant in "Land Distribution in Amethi Tehsil of Sultanpur District."	2.6.86	1.9.86	700/-
6.	Research Assistant in "Rural Outreach Programme Sponsored by Ford Foundation"	2.9.86	31.12.87	1000/-
7.	Junior Instructor in "Development of Women and Children of Rural Area"	1.10.88	31.12.88	Do
8.	Field Investigator in "A Study of Socio-Cultural Processes and Inter Relationship in the Sugar Industry of Uttar Pradesh	4.5.89	For 6 months	Do
9.	Research Investigator in "Evaluation of Adult Education and Non-Formal Education Programme in U.P.	1.11.89	For 2 months	Do
10.	Do	1.1.90	10.1.90	Do
11.	Field Investigator in "A Study of Socio-Cultural Process and Inter Relationship within Sugar Industry of U.P."	10.1.90	For 3 months	Do
12.	Do	9.4.90	30.4.90	Do
13.	Do	30.4.90	For 2 months	Do
14.	Research Investigator in "Evaluation of Adult Education and Non Formal Education Programme in U.P."	1.7.90	For 3 months	Do
15.	Do	1.9.90	For 3 months	Do

*

Held- Para 10 & 11

It is settled law that when the posts are created for purposes of the project and the project is completed, the temporary employees have no right to permanent post in the project particularly when their appointments were made for a specified prior or till the completion of the project. This Court cannot give any direction to regularize their services on abolition of the project nor give any direction to create posts in the project.

In view of the above position of law, and considering the request of the counsel for the petitioner the writ petition is disposed of with the direction to the respondents that if there is any post in any project under any scheme in which the petitioner can be accommodated, they may consider for his appointment, if he applies for the same keeping in view his training, qualification, experience and eligibility required for the post.

Case law discussed:

2000 SCC (L &S) 377
1997 (5) SCC-86
1998 SCC (L&S) 478

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

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

2. This writ petition has been filed for issuance of a writ in the nature of mandamus directing the respondents to give appointment to the petitioner as Research Assistant/Research Investigator/ Field Investigator in any of its projects.

3. The brief facts of the case are that the petitioner was appointed in Govind Ballabh Pant Social Sciences Institute, Allahabad on the following posts during the periods mentioned against each post on a consolidated salary.*

4. The appointment of the petitioner, as stated above, was fully temporary and for a specified. The chart given in paragraph 3 itself shows that the petitioner was engaged in different projects from time to time for a period specified in the above chart.

5. In ***Jawahar Lal Nehru Krishi Vishwa Vidyalaya, Jabalpur (M.P.) Vs. Bal Kishan Soni and others (1997) 5 Supreme Court cases 86***, the Apex Court has held that the Staff employed in a sponsored project cannot be regularized and the posts under project could continue only till the scheme existed. The Apex Court in paragraph 3 for the aforesaid judgment has further held that permanent posts cannot be created under the sponsored scheme and are coterminous with the scheme. On abolition of the scheme, the posts are necessarily stand abolished and the employees could not be claimed for their regularization.

6. In ***State of H.P. through the Secretary Agriculture to the Government of H.P. Shimla Vs. Nodha Ram and others, 1998 Supreme Court Cases (L & R) 478*** the Apex Court has held that :

"When the project is completed and closed due to non availability of funds, the employees have to go along with its closure. The High Court was not right in giving the direction to regularize them or to continue them in other places. No vested right is created in temporary employment. Directions cannot be given to regularize their services in the absence of any existing vacancies nor can directions be given to the State to create posts in a non-existing establishment. The Court should adopt pragmatic approach in giving directions. The directions would

amount to creating of posts and continuing them despite non availability of the work. The directions issued by the High Court are absolutely illegal warranting the Supreme Court's interference."

7. Recently in ***Karnataka State Coop. Apex Bank Ltd. Vs. & Y.S. Shetty and others, 2000 Supreme Court cases (L&S) 377,*** it has been held by the Apex Court that the terms and conditions of project and appointments are governed by appointment letters and the agreements entered by respondents and the employees appointed under the project have no right on the permanent post in the appellant Bank particularly when their appointments were made for specified project and as such their claim for being absorbed as Assistant Managers was also without any basis.

8. In ***Karnataka State Coop. Apex Bank Ltd. (supra)*** the respondents, however, pointed out that there were certain posts against which they could be accommodated and granted them liberty to submit their representations to the appellant Bank, for considering their case keeping in view their training, qualifications, experience and eligibility for the said posts.

9. In the instant case, it is an admitted fact that the petitioner has been appointed for a specified period in the project and has worked there till 31.12.90. The counsel for the petitioner states that looking to the training, qualifications, experience and eligibility of the petitioner, the institute may engage him in any project. The counsel for the respondents states that the petitioner may be permitted to make an application for appointment in a project subject to suitability, experience and eligibility as required.

10. It is settled law that when the posts are created for purposes of the project and the project is completed, the temporary employees have no right to permanent post in the project particularly when their appointments were made for a specified prior or till the completion of the project. This Court cannot give any direction to regularize their services on abolition of the project nor give any direction to create posts in the project.

11. In view of the above position of law, and considering the request of the counsel for the petitioner the writ petition is disposed of with the direction to the respondents that if there is any post in any project under any scheme in which the petitioner can be accommodated, they may consider for his appointment, if he applies for the same keeping in view his training, qualification, experience and eligibility required for the post. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 494 of 1999

Doneria Cold Storage & Ice Factory ...Petitioner
Versus
Commissioner of Income Tax, Agra and another ...Respondents

Counsel for the Petitioner:
Sri S.P. Gupta

Sri Tarun Agarwala

Counsel for the Respondents:
S.C.

Finance Act 1988 Indian Post Office Act- Section 3 (a)- Letter send to addressee- during course of transmission- but the presumption about reaching to its destination available only when the letter received by addressee- Postal Service Receipts can easily be procured- Petitioner send his representation under Kar Samadhan Scheme under Postal certificate not received by the authority within the prescribed period- held Rejection proper.

Held- Para 10

The above provision clearly indicates that merely by posting a letter it does not amount to making a declaration to the designated authority under section 88 of the Finance Act 1988. By merely posting a letter the sender only puts the letter in the course of transmission, but the letter will be deemed to have been made to the designated authority only when it reaches him. Moreover, there is a difference between sending a letter by registered post and postal certificate. The petitioner was situate only 50 k.m. from the office of the respondent no. 1 and its officials could have easily have gone to the office of the respondent no. 1 for the purpose of making the declaration. It is also a matter of common knowledge that postal certificates can easily be manufactured with an ante dated date and hence no reliance can be placed on the same.

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

1. This writ petition has been filed against the impugned order of the Commissioner Income Tax, Agra dated 4.5.99 Annexure-1 to the writ petition. It has also been prayed that respondent no. 1 be directed to entertain the petitioners' application under the Kar Vivad Samadhan Scheme 1998 treating it to be within limitation and to quash the recovery proceedings including the attachment order dated 21.4.99 (Annexure-8 to the petition).

2. The petitioner is a partnership firm. For the Assessment year 1992-93 it had filed return showing taxable income at Rs.53,950/-. However, the Assessing Authority passed an assessment order assessing the income of the petitioner to be Rs.76,63,740/-. The petitioner filed an appeal, which was allowed by the Commissioner of Income Tax and the matter was remanded back to the Assessing Authority and the Assessing Authority passed a fresh order dated 30.3.98 calculating the total income of the petitioner to be Rs.46,07,720/-. A demand notice for Rs.13,13,085/- was issued. Against that order the petitioner filed an appeal to the Commissioner of Income Tax (Appeal) which was rejected on 27.8.98 vide Annexure-2 to the writ petition. Thereafter it filed further appeal before the Income Tax Appellate Tribunal on 15.1.99. True copy of the memo of appeal has been annexed as A.

3. The Central Government issued Kar Vivad Samadhan Scheme under Finance (No. 2) Act 1998 which came into force from 1.9.98 and was applicable till 31.1.99. This Scheme provided for settlement of disputed arrears of tax etc. Section 88 of the aforesaid Finance Act of 1988 states as follows :

"Subject to the provisions of this scheme, where any person makes, on or after the 1st Day of September 1998 but on or before 31st day of December 1998, a

declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under the scheme by the declarant shall be determined at the rates specified hereunder."

4. The petitioner sent a declaration in Form 1-A dated 22.1.99 and sent it to the designated authority i.e. the Commissioner of Income Tax, Agra under certificate of posting dated 22.1.99. Photocopies of the 10 declarations Forms filed by the petitioners and its partners for the assessment year 1988-89 and 1992-93 have been collectively annexed as Annexure –5 to the writ petition.

5. It is alleged in paragraph 15 of the writ petition that the petitioner's partner met the Commissioner of Income Tax personally and requested for early disposal of their application filed under the aforesaid scheme. They also gave reminders vide letter dated 15.2.99 and 24.4.99 vide Annexure-6 and 7 to the writ petition. However the petitioner received the impugned order dated 4.5.99 stating that petitioner's application under the aforesaid Scheme had been rejected as the same was received in the office of the Commissioner of Income Tax, Agra on 5.2.99 i.e. after the last date of receiving application namely 31.1.99. Thereafter the Tax Recovery Officer passed an order dated 21.4.99 for attaching the petitioner's factory.

6. Learned counsel for the petitioner submitted that since the petitioner sent the declaration in Form–I-A under the Scheme by postal certificate dated 22.1.99 it should be presumed that it was received in the office of the designated authority in a day or two. He submitted that the Scheme does not contemplate that the declaration must be received in the office of the designated authority on or before 31.1.99.

7. We do not agree. A perusal of section 88 of the Act clearly shows that the declaration has to be made to the designated authority on or before 31.12.1998, which date had been extended to 31.1.99.

8. In the counter affidavit it has been stated in paragraph 11 that the petitioner's declaration was received in the office of the respondent no. 1 on 5.2.99, i.e. after the last prescribed date. It is further stated that Fatehabad (District Agra) from where the declaration was sent is only 50 km. from the office of the Income Tax Department. Had the petitioner sent the letter by postal certificate on 22.1.99 it would have reached the office of respondent no. 1 in not more than three days but it reached only on 5.2.99.

9. In our opinion it was for the petitioner to have ensured that the declaration reached the respondent no. 1 by 31.1.99. Section 88 of the Act as interpreted by us itself shows that it is for the assessee to ensure that the declaration has to reach the designated authority by the date fixed. Section 88 of the Act states that the person has to make the declaration to the designated authority by the prescribed dated. If the petitioner made the declaration by sending it by post then it is for him to ensure that the declaration reaches the designated authority by the prescribed dated.

Section 3 (a) of the Indian Post Office Act, 1898 states:-

(a) a postal article shall be deemed to be in course of transmission by post from the time of its being to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII."

10. The above provision clearly indicates that merely by posting a letter it does not amount to making a declaration to the designated authority under section 88 of the Finance Act 1988. By merely posting a letter the sender only puts the letter in the course of transmission, but the letter will be deemed to have been made to the designated authority only when it reaches him. Moreover, there is a difference between sending a letter by registered post and postal certificate. The petitioner was situate only 50 km. from the office of the respondent no. 1 and its officials could have easily have gone to the office of the respondent no. 1 for the purpose of making the declaration. It is also a matter of common knowledge that postal certificate can easily be manufactured with an ante dated date and hence no reliance can be placed on the same.

11. Since the declaration reached the respondent no. 1 after the prescribed dated it was clearly not maintainable. Thus there is no force in this petition and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.1.03

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 25006 of 2001

Ramesh Kumar Misra ...Petitioner
Versus
The Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Kumar Misra (In person)
Sri P.S. Pandey

Counsel for the Respondents:
Sri A.K. Sinha
Sri K.K. Parikh (Addl. S.C.)

Constitution of India- Article 226-Chief of Army Staff may be sued any where in the country and thus this court has jurisdiction to entertain, consider and finally decide the writ petition filed in the year 2001.

Held Para 12

In the aforesaid facts and circumstances of the case the writ petition is allowed. It is declared that the petitioner has retired from the rank of Havaldar group A on 31.8.1997 and is entitled to pension and other benefits as having retired from the rank of Havaldar, (MT) group A. The respondents are directed to re-fix his pension accordingly, and to pay his entire arrears, with simple interest as prevalent @ 10% per annum. The petitioner shall be entitled to cost of this writ petition.

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

1. This writ petition was filed through a counsel of this Court. The petitioner, however, has chosen to argue it

in person. He has prayed for a writ in the nature of mandamus directing the respondents to grant pension of Havaldar Group A with arrears and medical disability pension of real condition of his knee and soldier and C.B.I. investigation to give all the correct report and decide the representation dated 23.9.1998 and further to grant any writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

2. Sri A.K. Sinha, Standing Counsel was heard for Union of India.

3. The facts in brief are that petitioner Ex-Havaldar No. 14675948 Ramesh Kumar Misra was enrolled in the Army on 25.9.1976 in the apprentices category. He was transferred to men's service on 30.8.1978 in the trade of instrument machine group B, and promoted to the rank of NK Group B with effect from 1.1.1988. He passed diploma upon which he was re- mustered from Group B to A and appointed to the rank of HMT in Group A from his initial rank of Naik on 22.1.1990 and subsequently promoted to the substantive rank of Havaldar in Group B with effect from 1.11.1994. He was admitted in Base Hospital for medical re-categorisation. After discharge from the hospital, he absented himself without leave w.e.f. 26.10.1996 to 1.12.1996. Due to his absence without leave, his appointment of HMT was relinquished on 26.10.1996 and he was awarded punishment, 'servere reprimand' and 14 days pay as fine under section 39 (a) of the Army Act. He was discharged from service on 31.1.1997 on the ground of his medical category lower than 'AYE' and not upto prescribed medical military physical standard under item III (V) of table annexed to Rule 13 (3) Army Rules, 1954. At the time of his discharge, he was holding substantive rank of Havaldar in Group B. The Audit Authority granted him pensionary benefit in the rank of Naik by PPO dated 12.2.1998. His case was referred to PAO (OR) EMT with revised LPC cum –Date sheet for grant of pensionary benefit in the rank of Havaldar Group B. The Authority returned the case un-attended stating that the individual was reverted to the rank of Naik on 26.10.1996 from HMT. In addition to service pension, the petitioner was also granted disabled pension by PPO dated 14.12.1998.

4. Petition filed writ petition no. 33682 of 1998 which was disposed of by this Court on 23.10.1998 with a direction to decide petitioner's representation within two months. In compliance Ministry of Defence, Government of India vide its letter dated 7.1.1989 addressed to petitioner with copy of EME Record rejected the representation. The Government of India, Ministry of Defence reverted to each of his grievance as follows

"(a) Discharge from Service by Cheating. On being down graded to permanent Low Medical category, your officer Commanding had not recommended your further retention in service based on your day to day performance. While not recommending your retention in service, your officer Commanding had stated that you had lost the will to work and refused to do even light duties. He had also stated that you had become mentally weak and unable to take even normal pressures. Hence, you were discharged from service being placed in Medical Category lower than

"AYE" and not up to the prescribed. Military Physical standard. Hence no injustice/cheating :has been done to you.

(b) Non endorsement of Qualification in DC. As per procedure, civil education qualifications recorded in service documents can only be endorsed in the discharge certificate (DC). Since as per Service Documents, your qualification was matriculation and no record of your passing intermediate/BA classes is available with the Government, your qualification was endorsed as Metric in your Discharge Certificate. Moreover, diploma in Computer Programming and instrument Mechanic Technical were obtained by you through Army Institutions and as such, the same can not be recorded as civil education qualification.

(c) Less Disability Percentage, Degree of disablement was assessed by a duly constituted medical board of doctors after physically examining you. Hence your alleged grievance on this aspect is misconceived.

(d) Award of Punishment/Hard Punishment. On being discharged from Base Hospital, Delhi Cantt. You remained absent from 26 Oct 96 to 01 Dec 96. For this you were tried by your Commanding Officer under Army Act Section 39 (a) and awarded punishment of 'Service Reprimand' and '14 days pay fine' which is one of the minimum punishments awarded to an NCO. However, due to your Absence Without Leave from duty, your paid acting rank of HMT was automatically relinquished in terms of Army Instruction 84/68.

(e) Non Payment of Daily Allowances. As per procedure, the person proceeding on discharge/retirement are sent home after finalizing their accounts. The same procedure would have been followed in your case also. However, if you think that some dues have not been settled, you are advised to forward the details of the same along with copy of Part II Order to enable us for taking up the case with audit authorities.

(f) Non-Disposal of complaints repeated physical assault (Sodomy),

Complaint made by you against physical and mental harassment seems to be a wild allegation. The factual position of the allegation can not be proved at this belated stage without medical examination report. Hence your allegation appears to be afterthought.

(g) Non Provision of Police Protection: Allegations made by you regarding provision of police protection seems to be wild allegations. For personal relationship/enmity with some relatives, it is neither desirable nor possible that military should be involved. However, if you have some fear of anti social elements, police authorities may be approached.

(h) Non Payment of Due Pension/Arrears and AGI disability benefit, Concerned audit authorities have been approached for early settlement/finalization of your claim vide Army Headquarters letter No. B/12048/584/LN/EME Pers dated 30 Oct. 98. Payments will be made to you once the claims are adjudicated by the audit authorities.'

Petitioner filed second writ petition no. 29347 of 1999 which was again disposed of with the direction to decide petitioner's statutory complaint within three months time. The said statutory complaint was decided for and on behalf of Director General, EME by its letter dated 29.9.1999 addressed to petitioner. A decision was taken and communicated in the same terms as above by the Government of India in its letter dated 7.1.1999 except on the complaint of non payment of daily allowance and other dues and non payment of due pension/arrears and AGI disabled benefit. In respect of these two matters the Director General, EME took the following decisions :

"(e) Non Payment of Daily Allowance and other dues. The details of outstanding dues are as under:

(i) Amount on account of 30 days leave encashment for the year 1989 being released in consultation with audit authorities.
(ii) Daily Allowances (DEFENDANT No.1 APPELLANT) for 56 days being released in consultation with audit authorities.
(iii) Amount on account of ration money & CILO with effect from 10 Mar 95 being released in consultation with audit authorities.
(iv) A sum of Rs.9684/- and Rs.2265/- on account of Ist and 2nd installment of Vth Pay Commission have been remitted to you through money order.
(v) Rest of the entitled dues being released in consultation with audit authorities.

(h) Non payment of due pension/arrears and AGI disability benefits.

(i) Service pension of the rank of Naik has already been granted to you vide Pension Payment Order No. S/011691/98 dated 12 February 1998. The case for grant of pension to the rank of Havaladar to you is under consideration with audit authorities. The same will be granted to you once the final decision in this regard is taken.
(ii) Disability pension @ Rs.90/- per month with effect from 01 September 1997 to 30Jul 2002 has been granted to you vide CCDA (Pension) Allahabad Pension Payment Order No. D/E/451/98 as per recommendation of the Release Medical Board.
(iii) A sum of Rs.37206/- (Rupees thirty seven thousand two hundred six only) on account of Army Group Insurance Maturity Benefits has been paid to you vide Cheque No. 06559 dated 4Februrary 1988.
(iv) A sum of Rs.35494/- (Rupees thirty five thousand four hundred ninety four only) on account of disability cover under Army Group Insurance Scheme has been paid to you vide cheque no. 93117 dated 10 November, 1998'

5. From the aforesaid decision on representation in para d of the CA of Lt. A.K. Bhosle, ARO EME Records, Secundrabad, it appears that his matter with regard to pension to the rank of Havaldar was not finally decided as the matter was pending with the Audit Authorities. This case was resubmitted to PAO (OR) EME for the third time vide letter dated 14.10.2000 for rendering their audit report and onwards submission to EME Records. The PAO (OR) EME has transmitted the case to CDA Secundrabad on 24.10.2000 alongwith Audit report which has in turn forwarded the matter to Army Headquarters vide letter dated

20/21/11/2000. However, a decision has not been taken in the matter so far.

6. Additional Standing Counsel for Union of India was granted time on 15.3.2002, 8.4.2002, 20.9.2002 but he has of the been able to produce the decision taken by Army Headquarters with regard to the award of pension applicable to post of Havaldar. In his written submission he stated that after award of punishment to petitioner under Section 39 (a) of the Army Act, petitioner was automatically relinquished as Havaldar (HMT) as per Army Instruction No. 84 of 1968, and that petitioner is not entitled to pension in the rank of Havaldar. He submits that petitioner has not challenged the order dated 7.1.1999 passed by Central Government and that he cannot file second petition for the same relief.

7. The Court is unable to accept the submission that after a decision was taken by the Central Government and Director General EME on petitioner's representation vide letters dated 7.1.1999 and 21.9.1999, the case pleaded by him for award of pension of the rank of Havaldar has been concluded and that no further decision is required to be taken by the Army Headquarters in the matter. A perusal of the aforesaid decision, on petitioner's representation, show that the question with regard to pension to the rank of Havaldar was reported to be under consideration with the audit authorities and that an assurance was given that as soon as final decision is taken, the petitioner shall be informed. It appears, however, that inspite of the report sent by the audit authorities, the army Headquarters has not taken decision in this regard, nor the court was informed with any decision taken inspite of several opportunities given to the counsel for respondents.

8. Petitioner was substantively promoted to the rank of Havaldar Group B with effect from 1.11.1994. He was admitted for recategorisation to the Base Hospital and after discharge remained absent without leave for 37 days for which he was awarded punishment of 'severe reprimand' and 14 days pay as fine under section 39 (a). A perusal of section 39 shows that any person who commits any of the offence enumerated in the section shall, on conviction by Court Martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is mentioned in the Act. Petitioner was awarded a lesser punishment of severe reprimand and fine of 14 days pay. He was not awarded any further punishment including the punishment of reduction in rank. The respondents have not denied petitioner's assertion in para 15 of his writ petition that petitioner had not been absent without leave in his entire period of service except for the aforesaid period of which he was given the punishment. The Army Instruction No. 84/68 relied upon in para 3A of the Counter Affidavit as well as the letters deciding petitioner's representation have not been enclosed to the counter affidavit. These instructions were not placed on record by the counsel for respondents. In any case these instructions, which are in the nature of instructions, to the Army Officers to carry out the Act, Rules and Regulations, cannot over ride the provisions of the Act. Reduction from the rank to which petitioner was substantively promoted, cannot be directed except by way of punishment in the absence enumerated either under section 34 to 70 under

Chapter VI or by way of punishment awarded by court martial in accordance with section 71(1) to 89 provided in Chapter VII of the Act. The penal reduction from pay and allowances has been provided in section 90 to 100 under Chapter VIII. The Act or the Rules does not give respondents any such power to automatically treat his promotion to the substantive rank of Havaldar to have been relinquished on the award of punishment under section 39(a) of the Act.

9. The Army Headquarter has been repeatedly approaching the Audit Authorities to award petitioners' petitioner pension of the rank of Havaldar but for the reasons which have not been disclosed to the Court, Audit Authorities have not given requisite report and that the Army Headquarters has not taken final decision in the matter so far. The petitioner was discharged from service on 31.8.1997 on account of his lower medical category. In his document relating to retirement, he was shown to have retired from the rank of Havaldar. There is no pleading or document to show that any proceedings were initiated to revert petitioner from his substantive rank of Havaldar to the rank of Naik. He was not given any opportunity before he was sought to be relinquished from his substantive appointment of Havaldar. The respondents did not follow the procedure provided under the Army Act, 1950, and the Army Rules, 1954 to reduce him to the rank of Naik.

10. Counsel for respondents made a faint submission challenging the jurisdiction of the Court to decide the mater as the cause of action, according to him, did not arise in the territory of State of Uttar Pradesh. In ***Dinesh Chandra Gahtori Vs. Chief of Army Staff and another (2001) 2 UPLBEC 1275*** supreme court held that Chief of Army Staff may be sued anywhere in the country and thus this Court has jurisdiction to entertain, consider and finally decide the writ petition filed in the year 2001. I am unable to accept the contention that Dinesh Chandra Gahtori case has not taken into consideration, the earlier case of Supreme Court with regard to territorial jurisdiction of the High Court. The object and purpose of Dinesh Chandra Gahtori case is not far to seek. Army personnel can be posted any where in the country or abroad, in war or in peace time according to need of their deployment. They can be subjected to actions taken under Army Act, 1950 at any place where they are serving. They may not be able to have easy access to jurisdiction at such places where action may have been taken against them. In the circumstances the view that the Chief of Army Staff may be sued any where in the country appears to be just and reasonable and cannot be said to have ignored the earlier decisions of the Apex Court.

11. Petitioner's representation with regard to lower medical category have been considered both by the Central Government as well as Director General EME, where it was found that the degree of disentitlement was assessed by the duly constituted Board of Doctors for physical examination, petitioner has not challenged the finding of the Medical Board or the aforesaid letter deciding his representation. The Medical Board found him suffering from Paranold Schizophrenia, recurrent dislocation (LT) Shoulder (OPTD), and Tear and Cruciate Ligament and Medical Meniscus (RT) Knee (OPTD). The first and second

disabilities were considered by Release Medical Board as neither altributable to nor aggravated by military service, however, third disability was considered as aggravated due to stress and strain of service assessed compositely at 40% for two years and he was granted Rs.90/- per month as disability person, after adjudication, for five years with effect from 01 September, 1997 and paid cheque on account of disability under AGI Scheme. Petitioner was unable to point out any error in law or violation of any provision of Act, Rules or Regulations in making the aforesaid assessment of disability pension.

12. In the aforesaid facts and circumstances of the case the writ petition is allowed. It is declared that the petitioner has retired from substantive rank of Havaldar group A on 31.8.1997 and is entitled to pension and other benefits as having retired from the rank of Havaldar, (MT) group A. The respondents are directed to re-fix his pension accordingly, and to pay his entire arrears, with simple interest as prevalent @ 10% per annum. The petitioner shall be entitled to cost of this writ petition.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 17, 2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 29545 of 2001

Suresh Chandra and others ...Petitioners
Versus
State of U.P. and others...Respondents

Counsel for the Petitioners:
Sri B.K. Singh Raghuvansi
Sri Anilanand Misra

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service Law- Daily Wager, working w.e.f. 1982 with Gandak Region Irrigation Department- service terminated in the year 1990 due to non availability of work- admittedly new hands appointed in 1991 without considering the experience of Petitioner such action of authorities found in utter violation of Article 14 of the Constitution- Principle of last come first go' not followed direction issued to maintain a seniority list of Daily Wagers by serving the copy individually to all the Daily Wagers- utilize the same either in appointment of Daily Wagers or on Regular basis.

Held- Para 10

The respondents have felt the need of engagement of daily wage muster roll employees and had taken fresh hands in the year between 1992 and 1997. In the circumstances, petitioner's termination of service is held to be violative of Article 14 of the Constitution of India and against the principles of natural justice equity, justice and good conscience. In case the respondents require to engage fresh hands, petitioners should have been given an opportunity to serve in the divisions.

For the reasons aforesaid, the writ petitions are allowed. The impugned order dated 7.7.2001, terminating petitioners' services with effect from 16.6.2001 passed by the Executive Engineer, Drainage Khand, Gorakhpur is set aside without any benefit or back wages or any consequential benefit. The respondents are directed to draw a list of petitioners as well as the employees engaged by them on daily wages in accordance with their date of initial

engagements. The petitioners and other employees, so placed in the list, will be offered daily wage employment or regular appointments if available and required by the divisions, strictly in accordance with their seniority in the list. The list, so drawn, shall be sent to each of petitioners, separately and published in news papers.

Case law discussed:

1988(57) FLR 1976 (SC)
1997 (76) FLR 176
1999 (83) FLR 497
1991 LIC 241

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

1. By these petitions, 48 petitioners in writ petition no. 29545 of 2001 and one petitioners, namely, Anand Kanan in writ petition no. 29547 of 2001, have prayed for quashing the news paper publication dated 7.7.2001 by which they have been intimated that their services have been terminated with effect from 16.6.2001. They have also prayed for a direction to the respondents not to interfere in peaceful functioning of petitioners as Class IV Muster roll employee in the irrigation department and to pay their salary.

2. I have heard Sri B.K. Singh Raghuvansi, learned counsel for petitioners and learned standing counsel for respondents.

3. Brief facts, giving rise to these petitioners, are that petitioners were engaged as daily waged muster roll employee in Gandak Region of Irrigation Department in its various division in the year 1982 and onwards. They were disengaged, including other employees, totaling 58 daily waged muster roll employees in the year 1990 on the ground of non availability of work. Petitioners filed writ petition 45755 of 1999 and Writ Petition No. 45752 of 1999 which were disposed of by this Court on 21.3.2001 with a direction to dispose of their representation keeping in view the principle of last come first go. In compliance of the said orders, the Executive Engineer, Drainage Khand, Gorakhpur, engaged petitioners by his order dated 1.6.2001 pending decision by the State Government. By a subsequent order passed by the Chief Engineer (Gandak), Irrigation Department U.P., Gorakhpur, impugned in these writ petitions, the services of petitioners were terminated with effect from 16.6.2001.

4. Learned counsel for petitioners submitted that each of petitioners had completed 240 days of service in a calendar year during the period of their engagements from 1982 to 1990. A chart giving days of petitioners engagement from 1986 to 1991 has been annexed as annexure RA-1 to the rejoinder affidavit which has not been denied by the respondents. Petitioners, however, were retrenched without giving any notice and retrenchment compensation as well as informing the State Government as provided under Section 6-N of the U.P. Industrial Dispute Act, 1947. After terminating the services of petitioners in the year 1991, respondents engaged fresh hands as daily waged employees. Petitioners were not given an opportunity to serve and that the principle' last come first go' was not followed causing hostile discrimination between petitioners and the persons, who were engaged subsequently.

5. Learned standing counsel, appearing for the respondents, stated that petitioners are not class IV employees. They were engaged as muster roll daily

waged employee from time to time when their services were required. The Superintending Engineer (Gandak) Flood Circle, Gorakhpur was forced to issue letter dated 20.4.1999 to the Chief Engineer Gandak on account of the pressure put by the employees' Union to solve the problems of employees. The letter, however, nowhere states that petitioners have worked for more than 240 days in a calendar year. Petitioners never worked continuously for a period of eight years. Their representations were decided pending decision by the State Government, the Chief Engineer subsequently, after receiving the orders from higher authorities and going through the contents of the letter, dispensed with their services as they were not entitled to be re employed.

6. The questions whether petitioners' services were terminated as against the provisions of the U.P. Industrial Disputes Act, 1947 and whether they were completed 240 days in a calendar year, are questions of facts which can be adjudicated upon by the forum provided by the said Act. These facts cannot be investigated in writ jurisdiction. In Des Raj and others vs. State of Punjab and others, 1988 (57) FLR 176 (SC), the Supreme Court in the context of the activities of irrigation department in the State Government of Punjab, held that the Irrigation Department is an 'industry' and that the services of workmen- employees could not have been terminated without following the conditions precedent to the retrenchment and for which such workers had right to approach the labour court. The Supreme Court has, however, in its latter decision Executive Engineer (State of Karnataka) vs. K. Somasetty and others, 1997 (76) FLR 176, held that Irrigation Department performs sovereign functions and cannot be treated to be an 'industry'. This Court in State of U.P. vs. Presiding Officer, Industrial Tribunal (V), Meerut and another (1999 (83) FLR 497) had chosen to follow the decision in Des Raj's case (supra), treating it to be correct decision. By an order dated 20.12.2002 in Civil Misc. Writ Petition No. 52256 of 2002, between State of U.P. and another vs. Santosh Kumar and another, the matter has been referred by this court to a larger Bench. These development, however, need not be detailed further to decide the issue raised in the present writ petitions.

7. The fact that petitioners completed 240 days in a calendar year has not been specifically denied and no reply has been given to the rejoinder affidavit which was filed on 14.3.2002. Petitioners could have approached the forum provided under the U.P. Industrial Disputes Act, 1947 for adjudication of their rights arising out of their illegal retrenchment of their services. A writ petition for the relief claimed, which could have been adjudicated upon by the Labour Court, is not maintainable in view of the Full Bench decision of this Court in Chandrama Singh vs. Managing Director, U.P. Co-operative Union, 1991 LIC. 2413.

8. The fact, however, remains that the work was still available with the respondents in the divisions and that inspite of Government Order dated 6.5.1992 specifically directing the department not to engage any muster roll daily wagers, the divisions continue to engage such employees. In the report dated 2.7.2001, the Executive Engineer

informed the Chief Engineer (Gandak). Irrigation Department Uttar Pradesh, Gorakhpur and thereafter, the Chief Engineer (East) in his report dated 11.7.2001, annexed as annexure RA-2 to the rejoinder affidavit, reported that between 1992 and 1997, the following daily wages employees were engaged in different divisions:-

1. Gandak Sinchai Kaarya Mandal Pratham, Gorakhpur 07

2. Gandak Sinchai Karya Mandal Tritiya,. Gorakhpur 12

3. Gandak Flood Region, Gorakhpur 03

4. Gandak Flood Region, Basti. 06

9. In view of the above, the petitioners, who had already served in the department, were, as such, discriminated in employment. In Ghaziabad Development Authority and others vs. Vikram Chaudhary and others (1995) 5 Supreme Court cases 210, considering the similar question with regard to daily waged employees and Ghaziabad Development Authority and their retrenchment as against the provisions of U.P. Industrial Disputes Act, 1947, the apex court held that since petitioners', in the said case, were temporary daily wage employees, the question of making them regular employees and regular pay does not arise so long as regular posts are not available, but that in the event, the authority is to terminate their services, the principle of 'last come first go' should be followed and, in the event of their being reemployment, preference should be given to the displaced employees. The Supreme Court approved the observations of the High Court which were found to be inconsistence with the well established principles of natural justice and equity, justice and good conscience. It was also directed that until regular posts are available, the workmen shall be paid minimum wages under the statute, if any, or the prevailing wages in the locality.

10. In the present case, petitioners have been agitating their rights since their services were illegally terminated. They cannot, therefore, be denied the relief on the ground that they were not employed after 1990-91. The respondents have felt the need of engagement of daily wage muster roll employees and had taken fresh hands in the year between 1992 and 1997. In the circumstances, petitioners' termination of service is held to be violative of Article 14 of the Constitution of India and against the principles of natural justice, equity, justice and good conscience. In case the respondents require to engage fresh hands, petitioners should have been given an opportunity to serve in the divisions.

11. For the reasons aforesaid, the writ petitions are allowed. The impugned order dated 7.7.2001, terminating petitioners' services with effect from 16.6.2001 passed by the Executive Engineer, Drainage Khand, Gorakhpur is set aside without any benefit or back wages or any consequential benefit. The respondents are directed to draw a list of petitioners as well as the employees engaged by them on daily wages in accordance with their date of initial engagements. The petitioners and other employees, so placed in the list, will be offered daily wage employment or regular appointments if available and required by

the divisions, strictly in accordance with their seniority in the list. The list, so drawn, shall be sent to each of petitioners, separately and published in news papers.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J

Civil Misc. Writ Petition No. 53411 of 2002

Chandra Pal Singh ...Petitioners
Versus
State Public Service Tribunal, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Yogesh Agarwal

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Service Law-termination order on the ground a particular record not returned by the Petitioner–inquiry officer recorded specific finding that there is no material regarding hand over of record to the petitioner- State Tribunal ignored this material document- direction issued for reinstatement.

Held- Para 5

We are surprised to note that the Tribunal has not apparently seen the enquiry report where the finding of fact is that there is no material to show that the record in question had been handed over by T.B. Singh to the petitioner. Hence the Tribunal has clearly made an observation (quoted above) which is baseless. We have therefore to hold that the original record in question has not been handed over by Sri T.B. Singh to the petitioner and there was no material to show that that was done.

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

1. We have heard the learned counsel for the petitioner and learned Standing Counsel.

2. The petitioner has challenged the impugned order of the U.P. Public Service Tribunal dated 20.9.2002.

3. The petitioner was a Stenographer in the office of the Trade Tax Department, Allahabad. He was charge sheeted vide charge sheet dated 19.2.2000 vide Annexure 4 to the writ petition to which he gave reply vide Annexure 5 to the writ petition. Thereafter an enquiry was held. True copy of the enquiry report dated 22.7.2000 is Annexure 6 to the writ petition. It has been observed by the enquiry officer that the then record keeper T.B. Singh appears to be responsible for disappearance of the record relating to a particular trader M/s M.B. Traders. The enquiry officer has recorded a finding that there is no material to show that T.B. Singh handed over the record to the petitioner, Chandra Pal Singh.

4. The Tribunal in its impugned order Annexure 1 to the writ petition has observed "As per finding of fact the original record relating to a particular trader for a particular year was given by the record keeper to the petitioner who did not return the same back to the record keeper in original. He, rather, gave back only a photocopy thereof."

5. We are surprised to note that the Tribunal has not apparently seen the

enquiry report where the finding of fact is that there is no material to show that the record in question had been handed over by T.B. Singh to the petitioner. Hence the Tribunal has clearly made an observation (quoted above) which is baseless. We have therefore to hold that the original record in question has not been handed over by Sri T.B. Singh to the petitioner and there was no material to show that that was done.

6. In view of the above finding of the enquiry officer the impugned order of the Tribunal dated 20.9.2002 as well as the order of the Deputy Commissioner Trade Tax dated 18.10.2000 and order of the Commissioner Trade Tax U.P. dated 19.5.2001 are vitiated in law and are hereby set a side and the impugned orders are quashed.

7. The petition is allowed. The petitioner shall be reinstated within a month of production of a certified copy of this order before the authority concerned in accordance with law. He shall also be paid back salary from the date of termination to the date of reinstatement and such payment shall be made within two months of production of a certified copy of this order before the authority concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 41390 of 2001

Syed Vequar Ahmad ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- service law- promotion- denied- due to adverse entry- representation against pending- held promotion can not be denied- G.O. Dated 04.05.95 relied on.

Held- Para 4

It has been admitted in paragraph 10 of the same that in view of G.O. dated 4.5.1995 if a representation is pending against an adverse entry the said adverse entry will not come in the way of promotion. It has also been admitted in paragraph 8 that the entries for 1995-96 have been deleted.

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

Heard counsel for parties.

2. The petitioner has prayed for a writ of mandamus directing that he be considered for promotion to the post of Assistant Excise Commissioner. The petitioner is presently Excise Inspector. He was selected by the U.P. Public Service Commission in 1985 and has been

working since then. 12 posts of Assistant Excise Commissioner fell vacant in December 2000, which were to be filled in by promotion from Excise Inspectors. The petitioner made a representation vide Annexure 3 to the writ petition requesting for promotion. He was awarded special entry for the calendar year 1990-91 and 1991-92.

3. However, he was not considered for promotion because he was awarded adverse entries for the years 1994-95 vide Annexure 4 the petitioner filed a writ petition, being writ petition no. 15315 of 1996 which is pending in this Court and the impugned adverse entry has been stayed vide order dated 1.5.1996.

4. As regards the two adverse entries for the year 1995-96, dated 10.10.1996 and 24.12.1996, vide Annexures 5 and 6, one was awarded because he did not participate in the meeting of 19.7.1996, and the other because he did not participate in the meeting of 14.12.1996 along with the register. The petitioner made representations against these entries vide Annexure 3. The petitioners' representations against those entries have been allowed and those entries have been quashed, vide orders dated 12.5.2001, Annexure 7 to the petition.

5. A counter affidavit has been filed by the respondents and we have perused the same. It has been admitted in paragraph 10 of the same that in view of G.O. dated 4.5.1995 if a representation is pending against an adverse entry the said adverse entry will not come in the way of promotion. It has also been admitted in paragraph 8 that the entries for 1995-96 have been deleted.

6. Presently there is no material against the petitioner since the adverse entry for 1994-95 has been stayed by this Court. Hence we allow the writ petition and direct that the petitioner shall be considered for promotion as Assistant Excise Commissioner when the next D.P.C. meets. However, this order will be subject to the decision in writ petition no. 15315 of 1996.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 4.2.2003

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

Habeas Corpus Writ Petition No. 54624 of 2002

Smt. Shahana @ Shanti ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Sarvesh

Counsel for the Respondents:
Sri Mohd. Shabbir
A.G.A.

Constitution of India- Article 226- Habeas Corpus- even a minor cannot be detained in Government Protective Home against her wishes- petitioner has desired to go with Sunil Kumar. Besides this according to the two medical reports i.e. of the Chief Medical Officer and LLRM. Medical College, Meerut the petitioner is certainly not less than 17 years and she understands her well being and is also capable of considering her future welfare. As such her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.1996 passed by the Magistrate directing her

detention till the party concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed.

Held- Para 10

In the instant case Magistrate had directed the petitioner to be released and to go to place of her choice. However, a revision was preferred against the said order and the Revisional Court directed detention of petitioner in Nari Niketan Bareilly. Undisputedly, the petitioner is not accused in any offence. Assuming that her age is about 17 years she cannot be detained against her will as provisions of Sections 97 and 171 Cr.P.C. do not justify detention of the petitioner. No other provision has been shown under which the petitioner could be detained against her wishes. Therefore, we are of the view that detention of the petitioner in Nari Niketan Bareilly is illegal and order directing her detention passed by the Sessions Judge, Bareilly in Criminal Revision No. 605 of 2002 being against law is quashed. The respondent no. 2, Superintendent, Nari Niketan, Bareilly is directed to release the petitioner forth with to go to place of her choice.

Case law referred:

1983(2) ACC, 168
1997 JIC, 473 (All.)
1982 (19) ACC. 32
1995 (1) JIC, 189

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

1. The petitioner has filed this petition for issue of a writ, order or direction in the nature of habeas corpus commanding the respondents to set her at liberty immediately and a writ. Order or direction in the nature of mandamus commanding the respondent no.2 to produce her before this Court.

2. It is alleged by the petitioner that she is the wife of Damodar Das with whom she married in the month of February, 2002 with her own free will and she changed her name as Shanti and started living with her husband. After her marriage with Damodar Das she conceived and is in a family way. The petitioner went to her parental place in the month of May, 2002 where she was beaten and threatened with dire consequences for marrying a Hindu boy. She was asked to severe all her relations with Damodar Das. When she refused to do so, she was assaulted and threatened that her husband would be sent to jail. However, the petitioner escaped from her parental house and reached her in laws place on 18.8.2002 and after some time she started living at Pilibhit. Thereafter, her father, uncle and brother along with some other relatives came to the house of petitioner and scolded her saying that she had lowered down their image and reputation. They tried to forcibly take her away, but she was saved by the neighbours. The petitioner along with her husband went to the police station to lodge report of the occurrence, but her report was not written by the police. She was very much disappointed and shocked. Then she filed a complaint against the accused persons, which was registered as Case No. 1543 of 2000 under Sections 323, 304, 504 and 452 IPC and got her statement recorded under Section 200 Cr.P.C. before the Additional Chief Judicial Magistrate IInd, Pilibhit. The father of the petitioner lodged a FIR against her husband under Sections 363, 366 and 376 IPC. In the said case her husband was released on bail on 1.11.2002. The petitioner was detained by the police and therefore her father-in-law made an application before the Additional

Chief Judicial Magistrate, VII Bareilly in connection with Case Crime No. 335 of 2002 under Sections 363, 366 and 376 IPC, P.S. Nababganj, district Bareilly and also made an application for the custody of the petitioner. The A.C.J.M., VII Bareilly passed an order on 30.9.2002 summoning the petitioner fixing 30.10.2002. However, on the request of father-in-law of the petitioner the case was fixed for 7.10.2002 and thereafter on 8.10.2002. On 8.10.2002 the Magistrate passed an order directing the police to set the petitioner at liberty to go to place of her choice. Father and brother of the petitioner filed revision against the order of the Magistrate before Sessions Judge. The Revisional Court stayed the order of the Magistrate and the petitioner is languishing in Nari Niketan where she had been tortured and beaten.

3. A counter affidavit was filed by Km. Tahira Begum, Incharge Assistant Superintendent Nari Niketan district Bareilly deposing that the petitioner was admitted in Nari Niketan by the order of the Court and she had not been tortured or ill treated.

4. Heard Sri Sarvesh, learned counsel for the petitioner, Mohd. Shabbir, learned counsel for respondent no. 3 and learned A.G.A. for respondents no. 1 and 2 and perused the record.

5. It is not disputed that the petitioner was produced before A.C.J.M. Court No. 7, Bareilly in connection with Case Crime No. 335 of 2002 under Sections 363, 366 and 376 IPC on 8.10.2002. The learned A.C.J.M. perused the case diary and medical report. According to medical report the age of the petitioner was found as 17 years. Considering the above age ascertained on ossification of bone test and giving grace of two years on both sides and the statement of the petitioner the learned Magistrate directed to release the petitioner to go to place of her choice, vide order dated 8.10.2002, Annexure-3. It is also not disputed that thereafter namely, respondent no. 3 father of the petitioner filed Criminal Revision No. 605 of 2002 before the Sessions Judge, Bareilly. The Revisional Court on 11.10.2002 passed following order :

"Heard. Admit.

Issue notice fixing 23.10.2002 for disposal Meanwhile, Smt. Shehana will remain in Nari Niketan. Transfer to the Court of Special Judge S.C. & S.T. Act."

6. It is also clear from the counter affidavit of Km. Tahira Begum, respondent no. 2 that the petitioner is detained in Nari Niketan by the order of the Revisional Court. It is also not disputed that the above revision has yet not been finally decided.

7. The contention of the learned counsel for the petitioner was that the petitioner was not an accused in any case and she is major and had married with Damodar Das with her own free will and she cannot be detained in Nari Niketan under any law. That the petitioner is above 19 years of age and in medical report, her age was wrongly assessed as 17 years. He also placed reliance on Division Bench decisions of this Court in Tara Chand Seth vs. Superintendent, District Jail, Rampur and others, 1983 (2) ACC 168, Smt. Raj Kumari vs. Superintendent Women Protection House, Meerut and others 1997 JIC 473 (All),

Smt. Parvati Devi vs. State of U.P. and others, 1982 (19) ACC 32 and Single Judge decision in Pushpa Devi @ Rajwanti Devi vs. State of U.P. and others (1995)1 JIC, 189.

8. In the case of Parvati Devi (supra) the mother of Smt. Parvati Devi lodged a report under section 366 IPC against Jokhu alleging that he had enticed away Smt. Parvati Devi, who was a minor girl. The police arrested Jokhu and also recovered Smt. Parvati Devi from his house and produced Smt. Parvati Devi before the Judicial Magistrate, Handia and prayed for appropriate orders for her custody. The Magistrate took steps to obtain medical report with regard to age of Smt. Parvati Devi and directed that in the meantime she be kept in the Nari Niketan, Khuldabad, Allahabad. On the above fact it was held that the confinement of Smt. Parvati Devi in Nari Niketan, Khuldabad, Allahabad against her wished could not be authorised either under section 97 or under Section 171 Cr.P.C. The respondents failed to bring to the notice of the Bench any legal provision where under the Magistrate has been authorised to issue direction that a minor female witness shall, against her wishes, be kept in Nari Niketan.

9. In the case of Smt. Raj Kumari (supra) the mother of Raj Kumari moved an application before the City Magistrate, Bulandshahr for issuing search warrant and for recovery of Raj Kumari. The City Magistrate issued search warrant under section 97 Cr.P.C. The petitioner was recovered and the City Magistrate ordered her detention in Government Women Protective Home, Meerut. Her medical examination was also got done and according to medical report the age of the petitioner was about 19 years. While the petitioner was detained in the Government Protective Home, filed Habeas Corpus Petition. Considering the various decisions of the Apex Court and of this Court Division Bench of this Court held as below:-

"In view of above it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter petitioner has desired to go with Sunil Kumar, besides this according to the two medical reports i.e. of the Chief Medical Officer and LLRM Medical College, Meerut, the petitioner is certainly not less than 17 years and she under stands her well being and is also capable of considering her future welfare. As such we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed.

10. In the instant case Magistrate had directed the petitioner to be released and to go to place of her choice. However, a revision was preferred against the said order and the Revisional Court directed detention of petitioner in Nari Niketan, Bareilly. Undisputedly, the petitioner is not accused in any offence. Assuming that her age is about 17 years she cannot be detained against her will as provisions of Sections 97 and 171 Cr.P.C. do not justify detention of the petitioner. No other provision has been shown under which the petitioner could be detained against

her wishes. Therefore, we are of the view that detention of the petitioner in Nari Niketan Bareilly is illegal and order directing her detention passed by the Sessions Judge, Bareilly in Criminal Revision No. 605 of 2002 being against law is quashed . The respondent no. 2, Superintendent, Nari Niketan, Bareilly is directed to release the petitioner forth with to go to place of her choice.

11. Copy of this order may be made available to the learned counsel for the petitioner within 48 hours on payment of usual charges. Office is also directed to send copy of this order immediately to Superintendent, Nari Niketan, Bareilly for information and compliance.

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2003

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

Criminal Revision No. 66 of 2003

Sunil Kumar ...Revisionist
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Revisionist:
Sri K.M. Misra

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

Code of Criminal Procedure- Section 156 (3)- Magistrate being satisfied with Prima feci case made out- directed the S.O. to Register investigate and submit its report u/s 173 Cr.P.C.- order challenged on the ground that such direction amounts to submit charge sheet at any cost- held – such apprehension base less- in either case the Police has to submit its either final report under section 169 Cr.P.C. or submit charge sheet under section 173 Cr.P.C.

Held- Para 2

The relevant provision of Section 173 Cr.P.C. shows that as soon as the investigation is completed, the officer Incharge of the police station shall forward the same to a Magistrate empowered to take cognizance of the offence on a police report. It necessarily does not mean the submission of the charge sheet. The charge sheet shall be submitted only if the case is made out against the accused. If no case is made out, the police has to proceed under section 169 Cr.P.C. and submit a final report. In both the circumstances, the police has to submit a report under section 173 Cr.P.C. It may either be in the form of charge sheet or in the shape of final report. Thus this apprehension, on the part of revisionist, that the order of the Magistrate directing the police to submit a report under section 173 Cr.P.C. would mean the direction to submit a charge sheet, is without basis.

(Delivered by Hon'ble K.N. Sinha, J.)

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

2. The brief facts, giving rise to this revision, are that Respondent no. 2 Smt. Paiti filed an application under Section 156 (3) Cr.P.C. for registration and investigation of the case. The Magistrate after going through the application found that the application, discloses a cognizable offence and he accordingly directed the concerned police of Police Station Jaswant Nagar, Etawah to register the case, investigate and submit a report under section 173 Cr.P.C. This revision has been filed against the said order, only

on the point that the Magistrate has directed to submit a report under section 173 Cr.P.C. which will mean that the Magistrate directed the police, police station Jaswant Nagar to submit a charge sheet . The learned counsel for the revisionist has submitted that only charge sheet can be submitted under Section 173 Cr.P.C. The relevant provision of Section 173 Cr.P.C. shows that as soon as the investigation is completed, the officer in charge of the police station shall forward the same to a Magistrate empowered to take cognizance of the offence on a police report. It necessarily does not mean the submission of the charge sheet. The charge sheet shall be submitted only if the case is made out against the accused. If no case is made out, the police has to proceed under section 169 Cr.P.C. and submit a final report. In both the circumstances, the police has to submit a report under section 173 Cr.P.C. It may either be in the form of charge sheet or in the shape of final report. Thus this apprehension, on the part of revisionist , that the order of the Magistrate directing the police to submit a report under section 173 Cr.P.C. would mean the direction to submit a charge sheet, is without basis. The impugned order does not necessarily direct the I.O. to submit a charge sheet. The I.O. shall, therefore, be free to submit a charge sheet or a final report after completion of the investigation.

3. With the above observation, the revision is disposed of finally.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 20105 of 2000

S.A.K. Roy ...Petitioner
Versus
District Magistrate, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri R.O.V.S. Chauhan
Sri Vishnu Gupta

Counsel for the Respondents:
Sri R.G. Padia
Sri Prakash Padia
Sri K.K. Roy
Sri Ramesh Chandra Singh
Sri Ram Harsh
Sri P.K. Gupta
Sri U.K. Uniyal
S.C.

Constitution of India, Article 226- Extraordinary jurisdiction- Petitioner not approached with clean hand- guilty of suppressions material facts not entitled for any relief claimed for- Petition rejected.

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

1. We have heard learned counsel for the parties.

2. This writ petition has been filed praying for a writ of certiorari to quash the auction notice dated 7.3.2000, Annexure 6 to the writ petition and the auction held in pursuance thereof on 15.3.2000 and all other proceedings in pursuance thereto.

3. It is alleged in paragraph 2 of the writ petition that the father of the petitioner was owner of house no. 8 and 8-A, Muir Road, Allahabad, 12 Kutchery Road, Allahabad and House no. 1 Sir Suleman Road, Allahabad. He submitted a return under section 6 of the U.P. Urban Land (Ceiling and Regulation), Act 1976. The competent authority declared 15560.13 sq. meter total land as surplus land out of the aforesaid premises. Out of house no. 8 and 8-A, Muir Road , Allahabad 11997.68 sq. meter land was declared surplus. Out of house no. 12 Kutchery Road, Allahabad an area of 397.92 sq. meter land was declared surplus and out of land of house no. 1 Sir Suleman Road, Allahabad an area of 3164.53 sq. meter land was declared as surplus. Out of 11997.68 sq. meter land the father of the petitioner sold 11488 sq. meter land to the Prayag Upniveshan Avas Evam Nirman Sahkari Samiti Ltd., Dariyabad, Allahabad and the State Government by its order dated 19.2.1983 granted exemption under section 20 (2) of the Act. True copy of the exemption order is Annexure 1 to the writ petition.

4. It is alleged in paragraph 6 of the writ petition that after the death of the petitioner's father on 1.6.1998 the petitioner and his brother are exclusive owner of the aforesaid house no. 8 and 8-A Muir Road, Allahabad. In paragraph 7 of the writ petition it is alleged that the respondent did not take any proceeding under Section 10 (5) of the Act and did not call the petitioner to vacate the aforementioned surplus land. As regards the portion of the house no. 8 and 8-A Muir Road, Allahabad after the sale of its portion to the aforesaid housing society, it is in possession of S.P. Gangapar, Allahabad and it was allotted in his favour on 17.5.1999 by the Rent Control and Eviction Officer. True copy of the allotment order is Annexure 2 to the writ petition.

5. The Urban land (Ceiling and Regulation), Act 1976 were repealed by U.P. Act no. 15 of 1999. However, clause 3 of the Repealing Act saved such land in which the possession of the vacant land had already been taken over by the State Government. It is alleged in paragraph 12 of the writ petition that the petitioners have not been dispossessed from any part of the land of the aforesaid house no. 8 and 8-A, Muir Road, Allahabad and they have not been paid compensation.

6. In paragraph 14 of the writ petition it is stated that the petitioner has come to know that the respondents have notified the aforesaid property for auction vide Annexure 6 to the writ petition. In paragraph 16 of the writ petition it is stated that the petitioners have come to know that the aforesaid property had been auctioned on 15.3.2000. However, it is alleged that the auction purchaser has not been given possession.

7. A counter affidavit has been filed on behalf of the A.D.A. In paragraph 4 of the same it is stated that after the father of the petitioner filed a return under section 6 he did not participate in the proceedings after the notice under section 8 (3) of the Act and hence an exparte order dated 30.3.1982 was passed under section 8 (4). True copy of the order dated 30.3.1982 is Annexure CA 1. Consequently, a final statement under section 9 of the Act was issued on 25.5.1982 which was duly served on the returnee. Photocopy of the final statement is Annexure CA 2 to the counter affidavit. An appeal being appeal

no. 20/82 was filed by the returnee which was allowed and the matter was remanded back to the competent authority for deciding the matter afresh after giving opportunity of hearing to the returnee. True copy of the order of the District Judge, Allahabad is Annexure CA 3 Consequently an objection dated 21.9.1984 was filed which was rejected vide letter dated 22.2.1986 and the order dated 30.3.1982 passed under section 8(4) of the Act was confirmed. True copy of the objection and order dated 21.9.1984 and the order dated 22.2.1986 are Annexures CA 4 and CA 5 to the counter affidavit.

8. Aggrieved by the order dated 22.2.1986 the returnee filed an application dated 24.2.1986 for recalling of the order dated 20.2.1986 praying for a decision on merits. True copy of the application dated 24.2.1986 is Annexure CA 6. This application dated 24.2.1986 was confirmed vide order dated 23.4.1986. True copy of the order dated 23.5.1987 confirming the order dated 20.2.1986 and rejecting the application dated 18.4.1986 and 31.3.1987 is Annexure CA 7. Yet another application was moved by the returnee on 1.6.1987 for recall of the order dated 23.5.1987 and this application was decided on 11.3.1988 by which order dated 23.5.1987 was recalled on 17.3.1988 was fixed for hearing. True copy of the application dated 1.6.1987 and order dated 11.3.1988 are Annexures CA 8 and CA 9 to the counter affidavit.

9. Several dates were fixed after 11.3.1988 and ultimately because of the non-participation and non-cooperative attitude of the petitioner the matter was decided again exparte on 29.9.1995 whereby the initial order dated 30.3.1982 was adopted as the order under section 8 (4) of the Act. True copy of the order dated 29.9.1995 is Annexure CA 10. Thereafter a notification under section 10 (3) were issued on 1.2.1996 vide Annexure CA 11. In consequence to the notification published on 15.6.1996 under section 10 (3) of the Act a notice was issued on 20.2.1997 vide Annexure CA 12 to the counter affidavit. The petitioner moved an application on 10.8.1998 for recall of the earlier orders under Section 8 (4) vide Annexure CA 13. The competent authority disposed of the said application by order dated 10.3.1999 vide Annexure 14 to the counter affidavit and the surplus land was predetermined. This order dated 10.3.1999 modified the earlier order to a certain extent and a notification under section 10 (3) of the Act was published and as a result surplus land was declared which remained vested in the State of 11997.68 sq. meter out of the total property of the returnee which was confined to the two premises of the returnee i.e. 8 and 8-A, Muir Road, Allahabad. So far as the other premises are concerned, these were not declared vacant and they are still available to the petitioners.

10. In paragraph 9 of the counter affidavit it is stated that the petitioners are not in possession of the land in question. In paragraph 12 it is stated that the vacant possession of the portion had already been taken and the same had been auctioned and possession had already been taken over by the auction purchaser.

11. A counter affidavit has also been filed on behalf the respondents 5 and 6 and we have perused the same. In paragraph 3 of the same it is stated that the respondents 5 and 6 have already

invested huge amount in the purchase of the land in dispute. They have duly purchased the land in question in a legal and bona fide manner. In paragraph 6 of the counter affidavit it is stated that the land in question has already been declared surplus vide order dated 10.3.1999 Annexure CA 1. In paragraph 8 it is stated that the vacant part of the premises was put to auction by the A.D.A. and the respondents 5 and 6 made their bids which was the highest bid and their bid was accepted. Subsequently, they deposited 25% of the total bid amount i.e. 2,25,000/- which was duty accepted by the Secretary, A.D.A. vide order dated 15.3.2000 Annexure CA-2. The respondents 5 and 6 were directed to deposit the balance 75% and that too was deposited well within time i.e. before 30.3.2000. Subsequently, the auction was confirmed in favour of the respondents 5 and 6 vide order dated 10.4.2000 Annexure CA 4.

12. In paragraph 13 of the counter affidavit it is stated that the possession had already been given to the respondents 5 and 6 and the auction has been confirmed but these relevant facts was suppressed by the petitioner while filing the writ petition and by such suppression the petitioner obtained the interim order dated 1.5.2000. The interim order was obtaining without arraying respondents 5 and 6 as parties.

13. In paragraph 20 of the counter affidavit it is stated that the petitioner moved a highly belated application dated 7.8.1998 for recalling the order dated 29.9.1995. The competent authority allowed the said application by order dated 10.3.1999. This order has become final and never been challenged in any competent court of law. In paragraph 24 it is stated that possession has already been taken of the land in question by A.D.A. and it has been given to the respondents 5 and 6. In paragraph 30 it is stated that the auction was confirmed on 10.4.2000 and possession was given thereafter to the respondents 5 and 6.

14. We have carefully perused the affidavits in this case and heard the submissions of the learned counsel for the parties.

15. It is evident from a perusal of Annexure CA 1-A of the counter affidavit of Lalta Prasad that the public auction of the surplus land in question had already been held by the A.D.A. on 15.3.2000 which was confirmed on 10.4.2000 vide Annexure CA 3 and the possession had been given to the respondents 5 and 6 as is evident from the certificate of possession, copy of which is Annexure CA 4.

16. Thus it is evident that the possession had been with respondents 5 and 6 since 10.4.2000 and it has wrongly been alleged by the petitioners that they are still in possession.

17. In our opinion, the petitioner has not come to the Court with clean hands as he has suppressed very relevant facts in this petition as stated in paragraphs 13,18 and 24 of the counter affidavit of Lalta Prasad. In our opinion this concealment of material facts was done by the petitioner for obtaining the interim order dated 1.5.2000 of this Court. In our opinion, the petition is liable to be dismissed on this ground alone namely that the petitioner has not come with clean hands as he has suppressed material facts.

Writ jurisdiction is discretionary jurisdiction. One of the grounds for refusing to exercise jurisdiction under Article 226 is that the petitioner has not come with clean hands.

18. In Asiatic Engineering Co. V. Achhru Ram, AIR 1951 All 746 (para 51) a Full Bench of this Court observed :

"In our opinion, the salutary principle laid down in the cases quoted above should appropriately be applied by Courts in our country when parties seek the aid of the extraordinary powers granted to the Court under Art. 226 of the Constitution. A person obtaining an ex parte order or a rule nisi by means of a petition for exercise of the extraordinary powers under Art. 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the Court, must refrain from making misleading statements & from giving incorrect information to the Court. Courts for their own protection, should not attempt, in any manner, to misuse this valuable right by obtaining ex parte orders by suppression, misrepresentation or misstatement of facts. Applying this principle to the present case, we feel that, in this case, the petitioner Company has disentitled itself to ask for a writ of prohibition by material suppression, misrepresentations & misleading statements which have been found by us above."

19. In the present case the petitioner suppressed and concealed the facts in this writ petition that possession of the land had been taken by the State and handed over to the auction purchasers (respondents 5 and 6), as is evident from the certificate of possession, copy of which is Annexure CA 4 to the counter affidavit. He also suppressed the fact of the auction by the A.D.A. on 15.3.2000 and of its confirmation on 10.4.2000. The affidavit in support of the writ petition was sworn on 27.4.2000, and it is not possible for us to believe that the petitioner did not know of the above facts. Yet the petitioner has falsely stated in paragraphs 12 and 18 of the writ petition that they are in possession. There is no mention in the writ petition of the auction of the land in dispute. It is therefore evident to us that the petitioner suppressed all these material facts in order obtain the interim order of this Court dated 1.5.2000.

20. This practice of suppressing material facts to obtain interim orders from this Court has assumed colossal dimensions. This Court has been too indulgent to this malpractice, and the result has been that a large number of petitions are being filed in the Court concealing and suppressing relevant and material facts only to obtain interim orders, and knowing that because of the heavy pendency of cases in the Court stay vacation applications are not taken up for hearing for years. The only way to stop this malpractice is to dismiss such writ petitions on the ground that the petitioner has not come with clean hands, without going into the merits. Writ jurisdiction is equity jurisdiction, and he who seeks equity must come with clean hands.

21. Since in this case the petitioner has not come with clean hands as he has suppressed material and relevant facts we dismiss this writ petition on this ground without going in the merits. Interim order is vacated.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1704 of 2001

Dr. Vijay Laxmi Agarwal ...Petitioner
Versus
The Vice Chancellor, Mahatma Jyotiba Phoole Ruhil Khand University, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri Ishrat Ali
Sri Surendra Prasad
Sri Irshad Ali

Counsel for the Respondents:
Dr. R.G. Padia
Sri A.K. Pandey
Sri Govind Saran

Constitution of India, Article 226-Practic 8 C Procedure- averments made in writ petition- No specific denial – mere bald denial- shall be treated as admission.

Held – Para 7

The replies to paragraphs 11 and 12 of the writ petition are contained in paragraphs 27 and 28 of the counter affidavit of the committee of management. The only answer contained therein is that the allegations contained in paragraphs 11 and 12 of the writ petition are denied. It is settled law that if there is no specific denial of the allegations in the petition then a mere bald denial will not do and it will be treated as an admission. In paragraphs 27 and 28 of the counter affidavit there is merely a bald denial and not a specific denial of the allegations contained in paragraphs 11 and 12 of the writ petition. We have, therefore to hold that the petitioner was not given any show cause notice or opportunity of hearing before passing the impugned order.

Statutes of Ruhil Khand University Statute No.11.20-appointment of officiating principal-Senior most lecturer–superseded–No show cause notice given held illegal-senior most lecturer is entitled to work as officiating Principal.

Held.- Para 9

In our opinion, this would avoid arbitrariness and would be sufficient compliance of the principles of natural justice. Fairness demands that a person should know why some action is being taken against him. Since ordinarily the senior most teacher has a right to be appointed as Principal, he must at least know why the action is being taken against him and he must be given a show cause notice and opportunity of hearing (which need not be personal hearing) before taking the action.

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

1. Heard Sri Ishrat Ali learned counsel for the petitioner and Dr. R.G. Padia for Dr. (Smt. Neerja Garg respondent no. 3.

2. A counter affidavit has been filed on behalf of respondent no. 2, the Committee of Management of S.B.D. Mahila Mahavidyalaya, Dhampur, district Bijnor through Dr. Awadhesh Saxena.

3. The short point involved in this case is as to who is entitled to be appointed as officiating Principal of the institution till the regular selection is made by the U.P. Higher Education Services Commission. Admittedly the petitioner Dr. Vijay Laxmi Agarwal is senior to Dr. Neerja Garg Statute 11.20 of

the Statutes of the Rohil Khand University states:

"11.20. When the office of the Principal of an Affiliated College falls vacant, the Management may appoint any teacher to officiate as Principal for a period of three months or until the appointment of a regular Principal, whichever is earlier. If on or before the expiry of the period of three months, any regular Principal is not appointed, or such a Principal does not assume office, the senior most teacher in the college shall officiate as Principal of such college until a regular Principal is appointed."

4. A perusal of the above quoted statute shows that when the post of Principal of a College falls vacant, the management can appoint any teacher as officiating Principal for three months or until regular selection is made, whichever is earlier. However, if on the expiry of three months no regularly selected Principal is appointed or such a Principal does not assume office, the senior most teacher in the College shall officiate as Principal until regular appointment.

5. In the present case the permanent Principal of the College Dr. Saroj Markandey retired on 30.6.2000 and hence admittedly a vacancy had occurred. The committee of Management appointed the petitioner as officiating Principal of the College on 1.7.2000. However, thereafter by the impugned resolution dated 18.12.2000 the committee of Management removed the petitioner from the post of Principal and appointed the respondent no. 3 as officiating Principal, vide Annexure 4 to the writ petition.

6. It has been asserted in paragraph 11 and 12 of the writ petition that no opportunity of hearing was given to the petitioner before passing the impugned order dated 20.12.2000/ 3.1.2001 (Annexure 4 to the writ petition).

7. The replies to paragraphs 11 and 12 of the writ petition are contained in paragraphs 27 and 28 of the counter affidavit of the committee of management. The only answer contained therein is that the allegations contained in paragraphs 11 and 12 of the writ petition are denied. It is settled law that if there is no specific denial of the allegations in the petition then a mere bald denial will not do and it will be treated as an admission. In paragraphs 27 and 28 of the counter affidavit there is merely a bald denial and not a specific denial of the allegations contained in paragraphs 11 and 12 of the writ petition. We have, therefore to hold that the petitioner was not given any show cause notice or opportunity of hearing before passing the impugned order.

8. It has been held by a Division Bench of this Court in Teachers Association of Sanatan Dharam (PG) College & others vs. Chowdhary Charan Singh University, Meerut and others 2000 (2) ALJ 1862, following the Full Bench decision in Radha Raizada vs. Committee of Management Vidwati Darbari Girls Inter College, 1994 ALJ 1077 that while ordinarily the senior most teacher should be appointed Principal of a Degree College, till regular selection, in exceptional circumstances where it would not be in the interest of the institution to appoint the senior most teacher, he can be superseded and the next after him in seniority can be appointed.

9. In our opinion when it was proposed by the Committee of Management to supersede the senior most teacher, it was incumbent on the Committee of Management to give show cause notice to the senior most teacher stating therein that there are some serious allegations against him and, therefore, it was proposed to supersede him/her and asking him/her to show cause within a specified period, why this action should not be taken, vide Tribhuwan Nath Misra vs. District Inspector of Schools 1992 ESC 563. No doubt, this show cause notice need not be followed by an elaborate departmental enquiry in which oral hearing is given, including an opportunity of examination and cross-examination. The show cause notice can merely make allegations against the petitioner as to why he is proposed to be superseded and give him a short period of time, say of one week, to reply to the show cause notice, and after receiving the reply or expiry of the period for reply, the management can order super session of the senior most teacher after giving in brief the reasons for doing so (which need not be elaborate reasons as contained in the judgment of a court of law).

In our opinion, this would avoid arbitrariness and would be compliance of the principles of natural justice. Fairness demands that a person should know why some action is being taken against him. Since ordinarily the senior most teacher has a right to be appointed as Principal, he must at least know why the action is being taken against him and he must be given a show cause notice and opportunity of hearing (which need not be personal hearing) before taking the action.

10. Since no such notice was given to the petitioner in the present case before passing the impugned order, we quash the order dated 18.12.2000 (Annexure 4 to the writ petition) removing the petitioner from the post of Principal of the Institution and appointing Dr. Neeraj Garg as officiating Principal and we direct that the petitioner be appointed as officiating Principal of the Institution forthwith, till regular selection

The petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 19399 of 2002

Dr. (Mrs.) Kavita Srivastava ...Petitioner
Versus
The Principal Secretary Higher Education, U.P. ...Respondent

Counsel for the Petitioner:
Sri S.K. Srivastava
Sri A.K. Srivastava

Counsel for the Respondent:
S.C.

Constitution of India, Article 14- writ of Mandamus-Petitioner earlier worked as lecturer in other state- represented her case for adding the period of service reheard in other state-G.O. dated 30.6.92 and 19.2.96 provides such benefit relied in other similar case of Dr. Gaur- petition held entitled for same treatment.

Held- Para 6 and 7

We have perused the order dated 19.2.1996 Annexure 4 to the writ petition in the case of Dr. Gaur and we find that Dr. Gaur has been given the same benefit being claimed by the petitioner in this case. We cannot see how the respondents can discriminate against the petitioner when a similar benefit has been given to Dr. Gaur. Any such discrimination will violate Article 14 of the Constitution.

For the reasons given above, this petition is allowed. The impugned order dated 10.8.2001 is quashed. A mandamus is issued to the respondent to add the service of the petitioner in Awadhesh Pratap Singh University, Rewa to her present service and give all consequential benefits.

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

1. This writ petition has been filed for quashing the impugned order dated 10.8.2001 Annexure 1 to the writ petition and for a mandamus directing the respondent to add the earlier service of the petitioner rendered in Awadhesh Pratap Singh University Rewa to the present service of the petitioner in Kulbhaskar Asharam Degree College, Allahabad.

2. In this case on 10.5.2002 learned Standing Counsel was granted one month's time to file counter affidavit but as yet no counter affidavit has been filed. We, therefore, treat the allegations in the writ petition to be correct.

3. We have heard learned counsel for the petitioner and learned Standing Counsel.

4. The petitioner is working as lecturer in Mathematics in Kulbhaskar Ashram Degree College, Allahabad which is affiliated to Chhatrapati Sahuji Maharaj Kanpur University. The petitioner had worked as lecturer in Mathematics in Awadhesh Pratap Singh University, Rewa from 20.1.1994 to 3.4.1996 after which she joined as lecturer in Kulbhaskar Ashram Degree College, Allahabad on 4.4.1996. True copy of the appointment orders of both the Colleges are Annexure 5 to the writ petition. The petitioner has been confirmed as lecturer in Mathematics vide order dated 3.6.1997 vide Annexure 8 to the writ petition. She has claimed that her service in Awadhesh Pratap Singh University, Rewa should be added to her service in Kulbhaskar Ashram Degree College, Allahabad. She made several representations in this connection vide Annexure 12 and 13 to the writ petition. The petitioner has relied on the Government order dated 30.6.1992 and 19.2.1996 which provide for adding of the prior service rendered outside the State. True copy of the representations dated 30.11.1999 along with relevant Government orders are Annexure 9 to the writ petition. The petitioner relied on the decision of the Supreme Court in Sharadendu Bhushan vs. Nagpur University 1987 (supp) SCC 5 in which the prior service of a lecturer was added to the present employment even though there was a break of two years in between. The petitioner made several more representations vide Annexure 10 to the writ petition. The Director of Higher Education made a recommendation dated 19.7.2000 in petitioner's favour vide Annexure 11 to the writ petition. The petitioner had also filed writ petition no. 12647 of 2001 in this Court which was disposed of with the direction that her representation be decided within two months. She sent reminder dated 9.5.2001 vide Annexure 13 to the writ petition.

Ultimately the impugned order dated 10.8.2001 was passed rejecting the claim of the petitioner.

5. The petitioner has referred to the case of Jagdish Prasad Gaur, lecturer in Commerce in I.P. College, Bulandshahr in which Dr. Gaur was granted the same benefit being claimed by the petitioner vide Annexure 4 to the writ petition.

6. We have perused the order dated 19.2.1996 Annexure 4 to the writ petition in the case of Dr. Gaur and we find that Dr. Gaur has been given the same benefit being claimed by the petitioner in this case. We cannot see how the respondents can discriminate against the petitioner when a similar benefit has been given to Dr. Gaur. Any such discrimination will violate Article 14 of the Constitution.

7. For the reasons given above, this petition is allowed. The impugned order dated 10.8.2001 is quashed. A mandamus is issued to the respondent to add the service of the petitioner in Awadhesh Pratap Singh University, Rewa to her present service and give all consequential benefits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 9940 of 2001

Narendra Kumar Tripathi ...Petitioner
Versus
The Secretary, Minor Irrigation Department, Lucknow ...Respondent

Counsel for the Petitioner:
Sri A.K. Srivastava
Sri T.P. Singh

Counsel for the Respondent:
S.C.

Constitution of India, Article 226- Seniority- Petitioner initially appointed on 18.1.83 on work charge basis- regularised on 14.12.89- Rural Engineering Services (Group B) 1993 came into force on 10.6.93- hence the seniority would be counted from the date of initial appointment e.g. 18.1.83.

Held- Para 7
In our opinion this decision squarely applies to the facts of the present case. Admittedly the petitioner was appointed as Assistant Engineer on 18.1.83 when the Service Rules 1993 had not come into force. Subsequently he was confirmed also. It is settled law that seniority is to be counted from the date of continuous officiating on the post in view of the above decision of the Supreme Court.
Case law discussed:
AIR 1960 SC 1607

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

1. This writ petition has been filed against the impugned order dated

26.12.2000, Annexure 1 to the writ petition by which petitioner's representation had been rejected by the State Government.

Heard learned counsel for the parties.

2. The petitioner was selected and appointed as Work Engineer on work charge basis by order dated 18.1.83 a selection committee was constituted and after taking into account the satisfactory work of the petitioner he was appointed as Assistant Engineer by order dated 14.12.89. A seniority list of the Assistant Engineer of Rural Engineering Service was published by the department on 4.1.95 wherein the petitioner's name was placed at serial no. 274 showing petitioner seniority with effect from 14.12.89. Photostat copy of the seniority list dated 4.1.95 is Annexure 6. A perusal of the seniority list shows that persons placed at Serial no. 8 to 64 were regularized vide order dated 15.4.85 w.e.f. 14.5.79, and similarly person placed at serial no. 132 was regularised by order dated 17.1.90 w.e.f. 13.5.84. One Subhash Singh whose name is at serial no. 8 was given the benefit of his previous service and his seniority fixed accordingly. However petitioner was not given any benefit of his previous service in the department. Hence he has made representations dated 10.3.1995 and 25.5.98 claiming seniority from the date of his initiate appointment that is 18.1.83 vide Annexures 7 and 8. He made further representations and copy of the last representation dated 6.5.2000 is Annexure 2 to the writ petition. However by the impugned order the said representation has been rejected.

3. It appears that the State Government had not made any Service Rules for the department prior to 1993 governing service conditions of Assistant Engineer in the Department of Rural Engineering Service, U.P. For the first time on 10.6.93 the U.P. Rural Engineering (Group B) Service Rules, 1993 came into force i.e. much after the petitioners initial appointment on 18.1.83 and regularisation order dated 14.12.89 . Hence the petitioner has alleged that he ought to have been regularised in accordance with the executive direction and government order from 18.1.83. True copy of the Service Rules, 1993 is Annexure 10.

Aggrieved this writ petition has been filed in this record.

4. The petitioner filed amendment application and impleaded several persons as respondents vide order dated 25.11.2002. By an amendment application, the petitioner has challenged seniority list dated 14.12.2001 which has been annexed to the amendment application.

5. A counter affidavit has been filed by the State Government . In para 5 it is stated that the petitioner was not given regular appointment by the department vide G.O. dated 14.12.89. It is stated in para 7 that adhoc services ;had not been added for the purposes of seniority list. The petitioner representation has been duly considered and rejected. In para it is stated that the petitioner's service was regularised by G.O. dated 14.12.89 in term of U.P. Regularisation of Adhoc Appointment (within the purview of Public Service Commission) Rules 1979. In para 13 it is stated that prior to the coming into force of the Service Rules regarding determination of seniority, the

G.O. dated 9.4.80 was issued containing draft service rules.

Rejoinder Affidavit has also been filed and we have perused the same.

6. In Direct Recruit Class II Engineering Officers Association Versus State of Maharashtra AIR 1960 SC 1607 it was held by the Supreme Court that seniority has to be counted from the date of appointment and not according to the date of confirmation.

7. In our opinion this decision squarely applies to the facts of the present case. Admittedly the petitioner was appointed as Assistant Engineer on 18.1.83 when the Service Rules 1993 had not come into force. Subsequently he was confirmed also . It is settled law that seniority is to be counted from the date of continuous officiating on the post in view of the above decision of the Supreme Court.

8. Following the said decision, this writ petition is allowed. The impugned order dated 26.12.2000 is quashed. The respondents are directed to fix petitioner's seniority with effect from the date of his initial appointment on 18.1.83. The seniority list shall be rectified accordingly.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2003

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

Civil Revision No. 135 of 2003

Hari Kishan ...Plaintiff
Versus
Pravin Kumar Garg and others
...Defendants

Counsel for the Revisionist:
Sri Arjun Singhal

Counsel for the Opposite Parties:
Sri Ram Mohan
Sri Niraj Pandey

Code of Civil Procedure- Order 17 r. 2- Plaintiff and his counsel remained absent on the date fixed- Trial court by impugned order directed the defendant to lead evidence- order set a side provided the plaintiff deposits Rs.5000/- with the trial court which shall be withdrawn by the caveator respondent- son of the plaintiff being advocate unnecessarily delaying the proceeding of court- suit for partition pending since 1991- court held the plaintiff/revisionist guilty for abusing the process of court.

Held- Para 4

In view of the fair stand taken by the defendant- respondent before me and the cumulative circumstances of the case as well as in the interest of justice I quash the judgment and order dated 3.1.2003. The original suit shall be restored to its original number and heard by the court below on the date fixed by the trial court on receiving certified copy of this judgment. The above order is, however, subject to the condition that the plaintiff deposits a sum of Rs.5000/- before the trial court on the next date fixed by the said court, as otherwise this

order shall have no consequence and the suit shall be treated to be dismissed without further opportunity to the plaintiff to ask for restoration of the same. The aforesaid amount can be withdrawn by the defendant/caveator(applicant). The certified copy of the judgement shall be presented before the trial court within 20 days from today. The caveator/applicant may inform the court, if possible, today for seeking a short date in the suit

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

1. Heard Sri Arjun Singhal on behalf of the plaintiff- revisionist and Sri Ram Mohan, Advocate holding brief of Sri Niraj Pandey, Advocate, learned counsel appearing for contesting defendant-respondent no. 2.

2. Learned counsel for the respondent no. 2 pointed out to trial court's order dated 12.2.2002 and appellate order dated 7.9.2002 to show that the plaintiff is not a bonafide litigant and he has been guilty of not pursuing litigation promptly and there by abusing the process of the court and harassing the defendant.

3. It may be noted that the present revision arises out of original suit no. 400 of 1991 which has been filed for partition. Learned counsel for the revisionist admits that the son of the plaintiff-revisionist is an Advocate. This Court takes judicial notice of the fact that whenever an Advocate is involved in the litigation, he takes to his head that the court and judicial process is in his pocket. This cannot be tolerated. I am convinced that the plaintiff is guilty of abusing the process of the court. The suit relates to the year 1991 but the plaintiff has not carried it bonafide. In view of the above, this court would have refused to interfere in exercise of the jurisdiction conferred under section 115 C.P.C. I am of the view that the impugned judgment and order dated 3.1.2003, directing the defendant to led evidence, once the court has came to the conclusion that there was no evidence lead on behalf of the plaintiff and that he was absent, the impugned order cannot be sustained in view of the provision of order 17 rule 2 CPC. The plaintiff and his counsel being absent and no evidence having been led on behalf of the plaintiff, the court below should have dismissed the suit in default.

4. In view of the fair stand taken by the defendant- respondent before me and the cumulative circumstances of the case as well as in the interest of justice I quash the judgment and order dated 3.1.2003. The original suit shall be restored to its original number and heard by the court below on the date fixed by the trial court on receiving certified copy of this judgment. The above order is, however, subject to the condition that the plaintiff deposit a sum of Rs.5000/- before the trial court on the next date fixed by the said court, as otherwise this order shall have no consequence and the suit shall be treated to be dismissed without further opportunity to the plaintiff to ask for restoration of the same. The aforesaid amount can be withdrawn by the defendant/caveator(applicant). The certified copy of the judgement shall be presented before the trial court within 20 days from today. The caveator/applicant may inform the court, if possible, today for seeking a short date in the suit.

5. The revision stands disposed of subject to the above observations and directions.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10 FEBRUARY, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 22246 of 2002

R.B.S. Chauhan ...Petitioner
Versus
Reserve Bank of India and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh
Sri Vijay Sinha

Counsel for the Respondents:
Sri S.N. Verma
Sri Sharad Verma
Sri Yashwant Verma

Constitution of India, Article 226- compulsorily Retirement- Petitioner working as Assistant Treasurer- in cash department- made sexual harassment to senior ladies officer- after full fledged enquiry the disciplinary authority taken the decision- can not be interfered by High Court.

Held- Para 10

In Apparel Export Promotion Council v. A.K. Chopra (supra) the Supreme Court held that in a case of sexual harassment for the offending action to be outrageous actual assault or touch by the offender is not essential. Objectionable overtures with sexual overtone is enough.

Case law discussed:
1997 (6) SCC 241
AIR 1999 SC-625

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

1. This writ petition has been filed for a writ of certiorari to quash the impugned order dated 7.5.2002 Annexure 7 to the writ petition by which the petitioner has been compulsorily retired.

Heard learned counsel for the parties.

2. The petitioner was selected in the service of Reserve Bank of India vide appointment letter, copy of which is Annexure 2 to the writ petition, and he was granted promotions vide Annexures 3,4 and 5 to the writ petition. It is stated in paragraph 10 of the petition that the petitioner's retirement age is 60 years but he has been compulsorily retired at the age of 55 ½ years. The relevant extract of the relevant Rule providing for compulsorily retirement is Annexure 8 to the writ petition.

The regulation 26 of RBI(Staff) Regulation 1948 states-

"26. (1) An employee shall retire at 60 years of age but no extension shall be given to any employee beyond 60 years of age.

Provided that an employee who attains the age of superannuation on any day other than first during a calendar month, shall retire on the last day of that month:

Superannuation and Retirement

Provided further that in the case of an employee in Class IV who has reached the age of 55 years the Bank may, in its discretion, retire him after giving two month's notice in writing if in the opinion

of the competent authority his efficiency is found to have been impaired.

Provided further that the Bank may, in its discretion, retire in public interest an employee, other than an employee in Class IV, at any time after completion of 50 years age;

Provided further in the case of an employee in Class III and Class I, who has attained the age of 60 years shall be subject to his being suitable to be retained in service."

3. It is alleged in paragraph 12 of the petition that there was no material before the Committee of the Central Board or before respondent no. 2 and 3 to pass the impugned order of compulsory retirement. It is alleged that the petitioner's record is excellent and there is no adverse entry against him. He has also earned promotions, the latest one being on 7.7.2000. In paragraph 22 of the petition it is alleged that no opportunity of hearing was given to the petitioner before passing the impugned order and hence there was violation of natural justice.

4. The respondent Bank has filed a counter affidavit. In paragraph 9 of the same it is stated that complaint of sexual harassment was received against the petitioner from a lady Class I officer serving in the respondent Bank at Kanpur. In respect of this complaint the Regional Complaint Committee, which conducted an enquiry giving opportunity of hearing to the petitioner submitted its report, dated 14.2.2002. The Regional Director RBI, Kanpur on 6.4.2002 made a recommendation to the Chief General Manager for the petitioner's compulsory retirement.

5. In paragraph 12 of the counter affidavit it is stated that the entire service record of the petitioner as well as the report of the enquiry into the incident of sexual harassment was placed before the Committee of the Central Board. The Committee looked various matters and then made the recommendation for compulsory retirement of the petitioner. In paragraph 13 it is stated that if action has not been taken against the petitioner it would have a demoralizing effect on the numerous lady employees of the Bank and therefore, it was in the public interest to pass the impugned order. In paragraph 17 of the counter affidavit it is stated that various departmental enquiries were conducted against the petitioner and he was also dismissed from service but subsequently he was reinstated upon the intervention of the Union, and numerous advisory letters were issued to him which failed to have any effect. In paragraph 20 and 26 of the counter affidavit it is stated that the respondent Bank took into consideration the entire service record of the petitioner as also the incident of sexual harassment which occurred on 30.12.2001 at Agra and it was then decided to pass the order of compulsory retirement of the petitioner.

6. The Regional Director of the Bank at Kanpur has also filed a supplementary counter affidavit and we have perused the same. In paragraph 4 of the same it is mentioned that the petitioner was working as Assistant Treasurer in the cash department of the RBI, Kanpur. One Smt. Anita Mehta was working as Manager in the said department on post higher than that of the petitioner. Both these officers were deputed to visit Agra and Mathura for inspection of Currency Chest from

18.12.2001 to 17.1.2002. It was during this visit to Agra that the alleged sexual harassment of Smt. Anita Mehta by the petitioner took place. In this connection Smt. Anita Mehta has given a written complaint to the Regional Director, Reserve Bank of India, Kanpur dated 4.1.2002, copy of which is Annexure SCA-1 to the affidavit. It is stated in that complaint that the petitioner and the complainant had both gone to Agra for an official visit and were staying in the same Hotel but in different rooms. On 30.12.2001 at about 9.00 p.m. the petitioner rang the bell of Smt. Anita Mehta's room and when she opened the door the petitioner said that he wanted to talk to her urgently. Thereafter he came in the room of Smt. Anita Mehta and said that he wanted to have dinner. She gave him dinner but after dinner he refused to go back to his own room and said "I am alone, you are alone, we can enjoy". Smt. Anita was horrified at this disgusting immoral remark and asked him to leave the room on 31.12.2001. At about 8.45 p.m. he opened over the intercom 'please do not put the receiver down. Have you pardon me or not. Please pardon me. I know not what happened to me yesterday.' Smt. Anita Mehta immediately put the receiver down and on the same day at 4.45 p.m. after inspection of the currency chest she telephoned the General Manager, Issue Department, Kanpur saying that she was not feeling comfortable and wanted to come back. Thereafter she returned back to Kanpur on 1.1.2002 and informed the General Manager about the incident. She alleged that she is in a mental shock, tension and grief due to the act of the petitioner, which is unpardonable.

7. The matter was referred to the Sexual Harassment Committee of the Bank and the Committee conducted a regular enquiry in which the petitioner attended as stated in paragraph 5 of the supplementary counter affidavit. Thereafter the Committee submitted the report. The copy of the entire proceedings of the Sexual Harassment Committee has been annexed as Annexure SCA-2 to the affidavit and its report is Annexure SCA-3 to the affidavit. The report was placed before the Regional Director and the matter was referred to the Central Office of the RBI Bombay. Thereafter the impugned order was passed.

8. In our opinion the conduct of the petitioner is deplorable and cannot be condoned. The Supreme Court in **Vishaka and others v. State of Rajasthan 1997 (6) SCC 241 and Appeal Export Promotion Council vs. A.K. Chopra AIR 1999 SC 625** has upheld the Disciplinary action in cases of sexual harassment.

9. Learned counsel for the petitioner has submitted that no opportunity of hearing was given to the petitioner before passing the impugned order and the said order was punitive. In our opinion the Rules of natural justice are not a straitjacket formula as held in several decisions of the Supreme Court. In our opinion adequate opportunity of hearing was given to the petitioner, as is evident from the paragraphs 5,15,17,29,31 and 41 of the supplementary counter affidavit in which full details have been given. The petitioner has attended the proceedings of the Committee on 29.1.2002 and 1.2.2002 and the minutes were duly signed by him as stated in paragraph 15 of the supplementary counter affidavit. There is

no reason for disbelieving the complaint of Smt. Anita Mehta and we are of the opinion that her complaint, copy of which is Annexure SCA-7 to the Supplementary counter affidavit, is factually correct. As stated in paragraph 35 of the supplementary counter affidavit, the management did not hold a full fledged disciplinary proceedings as that would have caused further embarrassment to the lady officer who was already suffering from mental trauma. The enquiry held by the respondents in our opinion was adequate. Rules of natural justice are flexible and depend on the facts and circumstances of each case, vide Hira Nath Misra v. Principal, AIR 1973 SC 1260. On the facts of the present case opportunity of hearing was given to the petitioner and in sufficient compliance of the Rules of natural justice, considering the fact that it is a case of sexual harassment. In fact the Bank has acted leniently by only ordering compulsory retirement instead of dismissal which the petitioner deserves.

10. An Apparel Export Promotion Council v. A.K. Chopra (supra) the Supreme Court held that in a case of sexual harassment for the offending action to be outrageous actual assault or touch by the offender is not essential. Objectionable overtures with sexual overtone is enough.

The facts, of the aforesaid case squarely applies to the present case. The petitioner's remarks were clearly outrageous and had sexual overtones. Moreover, this is not a fit case to exercise our discretion under Article 226 of the Constitution. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 7, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 42320 of 2002

Uttar Pradesh Udyog Vyapar Pratinidhi Mandal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Subodh Kumar

Counsel for the Respondents:
Sri B.P. Singh
Sri Bhagwati Prasad
Sri S.S. Upadhyaya
Mr. Sadhna Upadhyaya

Constitution of India, Article 226 read with section 142 of U.P. Kshetriya Panchayat Adhiniyam 1961- bye laws from for realization of fees and tolls- never published in well known popular news paper as required under section 239 read with 242(2)- fee realized against the facility of drinking water, first aid, treatment at the place of load and unloading the articles- without providing such facility the toll tax cannot be realized.

Held- para 12
The Zila Panchayat has failed to establish that it is providing any service either directly or remotely to the persons from whom it is realizing the impugned fee. There is total lack of element of quid pro quo. Hence the levy in question is not a fee but tax in nature.

(Delivered by Hon'ble Prakash Krishna, J.)

1. These are four writ petitions. The controversy involved in all the

abovementioned writ petitions is common and hence they are being disposed of by the common judgment.

2. The petitioners have filed the writ petitions challenging the validity of the bye-laws filed as Annexure 2 to the writ petition, framed by the Zila Panchayat, Agra. The said bye-laws were published in the official gazette on 11th May, 2002. These bye-laws were framed for the purpose or regulation of transportation by vehicles from Agra district to outside and from outside districts to Agra of Gitti, Patthar, Bolder, Coal, Marble, Yamuna sand and Balu etc. Bye law no. 19 provides the charges to be paid on every trip of the vehicle, namely trolly, mini truck and truck. It further provides that the amount thus realized shall be utilized for providing drinking water facility to the vehicle owners and drivers and medical facilities shall also be provided at the point of loading or at any other specified place.

3. The petitioners have challenged the validity of the aforesaid bye-laws on a number of grounds. They have pleaded that the Zila Panchayat has no power to frame such bye laws in view of provisions of sections 142 to 145 of U.P. Kshettra Panchayat and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as the Act). They have further pleaded that the aforesaid sections 142 to 145 contemplate imposition of certain fees and tolls but the impugned leavy does not come within the ambit of aforesaid sections, namely, sections 142 to 145. A plea has also been raised by the petitioners that the aforesaid bye laws were never published in any reputed newspaper, such as Amar Ujala', Dainik Jagran', Times of India, Hindustan Times, Rastriya Sahara, etc. vide paragraph 14 of the writ petition. The petitioners or other persons were not made aware about any proceedings for framing of bye laws by the Zila Panchayat, Agra. These bye laws were never published as required by Section 239 read with sub section 2 of section 242 of the Act, while previous publication is mandatory. In paragraph 17 of the writ petition it has been mentioned that the fee which is being sought to be recovered by the respondents against the facility of drinking water and first aid treatment at the places of loading and unloading are the statutory functions of the Kshettra Panchayat and Zila Panchayat. It is the duty of the Zila Panchayat to provide drinking water and medical facilities vide Part A to schedule II clauses (xi) and (xxiii) of the Act, the respondents have failed to take any decision on the representations filed by the petitioners and other persons hence the present writ petitions.

4. A counter affidavit has been filed in writ petition no. 42320 of 2002 on behalf of respondents no. 3 and 4 by one Gaya Prasad Gupta, clerk in Zila Panchayat, Agra. The said counter affidavit has been relied upon for the purpose of other writ petitions also as jointly agreed between counsel for parties. It has been stated that in the meeting dated 28.2.2001 vide Resolution no. 4, the Zila Panchayat, Agra decided to frame the said bye laws. Proceedings of the meeting have been filed as Annexre CA-1. The said resolution was published in the newspaper, namely , daily Hindi Dainik Aaj, dated 24.4.2001 filed as Annexure CA-2. Thereafter the said bye- laws were submitted to the Commissioner of the Division and were published in the official gazette. In paragraph 26 of the

counter affidavit it has been stated that the objections were invited from the public and since no objections whatsoever were received, the bye laws were sent for confirmation by the Prescribed Authority, that is the Commissioner, Agra Region, Agra. The impugned bye laws fall under the provisions of sections 142, 143, 144 and 145. In paragraph 29 of the counter affidavit it is stated that the respondents have provided medical facilities as well as drinking water and other facilities. One receipt issued by New Prince Medico dated 17.6.2002 in the name of one Ram Prakash had been filed as Annexure CA-5 to the counter affidavit to show that the Zila Panchayat is rendering medical service. The Zila Panchayat is suffering a loss of Rs.50,000/- per day on account of the stay order passed by this Court and the impugned levy is perfectly justified.

5. We have heard counsel for parties and also Smt. Sadhna Upadhyaya on behalf on Contractors.

6. It has been submitted by the counsel for the petitioners that the respondents have got no power to frame such bye laws under sections 142 to 145 of the Act which contemplate imposition of certain fees and tolls. The impugned fee does not come within the ambit of sections 142 to 145 of the Act. The impugned bye laws imposes different fee and the Zila Panchayat is not competent to do so. The further argument is that the said fee is in the nature of tax as the Zila Panchayat is not rendering any special service either directly or remotely to the persons from whom the aforesaid fee is being realized. There is a distinction between fee and tax. Since there is complete absence of quid pro quo in the present case, the impost is wholly illegal and invalid. It has further been submitted that fee can be imposed only for a specified purpose. It is the statutory duty of the Zila Panchayat to provide drinking water and medical facility and for the said purposes the impost of the present levy cannot be justified.

7. In this connection it is relevant to quote relevant portions of paragraph 21 and 29 of the counter affidavit.

"para 21……whereas the new bye laws has been framed by the answering respondent under the provisions of the Act to provide facilities to the public of the district by enhancing its resource for meeting out the need of the public and for the purpose of providing at least there is no facilities for the people of Agra.

"29……that the answering respondents providing the medical facilities as well as drinking water and other facilities also either itself or through its' agents…… The photographs containing the Medical facilities drinking water being provided by the Zila Parishad to the public at large including the employees of trolleys, mini truck, truck and tractor, the photographs of the same is being filed herewith and is marked as Annexure No. CA 6 to this affidavit. "

From the above it is crystal clear that the Zila Panchayat is using the money thus realized under the impugned bye laws for the purposes of providing medical facilities and drinking water to the public at large.

8. The question arises whether in the facts of the present case the impost is a fee or a tax. In Nagar Palika Varanasi vs. Durga Das Bhattacharya AIR 1968 SC

1119, while dealing with the provisions of U.P. Municipalities Act the Supreme Court held that there is generic difference between a tax and fee, both are compulsory exactions of money by public authorities, but whereas a tax is imposed for public purposes and is not supported by any service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authorities which imposes it. In the aforesaid case it has been further held :-

"In this context it is important to notice that the power in the American Municipal Law – (Dillon on 'Municipal Corporations', Vol. IV 5th Edn. P. 2400). It has been held that the police and taxing powers of the legislature though co-existent, are distinct powers. Boradly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitation, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous businesses, occupations, or activities, and is not subject to the constitutional restrictions applicable to the taxing power. "It may consequently be said that if the primary purpose of a statute or ordinance exacting an imposition of some kind is to raise revenue, it represents an exercise of the taxing power, while if the primary purpose of particular occupation, calling or activity., it is an exercise of the police power, even if it incidentally produces revenue'. (American Jurisprudence 2nd Edn. Vol. 16, p. 519.

9. Learned counsel for the petitioners has placed reliance upon the judgment of the Supreme Court in the cases of **Hansraj and Sons vs. State of Jammu and Kashmir** (2002) 3 UPLBEC 2015 and **Okhla Sand Supply Company vs. State of U.P. and others** (2001) 1 AWC 803. In the aforesaid judgments of the Supreme Court it has been held that the expression ' toll' normally means a definite payment exacted by the State or the local authority by virtue of sovereignty or lordship or in return of protection, more especially, for doing some act, perform such functions. Another meaning attributed to the term is a charge for landing or shipping goods at a port. In **Okhla Sand Supply Company's** case it was held that the mere purpose of imposition of toll tax is to recover the cost of construction and maintenance of a bridge. Tax can only be imposed in respect of items enumerated in section 144 of the Act. Zila Panchayat is authorized to impose tax only in respect of items mentions in section 239 of the Act. Section 239 of the Act provides that a Parishad may make a bye laws in respect of the matters required by this Act to be governed by bye laws and for the purposes of promoting or maintaining the health, safety and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of this Act. Sub section (2) of section 239 enumerates various subject upon which bye laws can be framed.

10. The question with regard to distinction between a fee and tax has been subject matter of debate since long. The Supreme Court in the case of **Commissioner, Hindu Religious Endowments vs. Sri Lakshimndra Thirtha Swaiar of Sri Shirur Mutt** (AIR

1954 SC 282) examined the matter in detail . It also considered Article 110 of the Constitution and came to the conclusion that there is no generic difference between a tax and fee. Our constitution has made a distinction between a tax and a fee. The Court also pointed out that as indicated by Article 110 of the constitution ordinarily there are two classes of cases where the Government imposes fees upon persons. In the first class of cases the Government simply grants a permit or privilege to a person to do some thing which that person would otherwise not be competent to do and extracts fee from that person in return for the privilege that in conferred. In other class of cases the Government does some positive work for the benefit of person and the money is taken as return for the work done or the services rendered. The Court also pointed out that in cases falling in the second category, that is, where the fee is being charged for the services rendered, it is absolutely necessary that the levy of fee should, on the face of the legislative provision, be co-related to the expenses incurred by the Government in rendering of services. However, there are subsequent pronouncements by the Supreme Court wherein it has been held that the element of quid pro quo in strict sense is not otherwise a sine quo non of a fee. Sec. 1980 AIR SC 1963. But the fact remains that the principal criterion for the purposes as propounded in the earlier cases of the Supreme Court that in order to qualify as a fee, the impost must have relation to services rendered or advantages conferred, however, still holds good. The communication need not be direct and mere actual relationship may be regarded as sufficient. In this background we have to examine the facts of the present case.

11. As mentioned in earlier paragraphs of this judgement , the fee so realized is being utilized by the Zila Panchayat for the purposes of providing drinking water and medical facilities. Section 23 of the Act gives the general powers and functions of Zila Panchayat. The powers and functions in Part A of Schedule II have been mentioned in clause (v) of section 33 (i). In the said Schedule Entry (xi) reads as follows – Drinking water

(a) Maintenance of drinking water of public use,
(b) Plan and programme for drinking water, and
(c) Supervision and Control of water pollution. “

Entry (xxiii) Medical and Sanitation.

Thus, it is the statutory function of Zila Panchayat to provide drinking water and medical facilities etc. The Supreme Court in the case of **Nagar Mahapalika Varanasi** (supra) has held that for the expenditure incurred by the Municipal Board in the discharge of its statutory duties the licence fee cannot be imposed for reimbursing the cost of statutory duties or ordinary medical services which the municipal board was bound under the statute to provide to the general public vide paragraph 10 of the judgment, in view of the judgment of the Supreme Court rendered under section 294 of the U.P. Municipalities Act, which is in para materia with the provisions of Khettriya Panchayat and Zila Panchayat Adhiniyam. The Zila Panchayat Agra in its counter affidavit has sought to justify the impost on the basis that it is incurring expenditure towards its ordinary services which the Zila Panchayat was bound to provide under the statute to the general

public. No attempt has been made in the counter affidavit in any manner that as against the fee sought to be levied and recovered, the Zila Panchayat is going to render any special service to the persons from whom the fee is being realized. It has been stated in the counter affidavit that it is incurring a loss of Rs.50,000/- per day on account of the stay order granted by this Court, but in the counter affidavit the Zila Panchayat has not given the details of any special services provided to the persons from whom the fee was realized . The power to impose tax under the Act has been given under section 23. It also provides that a preliminary proposal for imposition of tax shall be framed which shall be passed by a special resolution. The Zila Panchayat in its counter affidavit has sought to justify the action with reference to sections 142 to 145. The counter affidavit is silent as to under which section the aforesaid by laws were framed. The impugned fee does not come within the ambit of sections 142 to 145 of the Act. To provide drinking water and first aid or medical facility is a statutory duty of Zila Panchayat as indicated above. Hence no separate bye laws can be framed and no separate fee can be charged for providing drinking water or medical facilities to the public at large. The respondents have realized fee till October, 2002 meaning thereby a sum of about Rs.90,00,000/- has been realized by them. It is strange that out of this huge sum the Kshettra Panchayat has not been able to show that it has done some special service to the persons from whom money was realized. Along with counter affidavit a bill of Rs.10,000/- and odd, showing purchase of some medicines, has been filed. The petitioners have disputed the said purchase as the bill is not in the name of Zila Panchayat or its officers/officials.

12. Thus, the Zila Panchayat has failed to establish that it is providing any service either directly or remotely to the persons from whom it is realizing the impugned fee. There is total lack of element of quid pro quo. Hence the levy in question is not a fee but tax in nature.

13. In view of the above, the impugned bye laws, a copy of which has been filed as Annexure 2 to the writ petition, published in the official Gazette dated 11.5.2002 is quashed. The writ petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 3694 of 2000

IC No.39255W Major Surendra Singh Sajwan ...Petitioner
Versus
The Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Yogesh Agarwal
Sri G.D. Mukerji
Sri Satyajit Mukerji
Sri S.K. Singh

Counsel for the Respondents:
Sri S.K. Rai
Sri Subartee Banerjee
S.C.

Constitution of India, Article 226- Army Service- Promotion Rule 6 of Army Act- provides Constitution selection board-

for promotion on the post of Lt. Col.- Instead of petitioner some other officer recommended for promotion- service Dossier of Petitioner found excellent but even then can not be promoted on higher post because of shortage of vacancy- Army Organization and hereby like a pyramid which goes narrower- High Court can not sit as appellate authority upon the decision of Board- No flagrant violation of Rules or arbitrainess shown – court declined to interfere.

Held – Para 6

Thus while it is evident that the petitioner is a good officer and there is no adverse material against him, the Selection Board has found other Officers having better record and hence those officers have been promoted, while petitioner could not make the grade on his overall profile as stated in the impugned order dated 10.6.99 Annexure 20 to the writ petition. This Court is normally reluctant to interfere in Army matters, as that would be bad for the morale of the Army. This does not of course mean that the Court can never interfere in Army matters but it shall do so when there is clear flagrant violation of the Rules or there is extreme arbitrariness, which is not found in this case.

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

1. Heard learned counsel for the parties. The petitioner is a major in the Indian Army.

2. The petitioner is challenging the impugned order dated 10.6.99 Annexure 20 to the writ petition and also the communication to the petitioner that he has not been approved for promotion to the rank of Acting Lt. Col. Vide letter dated 7.9.99 Annexure 18 to the writ petition. The petitioner has prayed that he should be promoted as Acting Lt. Col.

3. We have carefully perused the petition and the counter affidavit and we have also perused the Service Dossier of the petitioner, and Selection Board proceedings, which were produced before us. The petitioner appears to have a misapprehension that he has been passed over for promotion because there is adverse material against him on his dossier. We have perused the dossier and we find nothing against him. However, it often happens in the Army that even good Officers cannot be promoted because there is no vacancy on the higher post. The Army Organisation and hierarchy is like a pyramid, and the higher one goes the narrower becomes the pyramid. Hence merely because one has been passed over it does not mean that one is not a good officer, but it means that in evaluation by Selection Board other officers have been found to be better.

4. Under the Selection System dated 6.5.87, copy of which has been produced before us, it is mentioned in Rule 6 that there is a Selection Board for selecting Majors to be promoted to the rank of Acting Lt. Col. We are informed that this Selection Board consists of five members, the Chairman being Lt. General, who is a Core Commander, and the other four members are two Major Generals and two Brigadiers. Thus Selection Board consists of very senior officers and in our opinion due deference should be given to their judgment.

5. This Court cannot sit as a court of appeal over the decision of the Selection Board. It can only interfere in rare cases where it is clearly evident that there is flagrant violation of the Rules or there is extreme arbitrariness. This is not a case of that nature.

6. Thus while it is evident that the petitioner is a good officer and there is no adverse material against him, the Selection Board has found other officers having a better record and hence those officers have been promoted, while petitioner could not make the grade on his overall profile as stated in the impugned order dated 10.6.99 Annexure 20 to the writ petition. This Court is normally reluctant to interfere in Army matters, as that would be bad for the morale of the Army. This does not of course mean that this Court can never interfere in Army matters, but it shall do so only when there is clear flagrant violation of the Rule or there is some extreme arbitrariness, which is not found in this case.

The petition is therefore, dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Income Tax Appeal No. 37 of 2000

Commissioner of Income Tax and another ...Appellants
Versus
Sri Shyama Charan Gupta ...Respondent

Counsel for the Appellants:
Sri A.N. Mahajan, S.C.

Counsel for the Respondent:

Income Tax Act- Section 155 (i)- Reassement of firm- assessing officer can modify the assessment, but can not take recourse of section 148.

Held - Para 8

In case of reassessment of a firm the assessing officer has not only to determine the assessable income of the firm but has also to amend the assessment order of the partners accordingly. Hence in our opinion the Tribunal has correctly held that t he assessing officer could only take recourse to Section 155 to modify the assessment of the assessee and he could not take recourse to Section 148 of the Income Tax Act. The Tribunal has also held that the revenue can revise the shares of the appellants in the firm by invoking the provisions of Section 155 (1), if the law so permits.

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

1. This is an appeal under Section 260 A of the Income Tax Act by which the impugned order of the Income Tax Appellate Tribunal dated 26.8.1999 Annexure 3 to the appeal has been challenged.

2. We have heard the learned counsel for the Department as well as of the assessee and have perused the impugned order and find no illegality in the same.

3. The respondent assessee is a partner in a firm M/s Shyam Bidi Works. The Original assessment of the firm as well as of the partners was completed. Subsequently there was a search under Section 132 of the Income Tax Act in connection with the firm, its partners and Directors of the Company of this group in November 1998. As a result of this search the firm filed a revised return on 27..1989 disclosing an income of Rs. 900890/- as declared in the revised return. Consequent to the revised assessment of the firm the assessments of the partners were also sought to be revised by revision of their

share in the firm. Since the partners had not furnished revised returns subsequent to the furnishing of revised return 27..1989 the assessing officer initiated reassess reassessment proceedings under Section 147/148 of the Income Tax Act.

4. The respondent assessee furnished returns in response to the notice under section 148 under protest. The assessment was completed under Section 143 () by which the assessing officer in addition to revising the assessee's share in the firm made certain additions on account of low household withdrawals. The assessee and other partners challenged the reassessment proceedings as well as addition on account of low household expenses, but their appeals were dismissed by the C.I.T. (Appeals).

5. On appeal the Tribunal set aside the orders of the C.I.T. (Appeals) and the reassessments were quashed.

6. It has been observed in paragraph 7 of the impugned order of the Tribunal that the assessee has submitted that since his original assessment has been completed his share in the firm should have been revised by invoking the provisions of Section 155 (1) of the Income Tax Act and not Section 147. We are in agreement with the view taken by the Tribunal.

Section 155 (1) of the Income Tax states as follows:
'Where, in respect of any completed assessment of a particular in a firm for the assessment year commencing on Ist day of April, 1992 or any earlier assessment year, it is found -

(a) on the assessment or reassessment of the firm, or

(b) on any reduction or enhancement made in the income of the firm under this section, section 154, section 250, section 254, section 260, section 262, section 263 or section 264, [or]

[(b)] on any order passed under sub section (4) of Section 245 D on the application made by the firm.)

7. that the share of the partner in the income of the firm has not been included in the assessment of the partner or, if included, is not correct, the Assessing Officer may amend the order of assessment of the partner with a view to the inclusion of the share in the assessment or the correction thereof, as the case may be, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub section (7) of that section being reckoned from the end of the financial year in which the final order was passed in the case of the firm."

8. A perusal of the above provision shows that in case of reassessment of a firm the assessing officer has not only to determine the assessable income of the firm but has also to amend the assessment order of the partners accordingly. Hence in our opinion the Tribunal has correctly held that t he assessing officer could only take recourse to Section 155 to modify the assessment of the assessee and he could not take recourse to Section 148 of the Income Tax Act. The Tribunal has also held that the revenue can revise the shares of the appellants in the firm by invoking the provisions of Section 155 (1), if the law so permits.

9. We find no illegality in the impugned order of the Tribunal. The appeal is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.2.20033

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

Criminal Revision No. 64 of 2003

Deepak Kumar ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Kamal Singh Yadav

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

Juvenile Justice (Care & Protection of children) Act, 2000- if the release is refused on these ground the court should record finding as to whether any such ground exists or not the impugned order does not show any such ground except that it is against law. The impugned order has been passed in utter disregard of section 12 of the Act.

Held- Para 6

The revision is therefore, allowed. The revisionist shall be released on bail on his furnishing two sureties and personal bond to the satisfaction of the Magistrate concerned.

(Delivered by Hon'ble K.N. Sinha, J.)

1. The present revision has been filed against the order dated 17.12.2002 passed by Additional Session Judge I Baghpat refusing bail application number 1114 of 2002 moved by revisionist under the Juvenile Justice (Care and Protection of Children) Act 2000, (hereinafter referred to as Act).

2. The brief facts giving rise to this revision are that on 19.6.2002 revisionist Deepak Kumar committed rape on Km. Ujma Praveen. The revisionist was arrested and he moved for bail which was rejected. The revisionist approached this Court by filing criminal revision no. 2888 of 2002 which was disposed of by this Court by order dated 15.11.2002 directing the Sessions Judge to decide the bail application on merit by exercising his power vested on him by Section 6 (2) of the Act keeping in view the provisions of Section 12 of the Act. After the remand of the case and the above direction by this Court the Sessions Judge transferred the bail application to the Court of Additional Sessions Judge I, who rejected the bail application hence this revision.

3. I have heard learned counsel for the revisionist and the learned A.G.A. perused the impugned order. This Court has directed to decide the matter keeping in view the provisions of Section 12 of the Act. Section 12 of the Act reads as follows :

12. Bail of Juvenile-
(1) when any person accused of a bailable or non bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being In force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring

him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.
(2).....
(3).....

4. According to Sub Section (1) of Section 12 any person, being juvenile shall be released on bail with or without surety. However, for refusal of the bail there are only three grounds- firstly if the release is likely to bring him into the association with any known criminal. Secondly, exposes him to moral, physical or psychological danger and thirdly if his release would defeat the ends of justice.

5. This Court has been repeatedly directing that if the release is refused on these grounds the court should record finding as to whether any such ground exists or not. It is not that the mere quoting of few lines from this Act, the bail should be refused. The impugned order does not show any such ground except that it is against law. Being against law is no ground under Section 12 of the Act whereas this Court by its order dated 15.11.2002 directed the Sessions Judge to decide the bail application keeping in view the provision of Section 12 of the Act. The impugned order has been passed in utter disregard of Section 12 of the Act but it nowhere shows that the release would defeat the ends of justice and moreover there is also nothing to show as to how the release would defeat the ends of justice. No doubt the girl is minor but at the same time the boy is also minor and is detained in Children Home for the last 7-8 months. It appears that the Sessions Court was bent upon refusing the bail application and that is why ignored the direction of this Court, which is not proper for the Additional Sessions Judge concerned.

6. The revision is therefore, allowed. The revisionist shall be released on bail on his furnishing two sureties and personal bond to the satisfaction of the Magistrate concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 7, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 387 of 2000

M/s Girraj Stone Crusher Private Limited, Agra ...Petitioner
Versus
The Commissioner of Trade Tax and another ...Respondents

Counsel for the Petitioner:
Sri Bharatji Agarwal
Sri Rakesh Ranjan Agarwal

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act- Section -8 c (3 A) Power to issue direction- for taking security in cash from the dealer before issuing form 31- demand of cash security more than the amount of tax liability- held- arbitrary and illegal- direction issued to the Commissioner to issue fresh circular as per observation of the Court.
Held - Para 22

The Commissioner while issuing the circular under section 8 C (3A) can adopt any reasonable and rational method so that the cash security is demanded of an amount which is reasonable having nexus to the amount of tax which would

be payable. In this way the interest of the State and that of the dealers would be balanced.

Case law discussed:

1993 U.P.T.C. 833, 1993 UPTC 1371,1988 UPTC 218

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

1. This writ petition and connected/similar writ petitions are being disposed of by a common judgment.

2. Heard Sri Bharatji Agarwal learned Senior Advocate and Sri Rakesh Ranjan Agarwal, Advocate for the petitioner and learned standing counsel.

3. The petitioner has challenged the impugned circular dated 26.6.99 issued by the Commissioner, Trade Tax, U.P. Annexure -4 to the writ petition by which the cash security for issuing Form 31 under U.P. Trade Tax Rules for import of stone ballast has been increased from Rs.180/- to Rs.530/- per form.

4. The petitioner supplies stone ballast to the Railways in accordance with the Railways specifications. Copy of the relevant extract of the contract dated 25.10.99 is Annexure-1 to the writ petition. Under the U.P. Trade Tax Act stone ballast is liable to pay trade tax at 7.5% under Notification dated 23.11.98. The Railway is a Central Government Department and is hence authorized under the U.P. Trade Tax Act under section 3 G to issue From III D to its supplier on the purchase of material, and on the issue of Form D the rate of tax is 5%.

5. The petitioner is purchasing stone ballast from the State of Haryana & Rajasthan. It is purchasing 300 cubic meter stone ballast for Rs.1500/- approximately including Central sales. For the import of stone ballast into U.P. the petitioner requires From 31 as envisaged by Section 28 A of the U.P. Trade Tax Act.

6. Section 8 C (3A) entitles the Commissioner Trade Tax to issue directions for issue of Form 31 to the dealers after taking cash security. Section 8 C (3A) states -

"Notwithstanding anything contained in Sub section (2) of sub section (3), the Commissioner may, in respect of any goods notified by the Government in this behalf, by a joint order in writing, direct that a cash security of such amount as may be specified in such order shall be required to be furnished by a dealer or person requiring any of the forms prescribed under this Act."

7. Under the aforesaid provision the Commissioner Trade Tax had issued a circular dated 27.3.91 for issue of Form 31 to the dealers of stone ballast after taking Rs.180/- as advance security per Form applicable to 300 cubic ft. True copy of the circular is Annexure 2 to the writ petition.

8. The petitioner is aggrieved by the subsequent circular dated 26.6.99 by which the cash security for stone ballast has been increased from Rs.180/- to Rs.530/- per form vide Annexure 4 to the writ petition for import of 300 cubic ft. stone ballast from outside the State. It is alleged that the fixation of cash security at Rs.530/- per form is wholly arbitrary and has no reasonable nexus with the actual tax liability under the U.P. Trade Tax Act.

9. In paragraph 14 of the petition it is alleged that the rate of ballast is Rs.215/- per cubic metre. At this rate, the value of 300 cubic feet comes to Rs.1826.42 paisa taking it to a round figure at Rs.1850/-. The tax @ 7.5% comes to Rs.138.75 . It is stated that one cubic metre is equal to 35.31 cubic feet. The petitioner is getting Form 3 D from the Railway and the rate of tax is 5%. On that basis the tax on Rs.1850/- comes to Rs.95.50. If no Form 3-D is received the rate of tax would be 7.5% and the tax would be Rs.138.75.

10. It is alleged in paragraph 17 of the writ petition that the tax liability would not exceed Rs.180/-. Hence the fixation of cash security at Rs.530/- per form is wholly arbitrary.

11. Learned counsel for the petitioner has submitted that cash security is demanded to secure the interest of the revenue for convenient realization of tax, and hence the amount fixed as the cash security should have a reasonable nexus with the amount of tax payable. He has submitted that the fixation of Rs.530/- as cash security per form for the import of 300 cubic feet of stone ballast is wholly arbitrary and unreasonable and without any nexus to the tax liability. He has further stated that freight should not have been taken into consideration for fixation of the cash security. He has submitted that fixation of the cash security at such a high figure is wholly arbitrary since it blocks a huge amount of money of the dealers unnecessarily, and deprives them of their capital.

12. A counter affidavit has been filed and we have perused the same. In paragraph 4 of the same reference has been made to several decisions of this Court in which judicial notice has been taken of the fact that there is a large scale of evasion of Trade Tax (earlier known as Sales Tax) and extensive malpractice regarding import of certain commodities. The validity of the Circulars of the Commissioner Trade Tax has been upheld vide Annexure CA-1 to Annexure CA-12.

13. We have carefully perused the aforesaid decisions which have been annexed to the counter affidavit. In paragraph 11 of the counter affidavit it has been stated that while determining the tax payable after such import the sale value of better quality stone ballast has been taken into consideration. In paragraph 25 of the counter affidavit it is stated that value of cash security under section 8 C (3A) is determined on the basis of best quality of goods and also the average freight incurred thereon plus reasonable margin of profits. If in a given case the security is found excessive the same may be refunded or adjusted on making the final assessment.

14. The validity of section 8C(3A) has been upheld by this Court in **M/s Saurabh & Brothers, Sidharthnagar vs. State of U.P. and others 1993, UPTC 833** and it has not been challenged before us. What learned counsel for the petitioner has contended before us is that the cash security should be determined on the average quality of the goods and not the best quality of goods.

15. In our opinion 'average quality of goods' is a vague expression and will only lead to all kinds of confusion and unnecessary litigation. Hence we are not inclined to direct that the cash security

should be fixed on the basis of average quality of stone ballast.

16. However, we are certainly of the opinion that the fixation of the cash security on the basis of the price of the highest quality of goods is arbitrary and hence violative of Article 14 of the Constitution. In Maneka Gandhi v. Union of India AIR 1978 SC 597 the Supreme Court held that arbitrariness violates Article 14 of the Constitution. After that landmark decision of the seven Judges bench of the Supreme Court it is settled that the test of reasonability pervades the entire Constitution, and no authority can act arbitrarily. Hence although the Commissioner has power under section 8 C (3A) to direct that cash security should be given for issuing Form 31, yet the Commissioner cannot fix the cash security at an arbitrary amount. Learned counsel for the petitioner is correct when he says that the cash security must have reasonable nexus to the tax which may be payable on the sale of the stone ballast. In M/s J.P. Stone Co. V. State of U.P., 1993 UPTC 1371 a division bench of this Court observed " The power conferred on the Commissioner under Section 8C (3A) must be exercised in a reasonable manner, and the security amount which is fixed in exercise of that power **must have a nexus with the object for which security is demanded."** The Court also observed" The amount of security which may be required to be paid by a dealer should be reasonable and commensurate with the tax that may be realized from him, and should not be excessive."

17. It may be mentioned that Section 8C (3) mentions ' the amount of such security or additional security shall also **in no case exceed the tax payable** in accordance with the estimate of the assessing authority."

18. In our opinion, Section 8C (3) and Section 8c (3A) should be read together , and not in isolation. Hence it follows that though it is not expressly mentioned in the latter provision, as it is in the former, that the cash security which the Commissioner can fix should not exceed the tax payable, it should have a reasonable nexus with the same, as held in the case of M/s J.P. Stone Co. (supra). In the present case we find no such nexus.

19. No doubt if a higher amount of cash security is demanded, which is higher than the trade tax, the same is liable to be refunded after the final assessment, but we cannot be impervious to the fact that once the Trade Tax Department gets some money from the dealers which it is not entitled to it takes a long time to get a refund, and this blocks the capital of a businessman. In business it is essential that money should not be blocked for a long time and it must be kept in circulation.

20. To take a hypothetical case, suppose the trade tax payable on a low quality product is Rs.100/- per unit while that payable on the similar product of very high quality is Rs.500/- per unit (the difference will be due to difference in price) then surely it is unreasonable and arbitrary to ask a dealer who is selling low quality product to pay Rs.500/- for form 31 when the tax payable by him would only be Rs.100/-.

21. In our opinion the appropriate course of action therefore, would be for the Commissioner to issue circular under section 8C (3A) of the U.P. Trade Tax

Act on rational and reasonable principles. For example, the Commissioner can in his circular grade the various varieties of stone ballast which are known in the market in various grades e.g. Grade-I for the best quality, Grade-II for the next best, Grade III for the next, etc. according to the price of these various grades in the market, and the cash security for Form 31 should be demanded accordingly. It is inappropriate and arbitrary to demand cash security only on the basis of the highest grade or quality of stone ballast, as has been done in the present case.

22. We make it clear that we are not directing the Commissioner to issue his circular in a particular manner. This Court is not an expert in such matters and hence such matters should be left to the Commissioner to decide after consulting experts. The Commissioner while issuing the circular under section 8C (3A) can adopt any reasonable and rational method so that the cash security is demanded of an amount which is reasonable having nexus to the amount of tax which would be payable. In this way the interest of the State and that of the dealers would be balanced.

23. In paragraph 13 of the counter affidavit the price of the best quality stone ballast is mentioned as Rs.660/- per cubic metre, but no material has been stated in the counter affidavit as to on what basis this figure has been reached. The Railway purchases the stone ballast at Rs.247/- per cubic metre. It may also be mentioned that the prices of commodities keep on changing from time to time and hence this factor should also be taken into consideration by the Commissioner when issuing the circular (or circulars) as suggested by us.

24. Moreover, in **M/s Vinod Coal Syndicate v. CST 1988 UPTC 218** it was held by the Supreme Court that freight charged separately is not part of the turnover. The definition of turnover in section 2 (i) Explanation II Clause (i) excludes the cost of freight if separately charged. Annexure-1 to the writ petition clearly shows that freight has been separately charged. Hence we direct the Commissioner that when he issues the circular under section 8C(3A) he should fix the cash security on a basis which excludes the freight wherever separately charged.

25. In the circumstances the writ petition is allowed. The impugned Circular dated 26.6.99 is quashed. The Commissioner Trade Tax UP is directed to re-fix the rate of cash security for issuance of Form 31 on stone ballast in the light of the observations made above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.1.2002

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

Special Appeal No. 58 of 2003

Jitendra Singh ...Petitioner
Versus
District Judge, Etah and another ...Respondents

Counsel for the Appellant:
Sri V.K. Singh
Sri M.N. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Termination order- appointment on the post of steno without facing selection process- District Judge appointed just prior 15 days from his date of retirement- No one shall be permitted to take benefit of his own wrong "NEL PRENORA ADVANTAGE DEFENDANT SON TORI DENESEN" applicable held- termination order justified.

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

1. We have perused the impugned judgment and order dated 19.12.2002 passed by learned Single Judge in Writ Petition No. 54389 of 2002 giving rise to the present Special Appeal. By means of the said judgment, aforesaid Writ Petitionk has been dismissed.

2. We have perused the record of the Special Appeal, which includes copy of the writ petition as well.

3. Petitioner was appointed on the post of Stenographer in Fast Track Court in the judgeship of Etah on 27.8.2002, copy of appointment letter has been filed as Annexure 1 to the affidavit filed in support of the Stay application. The appointment letter, particular page 18 to the paper book, itself mentions 'You are hereby temporarily appointed as Steno….. for a period till the Fast Track Courts run. It is made clear that as soon as Track courts cease to run your services shall also cease accordingly….."

4. The appointment letter itself mentions that appointment of the petitioner was temporary'. It also indicates that the appointment of the petitioner was for fixed term i.e. co-existing with the Fast Track Court.

5. The impugned judgment dated 27.11.2002, passed by the concerned District Judge, takes cognizance of the complaint made to the then Hon'ble Administrative Judge by one S.K. Srivastava, as a consequence of which an enquiry was conducted on 20.9.2002 and the then Special Judge (SC & ST Act) Etah, required the petitioner to undergo a test for assessing his skill as Stenographer and the said test revealed that he was not suitable/competent to hold the post.

6. The impugned order further takes notice of the fact that the then District Judge, Sri Brijendra Singh, ignoring the said report of then Special Judge (Sri Abhimanyu Kumar) appointed the petitioner.

7. Another circumstances, creating serious doubt about the fairness' in the matter is that the then District Judge Sri Brijendra Kumar made this appointment only 14 days before his retirement. The impugned order contains serious allegations against the then District Judge- Sri Bijendra Singh.

8. We have no doubt, considering the circumstances mentioned in the impugned order, that the then District Judge was guilty of meddling and tampering the record which warranted serious action against him for the charge of gross abuse of his authority/office.

9. The District Judge, Etah, while passing the order, did consider the contention of the petitioner that he was given no notice before passing the impugned order *EX DOLO MALO NON ORITUPACTIO*"- A right of action does not arise out of fraud is the answer to the aforesaid contention of the petitioner.

10. Concept of fairness in administrative action, at one stage in the past became an issue and subject matter of considerable judicial debate but there has been total unanimity on the basic element, viz. it is dependent upon facts and circumstances of each case pending scrutiny before a court and that no straight jacket formula can be laid down with precision.

11. Menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities. In the cases of **K. Karunakaran versus State of Karela and another** reported in **2000 (3) SCC 761 (para 8) and United India Insurance Company Limited versus Rajendra Singh and others, 2000 (3) SCC 581 (para 3)** the Apex Court has reaffirmed that fraud and justice never dwell together "*FRAUS ET JUS NUNQUAM COHABITANI*"

12. There is another principle, i.e., no one shall take advantage of his own wrong *"NEL PRENORA ADVANTAGE DEFENDANT SON TORT DEMESEN*".

13. It is noted in the impugned order that the test report was taken out of record by the then District Judge. In such a situation court will be justified to proceed on the basis that everything should be presumed against the wrong doer- vis, the test report was taken off the record by then District Judge for extraneous consideration in order to confer certain benefit in an illegal manner, which were not otherwise available, upon the petitioner.

14. In our opinion, the District Judge committed no illegality.

15. We have no doubt that a person, who has been given an appointment in an extra ordinary manner, can be dispensed with from service in similar fashion by resorting to extra ordinary procedure. In view of the Test report- petitioner could never be appointed.

16. We take judicial notice of the fact that serious irregularities are being perpetuated in all the District Judgeships barring a few as exception in the matter of appointments of Class III and Class IV posts.

17. We observe that whenever in such matters, some enquiry is initiated it is seldom allowed to arrive at logical conclusion and never in past, such illegally appointees are removed or discharged. The general explanation offered by the concerned District Judges, without exception, is that such appointments are under pressure of such, whom they cannot afford to annoy. Be that as it may, a procedure, which is transparent and eliminates arbitrary appointments (not conforming to the rules or test of fairness) is prescribed by the concerned authority.

18. We have no doubt that if malpractice' is to be checked and arbitrariness is to be avoided, it is high time that the persons and the authorities should come forward to show their bona fide and provide modalities/ procedure wherein elements of nepotism, corruption, arbitrariness etc. are ruled out.

19. In our opinion, that we have said enough and no more is required to be commented. Record of the case shall be placed before Hon'ble the Chief Justice

for such action as may be deemed appropriate.

20. Special Appeal has no merit. It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 7453 of 2003

Bhagwati Prasad Chaudhari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Singh
Sri G.N. Kanaujiya

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- No confidence motion- against Chairman District Cooperative Bank- S.D.M. being director held due to lack of requisite majority- no confidence motion illegal- High Court by judgement dated 3.1.03 had already held- the no confidence motion as valid one- by impugned order District Magistrate adjourn the meeting on the pretext that the Registrar Cooperative Society has held the S.D.O. as appropriate authority while High Court has directed that District Magistrate held- due to ulter motive the District Magistrate adjourn the meeting . Suo moto contempt proceeding initiated - necessary direction issued to hold no confidence motion on particular day without any adjournment.

Held- Para 6

Thus, it appears that the District Magistrate is of the opinion that the Registrar's order is contrary to the view expressed by this Court in its judgment dated 3.1.2003. We fail to understand how a senior officer like the District Magistrate is of the opinion that the Registrar, Cooperative Society's order will prevail over the opinion expressed by this court in its judgment. Prima facie it seems to us that it was with ulterior motive that the District Magistrate, Mirzapur has passed the impugned order to adjourn the meeting of no confidence on some flimsy pretext. Thus, he appears to have committed gross contempt of the order of this Court dated 3.1.2003.

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

1. Standing counsel is granted one week's time to file counter affidavit. List peremptorily on 25th February, 2003.

2. This case illustrates how the executive authorities have now started disobeying the orders of this Court by giving scant regard to the same.

3. The dispute in this case is regarding no confidence motion against the Chairman of the District Cooperative Bank Limited, Mirzapur.

4. The controversy came up before this court in writ petition no. 55526 of 2002, Ranjan Jaiswal vs. The Registrar, Cooperative Societies, UP Lucknow and others, which was decided on 3.1.2003, vide Annexure 1 to the writ petition. A Division Bench of Hon'ble S. Rafat Alam and Hon'ble D.P. Singh, JJ allowed the writ petition in which the District Magistrate, Mirzapur as well as the Sub Divisional Magistrate Sadar, Mirzapur as also the Director of the District Cooperative Bank Limited, Mirzapur

were respondents. In this case it was held that the no confidence motion was not invalid for want of quorum or lack of requisite majority because two third members were present in the meeting.

5. We would have expected that after this judgment the meeting for considering the motion of no confidence would have been held on 27.1.2003 as had been fixed earlier, but by the impugned order dated 25.1.2003 the meeting has been adjourned, vide Annexure 7 to the writ petition, by the District Magistrate, Mirzapur, respondent no. 2 in this petition. In the impugned order the District Magistrate states that there are contradiction regarding the decision of the dispute regarding the validity of nomination of nominated members. According to him the High Court has held that the District Magistrate is the competent authority to decide the objections, whereas the Registrar Cooperative Societies is of the opinion, vide his letter dated 17.1.2003, that the controversy has to be decided by the Sub Divisional Magistrate, who has decided the controversy. According to the District Magistrate, as mentioned in his impugned order, there is contradiction between the direction of the Registrar, who has directed that the controversy will be decided by the sub Divisional Magistrate and the judgment of this court dated 6.1.2003, which has directed that the controversy should be decided by the District Magistrate.

6. Thus, it appears that the District Magistrate is of the opinion that the Registrar's order is contrary to the view expressed by this Court in its judgment dated 3.1.2003. We fail to understand how a senior officer like the District Magistrate is of the opinion that the Registrar, Cooperative Society's order will prevail over the opinion expressed by this court in its judgment. Prima facie it seems to us that it was with ulterior motive that the District Magistrate, Mirzapur has passed the impugned order to adjourn the meeting of no confidence on some flimsy pretext . Thus, he appears to have committed gross contempt of the order of this Court dated 3.1.2003.

7. We, therefore, issue notice of contempt of court to Sri Amrit Aabhijat, District Magistrate, Mirzapur to show cause as to why he should not be punished for contempt of Court for violating the judgment of this Court dated 3.1.03. The District Magistrate, Mirzapur, Sri Amrit Abhijat, should be personally present in court on the date fixed along with his reply. The learned Standing Counsel will communicate this order to the District Magistrate, Mirzapur forthwith. We further direct that the meeting or consideration of no confidence motion will be held on Monday, March 3, 2003 and it shall not be adjourned on that date.

8. This order has been passed in presence of Sri R.S. Singh, learned counsel for the petitioner and the learned Standing Counsel. The petitioner will serve the respondents no. 2 and 4 personally within three days and then may file counter affidavit by the next date fixed in the matter i.e. 25.2.2003. Standing counsel will also communicate the order to the D.M., Mirzapur.

A certified copy of this order may be given to the learned counsel for parties on payment of usual charges to day.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 31, 2003

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 21011 of 1991

District Co-operative Bank Limited, Azamgarh ...Petitioner
Versus
Vth Additional District Judge, Azamgarh and others ...Respondents

Counsel for the Petitioner:
Sri N.D. Shukla

Counsel for the Respondents:
Sri Indal Singh
Sri Ashok Kumar Divedi
Sri Pradeep Kumar
S.C.

Payment of Wages act- 15- Reinstatement with back wages- wages not quantified- workman not entitled for 10 times wages.

Held - Para 9

The third submission of the learned counsel for the petitioner appears to be correct. Though, the award has not been filed by either of the parties, however, from a perusal of both the impugned orders, it is apparent that the award had not quantified the wages payable to the respondent workmen. Also, there is nothing on record to show that any application under section 6-H for quantification of the award or its execution was filed. The petitioner had clearly stated that the respondent workman was reinstated in service on 2.9.1999 and since is getting all emoluments admissible to him. This fact has not been denied. Though , it is stated that it has been treated to be an appointment on probation. Be it may that so, but there appears to be a bonafide dispute as to the exact amount of wages to be paid to the respondent workman. A Division Bench of this Court in the Case of Om Prakash Goel vs. Lakshmi Ratan Engineering Works Ltd. and other (1973 ALJ 538) has held that in such bonafide disputes with regard to the amount of wages to be paid, the authority is not entitled to award compensation at ten times of the claim. Thus, in my view, the amount of compensation awarded to the respondent workman by the authorities below was not justified.

Case law discussed:
1973 ALJ 538

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard Sri N.D. Shukla, learned counsel for the petitioner and Sri Indal Singh, learned counsel for the workman at length.

2. The writ petition arises out of proceedings under section 15 of the Payment of Wages Act. It is admitted position that the respondent no. 3 who was posted as Peon-cum-Guard with the petitioner Bank worked at least from 24th October, 1979 to 30th June 1981 when his services were terminated on 1.7.1988. The aforesaid termination resulted in a reference under section 4 K of the U.P. Industrial Disputes Act. The Labour Court passed an award dated 29th January, 1996 whereby the respondent workman was reinstated with full back wages and restored to his position as on 1.7.1981 with the same salary. The petitioner challenged the award through a writ petition before this Court. However, the writ petition was dismissed by this Court by an order dated 17th July, 1986. Thereafter, since the salary was not being paid to the respondent workman, he lodged a case under section 15 of the

Payment of Wages Act which application was allowed vide order dated 22nd June, 1989. The appeal against the said order was also dismissed on 9th January, 1991. Both these orders have been challenged in this writ petition.

3. Counsel for the petitioner raised three submissions before me.

1. Bonus and leave encashment not being wages as defined under the Act, thus the application was not maintainable.
2. Application was time barred, therefore, no relief could be granted to the workman.

4. Learned counsel for the respondents workman, on the other hand, submitted that none of these grounds were taken before the courts below, therefore, they cannot be urged for the first time in the writ petition. Further, he contends that bonus and leave encashment is also a part of wages. The last contention is that in any event, the petitioner is not entitled to any relief, as on the facts of this case equity is heavily against the petitioner.

No other point has been urged by either of the parties.

5. The terms "wages" has been defined in section 2 (vi) of the Act and the relevant portion reads as under:

"2 (vi) wages means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would , if the terms of employment, expressed or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes-

(a) any remuneration to which the person employed is entitled in respect of over time work or holidays or any leave period.
(b)…….
(c)…….
(d) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force, but does not include-

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a court;
(2) ……..
(3) ……..
(4) ……..
(5) ……..
(6) ……..

6. The section itself is explicit that any sum payable under a award or any remuneration with respect to holidays or leave period is covered by it. The only exception made is that bonus under a scheme of profit sharing is excluded but bonus forming part of the remuneration has not been excluded. The award has not been filed by the petitioner. The petitioner has also not averred either before this court or before the authorities below, that claim included under the head of bonus did not form part of the remuneration payable to the employees of the petitioner bank. It is settled that the workmen are entitled for grant of bonus as regular remuneration under the Payment of Bonus Act, 1965.

7. Further, remuneration for holidays and leave period are also

included within the said term. Therefore, the first submission of the learned counsel for the petitioner has no force and is rejected.

8. The submission that the claim is time barred, also has no legs to stand. The authority has considered this aspect and on the facts disclosed in the application under section 15 has found that there was sufficient cause shown therein to justify and explain the delay in making the application . Therefore, the authority has condoned the delay in making the application. This being a finding of fact, and also not shown to be perverse or against the evidence on record cannot be interfered with under Article 226 of the Constitution of India.

9. The third submission of the learned counsel for the petitioner appears to be correct. Though, the award has not been filed by either of the parties, however, from a perusal of both the impugned orders, it is apparent that the award had not quantified the wages payable to the respondent workmen. Also, there is nothing on record to show that any application under section 6-H for quantification of the award or its execution was filed. The petitioner had clearly stated that the respondent workman was reinstated in service on 2.9.1999 and since is getting all emoluments admissible to him. This fact has not been denied. Though , it is stated that it has been treated to be an appointment on probation. Be it may that so, but there appears to be a bonafide dispute as to the exact amount of wages to be paid to the respondent workman. A Division Bench of this Court in the Case of *Om Prakash Goel vs. Lakshmi Ratan Engineering Works Ltd. and other* (1973 ALJ 538) has held that in such bonafide disputes with regard to the amount of wages to be paid, the authority is not entitled to award compensation at ten times of the claim. Thus, in my view, the amount of compensation awarded to the respondent workman by the authorities below was not justified.

10. The contention of the learned for the workman that ground of maintainability was not taken is devoid of any merit. A bare perusal of the impugned orders show that the grounds were urged. So far as, the applicability of the principles of equity is concerned, it has a double edge. From the pleadings it does not appear that the respondent workman adopted the normal procedure. He should have applied first for quantification of the wages under the award and then put the same into execution. Though, there was some delay in implementing a part of the award, but, it is not such a case where it can be said that the action or omission of the employer was wholly malafide. To me, equity in the present case appears to be evenly balanced.

11. On the basis of the discussions above, the writ petition is partly allowed and the award of compensation is hereby quashed. The rest of the order, however, is maintained. Whatever the petitioner has deposited on the basis of the interim order of this court would be adjusted when the impugned orders, as truncated by this court is implemented. The writ petition is, therefore, partly allowed on the terms mentioned above. Costs on parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 11, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1246 of 1988

M/s Agarwal Dal and Oil Mill ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.V. Gupta
Sri Shashi Kant Gupta

Counsel for the Respondents:
Sri S.P. Kesharwani, S.C.

U.P. Sales Tax (now Trade Tax) Act- Section 4-A- the order rejecting the application for grant of eligibility certificate are based on irrelevant considerations and the petitioner is entitled for exemption even if it was trading in oil seed.

Held- Para 8
In view of the above the writ petition is allowed. The impugned orders dated 16th March, 1988, communicated by the letter dated 31.3.1988 (Annexure 3 to the writ petition) and the order dated 2.6.1988 filed as Annexure cA-1 to the counter affidavit rejecting the review application of the petitioner are quashed. Since no other ground was taken for refusing to grant eligibility certificate to the petitioner, we direct the respondents to issue the requisite eligibility certificate to the petitioner under section 4 A of the U.P. Trade Tax Act.

(Delivered by Hon'ble Prakash Krishna, J.)

1. The petitioner has challenged the orders dated 31.3.1988 and 2.6.1986 rejecting the petitioner's application for grant of eligibility certificate under section 4A of the U.P. Sales Tax (now Trade Tax) Act by the Divisional Level Committee.

2. The petitioner is a partnership firm registered under the Partnership Act and it established a new industry to manufacture oil in the year 1983. The petitioner was also carrying on the business of oil seeds (Telhan). The petitioner 's application for the grant of eligibility certificate was rejected solely on the ground that the unit besides production of oil is also doing trading business of Telhan, vide annexure 3 to the writ petition. The said order is dated 16.3.1988 communicated to the petitioner by means of letter dated 31.3.1988. Thereafter the petitioner filed review application and also placed reliance upon the Circular of the Commissioner of Trade Tax, dated 25.2.1988 with respect to the new units established in between 1.10.1982 to 31st March, 1990. However, the said review application was also dismissed. The certified copy of the order rejecting the review application was not annexed alongwith the writ petition. However, this Court on 7.12.1988 directed the Standing Counsel to file the copy of the order passed on the review application, by which the review application was rejected. The said order has been filed as annexure CA-1 to the counter affidavit sworn by Sri Shyam Sundar Chaurasia filed on behalf of District Industries Centre. A perusal of the same shows that review application was also rejected on the same ground. Aggrieved against the aforesaid two orders the present writ petition has been filed.

3. On behalf of the respondents two counter affidavits on similar allegations have been filed.. It has been stated that the date of commencement of production is 31st March, 1983 and the application for the grant of eligibility certificate was rejected in view of the report given by the Deputy Commissioner (A) Sales Tax, Allahabad by the letter no. 1450 dated 26.5.1988. In the said report it was stated that " The unit apart from production and sale of oil and oil cake is also engaged in trade of oil seeds. Oil seed is used for manufacture of oil and oil cake. As per O.S.T. registration certificate the unit is authorized for trading of oil seeds. An apprehension was expressed in the said letter that the petitioner can avail double benefit of exemption causing loss to the State exchequer and that the statement of the petitioner that they do no do trading of produced items and no tax evasion is involved is incorrect and baseless.

4. We have heard Sri Shashi Kant counsel for the petitioner and Sri S.P. Kesharwani Standing Counsel for the respondents.

5. From the undisputed facts it is clear that the petitioner has established a new unit of manufacturing oil. It is also not disputed that the petitioner is also carrying on the trading business of oil seeds. The Divisional Level Committee has rejected the application of the petitioner for grant of eligibility certificate only on the ground that the petitioner is also carrying on the trading business of oil seeds. In this connection the Circular dated 26.2.1988 of the Commissioner is relevant. Paragraph 4 of the Circular states:

"Shasan ko yeh bhi sabndarwhit kiya the ki agar nayee ikayee daar kisi vastu ke kraya vikraya ka bhi vyopar kiya jata hai to asisi ikayee bhee chhoot kee patra hogi. Shsan ne yeh nirdesh diye hain ki aisi ikai to swayam ke dwara nirmit mal ki vikri par chhoot diye jane men koyee aapatti nahin hai kintu yeh sunishcit kar liya jay ki aisich vastu jinka kray vikray ka vaipar kiya ja rah hai, ikayee dwara utpadit vastuon se Bhim ho taki karapvanchan kee koyee gunjaysh na rahe."

6. Counsel for the petitioner has submitted that in view of the said Circular the rejection of the application for grant of eligibility certificate by the Divisional Level Committee is totally illegal. In paragraph 9 of the writ petition the petitioner has placed reliance upon the said Circular dated 26.2.1988 of Commissioner Sales Tax. In reply the respondents in the counter affidavit have not stated even a single word as to how the said Circular is not applicable to the facts of the petitioner's case. Reply to paragraph 9 of the writ petition has been given in paragraph 3 of the affidavit of Sri S.B.P. Gupta, Sales Tax Officer Grade II. In another counter affidavit of Sri Shyam Sundar Chaurasia only an apprehension has been mentioned in paragraph 10 that the unit can evade tax by resale of unpaid oil seed to such customer who can avail facilities under section 4 A.

7. Having considered the respective submissions of the parties, we are of the opinion that the order rejecting the application for grant of eligibility certificate are based on irrelevant consideration and the petitioner is entitled for exemption under section 4 A even if it is was trading in oil seed. There is no such condition under section 4 A that a person

who is also doing trading business cannot carry on manufacturing unit of a different commodity. Even the Circular issued by the Commissioner of Trade Tax does not impose any such condition. On the contrary it says that the bar has only been imposed for not trading in the product and not with the raw material. The oil seed is not the product of the unit of the petitioner and it was also not the case of the respondents either before the Divisional Level Committee or before this Court that the petitioner is also carrying on the trading activities in oil or oil cake.

8. In view of the above the writ petition is allowed. The impugned orders dated 16th March, 1988, communicated by the letter dated 31.3.1988 (Annexure 3 to the writ petition) and the order dated 2.6.1988 filed as Annexure CA-1 to the counter affidavit rejecting the review application of the petitioner are quashed. Since no other ground was taken for refusing to grant eligibility certificate to the petitioner, we direct the respondents to issue the requisite eligibility certificate to the petitioner under section 4 A of the U.P. Trade Tax Act.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.1.2003

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

Civil Misc. Writ Petition No. 14333 of 1998

Miss. Sunita Sharma and another
...Petitioners
Versus
District Inspector of Schools and others
...Respondents

Counsel for the Petitioners:
Sri V.C. Misra
Sri Vikrant Pandey
Sri Krishna Murari

Counsel for the Respondents:
Sri Vashishtha Tiwari, S.C.

Constitution of India- Article 226- the refusal in not making sanction and approval of the appointment by the District Inspector of Schools is not legally judifiable as the said ban dated29.6.1991 was superseded by another G.O. dated 26 September, 1991 by which the ban for making appointment against the short term vacancy was lifted.

Held - Para 9

The averments made in the counter affidavit of the District Inspector of School has been controverted and the contentions of the writ petition have been reiterated on behalf of the petitioner.

(Delivered by Hon'ble R.B. Misra, J.)

Heard Sri V.C. Misra, learned Senior Advocate with Sri Vikrant Pandey, counsel for the petitioner and learned

Standing Counsel for the respondent no. 2.

1. In this writ petition a prayer has been made by the petitioner for a writ of certiorari calling the respondents to produce the record of the case and to quash the impugned orders dated 7.3.1998 and 19.3.1998 (Annexure 8 and 9 to the writ petition) passed by respondent no. 1, whereby the respondent no. 1 disapproved the appointment of the petitioner no. 1 as a Lecturer in Biology made on short term vacancy on the ground that vide Government order dated 30.7.1991, there has been a total ban on the appointment and further the Director of Education vide his letter dated 31.8.1991 has directed that no final approval be accorded to any appointment in Intermediate College. Similarly the appointment of the petitioner no. 2 as Assistant Teacher in L.T. Grade was also dis-approved on the aforesaid ground vide order dated 19.3.1998 by the respondent no. 1. While disapproving the appointment of both the petitioners on the ground of ban imposed by the aforesaid Government order, the respondent no. 1 lost sight of the Government order dated 26.9.1991, whereby the ban imposed was superseded and lifted.

2. It appears that on 30.6.1997 the Principal of the Institution Chameli Devi Girls Inter College, Mathura retired and as such one Km. Snigdha Talpatra, who was the senior most teacher in the Institution was given adhoc promotion and appointed as adhoc Principal of the Institution. As result of promotion of Miss. Snigdha Talpatra, a short term vacancy arose in the Lecturer grade and similarly another short term vacancy arose on account of promotion of Smt. Pushpa Pandey, a L.T. grade teacher to Lecturer Grade. Thereafter the selection committee after interviewing the candidates, recommended the name of the petitioners for appointment on the post of Lecturer (Biology) and as Assistant Teacher in L.T. grade, respectively. On the basis of the aforesaid recommendation the management issued an appointment order dated 17.7.1997 appointing the petitioner no. 1 as a Lecturer is Biology in short term vacancy and the petitioner no. 2 was also given appointment on the same day as Assistant Teacher in L.T. Grade in the short term vacancy.

3. However, thereafter the Committee of Management forwarded the papers pertaining to the appointment of the petitioners to the District Inspector of Schools, Mathura for approval vide letter dated 18.10.1997, which was disapproved on 7.3.1998 by the respondent no. 1, D.I.O.S. Mathura by saying that the ban for making appointment to direct recruitment or to short term vacancy under the purview of the Commission was prevailing.

4. Sri V.C. Misra, learned Senior Counsel appearing for the petitioner, has argued that there is no other ground referred in impugned order in question in the writ petition.

5. The Counter affidavit has been filed by the Manager, Chameli Devi Kahndelwal Girls Inter College, Mathura, wherein in para 7 he has mentioned that the vacancy in question was advertised and published in local Hindi news paper having vide circulation in the state and the applications were invited amongst the duly qualified candidates and a proper selection committee was constituted in

which eight candidates appeared before the selection committee, out of which the petitioner nos. 1 and 2 were selected and appointed as Lecturer in Biology and Assistant Teacher in L.T. grade respectively. It has further been mentioned in the counter affidavit that the G.O. dated 26.9.1991 is also not applicable in the case of the short term vacancy and there was no ban at the appointment of short term vacancy and as such the selection of the petitioners were made in accordance with law. However, in the counter affidavit given on behalf of the District Inspector of Schools, Mathura it has been indicated as below:

"The advertisement was not in accordance with the rules and regulations framed under the U.P. Intermediate Education Act. According to the existing law, advertisement has to be made in two daily news papers. One should be of State level circulation and other of local circulation so as to meet the requirement of Article 14 and 16 of the Constitution of India and this view has been approved by this Hon'ble Court in its full Bench decision reported in 1994 U.P.L.B.E.C. (3) page 1551 popularly known as Radha Raizada Case. In this case even according to the petitioner, advertisement has been made in a local Hindi news paper, therefore, the petitioners' appointment is bad in law and no approval could be granted. Moreover, this aspect could not be detailed in the order refusing the approval of the petitioner's appointment but the same may be read in consonance with the order refusing the approval."

6. Learned counsel for the petitioners has placed reliance on the decision of this court passed on April 16, 1992 in Civil Misc. Writ Petition No. Nil of 1992 Mahendra Pratap Singh v. District Inspector of Schools (Enclosed as Annexure 13 to the writ petition), whereby while allowing the writ petition of Mahendra Pratap Singh this Court vide its order dated 16th April, 1992 has noticed that the ban which was imposed by Telex dated 29.6.1991 and G.O. dated 17.7.1991 has been superseded by another G.O. dated 26th September, 1991 by which the ban has been lifted.

7. On behalf of the learned counsel for the petitioners reliance has been made on a decision reported in Education Service Cases at page 1670 (2000 (3) ESC 1670 (All.). District Inspector of Schools Kanpur Nagar and others v. Diwakar Lal and others (Special Appeal No. 40 of 2000 decided on 25th May, 2000), wherein it is mentioned that the fresh ground in the counter affidavit cannot be taken by the authority concerned. Para 7 of the above case reads as under:

"7. The learned single Judge held that by adding a ground in the counter affidavit which did not find mention in the impugned order passed by the District Inspector of Schools, the respondents cannot be permitted to support the impugned order by carrying out a new case or raise a new ground for the first time before the Appellate/higher authority or Court to make the order valid. In support reference was made to the case of Mohinder Singh Gill vs. Chief Election Commissioner (AIR 1978 SC 851)"

8. The averments made in the counter affidavit of the District Inspector of School has been controverted and the contentions of the writ petition have been reiterated on behalf of the petitioner.

9. I have heard learned counsel for the parties and I find that the vacancy in question were advertised and published in the local news paper including Hindi Dainik " AAZ" after its vide circulation in the State and as such the vacancies were advertised. However, the refusal in not making sanction and approval of the appointment by the District Inspector of Schools is not legally judifiable as the said ban dated 29.6.1991 by which the ban for making appointment against the short term vacancy was lifted.

10. The petitioners are entitled to receive the salary from the next month and onwards and the arrears of salary, if they have taught in the Institution, and the same shall be disbursed to them within a period of six months from the date of production of a certified copy of this order.

11. A copy of this order be given to the learned counsel for the petitioners on payment of usual charges within three days and learned Standing Counsel free of charges.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.2.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 35344 of 2001

Smt. Kanti Srivastava ...Petitioner
Versus
State Bank of India and others ...Respondents

Counsel for the Petitioner:
Sri B.B. Paul
Sri Subash Dewedi

Counsel for the Respondents:
Sri Vipin Sinha

Constitution of India, Article 226- Service Law Compassionate appointment- claim rejected on the ground- the widow has received lum-sum amount from the employer bank- apart from so many investment in the life time of her husband- held- rejection order illegal- direction issued for fresh consideration in the light of observation made by the Court.

Held- Para 7 & 8

The impugned order does not give reason nor is there any application of mind into the relevant factors or any discussion on most material and vital points. The authorities have not bestowed laborious thoughts upon the factors that the deceased was survived by three minor daughters and they have not also given thought to the fact whether the family, in the circumstances, would require any permanent source of income to sustain itself after having lost its sole bread earner to keep the pot of the family boiling.

In the above perspective, the impugned order cannot be sustained and is liable to be quashed. In the result, the petition succeeds and is allowed and the impugned order declining compassionate appointment to the petitioner is accordingly quashed attended with the direction to the respondent Bank authorities to reconsider the claim of the petitioner for compassionate appointment in the light of true intendment of the scheme.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Petitioner, widow of late Ashok Kumar Srivastava, who was serving as Assistant Manager in the State Bank of India and was at the relevant time, posted

at Pratapgarh, has preferred this petition for the relief of quashing the impugned order contained in the communication dated 12.7.2001 and also for the relief of mandamus to the respondents to employ the petitioner in Class III service of the State Bank of India.

2. The brief facts, which bear on the controversy involved in this petition are that the husband of the petitioner namely Ashok Kumar Srivastava who held the post of Assistant Manager in the Bank was, at the relevant time, posted at Pratapgarh met with a road accident and succumbed to his injuries on 26.12.99. The deceased was survived by his widow and the three daughters. It is stated that the petitioner applied for compassionate appointment in Class 3 cadre commensurate to her educational qualification. The application moved for compassionate appointment did not find favour with the competent authority who rejected the same by means of the order contained in communication dated 12.7.2001. It is this order, which is the causative factor for institution of the present petition. Detailed order passed for declining the prayer for compassionate appointment has been annexed to the counter affidavit as Annexure CA 2. From a perusal of the order dated 14.6.2001, it would transpire that after furnishing details about the fiscal condition of the family, it has been spelt out that **'indigent circumstances do not exist in the family'**.

3. Learned counsel appearing for the petitioner in vindication of his stand that the petitioner is entitled to appointment on compassionate ground, submitted that the authorities were not justified in reckoning into consideration the funds received by family on account of death from employer including the pension etc. as the basis for opining that the family was not in financial straits and consequently for declining the prayer for compassionate appointment. He further submitted that the order spells out no reason and merely enumerates details about the moveable and immoveable properties of the deceased. It is further submitted that the order does not spell out any objective consideration of the various factors including marriage of three unmarried daughters of the deceased and as such, proceeds the submission, the order has been passed in utter disregard of the underlying object of compassionate appointment. The learned counsel representing the respondent bank, on the other hand, resisted the claim of the petitioner and contended that the petitioner was not entitled to appointment of compassionate ground. He further submitted that mere death furnishes to foundation for automatic appointment and that other attendant factors such as financial condition of the family have also to be taken into account and in the instant case, the Bank scanned the case of the petitioner in all its pros and cons and boiled down to the opinion that there existed no indigent circumstances so as to warrant compassionate appointment.

4. Before proceeding further, it would be appropriate to have acquaintance with the purpose behind providing compassionate appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family and thus there should be imperativeness in providing such appointment in order to redeem the family in distress. It is in the light of the above

general principle that I am prompted to scan the relevant provision which has been pressed into service by the Bank authorities to decline compassionate appointment.

"10. Financial condition of the family.

Appointments in the public services are made strictly on the basis of open invitation of applications and merit. However, exceptions are made in favour of dependents of employees dying in harness and leaving their family in penury and without any means of livelihood. Determining the financial condition of the family is, therefore, an important criterion for deciding the proposals for compassionate appointment. The following factors should be taken into account for determining the financial condition of the family.

(i) family pension
(ii) gratuity amount received
(iii) employee's/employer's contribution of Provident Fund
(iv) any compensation paid by the Bank or its Welfare fund
(v) proceeds of LIC Policies and other investments of the deceased employee
(vi) income of family from other sources
(vii) income of other family members from employment or other sources
(viii) size of the family and verifiable liabilities, if any

Decisions have been copiously cited from both sides in vindication of their respective contentions. In the first place, I propose to examine the case-laws cited by the learned counsel for the respondent bank. Sri Vipin Sinha, appearing for the respondent bank has placed credence on as many as 21 cases to hammer home the point and in order to avoid swelling the judgment. I would deal with so much precedents as are necessary for the just adjudication of the controversy involved in this petition. The learned counsel placed reliance of **Umesh Kumar Nagpal v. State of Haryana**[1]. The quintessence of what has been held in this decision by the Apex Court is that the whole object of granting compassionate appointment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. It has been further held by the Apex Court that in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet. The second case relied upon by the learned is **Director Education (Secondary) and another v. Pushpendra Kumart and others**[2]. The ratio flowing from this case is that a person cannot insist upon a particular post. The appointment on class 4 could be offered if class 3 post is not available. This case echoed the self same ratio and principles as prescribed in Nagpal's case. The third case relied upon by the learned counsel is **Kaushal Kumar Shukla v. C.M., P.N.B. and another**[3]. In this case, the petitioner was denied appointment on the ground that the family had sufficient means and there was no crisis of livelihood. The fourth case taken in aid of the case of the Bank is **S.B.I. and another v. Ram Plyarey**[4]. In this case also the appointment was denied on ground that financial condition of the family of the deceased was sound and

[1] JT 1994 (3) SC 525
[2] (1998) 5 SCC 192
[3] 2001 (2) ESC (All) 1342
[4] 200(2) ESC (All) 876

there was no\crisis to tide over. In **Haryana State Electricity Board v. Naresh Tanwar and another**[5], the Apex Court has held that compassionate employment is a vested right which could be exercised any time in future but it cannot be claimed and offered whatever after lapse of time and after the crisis in the family is over. In **Sanjeev Kumar Dubey vs. D.I.O.S., Etawah and others**[6] it was held by a division bench of this court that financial status of the family, qualification and suitability are the relevant factors to be taken into consideration. The Apex Court in this case based its decision on the ratio flowing from Nagpal's case. In **Jadwati Devi vs. State Bank of India and others**[7], the decision has been rendered based on the ratio flowing from Nagpal's case that the financial condition of the family of the deceased was sound and thus appointment was denied. The other cases cited by the learned counsel are **Haryana State Electricity Board v. Hakim Singh**[8]**, State of H.P. and others v. Rajesh Kumar**[9]**, Jagdish Prasad v. State of Bihar and another**[10]**, Smt. Sushma Gosain v. Union of India and others**[11]**', Dhiraj Kumar Dixit v. G.M. (P) UCO Bank Calcutta and others**[12]**, Kishore Singh V. State Bank of India Kanpur and others**[13]**, and Unlon of India v. Joginder Sharma**[14]**.** Besides the above cases, decisions rendered **in Special Appeal 447 of 1999 Jaddawati Devi and another v. State Bank of India and others, Civil Misc. W.P. No. 34547 of 2000 Pushpendra Arora v. SBI and others, Civil Misc. W.P. No. 16616 of 2001 Abeeda Begum and another v. Chairman SBI and others, Civil Misc. W.P. No. 5659 of 2000 Anurag Yadav v. CGM SBI and others** have also been called in aid by the learned counsel to enforce his contention that the fiscal condition of the petitioner was too sound to warrant the need of any appointment.

5. The distillate of the above decisions cited by the learned counsel for the respondent bank is that every appointment has to be made on merits, that compassionate appointment could not be made or claimed as a matter of right but in case, scheme or the rule prescribes such conditions or postulates as to warrant compassionate appointment, it could be made to tide over sudden crisis befalling the family taking into consideration the financial condition of the family of the deceased to the effect that it will not jeopardise the livelihood and existence of the family.

6. In **Krishana Kumar v. Union of India and others**[15], the Apex Court observed that only the ratio decidendi and not the reasons in support of decision have the force of law. In another case in **The Municipal Corporation of Bombay v. Thukral Anjall Deo Kumar**[16] the Apex Court explained that observation in a judgement has to be understood in the context of the facts of that particular case. The sheet anchor case amongst all the cases relied upon by the learned counsel

[5] JT 1996 (2) SC 542
[6] 2000 (1) ESC 635
[7] 1999 (3) AWC 2048
[8] JT 1997 (8) 332
[9] (2001) 9 SCC 174
[10] JT 1995 (9) SC 131
[11] (1989) 4 SCC 468
[12] JT 2002 (3)
[13] 2000 (1) Bank CLR 220 (All)
[14] (2002) 8 SCC 65
[15] 1990 (4) SLR (SC) 716
[16] 1989 (2 SLR 15 (SC)

is **Nagpal's** case (supra). The observation of the Apex Court in the said case is born of the direction of the High Court to the Government to offer compassionate appointment to the dependent of the deceased employee-a class I officer, to a class I or class II post. Here in the instant case, the petitioner applied for appointment and it was declined considering the lump sum amount received by the petitioner from employer on various counts and also having regard to certain private investments made by the deceased during his life time which the family of the deceased received . Besides it does not appear to be the intendment of the said decision to arrive at a subjective satisfaction of sound fiscal status on the basis of lump sum amount and certain investments made by the deceased in his lifetime. The question that begs consideration is whether mere receiving certain amount from employer after death of the bread earner and some other lump sum amount paid to the family would suffice vis a vis the factors that there are daughters of marriageable age to be married off, that there remains or not any perennial permanent source of income from employment of any of the members of the deceased family, and that how long the family will be able to sustain on whatever means left behind by the deceased. All these aspects have not been traversed upon nor discussed in the impugned order and the authorities after enumerating details of sources of income, converged to the conclusion that the family had enough means to sustain itself. By the impugned order, it appears that the Bank considered the notional income of the family of the deceased in declining appointment to the petitioner and it does not appear to be the principle and ratio of any of the decisions cited by the counsel. No doubt, it was permissible for the bank to have taken into reckoning the financial status of the family of the deceased but not in the manner as has been done in the instant case. It is settled position in law that family benefit scheme cannot in any way be equated with compassionate appointment and in **Balbir Kaur and another v. Steel Authority of India ltd. and others**[17] the Apex court further observed that the feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and at that juncture if some lump sum amount is made available with a compassionate appointment, the grief stricken family may find solace to the mental agony and manage its affairs in the normal course of events. In the last it was observed that it is not that monetary benefit would be replacement of the bread earner but that would undoubtedly bring some solace to the situation. It would thus appear that the lump sum amount received by the family of the deceased cannot be a substitute for employment to be offered to any eligible member of the family of the deceased in order to keep the pot of family boiling after the death of the sole bread earner. In the above context, I proceed to deal with tenability of the impugned order. The impugned recommendation after enumerating details of the lump sum amount paid in the aftermath of the death of the deceased, goes to quip by way of remark as under:

"In view of the Central Office guidelines/Supreme Court judgment vis a vis the above financial position of the family, we observe that indigent circumstances do not exist in the family. We therefore, recommend that request of

[17] 2000(3) ESC 1618 (SC)

Smt. Kanti Srivastava for her compassionate appointment in the Bank may please be declined. We shall advise the Deputy General Manager, State Bank of India, Zonal Office, Lucknow to advise Smt. Srivastava suitably and treat the matter as closed."

7. From a perusal of the above recommendation on which is affixed the faconic word 'approved' by way of order by the competent authority, it appears to me that the authorities have skimmed the surface of ratio flowing from various decisions and has not grasped the pivotal underlying object of the scheme of compassionate appointment. The authorities concerned have not assigned any reason for accepting recommendation, the necessary corollary whereof is that the competent authority has not applied its mind on the recommendation whether the details furnished by the recommending authority were valid to warrant denial of appointment of compassionate ground and whether the authority concerned was perspicacious enough to assess the consequence of denial of appointment to the bereaved family in the long run. The object of speaking order and observance of principles of natural justice is to prevent miscarriage of justice and secure fair play in action. In the present case, the competent authority merely contented itself by affixing laconic word 'approved' on the recommendations and has not assigned any reason and in the circumstances, the denial of appointment by the competent authority by way of laconic word 'approved' does not have the complexion of a valid order passed after considering all the ramification of the matter with due regard to the underlying object of the compassionate appointment. The impugned order does not give reason nor is there any application of mind into the relevant factors or any discussion on most material and vital points. The authorities have not bestowed laborious thoughts upon the factors that the deceased was survived by three minor daughters and they have not also given thought to the fact whether the family, in the circumstances, would require any permanent source of income of sustain itself after having lost its sole bread earner to keep the pot of the family boiling.

8. In the above perspective, the impugned order cannot be sustained and is liable to be quashed. In the result, the petition succeeds and is allowed and the impugned order declining compassionate appointment to the petitioner is accordingly quashed attended with the direction to the respondent Bank authorities to reconsider the claim of the petitioner for compassionate appointment in the light of true intendment of the scheme.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.2.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 2482 of 2001

Maya Press Private Limited and others ...Petitioner

Versus

The Deputy Labour Commissioner, Allahabad and another ...Respondents

Counsel for the Petitioners:
Sri S.N. Verma
Sri P.K. Mukerjee
Sri J. Nagar

Sri S.U. Khan
Sri P.K. Chatterjee

Counsel for the Respondents:
Sri K.P. Agarwal
Miss Bushra Maryam
Sri Ashwani Mishra
S.C.

U.P. Industrial Disputes Act, 1947- provisions of section 6 (W) which are pari materia to section 25 (O) of the Central Industrial Disputes Act, are not violative of fundamental rights guaranteed under constitution of India, and thus the employer can close industrial establishment without seeking the permission of the State Government.

Held (Para 9)

In the facts and circumstances, both the aforesaid writ petitions are dismissed with the observation that their parties shall be permitted to take all possible objection before the Deputy Labour Commissioner, who shall decide the matter as expeditiously as possible.

Case law referred:
1992 (65) FLR 961
JT 2002 (1) SC 160
2000 (1) UPLBEC 651

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

1. Heard Sri S.N. Verma assisted by Sri P.K. Mukerjee for petitioner and Sri K.P. Agarwal for contesting respondents.

2. This writ petition has been filed challenging the show cause notice dated 23.12.2000 and 30.12.2000 (annexures 2 and 5 to the writ petition) by which the petitioners were called upon by the Deputy Labour Commissioner, U.P., Allahabad to appear before him for resolving industrial unrest/industrial dispute arisen between petitioner and its workmen on account of the closure of the establishment on 23.12.2000.

3. Entertaining the writ petition, on the strength of decision of this Court in **Jayshree Tea Limited vs. Industrial Tribunal (I) Allahabad**, annexed as annexure 3 to the writ petition and the judgment in **Indian Oxygen Shramik Sangh Vs. Additional Labour Commissioner, 1992 (65) FLR 961**, annexure -4 to the writ petition, this Court vide its order dated 22.2.2001, while issuing notice stayed further proceedings initiated on the basis of impugned notice dated 30.12.2000 and 23.12.2000. The interim order has been extended from time to time.

4. When the matter was taken up on 23.1.2003, it was pointed out to this Court that the view taken by the decision of this Court to the effect that the provisions of Section 6 (W) of the U.P. Industrial Disputes Act, 1947 for prior permission are unconstitutional, has not been approved by the Supreme Court, and that the Supreme Court has held in **M/s Orissa Textile and Steel Ltd. Vs. State of Orissa and others, JT 2002 (1) SC 160** that its earlier judgment in Excel Wear's case was not properly appreciated and that the principles laid down in **Meenakshi Mills case** will apply. In substance it was held that provisions of Section 6 (W) of the U.P. Industrial Disputes Act, 1947 which are pari materia to section 25 (O) of the Central Disputes Act, are not violative of fundamental rights guaranteed under Constitution of India, and thus the employer can close industrial establishment without seeking the permission of the State Government.

5. After the aforesaid order, the counsel for petitioner Sri J. Nagar sought permission and was permitted to withdraw from the case, and has been substituted by Sri P.K. Chatterjee, Advocate, Sri S.N. Verma, Senior Counsel for petitioner has relied upon the judgment of this Court in **Electro Steel Castings Ltd. vs. State of U.P. and others, 2001 (1) UPLBEC 651** in submitting that provisions of Section 6 (W) are not applicable to establishment where there are more than 300 workmen. Sri K.P. Agarwal appearing for workmen submits that the said matter was argued by him, and that relevant provisions of law were not considered and which were left to be pointed out at that stage.

6. A supplementary affidavit has been filed by petitioner stating that during the pendency of writ petition, some of the workmen approached Deputy Labour Commissioner, Allahabad in proceedings under section 33-C (2) of the Central Industrial Disputes Act, 1947, in which the Deputy Labour Commissioner, Allahabad has allowed the application with the direction that the applicant workmen concerned are entitled to three months pay as closure compensation and three months notice pay from the employers and further 10% interest if the amount has not been paid within three months. The order appears to have been passed after notice but without benefit of appearance on behalf of the employers, who after some adjournments absented from proceedings.

7. A writ petition against show cause notice is not maintainable. The petitioner has not filed its reply before the Deputy Labour Commissioner nor have pleaded that they were not required to obtain permission of closure as they employed less than three hundred workmen, or that the closure was effected due to unavoidable circumstances. In each case different consequences follow under industrial law.

8. The disputed facts had not been raised before or considered by the Deputy Labour Commissioner. It is contended by Sri S.N. Verma that the matter has to be referred under section 4 K for adjudication. Sri K.P. Agarwal does not agree with the proposition. According to him, there is no dispute to be decided and that only computation to be made and that the workmen are entitled to full wages on account of illegal and inoperative closure. As found above, this question has not been raised or considered by the Deputy Labour Commissioner. The industrial unrest on account of alleged closure dated 11.3. 2000 has not been resolved as yet.

9. In the facts and circumstances, both the aforesaid writ petitions are dismissed with the observation that their parties shall be permitted to take all possible objection before the Deputy Labour Commissioner, who shall decide the matter as expeditiously as possible.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 37210 of 2001

Dayal Kushwaha ...Petitioner
Versus
The State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri M.C. Dwivedi
Sri N.K. Trivedi
Sri Bhagwati Prasad

Counsel for the Respondents:
S.C.

Constitution of India, Article 311 (2)- Service Law- Punishment of dismissal from service- only charge against the employee about using filthy language to his Superior authority- not amount to physical assault- held - punishment of dismissal highly disproportionate liable to quashed.

Held- Para 4

The finding of the Tribunal is a finding of fact and we cannot interfere with the same. In so far as the punishment is concerned in our opinion the same is disproportionate to the offence. The allegation against the petitioner is that he abused his superior. There is no averment that the petitioner physically assaulted his superior or committed some such grave act of misconduct. There is a difference between abusing and physically assaulting. It is said in English that 'words break no bones'. In other words, abusing a person does not cause physical hurt. However, it may certainly hurt his feelings and it may be an act of insubordination. Be that as it may, in our opinion the extreme sentence of dismissal is too harsh for the misconduct of abuse. Now a days it very often happens in society that people lose their temper and utter improper words which they should not , but that is a lesser offence than physical assault. It is well settled in service law that the punishment should be proportionate to the offence.

Practice and Procedure- punishment of dismissal found highly disproportionate order quashed - whether should the court itself impose lessor punishment or ought to have remand the matter before the disciplinary authority ? held- considering unreasonable delay the Court can impose the lessor punishment.

Held- para 8

In the present case, since the matter has been delayed for a long time, we are of the opinion that instead of remanding the case to the disciplinary authority for imposing appropriate punishment, this court itself should impose punishment. Hence while we set aside the impugned orders on the ground that the punishment is disproportionate to the offence and direct reinstatement of the petitioner with continuity of service, we impose the punishment that the petitioner will get only half the back wages from the date of suspension till the date of reinstatement and the petitioner will be given severe warning not to commit such an offence in future.

Case law discussed:
1984 (2) SCC-569
AIR 1982 SC-1552
AIR 1977 SC-3387

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

1. Heard learned counsel for the petitioner and the learned standing counsel.

2. This writ petition has been filed against the impugned order of the U.P. Public Services Tribunal dated 4.6.2001, the order of dismissal dated 15.1.1994 as well as appellate order dated 21.1.1995, vide Annexures 1, 10 and 12 to the writ petition.

3. The petitioner was appointed as an additional child warden at District Jail, Jhansi. The Deputy Jailor made a complaint against the petitioner and one Rajendra Prasad Tiwari on 20.9.1992, vide Annexure 2 to the writ petition in which it was alleged that the petitioner

and one Rajendra Prasad Tiwari had abused the Deputy Jailor, who was their superior. Thereafter, the petitioner was given a charge sheet dated 20.11.1992, vide Annexure 6 to the writ petition and after enquiry a report dated 28.5.1993 was submitted by the Enquiry Officer, vide Annexure 8 to the writ petition. On the basis of the enquiry report petitioner's service was terminated and his appeal was also dismissed. He filed a claim petition no. 2256 of 1995, which was also dismissed.

4. The finding of the Tribunal is a finding of fact and we cannot interfere with the same. In so far as the punishment is concerned in our opinion the same is disproportionate to the offence. The allegation against the petitioner is that he abused his superior. There is no averment that the petitioner physically assaulted his superior or committed some such grave act of misconduct. There is a difference between abusing and physically assaulting. It is said in English that 'words break no bones'. In other words, abusing a person does not cause physical hurt. However, it may certainly hurt his feelings and it may be an act of insubordination. Be that as it may, in our opinion the extreme sentence of dismissal is too harsh for the misconduct of abuse. Now a days it very often happens in society that people lose their temper and utter improper words which they should not, but that is a lesser offence than physical assault. It is well settled in service law that the punishment should be proportionate of the offence.

5. In Ved Prakash Gupta vs. M/s Delton Cable India (P) Ltd. (1984) 2 SCC 569 the worker had abused a co-worker in filthy language and hence he was given punishment of dismissal. The Supreme Court observed that the punishment awarded is shockingly disproportionate to the charge. Similarly in Rama Kant Misra vs. State of U.P. AIR 1982 SC 1552 the Supreme Court observed that abusive language may show lack of culture but mere use of such language on one occasion unconnected with any subsequent positive action and not preceded by any blame worthy conduct cannot justify the extreme penalty of dismissal from service.

6. Following the said decision, this writ petition is allowed. The impugned order of the Tribunal dated 4.6.2001 as well as the order of dismissal dated 15.1.1994 and the order dated 21.1.1995 dismissing the appeal of the petitioner are quashed.

7. Ordinarily when this court sets aside the order of punishment on the ground that it is disproportionate to the offence, it has to remand the matter to the disciplinary authority for imposing appropriate punishment. However, it has been observed by the Supreme Court that in exceptional cases, where there has been already considerable delay in order to avoid further hardship, the Court can itself impose the punishment, vide Union of India vs. G.G. Ganayutham AIR 1997 SC 3387.

8. In the present case, since the matter has been delayed for a long time, we are of the opinion that instead of remanding the case to the disciplinary authority for imposing appropriate punishment, this court itself should impose punishment. Hence while we set aside the impugned orders on the ground that the punishment is disproportionate to

the offence and direct reinstatement of the petitioner with continuity of service, we impose the punishment that the petitioner will get only half the back wages from the date of suspension till the date of reinstatement and the petitioner will be given severe warning not to commit such an offence in future.

9. The petition is allowed with the above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18TH FEBRUARY, 2003

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Civil Misc. Writ Petition No. 4101 of 2003

Sri Abdul Waheed & others ...Petitioners
Versus
U.P. State through Collector
...Respondents

Counsel for the Petitioners:
Sri Kshitij Shailendra
Sri S.K. Johari

Counsel for the Respondents:
S.C.

Indian Stamp Act 1899- Sub Section (4) of Section 47-A- now numbered as sub section (3) which empowers the Collector to Act suo motu. Therefore, the reference made by the Sub Registrar can be treated to be a mere information to the Collector, in the present case.
Held- Para 10

The contention is not acceptable for two reasons. The first reason is that there is a power under sub section (4) of Section 47-A now numbered as sub section (3), which empowers the Collector to Act suo motu. Therefore, the reference made by the Sub Registrar can be treated to be a mere information to the Collector, in the present case.

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

1. A sale deed dated 11.5.2001 was executed in favour of the petitioners. According to the recital in the sale deed it was in respect of land alone. The Sub Registrar after the date of registration of the sale deed sent a reference to the Collector under section 47 A of the Indian Stamp Act, 1899 by his letter dated 17.7.2001. In that letter it was written that the spot inspection was carried out in which the land was found to have a three story building standing over it, which appeared to be more than ten years old.

2. On the basis of this information, proceedings were started in the form of Case no. 131/2001-02 under sections 33/40/47 of the Indian Stamp Act. Stamp duty and penalty was imposed by an order of the Additional District Magistrate dated 27.3.2002. It was stated in that order that the Additional District Magistrate had himself inspected the property on 17.3.2002 and found three storied old house on the land in question, which appeared to be ten or twelve years old. The petitioners preferred a revision under section 56 (1) Stamp Act, being Revision No. 36 of 2001-02, which was allowed by the Commissioner by order dated 8.5.2002 and the matter was remanded back with an observation that the matter be decided after spot inspection. After the remand the Additional District Magistrate, Moradabad again repeated his order. In the order he again mentioned that spot inspection was done by him which corroborated the report of the Sub

Registrar dated 17.7.2001 which was based upon inspection of spot done on 11.7.2001. The order also says that it was not possible to get three storied building constructed in such a short time between the date of sale deed and the date of inspection by the Sub Registrar. The order further says that the petitioners have not produced any evidence to prove that the construction was done after the sale deed. The order also says that despite opportunity the petitioners did not appear to argue out the case.

3. An appeal was preferred by the petitioners under section 56 of the Stamp Act, being appeal no. 33 of 2002, which has been dismissed by the learned Commissioner by order dated 11.12.2002, which is under challenge in this writ petition. The Commissioner has disbelieved the contention of the petitioners that no inspection was done of the spot. He has also held that there is no requirement under the Act or the Rules for preparing a formal inspection note.

4. Essentially the concurrent findings recorded by the subordinate authorities i.e. Additional District Magistrate and the Commissioner are pure findings of fact.

5. Learned counsel representing the petitioners has raised following three contentions:

(i) It is option of the vendor and vendee to sell the land leaving out the building standing on the land and in such an event it is the value of the land, alone which is to be examined for the purposes of determining the stamp duty payable on the sale deed.

(ii) On the facts of this case the building was not standing on the land at the time of sale deed and the finding to that effect recorded by the subordinate authorities suffers from an error of law.

(iii) The reference under section 47-A could not have been made by the Sub Registrar after the sale deed had been registered and therefore all consequential proceedings are vitiated.

6. Each of the above contention is dealt with below:

POINT No. 1

Learned counsel for the petitioner has contended that Section 3 of the Indian Stamp Act 1899 read with Item-2 of Schedule I-B and Rules 340 and 341 of the Indian Stamp Rules, 1925 and Rule 3 of U.P. Stamp (Valuation of Property) Rules, 1997 would indicate that the land below a standing building can be sold without including the building and in such an event the value of the structure is not relevant for the purposes of determining the stamp duty payable on the sale deed, in as much as the standing building embedded to earth, which is immovable property, will not stand transferred, not being included in the registered sale-deed and the title of the same will remain the same with the vendor.

The argument is more attractive than sound. Such matters have to be decided on practical considerations and not in pure theoretical terms. Practically in the situation, as above, the building or the structure is bound to pass with the land in respect of its use and enjoyment and for

all practical purposes it would not be possible for the vendor to use or enjoy the building or that matter exercise any right in respect of the structure except perhaps carrying away of the debris.

Besides Rule 340 is reproduced below:

Rules for determining the market value of certain instruments:-

R-340 *In the case of an instrument of conveyance, exchange, gift, settlement, award or trust relating to immovable property chargeable with an ad valorem duty on the market value of the property, the following particulars shall also be fully and truly given in the instrument in addition to the market value of the property in compliance with sub section (2) of section 27 of the Indian Stamp Act as amended in its application to Uttar Pradesh:-*

(1) In case of land:

(a) included in the holding of a tenure-holder, as defined in the law relating to land tenures:-

(i) the khasra number and area of each plot forming part of the subject matter of the instrument;

(ii) whether irrigated or unirrigated:

(iii) If under cultivation whether do-fasli or otherwise;

(iv) land revenue or rent whether exempted or not and payable by such tenure holder; and

(v) Classification of soil, supported in case of instruments exceeding Rs.10,000 in value, by the certified copies, of extracts from relevant revenue records issued in accordance with law.

(b) being land other than land referred to in clause (a), the assumed annual rent/land revenue of rent revenue free, grain rented and unrented land;

(c) being non-agricultural land situate within the limits of any local body constituted under the U.P. Nagar Mahapalika Adhiniyam, 1959, U.P. Municipalities Act, 1916 or U.P. Town Areas Act, 1914, as the case may be, the area of the land in square meters with the average price per square meter preavailing in the locality in which the land is situate on the date of the instrument

(2) In case of grove or garden;

(a) the nature, size, number and age of trees;

(a) annual recorded land revenue or where the grove is not assessed to any revenue or is exempted from it, the annual rent and/or premium if left out, otherwise, the annual average of income which has arisen from it during the three years immediately preceding the date of the instrument.

3. In case of building:

(a) Total covered area and open land, if any, in square meters,

(b) *Number of storeys and area of each storey in square meters*

(c) *Whether Pacca or Katchcha,*

(d) *Actual annual rent or assumed annual rent,*

(e) *Annual rent assessed by any local body and the amount of house tax payable thereon, if any, :*

Rule 341 of 1925 Rules and Rule 3 of 1997 Rules are almost identical to the

above quoted Rule 340 would clearly indicate that where a structure is standing on the land it would not fall within the expression : land ' as used in sub rule (1) but would fall within the expression' building' as used in sub rule (3) and will have to be sold as 'building'. This interpretation, which has been given above, is essentially to avoid evasion of tax of stamp duty and defrauding of revenue.

Learned counsel for the petitioner has relied upon following decisions:

(1) Maydhan Gupta Vs. Board of Revenue 1969 ALJ 333
(2) Kadorilal Vs. Sukhlal AIR 1968 MP 4
(3) Board of Revenue Vs. K. Manjunatha Rai AIR 1977 Madras, 10

None of these decisions deal with the situation like in the present case. The question to be examined here is whether parties should be permitted to record only part of the property sold in a sale deed, which has the practical effect of transferring the entire property in respect of its total perpetual enjoyment, though perhaps technically not transferring the title in the remaining part of the property and thereby evade payment of the stamp duty. The answer obviously must be 'no' . In fact , the Legislature has throughout been making amendment to prevent this kind of mischief by unscrupulous persons by agreement for sale with possession and irrevocable powers of attorney with possession."

Thus the law appears to be that every instrument of transfer must truly set forth the entire property which, from the point of view of practical considerations, is the subject matter of transfer. Therefore where a structure is standing on land, the land alone can not be transferred without the structure unless before transferring the structure is removed. However, the converse may not be correct, as it may be possible to transfer the structure alone without transferring the land.

POINT No.2

7. Regarding the second point it has already been mentioned above that the finding that structure existed at the time of sale deed is a finding of fact recorded concurrently by the subordinate authorities and that finding of fact cannot be interfered with in this writ petition, in as much as is not perverse and it is also not a case where the finding can be said to be based on no evidence.

8. The alleged error of law relied upon by the learned counsel for the petitions to challenge the said finding of fact is said to be the failure on the part of inspecting authorities to prepare a formal inspection note. The revisional order mentions that the rules do not require preparation of formal inspection note. As against this learned counsel for the petitioners has relied upon the decision of the Board of Revenue (in its capacity as Chief Controlling Revenue Authority) in the case of **Smt. Shakeela Khatoon Vs. State of U.P. reported in 1995 AWC 2053**. I have examined the said decision and it appears that the learned Member of the Board of Revenue, who decided the case proceeded on the wrong hypothesis that the provisions of Code of Civil Procedure apply to the proceedings under Indian Stamp Act. Due to its total misconception of law the said decision is

obviously incorrect and can not help the petitioners.

9. Learned counsel for the petitioners has relied upon certain amendments made to Section 47-A by which the power of Sub Registrar to make a reference after registration of the sale deed is alleged to have taken away. It has been argued that the Sub Registrar could have made the reference only prior to the registration of sale deed and the subsequent reference is not valid. Therefore, the argument proceeds, all proceedings consequent upon such invalid reference are vitiated.

10. The contention is not acceptable for two reasons. The first reason is that there is a power under sub section (4) of Section 47-A now numbered as sub section (3), which empowers the Collector to Act suo motu. Therefore, the reference made by the Sub Registrar can be treated to be a mere information to the Collector, in the present case.

The second reason is that the petitioners are before this Court in discretionary and equitable jurisdiction. I am not inclined to exercise such a jurisdiction to assist the petitioners in their attempt to evade the tax.

In view of aforesaid circumstances, this writ petition fails and is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 266 of 2003

Vaaho Photo International and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Bharat Ji Agarwal
Sri Piyush Agarwal
Sri Amit Jaitly

Counsel for the Respondents:
Sri S. P. Kesharwani
S.C.

Constitution of India, Article 226- trade tax- imposition upon a firm doing business of Photographer- the article or goods transferred to the customers by the firm liable for imposition of trade tax as per order of Commissioner- held proper.

Held- Para 11 and 12

When a photograph, whether positive or the negative print is given to the customer certainly some material property is transferred to the customer, and it cannot be said that only service is rendered to the customer. It often happens that a customer goes to a photographer's shop, the photographer takes him into the studio and takes his photographs. To this extent service is rendered. Thereafter when the photograph is handed over to the customer there is transfer of goods when the photograph is sold to the customer that is a transfer of the property in goods

and it is not merely rendering of service as is the case in a barber's shop.

In the present case the commissioner has directed levy of trade tax only on the material/property which has been transferred by the petitioners to the customers.

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

1. This writ petition has been filed against the impugned circulars dated 4.5.2001 and 28.1.2002 (Annexure 2 and 3 to the writ petition) issued by the Commissioner of Trade Tax. The petitioner has also challenged the notice dated 28.1.2003 (Annexure 4 to the writ petition) issued by respondent no. 3 on the basis of the aforesaid circulars.

2. Heard Sri Bharatji Agarwal Senior Advocate and Amit Jaitly for the petitioner and Sri S.P. Kesharwani for the respondents.

3. The petitioner no. 1 is a registered partnership firm and petitioner no. 2 is one of its partners. Petitioners are carrying on the business of developing, printing, processing and enlarging photographs. By the impugned Circular dated 28.1.2002 (Annexure 3 to the writ petition) the Commissioner of Trade Tax has directed that trade tax can be imposed on the photographs taken and printed by the petitioners by bifurcating the value of the goods and service provided by the petitioners.

4. Sri Bharatji Agarwal, learned counsel for the petitioners, has relied on the decision of the Supreme Court in **M/s Rainbow Colour Lab and another Vs. State of Madhya Pradesh and others** 2000 UPTC 193. That judgment was delivered by a two Judge Bench of the Supreme Court and in that case also the challenge was on the levy of trade tax on photographs as stated in paragraph 7 of the said judgment. In paragraph 14 of the said judgment in **M/s Rainbow Lab's** case (supra) it was observed that the activity of the appellants cannot be treated as sale of the photographs for the reason that it is not the intention of the customer to buy a photograph from the photographer. The Supreme Court observed :

"The photograph has no marketable value. What is expected from the photographer is his service, artistic skill and talent. If any property passes to the customers in the form of photographic paper, it is only incidental to the service contract. No portion of the turnover of a photographer relating to this category of work would be eligible to sales tax".

5. In a subsequent decisions a three Judge Bench of the Supreme Court in **Associated Cement Companies Ltd. Vs. Commissioner of Customs** (2001) 124 STC 59 observed in paragraph 26:

"Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would be empowered to levy sales tax on the material used in such contract. The conclusion arrived in Rainbow Colour Lab case (2000) 118 STC 9 (SC): (2000) 2 SCC 385, in our opinion, runs counter to the express provision contained in Article 66 (29A) as also of the Constitution Bench decision of this Court in Builders' Association of India v. Union of India (1989) 73 STC 370: (1989) 2 SCC 645."

6. Sri Bharatji Agarwal, learned counsel for the petitioners submitted that the decision of the Supreme Court in **Associated Cement Company's** case (supra) has not over ruled the earlier decision of the Supreme Court in the case of M/s Rainbow Lab's case (supra) but has only doubted the correctness of the said decision. We do not agree. When the Supreme Court states that the conclusion arrived at in Rainbow Lab's case (supra) runs counter to the provisions contained in Article 366 (29A) as also of the Constitution Bench decision in Builder's Association of India (supra), in our opinion it has overruled the decision in Rainbow Colour case, though by using a different language. It is not the language used which is material but the substance of the decision has to be seen.

7. In our opinion a full reading of the judgment of the three Judges Bench in Associated Cement Companies Ltd. (supra) clearly shows that the decision in **Rainbow Colour Lab** (supra) has been clearly overruled. In our opinion this has been done for good reasons also. The law prior to insertion of Article 366 (29A) in the Constitution was that the State Legislature cannot by legal fiction deem something which is not a sale to be a sale and then impose sales tax on it. In **State of Madras V. Gannon Dunkerley and Company (Madras Ltd.** 1958 9 STC 353 SC what happened was that the State Legislature of Madras had defined a sale in its Sales Tax Act to include a work contract. The Supreme Court rightly held in that case that the State Legislature cannot artificially deem some thing which is not sale to be a sale and in this way impose sales tax on it. A works contract is not a sale and hence the State Legislature could not impose sales tax because there was no entry either in the State or concurrent list which enabled the State Legislature to impose sales tax on a works contract.

8. Subsequent to said decision in **Gannon Dunkereley's** case (supra) the Constitution was amended and Article 366 (29A) was inserted which enables the State Legislature to impose sales tax on that part of a works contract whereby material in goods is transferred, but the State Legislature cannot impose sales tax on the services rendered. Thus, by this amendment a works contract can be split up into two parts and need not be treated as indivisible i.e. contract of rendering service and contract for transfer of materials.

9. In our opinion the two Judge Bench of the Supreme Court in **Rainbow Colour Lab** case (supra) was rightly overruled by the three Judges Bench in **Associated Cement Company** case (supra) because the two Judge Bench had held that the sale of photographs is only incidental to the service contract and hence sales tax cannot be imposed on it.

10. In **Associated Cement Company** case (supra) the Supreme Court observed in paragraph 26 that even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty Sixth amendment the State would now be empowered to levy sales tax on the material used in such contract.

11. When a photograph, whether positive or the negative print is given to the customer certainly some material property is transferred to the customer, and it cannot be said that only service is

rendered to the customer. It often happens that a customer goes to a photographer's shop, the photographer takes him into the studio and takes his photographs. To this extent service is rendered. Thereafter when the photograph is handed over to the customer there is transfer of goods. When the photograph is sold to the customer that is a transfer of the property in goods and it is not merely rendering of service as is the case in a barber's shop.

12. In the present case the commissioner has directed levy of trade tax only on the material/property which has been transferred by the petitioners to the customers.

13. Hence there is no merit in the contention of the learned counsel for the petitioner. The petition is dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.2.2003

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

Criminal Misc. Habeas Corpus Petition No. 44309 of 2002

Raies alias Yogendra Singh Yadav
...Petitioner
Versus
State of Uttar Pradesh and others
...Respondents

Counsel for the Petitioner:
Sri V.S. Singh

Counsel for the Respondents:
Sri Arvind Tripathi
A.G.A.
Sri B.N. Singh
S.C.
Sri R.K. Shukla

National Security Act- Section 3 (2)- the detention order can be passed even if the detenue is in jail, provided the detaining authority has recorded his satisfaction that there was every possibility of his being released on bail and that after release on bail, he would indulge in similar activities prejudicial to the maintenance of public order.

Held (in Para 21)

In the instant case, the detaining authority has mentioned in the grounds of detention that at present the petitioner was detained in district jail, Jhansi in connection with case crime no. 193 of 2002 under section 364-A/395/412 IPC and 10/12 Dacoity Affected Area Act relating to P.S. Babina and he and co-accused Bhaiyan @ Satyapal had moved application for their bail in the Court of Special Judge (Dacoity Affected Area), Jhansi and there was real possibility of being him released on bail.

Case law referred:
1989 (26) ACC 1 (SC)
1990 (2) SCC, 456
2002 (45) ACC, 998
1990 (27) ACC, 621 (SC)

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

1. The petitioner has filed this writ petition challenging his detention order dated 26.7.2002 passed by District Magistrate, Jhansi, respondent no. 2, under section 3 (2) of National Security Act.

2. The grounds of detention served on the petitioner alongwith detention order (Annexure SA-1 to the supplementary affidavit) disclosed that on the night of 4/5.6.2002 at about 12.30 a.m. 10-12 armed persons of Dhan Singh gang with which the petitioner was

associated came to the site of contractor Jagdish Rai, Driver Sonu Cashier Sanjai and Foreman Laxmi were sleeping. The persons of the gang enquired from Chaukidar Sitaram as to who were residing there and slapped him. They also looted cash of Rs.10,000/- by breaking open the almirah, the money of the workers and their clothes. They also kidnapped Sanjai and Gopi Cashier and worker respectively for purposes of ransom. The persons of the gang also removed air of the wheels of the jeep and also took away its key saying that the above persons would be released on payment of Rs. 80 lac and in case report is lodged, they would kill all of them. Jagdish Rai lodged report of the occurrence on 5.6.2002 at 12.10 on the basis of which a case at crime no. 193 of 2002 under section 364 IPC was registered. The persons of the gang took Gopi and Sanjai in the jungle of Orchcha and kept the above kidnapees at different places. The petitioner was visiting the said gang for negotiating the release of the kidnapees. Ultimately negotiation with proprietor of G.S. company was settled for Rs. 3 lacs. The petitioner and co-accused Bhaiyan went in the jungle of Orchcha on 17.6.2002 with ransom money of Rs.2,10,000/- and negotiated the release of kidnapees with Dhan Singh gang. On getting Rs.2,10,000/- the kidnpaees were released at about 8 p.m. near railway station. Baruwa Sagar from where they were taken on utility vehicle of G.S. Company.

3. On account of kidnapping of the workers of the G.S. Company in a dare devil manner, the persons working in the Company were terrorised and a sense of fear and insecurity was created amongst them. Due to fear of the petitioner and his gang it could not be mentioned in the report that a sum of Rs.80,00,000/- was demanded as ransom for release of the kindnappes. The police of P.S. Babina confirmed the kidnapping by petitioner and his associate gang.

4. On 25.6.2002 the police got information that some persons of Dhan Singh gang were present in the house of Prem Singh situated at village Khirkan. Believing on above information Sri Nihal Singh, Station Officer P.S. Babina along with police force reached village Khirkan and surrounded the house of Prem Singh Yadav. On search of the said house the petitioner and his four associates namely Papu @ Kishan Lal Dhimar, Kamlesh Prakash Dimar and Bhaiyan @ Satya Prakash Yadav were apprehended from the said house at about 2.10 a.m. On his personal search, the petitioner was found in possession of Rs.30,000/- cash, his associates Pappu @ Kishan Lal, Prakash Dimar and Bnhaiyan also were found in possession of Rs.5000/- each while Kamlesh was found in possession of Rs.10,000/-. The bundles of currency notes recovered from the petitioner and his associates were bearing stamp mark of Messrs Gurmit Singh and Company (G.S. Company) on both sides. The petitioner and his associates also confessed their guilt before the police.

5. On account of above incident and subsequent negotiations by petitioner and his associates, a sense of terror and insecurity was again created in the public. The persons started closing their house in the evening and were feeling insecured even in performing their daily routine. The persons working in G.S. Company started leaving their job and the

construction of government canal was adversely affected.

6. After rescue of the kidnapees and recovery of ransom amount from the possession of petitioner and his associates, the case was altered under Section 364-A, 395 and 412 IPC and 10/12 Dacoity Affected Area Act.

7. The petitioner was detained in jail in connection with case crime no. 193 of 2002 and had moved bail application before the Special Judge, Dacoity Affected Area. There was every possibility of his being released on bail and after his release on bail, there was also possibility that he would indulge in similar activities prejudicial to the maintenance of public order.

8. Heard Sri V.S. Singh, learned counsel for the petitioner and Sri Arvind Tripathi, learned A.G.A. for respondents no. 1,2,and 3 and the Standing Counsel for respondent no. 4 the Union of India.

9. The learned counsel for the petitioner has challenged the detention order on the following grounds:

1. The incident regarding which the petitioner was detained related to only law and order and had no effect on public order.

2. That the petitioner was detained in the jail at the time of passing of detention order and there was no possibility that he would be released on bail.

3. There was delay in deciding representation of the petitioner.

10. On the first ground it was contended by the learned counsel for the petitioner that the incident of kidnapping for ransom for which, the petitioner was detained was a solitary incident and the petitioner had no criminal history. He further contended that the petitioner was not even named in the F.I.R. and the incident in question had no effect on public order as it was purely law and order problem. He further contended that it is alleged that the petitioner was negotiating the payment of ransom money and release of kidnapees, but initially Jagdish had named Bhaiyan @ Satya Pal Yadav, as the negotiator and by making interpolation in the case diary, the name of petitioner was inserted in place of Bhaiyam @ Satya Pal.

11. Word 'public order' and 'law and order' have been explained by the Apex Court in the case of Smt. Angoori Devi for Ram Ratan v. Union of India and others, 1989 (26) ACC 1 (SC) as below :-

12. 'The impact on 'public order' and 'law and order' depends upon the nature of the act, the place where it is committed and motive force behind it. If the act is confined to an individual without directly or indirectly affecting the tempo of the life of the community, it may be a matter of law and order only. But where the gravity of the act is otherwise and likely to endanger the public tranquility, it may fall within the orbit of the public order. This is precisely the distinguishing feature between the two concepts. Sometimes, as observed by Venkatachaliah, J. in Ayya alias Ayub v. State of U.P.,' what might be an otherwise simple 'law and order' situation might assume the gravity and mischief of a ' public order' problem by reason alone of the manner or

circumstances in which or the place at which it is carried out.' Necessarily, much depends upon the nature of the act, the place where it is committed and the sinister significance attached to it. '

13. The Apex Court in the case of T. Devaki vs. Government of Tamil Nadu and others (1990) 2 SCC 456 as below :-

'Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also affect law and order but the same need not affect maintenance of public order. There is basic difference between law and order and public order. The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause disturbance of the public order, is a question of degree and extent of the reach of the act upon the society. A solitary assault on one individual can hardly be said to disturb public peace or place public order in jeopardy so much as to bring the case within the purview of the Act providing for preventive detention. Such a solitary incident can only raise a law and order problem and no more.'

Testing the incident in the light of above observations it would reveal that no doubt the petitioner was not named in the F.I.R. that 10-12 miscreants armed with guns, out of which two were covering their faces committed looting by tying the persons present on the site with the Charpai and kidnapped Sanjai and Gopi, Cashier and worker respectively of the company. However, in his statement under Section 161 Cr.P.C. Jagdish Rai told that the miscreants while kidnapping the two persons had also told that they would be released only after payment of Rs. 80 lac as ransom. It is also mentioned in the grounds of detention that during investigation it was revealed that the petitioner and his other associates were negotiating with the proprietor of G.S. Company for release of the above persons and the matter was settled for Rs. 3 lac. That on 17.6.2002 the petitioner along with his associate Bhaiyan came in the jungle of Orchcha and settled with Dhan Singh gang the release of the above persons on payment of Rs.2,10,000/- and that the above persons were released on payment of above money. It is also revealed from the grounds of detention that the petitioner was arrested by the police on 25.6.2002 at 2.20 a.m. along with his associates from the house of Prem Singh Yadav at village Khirkan and on his personal search he was found in possession of Rs.30,000/- which was the ransom money of his share. The participation of the petitioner in the kidnapping and realisation of ransom money thus came into light during investigation and not naming of the petitioner did not show that the incident had no effect on public order.

14. The incident of kidnapping, detaining the kidnapees in jungle of Orchcha at various places and their release after payment of Rs. 3 lac by the negotiation of petitioner came to the knowledge of workers of G.S. company and persons of the locality and taking into consideration the entire incident from kidnapping to release of kidnapees, it was a incident, which affected public order. A sense of terror and insecurity was created in the workers of G.S. Company and public at large was feeling insecure.

15. Even if, it is assumed that the petitioner was not recognized by the workers of G.S. Company at the time of kidnapping, but the action of petitioner was known to the kidnapees, when he started negotiating for their release and realization of ransom money from the proprietor of G.S. Company.

16. Learned counsel for the petitioner placed reliance on decision of this Court in Yuvraj Singh vs. State of UP and others, 2002 (45) ACC, 998. In the said case on 29.11.2001 at 3.45 p.m. the petitioner and three others riding on two motor cycles opened fire on Satyendra Singh when he along with two other persons was traveling in Santro Car. The above incident had taken place 200 yards away from the brick kiln of Nepal Singh on the road. From perusal of F.I.R. it was born out that the back ground of the incident was the personal enmity of Vikas with the deceased and the petitioner was said to be associated with the said crime by doing a criminal conspiracy. Held that the murder which took place over the enmity between the two sides did not make out a case of public order. The facts of the present case are totally different. The incident was not confined only to kidnapping, but also release only on payment of ransom money amounting to Rs. 3 lac. There was no enmity between the petitioner or his associates and the kidnapees or the proprietor of G.S. Company. The incident in question was for purposes of realisation of ransom money. The nature of incident was such that it had affected public at large as any one could be kidnapped for purposes of ransom.

17. The learned counsel for the petitioner further contended that Jagdish had told before the I.O. that it was co-accused Bhaiyan, who was negotiating for release and came to jungle of Orchcha in that connection. But the name of petitioner was subsequently inserted by scoring out the name of Bhaiyan and this fact was also noticed by the Trial Court while granting the bail. For this purpose, the original case diary of the case was summoned. On perusal of the case diary, we found that Gopi and Sanjai, of G.S. Company, the kidnapees, were interrogated by the I.O. on 18.6.2002 and both of them had disclosed in their interrogation that petitioner Rais Yadav used to come for negotiation of their release. However, Jagdish Rai was interrogated by I.O. on 25.6.2002 and he had previously told that Bhaiyan was involved in the negotiation of release and kidnapees and subsequently some interpolation was made and name of petitioner 'Rais ' was inserted. Assuming that there was some interpolation in the statement of Jagdish Rai interrogated on 25.6.2002 the two kidnapees namely Sanjai and Gopi had already disclosed the name of petitioner, as the negotiator of their release.

18. Therefore, the incident in question and subsequent incident of negotiation and release of two kidnpaees for ransom of Rs. Three lac affected public order and incident cannot be said to be confined only with law and order problem.

19. The next point raised by the learned counsel for the petitioner was that at the time of passing of the detention order, the petitioner was detained in jail and there was no material for the detaining authority to record his

satisfaction that he would be released on bail.

20. It is settled law that the detention order can be passé even if the detenu is in jail, provided the detaining authority has recorded his satisfaction that there was every possibility of his being released on bail and that after release on bail, he would indulge in similar activities prejudicial to the maintenance of public order. The Apex Court held in the case of Kamrunnisa and another vs. Union of India and others, 1990 (27) ACC, 621 (SC) that in case a person is in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody, (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity, and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authorities was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court.

21. In the instant case, the detaining authority has mentioned in the grounds of detention that at present the petitioner was detained in district jail, Jhansi in connection with case crime no. 193 of 2002 under section 364-A/395/412 IPC and 10/12 Dacoity Affected Area Act relating to P.S. Babina and he and co-accused Bhaiyan @ Satyapal had moved application for their bail in the Court of Special Judge (Dacoity Affected Area), Jhansi and there was real possibility of being him released on bail**.**

22. That there was also possibility that after release on bail, he would indulge in similar activities prejudicial to the maintenance of public order.

23. No doubt in para 18 of the petition it was mentioned that the detention order was passed by the District Magistrate on non application of mind, as the petitioner was in custody and the Chief Judicial Magistrate was not competent to grant bail to the petitioner, so there was no likelihood for the petitioner to be released on bail. It is also mentioned in paragraph 24 of the said petition that at that time when the detention order was passed, no bail application of the petitioner was pending, to create apprehension in the mind of detaining authority to prevent his liberty , so there was no occasion for detaining authority to pass detention order.

24. In paragraph 4 of the counter affidavit of Sri Shyam Mohan Srivastava, District Magistrate, Jhansi, detaining authority, had deposed that bail application was moved on behalf of the petitioner, which was pending when the order was passed against him and the copy of bail application has also been supplied to the petitioner alongwith grounds of detention. That he has considered activities of the petitioner and was satisfied that though the petitioner was in jail, but he was trying for his release and his release was a real possibility. That he was also satisfied on the basis of relevant and cogent material that in case the order is not passed against the petitioner under National Security

Act, he would repeat the similar activities in future after getting the bail.

25. The above assertion in the petition indicated that according to petitioner he had moved bail application before the C.J.M. who had no jurisdiction to grant bail and that no bail application was moved prior to passing of detention order before the competent court. As mentioned above, the above averments were emphatically denied by the detaining authority. The original record of the case of the petitioner was also summoned and a perusal of it shows that the petitioner moved his bail application on 27.6.2002 before the Special Judge, Dacoity Affected Area, Jhansi. Copy of the bail application was received by Government Counsel on 28.6.2002 while detention order was passed much after it i.e. on 26.7.2002. The copy of above bail application was also supplied to the petitioner along with grounds of detention . Thus, there were sufficient material for recording his satisfaction by the detaining authority that there was possibility of being the petitioner released on bail.

26. The detaining authority has also deposed in his counter affidavit that he considered the activities of the petitioner and was satisfied that after release on bail, the petitioner would indulge in similar activities prejudicial to the maintenance of public order. Perusal of original record further shows that there were sufficient material before the detaining authority which showed that the petitioner was active member of gang of Dhan Singh and was indulged in kidnapping and illegally detaining the kidnapped persons for ransom and earning money through his above criminal activities. It is also clear from the statement of the witnesses of case crime no. 193 of 2002 that the petitioner was negotiating for ransom money with the proprietor of the company the workers of which were kidnapped. Thus there were sufficient materials for the detaining authority to satisfy that after release on bail, the petitioner would again indulge in similar activities (kidnapping for ransom) prejudicial to the maintenance of public order.

27. The next and last contention of the learned counsel for the petitioner was that the representation of the petitioner was decided with delay, which rendered his continued detention invalid.

28. The counter-affidavit of Sri Rajendra Prasad, Jailor, District Jail, Jhansi discloses that the petitioner submitted his representation to the Jail Authorities on 5.8.2002 and on the same day it was sent to the District Magistrate, Jhansi for further action. The counter affidavit of Sri Shyam Mohan Srivastava, District Magistrate, Jhansi shows that representation of the petitioner was received in his office on 5.8.2002 and he considered the said representation and rejected the same on 6.8.2002. That on the same day he sent the representation of the petitioner to the State Government and Central Government through special messenger. The State Government has rejected the said representation and sent message dated 16.8.2002. The counter affidavit of Sri C.P. Singh on behalf of the State of U.P. discloses that the representation of the petitioner dated 5.8.2002 along with parawise comments there on forwarded by the District Magistrate, Jhansi, vide his letter dated 6.8.2002 was received in the concerned Section on 7.8.2002. The State Government sent copy of representation

to the Central Government through letter dated 8.8.2002. The State Government examined the representation on 9.8.2002. The Special Secretary examined it on 12.8.2002. Secretary examined it on 12.8.2002 and submitted to the higher authorities and after due consideration the said representation was finally rejected by the State Government on 12.8.2002. The counter affidavit of Sri Ramesh Kumar on behalf of the Union of India shows that the representation of the petitioner dated 5.8.2002 alongwith parawise comments of the detaining authority was received by the Central Government on 7.8.2002. The representation was immediately processed for consideration and the District Magistrate asked to send parawise report through Crash wireless message dated 9.8.2002. The report was received on 12.8.2002. The representation was processed for consideration and was put up before the Director Ministry of Home on 13.8.2002 and he along forwarded to the Union Home Minister on 4.8.2002. The Union Home Minster considered and rejected the same on 14..8.2002.

29. In this way the authorities concerned had decided the representation without any delay and there is explanation for each day. As the District Magistrate, detaining authority decided the representation of the petitioner on next day, State Government decided it on 12.8.2002 and the Central Government on 14.8.2002. Thus, there is no delay.

30. In view of our above discussions and observations on the points raised by the learned counsel for the petitioner we find that there is no force in the petition and the same is liable to be dismissed.

31. The petition is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 7, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition (Tax) No. 287 of 1998

Hotel Taj Ganges, and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Mool Behari Saxena

Counsel for the Respondents:
S.C.

U.P. Entertainment and Betting Tax Act 1979 as Amended by U.P. Act No. 15 of 2001- Section 3 (7)- Leavy of entertainment tax- Hotel providing facilities to its customers by providing telephone and Television set in each room with facilities of cable channel - whether is the owner of the Hotel liable to pay separate cable operation charges held- No- the management not charging separate fee, nor it is necessary that every consumer regularly watching the television.

Held- Para 12 and 14

We may now examine the above provisions which we have quoted. The word 'entertainment' means exhibition, performance, etc. to which persons are admitted for payment. Hence the definition of entertainment itself means that to be entertainment under the Act persons have to be admitted for payment. As stated in the petition, the cable or video service to the petitioner hotel's room is not made for any

payment. There is no separate charge for the same. Even if one does not see the programme on T.V. it will make no difference because the tariff of the hotel room will remain the same. Hence it cannot be said that the cable/video service which the petition is providing to its customers is entertainment as defined under the Act. It may be noted in this connection that it is only for cabaret and floor show that entertainment tax has to be paid even if there is no separate charge for the same, vide Section 3 (6) of the Act.

(B) Constitution of India- Article 265- Hotel Management- having own cable net work- providing cable facilities to its customers for attracting them whether is such customer within the meaning of subscriber ? held- No' levy of entertainment tax prior to 5.3.01 is violative of Article 265 of the Constitution of India.

The charging provision in the Act is Section 3 which levies a tax on payments for admission to entertainment . Since in our view there is no payment for admission hence obviously no tax can be imposed under the Act on the petitioner's cable/video service.

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

1. This writ petition no. 287 (Tax) of 1998 has been filed for a writ of certiorari to quash the impugned order of the Assistant Entertainment Tax Commissioner, Varanasi dated 24.9.1993 and 27.12.1993 Annexure 3 and 4 to the writ petition no. 287 (Tax) of 1998. Writ petition no. 361 (Tax) of 1998 has been filed for quashing the orders dated 17.8.1998, 23.6.1998 and 27.4.1998 and for refund of the amount said to be illegally realized from the petitioner. Writ Petition No. 1056 of 1994 has been filed for quashing the orders dated 13.12.1993 and 6.1.1994. The petitioners have also prayed for a mandamus directing the respondents not to levy any entertainment tax on the petitioner on its providing dish antenna services to its room in its hotels and to refund the amount said to be illegally realized by the respondents.

Heard learned counsel for the parties.

2. The petitioners are 5 Star government approved hotels which provide boarding and lodging facilities to its customers. The petitioners are part of a chain of hotels managed by the Taj Group of hotels having its hotels at various centers in the country and abroad. In its hotels the petitioner have a huge multi storied building having shopping arcade, swimming pool, lavish lawn, badminton court, tennis court, jogging area, peacock garden etc. apart from other facilities e.g. conference hall, huge lobby, travel desk computer, in house bank, money changing facilities , post office etc. The petitioners also have restaurant, coffee shop, bar licence, 24 hours room service etc.

3. In paragraph 6 of writ petition no. 287 of 1998 it is stated that to provide comforts and efficient service, the petitioner's room are equipped with modern and international standard gadgets having different channel music system, T.V. set etc. The petitioner has stated in paragraph 12 (a) of the writ petition that the petitioner does not charge any amount for admission for entertainment except the fixed tariff for the rooms from its customers. The entertainment is part of the service rendered by the petitioner for which a fixed tariff is charged. It is alleged that it is difficult and impossible for the petitioner to calculate the payment towards the entertainment through the

T.V. on the rooms. The occupancy in the hotel is not 100% every day and sometimes the occupancy is up to 50% and sometimes as low as 10%.

4. In paragraph 14 of the writ petition it is alleged that to provide maximum comfort to its customers and to give all the facilities available in the 5 star hotel the petitioner has also made arrangement for dish antenna in its hotel premises through which a customer living in a room may enjoy any of the programmes such as Zee T.V. Star T.V. B.B.C., Doordarshan etc. It is not possible to ascertain and calculate which of the rooms occupied by the customers availed the service of these channels of T.V. In paragraph 15 of the writ petition it is alleged that being a 5 Star hotel, in order to keep its goodwill and to compete with other hotels, it has to provide modern facilities which are internationally recognized and provided in other hotels in the world. The guests staying in the rooms pay irrespective of the fact whether they avail these facilities in the rooms, and the management does not charge any extra amount against this facilities available in the room. Being a 5 Star hotel the petitioner has to provide these facilities otherwise the classification committee constituted by the Tourism Department of the Government would be compelled to degrade the petitioners hotel from 5 Star hotel to a lower Star category hotel.

In paragraph 17 of the writ petition it is stated that the petitioner was surprised to receive the letter dated 24.9.1993 of the Assistant Entertainment Tax Commissioner, Varanasi stating that the petitioner was providing entertainment through dish antenna to its customers in the rooms between the period 1.4.1992 to 24.9.1993 and it was liable to pay 30% entertainment tax in pursuance of the government notification dated 13.4.1989 is Annexure 3 to the writ petition. In paragraph 17 (b) of the writ petition it is stated that cable operation is a commercial business enterprise of entertainment through cable T.V. which also includes one channel of video film for which an exclusive fee is charged and is basically run for profit. On the other hand, the petitioner's hotel does not show one additional video channel for film and showing of foreign programmes through satellite is one of the main facilities provided to guests staying in the hotel for which there is no distinct charge. It is alleged in paragraph 17 (d) of the writ petition that the demand of entertainment tax worked out is irrational, arbitrary as the entertainment tax is levied at 30% of the payment received for admission to the programmes. In the case of the petitioner no amount is received towards the entertainment or as an admission to watch T.V. programmes through dish antenna. It is providing dish antenna service to the room in the hotel which is a private place and it could not be termed to be a public place. It is alleged in paragraph 17 (J) of the writ petition that providing satellite service through dish antenna to its customers staying in the rooms in the hotel is clearly different from providing cable service an video shows in public places, vehicles or hotels. In this connection the petitioner met the Assistant Entertainment Tax Commissioner and placed the full facts and requested that the entertainment tax may not be demanded from it for providing dish antenna service to its rooms as this is not entertainment within the meaning of Section 2 (g) of the U.P. Entertainment & Betting Act 1979

(hereinafter referred to as the Act). However, the said authority vide letter dated 27.12.1993 directed the petitioner to pay Rs.79380/- within three days failing which the amount will be realized as arrears of land revenue vide Annexure -4 to the writ petition. In paragraph 39 it is stated that it is always open to the guests occupying the rooms to switch on the T.V. or not, and it is purely in their discretion. In paragraph 40 of the writ petition it is stated that many of foreign tourists do not understand English, what to say of Hindi. The programme is either in English or Hindi. Aggrieved this writ petition has been filed.

5. A counter affidavit has been filed in writ petition no. 361 of 1998 and we have perused the same. In paragraph 5 of the same it is stated that providing entertainment to the customers by the petitioner is entertainment as defined in Section 2 (g) of the Act. The respondents have relied on several decisions of this Court in various writ petitions referred to in paragraphs 7, 8 and 44 of the counter affidavit. We have carefully perused the decisions in the aforesaid cases. The facts of the present case are totally different from the facts of writ petition (tax) no. 1353 of 1993 Universal Communication System vs. State of U.P. connected with Writ petition no. 831 of 1994 Suneel Kumar Agarwal vs. District Magistrate, Writ petition no. 823 of 1994 M/s Osho Resorts vs. District Magistrate and Writ petition no. 823 of 1994 Sudheer Kumar Gupta vs. District Magistrate which were all decided by a Division Bench of this court by judgment dated 26.5.1995. The facts of those cases were totally different from the facts of the present case. Those writ petitions were filed by cable operators who had challenged the demand of entertainment tax under the U.P. Entertainment and Betting Tax Act, 1979 as amended. The petitioner is not a cable T.V. operator and hence the aforesaid decisions have nothing to do with the facts of the present case.

6. It is not disputed that the petitioner does not charge any extra and separate amount from its customers for providing T.V. service in the rooms to enable them to view different channels. This is also evident from the room brochure and tariff, vide Annexures 1, and 2 to the writ petition no. 2870 of 1992. The petitioner does not take service of any cable operator nor pays any amount to them for enabling its customers to view films through cable operators. Whatever is available through the dish antenna installed by the petitioner in its hotel premises are only viewed by the customers on T.V. sets in their rooms without paying any extra amount.

7. It may be mentioned that the cable operators business is a commercial business enterprise of entertainment through cable T.V. which operates for profit motive for providing this service. The petitioner does not charge any extra amount for such entertainment and its does not show any additional video channels for films. The customers can see only the programmes which come through the dish antenna installed in the petitioners' premises which comes through satellite and the petitioner does not charge any extra amount for this.

8. To appreciate the submissions made in this case we may refer to certain relevant provisions of the Act.

Section 2 (g) of the Act defines entertainment as follows :

"entertainment includes any exhibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematograph exinition, includes exhibition or news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately."
Section 2 (1) states:

"Payment for admission' includes-
(i) any payment for seats or other accommodation in any form in a place of entertainment.
(ii) Any payment for a programme or synopsis of an entertainment,
(iii) Any payment made for the loan or use of any instrument or contrivance which enables a person to get normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get,
(iv) Any payment, by whatever name called for any purpose whatsoever, connected with an entertainment, which a person is required to make in any form as a condition of attending or continuing to attend the entertainment, either in addition to the payment, if any admission to the entertainment or without any such payment for admission,
(v) Any payment made by a person, who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required."

Section 3 (1) states:

"Subject to the provisions of this Act, there shall be levied and paid on all payments for admission to any entertainment, other than an entertainment to which Section 4 applies, an entertainment tax at such rate not exceeding (one hundred and fifty percent) of each such payments as the State Government may from time to time notify in this behalf, and the tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed."

Section 3 (6) states :

"What in a hotel or a restaurant, entertainment by way of cabaret or floor show (by whatever name called but excluding a mere band in attendance or recorded music) is provided along with any meal or refreshment with a view to attracting customers, whether or not payment for admission is charged distinctly for such entertainment, twenty percent of the amount payment by the customer for such meal or refreshment or the amount charged distinctly for such entertainment, whichever is higher shall be deemed to be the payment for admission to such entertainment and the tax shall be levied and paid accordingly. "

9. The Act was amended by the U.P. Entertainment and Betting Tax (Second Amendment) Act, 1995 (U.P. Act 28 of 1995). We may refer to the relevant provisions of this Amending Act.

10. By Section 2 (6) of this Act the following clauses have been inserted in Section 2 of the original Act :

"(ee), 'cable service' means the transmission by cables of programmes including re-transmission by cable of any broadcast television signals.'

(eee), 'cables television network' means any system consisting of set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers.'

By the same Amendment of 1995 after Section 4 B of the principal Act the following section has been inserted.

"4-C, Tax on cable service (1) The proprietor of a cable television network providing cable service shall be liable to pay entertainment tax at such rate not exceeding two hundred rupees for every subscriber for every month, as the State Government may, from time to time, notify in this behalf,

Provided that the proprietor of a cable television network shall not be liable to pay entertainment tax in respect of a subscriber which is a hotel.'

11. The original Act was again amended by UP Act 15 of 2001. The statement of Object and Reasons of this 2001 Amendment Act states :

"There was no specific provision in the said Act for levy and payment of tax on entertainments provided through cable service. It was therefore decided to amend the said Act mainly to provide for

(1) the definition of the term 'cable operator' and extending the meanings of words and expressions assigned to such in the Cable Television Network (Regulation) Act, 1995 as were used in the Act but are not defined therein
(2) imposition of tax on the proprietor of a hotel who provides cable service to the hotel through his own cable television network.'

Section 2 (a) of this 2001 Amendment Act inserted clause (ee) after clause (e) which reads:

"cable operator' means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of cable television network and includes the proprietor of a hotel who provides cable service in the hotel through his own cable television network."

Section 3 of the Amendment Act inserted clause (7) after Section (6) which reads:

"(7) Where in a hotel, entertainment by way of cable service is provided in rooms or other places, the entertainment so provided in each room or other place shall be deemed to be a separate entertainment and the subscription for admission to each such entertainment shall be deemed to be equal to the amount or subscription charged from a subscriber in the vicinity of the hotel by the cable operator providing cable service in the hotel and the tax shall be levied and paid on the basis of such subscription:

"Provided that where the cable operator himself is the proprietor of the hotel, the subscription for admission to each such entertainment shall be deemed to be equal to the amount of subscription charged from a subscriber in the vicinity of the hotel by any other cable operator."

12. We may now examine the above provisions which we have quoted. The word 'entertainment' means exhibition, performance, etc. to which persons are admitted for payment. Hence the definition of entertainment itself means that to be entertainment under the Act persons have to be admitted for payment. As stated in the petition, the cable or video service to the petitioner hotel's room is not made for any payment. There is no separate charge for the same. Even if one does not see the programme on T.V. it will make no difference because the tariff of the hotel room will remain the same. Hence it cannot be said that the cable/video service which the petitioner is providing to its customers is entertainment as defined under the Act. It may be noted in this connection that it is only for cabaret and floor show that entertainment tax has to be paid even if there is no separate charge for the same, vide Section 3 (6) of the Act.

13. The word 'payment for admission' has been defined in Section 2 (1) which we have quoted above. The video/cable service provided by the petitioner is not provided by payment for admission.

14. The charging provision in the Act is Section 3 which levies a tax on payments for admission to entertainment. Since in our view there is no payment for admission hence obviously no tax can be imposed under the Act on the petitioner's cable/video service.

15. As regards the 1995 amendment, that in our opinion relates to tax on proprietors of a cable television network. This obviously relates to the persons who run the cable operator business. The petitioner does not run any business of a cable television network. It is only providing the cable/video service from its own dish antenna. A careful reading of Section 4 -C as inserted by the 1995 amendment shows that the tax is payable for every subscriber.

16. The word 'subscriber' is defined in Section 2(d) of the 1995 amendment to mean:

"'Subscriber' means a person who receives the signals of cable television network at a place indicated by him to the proprietor of the cable television network, without further transmitting it to any other person."

17. The definition of subscriber indicates that a subscriber is a person who receives the signals of a cable television network at a place indicated by him to the proprietor of the cable television network. In our opinion the petitioner's customers cannot be called subscribers because they do not indicate to any proprietor of any cable television network any place for receiving signals of a cable television network.

18. In fact the legislature itself realized that the service of the kind rendered by the petitioner's hotel is not covered by the Act even after its amendment in 1995, and hence further amendment was made in the Act by U.P. Act No. 15 of 2001 which came into force from 5.3.2001 vide Section 1 (2) of the Amending Act. Hence it is only after 5.3.2001 that the petitioner had to pay entertainment tax and not for the period before 5.3.2001.

19. The statement of objects and reasons of the Amending Act of 2001 clearly indicate that since there were no specific provisions in the Act for levy and payment of tax on entertainment by hotel owners who provided cable service through their own T.V. set hence this Amendment had to be introduced before any such tax could be levied.

20. A perusal of the above amendment shows that now the legislature has clearly provided that even hotels which provide their own cable television network have to pay entertainment tax. Thus it is clear that the petitioner was not liable to pay such tax prior to 5.3.2001, and hence levy and realization of the tax prior to this date was violative of Article 265 of the Constitution.

21. In the result these writ petitions are allowed. The impugned orders are quashed. The respondents are directed to refund the amounts they have illegally collected as entertainment tax from the petitioners for the period prior to 5.3.2001 within two months of production of copy of this order before the respondent no. 3.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 10, 2003.

BEFORE
THE HON'BLE S.P. SRIVASTAVA, A.C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 49 of 2003

Chairman, Aligarh Gramin Bank ...Appellant

Versus

Sri Lattoori Singh ...Opposite Party

Counsel for the Appellant:
Sri S.N. Verma
Sri Yashwant Verma

Counsel for the Opposite Party:
Sri I.M. Tripathi

Aligarh Gramin Bank (Officers and Employees) Service Regulations 2000- Regulation 43- Prior permission to take service of legal practitioner - No prayer made by the delinquented employee- except to appoint his next friend Mr. R.P. Singh, the officer of Central Bank of India- whether an officer outside from the Bank can be appointed as next friend of the delinquent employee. Held- 'No' unless rules so provides- question for appointment of legal practitioner left open for the delinquent employee.

Held- Para 33

Defence representative from Central Bank of India and direction to that effect by the learned single Judge cannot be sustained and is hereby set aside. However, it is observed that the respondent (writ petitioner) is entitled to have a defence representative from Aligarh Gramin Bank as permitted by the Enquiry Officer or he may pray for assistance by legal practitioner in accordance with Regulation 4 as observed above.

Case law discussed:
2001 (9) SCC 540
2003 (1) AWC-70
AIR 1972 SC 2178
AIR 1983 SC 454

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

1. We have heard Sri S.N. Verma, Senior Advocate assisted by Sri Yaswant Verma for the appellant and Sri I.M. Tripathi, Advocate for the respondent.

2. This Special Appeal has been filed by the appellant against the

judgement of the learned single Judge dated 3.12.2002 passed in writ petition no. 48308 of 2002 Sri Latoori Singh Vs. Chairman, Aligarh Gramin Bank allowing the writ petition in part.

Facts giving rise to this special Appeal briefly stated are-

3. The respondent Latoori Singh is working as Officer Scale II in Aligarh Gramin Bank. A disciplinary enquiry was initiated by the bank against the respondent by issuing charge sheets dated 31.7.2002 and 9.8.2002, the Enquiry Officer was appointed by the disciplinary authority on 4.9.2002 in accordance with the Aligarh Gramin Bank (Officers and employees) service, Regulations, 2000 with respect to charge sheet dated 9.8.2002 in which presenting officer on behalf of the Bank also appeared. The enquiry officer asked the respondent as to whether he wants to engage a defence representative which was replied in affirmative by the respondents. The respondents stated to the Enquiry Officer that he wants to engage a legal practitioner for his defence. The Enquiry Officer refused the prayer for engaging a legal practitioner and stated that the respondent can only bring any officer or employee of the Aligarh Gramin Bank as a defence representative. The aforesaid decision of the Enquiry Officer was objected by the petitioner but the enquiry officer reiterated his same decision on which the respondent stated that he wants to bring one Sri R.P. Singh of Central Bank of India as his defence representative. The Enquiry Officer stated that at his level only permission for engaging defence representative belonging to Aligarh Gramin Bank can be granted. The Enquiry Officer asked for fifteen days' time for searching an employee or officer of Aligarh Gramin Bank for being his defence representative . The enquiry was adjourned by the Enquiry Officer to 12th November, 2002.

4. After the above proceedings the writ petition was filed by the petitioner praying for quashing of the order dated 4.9.2002 and the order dated 11.9.2002 initiating the enquiry proceedings as well as the charge sheets dated 31.7.2002 and 9.8.2002. A writ of mandamus was also prayed for commanding the respondent to allow the petitioner (respondent to this appeal) to appoint an independent defence representative as Sri R.P. Singh a Special Officer of Central Bank of India. Further prayer seeking a writ of mandamus commanding the respondent not to interfere in the peaceful functioning of the petitioner and further not to take any coercive action in respect to the order passed in enquiry proceedings. Counsel for the Bank was represented in the writ petition and the writ petition was heard by the learned single Judge without inviting counter affidavit from the Bank. The learned single Judge dismissed the writ petition in so far as the prayer for quashing the disciplinary proceedings in pursuance of the charge sheets was concerned. The writ petition was partly allowed holding that the petitioner has a right to engage Sri R.P. Singh or any officer of the Central Bank of India or Aligarh Gramin Bank as representative to defend the writ petitioner in the enquiry. The judgment of the learned single Judge in so far as it partly allowed the writ petition, has been appealed by the Aligarh Gramin Bank. Sri S.N. Verma, Senior Advocate, raised following submissions in support of the appeal.

1. The service conditions of the employee of the Bank are governed by Aligarh Gramin Bank (Officers and employees) Service, Regulations 2000 which do not contain any provision enabling the writ petitioner to have a defence representative from any other Bank. The right of representation in the disciplinary enquiry is regulated by the statutory rules and unless the rules permit the employee has no right to claim engagement of defence representative from any out side organization i.e. Central Bank of India.

2. The learned single Judge did not correctly construe the provision of Regulation 43 of the Aligarh Gramin Bank (Officers and employees) Service, Regulations 2000.

5. The judgment of the learned single Judge is in teath of the judgement of the apex court in Indian Oversees Bank versus Indian Oversees Bank Officers' Association and another reported in (2001) 9 Supreme Court Cases 540.

6. The counsel for the appellant placed reliance on the decisions of the apex court in Bharat Petroleum Corporation Ltd. versus Maharashtra General Kamgar Union and others reported in (1990) 1 Supreme Court Cases 6926, Indian Oversees Bank versus Indian Oversees Bank Officers' Association and another reported in (2001) 9 Supreme Court Cases 540 and a Division Bench Judgement of this Court in Ajai Kumar Misra versus Assistant General Manager, Aligarh Bank, and another reported in 2003 (1) AWC 70.

7. Sri I.M. Tripathi, learned counsel appearing for the respondent writ petitioner supporting the judgment of the learned single Judge submitted that the respondent has right to engage a defence representative of his choice which is in consonance of principles of natural justice. Sri Tripathi submits that there is no prohibition in Aligarh Gramin Bank (Officers and Employees) Service,. Regulations 2000 in engaging a defence representative from out side the bank. Referring to Regulation 43, the learned counsel submitted that since there is no restriction even in engaging legal practitioner hence it can safely be assumed that the representation by any other person is also permissible. Referring to Regulation 62 of the Aligarh Gramin Bank (Officers and Employees) Service, Regulations 2000 has also been made which provided that leave can be granted to an officer or employee for defending any officer or employee in an enquiry.

8. The counsel for the respondent placed reliance on following judgments of the apex court :-

(1) C.L. Subramaniam v. The Collector of Customs, Cochin AIR 1972 Supreme Court, 2178 ;

(2) Bhagat Ram v. State of Himachal Pradesh and others AIR 1983 Supreme Court 454,

(3) The Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendnath Nadkarni and others AIR 1983 Supreme Court 109

(4) J.K. Agrawal vs. Haryana Seeds Development Corporation Ltd. and others, AIR 191 Supreme Court 1221

Reliance has also been placed on the judgments of several High Courts namely:-

(1) K.N. Gupta, s/0 Behari Law vs. Union of India through Secretary Railway Board and another, AIR 1968 Delhi 85

(2) Hans Raj Gupta vs. State of Punjab 1992 (1) SLR 146 (Punjab and Haryana High Court)

(3) Kehar Din, Ex Class IV Employee vs. The Presiding Officer, Labour court and another 1992 (2) SLR 199 (Punjab and Haryana High Court)

(4) Nripendra Nath Bagchi vs. Chief Secretary, Government of West Bengal AIR 1961 (Calcutta High Court) 1 and

(5) Hari Prasad vs. Hon'ble High Court of Judicature at Allahabad and another (1995) 2 UPLBEC 1250,.

9. We have considered the submissions made by the counsel for both the parties and have also perused the record of the writ petition. As prayed by counsel for the parties we are deciding this appeal finally.

10. The rival submissions made by counsel for the parties veer round the controversy regarding extent of right of an employee to have his defence representative in disciplinary proceedings against him. The Regulations have been framed under Section 30 of the Regional Rural Banks Act, 1976 namely, Aligarh Gramin Bank (Officers and Employees) Service Regulations 2000. The Regulation apart from giving other conditions of service, conduct, disciplinary and appeals, regulation 38 enumerates the penalty which can be imposed on an officer or employee of the Bank. Second proviso of regulation 38 which is relevant is extracted below:-

"II employees

(a) Penalties for minor misconduct

(i) censure
(ii) recording of adverse remarks against him

(b) Penalties for major misconduct

(i) fine
(ii) withholding of increment for a period not exceeding 6 months.
(iii) Withdrawal of special allowance
(iv) Reductions of pay to next lower stage upto a maximum period of 2 years in case the staff has reached the maximum in the scale of pay.
(v) Removal from service which shall not be a disqualification for future employment
(vi) Dismissal.

Provided further that no order imposing any of the penalties specified above, shall be made except by an order in writing signed by the competent authority and no such order shall be passed without the charge or charge being formulated in writing and given to the employee in enquiry held so that he shall have reasonable opportunity to answer the charge or charges and defend himself.

11. Regulation 40 deals with delegation of the power to enquire which is extracted below:-

"40. Delegation of the power to enquire

The enquiry under Regulation 38 and the procedure with the exception of final order, may be delegated by the competent authority to an officer who is senior to the officer against whom the proceedings are instituted and in the case of an employee to any officer.

12. Regulation 43 is regarding restriction on engagement of a legal practitioner which is extracted below :-

"43. Restriction on engagement of a Legal Practitioner

For the purpose of enquiry, the officer or employee shall not engage a legal practitioner without prior permission of the competent authority."

13. The word ' competent authority' has been defined in Regulation 2 (i) which means the Chairman in the case of officers and the officer designated by the Chairman in the case of employees.

Regulation 62 which has been referred by the counsel for the respondent may also be noted which deals with special casual leave. For ready reference regulation 62 is extracted below :-

"62 Special Casual Leave

An officer or employee may be granted special casual leave and special leave for sports, donation of blood, family planning, defending another officer or employee in an enquiry, or for joining civil defence services or any other purpose as may be decided by the Board in accordance with the guidelines of the Central Government."

14. Aligarh Gramin Bank (Officers and employees) Service, Regulations 2000 do not specifically contain any provision giving right to an officer or employee to represent himself in the disciplinary enquiry by any other representative. However, regulation 43 contains a restriction in engagement of a legal practitioner which provides that for the purpose of enquiry, the officer or employee shall not engage legal practitioner without prior permission of the competent authority. This regulation does contemplate engagement of legal practitioner by an officer or employee in a disciplinary enquiry with the permission of the competent authority. Regulation 43 thus clearly contemplates representation of an employee in an enquiry by legal practitioner with the permission of the competent authority. The question which has arisen in this appeal is to the effect that when the regulations do not specifically contemplate representation by an employee or officer by any other person apart from legal practitioner, can an employee insist for having his defence representative from another bank or from any out side organization. The regulation also do not specifically contemplate representation by any other officer or employee of the same bank but reference of such fact has been made in Regulation 62 provides that an officer or employee may be granted special causal leave for defending another officer or employee in an enquiry. In incorporating the provision of grant of special casual leave to an officer or employee for purpose of defending an officer in an enquiry the regulation makers were aware of such event and contingencies in the Bank. The Aligarh Gramin Bank (Officers and employees) Service, Regulation 2000 thus impliedly recognizes and takes care of

fact and situation in which an officer or employee may be granted special causal leave for defending any officer or employee in an enquiry. Regulations 43 and 62 thus contemplate representation of an employee in disciplinary enquiry by a legal practitioner or by an officer or employee. It is relevant to note that the word' officers and employee' referred to in Regulation 62 obviously refers to officers and employees as defined in Regulation 2 (n) and 2(1) of the Aligarh Gramin Bank. Thus an officer or an employee referred in Regulation 62 refers the officer and employee of the Aligarh Gramin Bank. The scheme of the Regulation thus makes it clear that the representation is permissible in disciplinary enquiry by a charge sheeted employee either by legal practitioner or by any other officer or employee of the Bank.

15. The question to be considered in this appeal is as to whether the respondent has right to claim for a defence representative from an outside organization i.e. Central Bank of India as a matter of right. Before proceeding to consider the aforesaid question any further it will be relevant to take into note certain decision of the apex court which considered different aspects of this right.

16. The three Judge Bench of the apex court in A.I.R. 1960 Supreme Court 914 N. Kalindi and others versus M/s Tata Locomotive & Engineering Co. Ltd. Jamshedpur had occasion to consider as to whether in an enquiry held by the Management against a workman, has the workman right to be represented by a representative of his Union. In the case before the apex court no provisions were made in the relevant rules permitting the person against whom enquiry was being held to be represented by any body else. After noticing the aforesaid fact it was held in paragraph 5 by the apex court :-

"5. Our conclusion therefore is that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union, though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

17. In Crescent Dyes and Chemicals Ltd. versus Ram Naresh Tripathi reported in (1993) 2 Supreme Court Cases 115 the apex court had occasion to consider whether a delinquent is entitled to be represented by an office bearer of another Trade Union or a non recognized union functioning within the undertaking in which the delinquent is employed. The apex court in the aforesaid judgment has considered several earlier judgments of the apex court and English cases. In paragraph 17 the apex court laid down in following words:-

"17. It is, therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations or standing orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice in so far as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent. In the instant case the delinquent's right of representation was regulated by the Standing orders which permitted a clerk

or a workman working with him in the same department to represent him and this right stood expanded on sections 21 and 22 (ii) permitting representation through an officer, staff-member or a member of the union, albeit on being authorized by the State Government. The object and purpose of such provisions is to ensure that the domestic enquiry is completed with dispatch and is not prolonged endlessly. Secondly, when the person defending the delinquent is from the department or establishment in which the delinquent is working he would be well conversant with the working of that department and the relevant rules and would, therefore, be able to render satisfactory service to the delinquent. Thirdly, not only would the entire proceedings be completed quickly but also inexpensively. It is, therefore, not correct to contend that the Standing Order or Section 22 (ii) of the Act conflicts with the principles of natural justice.

18. The apex court in Bharat Petroleum Corporation Ltd. versus Maharastra General Kamgar Union and others reported in (1999) 1 Supreme Court Cases 626 (supra) had again occasion to consider clause 29.4 of draft standing orders provided for that workman is permitted to be defended by a fellow workman of his choice who must be an employee of the Corporation. The challenge to the above standing order was made before the apex court. The apex court after considering several cases has laid down that the basic principle is that an employee has no right of representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. Following was held in paragraph 36 of the aforesaid judgment.

"38. The model Standing orders, no doubt, provided that a delinquent employee could be represented in the disciplinary proceedings through another employee who may not be the employee of the parent establishment to which the delinquent belongs and may be an employees elsewhere, though he may be a member of the trade union, but this rule of representation has not been disturbed by the Certified Standing Orders, in as much as it still provides that the delinquent employee can be represented in the disciplinary proceedings through an employee. The only embargo is that the representative should be an employee of the parent establishment, the choice of the delinquent in selecting his representative is affected only to the extent that the representative has to be a co-employee of the same establishment in which the delinquent is employed. There appears to be some logic behind this as a co-employee would be fully aware of the conditions prevailing in the parent establishment, its Service Rules, including the Standing Orders, and would be in a better position, than an outsider, to assist the delinquent in the domestic proceedings for a fair and early disposal. The basic features of the model Standing Orders are thus retained and the right of representation in the disciplinary proceedings through another employee is not altered, affected or taken away. The Standing Orders conform to all standards of reasonableness and fairness and, therefore, the appellate authority was fully justified in certifying the Draft Standing Orders as submitted by the appellant.

19. In the case of Indian Overseas Bank versus Indian Overseas Bank Officers' Association an another (supra) the apex court had again occasion to consider the nature and extent of employees' right of representation in a departmental enquiry. The apex court again reiterated the principle in paragraph 6 of the said case after taking into consideration the earlier pronouncement of the apex court. Paragraph 6 of the said judgement is extracted below:-

"6. We have carefully considered the submissions made as above, the issue ought to have been considered on the basis of the nature and character or the extent of rights, if any, of an officer-employee to have, in a domestic disciplinary enquiry, the assistance of some one else to represent him for his defence in contesting the charges of misconduct. This aspect has been the subject matter of consideration by this court on several occasions and it has been categorically held that the law in this country does not concede an absolute right of representation to an employee in domestic enquiries as part of his right to be heard and that there is no right to representation by somebody else unless the rules or regulations and standing orders, if any, regulating the conduct of disciplinary proceedings specifically recognize such a right and provide for such representation (N. Kalindi vs. Tata Locomotive & Engg. Co. Ltd. (AIR 1960 SC 914), Dunlop Rubber Counsel for the petitioner. (India) Ltd. v. Workmen (AIR 1965 SC 1392) Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi (1993) 2 Supreme Court cases 115 and Bharat Petroleum Corpn. Ltd. v. Maharashtra Central Kamgar Union (1999) 1 Supreme Court cases 626. Irrespective of the desirability or otherwise of giving the employee facing charges of misconduct in a disciplinary proceeding to ensure that this defence does not get debilitated due to inexperience or personal embarrassments, it cannot be claimed as a matter of right and that too as constituting an element of principle of natural justice to assert that a denial thereof would vitiate the enquiry itself."

20. The Division Bench judgment relied upon by the counsel for the appellant in Ajai Kumar Misra versus Assistant General Manager, Allahabad Bank and another reported in 2003 (1) AWC 70 do support his contention. In the aforesaid case the writ petitioner was messenger in Allahabad Bank. The petitioner moved an application praying that he should be permitted to take one Sri Surendra Misra, a retired officer of Central Excise Department to act as his defence representative. Another application was made that if Surendra Misra is not agreeable then another employee Sri K.K. Dubey of Custom & Central Excise Department may be permitted. The said request was turned down by the Enquiry Officer referring to Allahabad Bank Officer Employees' (Discipline and Appeal) Regulations, 1976. The Enquiry Officer stated that above Regulation do not permit engagement of a person other than officer or employee of the Bank to act as defence representative in the departmental proceedings. The aforesaid decision was challenged before this Court. The Division Bench after considering the several decisions of the apex court held in paragraph 8 which is quoted below:

"8. The law, therefore, is well settled that an employee facing disciplinary proceedings can have the assistance of the defence representative only in accordance with the rules governing his condition of service and is not entitled to claim that he may be allowed to be represented by a legal practitioner or someone else who does not fall within the purview of the rule. It is not the case of the petitioner that the presenting officer is a legal practitioner or is a legally trained person. In these circumstances, we do not find any infirmity in the order dated 3.11.2001 passed by the Disciplinary authority. "

21. The aforesaid judgments clearly lay down that an employee facing the disciplinary enquiry can have assistance of defence representative only in accordance with rules governing his service condition. In the present case regulation 43 provides for representation by legal practitioner with the permission of the competent authority. However in the present case we are not called upon to examine the question as to whether the petitioner was entitled to have legal practitioner as his defence representative since we have not been shown any material on record to show that the petitioner ever made a demand of having a legal practitioner as his defence representative in accordance with the regulation 43, Regulation 43 requires prior permission of the competent authority for engaging legal practitioner as defence representative. The above provision thus requires request by an employee. We have also looked into the prayer of the writ petitioner in writ petition. The petitioner has not made any prayer for direction to the respondent to permit him to have a legal practitioner as his defence representative presumably due to the reason that the writ petitioner himself has never approached the competent authority. The petitioner has made specific prayer in the writ petition seeking a writ of mandamus to the respondents to allow the petitioner to appoint Sri R.P. Singh a special officer of Central Bank of India as defence representative. Thus we have not examined the question as to whether the petitioner is entitled for service of a legal practitioner as defence representative and we deem fit that this question be left open to the petitioner to raise before the appropriate competent authority, if so advised.

22. The counsel for the respondent has laid much emphasis on the fact that the Aligarh Gramin Bank (Officers and Employees) Service, Regulations 2000 does not prohibit engagement of any person from Bank other than Aligarh Gramin Bank as defence representative. He submitted that if the Regulation do not prohibit there was no restraint on the petitioner from seeking a defence representative from the Central Bank of India. Learned single Judge for allowing the writ petition has also taken the view that since the said Regulations, 2000 does not prescribe engagement of any person from a Bank other than the respondent - Bank hence the petitioner has right to engage Sri R.P. Singh or any officer of the Central Bank of India or any person from any other Branch to defend and represent the writ petitioner in the enquiry.

23. After having taken into consideration the provisions of Regulations 2000 specially regulations 38, 43 and 62, we are of the view that the learned Single Judge has not correctly

construed the regulation 43 while laying down that if the regulation envisage that an officer can be defended through a lawyer the view is irresistible that in case the petitioner makes a prayer to engage some officer from a Bank other than the respondent Bank, which would be an independent person unrestrained by any disciplinary control of the employer, the petitioner will be properly defended and the intention of the framers of the regulations in this regard is too obvious and patent to be ignored that they intended a right to be defended through an independent representative either from the same Bank or from the other Bank by the expression that 'he shall have reasonable opportunity to answer the charge or charges and defend himself."

24. Regulation 43 amply protect the right of an employee and officer of the Bank while permitting taking assistance of the legal practitioner. The prior permission is contemplated in regulation 43 to keep a check on frivolous and unnecessary request made for legal practitioner if the facts and situation do not demand so. The principle underlined by the apex court in several cases, is clear that assistance by legal practitioner is to be given to an employee when the Enquiry Officer conducting the enquiry as a legal trained person, from the enquiry proceedings on the date 19.10.2002 which has been annexed as Annexure-3 to the writ petition, it is clear that the enquiry officer himself has permitted the writ petitioner to have defence representative from Aligarh Gramin Bank.

25. The right of representation by an employee in enquiry proceedings by legal practitioner or by any other person is in consonance with the principles of natural justice safe guarding his right to express himself to find a person who may ably protect his interest but as noticed above from the pronouncements made by the apex court as noted above, the basic principle is that an employee has no right to representation in the disciplinary proceedings by any other person or lawyer unless the service Rules specifically provides for the same. The Aligarh Gramin Bank (Officers and Employees) Service, Regulations 2000 do provide representation by legal practitioner and also impliedly envisage a situation when an officer has to be granted leave as special casual leave to represent an employee or officer in a department enquiry. Thus the said Regulation of 2000 fully protect the interest of a delinquent. The representation in disciplinary enquiry by an officer and employee of the same bank has also salutary purpose and object. An Officer or employee of the same bank has special knowledge of the prevalent practices, facts and circumstances of the Bank, rules and regulations including the orders of the higher authorities and he may be in a better situation to defend an officer or employee of the same Bank in the disciplinary enquiry. Further when defence representative is from the same Bank he can also seek special casual leave for defending the employee. Defence representative from the same Bank will also facilitate expedition in conclusion of the disciplinary enquiry and the availability of the defence representative will be more easy as compared to any out side person. The fear which has been expressed by the counsel for the respondents that the defence representative belonging to the same Bank will be under pressure from the employer, is over simplification of an

issue. A person working in an organization can not be heard in saying that he has no trust in whole of the organization. Every organization consist of different persons. In several cases there are registered Unions of the employees and officers of the organization to espouse their cause and in case the enquiry is not fair the workmen concerned can challenge its validity in appropriate proceedings. The cases of biased enquiry or cases of conduct of enquiry in an unfair manner, cannot be lead to presume that in all cases defence representative will not be independent and useful. Assuming for argument sake that officers or employees in a particular case may not be able to function independently, regulation 43 amply protect the interest of the employee or the officer and the said employee or the officer can seek assistance of the legal practitioner in case where he is able to demonstrate that the defence representative from the same organization will not be able to function independently or there are any other good reason for permitting a legal practitioner.

26. The contention of the respondent that since there is no prohibition in the Regulation from engaging a person from the out side it be held that he has right to do so is too far to be accepted. As noted above the apex court has clearly laid down that the extent of representation in an enquiry has to be in accordance with that extent which is specifically permitted under the rules. Extending the right of representation upto the extent which is not prohibited will run counter to the dictum laid down by the apex court in the above noted cases. In case such interpretation is given to the rules it will lead to unworkable and unreasonable result. A person may insist that he may be permitted to take a defence representative who has been a dismissed employee or officer of the same bank or of any other bank of a person of criminal background. If is conceded that the employee has right to take any one which is not prohibited that will cause undue hindrance in holding of disciplinary enquiry and smooth conduct of the enquiry. We are unable to subscribe ourselves to the view taken by the learned single Judge that since engagement of any person from Bank other than Aligarh Gramin Bank is not prohibited the petitioner has right to engage Sri R.P. Singh of Central Bank of India Branch Aligarh.

27. The various decisions relied by the counsel for the respondents are now to be considered. The apex courts judgment in C.L. Subramaniam v. The Collector of Customs, Chochin reported in AIR 1972 Supreme Court 2178 relied upon by the counsel for the respondents considered the rule 15 (5) of the Central Civil Services (Classification, Control and appeal) Rules, 1967 which provided that the government servant may present his case with the assistance of any government servant approved by the disciplinary authority, but may not engage a legal practitioner for the purpose unless the person nominated by the disciplinary authority having regard to the circumstances of the case, so permits. The apex court in the aforesaid case considered the claim of the petitioner. In the present case as observed above, we have not examined the question of entitlement of the petitioner to have petitioner hence this case has no application.

28. The case of Bhagat Ram v. State of Himanchal Pradesh and others (supra)

was a case in which delinquent a class IV employee was not asked as to whether he wanted also to be represented by a government servant. The enquiry in that case was also to be governed by rule 15(2) of the Central Civil Services (Classification, Control and Appeal) Rules 1967 and the apex court held the enquiry to be vitiated since the delinquent was not asked as to whether he wanted to be represented by a government servant. The aforesaid case has also no application.

29. The next case relied by the counsel for the respondents is the Board of Trustee of the Port of Bombay v. Dilip Kumar Raghvendra Nath Nadkarani and others reported in AIR 1983 Supreme Court, 109. In the aforesaid case the employer was represented by legal train officer in an enquiry. The request of the employee to be represented by the lawyer was refused. In that view of the matter the apex court held that there was denial of opportunity of hearing to employee. Following was observed by the apex court in paragraph 13 :-

"However, when Regulation 12 (8) came into force, the situation merely altered and the large number of witnesses almost all except one were examined after the Regulation came into force and which made it obligatory to grant the request of the first respondent because the regulation provide granting of permission to appear and defend by a legal practitioner once the department was represented by legally trained minds."

30. AIR 1991 Supreme Court 1221 G.K. Agarwal V. Haryana Seeds Development Corporation Ltd. and others was again a case in which the presenting officer was not man of legal appointment and experience and refusal of service of lawyer to the delinquent was held to be violation of principles of natural justice. It was laid down in paragraph 4 of the aforesaid judgment by the apex court -

"4. In the present case, the matter is guided by the Provisions of Rule 7 (5) of the Civil Service (Punishment and Appeal) Rules, 1952 which says :

"7 (5) Where the punishing authority itself enquires into any charge or charges or appoints an Enquiry Officer for holding enquiry against a person in the service of the Government, it may, by an order, appoint a Government servant or a legal practitioner to be known as a Presiding Officer to present on its behalf the case, in support of the charge or charges.

The person against whom a charge is being enquired into shall be allowed to obtain the assistance of a Government Servant, if he so desires, in order to (sic) his defence before the Enquiry Officer. If the charge or charges are likely to result in the dismissal of the person from the service of the Government such person may, with the sanction of the Enquiry Officer, be represented by counsel."

(Underlining supplied)

It would appear that in the inquiry the Respondent -Corporation was represented by its Personal and Administrative manager who is stated to be a man of law. The rule itself recognize that where the charges are so serious as to entail a dismissal from service the inquiry authority may permit the services of a lawyer. This rule vests a discretion. In the matter of exercise of this discretion, one

of the relevant factors is whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of the appellant being pitted against a presenting officer who is trained in laws. Legal Advisor and lawyer are for this purpose some what liberally construed and must include' whoever assists or advises on facts and in law must be deemed to be in the position of a legal advisor. "In that last analysis, decision has to be reached on a case to case basis on the situational particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question ' whether as a sequel to an adverse verdict in a domestic enquiry serious civil and pecuniary consequences are likely to ensue, in order to enable the person so likely to suffer such consequence with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner' which was kept open in Board of Trustees of the Port of Bombay vs. Dilip Kumar 1983 (1) SCR 828 (AIR 1983 SC 109). However, it was held in that case:

"…In our view we have reached a stage in our onward march to fair play in action that where in an enquiry before the domestic tribunal the delinquent officer is pitted against a legal trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated."

31. The judgment of Delhi High Court in K.N. Gupta s/o Behari Lal vs. Union of India through Secretary, Railway Board and another AIR 1968 Delhi 85 (V. 55 C 22) was a case of refusal to adjourn enquiry to enable the petitioner to have assistance of another railway servant which was held to vitiate the enquiry. Rule noted by the Delhi High Court which permitted assistance of any other railway servant employed on the same railway. The said case has no application in the facts of the present case. The judgments relied by the respondents in Hans Raj Gupta vs. State of Punjab (Pb & Hry.), 1992 (1) SLR 146 and Kehar Din v. The Presiding Officer, Labour Court and another (Pb. & Hry.), 1992 (2) SLR 1999 where the delinquent was not asked whether he wanted the assistance of any friend due to which the enquiry was held to be vitiated. The aforesaid cases are not applicable in the present case . The judgement of Calcutta High Court in Nripendra Nath Baghchi v. Chief Secretary, Govt. of West Bengal AIR 1961 Calcutta 1, relied upon by the counsel for the respondents laid down that if on the particular facts and complexity of a case, assistance of a lawyer is regarded as a part of reasonable opportunity, then denial of such an opportunity is violation a like of the cons protection under Article 311 (2) and the principles of natural justice. The aforesaid case is not attracted in the facts of the present case.

32. The last judgment relied upon by the counsel for the respondents is Hari Prasad's case (supra) was again a case where permanent class-IV employee made an application for permission to have a legal assistance on which no orders were passed. The aforesaid case has also no application in the present case. In view of the above, the cases relied upon by the

counsel for the respondents do not support the contention raised by him that he is entitled to have defence representative from Central Bank of India.

33. In view of foregoing discussions, we are of the view that the writ petitioner-respondent was not entitled to have defence representative from Central Bank of India and direction to that effect by the learned single Judge cannot be sustained and is hereby set aside. However, it is observed that the respondent (writ petitioner) is entitled to have a defence representative from Aligarh Gramin Bank as permitted by the Enquiry Officer or he may pray for assistance by legal practitioner in accordance with Regulation 4 as observed above.

The special appeal is allowed subject to observations as made above. Parties to bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.3.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Write Petition No. 64 of 2003

Om Prakash Srivastava ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare

Counsel for the Respondents:
S.C.

Constitution of India, Article- 226- service laws- Regularisation junior to the petitioner regularised in agricultural service on 3.7.81- while the Petitioner being senior ignored- on the reason that in the year adverse entry was given- subsequently, expunged- regularization given w.e.f. 15.12.93- held- entitled for regularization given w.e.f. 15.12.93- held entitled for regularization from the date on which juniors were regularised with all consequential benefit.

Held- Para 4

We, therefore, allow this writ petition and direct that the petitioner should be regularised with effect from 3.7.1981 and be granted all the consequential benefit within a period of two months from the date of production of a certified copy of this order before the authority concerned.

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

1. Heard learned counsel for the petitioner and the learned standing counsel. In this case on 6.1.2003 learned standing counsel was granted time to file counter affidavit and thereafter on 11.2.2003 time was again granted for that purpose but no counter affidavit has been filed till today. We are not inclined to grant any further time and are disposing of this writ petition.

2. The petitioner was appointed on 22.12.1972 on ad hoc basis in the U.P. Agriculture Service. On 3rd July, 1981 an order of regularization was passed with regard to 14 persons including some persons junior to the petitioner but not for the petitioner. The reason why the regularization order was not passed in favour of the petitioner was that there was an adverse entry against him for the year 1974-75. This adverse entry was subsequent expunged on 30.6.1984, vide Annexure 5 to the writ petition. The petitioner was regularized with effect

from 15.12.1993 but his prayer is that he should be regularised from 3.7.1981 when his juniors were regularized.

3. In our opinion the prayer of the petitioner is justified. But for the adverse entry for the year 1974-75 the petitioner would have been regularised with effect from 3.7.1981 when his juniors were regularised.

4. We, therefore, allow this writ petition and direct that the petitioner should be regularised with effect from 3.7.1981 and be granted all the consequential benefit within a period of two months from the date of production of a certified copy of this order before the authority concerned.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.3.2003

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE M.P. SINGH, J.

First Appeal From Order No. 528 of 2003

National Insurance Company Ltd.
...Appellant
Versus
Smt. Urmila Devi and others
...Respondents

Counsel for the Appellant:
Sri Arvind Kumar

Counsel for the Respondents:
Sri B.P. Verma

Motor Vehicle Act 1988- Section 163-A - Compensation jurisdiction of claim Tribunal- permanent diablement- compensation awarded by the Tribunal- Challenge made on the ground- under workmen compensation Act- the amount of award can be given can not be exceed by the Tribunal in motor accident- held- cannot be limited but ought to be just amount has to be determined not withstanding any thing contained in other law for the time being in force.

Held- Para 8

The use of the non abstante clause in Section 163-A of the Motor Vehicles Act is quite significant. It shows that the amount of compensation determined in the proceedings under the Motor Vehicles Act which ought to be just cannot be limited to any amount as specified in the Workmen's Compensation Act as the amount contemplated under Section 163-A of the Motor Vehicle Act has to be determined notwithstanding any thing contained in any other law for the time being in force.

(B)Motor Vehicle Act 1988- Section 170- Permission for filing Appeal- not taken- defence taken that the permission was rejected- no material brought on record- regarding challenge of rejection order- held Appeal not sustainable.

Held- Para 14

In the absence of the requisite permission under Section 170 of the Motor Vehicles Act, the claim of the Insurer- appellant against the quantum of compensation determined by the Motor Accident Claims Tribunal is not sustainable in law and this aspect of the matter stands amply clarified from the observations made by the Hon'ble Supreme Court in its decision in Civil Appeal No. 4292 of 2002. National Insurance Co. Ltd. Chandigarh vs. Nicilletta Rohtagi & others reported in JT 2002 (7) SC 251. The ratio of the aforesaid decision stands squarely attracted in the circumstances of the present case.

Case law discussed:
200(2) TAC-213
JT 2002 (7) SC-251

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

1. Heard the learned counsel for the Insurer- Appellant and Sri B.P. Verma , learned counsel for the claimants-respondents.

2. The appellant has filed the present appeal under Section 173 of the Motor Vehicles Act feeling aggrieved by the award of an amount of Rs. 4,08,000/- determined as just compensation which the dependants of the deceased Shyamvir sing @ Pappu were found entitled to on account of his untimely death in an accident involving the offending motor vehicle. The deceased Shyamvir Singh @ Pappu was claimed to be the cleaner - driver of the offending motor vehicle which had been insured by the appellant covering the risk.

3. It may be noticed that the application filed by the dependents of the deceased Shyamvir Singh @ Pappu had been filed under Section 163-A of the Motor Vehicles Act.

4. The Motor Accident Claims Tribunal vide the impugned judgement and award after carefully considering the evidence brought on record by the parties, had come to the conclusion that on the date of the death Shyamvir Singh @ Pappu was aged about 34 years. It was also found that untimely death of Shyamvir Singh had been caused on account of the accident involving the motor vehicle which was insured by the present appellant covering the risk. The tribunal returned a finding against the appellant holding that the deceased was having an income of Rs.3,000/- per month. After calculating the amount of dependency excluding 1/3 of the amount of Rs.3,000/- which was found to have been spent by the deceased on himself the annual dependency was held to be Rs.24,000/- per annum. Applying the multiplier of 17, the Tribunal came to the conclusion that the dependents of the deceased were entitled to an amount of Rs.4,08,000/-.

5. Learned counsel for the appellant has strenuously urged that taking into consideration the nature of the pleadings it was apparent that the deceased had been claiming the compensation on the ground that the deceased had met his death while in the course of employment and consequently the provisions contained in the Workmen's Compensation Act were attracted. The contention is that in such a situation the amount of compensation cannot exceed the amount which a workman can get in the proceedings under the Workmen's Compensation Act.

6. Learned counsel for the claimants- respondents, however, has urged that the Insurer had issued a policy covering the risk after taking a large amount of premium. The learned counsel for the claimants- respondents had produced the cover note issued by the present appellant as well as the insurance policy which shows that an amount of Rs.4,706/- was accepted as premium by the Insurer. This premium covered the risk of driver and cleaner both. It is further urged that there is no provision under the Motor Vehicles Act which can restrict the award of compensation to an amount as admissible under the provisions of the Workmen's Compensation Act.

7. The provisions contained in Section 167 of the Motor Vehicles Act

stipulate that Notwithstanding anything contained in the Workmen's Compensation Act, 1923 where the death of or bodily injury to, any person gives rise to a claim for compensation under Motor Vehicles Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. It is, therefore, obvious that the option is left to the person entitled to compensation to choose whether he would seek the remedy available under the Motor Vehicles Act or the Workmen's Compensation Act. The provisions contained in Section 168 of the Motor Vehicles Act stipulate that Motor Accident Claim Tribunal has to determine the amount of compensation which appears to it to be just.

8. In the present case the application seeking compensation had been filed specifically under section 163-A of the Motor Vehicles. The provisions contained in Section 163-A indicates that notwithstanding anything contained in Motor Vehicles Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the second schedule, to the legal heirs or the victim, as the case may be. The use of the non abstante clause in Section 163-A of the Motor Vehicles Act is quite significant. It shows that the amount of compensation determined in the proceedings under the Motor Vehicles Act which ought to be just cannot be limited to any amount as specified in the Workmen's Compensation Act as the amount contemplated under Section 163-A of the Motor Vehicle Act has to be determined notwithstanding any thing contained in any other law for the time being in force.

9. In the aforesaid circumstances it is obvious that the jurisdiction of the Motor Vehicle Accident Claims Tribunal could not be taken to be abridged or limited in any manner by the provisions contained in the Workmen's Compensation Act.

10. Learned counsel for the claimants- respondents in support of his submissions has placed reliance upon a decision of the Apex Court in the case of Smt. Rita Devi and others vs. New India Assurance Co. Ltd. and another, reported in 2000 (2) TAC 213. The aforesaid case also involved a controversy in regard to the claim raised by a workman who had died in the course of employment as a driver of a motor vehicle and the application seeking compensation had been filed under the provisions of Section 163-A of the Motor Vehicles Act.

11. The Apex Court in the aforesaid decision in the case of Smt. Rita Devi (supra) reversing the decision of the High Court had upheld the decision of the Motor Accident Claims Tribunal allowing the application of the dependents of the deceased.

12. The ratio of the aforesaid decision also indicates that the jurisdiction of the Motor Accident Claims Tribunal while determining the just compensation is not limited or abridged by the provisions of the Workmen's Compensation Act.

13. There is yet other aspect of the matter which cannot be lost sight of . In the present case the Insurer had not obtained the permission envisaged under Section 170 of the Motor Vehicles Act. The contention of the learned counsel for the claimant- respondent is that his application had been filed for the purpose but had been rejected. A perusal of the memo of appeal indicates that the Insurer has not challenged the order denying permission under Section 170 of the Act. In fact there is no such grievance raised.

14. In the absence of the requisite permission under Section 170 of the; Motor Vehicles Act, the claim of the Insurer- appellant against the quantum of compensation determined by the Motor Accident Claims Tribunal is not sustainable in law and this aspect of the matter stands amply clarified from the observations made by the Hon'ble Supreme Court in its decision in Civil Appeal No. 4292 of 2002. National Insurance Co. Ltd. Chandigarh vs. Niciolletta Rohtagi & others reported in JT 2002 (7) SC 251. The ratio of the aforesaid decision stands squarely attracted in the circumstances of the present case.

15. The learned counsel for the appellant has tried to assail the findings returned by the Motor Accident Claims Tribunal against it but has not been able to demonstrate that the said findings can be taken to be suffering from any such legal infirmity which may justify an interference by this Court. These findings are amply supported and warranted by the evidence and the material brought on record.

16. This appeal is devoid of merit which deserves to be and is hereby dismissed.

17. The amount of Rs.25,000/- deposited in this Court by the appellant under Section 173 of the Motor Vehicles Act be remitted to the Motor Accident Claims Tribunal concerned within one month from the date an application is filed by the appellant for the purpose so that it may be adjusted against the amount required to be deposited under this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.2.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 1068 of 2003

United India Insurance Co. Ltd.
...Petitioner
Versus
Additional District & Sessions Judge, Muzaffarnagar and others...Respondents

Counsel for the Petitioner:
Sri Saurabh Srivastava

Counsel for the Respondents:
S.C.

Motor Accident Claim Tribunal Rules 1967, Rule 206- Claim petition filed- otherwise good for hearing- whether can it be dismissed in default ? held- 'No' - if dismissed - shall be treated to be filed as on the initial date of filing.

Held-Para 10

Therefore, be unjust and unfair where a claim, which is prima facie found to be valid for consideration, be dismissed for default and thereafter remedy of restoration, or restoration of restoration

be dismissed on technical grounds. Even a police report has to be treated as an application, and that every application filed must be inquired into and decided by the Tribunal. In case no evidence is forthcoming, the Tribunal may dismiss the claim but that it cannot dismiss the claim for default and that where it has been so dismissed, the claim petition may be treated to have been filed on the date when such an application is made as there is no provision of limitation after deletion of sub sec. (3) of Section 168 of Motor Vehicles (amendment) Act, 1988 (Act No. 59 of 1988).

Case law referred.

1996 ACJ 1153
1989 ACJ 181
2000 (3) SCC 581

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

Heard counsel for petitioner.

1. The Motor Accident Claims Tribunal /9th Additional District Judge, Muzaffarnagar has by its order dated 28.10.2002, allowed application filed by claimant respondent no. 2 Tej Pal Singh under order 9 Rule 4 read with Section 151 CPC for recalling order dated 19.12.2000 in Misc. Case No. 12 of 1998 for restoration of claim petition, which was dismissed in default on 19.12.1997, and has restored Misc. Case No. 12 of 1998 to its original number. The said order dated 28.10.2002, is under challenge in this writ petition.

2. Sri Saurabh Srivastava, learned counsel for petitioner has relied upon a decision of Division Bench of this Court in **Nanhi Bai and others v. Motor Accidents Claims Tribunal, Banda and others** (1996 ACJ 1153) holding that all the provisions, of Code of Civil Procedure have not been made applicable before the Tribunal and that only the provisions , specified under Rule 21` of UP Motor Accidents Claims Tribunal Rules, 1967, are applicable. Neither Order 9 Rule 9 nor section 151 CP.C. has been made applicable to the proceedings for restoration of application dismissed in default. According to the Division Bench, the provisions appear to have been deliberately excluded from application and that it is a case of casus omissus.

3. The aforesaid decision was rendered in respect of claim filed under section 110 A of Motor Vehicles Act, 1939 and in interpretation of Rule 21 of U.P. Motor Accidents claims Tribunal Rules, 1967 made under the Act, which was amended in 1988 and a new Act, namely, Motor Vehicles Act, 1988 (59 of 1988) was enacted making substantial and comprehensive changes with regard to the accident claims. Whereas Section 140 provides for ' no fault' liability, section 163 provided for a Scheme for payment of compensation in case of ' hit and run' motor accidents. Section 163-A provided for award of claims Tribunal. The limitation of six months provided in sub section 3 of section 166 of Motor Vehicles Act, 1988 and the power of Tribunal to condone the delay upto the expiry of twelve months was deleted by Motor Vehicles (Amendment) Act, 1994. A new set of rules were framed in the name of Motor Vehicles Rules, 1998 regulating procedures to the Claims Tribunal. Rule 221 is pari material to Rule 221 of 1967 and provides as follows :

"221. Code of Civil Procedure to apply in certain cases- The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be , apply to proceedings before the claims Tribunal, namely, Rules 9 to

13 and 15 to 30 of Order V, Order IX, Rules 3 to 10 of Order XIII, Rule 2 to 21 of Order XVI, Order XVII, and Rules 1 to 3 of Order XXIII."

4. The rules are framed for carrying out the object and purpose of the Act. Since the Act has been amended by taking away limitation for filing claims, a claim petition which is not rejected at the first hearing cannot be dismissed for default.

5. Section 168 of Motor Vehicles Act, 1988 provides that on receipt of an application for compensation made under Section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of Section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be Section 158 (6) of Motor Vehicles Act, 1988 provides that as soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer in charge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report, to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer.

6. An information given by the police, as aforesaid, under Sub Section (4) of Section 166 is to be treated as a claim petition. After the application has been made or information, as aforesaid, has been received, the Tribunal may examine the application and dismiss the application summarily, if for reasons to be recorded, it is of the opinion that there are no sufficient grounds for proceeding there with. Rule 207 provides that if the application is not dismissed under Rule 206, the Claims Tribunal shall send to the owner of the motor vehicle involved in the accident and its insurer, a copy of the application together with a notice of the date on which it will hear the application, and shall call upon the parties to produce on that date any evidence which they may like to produce. Rule 208 (2) provides that where the claim is contested, the Claims Tribunal, with a view to elucidating matters in controversy between the parties, examine orally such of the parties to the claim proceeding as it deems fit and shall reduce the substance of the examination, if any in writing. Issues may be framed under Rule 209 and witnesses may be summoned where the application is made. The Tribunal shall make a brief memorandum of the substance of what is deposed and such memorandum shall be written and signed by the Claims Tribunal and shall form part of the record. The medical evidence may be taken down word for word. The Claims Tribunal has been given the power for local inspection and inspection of vehicle under Rules 213 and 214. The powers to examine any person likely to be able to give

information relating to the injury, have been provided under Rule 215. The adjournment of hearing is provided under Rule 216, for the reasons to be recorded, on the application of a party.

7. The aforesaid rules show that the Claims Tribunal has to decide the application by holding an inquiry. A claim petition, if it has not been dismissed under Rule 206, cannot be dismissed for default. If the claimant does not appear on the date fixed, the Tribunal shall proceed to decide the claim. If evidence has been led or partly led, it may examine the evidence and make an award. Where evidence has not been led, the Tribunal may decide matter for insufficiency of or for want of evidence, but having proceeded with the matter beyond the stage of Rule 206, it cannot dismiss it only on the ground that on the date fixed the claimant or claimants have failed to appear.

8. In Stella v. Motor Accidents Claims Tribunal (1989 ACJ 181 (Ker.)), it was held that even in the absence of a provision in procedural laws, power inheres in every Tribunal, of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play and even when Order IX of the C.P.C. is not applicable to the given facts of a case, the Tribunal does have the power to restore a claim petition that has been dismissed for default by using its inherent powers, in which Rules of 1998 or Order IX C.P.C. has been made applicable and thus the Tribunal has power to restore the claim petition.

9. In United India Insurance Co. Ltd. v. Rajendra Singh and others (2000) 3 Supreme Court Cases 581), the Supreme Court allowed the appeal, set aside the orders of Tribunal, which held that Tribunal does not have powers to review its orders except to correct any error in calculating the amounts. The Allahabad High Court had dismissed the writ petition stating that it is a question of fact for which writ petition is the appropriate remedy. The Supreme Court allowing applications filed under Section 151, 152 and 153 CPC, praying for recall of orders on the ground of revelations of new facts that injuries were not suffered due to accident, held in para 16 as follows:

"16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

10. So far the question whether restoration of restoration application is concerned, the power may be found under Section 151 C.P.C. and is also spelled out of the provisions of the Act, which provide for Motor Accidents Claims Tribunal as a special Tribunal for remedies which earlier lied in a action for compensation based on Torts. The new forum was created for speedy and simplified remedy, of compensation to accident victims or their dependents and provisions for losses and expenses. New remedies of 'no fault liability' and for 'hit and run' cases were added to meet extra-ordinary situations for immediate compensation or where the negligent

owner or driver of vehicle has not been identified. The claimant, or dependent of claimant is often handicapped in persuing the remedy. It will, therefore, be unjust and unfair where a claim, which is prima facie found to be valid for consideration, be dismissed for default and thereafter remedy of restoration, or restoration of restoration be dismissed on technical grounds. Even a police report has to be treated as an application, and that every application filed must be inquired into and decided by the Tribunal. In case no evidence is forthcoming, the Tribunal may dismiss the claim but that it cannot dismiss the claim for default and that where it has been so dismissed, the claim petition may be treated to have been filed on the date when such an application is made as there is no provision of limitation after deletion of sub sec. (3) of Section 168 of Motor Vehicles (amendment) Act, 1988 (Act No. 59 of 1988). The decision in Nanhi Bai's case (supra) was under the old Act and is thus not applicable to the facts of the present case.

11. Coming to the facts of the case, the petitioner has given reasons for absence on 18.8.2000 that he could not attend the hearing on account of heavy rains. These reasons have been found to be sufficient to recall the order. The discretion has rightly been exercised and thus no interference is required to be made with the impugned order.

The writ petition is, accordingly, dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1745 of 2002

Ajay Kumar Sinha ...Petitioner
Versus
The Life Insurance Corporation of India and another ...Respondents

Counsel for the Petitioner:
Sri Suresh Singh
Sri Sanjay Sharma
Sri Ashok Khare

Counsel for the Respondents:
Sri R.G. Padia
Sri P. Padia

Constitution of India- Article 226 Service Law- Promotion on the Post of Asstt. Branch Manager- for 2001-2002 78 posts vacancy notified merit list prepared, out of 78 only 41 Candidates joined- remaining post lying unfilled- petitioner below in merit list- claimed promotion against existing vacancy- No minimum marks prescribed- held entitled for promotion- remaining posts are to be fulfill from the merit list already prepared.

Held Para 2

The claim of the respondent that the contingency list was required to be only of 15 percent of the vacancies is in our opinion without any justification. In fact the entire remaining list is in the nature of a waiting list of candidates who are entitled for promotion against unfilled vacancies. Reliance is placed by the learned counsel for the petitioner upon the decision of this Court in State of U.P. vs. Ravindra Nath Rai 1999(1) LBSER

949 (Special Appeal 313 of 98 decided on 3.2.99). In this decision the stand of the State was that there is no provision for preparing a waiting list and therefore unfilled vacancies cannot be filled up. The contention was rejected by this Court and it was held that the remaining merit list was to be treated as the waiting list and unfilled vacancies were required to be filled up. The said principle of law is fully applicable in the instant case also. We are informed that the SLP against this judgment has also been rejected.

Case Law discussed:

1999 (1) LBSER 949

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

1. This writ petition has been filed for a mandamus directing the respondents to declare the waiting list in order of merit pertaining to the selection for promotion to the cadre of Assistant Branch Manager (Sales) for the year 2001-2002 in the service of the L.I.C. and to promote the petitioner to the post of Assistant Branch Manager (Sales).

Counter and rejoinder affidavits have been filed and we have perused the same and heard the learned counsel for the parties.

2. The petitioner is a Development Officer in the service of the respondent Corporation. He is aggrieved against the non-grant of promotion to him to the post of Assistant Branch Manager (Sales). The respondent Corporation identified 78 posts of Assistant Branch Manager (Sales) to be filled up during the year 2001-2002 by promotion. Selection proceeding were initiated on 27.3.2001 in which the petitioner also participated and after the selection proceedings a select list was published comprising of 78 names as against the 78 posts of Assistant Branch Manager (Sales) on 8.1.2002. In this list the petitioner's name was not included. Out of 78 selected candidates only 41 candidates joined on the post of Assistant Branch Manager (Sales) while 37 incumbents declined to join the post despite their promotion. According to the case of the petitioner, these 37 posts ought to have been filled up by granting promotion to the persons who were lower in the merit list. According to the counter affidavit the respondents had also prepared a contingency list comprising of 15 Development Officers who were promoted as Assistant Branch Manager (Sales). The remaining 22 vacancies continue to be vacant. Against one of the vacancies the petitioner claims that he is entitled to be promoted. On the basis of selection a merit list was prepared in which the name of the petitioner find place but at a lower placement than the first 78. In the counter affidavit there is no mention about any minimum qualifying marks for the selection on the aforesaid post. In our opinion in absence of any minimum qualifying marks having been fixed up the remaining vacancies are required to be filled up from the persons who are lower in the select list. The claim of the respondent that the contingency list was required to be only of 15 percent of the vacancies is in our opinion without any justification. In fact the entire remaining list is in the nature of a waiting list of candidates who are entitled for promotion against unfilled vacancies. Reliance is placed by the learned counsel for the petitioner upon the decision of this Court in State of U.P. vs. Ravindra Nath Rai 1999(1) LBSER 949 (Special Appeal 313 of 98 decided on 3.2.99). In this decision the stand of the State was that there is no provision for preparing a

waiting list and therefore unfilled vacancies cannot be filled up. The contention was rejected by this Court and it was held that the remaining merit list was to be treated as the waiting list and unfilled vacancies were required to be filled up. The said principle of law is fully applicable in the instant case also. We are informed that the SLP against this judgment has also been rejected.

3. In view of the above this writ petition is allowed. A mandamus is issued to the respondents to promote the petitioner in the cadre of Assistant Branch Manager (Sales) for the year 2001-2002 forthwith.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Income Tax Appeal No. 39 of 2001

Commissioner of Income Tax, Agra
...Appellant
Versus
M/s Hind Lamps Ltd. Shikohabad (U.P.)
...Respondent

Counsel for the Appellant:
Sri Shambhu Chopra
I.T. Standing Counsel

Counsel for the Respondent:

Income Tax Act 1965- Section 37- Business Expenditure those expenditure which are although not permissible in the eye of law- but can be allowed as busiigness expenditure.

Held- Para 6

It may be mentioned here that even if the amount is not legally due yet it can be allowed as a business expenditure U/s 7 of the Act, if it is made for commercial expediency. A businessman has to incur many expenditures which are not due under any legal obligation but to facilitate the business and for commercial expediency vide M/s Shahzadanand Vs. Commissioner of Income Tax 21977 UPTC 48 (SC). Hence these expenditures made for commercial expediency even without any legal obligation are allowable as business expenditures under section 37.

Case law discussed:
(1991) 190 ITR 455
111 Taxman-81 cal. 111

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

1. This appeal under section 260-A of the Income Tax Act has been filed against the impugned order of the Income Tax Appellate Tribunal dated 18-12-2000 vide annexure-3 to the Appeal.

The main point pressed by the learned counsel for the department is that the amount of Rs.9,82,426/- was wrongly allowed by the Tribunal under section 36 (i) and (ii) or Section 37 (i) of the Income Tax Act. This question has been discussed in paragraph 5 of the impugned order of the Tribunal. It appears that in the year 1978 the workers of the assessee went on strike and the factory was closed for almost a month. When finally the Chief Minister of Uttar Pradesh intervened, an agreement was reached, whereby certain amount was to be paid over and above the statutory bonus. Thereafter every year the workmen demanded twenty percent bonus, which was the maximum limit under the provisions of Payment of Bonus Act, 1965. Thereafter, also the assessee was paying to the workmen bonus above

the amount legally payable under Payment of Bonus Act, 1965.

2. It may be mentioned here that under the Payment of Bonus Act, the bonus (which deals with profit bonus) is payable to the employees as a matter of right and it is not the sweet will of the employer to pay it or not. The scheme of the payment of Bonus Act for calculating bonus payable to the workmen is that we have to start from the profit of the previous year as mentioned in the profit and loss account of the company. We have then to add certain amounts and subtract certain amounts which are mentioned in the Payment of Bonus Act. We then come to the available surplus. Sixty percent of the available surplus is the allocable surplus payable to the workmen. The idea of giving bonus is that since the workmen have contributed to the prosperity of the concern, they are entitled to share in the profit of the concern. There may be several cases like the present where the concern pays higher bonus than what it is legally bound to pay under the Payment of Bonus Act, and this higher amount is often paid to keep harmony and good …… relationship so as to facilitate the smooth business. In the present case, as mentioned in para 8 of the order of CIT (Appeals), the payment above the legally due amount under the Payment of Bonus Act was made to the workmen because they had threatened to stop the work and they resorted to mass hunger strike, which continued for two days.

3. In Commissioner of Income Tax Vs. M/s Shaw Wallace and Company Limited (1991) 190 ITR 455 similar facts, as in the present case were involved. The Calcutta High Court held that the payment made above the amount due under the Act to keep industrial peace was allowable as a business expenditure. We are in respectful agreement with the aforesaid decision of Calcutta High Court.

4. Learned counsel for the appellant then submits that the Tribunal was not justified in deleting addition of 18% under section 40 (A) (12) of the Income Tax Act. The present appeal relates to the assessment year 1986-87. Whereas Section 40-A (12) was inserted in the Income Tax Act by the Finance Act, 1985 with effect from 1.4.1986. Hence the aforesaid provision will only relate to the proceedings for the assessment year 1987-88 and onwards and not to the assessment year 1986-87 with which we are concerned.

5. Learned counsel for the department then submitted that the Tribunal was not justified in upholding the deletion of addition of Rs.16,350/- made under Section 40-A (9) of the Act by the Assessing Authority which was paid as subsidy to certain Clubs, of which the staff and workers of the assessee were members. In our opinion Section 40-A (9) of the Act has no application to the facts and circumstances of the case as payment was not made for formation or setting up of any trust, not as contribution to the same. The Learned Tribunal has relied upon the decision in **111 Taxmen 81 (Calcutta) and 111 Taxmen 186 (Delhi)**. We respectfully agree with the aforesaid decisions.

6. It may be mentioned here that even if the amount is not legally due yet it can be allowed as a business expenditure U/s 37 of the Act, if it is made for commercial expediency. A businessman

has to incur many expenditures which are not due under any legal obligation but to facilitate the business and for commercial expediency vide M/s Shahzadanand Vs. Commissioner of Income Tax 21977 UPTC 48 (SC). Hence these expenditures made for commercial expediency even without any legal obligation are allowable as business expenditures under section 37.

7. Thus there is no force in the appeal and it is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.2.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 273 of 2003

Shambhu Nath Patel ...Petitioner
Versus
The Taxation Officer, Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri A.R. Dube

Counsel for the Respondents:
S.C.

Motor Vehicle Taxation Act 1997- Act 1997- Article I- words and phases - stage carriage- where there is absence of prior contract between the Passenger- and vehicle owner- the vehicle of stage carriage- where the passenger, individually pay the rent as per distance but where is vehicle run under contract basis- is a contract carriage- hence the Petitioner being operator of Contract carriage- liable to pay the tax accordingly the petitioner liable to pay the tax as per demand of authorities.

Held- Para 6

Learned counsel for the petitioner has invited our attention to a Full Bench decision in Brijendra Chaudary vs. State Transport Authority (AIR 1991 Alld. 300). This decision in fact supports the view which we are taking in this case. In para 8 of the said Full Bench judgment it has been held that in the case of stage carriage there is absence of prior contract by the passenger or passengers for the carriage to be used as a whole for fixed or agreed sum. Instead, in case of stage carriage when it is boarded by the passengers on a route they pay for the distance they propose to travel. Infact , this Full Bench decision also supports the view, which we are taking that the petitioners' vehicle is not a stage carriage but is contract carriage. This is also the view of the Supreme Court in Roshanlal vs. State of U.P. and others (AIR 1965 SC 991).

Case law discussed:
AIR 1991 300 (Alld)
AIR 1965- SC- 991

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

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

2. The petitioner has prayed for a writ of mandamus directing the respondents to charge additional tax at the rate given in the proviso to Article 1 (a) of Fourth Schedule of the Motor Vehicles Taxation Act, 1997 and for a writ of mandamus directing the respondents not to compel the petitioner to deposit additional tax at the rate given in Fourth Schedule of the Motor Vehicles Taxation Act, 1997.

3. The petitioner is a registered owner of a bus, which carries the staff/employees of Indian Farmer Fertilizer Cooperative Limited, Phulpur, district Allahabad from their houses in

Allahabad city to the factory premises in Phulpur, which is about 35 Km. away from Allahabad City. In this connection they have entered into an agreement with IFFCO, a copy of which is enclosed as Annexure 1 to the writ petition.

4. Learned counsel for the petitioner submits that the Vehicle of the petitioner is a Stage Carriage and not Contract carriage and hence additional tax should be charged in accordance with Article 1 of the Fourth Schedule of Motor Vehicle Taxation Act, 1997 and not in accordance with Article 5. We do not agree with this submission. In our opinion the petitioner's vehicle is not stage carriage but is a contract carriage. Section 2 (7) of the Motor Vehicle Act, 1988 defines contract carriage as under :

"(7) "contract carriage means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract whether express or implied for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorized by him in this behalf on a fixed or an agreed rate or sum -

(a) on a time basis, whether or not with reference to any route or distance, or
(b) from one point to another,

and in either case, without stopping to pick up or set down passengers not included into contract any where during the journey and includes -

(i) a maxi cab and
(ii) a motor cab notwithstanding that that separate fares are charged for its passengers."

Section 2 (40) of the Motor Vehicles Act defines ' stage carriage' as under :

"Stage carriage' means a motor vehicle constructed or adopted to carry more than six passengers excluding, the driver for hire or reward at separate fares paid by or for individual passengers either for the whole journey or for stages of the journey.

Under section 2 (40) of the Motor Vehicles Act stage carriage means a motor vehicle, which carries passengers for hire or reward at separate fare paid by or for individual passenger means that for the vehicle to be stage carriage passengers must pay fare. The words ' at separate fare said by or for individual passenger' individually. Thus ordinarily the buses, which run between different towns, are ' stage carriages as every passenger has to pay for his own ticket separately.

5. On the other hand 'contract carriage' is one where the entire bus is taken on contract from the owner for certain amount of money and it is not the individual passengers who pay the fare. Thus, for example when a person takes a bus for a marriage party from one city to another, this will be a contract carriage. Similarly when a bus is taken on contract for carrying the workers from their residence to the factory and back, this again is not stage carriage but a contract carriage because passengers are not charged separately or individually. Usually it is the company, which provides the bus service, as an amenity to the workers and it is not that the passengers have to buy tickets individually.

Thus we are of the opinion that the petitioner's bus is a "contract carriage" and not "stage carriage".

6. Learned counsel for the petitioner has invited our attention to a Full Bench decision in **Brijendra Chaudary vs. State Transport Authority (AIR 1991 Alld. 300)**. This decision in fact supports the view which we are taking in this case. In para 8 of the said Full Bench judgment it has been held that in the case of stage carriage there is absence of prior contract by the passenger or passengers for the carriage to be used as a whole for fixed or agreed sum. Instead, in case of stage carriage when it is boarded by the passengers on a route they pay for the distance they propose to travel. Infact, this Full Bench decision also supports the view, which we are taking that the petitioners' vehicle is not a stage carriage but is contract carriage . This is also the view of the Supreme Court in **Roshanlal vs. State of U.P. and others (AIR 1965 SC 991).**

For the reasons given above the writ petition fails and is dismissed.

There will be however, no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.2.2003

BEFORE
THE HON'BLE TARUN CHATTERJI, C.J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 328 of 1999

State of U.P. and others ...Appellants
Versus
Ramesh Pratap Singh and others ...Respondents

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

Counsel for the Respondents:
Sri H.N. Singh

Construction of India, Article 39(a)- Equal pay for equal work- Assistant Machine operators of set- claimed same pay scale of machine man off set-- both performing same duty were given the same pay scale at the recommendation of 2nd pay commission report- even samta samiti recommended the same pay scale of Rs.1200/-1800/- for the first time vide order dated 31.7.96 pay scale of machine man off set enhanced - hence is a case of removal of anomaly in pay scale of Assistant Machine operator of set.

Held- para 20

In the present case the parity is not being claimed with the employees of another Government but discrimination meted out to the petitioners in respect of employee of the same department who were holding the equivalent post and discharging the same duties is being sought to be redressed.

Case law discussed:
AIR 1989 SC-19
AIR 1990 SC-334
AIR 1995 SC-809

AIR 2002 SC-2197
J.T. 2002 (5) SC-189
J.T. 2002 (6) SC-369
1986 SCC (1) 637

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

1. The present special appeal has been directed against the judgment and order dated 25.9.1998 passed by the learned single judge in civil misc. writ petition no. 8027 of 1992 whereby the learned single judge has allowed the writ petition and directed the appellants to treat the respondents- petitioners entitled for pay scale of Rs. 1350-30-1440-40-1800- EB-50-2200 from the date on which it was admissible to employee working in the post of Machine man offset under the Government order dated 12.4.1990, and the balance of the amount which has not been paid to the petitioner for the period after 12.4.1990 to 31.7.1996 shall be paid to them within a period of six months from the date a copy of the order passed in the said writ petition, is filed before the appropriate authority.

2. Briefly stated the facts giving rise to the present special appeal are that the respondents- writ petitioners, at the relevant period, were posted as Assistant Machine Operators, offset, in the Government Press, Ram Nagar district Varanasi. Prior to July 1979, the pay scale relating to the posts of Assistant Machine Operators, Offset and Machine man Offset were treated to be equivalent posts and the pay scale for both the posts were same at Rs.200-320. The pay scale was revised at Rs.354-550 pursuant to the recommendation made by the 2nd Pay Commission. The Equivalence Committee (Samta Samiti) which was constituted by the State Government vide order dated 14.10. 1988 also recommended the same pay scale for both the posts which was accepted by the State Government and vide order dated 21.8.1989, the same pay scale was stipulated for two posts. The post of Assistant Machine Operators offset was shown at serial no. 63, whereas the post of Machine Man offset was shown at serial no. 65. The pay scale recommended for these two posts was at Rs.1200-30-1440 EB-30-1800.

3. It appears that on the representation made by the employees working on the post of machine man offset, the Government order dated 21.8.1989, was modified vide order dated 12.4.1990 and the pay scale for the post of machine man offset shown at serial no. 65 in the Government order dated 21.8.1989, was enhanced to Rs. 1350-30-1440-40-1800-EB-50-2200. However the pay scale for the post of Assistant Machine Operator offset, which was shown at serial no. 63, remained unchanged. Thus, the parity in the pay scale of two posts, was, for the first time disturbed on 12.4.1990. The respondents- petitioners made representation ,but no action was taken by the State Government. However, vide Government order dated 1.7.1996, the pay scale for the post of Assistant Machine Operator offset, was made at par with that of machine man offset and the grievance of the respondents- petitioners before the learned single judge, was that two posts ought to have been equated with similar pay scale from 12.4.1990 itself, when the pay scale of machine man offset , was enhanced.

4. The Appellants had filed counter affidavit before the learned single judge wherein they had admitted the discriminatory nature of pay scale.

Paragraph 5,6 and 8 of the said counter affidavit filed on behalf of the State Government in the writ petition are reproduced below :

"5. That the Pay Commission in its recommendation dated 31.8.1989 had provided the same pay scale of both the posts.

6. That the order dated 12.4.1990 is discriminatory in nature as the pay scale of machine man offset has been revised to Rs. 1350-2200 whereas the post held by the petitioners being of the same cadre and bearing the same pay scale from before, has been left out.

8. That so far as the claim of the petitioners regarding payment of difference and pay is concerned, it is submitted that the same cannot be granted to them for the reasons firstly that no entitlement ever accrued in their favour and secondly if particular cadre has been wrongly benefited , the other cadres not so benefited, would not be entitled to claim difference of pay. The disparity does not create any right for such claim and the same having been removed by the order dated 31.7.1996, the grievance of the petitioners has been redressed and no other dispute relating to payment of difference amount can be raised by the petitioners. '

5. The learned single judge, came to the conclusion that admittedly, the employees working on both the posts namely Assistant Machine Operators offset and Machine Man offset were being paid same pay scale which uniformity was maintained in the recommendation made by the pay commission and the pay committee at the time of revision and, therefore, it is not a case of a particular cadre having been wrongly benefited with the enhancement in the pay scale.. The State Government, realizing its mistake granted the same pay scale to the Assistant Machine operator offset w.e.f. 1.7.1996 and, there was no reason as to why it denied the benefit of the said pay scale from 12.4.1990 which the employees working in the post of Machine Man offset were getting.

6. We have heard Sri Sabhajit Yadav learned Standing Counsel for the appellants and Sri H.N. Singh learned counsel for the respondents.

7. The learned Standing Counsel submitted that the post of Assistant Machine Operators offset and Machine Man offset are different posts and the employees in two posts are discharging different duties, thus, there was no question of granting similar pay scale of machine man offset to the employees working on the post of Assistant Machine Operator offset.

8. He further submitted that it was the sole discretion and within the exclusive domain of the State Government to grant any particular pay scale to a particular posts and thus, the Court, in exercise of jurisdiction under Article 226 of the Constitution of India, should not interfere in such matters.

9. In support of these contentions, he relied upon the following decisions mentioned below :

(i) State of U.P. and others vs. J.P. Chaurasia and others, AIR 1989 SC 19

(ii) Supreme Court employees Welfare Association vs. Union of India and others, AIR 1990 SC 334,

(iii) State of Rajasthan vs. Gopal Das AIR 1995 SC 809

(iv) Union of India and others vs. Indu Lal and others, AIR 2002 SC 2197

(v) State of Haryana and Anr. Vs. Haryana Civil Scretariat personal Staff Association , JT 2002 (5) SC 189

(vi) State of Haryana & Ors. Vs. Jagroop Singh JT 2002 (6) SC 369.

10. Sri H.N. Singh learned counsel for the respondents writ petitioners submitted that the employees working on the two posts namely Assistant Machine Operator offset and Machine Man offset perform similar duties on the offset machine and that is why, they were granted the same pay scale. Even the 2nd Pay Commission, also recommended the same pay scale for these two posts. Thus, the position in respect of these two posts in question, continued equally till 12.4.1990. Thereafter on some representation being made, the difference crept in. However, the State Government, on representation being made, rectified the mistake by granting same pay scale on 31.7.1996 and there was no reason whatsoever to deny the benefit of the same pay scale during the period 12.4.1990 to 31.7.1996. He submitted that the respondents petitioners were not claiming any parity of salary and emoluments for the first time before this Court as the State Government itself had treated the two posts similar since beginning upto 12.4.1990 and again from 1.7.1996 till date. The respondents writ petitioners were also not claiming any fixation of their pay scale, but, are seeking redressal of discrimination meted out to them which fact has also been admitted by the State Appellants in their counter affidavit as mentioned hereinabove. According to him the decisions relied by the learned Standing Counsel have no application to the facts and circumstances of the present case.

11. Having heard the learned counsel for the parties, we find that it is not in dispute that the pay scale of Assistant machine operators offset and machine man offset was the same i.e. Rs. 200-320 prior to July 1979. The 2nd Pay Commission also recommended the same pay scale for these two posts at Rs.354-550. The Equivalence Committee constituted under the Government order dated 14.10.1988 also recommended the equal pay scale for two posts at Rs. 1200-0-1440 EB-30-1800 which report was accepted by the State Government vide order dated 21.8.1989. The pay scale of Machine Man offset, was enhanced by the State Government vide order dated 12.4.1990 on some representation being made by the concerned employees. However, no enhancement in the pay scale relating to the post of Assistant Machine Operator offset was made, the State Government once again vide order dated 31.7.1996, removed the anomaly crept into these two posts and granted the same pay scale which was applicable to the post of Machine Man offset. In paragraph 5, and 6 of the counter affidavit filed by R.N. Tripathi on behalf of the State Appellants in the writ petition, it admitted that the Pay Commission in its recommendation dated 21.8.1989 had prescribed the same pay scale to both the posts. In paragraph 6 of the counter

affidavit it has been admitted that the order dated 12.4.1990 is discriminatory in nature as the pay scale of Machine Man offset has been revised to Rs.1350-2200 whereas the post held by the respondent-writ petitioners being of the same cadre and bearing same pay scale from before has been left out. Thus, it is admitted by the Appellants that the posts of Machine Man offset and assistant machine operators offset is of the same cadre and has been discriminated. Thus, from own showing of the Appellants, the order dated 12.4.1990 by which the pay scale relating to the post of Machine Man offset, had been enhanced leaving out the post of assistant machine operator offset, is discriminatory. Apart from it, the State Government has all along been treating these two posts as equivalent and that is why the same pay scale was granted for both the posts. But only in the year 1990, vide Government order dated 12.4.1990, a departure was made, which mistake was corrected on 31.7.1996. No reason has been assigned by the State Government as to why the Assistant Machine Operators Offset were not entitled for similar treatment (same pay scale) which was given to the Machine Man Offset for the period from 12.4.1990 to 31.7.1996 when prior to 12.3.1990 and after 31.7.1996 both the posts carried the same pay scale. In the absence of any reason having been put forward, the plea taken by the Appellant that the Assistant Machine Operator Offset cannot be granted the same pay scale, is not sustainable. However, the appellants accorded the same pay scale since 31.7.1996. Thus, we hold that the stand that if a particular cadre has wrongly been benefited and then other cadre shall not be benefited, is discriminatory in nature and is hit by Article 14 of the Constitution of India.

12. In the case of State of U.P. and others Vs. J.P. Chaurasia and others (supra) the Hon. Supreme Court has held that "the same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula. If it has a rational nexus with the object to be sought for, as reiterated before a certain amount of value judgment of the administrative authorities who are charged with fixing the pay scale has to be left with them and it cannot be interfered with by the Court unless it is demonstrated that either it is irrational or based on no basis or arrived mala fide either in law or in fact."

13. In the case of Supreme Court Employees Welfare Association Vs. Union of India and others (supra), the Hon. Supreme Court has held that "It follows from the above decisions that although the doctrine of 'equal pay for equal work' does not come within Art. 14 of the Constitution as an abstract doctrine, but if any classification is made relating to the pay-scales and such classification is unreasonable and/or if unequal pay is based on no classification, then Art. 14 will at once be attracted and such classification should be set at naught and equal pay may be directed to be given for equal work. In other words, there unequal pay has brought about a discrimination within the meaning of Art. 14 of the Constitution, it will be a case of equal pay for equal work', as envisaged by Art. 14 of the Constitution. If the classification is proper and reasonable and has a nexus to the object sought to be achieved, the doctrine of 'equal pay for equal work' will not have any application even though the

persons doing the same work are not getting the same pay. In short, so long as it is not a case of discrimination under Art. 14 of the Constitution, the abstract doctrine of 'equal pay for equal work', as envisaged by Art. 39 (d) of the Constitution, has no manner of application, nor is it enforceable in view of Art.37 of the Constitution. Dhirendra Chamoli V. State of U.P. (1986) 1 SCC 637 is a case of 'equal pay for equal work, as envisaged by Art. 14, and not of the abstract doctrine of equal pay for equal work'.

14. These decisions have no application to the facts of the present case as the appellants themselves have admitted the two posts to be in the same cadre and the discrimination met out to the Assistant Machine Operator offset was rectified subsequently.

15. In the case of State of Rajasthan Vs. Gopal Das (supra) the pay scale of Upper Division Clerks of subordinate offices was revised under the Rules from Rs.385-650 to Rs.520-925 whereas the existing pay scale of Upper Division Clerks of Secretariat which was at Rs.440-775 was revised to Rs.610-1090 w.e.f. 1.9.1981. On representation being made by the Upper Division Clerk to the subordinate offices, the pay scales were made at par with the Upper Division Clerk of the Secretariat w.e.f. 1.2.1985. The plea taken by the Upper Division Clerk was that they are entitled for the same pay scale w.e.f. 1.9.1981. On these facts, the Hon. Supreme Court held that the notification dated 23.2.1985 relating to the U.D.Cs. of subordinate offices was not a issue with a view to remove any anomaly or to make any provision for category which was left out of the Rules. It was a notification issued as a result of the acceptance of the demand of the UDCs of the subordinate offices for grant of higher pay scale which was given to their counterparts in the Secretariat and the State Government was justified in granting revised pay scale w.e.f. 1.2.1985.

16. In the present case we find that the pay scale of Assistant Machine Operators Offset and Machine Man Offset was the same pursuant to the recommendation of the Equivalence Committee. The pay scale of Machine Man Offset was enhanced on 12.4.1990 leaving out the pay scale of Assistant Machine Operator Offset who were also enjoying the same pay scale and were doing similar work. The anomaly was removed vide order dated 31.7.1996. Thus, it is not the case of granting revised pay scale but of removal of anomaly in the pay scale of Assistant Machine Offset.

17. In the case of Union of India and others Vs. Indu Lal and others (supra) the Hon. Supreme Court has held that the Chief Law Assistant and Law Assistant who were designated as presenting Officer under Section 19 (2) of the Railways Claim Tribunal Act cannot be equated and no parity in pay scale can be given as Law Assistant and Chief Law Assistant were working under the supervision and guidance of Junior Administrate Grade, the presenting Officer who has full administrative control over them and they do not discharge similar nature of duties and at no stage these officers were authorised to act independently and had to get the approval for every act done by them from Junior Administrative Grade Presenting Officer.

18. In the present case, the two posts carried the same pay scale until 12.4.1990 and also from 31.7.1996. On the basis of that two posts are equivalent and the employees working thereon are discharging the similar duties.

19. In the case of State of Haryana and Anr. Vs. Haryana Civil Secretariat Personal Staff Association (supra), the Personal Assistance in State Civil Secretariat of Haryana State were claiming the same scale of pay granted by the Central Govt. to the Personal Assistant working in the Central Secretariat. The Hon. Supreme Court in para 10 of the judgment has held as follows:

"10. It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the government. Fixation of pay and determination of party in duties and responsibilities is a complex matter, which is for the executive to discharge. While taking a decision in the matter several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the state government to bear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the state government is also a relevant factor for consideration by the state government. In the context of complex nature of issues involved, the far reaching consequences of a decision in the matter and its impact on the administration of the state government courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The Court should approach such matters with restrain and interfere only when they are satisfied that the decision of the government is patently irrational, unjust and prejudicial to a section of employees and the government while taking the decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by the government to be unsustainable then ordinarily a direction should be given to the state government or authority taking the decision to reconsider the matter and pass a proper order. The court should avoid giving a declaration granting a particular scale of pay and compelling the government to implement the same. As noted earlier, in the present case the High Court has not even made any attempt to compare the nature of duties and responsibilities of the two sections of employees, one in the state secretariat and the other in the central secretariat. It has also be ignored the basic principle that there are certain rules, regulations and executive instructions issued by the employers which govern the administration of the cadre."

20. In the present case the parity is not being claimed with the employees of another Government but discrimination meted out to the petitioners in respect of employee of the same department who were holding the equivalent post and discharging the same duties is being sought to be redressed.

21. In the case State of Haryana & Ors. Vs. Jagroop Singh (supra) the 4th Pay Commission recommended the pay scale of Rs. 950-1500 w.e.f. 1.1.1986 which was given by the State Government w.e.f. said date. On representation being made, the pay scale was enhanced to Rs.1200-2040 w.e.f. 1.5.1990. The employee approached the High Court claiming entitlement of pay scale of Rs.1200-2040 w.e.f. 1.1.1986 without assailing the notification issued by the State Government modifying the pay scale. The Government on the basis of representation made, suggestion received as well as qualification for different posts had modified the pay scale w.e.f. 1.5.1990. The Hon. Supreme Court did not find any infirmity in the Government decision particular when the employee did not assail the legality of the aforesaid notification.

22. In the present case, as already mentioned hereinbefore, the respondents-writ petitioners had alleged discrimination and sought the same pay scale w.e.f. 12.4.1990, which had been given to the employees working as Machine Man Offset. We have already held that the respondent-writ petitioners have been arbitrarily discriminated and action of the appellant in not granting the same pay scale which was given to the Machine Offset is violative of Article 14 of the Constitution of India. Thus, we are of the view that the decisions relied upon by the Appellants have no application to the facts of the present case.

23. In view of the foregoing discussions, we do not find any legal infirmity in the impugned judgment and order passed by the learned Single Judge. The Special Appeal fails and is dismissed.

However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.3.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 17568 of 1999

Badri and others ...Petitioners
Versus
Deputy Director of Consolidation, Ghazipur and others ...Respondents

Counsel for the Petitioners:
Sri G.N. Verma

Counsel for the Respondents:
Sri Aditya Narain
Sri A.N. Singh
S.C.

U.P. Consolidation of Holding Act 1962- Section 48- impugned order passed by Deputy Director of Consolidation- the Conclusion recorded- without discussion- held illegal.

Held- Para 4

What are the material ingredients to constitute a finding received consideration of the Apex Court as also this Court in a catena of decisions and position is now well settled that the finding includes materials considered, reasons recorded and then conclusions. The impugned order contains conclusions and not reasons. Therefore, the impugned order detracts from being a judicial order containing reasoning and is liable to be quashed. I would not shrink from observing that expeditious disposal is a desirable thing but it should not be preferred at the altar of requirements consisting in a judicial order.

Case law discussed:
2000 R.D.-203
2000 R.D.-213
1994 R.D.-299

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Heard learned counsel for the parties.

2. Petition in hand is directed against the judgment and order dated 1.3.99 passed by the Deputy Director Consolidation (Annexure 7 to the petition) by which revision no. 1076 preferred by Kapil Deo was allowed and chaks allotted at the stage of Consolidation Officer between the parties were re arranged. The learned counsel for the petitioner submitted that the revisional court has passed orders on the ground that chaks in questions were the original holdings of the respondents 2 and 3 and in consequence, interfered with the arrangement made at the level of consolidation officer and re allocated the same to the respondents and those of the respondents to the petitioners. It is further submitted that from a perusal of Form ….no. 23, the finding recorded by the Deputy Director of Consolidation is impaired and wears the taint of perversity. The learned counsel next submitted that by this order, plot nos. 383, 624 and 625 comprising in the original holding of the petitioners were assigned to respondents and those of the respondents, to the petitioners and therefore, the conclusions arrived at by the Deputy Director, Consolidation are not informed with reasons as to how the demand of the revisionist carried substance. He also assailed the order on the ground that there is not a vestige of finding in vindication of the observation that the order passed by the Settlement Officer Consolidation suffered from the blemish of illegality. In opposition, Sri Aditya Narain learned counsel appearing for the Opposite parties tried to justify the order stating that it was rightly passed and was in accordance with law. He further tried to whittle down the submissions by stating that the petitioners have been allotted plots in the propinquity of their residential house while the respondents have been assigned chaks far removed from their residences and this arrangement has not prejudiced the interest of the petitioners in any way and that merely wrongs done to the respondents have been undone in revision by the Deputy Director of Consolidation. Ultimately, it is submitted that the arrangement made by the Deputy Director Consolidation was strictly in accordance with the provisions as contemplated in section 19 of the U.P. Consolidation of Holdings Act.

3. Having considered the submissions made across the bar and upon a perusal of the order impugned herein, it is eloquent that the D.D.C. has not recorded anyone reason to prop up his conclusion thereby holding the demand of the petitioners as genuine. The solitary ground which can be perceived from the order appears to be that the Deputy Director Consolidation was swayed by consideration to ;hold that the demand was plausible on the premises that the plots in question had earlier comprised in the original holding of the respondents. It is well settled in law that where it appears that the Deputy Director Consolidation has not applied its mind to evidence on record and has decided the matter without the merit being sifted or dealt with , the order is manifestly erroneous and suffers from not being a judicial order. It would appear that contentions of the parties have

not been discussed nor is there any indicia to indicate that the Deputy Director Consolidation relied upon any documents filed by the parties in support of their respective contentions or he sifted or dealt with the merits of the respective contentions. Under the provisions of section 48, the Deputy Director Consolidation is enjoined to satisfy himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order after allowing the parties an opportunity of being heard. It is not eloquent from the order that the Deputy Director Consolidation observed any of the postulates contained in the aforesaid section in compliance. The pith of the observation made by the Apex Court in **Sheshmani v. Deputy Director consolidation Basti**[1] is that in amended section 48 of the U.P. Consolidation of Holdings Act, power of Director consolidation is not circumscribed to mere error of jurisdiction but it now extends to satisfying himself as to the regularity correctness legality and propriety of any order other than interlocutory order but the said power cannot be equated with the power of the appellate court. It is further observed that in considering correctness, legality and propriety of the order, the Deputy Director of Consolidation has to consider whether legally admissible evidence has been considered by the authority in recording a finding of fact or law and conclusions reached by them are based on evidence or patent illegality or impropriety has been committed or error in procedural legality which goes to the roots of the matter. It is further observed that notwithstanding the fact that section 48 has been couched in wide terms it only permits interference with the finding of the appellate court in the sense that they are not supported by evidence on record and they are against the law or against the scheme in the U.P. Consolidation of Holdings Act or are suffering from the vice of procedural irregularities. In the ultimate analysis it has been postulated that in order to arrive at a conclusion, he has to consider the material on record and record reasons. The Apex Court has also reckoned into consideration with approval the case of **Ram Dular v. Deputy Director of Consolidation Jaunpur**[2] and two other cases. The above observations find its echo in the case of **Gaya Din v. Hanuman Prasad**[3] as well. The cryptic order that has been passed in the instant case, cannot be given the veneer of a judicial order and therefore, it does not commend to me for being sustained.

4. What are the material ingredients to constitute a finding received consideration of the Apex Court as also this Court in a catena of decisions and position is now well settled that the finding includes materials considered, reasons recorded and then conclusions. The impugned order contains conclusions and not reasons. Therefore, the impugned order detracts from being a judicial order containing reasoning and is liable to be quashed. I would not shrink from observing that expeditious disposal is a desirable thing but it should not be preferred at the altar of requirements consisting in a judicial order.

5. In the conspectus of the above discussion, the petition is allowed and the

[1] reported in 2000 R.D. p.213

[2] reported in 1994 R.D. 290

[3] reported in A.L.R. 2001 226

impugned order dated 31.3.1999 passed by the Deputy Director consolidation contained in annexure 7 to the petition, is quashed. The matter is relegated to the Deputy Director of Consolidation for decision afresh in observance of the mandatory provisions of section 48 of the U.P. Consolidation of Holdings Act.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.3.2003

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE R.K. AGARWAL, J.

Civil Misc. Application No. 7 of 2003

Smt. Akhtari Begum and others
...Applicants
Versus
Nasim Ahmad & another ...Respondents

Counsel for the Applicants:
Sri J.J. Munir

Counsel for the Respondents:

Constitution of India- Art. 227 Supervisory Power of High Court- order under challenge by which the application for summoning Original Deed- Rejected- specific provision under section 115 C.P.C. provides for revision- power under Article 227 can not be exercised- can be used sparingly and extra ordinary circumstances.

Held- Para 13

Accordingly, it is not a fit case where the High Court will exercise its power under Article 227 of the Constitution which has to be sparingly used and in our view it is not a case where such interference is needed. At the same time, as held herein earlier, we are of the view that the application under Article 227 of the Constitution is not maintainable.

Case law discussed:
AIR 1964 Cal. 439

(Delivered by Hon'ble Tarun Chatterjee, J.)

1. This is an Application under Article 227 of the Constitution challenging the order dated 22nd January, 2003 passed by the civil judge (junior division), Najibabad in O.S.No. 62 of 1992 whereby an application filed by the petitioners seeking to summon original Will dated 14th July, 1987 in the court of Judge, Small Causes, Bijnor was rejected. It is not in dispute that this order was passed in the suit filed by the plaintiff-opposite parties in which the petitioners were the defendants.

2. A question of some importance has arisen for decision before us whether the order rejecting the application seeking to summon the original Will dated 14th July, 1987 in the court of Judge, Small Causes, Bijnor could be challenged by way of proceedings under Article 227 of the Constitution in view of the specific provisions contained in Section 115 of the Code of Civil Procedure.

3. According to the learned counsel for the petitioners, in view of the amendment in the Code of Civil Procedure, no application for revision of the impugned order would be maintainable. Learned counsel for the petitioners further contended that according to law, an application under Article 227 of the Constitution against the impugned order is maintainable. We are unable to accept this contention of the learned counsel for the petitioners. In our view when there is specific provision for filing a revision application under section 115 of the Code of Civil Procedure, the

question of filing an application under Article 227 of the Constitution does not arise.

4. The Code of Civil Procedure, 1908 was amended in the year 1977. Before the present amendment of the Code of Civil Procedure, section 115 of the Code of Civil Procedure was to the following effect.

"115. (1) The High Court may call for the record of any case which has been decided by any court subordinate of such High Court and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercise a jurisdiction not vested in it by law, or
(b) to have failed to exercise the jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court may make such order in the case as it thinks fit :
(Provided that the High Court shall not, under this section, vary or reverse any order, made, or any order deciding an issue, in the course of a suit or other proceedings, except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding or
(b) The order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.)

2. The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto."

5. By a plain reading of section 115 of the Code of Civil Procedure it appears to us that the power of the High Court to interfere with the order is very much limited. The High Court in revision can interfere with an order passed by the subordinate court only if it appears to the High Court that the subordinate court had exercised its jurisdiction, not vested in it by law and failed to exercise its jurisdiction or had acted in the exercise of its jurisdiction illegally and with material irregularity.

6. A controversy had arisen that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or
(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

7. The proviso to section 115 of the Code of Civil Procedure, before its amendment, clearly indicates that the High Court in exercise of powers under section 115 of the Code of Civil Procedure shall not vary or reverse any order made or any order deciding an issue except where the conditions (a) and (b) mentioned above are satisfied. Therefore, from the perusal of the relevant provisions of section 115 of the Code of Civil Procedure, it may be safely quoted that under section 115 of the Code of Civil

Procedure, High Court has been conferred with power to interfere with an order passed in a suit or proceeding in case the conditions indicated in Section 115 of the Code of Civil Procedure have been satisfied. It cannot be a case that an application under section 115 of the Code of Civil Procedure would not be maintainable in law but the High Court, in exercise of its power conferred under Section 115 of the Code of Civil Procedure, can not interfere with an order until and unless the conditions laid down in the said section, referred to above, are fully satisfied.

8. Subsequently, section 115 of the Code of Civil Procedure has again been amended in the following manner -

"115. Revision- (1) The High Court may call for the record of any case which has been decided by any court subordinate of such High Court and in which no appeal lies thereto, and if such subordinate court appears-
(d) to have exercises a jurisdiction not vested in it by law, or
(e) to have failed to exercise or jurisdiction so vested,
(f) to have acted in the exercise of its jurisdiction illegally or with material irregularity

the High Court may make such order in the case as it thinks fit

(Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have disposed of the suit or other proceedings)

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

9. In Uttar Pradesh, by way of further amendment, the following words have been substituted in section 115 of the Code of Civil Procedure-

"115. Revision- The High Court, in cases arising out of original suits or other proceedings (of the value exceeding one lakh rupees or such higher amount not exceeding five lakh rupees as the High Court may from time to time fix, by notification publishing in the official Gazettee including such suits or other proceedings instituted before the date of commencement of the U.P. Civil Laws (Amendment) Act, 1991, or as the case may be, the date of commencement of such notification) and the District Court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of any case which

has been decided by any court subordinate of such High Court and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercises a jurisdiction not vested in it by law, or

(b) to have failed to exercise or jurisdiction so vested,

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court or the District Court, as the case may be, may make such order in the case as it thinks fit

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make an order under the section-

Provided further that the High Court or the District Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where -

(i) the order, if so varied or reversed would finally dispose of the suit or other proceeding or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(Provided also that where a proceeding of the nature in which the District Court may call for the record and pass orders under this section was pending immediately before the relevant date of commencement referred to above, in the High Court such court shall proceed to dispose of the same.")

10. Learned counsel appearing on behalf of the petitioner in support of his contention relied upon a Division Bench decision of the Calcutta High Court in ***Sukumar Chatterjee vs. Kiran Chandra Mitter*** (AIR 1964 Calcutta 439). We have carefully considered the relevant provisions of section 115 of the Code of Civil Procedure and also the decision on which the learned counsel for the petitioner has placed implicit reliance in the present case. We are unable to hold that an application under Article 227 of the Constitution is maintainable in view of the fact that second proviso to section 115 of the Code of Civil Procedure in the Uttar Pradesh amendment having been deleted from section 115 of the Code of Civil Procedure.

11. As noted herein earlier, on careful consideration of section 115 of the Code of Civil Procedure, before its amendment and also after the present amendment, it cannot be said that a revision application under section 115 of the Code of Civil Procedure is not maintainable in law. Only exercise of power under section 115 of the Code of Civil Procedure has been restricted on the ground mentioned in the section. If the order of the trial court does not come within the ambit of that section and the conditions laid down therein are not satisfied then only a conclusion is arrived at that the High Court in its revisional jurisdiction cannot interfere with the order impugned in the revision application. This does not amount that in a revision

application the High Court, in a case where the conditions imposed in section 115 of the Code of Civil Procedure have been fully satisfied, is powerless to exercise its revisional jurisdiction. Where an order impugned in the revision application is brought within the ambit of section 115 of the code of civil procedure, the High Court while exercising its power under section 115 of the Code of Civil Procedure will go into that question and come to the conclusion that since the limitations laid down in section 115 of the Code of civil procedure for interference under section 115 of the code of civil procedure had not been satisfied the High Court was not entitled to invoke its revisional power under section 115 of the code of civil procedure against a particular order of the trial court. Therefore, we are unable to accept the contention of the learned counsel for the petitioners that in view of second proviso to section 115 of the code of civil procedure power of the High Court to exercise jurisdiction under section 115 of the code of civil procedure has been further limited, the application under Article 227 of the Constitution must be held to be maintainable in law.

12. So far as the decision in ***Sukumar Chatterjee vs. Kiran Chandra Mitter*** (AIR 1964 Calcutta 439) is concerned the Division Bench of the Calcutta High Court held that even if the order refusing to amend a pleading under Order 6 rule 17 is revisable under section 115 of the Code of civil procedure such an order can also be revised under Article 227 of the Constitution. This decision does not apply to the present case simply because of the fact that an amendment was made in the year 1977 when a proviso was added in which it has been stated that High Court shall not under section 115 of the code of civil procedure, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding, except where (a) the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings, or (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

It is true that under Article 227 of the Constitution the High Court has power of superintendence over all subordinate courts and tribunals but when there is specific provision under section 115 of the Code of Civil Procedure to file an application under section 115 of the code of civil procedure against an order passed in a suit such power under Article 227 of the Constitution cannot be exercised. It is well settled that exercise of power under Article 227 of the Constitution has to be sparingly used. Assuming that an application under Article 227 of the Constitution is maintainable against the impugned order even then we find no reason to interfere with the order passed by the trial court. We can only direct that certified copy of the Will from the court of Judge, Small Causes, Bijnor will meet the purpose for which the original Will was sought to be produced.

13. Accordingly, it is not a fit case where the High Court will exercise its power under Article 227 of the Constitution which has to be sparingly used and in our view it is not a case where such interference is needed. At the same time, as held herein earlier, we are of the view that the application under Article

227 of the Constitution is not maintainable.

14. For the reasons aforesaid, we reject this application under Article 227 of the Constitution. There will be no order as to costs.
